The Merger Control Review

Eleventh Edition

Editor
Ilene Knable Gotts

The LawReviews

THE

Merger Control Review

Eleventh Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Katrina McKenzie

SUBEDITOR
Keely Shannon

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-478-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ASHURST

AZB & PARTNERS

BAKER MCKENZIE

BERNITSAS LAW FIRM

BLAKE, CASSELS & GRAYDON LLP

BOWMANS

BREDIN PRAT

CAIAZZO DONNINI PAPPALARDO & ASSOCIATI – CDP STUDIO LEGALE

CALLOL, COCA & ASOCIADOS

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CMS

CRAVATH, SWAINE & MOORE LLP

DEBEVOISE & PLIMPTON LLP

DENTONS

DLF ATTORNEYS-AT-LAW

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW

FACIO & CAÑAS

HOUTHOFF

LAW FIRM BEKINA, ŠKURLA, DURMIŠ AND SPAJIĆ LTD

LCS & PARTNERS

MAYER BROWN

MILBANK LLP

PAUL HASTINGS LLP

PÉREZ BUSTAMANTE & PONCE

RAHMAT LIM & PARTNERS

SLAUGHTER AND MAY

UGGC AVOCATS

VALDES ABASCAL ABOGADOS SC

VEIRANO ADVOGADOS

WACHTELL, LIPTON, ROSEN & KATZ

WILMER CUTLER PICKERING HALE AND DORR LLP

CONTENTS

PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., in Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission (EC) both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2020

Part I

General Papers

Chapter 1

EU MERGER CONTROL

Nicholas Levy, Patrick Bock and Esther Kelly[1]

On 21 September 1990, the EC Merger Regulation entered into force,[2] introducing into EU competition law a legal framework for the systematic review of mergers, acquisitions, and other forms of concentration. The EC Merger Regulation has been transformative, effecting significant and permanent change to EU competition law and practice. This chapter contains a short introduction to the principal provisions of the EC Merger Regulation and identifies certain of the most important developments in its recent application.

I INTRODUCTION

Adopted in 1989, the EC Merger Regulation contains the legal framework and principal provisions of EU merger control. It was designed to 'permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations'.[3] Responsibility for the enforcement of the EC Merger Regulation rests with the Competition Commissioner, who oversees the European Commission's Directorate-General for Competition (DG COMP). Since October 2014, Margrethe Vestager has served as Competition Commissioner.

At the time of its adoption, the Commission also approved an Implementing Regulation,[4] which addresses procedural matters and, among other things, contains Form CO and Short Form CO, the forms prescribed for the notification of reportable transactions.[5] To facilitate

1 Nicholas Levy, Patrick Bock and Esther Kelly are attorneys at Cleary Gottlieb Steen & Hamilton LLP. The views expressed are personal, and all errors, omissions and opinions are the authors' own. The authors have drawn on material contained in various editions of Nicholas Levy and Christopher Cook, *European Merger Control Law* (Matthew Bender & Co).

2 The EC Merger Regulation was adopted in 1989 and came into force in 1990. Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1990 O.J. L257/13; with amendments introduced by Council Regulation 1310/97, 1997 O.J. L180/1, corrigendum 1998 O.J. L40/17. In 2004, a revised and significantly recast version of the EC Merger Regulation came into force. Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, 2004 O.J. L24/1.

3 Recital 6, EC Merger Regulation.

4 Commission Regulation 2367/90 on the notification time limits and hearings provided for in Council Regulation 4064/89 on the control of concentrations between undertakings, 1990 O.J. L219/5, as amended by Commission Regulation 3384/94, 1994 O.J. L377/1, by Commission Regulation 447/98, 1998 O.J. L61/1, and Commission Regulation 802/2004 implementing Council Regulation 139/2004, 2004 O.J. L133/1.

5 Form CO relating to the notification of a concentration pursuant to Council Regulation 139/2004, 2004 O.J. L133/1; and Short Form CO for the notification of a concentration pursuant to Council Regulation 139/2004, 2004 O.J. L133/1.

understanding of the EC Merger Regulation and to provide transparency in its practice, application and interpretation, the Commission has adopted and kept updated a number of interpretative Notices and Guidelines that address a range of jurisdictional,[6] substantive,[7] and procedural matters[8] and are designed to provide 'maximum transparency and legal certainty . . . informing the companies and the public about our procedures and at the same time offer[ing] us the opportunity to adapt our policies over time in order to reflect legal and economic developments as they come along'.[9]

The scope, purpose, and objectives of the EC Merger Regulation were articulated at the time of its adoption in 1989 by Sir Leon Brittan QC, subsequently Lord Brittan, then Competition Commissioner:

> *My task is to discover which mergers stifle competition. They will be stopped. All others will proceed. All mergers with a Community dimension will benefit from the one-stop-shop regime. We have clarified and simplified the law in an area which was full of uncertainties and complications. . . . The Community's single market now has a proper system of merger law and policy to ensure that its benefits are passed on to consumers and will lead to the enhancement of competitive industry.*[10]

In the years since the EC Merger Regulation's adoption, the Commission has emphasised the Regulation's 'fundamental objective of protecting consumers against the effects of monopoly

6 The Consolidated Jurisdictional Notice provides guidance on jurisdictional issues concerning the scope of application of the EC Merger Regulation. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2008 O.J. C95/1.

7 The Commission Notice on the definition of the relevant market for purposes of Community competition law provides guidance on the Commission's approach to product and geographic market definition. Commission Notice on the definition of the relevant market for the purposes of Community competition law, 1997 O.J. C372/5. This Notice is currently under review to account for potential changes in market structures resulting from globalisation and digitisation. Results of the Commission's review are expected in 2021, with the potential adoption of an updated Market Definition Notice in 2022. In 2004, the Commission adopted Guidelines on the appraisal of horizontal mergers, which explain the analytical framework applied to the assessment of concentrations between competitors (the Horizontal Mergers Guidelines). Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. C31/05. In November 2007, the Commission adopted Guidelines on the appraisal of non-horizontal mergers, which explain the analytical framework applied to the assessment of concentrations involving companies active in vertical or related markets (the Non-Horizontal Mergers Guidelines). Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008 O.J. C265/6.

8 The Commission Best Practices Guidelines on the conduct of merger control proceedings explain matters relevant to the day-to-day handling of merger cases and the Commission's relationship with the merging parties and interested third parties (the Best Practices Guidelines). DG Competition Best Practice Guidelines on the conduct of EC merger control proceedings.

9 Mario Monti, former Competition Commissioner, The Main Challenges for a New Decade of EC Merger Control, 10th Anniversary Conference, Brussels, 15 September 2000 (Commission Press Release SPEECH/00/311).

10 Sir Leon Brittan QC, subsequently Lord Brittan, *The Law and Policy of Merger Control in the EEC* [1990] 5 E.L.Rev. 351 and 357.

power (higher prices, lower quality, lower production, less innovation)',[11] and has underlined the common features of EU and US merger control, in particular the protection of consumer welfare and the pursuit of economic efficiencies:

> *[T]he goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market . . . Our merger policy aims at preventing the creation or strengthening of dominant positions through mergers or acquisitions. . . . Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare.*[12]

Commissioner Vestager, who was approved for a second term in 2019 with an expanded portfolio as Executive Vice President of the Commission responsible for making 'Europe fit for the digital age', has consistently defended these principles, reasserting the Commission's independence and, in the wake of the Commission's prohibition of the *Siemens/Alstom* transaction in 2019, rejecting calls to 'pick favourites' in the quest to create European champions:

> *Because you don't build strong champions by picking a favourite, and protecting them from competition in Europe. You do it by giving everyone a fair chance – so the best, the most productive and innovative companies can grow, without being held back by unfair competition.*[13]

Since its adoption, the EC Merger Regulation has evolved from 'one of the most dynamic domains in the competition portfolio'[14] into a relatively 'mature area of enforcement',[15] 'a well-oiled machine which draws on many years of experience'.[16]

---

11 XXXIst Report on Competition Policy (2001), Paragraph 252.

12 Mario Monti, former Competition Commissioner, The Future for Competition Policy in the European Union, speech at Merchant Taylor's Hall, 9 July 2001 (Commission Press Release SPEECH/01/340 of 10 July 2001). See too Mario Monti, Europe's Merger Monitor, The Economist, 9 November 2002 ('Preserving competition is not, however, an end in itself. The ultimate policy goal is the protection of consumer welfare. By supporting the competitive process, the EC Merger Regulation plays an important role in guaranteeing efficiency in production, in retaining the incentive for enterprises to innovate, and in ensuring the optimal allocation of resources. Europe's consumers have been the principal beneficiaries of the Commission's enforcement of the regulation, enjoying lower prices and a wider choice of products and services as a result').

13 Commissioner Vestager, Speech by Commissioner Vestager, 'Keeping the EU competitive in a green and digital world', College of Europe, Bruges, 2 March 2020. https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en.

14 Joaquín Almunia, former Competition Commissioner, The Past and the Future of Merger Control in the EU, Address at GCR Conference, Brussels, 28 September 2010 (Commission Press Release SPEECH/10/486).

15 Joaquín Almunia, Competition Policy: State of Play and Future Outlook, Address at European Competition Day, Brussels, 21 October 2010 (Commission Press Release SPEECH/10/576).

16 Joaquín Almunia, Policy Objectives in Merger Control, Fordham Competition Conference, New York, 8 September 2011 (Commission Press Release SPEECH/11/561).

II YEAR IN REVIEW

In recent years, the Commission's enforcement practice under the EC Merger Regulation has tightened and become less permissive: several concentrations have been prohibited or abandoned in the face of objections, others have been subject to wide-ranging commitments, and the Commission has explored ways in which the EC Merger Regulation's jurisdictional scope might be expanded, applied theories of harm that had not been actively pursued for several years, enforced the EC Merger Regulation's procedural rules more rigorously, and routinely required up-front buyers in remedies cases. The following primary developments and trends can be observed.

First, as to the jurisdictional scope of the EC Merger Regulation, the Commission has resisted applications from certain Member State agencies to cede jurisdiction over transactions having cross-border effects,[17] in particular those affecting the media and telecommunications sectors, where a number of national agencies have unsuccessfully petitioned the Commission to review concentrations impacting their respective national markets.[18]

The Commission has also considered, but ultimately decided against pursuing, expanding the EC Merger Regulation's jurisdictional scope. In June 2013, the Commission published a consultative paper seeking comments on a proposal to expand the jurisdictional scope of the EC Merger Regulation to capture the acquisition of non-controlling minority shareholdings.[19] A year later, in July 2014, the Commission issued a White Paper[20] and a Staff Working Document[21] confirming its intention to propose expanding the jurisdictional scope of the EU Merger Regulation to capture the acquisition of non-controlling minority shareholdings. Shortly after her appointment, however, Commissioner Vestager appeared determined not to advance these proposals, suggesting that the 'balance between the concerns that this issue raise and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further'.[22]

17 See, e.g., Alexander Italianer, Best Practices for Antitrust Proceedings and the Submission of Economic Evidence and the Enhanced Role of the Hearing Officer, speech at OECD Competition Committee Meeting, Paris, 18 October 2011.

18 See, e.g., *Telefónica Deutschland/E-Plus*, Case COMP/M.7018, Commission decision of 2 July 2014; *Liberty Global/Ziggo*, Case COMP/M.7000, Commission decision of 10 October 2014; *Orange/Jazztel*, Case COMP/M.7421, Commission decision of 26 January 2015; *Altice/PT Portugal*, Case COMP/M.7499, Commission decision of 20 April 2015; *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 4 December 2015; *Vodafone/Liberty Global/Dutch JV*, Case COMP/M.7978, Commission decision of 3 August 2016; *NN Group/Delta Lloyd*, Case COMP/M.8257, Commission decision of 7 April 2017; and *Discovery/Scripps*, Case COMP/M.8665, Commission decision of 6 June 2018.

19 Towards more effective EU merger control, Commission Staff Working Document of 20 June 2013 (Staff Working Document 2013). See too Mergers: Commission consults on possible improvements to EU merger control in certain areas, 20 June 2013 (Commission Press Release IP/13/58).

20 White Paper, Towards more effective EU merger control, COM(2014) 449, 9 July 2014 (White Paper). See too Carles Esteva-Mosso, Deputy Director-General for Mergers, DG COMP, EU Merger Control: The Big Picture, speech at the Sixth Annual GCR Conference, Brussels, 12 November 2014, p. 8, available at: http://ec.europa.eu/competition/speeches/text/sp2014_06_en.pdf.

21 Commission Staff Working Document, Towards more effective EU merger control, 9 July 2014 (Staff Working Document SWD(2014) 221).

22 Margrethe Vestager, Competition Commissioner, Thoughts on Merger Reform and Market Definition, Keynote address at Studienvereinigung Kartellrecht Brussels, 12 March 2015 ('What have we learned from the replies? While many acknowledge that there may be an enforcement gap, there is widespread concern

In 2016, the Commission consulted on a new and different proposal designed to expand the jurisdictional scope of the EC Merger Regulation to capture high-value transactions that do not meet the revenue-based jurisdictional thresholds.[23] The Commission is particularly concerned with 'killer acquisitions' of small, innovative companies that are at risk of 'disappearing', 'not because they're not worth it, not because they couldn't be successful with customers, but because bigger businesses buy them – in order to kill them'.[24] It seems unlikely, however, that this proposal will be adopted in the near future. The July 2017 publication of responses to the Commission's consultation made clear that 'the majority of public and private stakeholders responding to the questionnaire do not perceive any (significant) enforcement gap'.[25]

More recently, in 2019, the Commission's expert report on Competition Policy for the Digital Era concluded that it was 'too early' to change the thresholds under the EC Merger Regulation and recommended postponing any legislative action pending a review of the consequences of the value-based thresholds introduced in Germany and Austria.[26] In reaching this conclusion, the experts noted the effectiveness of the referral process for addressing transactions such as *Apple/Shazam*[27] and *Facebook/WhatsApp*.[28]

The departure of the UK from the EU will also affect the Commission's jurisdiction. The UK will no longer be subject to EU competition law as of 1 January 2021, and the UK aspects of transactions currently subject to the Commission's exclusive jurisdiction under the EC Merger Regulation may be reviewed in parallel by the UK Competition and Markets Authority (provided the applicable thresholds of UK merger control rules are met). The Commission will retain exclusive jurisdiction over transactions notified until the end of 2020. In practice, parties would need to notify before the end-of-year break (and so, at the latest, by 23 December 2020).

Second, the Commission has devoted increasing resources to more complex cases, reducing the length of unconditional approval decisions concerning non-problematic transactions and exploring ways to simplify notification requirements in respect of such cases. In a package of reforms adopted in 2013, the Commission expanded the definition of concentrations eligible for notification under the simplified procedure to 'reduce the

regarding the proportionality of the White Paper's approach to closing the gap. Is it balanced? Will it work well? Against this background, my conclusion is that the balance between the concerns that this issue raise and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further.') See more recently the Commissioner's statements on the subject in June 2018. Charley Connor, 'Vestager: EU is considering value-based thresholds', *Global Competition Review*, 19 June 2019.

23 Evaluation of procedural and jurisdictional aspects of EU merger control, October 2016, available at http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf.

24 Margrethe Vestager, Competition Commissioner, cited in 'Killer acquisitions are a recurring issue, says Vestager,' Matt Richards, *Global Competition Review*, 17 January 2019.

25 Summary of replies to the public consultation on evaluation of procedural and jurisdictional aspects of EU merger control, July 2017, available at http://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf.

26 Competition Policy for the Digital Era, A report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 4 April 2019.

27 Case COMP M.8788, Commission decision of 6 September 2018.

28 Case COMP M.7217, Commission decision of 3 October 2014.

administrative burden and cost for business at a time when it needs it most'.[29] In 2016, the Commission consulted on further changes designed to permit a larger number of concentrations to be notified under the simplified procedure.[30]

Third, as to its enforcement practice, between 2012 and 31 December 2019, the Commission prohibited nine concentrations,[31] conditionally approved a number of others on the basis of far-reaching remedies,[32] and led a number of companies to abandon concentrations to avoid likely prohibition decisions,[33] provoking suggestions that it had become more interventionist.[34] Three transactions were prohibited in 2019 alone: *Siemens/Alstom*,[35] *Wieland/Aurubis*[36] and *Tata/ThyssenKrupp*.[37] At the time of writing, no prohibition decisions had been taken in 2020, although two concentrations were abandoned in the face of Commission concerns (*Johnson & Johnson/Tachosil* in April 2020 and *Boeing/Embraer* in May 2020).[38]

The Commission has maintained its focus on unilateral effects, showing greater readiness to focus on the competition that will be lost through a merger rather than post-transaction

29 Mergers: Commission Adopts Package Simplifying Procedures Under the EU Merger Regulation – Frequently Asked Questions, 5 December 2013 (Commission MEMO IP/13/1098).

30 Evaluation of procedural and jurisdictional aspects of EU merger control, October 2016, available at http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf.

31 *Deutsche Börse/NYSE Euronext*, Case COMP/M.6166, Commission decision of 1 February 2012; *UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2013; *Ryanair/Aer Lingus (III)*, Case COMP/M.6663, Commission decision of 27 February 2013; *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 11 May 2016; *Deutsche Börse/London Stock Exchange Group*, Case COMP/M.7995, Commission decision of 29 March 2017; *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia*, Case COMP/M.7878, Commission decision of 5 April 2017; *Siemens/Alstom*, Case COMP/M.8677, Commission decision of 6 February 2019; *Wieland/Aurubis*, Case COMP/M.8900, Commission decision of 6 February 2019; and *Tata/ThyssenKrupp JV*, Case COMP/M.8713, Commission decision of 11 June 2019.

32 See, e.g., *Südzucker/ED&F MAN*, Case COMP/M.6286, Commission decision of 16 May 2012; *Universal Music Group/EMI Music*, Case COMP/M.6458, Commission decision of 21 September 2012; *Outokumpu/Inoxum*, Case COMP/M.6471, Commission decision of 7 November 2012; and *Hutchison 3G Austria/Orange Austria*, Case COMP/M.6497, Commission decision of 12 December 2012.

33 See, e.g., *TeliaSonera/Telenor/JV*, Case COMP/M.7419, withdrawn on 11 September 2015, Commission Press Release STATEMENT/15/5627 of 11 September 2015 (parties abandoned the concentration when it became clear the Commission would not accept commitments offered to secure approval and would instead prohibit the transaction); and *Halliburton/Baker Hughes*, Case COMP/M.7477, withdrawn on 2 May 2016, Commission Press Release STATEMENT/16/1642 of 2 May 2016 (parties abandoned the transaction after the Commission raised objections and the US Department of Justice made clear it would seek to enjoin it from closing).

34 Joaquín Almunia, Merger Review: Past Evolution and Future Prospects, 2 November 2012 (Commission Press Release SPEECH/12/773) ('I am often asked why the Commission is raising hurdles against the creation of large European companies; why Brussels is not supporting 'European champions'. I am always a bit surprised by such remarks – and by their dogged reiteration – because they do not correspond at all to the facts. So, let's recognize the facts: it is simply not true that the Commission is putting the brakes on the legitimate efforts of Europe's firms to scale up. This is a thing that anyone can verify reading the newspapers or the Official Journal.').

35 *Siemens/Alstom*, Case COMP/M.8677, Commission decision of 6 February 2019.

36 *Wieland/Aurubis*, Case COMP/M.8900, Commission decision of 6 February 2019.

37 *Tata/ThyssenKrupp JV*, Case COMP/M.8713, Commission decision of 11 June 2019.

38 *Boeing/Embraer*, Case COMP/M.9097; and *Johnson & Johnson/Tachosil*, Case COMP/M.9547.

market shares.[39] In 2013, the Commission prohibited, for the first time, a transaction that raised unilateral effects concerns but might not have been readily susceptible to challenge under the dominance test contained in the original version of the EC Merger Regulation.[40] In 2015 and 2016, Commissioner Vestager reversed the policy of her predecessor, who had approved four-to-three mergers in the telecommunications sector.[41] In 2015, the Commission caused the abandonment of a four-to-three transaction between two Danish telecommunications operators;[42] in 2016, it prohibited a four-to-three transaction between two UK operators;[43] and, in approving a transaction between two major Italian telecommunications operators, the Commission required the divestment of sufficient assets to facilitate the establishment of a new operator.[44] In 2018, however, the Commission approved the combination of the third- and fourth-largest mobile operators in the Netherlands in *T-Mobile Netherlands/Tele2*, finding that, because Tele2 did not have a significant role in the Dutch market, its acquisition would not remove an important competitive constraint on T-Mobile.[45]

In May 2020, the Commission's *Hutchison 3G UK/Telefonica UK* prohibition decision was reversed by the General Court, which found that, to demonstrate a 'significant impediment to effective competition' in a unilateral effects case, the Commission must show that a concentration involves (1) 'the elimination of important competitive constraints that the merging parties had exerted upon each other' and (2) 'a reduction of competitive pressure on the remaining competitors'.[46] In proving the elimination of 'important competitive constraints', the Court held that the Commission must establish that the competitor being acquired 'stand[s] out from its competitors in terms of impact on competition'.[47] In that connection, it is insufficient for the Commission merely to show that the acquired company had been growing its market shares or had a history of competing on price, had offered lower prices than its competitors on certain products or was a relatively close competitor. As the Court held, 'if that were not the case, any concentration resulting in a reduction from four to three operators would as a matter of principle be prohibited.'[48]

In a number of other cases, the Commission has required wide-ranging remedies to address coordinated effects concerns[49] and conglomerate effects concerns,[50] after several

39 See, e.g., *Syniverse/MACH*, Case COMP/M.6690, Commission decision of 29 May 2013.

40 *UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2013. Overturned on appeal. *United Parcel Service v. Commission* (*UPS*), Case T-194/13 ECLI:EU:T:2017:144. Upheld on appeal to the ECJ. *Commission v. United Parcel Service* (*UPS*), Case C-265/17P, ECLI:EU:C:2019:23.

41 *Hutchison 3G Austria/Orange Austria*, Case COMP/M.6497, Commission decision of 12 December 2012; *Hutchison 3G UK/Telefónica Ireland*, Case COMP/M.6992, Commission decision of 28 May 2014; and *Telefónica Deutshland/E-Plus*, Case COMP/M.7018, Commission decision of 2 July 2014.

42 *Teliasonera/Telenor/JV*, Case COMP/M.7419, withdrawn on 11 September 2015.

43 *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 11 May 2016.

44 *Hutchison 3G Italy/WIND/JV*, Case COMP/M.7758, Commission decision of 1 September 2016.

45 *T-Mobile NL/Tele2 NL*, Case COMP/M.8792, Commission decision of 27 November 2018.

46 Case T-399/16, *CK Telecoms UK Investments Ltd v. Commission*, judgment of 28 May 2020, ECLI:EU:T:2020:217, Paragraph 96.

47 Case T-399/16, *CK Telecoms UK Investments Ltd v. Commission*, judgment of 28 May 2020, ECLI:EU:T:2020:217, Paragraph 174.

48 Case T-399/16, *CK Telecoms UK Investments Ltd v. Commission*, judgment of 28 May 2020, ECLI:EU:T:2020:217, Paragraph 249.

49 *AB InBev/SABMiller*, Case COMP/M.7881, Commission decision of 24 May 2016.

50 *Dentsply/Sirona*, Case COMP/M.7822, Commission decision of 25 February 2016; *Worldline/Equens/Paysquare*, Case COMP/M.7873, Commission decision of 20 April 2016; *Microsoft/LinkedIn*, Case

years in which neither theory of harm had been actively pursued. Even where remedies were not ultimately imposed, the Commission has engaged in extended reviews of conglomerate theories of harm, most notably in *Essilor/Luxottica*, ultimately cleared without remedies after a protracted Phase II investigation.[51]

Fourth, the Commission has continued to apply sophisticated quantitative tools,[52] to engage in economic analysis,[53] and to place increasing reliance on internal documents. Among other things, Form CO (as revised in 2013) encourages notifying parties to describe economic data collected in the ordinary course of business[54] and calls for a wide range of internal documents to be provided with notifications.[55] In addition, the Commission has shown increasing readiness to request large numbers of documents during its administrative procedure.[56] The Commission's focus on detailed economic data and analysis, and more systematic review of internal business documents, have lengthened the merger review timetable, particularly in complex Phase II cases.[57] In 2018, the Courts confirmed that

COMP/M.8124, Commission decision of 6 December 2016; and *Qualcomm/NXL*, Case COMP M. 9306, Commission decision of 18 January 2018.

51 *Essilor/Luxottica*, Case COMP/M.8394, Commission decision of 1 March 2018.

52 See, e.g., *Hutchison 3G Austria/Orange Austria*, Case COMP/M.6497, Commission decision of 12 December 2012, Paragraph 314 (Commission relied on upwards pricing pressure model to predict a concentration's effect on prices). See too Alison Oldale and Jorge Padilla, 'EU Merger Assessment of Upward Pricing Pressure: Making Sense of UPP, GUPPI and the Like', [2013] 4(4) *JCLP*, pp. 375–381; Stefan Thomas, 'Close Competitors in Merger Review', [2013] 4(5) *JCLP*, pp. 391–401; and Enrique Andreu, Jorge Padilla and Nadine Watson, 'The Economics of the UPS/TNT Case Revisited: Implications for the Future', *Competition Policy International*, July 2015.

53 See, e.g., *Universal Music Group/EMI Music*, Case COMP/M.6458, Commission decision of 21 September 2012, Annex I, Paragraphs 1–44 (Commission obtained three-year sales data covering 14 EU countries from major digital music platforms and recorded music companies to empirically test whether larger recorded music companies were able to extract better commercial terms from platforms, concluding that 'the results indicate that there is a positive relationship between the size of a recorded music company's repertoire and the wholesale price it negotiates with digital customers'.).

54 Introduction, Paragraph 1.8, Form CO.

55 Section 5.4, Form CO.

56 See, e.g., *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 11 May 2016 (notifying parties submitted over 300,000 internal documents, which the Commission reviewed to support its conclusion that Three and O2 competed closely with each other); and *Hutchison 3G Italy/WIND/JV*, Case COMP/M.7758, Commission decision of 1 September 2016 (WIND submitted over 1 million internal documents, which the Commission analysed to determine whether the merging companies were close competitors).

57 In 2012–2014, the average length of Phase II cases was 148 working days, ranging from 105 days (*UTC/Goodrich*, Case COMP/M.6410, Commission decision of 26 July 2012) to 133 days (*Syniverse/Mach*, Case COMP/M.6690, Commission decision of 29 May 2013) to 147 days (*Liberty Global/Ziggo*, Case COMP/M.7000, Commission decision of 10 October 2014) to 160 days (*UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2014) to 172 days (*Telefónica Deutschland/E-Plus*, Case COMP/M.7018, Commission decision of 2 July 2014). This trend has continued in more recent cases (see, e.g., *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 11 May 2016 (eight months); *Dow/DuPont*, Case COMP/M.7932, Commission decision of 27 March 2017 (nine months); and *Siemens/Alstom*, Case COMP/M.8677, Commission decision of 6 February 2019 (eight months)). In 2018, the average length of Phase II cases (excluding *Siemens/Alstom*) was 219 calendar days. These figures, based on the time between notification and a decision, fail to take account of the very substantial pre-notification period, which continues to increase. In 2019–2020, the trend of long pre-notification periods and extended reviews in complex cases has continued. For example,

the right to timely access to econometric models used by the Commission is a critical part of parties' rights of defence and that failure to provide such access can lead to annulment of a decision.[58]

In March 2018, the then-Director General of DG COMP disclosed that the Commission was preparing Best Practices Guidelines on the use and production of internal documents. However, despite informal consultations on possible drafts, at the time of writing, guidance was still to be issued. In practice, the Commission has been open to using new technologies to facilitate the production and review of internal documents, saving time and costs for the Commission and merging parties. In *Thales/Gemalto*, the Commission accepted, for the first time, the use of technology-assisted review in the production of internal documents, aligning the document requests and collection methods with those adopted in the same case by the US federal agencies.

Fifth, the Commission has expanded its consideration of effects on innovation competition[59] and has introduced new theories of harm aimed at capturing negative effects of concentrations on overall innovation, outside individual product markets. In *Novartis/GlaxoSmithKline Oncology Business*, the Commission expanded its analysis into merging parties' research projects, taking under review even products in the early stages of development;[60] in *General Electric/Alstom*, the Commission was concerned that, by removing an important innovator, the transaction would reduce 'the overall competitive pressure on the remaining competitors, with a reduction in the overall incentives to invest significantly in innovation';[61] and, in *Dow/DuPont*,[62] the Commission was concerned that the transaction would reduce the parties' innovation incentives, resulting in reduced innovation competition in several 'innovation spaces' as well as at the industry level overall. In April 2020, Johnson & Johnson abandoned its proposed acquisition of Takeda's Tachosil product following initiation of a Phase II review by the Commission, citing potential concerns about the effect

in April 2020, Boeing and Embraer abandoned their transaction (Case COMP/M.9097, *Boeing/Embraer*) after a review period of approximately 173 working days. Likewise, *Fincantieri/Chantiers de L'atlantique* (Case COMP/M.9162) continues a long review period, with the review suspended on 13 April 2020, approximately 319 working days after being referred to the Commission on 8 January 2019.

58 *United Parcel Service v. Commission (UPS)*, Case T-194/13, ECLI:EU:T:2017:144. Upheld on appeal to the ECJ. *Commission v. United Parcel Service (UPS)*, Case C-265/17P, ECLI:EU:C:2019:23.

59 See, e.g., *Pfizer/Pharmacia*, Case COMP/M.2922, Commission decision of 27 February 2003, Paragraph 22; and *Novartis/GlaxoSmithKline Oncology Business*, Case COMP/M.7275, Commission decision of 28 January 2015, Paragraphs 84–94.

60 *Novartis/GlaxoSmithKline Oncology Business*, Case COMP/M.7275, Commission decision of 28 January 2015.

61 *General Electric/Alstom (Thermal Power – Renewable Power & Grid Business)*, Case COMP/M.7278, Commission decision of 8 September 2015.

62 Case COMP/M.7932, Commission decision of 27 March 2017. See Mergers: Commission clears merger between Dow and DuPont, subject to conditions, 27 March 2017 (Commission Press Release IP/17/772).

on innovation.[63] The Commission's view that innovation concerns do not need to be tied to harm in any specific market[64] has been controversial and some commentators have been concerned by the lack of clear conditions and criteria for the innovation theory to apply.[65]

Sixth, as to procedure, the Commission has, in recent years, shown an increasing readiness to enforce its procedural rules and to discipline companies that do not observe those rules. In May 2017, the Commission fined Facebook €110 million for providing incorrect or misleading information during its 2014 investigation of its acquisition of WhatsApp. The magnitude of this fine dwarfed penalties imposed in the past for similar infractions and, as Competition Commissioner Vestager made clear at the time, 'sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information'.[66] In 2019, the Commission imposed a fine of €52 million on General Electric for providing incorrect information in connection with its acquisition of LM Wind.[67]

There has also been an increase in the number of gun-jumping cases pursued by the Commission. In 2014, the Commission imposed fines on Marine Harvest for premature implementation of its acquisition of Morpol.[68] It imposed separate fines – confirmed by the General Court and the European Court of Justice[69] – for breach of the notification and standstill requirements. This was followed by a fine of €124.5 million imposed in April 2018 on Altice for gun-jumping in relation to its acquisition of PT Portugal.[70] The Commission found, inter alia, that the transaction agreements granted Altice 'the possibility to exercise decisive influence over PT Portugal's business' while the Commission's review was still ongoing and that, in certain cases, 'Altice actually exercised decisive influence' over aspects of the target's business.[71] The *Altice* decision was followed by the Court of Justice's judgment in *Ernst & Young* (which found that gun-jumping arises only if a measure contributes to a

63 *Johnson & Johnson/Tachosil*, Case COMP/M.9547, Commission press release of 25 March 2020, IP/20/529.

64 Matthew Newman, 'Dow-DuPont merger remedy reflects EU's growing focus on innovation, Mosso says', MLex Insight, 28 March 2017 ('In some cases, you can know in which product the companies are innovating and you can identify an overlap in the future. But there could be situations where we don't know the outcome of the innovation process, but we nevertheless know the innovation process would be harmed as a result of the merger.').

65 See, e.g., Nicolas Petit, Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control? International Center for Law & Economics, Antitrust & Consumer Protection Research Program White Paper, 2017, p. 8 (Petit refers to the theory of harm as the 'Significant Impediment to Industry Innovation' theory, characterising it as a novelty that exceeds the scope of the current European merger control framework. The author considers that innovation concerns in previous cases were always anchored to a specific product market, whether current or future).

66 *Facebook/WhatsApp*, Case COMP/M.8228, Commission decision of 17 May 2017.

67 *General Electric Company/LM Wind Power Holding*, Case COMP/M.8436, Commission decision of 8 April 2019.

68 Case COMP/M.7184, Commission decision of 23 July 2014.

69 *Mowi ASA (formerly Marine Harvest ASA) v. Commission* (*Marine Harvest*), Case C-10/18P EU:C:2020:149; and *Marine Harvest v. Commission*, Case T-704/14 EU:T:2017:753.

70 *Altice/PT Portugal*, Case COMP/M.7993, Commission decision of 24 April 2018. See Mergers: Commission fines Altice €125 million for breaching EU rules and controlling PT Portugal before obtaining merger approval, Commission Press Release IP/18/3522 of 24 April 2018. On 5 July 2018, Altice brought an action for annulment of the decision imposing the fine (*Altice Europe v. Commission*, Case T-425/18, OJ 2018/C 341/31).

71 *Altice/PT Portugal*, Case COMP/M.7993, Commission decision of 24 April 2018.

change in control of the target undertaking, irrespective of whether that measure has market effects).[72] In June 2019, the Commission imposed a fine of €28 million in *Canon/Toshiba Medical Systems Corporation*,[73] where a warehousing structure had been used by the parties in breach of the EC Merger Regulation's standstill obligation.

In response to the covid-19 crisis, the Commission initially asked companies only to notify transactions for 'very compelling reasons',[74] in part due to difficulties in obtaining responses to information requests, but subsequently accepted notifications involving more complex issues, including *LSE/Refinitiv* and *Peugeot/Fiat Chrysler*,[75] as businesses restarted. In a number of cases, the Commission 'stopped-the-clock' to give companies more time to gather information requested by the Commission.[76] To facilitate notification, the Commission encouraged submissions (including filings) via email or the Commission's new e-TrustEx tool. Telephone and video conferencing facilities are also being used where possible, including for at least one oral hearing.[77]

Seventh, as to remedies, the Commission has maintained a rigorous approach towards their evaluation and implementation, including by subjecting remedy proposals to detailed and exacting review[78] and strengthening the role of monitoring trustees in the package of reforms adopted in late 2013.[79] Most significantly, perhaps, the Commission has required up-front buyer commitments in an increasing number of cases. In 2014, all five Phase II commitments decisions included up-front buyer provisions (*INEOS/Solvay/JV*,[80] *Hutchison 3G UK/Telefonica Ireland*,[81] *Telefónica Deutschland/E-Plus*,[82] *Liberty Global/Ziggo*[83] and *Huntsman Corporation/Equity Interests held by Rockwood Holdings*),[84] as did three of the seven Phase II commitments decisions rendered in 2015 (*Zimmer/Biomet*,[85] *Orange/Jazztel*[86] and *General Electric/Alstom),*[87] three of the six Phase II commitments decisions rendered in

72 *Ernst & Young P/S v. Konkurrencerådet* (*Ernst & Young*), Case C-633/16 ECLI:EU:C:2018:371 (Court of Justice held that KPMG Denmark's termination of a cooperation agreement with KPMG International, which occurred directly after rival Ernst & Young had agreed to purchase KPMG Denmark, but before merger approval had been obtained, did not constitute gun-jumping because Ernst & Young did not acquire the possibility to exercise influence on KPMG Denmark by that termination).

73 *Canon/Toshiba Medical Systems Corporation*, Case COMP/M.8179, Commission decision of 27 June 2019.

74 Special Measures Due To Coronavirus / Covid-19: Update of 7th April 2020, available at: https://ec.europa.eu/competition/mergers/covid_19.html.

75 See further, 'European Merger Control in Times of Crisis', 18 May 2020, Nicholas Levy, Richard Pepper, Anita Ng, Géraldine Babin and Edward Dean, www.clearygottlieb.com/news-and-insights/publication-listing/european-merger-control-in-times-of-crisis.

76 See, e.g., *Fincantieri/Chantiers de L'atlantique*, Case COMP M.9162.

77 Andrew Boyce and Lewis Crofts, 'PKN Orlen to defend Lotos at EU virtual hearing', MLex, 28 April 2020.

78 See, e.g., *Outokumpu/Inoxum*, Case COMP/M.6471, Commission decision of 7 November 2012, Paragraph 966 et seq.

79 Model Text for Divestiture Commitments.

80 Case COMP/M.6905, Commission decision of 8 May 2014.

81 Case COMP/M.6992, Commission decision of 28 May 2014.

82 Case COMP/M.7018, Commission decision of 2 July 2014.

83 Case COMP/M.7000, Commission decision of 10 October 2014.

84 Case COMP/M.7061, Commission decision of 10 September 2014.

85 Case COMP/M.7265, Commission decision of 30 March 2015.

86 Case COMP/M.7421, Commission decision of 19 May 2015.

87 Case COMP/M.7278, Commission decision of 8 September 2015.

2016 (*Staples/Office Depot*,[88] *Ball/Rexam*[89] and *Liberty Global/BASE Belgium*),[90] one of the two Phase II commitment decisions rendered in 2017 (*Dow/DuPont*),[91] three of the six Phase II commitment decisions rendered in 2018 (*Bayer/Monsanto*,[92] *Tronox/Cristal*[93] and *Praxair/Linde)*,[94] and three of the six Phase II commitment decisions rendered in 2019 (*BASF/Solvay*,[95] *Novelis/Aleris*[96] and *Nidec/Whirlpool*).[97] Commitment decisions in Phase I commitments involving up-front buyer provisions have also become more common.[98] Up-front buyer provisions were included in Phase I remedy packages in 2019 in: *DA Agravis Machinery/Konekesko Eesti/Konekesko Latvija/Konekesko Lietuva/Konekesko Finnish Agrimachinery Trade Business*[99] and *Amerra/Mubadala/Nireus/Selonda*.[100]

Additionally, as the Commission's scrutiny of divestment packages has increased, requirements for divestments that extend beyond the strict competition concerns identified to enhance the viability and competitiveness of the divestment business have become more common.[101] The Commission has also increased scrutiny on compliance with commitments, issuing its first-ever statement of objections for breach of commitments in 2018.[102] At the same time, the Commission has shown flexibility as to the terms of commitments, adopting a waiver decision only one year after the *Nidec/Whirlpool (Embraco Business)* decision came into force (partially waiving Nidec's commitments not to re-acquire part of the divestment business) on the ground that the structure of the relevant market had sufficiently changed in the intervening period.[103] Likewise, in May 2020, the Commission waived commitments given in *Takeda/Shire* due to a combination of unforeseeable events related to a pipeline product that Takeda had committed to divest.[104]

The Commission has faced calls to give greater weight to behavioural remedies, particularly following the *Siemens/Alstom* decision, when the French, German and Polish

88 Case COMP/M.7555, Commission decision of 10 February 2016.
89 Case COMP/M.7567, Commission decision of 15 January 2016.
90 Case COMP/M.7637, Commission decision of 4 February 2016.
91 Case COMP/M.7932, Commission decision of 27 March 2017.
92 Case COMP/M.8084 Commission decision of 21 March 2018.
93 Case COMP/M.8451, Commission decision of 4 July 2018.
94 Case COMP/M.8480, Commission decision of 20 August 2018.
95 Case COMP/M.8674, Commission decision of 18 January 2019 (not yet published).
96 Case COMP/M.9076, Commission decision of 1 October 2019.
97 Case COMP/M.8947, *Nidec/Whirlpool (Embraco Business)*, Commission decision of 28 November 2018.
98 See, e.g., *Boehringer Ingelheim/Sanofi Animal Health Business*, Case COMP/M.7917, Commission decision of 9 November 2016; *Merck/Sigma-Aldrich*, Case COMP/M.7435, Commission decision of 15 June 2015; *NXP Semiconductors/Freescale Semiconductor*, Case COMP/M.7585, Commission decision of 17 September 2015; *Holcim/Lafarge*, Case COMP/M.7252, Commission decision of 15 December 2014; *CrownHoldings/Mivisa*, Case COMP/M.7104, Commission decision of 14 March 2014; and *IMS Health/Cegedim Business*, Case COMP/M.7337, Commission decision of 19 December 2014.
99 Case COMP/M.9163, Commission decision of 25 March 2019.
100 Case COMP/M.9110, Commission decision of 11 July 2019.
101 See, e.g., *General Electric/Alstom*, Case COMP/M.7278, Commission decision of 8 September 2015, Paragraphs 1927–1975; *Teva/Allergan Generics*, Case COMP/M.7746, Commission decision of 10 March 2016; and *Dow/DuPont*, Case COMP/M.7932, Commission decision of 27 March 2017.
102 *Telefónica Deutschland/E-Plus*, Case COMP/M.9003, see also, Mergers: Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition, Commission Press Release of 22 February 2019, IP/19/1371.
103 Case COMP/M.8947, Commission decision of 15 May 2020.
104 Case COMP/M.8955, Commission decision of 28 May 2020.

governments called on the Commission to 'pay more attention to the relevance of behavioural remedies (e.g., commitments regarding price, quality or choice of contractual partners), especially if competition conditions may change in the short run, since such remedies are more flexible than structural ones (including sales of assets and other one-off irreversible measures modifying the companies' structure).' Although the Commission generally prefers structural remedies, in some cases it has remained open to accepting access remedies; for example, in 2019, in *Vodafone/Certain Liberty Global Assets*[105] and *Telia/Bonnier*.[106]

Eighth, as to the defences available under the EC Merger Regulation, the Commission to date has approved two transactions on the basis of the 'failing firm' defence – *Nynas/Shell/Harburg Refinery*[107] and *Aegean/Olympic (II)*[108] – and started to show greater willingness to take positive account of efficiencies,[109] including in *FedEx/TNT Express*.[110]

The Commission's Horizontal Merger Guidelines set a high bar for the failing firm defence[111] and Commissioner Vestager has made clear that the covid-19 crisis 'shouldn't be a shield to allow mergers that would hurt consumers and hold back the recovery'.[112] While the strict requirements for application of the failing firm defence remain unlikely to be softened, the crisis may lead to the Commission giving increased weight to the reduced competitive constraint exercised by financially struggling companies (sometimes referred to as the 'flailing firm' defence). The Commission may also be more open to approving concentrations on the basis of substantiated efficiencies and because reduced demand or high levels of unused capacity may render historical market data suggesting the existence of possible competition concerns less reliable.

As at the time of writing, the Commission had not relied on the efficiencies defence to approve a transaction that might otherwise have been prohibited. However, in its May 2020 judgment overturning the Commission's *Hutchison 3G UK/Telefonica UK* prohibition decision, the General Court held that if the Commission performs a quantitative assessment

105 Case COMP/M.8864, Commission decision of 18 July 2019. The remedy involved providing the remedy taker (identified upfront) with access to the merged entity's cable network in Germany to 'replicate the competitive constraint exerted by Vodafone'. Additionally, the Merged Entity undertook to refrain from contractually restricting broadcasters' freedom to also distribute content on an OTT service, not to increase feed-in fees paid by Feed-to-Air broadcasters, and to continue to carry the HbbTV signal of Free-to-Air broadcasters.

106 Case COMP/M.9064, Commission decision of 12 November 2019.

107 Case COMP/M.6360, Commission decision of 2 September 2013.

108 Case COMP/M.6796, Commission decision of 9 October 2013.

109 See, e.g., *UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2013; and *Deutsche Börse/NYSE Euronext*, Case COMP/M.6166, Commission decision of 1 February 2012, Paragraphs 1145–1342.

110 Case COMP/M.7630, Commission decision of 8 January 2016, Paragraphs 498–588 and 776–804.

111 Three criteria need to be met for the failing firm defence to succeed: (1) due to financial difficulties, the target would be forced out of the market in the near term if not acquired; (2) there is no less anticompetitive alternative purchaser; and (3) absent the merger, the assets of the failing firm would inevitably exit the market (which may underlie a finding that the market share of the failing firm would in any event accrue to the potential acquirer). Horizontal Merger Guidelines, Paragraph 90.

112 Nicholas Hirst, 'Crisis no "shield" for anticompetitive mergers, Vestager says', MLex (24 April 2020); Lewis Crofts, 'Failing firms won't get more EU leeway to plead for mergers, Vestager says', MLex (24 April 2020).

of a transaction's likely effect on prices, it should also take account of any 'standard efficiencies' arising from that transaction (e.g., the elimination of duplicate resources) in assessing whether competition will be significantly impeded.[113]

Ninth, as to judicial review, in *Cisco and Messagenet*, which concerned an application to annul a Phase I unconditional approval decision (*Microsoft/Skype),*[114] the General Court rejected the applicants' submission that the Commission was subject to a higher standard when it decided against opening a Phase II investigation,[115] and confirmed that the Commission was subject to an identical standard of judicial review irrespective of whether it approves concentrations in Phase I or Phase II, namely a balance of probabilities standard.[116] In 2015, the General Court[117] upheld the Commission's prohibition of the then-contemplated combination of *Deutsche Börse* and *NYSE/Euronext*,[118] confirming the Commission's broad discretion concerning the types of evidence that need be adduced to support its findings.[119]

In May 2020, the General Court revisited the question of the appropriate standard of proof in merger cases, clarifying in *Hutchison 3G UK/Telefónica UK* that, where the Commission is required to demonstrate a significant impediment to effective competition, it must 'produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration'.[120] According to the Court, this standard of proof is stricter then a balance of probabilities standard, but less strict than a beyond reasonable doubt standard. It is likely the Commission will appeal this finding to the Court of Justice.

In 2017, the General Court also annulled a Commission decision prohibiting the acquisition by United Parcel Service (UPS) of a rival express delivery services provider, TNT Express NV, because the Commission was found to have infringed UPS's rights of defence by relying on a version of an econometric model that had not been fully disclosed to UPS during

113 Case T-399/16, *CK Telecoms UK Investments Ltd v. Commission*, judgment of 28 May 2020, ECLI:EU:T:2020:217, Paragraphs 277–279.

114 Case COMP/M.6281, Commission decision of 10 October 2011.

115 *Cisco Systems Inc. and Messagenet SpA v. Commission* (*Cisco Systems and Messagenet*), Case T-79/12 EU:T:2013:635, Paragraph 43 (applicants had contended that the Commission was required 'to show beyond reasonable doubt that a concentration does not give rise to any competition concerns'.).

116 *Cisco Systems and Messagenet*, Paragraphs 45–50; at Paragraph 46 ('the standard of proof is no higher for decisions adopted under Article 6 of Regulation No. 139/2004 than those adopted under Article 8 of that Regulation'). Advocate General Kokott had previously advocated a standard of proof 'beyond a reasonable doubt' for Phase I decisions. See Opinion of Advocate General Kokott in *Bertelsmann and Sony*, Case C-413/06 P EU:C:2007:790, Paragraph 211 ('This particularly high standard is known principally in the field of criminal and quasi-criminal proceedings. In merger control proceedings it is applicable only in the preliminary phase (Phase I), to compensate for the fact that at that stage the investigation of a concentration is merely a summary one. At that stage, "serious doubts" as to the compatibility of the concentration with the common market will only prevent its being cleared too quickly and force the Commission to make a more extensive investigation in a formal procedure (Phase II).').

117 *Deutsche Börse AG v. Commission* (*Deutsche Börse*), Case T-175/12 EU:T:2015:148.

118 Case COMP/M.6166, Commission decision of 1 February 2012.

119 *Deutsche Börse*, Paragraph 132 (General Court held that 'there is no need to establish a hierarchy between "non-technical evidence" and "technical evidence"', confirming that 'the Commission's task [is] to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation', prioritising certain items of evidence and discounting others).

120 Case T-399/16, *CK Telecoms UK Investments Ltd v. Commission*, judgment of 28 May 2020, ECLI:EU:T:2020:217, Paragraph 118.

the administrative procedure. That judgment was upheld on appeal in 2019.[121] It remains to be seen whether UPS will be successful in obtaining the almost €2 billion in damages that it is reportedly seeking as compensation from the Commission.[122]

Finally, collaboration between the Commission and other antitrust agencies around the world has continued to deepen[123] and instances of disagreement have remained infrequent. Within Europe, however, tensions emerged in 2014 between the Commission and certain Member State agencies concerning the Commission's approval of a number of four-to-three concentrations impacting the telecommunications sector.[124]

Tensions re-emerged in 2018–2019 as a result of the review, and ultimate prohibition, of the *Siemens/Alstom* transaction. In December 2018, 19 EU governments called for a 'new political impetus' to ensure the competitiveness of Europe, while the French and German governments called, in February 2019, for a fundamental reform of EU competition law, inspired by a desire to increase Member State influence over Commission decisions and to take better account of competition from global rivals. The proposals have been opposed by the Commission, as well as various practitioners,[125] academics and certain national competition agencies.[126] In 2020, the French and German governments repeated calls for the creation of European champions.[127]

121 *United Parcel Service v. Commission* (*UPS*), Case T-194/13 ECLI:EU:T:2017:144. Upheld on appeal to the ECJ. *Commission v. United Parcel Service* (*UPS*), Case C-265/17P, ECLI:EU:C:2019:23.

122 *United Parcel Service v. Commission*, Case T-834/17, Action brought on 29 December 2017 OJ C 72, 26.2.2018, p. 41–42. 'UPS sues EU for blocking €5bn TNT Express deal', *Financial Times*, Rochelle Toplensky, 26 February 2018.

123 See, e.g., Joaquín Almunia, International Cooperation to Fight Protectionism, 11th Annual Conference of the International Competition Network, Rio de Janeiro, 18 April 2012 (Commission Press Release SPEECH/12/280) ('It is clear that – to carry out our duties responsibly – we must strengthen our bilateral and multilateral channels of worldwide cooperation.'); Andreas Bardong, former Head of Merger Control Unit, German Federal Cartel Office, 'Cooperation, Convergence, and . . . Conflicts? The Case of EU and National Merger Control', [2013] June (2) *Competition Policy International Newsletter*, pp. 2–9 ('The mantra of international merger control has been co-operation, convergence, and comity.'); and Patricia Brink, International Cooperation at the Antitrust Division: A View from the Trenches, 19 April 2013 (US Department of Justice), available at www.justice.gov/atr/public/speeches/296073.pdf.

124 See, e.g., 'Regulators revolt against Telefónica and E-Plus merger', *Financial Times*, 20 June 2014 (Commission proposal to approve a transaction impacting the German telecommunications sector faced opposition from a number of Member State agencies, including the German Federal Cartel Office, but was ultimately approved (*Telefónica Deutschland/E-Plus*, Case COMP/M.7018, Commission decision of 2 July 2014)).

125 'Franco-German proposals would undermine competitive markets in the EU', Letter from Vanessa Turner and others, *Financial Times*, 30 April 2019. See also N Levy, D R Little and H Mostyn, 'European champions – Why politics should stay out of EU merger control', *Concurrences*, No. 2-2019.

126 See, e.g., J Brunsden and M Kahn, *Financial Times*, 'Franco-German eurozone reform plan faces growing opposition', 22 June 2018 ('The Netherlands, Austria and Finland are among 12 Governments questioning the need for any joint Eurozone "fiscal capacity", challenging a central tenet of French President Emmanuel Macron's vision for the Eurozone that he has successfully pressed Berlin to endorse'); and S Marks and J Posaner, 'Macron's battle against European unity', *Politico*, 6 March 2019 ('Disagreements over the single market are flaring up all over the Continent. They pit France – and to a lesser extent Germany – against not just newer EU members like Romania, Poland and Hungary, but also against free-market champions like the Netherlands, Ireland and Sweden').

127 'EU competition rules should push for "industrial champions", Merkel and Macron Say', Areki Yaiche, MLex, 18 May 2020.

In response to suggestions that the Commission's enforcement practice should take greater account of global competition and the impact of digitalisation on competition, in April 2020 the Commission launched a public consultation to review the 1997 Market Definition Notice. This consultation followed Commissioner Vestager's December 2019 announcement that 'the time has come to review the Market Definition Notice'.[128] The results of this evaluation are expected in 2021, with adoption of a new notice in 2022.[129]

Finally, in April 2019, the European Council adopted a new framework for screening foreign direct investments coming into Europe.[130] The framework aims to create a cooperation mechanism for the exchange of information between Member States and the Commission and allow the Commission to issue opinions where an investment could pose a threat to one or more Member States or undermine a programme of interest to the EU.

III THE MERGER CONTROL REGIME

The EC Merger Regulation is based on four main principles: (1) the exclusive competence of the Commission to review concentrations of EU dimension; (2) the mandatory notification of such concentrations; (3) the consistent application of market-oriented, competition-based criteria; and (4) the provision of legal certainty through timely decision making. The principal provisions of the EC Merger Regulation are summarised below.

The EC Merger Regulation applies to concentrations (i.e., lasting changes in control). The concept of a concentration includes mergers, acquisitions, and the formation of jointly controlled, autonomous, full-function joint ventures. The concept of control is defined as the possibility to exercise 'decisive influence'.

All concentrations that meet prescribed jurisdictional 'size' tests are deemed to have EU dimension and, as such, are subject to mandatory notification under the EC Merger Regulation, irrespective of whether they have any effect in the EU. The Commission has exclusive jurisdiction over such transactions (the 'one-stop-shop' principle).

Concentrations that fall below the EC Merger Regulation's thresholds may be subject to national merger control rules. Any Member State may ask the Commission to allow its national competition agency to review a concentration that has an EU dimension. One or more Member State agencies may also refer to the Commission concentrations that would otherwise be subject to national competition rules. As of 1 May 2004, parties to a concentration may petition the Commission either to have a transaction that is reportable at the EU level referred to one or more national competition agencies or to have the Commission review a transaction that would ordinarily be subject to national merger control rules.

The EC Merger Regulation contains deadlines for the Commission's review of reportable concentrations, although those deadlines have been progressively extended and, particularly in complex cases, the Commission often encourages merging parties to engage in lengthy pre-notification discussions and may 'stop the clock' to secure more time. The large majority of concentrations are approved at the end of an initial 25 working day review period (Phase I). Where the Commission has 'serious doubts' about a concentration's compatibility

128 Speech, Commissioner Vestager, 9 December 2019, 'Defining Markets in a New Age'.

129 https://ec.europa.eu/competition/antitrust/legislation/timeline_table_M_AT_final.pdf.

130 See www.europarl.europa.eu/RegData/etudes/BRIE/2018/614667/EPRS_BRI(2018)614667_EN.pdf; European Parliament and Council Regulation establishing a framework for the screening of foreign direct investments into the Union.

with EU competition rules, it opens an in-depth (Phase II) review that lasts 90 working days, extendable to 125 working days. Both periods may be extended in situations where commitments are offered to address competition concerns identified by the Commission. Absent a derogation, reportable concentrations may not be implemented until they have been approved, and, in cases of breach, the Commission may take remedial action. Fines may also be imposed for failure to notify, late notifications, or the provision of incorrect or misleading information.

The EC Merger Regulation provides opportunities for both merging parties and third parties to be heard. The Commission encourages customers, competitors, suppliers, and other interested parties to play an active role in the EU merger control process. In practice, third parties play an important role in EC merger proceedings and the Commission attaches considerable importance to their views.

The substantive test under the EC Merger Regulation is whether a concentration 'significantly impedes effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'. The Commission's appraisal under the EC Merger Regulation has two main elements: definition of the relevant market and competitive assessment of the concentration. The Commission generally focuses first on unilateral exercises of market power and then on whether a concentration may have coordinated effects arising from tacit collusion. Horizontal mergers (i.e., those involving firms active in the same market), have accounted for the large majority of challenged transactions, although the Commission has also examined (and, on occasion, has prohibited) concentrations that have had anticompetitive vertical or conglomerate effects.

The Commission is not empowered to exempt or authorise, on public interest or other grounds, concentrations that are considered incompatible with the common market. It may, however, take positive account of efficiencies. The Commission may also condition its approval of transactions on undertakings or commitments offered by the merging parties.

An appraisal under Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements, may also be warranted under the EC Merger Regulation in respect of full-function joint ventures that give rise to spill-over effects between their parent companies. Non-full-function joint ventures fall outside the EC Merger Regulation and may be subject to Articles 101 or 102 of the TFEU, which prohibit anticompetitive agreements and abusive conduct by dominant companies, as well as national competition rules.

Although the EU has an administrative system of merger control, where the Commission investigates and adjudicates, Commission decisions are subject to judicial review by the EU courts, whose contribution to EU merger control has been significant, particularly in recent years, where several Commission decisions have been subject to far-reaching review.[131]

Since its adoption, the EC Merger Regulation has evolved into an integral part of EU competition practice. Unlike other areas of EU competition law, where few formal

131 In addition to reviewing appeals of Commission decisions, the EU courts have also issued a number of important judgments following preliminary references from national courts, most recently in *Austria Asphalt v. Bundeskartellanwalt* (*Austria Asphalt*), Case C-248/16 EU:C:2017:643 (clarifying the circumstances in which the Merger Regulation applies to changes from joint to sole control); and *Ernst & Young P/S v. Konkurrencerådet* (*Ernst & Young*), Case C-633/16 EU:C:2018:371 (clarifying EU rules on gun-jumping rules).

decisions have been adopted,[132] the EC Merger Regulation has produced a rich and extensive jurisprudence that provides guidance on a range of issues, including the competitive assessment of a wide variety of transactions affecting a broad array of product and geographic markets. The Commission has also adopted a pragmatic, open and informal approach to the EC Merger Regulation's application. Former Commissioner Monti explained the Commission's achievement under the EC Merger Regulation in the following terms:

> *The EC Merger Regulation, far from standing in the way of industrial restructuring in Europe, has facilitated it, while ensuring that it did not result in damages to competition. It has provided a 'one stop shop' for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions here in the EU. It has guaranteed that merger investigations are completed within tight, pre-determinable deadlines; a remarkable degree of transparency has been maintained in the rendering of decisions – each and every merger notified to the Commission results in the communication and publication of a reasoned decision. Above all, we have put in place a merger control system which is characterised by the complete independence of the decision-maker, the Commission, and by the certainty that mergers will be exclusively assessed for their impact on competition.*[133]

Between September 1990, when it entered into force, and April 2020, the Commission had rendered decisions in around 7,700 notified transactions, of which around 6,800 (88 per cent) approved concentrations unconditionally in Phase I; 55 (less than 1 per cent) found the EC Merger Regulation to be inapplicable; 325 (4 per cent) approved transactions subject to undertakings given in Phase I;[134] 62 (less than 1 per cent) approved transactions unconditionally during Phase II; and 134 (2 per cent) approved concentrations subject to undertakings given in Phase II. As at April 2020, the Commission had rendered 30 prohibition decisions, representing less than 0.5 per cent of all notified concentrations, five of which have been overturned on appeal by the EU courts.[135] Around 220 notifications have been withdrawn, of which 45 were withdrawn following the opening of Phase II investigations, in many instances to avoid prohibition decisions. Thus, around 1 per cent of all transactions notified under the EC Merger Regulation have been either prohibited or abandoned in the course of Phase II. The Commission's 'challenge rate' is broadly comparable to those of other major jurisdictions.[136]

---

132 For perspective, since the EC Treaty came into force in 1965, the Commission has rendered approximately 100 decisions applying what is now Article 102 of the TFEU, which prohibits abusive conduct by dominant companies.

133 Mario Monti, Merger Control in the European Union: A Radical Reform, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002 (Commission Press Release SPEECH/02/545).

134 Since 1 March 1998, the Commission has had explicit authority to condition decisions rendered at the end of the initial investigative period on commitments.

135 *Airtours plc v. Commission* (*Airtours*), Case T-342/99 EU:T:2002:146; *Schneider Electric v. Commission* (*Schneider*), Case T-310/01 EU:T:2002:254; *Tetra Laval v. Commission* (*Tetra Laval*), Cases T-5/02 and T-80/02 EU:T:2002:264, upheld by the Court of Justice in *Commission v. Tetra Laval BV* (*Tetra Laval CJ*), Case C-13/03 EU:C:2005:88; *MCI v. Commission* (*MCI*), Case T-310/00 EU:T:2004:275; and *United Parcel Service v. Commission* (*UPS*), Case T-194/13 EU:T:2017:144.

136 For perspective, of the 15,310 transactions notified in the United States between fiscal years 2007 and 2016, 'second requests' for additional information were issued in 480 instances (3 per cent). Note, however,

In the 28 years since it entered into force, the Commission's application of the EC Merger Regulation has evolved considerably. Eight aspects of this evolution may be identified:

a the EC Merger Regulation's scope of application has been broadened to include all full-function joint ventures, as well as mergers, acquisitions and other forms of concentration;

b the Commission has, over time, employed an increasingly rigorous, quantitative and economically orientated approach to market definition and substantive assessment;

c the Commission has applied the EC Merger Regulation's substantive test to a wide array of situations, including conglomerate mergers, vertical transactions and situations of collective dominance;

d the Commission has used interpretative Notices to codify the law and bring greater transparency;

e the Commission has developed a flexible and open-minded approach to the implementation of the EC Merger Regulation's procedural rules, extending the review periods far beyond those originally envisaged;

f the Commission has devoted time, effort and resources to shaping and enforcing remedies;

g the Commission has attached increasing importance to requesting and reviewing internal documents; and

h the Commission has fostered international cooperation and convergence in merger control.

The most significant challenge to the Commission's role as investigator, prosecutor and judge in EU merger control occurred in the early 2000s, when the EU courts overturned three prohibition decisions in a trilogy of judgments that were critical of the Commission's handling of the concentrations in question (*Airtours*,[137] *Schneider*[138] and *Tetra Laval*).[139] The principal criticism made was that the same Commission officials assess the evidence, state the case against a notified concentration, determine how far that case is proved and decide

that the filing thresholds in the United States are quite low, despite having been raised to $84.4 million as of February 2018 (see Federal Register Vol 83, No. 19, 4050). Therefore, US notifications are filed for a large number of relatively insignificant transactions that are not likely to be of interest to US regulators. See, e.g., Gavin Robert, 'Merger Control Procedure and Enforcement: An International Comparison', [2014] December, *European Competition Journal*, pp. 523–549.

137 *Airtours plc v. Commission* (*Airtours*), Case T-342/99 EU:T:2002:146.

138 *Schneider Electric v. Commission*, Case T-310/01 EU:T:2002:254. This case was decided concurrently with *Schneider Electric v. Commission*, Case T-77/02 EU:T:2002:255. The two cases are collectively referred to as *Schneider*.

139 *Tetra Laval BV v. Commission*, Case T-5/02 EU:T:2002:264. This case was decided concurrently with *Tetra Laval BV v. Commission*, Case T-80/02 EU:T:2002:265. The two cases are collectively referred to as *Tetra Laval*.

whether to approve or prohibit a transaction. A comparison was drawn with the United States,[140] where the prospect of independent judicial review is said to exert discipline on decision-making, irrespective of whether a given transaction is challenged or abandoned.[141]

In response to the judgments in *Airtours*, *Schneider* and *Tetra Laval*, the Commission acknowledged that 'the system put in place in 1990 [was] showing some signs of strain'[142] and recognised that a 'radical'[143] package of measures was needed to allay criticism, ensure that future decisions would be based on firm evidence and solid investigative techniques, and maintain the existing institutional framework in which the Commission approves or prohibits mergers.[144] The Commission expressed determination that 'these setbacks [should not be allowed] to distort our view of the Community's merger control policy', and resolved to 'transform them into an opportunity for even deeper reform than originally envisaged'.[145] In December 2002, the Commission approved a 'comprehensive merger control reform package, which is intended to deliver a world class regulatory system for firms seeking approval for their mergers and acquisitions in the Community'.[146]

By ensuring that decisions rendered following the 2004 reforms were increasingly well reasoned and firmly based in fact, law, and sound economics, the Commission successfully preserved its power to vet mergers. Commission officials also welcomed the European Court of Human Rights' determinations in *Jussila*[147] and *Menarini*[148] that, given the effective judicial oversight exercised by the EU courts, the Commission's combined role as prosecutor, investigator and decision-maker in antitrust proceedings, including merger control proceedings, is compatible with Article 6 of the European Convention on Human Rights, which provides that 'everyone is entitled to a fair and public hearing within a reasonable time

140 See, e.g., Donna Patterson and Carl Shapiro, Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons, 17 *Antitrust*, Fall 2002, p. 18 ('The most fundamental process difference between the U.S. and EU system is the fact that U.S. authorities must obtain an order from an independent judicial authority prior to blocking a transaction. By contrast, the Competition Commission plays the role of investigator, prosecutor and judge in each transaction that it reviews.').

141 See, e.g., William J Kolasky, Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels, George Mason University Symposium, Washington, DC, 9 November 2001. ('If we decide in the U.S. to challenge a merger, we know we may have to go to court to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition. This means that we know our witnesses will be exposed to the crucible of cross-examination before an independent fact-finder . . . After just six weeks at the agency, I cannot overstate how much knowing we may have to prove our case to an independent fact-finder disciplines our decision-making.').

142 Mario Monti, Europe's Merger Monitor, *The Economist*, 9 November 2002.

143 Philip Lowe, Future Directions for EU Competition Policy, International Bar Association, Fiesole, Italy, 20 September 2002 ('we will propose radical changes in areas where radical changes are needed').

144 See too Mario Monti, Europe's Merger Monitor, *The Economist*, 9 November 2002, who summarised the objectives of the Commission's proposals as follows: '[T]o improve the Commission's decision-making process, making sure that our investigations of proposed mergers are more thorough, more focused, and – most importantly – more firmly grounded in sound economic reasoning, with due regard for the rights of the merging partners and of third parties.'

145 Mario Monti, Merger Control in the European Union: A Radical Reform, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002 (Commission Press Release SPEECH/02/545).

146 Commission Press Release IP/02/1856 of 11 December 2002.

147 *Jussila v. Finland*, Application No. 73053/01, judgment of 23 November 2006.

148 *Menarini Diagnostics v. Italy*, Application No. 43509/08, judgment of 27 September 2011.

by an independent and impartial tribunal'.[149] Should, however, complaints resurface about the perceived absence of checks and balances on Commission decision-making and the lack of effective judicial review, the EU's institutions might again be under pressure to consider further reforms.

IV OTHER STRATEGIC CONSIDERATIONS

Over the past decade, the Commission has pursued various initiatives designed to increase coordination, facilitate convergence and avoid divergent outcomes with other agencies around the world. Perhaps the most important of these is an agreement between the EU and the United States that was intended to promote cooperation between their respective competition agencies.[150] This agreement has led to high level dialogue at political, senior management and academic level, about convergence on jurisdictional, substantive and procedural issues.[151]

The last significant disagreement between the Commission and US agencies occurred in 2001 in connection with the *General Electric/Honeywell* transaction.[152] The US Department of Justice (DOJ) concluded that, subject to certain divestitures in those areas where the merging parties did compete, the transaction would not harm competition. The Commission, however, prohibited the transaction, prompting criticism from US politicians and regulators.[153] This disagreement represented the most significant divergence between Commission and US

149 See too Wouter P J Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in which the European Commission Acts both as Investigator and as First-instance Decision Maker', *World Competition Law and Economic Review* (Kluwer Law International 2014 Volume 37 Issue 1), pp. 5–25.

150 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (1995 O.J. L95/47).

151 See, e.g., Joaquín Almunia, former Competition Commissioner, Trends and Milestones in Competition Policy since 2010, AmCham EU's 31st Annual Competition Policy Conference, Brussels, 14 October 2014 (Commission Press Release SPEECH/14/689) (Commission disclosed it had 'cooperated with other agencies in around half of [its] past significant merger cases'). See also Margrethe Vestager, Merger review: Building a global community of practice, ICN Merger Workshop, Brussels, 24 September 2015 ('At present, the European Commission has some form of cooperation with non-EU agencies in more than half of all cases that involve remedies or require in-depth reviews – what we call "second phase"').

152 Case COMP/M.2220, Commission decision of 3 July 2001. In 2000, Senators DeWine and Kohl had written to then-Commissioner Monti, voicing concerns that the Commission's competition policy might discriminate against US companies and suggesting that the EU might be influenced by 'pan-European protectionism rather than by sound competition policy'. Professor Monti dismissed the concerns as being 'wholly unfounded' and provided a breakdown of transactions challenged by the Commission, showing that, of the 13 concentrations that had been prohibited as at October 2000, only one had involved a US company.

153 A former senior US regulator characterised the divergent results as reflecting an 'absolutely fundamental disagreement' between the US and EU authorities (Charles A James, International Antitrust in the Bush Administration, Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada, 21 September 2001), while another described the Commission's decision as 'not strongly grounded in economic theory or empirical evidence' (William J Kolasky, US and EU Competition Policy: Cartels, Mergers, and Beyond, Council for the United States and Italy, 25 January 2002).

regulators since *Boeing/McDonnell Douglas*.[154] Since then, the Commission and the US agencies have endeavoured to avoid similar disagreements and the years following *General Electric/Honeywell* have been characterised by 'quiet and business-like cooperation'.[155]

In 2017–2019, the *Tronox/Cristal* saga provided salutary perspective on the complex challenges that can arise in transactions that raise issues on both sides of the Atlantic. In December 2017, the US Federal Trade Commission (FTC) sued to block the transaction shortly after the Hart-Scott-Rodino waiting period expired, but did not seek a preliminary injunction as the Commission's review was ongoing (and so the deal could not yet close). In July 2018, *Tronox/Cristal* was cleared by the Commission, subject to commitments (including an up-front buyer requirement). Similar divestitures were reportedly offered to the FTC but an agreement was not reached. In December 2018, an administrative judge blocked the transaction in the US based on a complaint by the FTC. Following a government shutdown that delayed the US process further, a consent agreement was reached with the FTC in April 2019, based on North American divestitures similar to those agreed one year earlier with the Commission.[156]

Other cases reveal significant cooperation and coordination between agencies. For example, the Commission cleared UTC's acquisition of US defence giant Raytheon subject to commitments on 13 March 2020,[157] shortly before the DOJ announced reaching a similar conclusion on 26 March 2020.[158] This process echoed similar synchronicity in the *L3/Harris* case[159] where the Commission announced its conditional approval of the transaction very shortly after the DOJ cleared the transaction subject to remedies.

In practice, counsel and companies should assume that antitrust agencies will, as a matter of course, cooperate in investigating transactions subject to parallel review. Counsel and companies should therefore ensure that submissions made in different jurisdictions are consistent. *Novelis/Aleris* provides an interesting example of merging companies pursuing different strategies in the EU and the US. Their decision not to offer remedies in the US similar to those given in the EU led the DOJ to pursue arbitration in an attempt to avoid proceedings before a federal court.[160]

The differences between EU and US reporting obligations and, in particular, the lack of any requirement that companies notifying transactions to the US agencies take a position on market definition or provide a competitive assessment of a given transaction,

154 Case IV/M.877, Commission decision of 30 July 1997.

155 Mario Monti, Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: An EU Perspective, UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Los Angeles, 28 February 2004 (Commission Press Release SPEECH/04/107). See, however, Pallavi Guniganti, 'US and EU Converge on Mergers but Not Unilateral Conduct, Enforcers Say', [2017] January, *Global Competition Review*, pp. 1–2.

156 Pallavi Guniganti, 'Tronox appeases FTC with Cristal divestiture', *Global Competition Review*, 11 April 2019.

157 European Commission, Press Release, Mergers: Commission approves acquisition of Raytheon by UTC, subject to conditions, 13 March 2020.

158 Department of Justice, Press Release, Justice Department Requires Divestitures in Merger Between UTC and Raytheon to Address Vertical and Horizontal Antitrust Concerns, 26 March 2020.

159 *Harris Corporation/L3 Technologies*, Case COMP/M.9234, Commission Decision of 21 June 2019 (not yet published).

160 Case COMP/M.9076, Commission decision of 1 October 2019; and *United States of America v. Novelis and Aleris*, 'Plaintiff United States' Explanation of Plan to Refer this Matter to Arbitration', 9 September 2019 (www.justice.gov/atr/case-document/file/1200821/download).

makes it essential that US counsel are aware of, and in agreement with, notifications filed in Brussels. Likewise, EU counsel should increasingly cooperate with their US colleagues when it comes to document production in complex cases. Costs and the risk of inconsistency can be significantly reduced by coordinating the response to 'second requests' in the US with the now inevitable production of documents in Europe. As a result, a premium is increasingly placed on achieving a level of cooperation and coordination between lawyers similar to that likely to occur between reviewing agencies.

V OUTLOOK AND CONCLUSIONS

The Commission's application of the EC Merger Regulation is widely considered to have been a success. Although there will inevitably be legal and practical developments, including advances in forensic tools and economic modelling, that shape its future application, the EC Merger Regulation is an increasingly mature legal instrument. At least as importantly, Commission practice has developed to a point where counsel are generally able to predict with reasonable certainty the analytical framework that will be applied in any given case, the economic and other evidence that will likely be considered probative, the duration of the Commission's review, and the probable outcome.

In her 2019 mission letter to Commissioner Vestager, Commission President von der Leyen set out a series of ambitious goals, including strengthening competition enforcement, reviewing competition rules, including merger control, tackling the 'distortive effects of foreign state ownership and subsidies', and applying State aid rules as part of a broader European industrial strategy. Commissioner Vestager will also need to consider how, if at all, to adapt EC merger control to the challenges of the digital age.

In the immediate term, Commissioner Vestager will need to maintain the Commission's efficient handling of cases while the covid-19 crisis continues. In the mid to long term, given mounting pressure from certain national governments to protect European companies and pursue a policy that favours European champions, the Commission will need to draw on its experience and pragmatism to maintain its independence in the field of merger control, to resist pressure to adapt EU merger control to take account of social, industrial, employment and other considerations, and to protect the EC Merger Regulation's established architecture and analytical framework.

Appendix 1

ABOUT THE AUTHORS

NICHOLAS LEVY

Cleary Gottlieb Steen & Hamilton LLP

Nicholas Levy's practice focuses on EU and UK antitrust law. He has extensive experience in notifying mergers and joint ventures under the EU Merger Regulation, coordinating the notification of international transactions, and advising on all aspects of antitrust law, including anti-cartel enforcement, collaborative arrangements, vertical agreements and unilateral conduct.

Over the past 25 years, he has been involved in numerous matters before the European Commission, the UK Competition and Markets Authority, the EU courts in Luxembourg and the UK Competition Appeal Tribunal.

He is recognised as a leading antitrust lawyer by *Chambers and Partners* and was included in *Euromoney's Guide to the World's Leading Competition Lawyers* and *Global Competition Review*'s '45 Under 45' and '40 Under 40' surveys of the world's brightest young antitrust lawyers.

Mr Levy has written and spoken widely on a broad array of European competition law issues, and has authored a two-volume treatise entitled *European Merger Control Law: A Guide to the Merger Regulation*, published by LexisNexis. Mr Levy joined Cleary Gottlieb in 1990 and became a partner in 1999. He is a graduate of Oxford University and the City University of London.

Mr Levy is a member of the Bar of England and Wales, a solicitor of the senior courts of England and Wales, and a member of the Brussels Bar.

PATRICK BOCK

Cleary Gottlieb Steen & Hamilton LLP

Patrick Bock's practice focuses on antitrust counselling and antitrust litigation.

Mr Bock advises clients on cutting-edge matters in the US and in Europe, including leading merger control cases and horizontal cooperation matters, cartel investigations and follow-on civil litigation across an array of industries and jurisdictions and vertical restraint investigations, as well as dominance and market power investigations.

Mr Bock received an undergraduate degree in economics and international studies, *magna cum laude*, from Yale University in 2000 and a JD degree from Harvard Law School in 2003. After starting in Cleary's Washington, DC office following graduation from Harvard, he served in Cleary's Brussels office for several years as an associate, before returning to

Washington and being elevated to partner in 2013. After his elevation to partner, he spent five years in Cologne and returned to Brussels in 2018. Mr Bock is actively involved in the ABA's Antitrust Section.

In 2015, *Global Competition Review* ranked Mr Bock as one of the top young antitrust lawyers in its '40 Under 40' survey and in 2017, *Who's Who Legal* recognised him as a 'future leader' in its 2017 and 2018 global industry rankings for competition law.

Mr Bock is a member of the Illinois and Washington, DC Bars, and is also registered with the Cologne and Brussels Bars.

ESTHER KELLY

Cleary Gottlieb Steen & Hamilton LLP

Esther Kelly's practice focuses on European competition law.

Ms Kelly has experience working in all aspects of European competition law, including complex cartel, abuse of dominance and merger control matters, and has worked extensively on cases related to a variety of industries including technology, pharmaceuticals, chemicals, transport and financial services.

Ms Kelly joined Cleary Gottlieb in 2009. She is a graduate of Downing College, Cambridge University, the Université libre de Bruxelles and the College of Europe. Ms Kelly is a visiting lecturer at Lille Catholic University.

Ms Kelly is a solicitor of the senior courts of England and Wales and a member of the Brussels Bar.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Rue de la Loi 57
1040 Brussels
Belgium
Tel: +32 2 287 2000
Fax: +32 2 231 1661
nlevy@cgsh.com
pbock@cgsh.com
ekelly@cgsh.com
www.clearygottlieb.com

an LBR business

ISBN 978-1-83862-478-1