THE MERGER CONTROL REVIEW

TWELFTH EDITION

Editor

Ilene Knable Gotts

THE LAWREVIEWS

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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 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 28 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. Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also 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 (see discussion of *Google/Fitbit* in the Japan chapter), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has recently adopted the potentially most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. Two recent referrals should provide significant guidance regarding the impact of this new referral process.

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., 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 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 US Federal Trade Commission 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, Japan, the Netherlands, Norway, South Africa, Ukraine, Vietnam and the United States). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). 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).

We are at a potentially transformational point in competition policy enforcement. This book should, however, provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
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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. Margrethe Vestager has served as Competition Commissioner since October 2014.

At the time of its adoption, the Commission also adopted an Implementing Regulation,[4] which addresses procedural matters and, among other things, contains Form CO and Short

1 Nicholas Levy and Patrick Bock are partners, and Esther Kelly is counsel, at Cleary Gottlieb Steen & Hamilton LLP. The views expressed are personal and all errors, omissions and opinions are their 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.

Form CO, the forms prescribed for the notification of reportable transactions.[5] To facilitate 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. A large European merger had to be hawked around several European capitals for approval and consideration also had to be given to the precise scope of Articles [101] and [102] [TFEU] in this field, on the basis of two judgments of the European Court. Now we have the policy right and we have clarified the procedures and the substantive rules. 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]

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.

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. 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, https://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

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.

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 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. Such a market power produces competitive harm, which manifests either directly through higher post-merger prices or reduced innovation or, indirectly, through the elimination of competitors, leading ultimately to the same negative results in terms of prices or innovation. 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 has consistently defended these principles, affirming the Commission's commitment to 'a strong competition culture [that] keep[s] protectionism at bay',[13] and maintaining that, although antitrust enforcement often serves wider political goals, individual cases should not be subject to political interference.[14] In the wake of the Commission's prohibition of the *Siemens/Alstom* transaction in 2019, Commissioner Vestager rejected calls for the Commission to take greater account of political considerations and industrial policy,[15] so as to permit the creation of European 'champions':[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). 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 Margrethe Vestager, 'Vestager vows to resist protectionism, antitrust politicization', MLex, 29 September 2014.

14 Margrethe Vestager, 'Independence is non-negotiable', Introductory remarks at the Chatham House Competition Policy Conference, London, 18 June 2015 ('Independence is simply non-negotiable. Because we know that our legitimacy, our credibility and – ultimately – the impact of our action depend on it. . . . Independence means enforcing the rules impartially without taking instructions from anyone').

15 German Federal Ministry for Economic Affairs and Energy press release, 'Altmaier and Le Maire adopt joint Franco-German Manifesto on Industrial Policy' (19 February 2019). See too Areki Yaiche, 'EU competition rules should push for "industrial champions", Merkel and Macron say', MLex, 18 May 2020.

16 See too 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

> *Competition policy ensures that we have open and fair competition in the European Single Market. It keeps our companies on their toes. A company is not going to be competitive abroad if it does not have any competition at home. Unchallenged companies are not likely to be innovative, flexible or efficient . . . in the global market place.*[17]

There nevertheless continues to be lively debate among European and US politicians, policymakers and practitioners as to whether enforcement should become more permissive to facilitate the creation of national or regional 'champions' or tightened to mitigate the effects of what some believe to have been historic under-enforcement of merger control rules on both sides of the Atlantic.[18]

Another critique of merger control in the EU, discussed further below, concerns its jurisdictional scope, which some believe is insufficient to capture all anticompetitive transactions, in particular 'killer acquisitions' (i.e., acquisitions by dominant companies of nascent competitors whose turnovers are too low to meet existing merger control thresholds). In response to this concern, a number of European countries have expanded the jurisdictional reach of their national merger control laws: Germany and Austria have introduced transaction value-based thresholds;[19] the UK has used its 'share of supply' test to review transactions involving targets with no (or *de minimis*) UK revenues;[20] France[21] and the Netherlands[22] are considering new rules that would either include transaction-value thresholds or require

verify reading the newspapers or the Official Journal.'). See also Nicholas Levy, David R Little and Henry Mostyn, 'European champions – Why politics should stay out of EU merger control', *Concurrences*, No. 2-2019.

17 Margrethe Vestager, 'Statement by Commissioner Vestager on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland', 6 February 2019 (Commission Press Release STATEMENT/19/889).

18 See, e.g., the UK Competition and Markets Authority (CMA), the German Federal Cartel Office and the Australian Competition and Consumer Commission, Joint statement on merger control (20 April 2021). See too J Stiglitz, 'Evidence to FTC Hearings on Competition and Consumer Protection in the 21st Century', 21 September 2018 ('Current antitrust/competition laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive market place'). See also Senator E Warren, 'Reigniting Competition in the American Economy', Keynote Remarks at New America's Open Markets Program Event, 29 June 2016 ('Competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere'); and Senator E Warren, 'Keynote Remarks at Centre for American Progress Ideas Conference', 16 May 2017 ('It's time for us to do what Teddy Roosevelt did – and pick up the antitrust stick again. Sure, that stick has collected some dust, but the laws are still on the books').

19 9th amendment to the German Competition Act and Austrian Cartel and Competition Law Amendment Act 2017.

20 The UK Enterprise Act's share of supply test is a flexible tool that does not require the CMA to define a relevant antitrust market to find jurisdiction. Rather, the CMA need only identify a reasonable description of goods or services for which the parties have a share of more than 25 per cent: CMA, 'Mergers: Guidance on the CMA's jurisdiction and procedure' (2 January 2014), Paragraph 4.56.

21 In January 2020, the French Senate passed a bill requiring digital platforms to notify all acquisitions, irrespective of size. See 'Digital giants should notify all acquisitions to French watchdog, says Senate law proposal', MLex, 22 January 2020. At the time of writing, the draft law was under review by the French National Assembly.

22 In May 2019, the Dutch government submitted a policy letter to the Dutch House of Representatives proposing to introduce transaction-value thresholds. See government of the Netherlands press release, 'Dutch government: Change competition policy and merger thresholds for better digital economy', 27 May 2019.

mandatory notification of all acquisitions by leading digital platforms. In 2021, the European Commission issued guidance encouraging Member States to refer potentially anticompetitive concentrations that do not meet the applicable national thresholds to allow the Commission to review such concentrations.[23]

As to the jurisdictional scope of the EC Merger Regulation, following the UK's exit from the EU and the expiry of the transition period on 1 January 2021, the Commission's jurisdiction under the EC Merger Regulation no longer extends to assessing the impact on competition in the UK, and the UK Competition and Markets Authority (CMA) has secured parallel jurisdiction to review concentrations that would previously have been examined by the Commission alone.

Finally, at EU and national level, various measures have been adopted, or are in the process of being adopted, to protect European companies from being acquired by undertakings that may raise national security concerns[24] and to address the impact of public subsidies on the EU's single market.[25] In respect of public subsidies, the Commission's proposal envisages a mandatory *ex ante* review of concentrations involving undertakings that have received financial contributions from third countries. It would operate in parallel to the EC Merger Regulation and allow the Commission to prohibit transactions that are facilitated by foreign subsidies and distort the EU's internal market.

II YEAR IN REVIEW

In recent years, the Commission's application of the EC Merger Regulation has become more interventionist: 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

23 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, Brussels, 26 March 2021, C(2021) 1959 final (the Guidance Paper).

24 As at 5 November 2020, 24 of the 27 EU Member States had either implemented domestic foreign direct investment (FDI) regimes, or were in the process of implementing new regimes. An overview of the national screening mechanisms currently in place is available at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf. See too Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, 2019 O.J. LI 79/1, establishing an EU framework as of 11 October 2020, for screening FDI that requires the notification of EU Member State screening mechanisms to the Commission, of formal contact points to exchange analyses and information, and procedures to react speedily to FDI concerns.

25 Commission Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market (COM(2021) 223 final).

with cross-border effects,[26] 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.[27]

The Commission also considered,[28] but ultimately decided against,[29] expanding the EC Merger Regulation's jurisdictional scope to capture the acquisition of non-controlling minority shareholdings and, more recently, high-value transactions that do not meet the revenue-based jurisdictional thresholds.[30] This second proposal was designed to address concerns about 'killer acquisitions' of small, innovative companies that were 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'.[31] The Commission ultimately decided not to pursue this proposal either, in part because it was concerned that doing so could lead the Council to make wide-ranging changes to the EC Merger Regulation.

Instead, in 2021, the Commission issued a Guidance Paper encouraging Member State agencies to refer to the Commission transactions that may have a significant cross-border impact but do not meet national merger control thresholds. This initiative, which did not require formal amendments to the EC Merger Regulation, was specifically designed to allow the Commission to investigate killer acquisitions, particularly those affecting the digital and pharmaceutical sectors.[32] The mechanism provided for in the Guidance Paper represents a significant change to the Commission's practice, which had been to discourage Member States from referring transactions to the Commission that did not meet applicable national thresholds. The Guidance Paper countenances review of transactions even after closing, although the Commission will generally not consider a referral more than six months after closing.

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26 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.

27 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; and *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 4 December 2015.

28 '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).

29 Margrethe Vestager, Competition Commissioner, 'Thoughts on Merger Reform and Market Definition', Keynote address at Studienvereinigung Kartellrecht, Brussels, 12 March 2015 ('[My] conclusion is that the balance between the concerns that this issue raises 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').

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

32 The referral mechanism provided for in the Guidance Paper is designed to capture a target that '(1) is a start-up or recent entrant with significant competitive potential; (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data, or intellectual property rights); or (5) provides products or services that are key inputs/components for other industries'. The Commission notes, however, that this list is 'purely illustrative' and 'cannot be deemed in any way comprehensive'.

In February 2021, the Commission applied the Guidance Paper for the first time, inviting Member States to refer Illumina's acquisition of Grail so that it might be investigated by the Commission in parallel to the US Federal Trade Commission (FTC) and the CMA. In March 2021, the French competition authority submitted a referral request, which was then joined by the competition authorities of Belgium, Greece, Iceland, the Netherlands and Norway, and accepted by the Commission in April 2021. In April 2021, following unsuccessful preliminary challenges in France and the Netherlands, Illumina appealed the Commission's decision to take jurisdiction to the General Court, arguing that the EC Merger Regulation was not intended to allow for the referral of cases that do not meet existing national merger control thresholds.[33] In May 2021, Facebook's proposed acquisition of Kustomer was referred to the Commission by a number of Member States, including one (Austria) that had jurisdiction over the transaction.[34]

Finally, in an effort to allow the Commission to identify potentially anticompetitive transactions entered into by leading digital platforms that might otherwise escape merger review in the EU because they do not meet EU or national merger control thresholds, the Commission's proposed Digital Markets Act, which was published in December 2020, would require digital 'gatekeepers' that operate core platforms and have 'an entrenched and durable position' to inform the Commission of any merger or acquisition concerning another undertaking that offers platform or digital services.[35] The Commission could then apply the mechanism provided for in the Guidance Paper to investigate any such merger or acquisition under the EC Merger Regulation.

Second, the Commission has devoted increasing resources to more complex cases, while 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 administrative burden and cost for business at a time when it needs it most'.[36] In 2016, the Commission consulted on further changes designed to permit a larger number of concentrations to be notified under the simplified procedure.[37] In 2020, transactions reviewed under the simplified procedure represented 77 per cent of all notified concentrations (up from 52 per cent in 2010 and 12 per cent in 2000).[38]

Third, as to its enforcement practice, between 2012 and 31 December 2020, the Commission prohibited nine concentrations,[39] approved a number of others subject to

33 *Illumina v. Commission* (*Illumina*), Case T-227/21. See also 'Illumina confirms EU court appeal of Grail decision', MLex, 29 April 2021.

34 Daily News, 12 May 2021 (Commission Press Release MEX/21/2464), available at https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_2464.

35 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, Article 3.

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

37 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.

38 European Commission Merger Control Case Statistics, available at https://ec.europa.eu/competition-policy/mergers/statistics_en.

39 *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)*,

far-reaching remedies,[40] and led a number of companies to abandon concentrations to avoid likely prohibition decisions.[41] Three transactions were prohibited in 2019: *Siemens/Alstom*,[42] *Wieland/Aurubis*[43] and *Tata/ThyssenKrupp*.[44] No prohibition decisions were 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).[45] As at June 2021, no concentrations had been prohibited in 2021, although two transactions were withdrawn (*Fincantieri/Chantiers de l'Atlantique* in February 2021 and *Air Canada/Transat* in April 2021).[46]

As to its substantive assessment, the Commission has maintained its focus on unilateral effects and its assessment of whether prices might rise due to the competition lost through a merger,[47] as well as the merging companies' scope to reduce output. In *Novelis/Aleris*, for example, the Commission required remedies to address a concern that Novelis held a 'pivotal' position in aluminium automotive body sheets in Europe that, because other suppliers were capacity constrained and were collectively unable to cover market demand, it could use to unilaterally raise prices post-merger.[48]

In 2020, the General Court overturned the Commission's 2016 decision in *Hutchison 3G UK/Telefónica UK*,[49] which prohibited a transaction that would have reduced the number of UK mobile network operators from four to three and created a new leader in the provision of UK mobile retail services with a share of 30 per cent to 40 per cent, rejecting the merging

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.

40 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.

41 See, e.g., *TeliaSonera/Telenor/JV*, Case COMP/M.7419, withdrawn on 11 September 2015 (Commission Press Release STATEMENT/15/5627) (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) (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).

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

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

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

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

46 *Fincantieri/Chantiers de l'Atlantique*, Case COMP/M.9162; and *Air Canada/Transat*, Case COMP/M.9489.

47 See, e.g., *Aurubis/Metallo Group Holding*, Case COMP/M.9409, Commission decision of 4 May 2020; *Takeda/Shire*, Case COMP/M.8955, Commission decision of 28 May 2020; *Alstom/Bombardier Transportation*, Case COMP/M.9779, Commission decision of 31 July 2020; and *Google/Fitbit*, Case COMP/M.9660, Commission decision of 11 May 2021.

48 *Novelis/Aleris*, Case COMP/M.9076, Commission decision of 1 October 2019.

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

parties' contentions that they were not each other's closest competitors.[50] The Court held that, where the Commission challenges a concentration that does not create or strengthen a dominant position, it is insufficient simply to point to a reduction in the number of rivals, label the target firm an 'important competitive force', or note that the merging firms are relatively close rivals (which is inevitable in concentrated markets). Instead, the Commission must show that the transaction will eliminate important competitive constraints that the merging parties had exerted on each other.

The judgment appears to have raised the bar for Commission intervention in oligopolistic markets where the concentration in question cannot be shown to create or strengthen a dominant position, as the Commission is required to show that the concentration will eliminate important competitive constraints that the merging parties had exerted on each other (and reduce competitive pressure on the remaining competitors). The judgment suggests that the mere reduction in the number of competitors – even in an oligopolistic market – is, in itself, insufficient. At a minimum, the Court's judgment will require the Commission to provide more concrete evidence as to how a concentration can be expected to significantly impede competition. In its pending appeal to the Court of Justice, the Commission has argued, inter alia, that the General Court applied 'a legal test that is not supported by the [EC Merger Regulation]'.[51]

In a number of cases, the Commission has required wide-ranging remedies to address coordinated effects concerns[52] and conglomerate effects concerns,[53] after several years in which neither theory of harm had been actively pursued. Even in cases where remedies were not ultimately imposed, the Commission has shown a readiness to engage in extended reviews of conglomerate theories of harm, most notably in *Essilor/Luxottica*, which was ultimately cleared without remedies after a protracted Phase II investigation.[54]

The Commission has also continued to focus on innovation competition. In *Novartis/GlaxoSmithKline Oncology Business*, the Commission expanded its analysis to assess the merging parties' research projects, including projects in the early stages of development;[55] 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';[56]

50 *CK Telecoms UK Investments Ltd v. Commission* (*Three/O2*), Case T-399/16 EU:T:2020:217.

51 Case C-376/20 P, appeal brought on 7 August 2020 by the Commission against the judgment of the General Court in *Three/O2*, Case T-399/16 EU:T:2020:217.

52 *AB InBev/SABMiller*, Case COMP/M.7881, Commission decision of 24 May 2016; *ArcelorMittal/Ilva*, Case COMP/M.8444, Commission decision of 7 May 2018; *KME/MKM*, Case COMP/M.8909, Commission decision of 11 December 2018; *EQT/Widex/JV*, Case COMP/M.8941, Commission decision of 13 February 2019; *Saudi Aramco/Sabic*, Case COMP/M.9410, Commission decision of 27 February 2020; and *Altice/Omers/Allianz/Covage*, Case COMP/M. M.9728, Commission decision of 27 November 2020

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

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

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

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

in *Dow/DuPont*,[57] 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; and, in April 2020, Johnson & Johnson abandoned its proposed acquisition of Takeda's Tachosil product following the opening of a Phase II investigation, citing concerns about the effect on innovation.[58]

Finally, the Commission has continued to investigate carefully transactions involving the leading digital platforms,[59] in part due to criticism that it had been too permissive in the past.[60] In *Google/Fitbit*, the Commission engaged in an in-depth review, notwithstanding the target's low share in Europe and negligible overlaps between the companies' activities.[61] Among other theories of harm that were examined, the Commission considered whether Google would have the ability and incentive to reduce the interoperability of Google's Android operating system with wearable devices that competed with Fitbit's products. The Commission also considered whether Google's acquisition of a database maintained by Fitbit containing details about users' health, combined with data that Google already had, would make it harder for rivals to match Google's services and thereby raise barriers to entry.

Fourth, the Commission has continued to apply sophisticated quantitative tools,[62] to engage in economic analysis of its own,[63] and to place increasing reliance on internal business planning documents. Among other things, the package of reforms adopted in 2013 expanded the range of internal documents that must be provided with notifications.[64] These changes to Form CO have been supplemented by the Commission's increasing readiness to request large numbers of internal documents during its administrative procedure.[65] 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

57 *Dow/DuPont*, 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).

58 *Johnson & Johnson/Tachosil*, Case COMP/M.9547, 25 March 2020 (Commission Press Release IP/20/529).

59 See, e.g., *Apple/Shazam*, Case COMP/M.8788, Commission decision of 6 February 2018; and *Thales/Gemalto*, Case COMP/M.8797, Commission decision of 11 December 2018.

60 See, e.g., *FIS/Worldpay*, Case COMP M.9357, Commission decision of 5 July 2018; and *Capgemini/Altran*, Case COMP/M.9460, Commission decision of 23 October 2019.

61 *Google/Fitbit*, Case COMP/M.9660, Commission decision of 11 May 2021.

62 *Vodafone Italia/Tin/Inwit JV*, Case COMP/M.9674, Commission decision of 6 March 2020.

63 *Aurubis/Metallo Group Holding*, Case COMP/M.9409, Commission decision of 4 May 2020.

64 Section 5.4, Form CO.

65 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); *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); *Bayer/Monsanto*, Case COMP/M.8084, Commission decision of 21 March 2018 (the Commission requested over 2.7 million internal documents that were extensively cited to corroborate the Commission's conclusions in respect of market definition, the merging parties' pipeline products and the extent of competition between the parties); and *Telia Company/Bonnier Broadcasting Holding*, Case COMP/M.9064, Commission decision of 12 November 2019 (the Commission requested more than 770,000 internal documents, many of which were cited to support the Commission's conclusion that 'over-the-top' services such as Netflix complemented free-to-air and pay-TV services).

cases.[66] In 2018, the Courts confirmed that 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.[67]

Fifth, 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'.[68] 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.[69] Most recently, the Commission fined Aldrich €7.5 million following its acquisition by Merck, the first occasion under the EC Merger Regulation where a target company (as opposed to the notifying party) has been fined for providing misleading information.[70]

In 2014, the Commission imposed fines on Marine Harvest for premature implementation of its acquisition of Morpol.[71] It imposed separate fines – confirmed by the General Court[72] – 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.[73] 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.[74] 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 change in control of the target undertaking, irrespective of whether that measure has market effects.[75]

66 In 2012–2014, the average length of Phase II cases was 148 working days. By 2018, the average length of Phase II cases 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.

67 *United Parcel Service v. Commission* (*UPS*), Case T-194/13 EU:T:2017:144. Upheld on appeal to the Court of Justice in *Commission v. United Postal Service* (*UPS CJ*), Case C-265/17 P EU:C:2019:23.

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

69 See 'Mergers: Commission fines General Electric €52 million for providing incorrect information in LM Wind takeover', 8 April 2019 (Commission Press Release IP/19/2049).

70 *Merck/Sigma-Aldrich*, Case COMP/M.8181, Commission decision of 3 May 2021.

71 *Marine Harvest/Morpol*, Case COMP/M.7184, Commission decision of 23 July 2014.

72 *Marine Harvest v. Commission* (*Marine Harvest*), Case T-704/14 EU:T:2017:753.

73 *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', 24 April 2018 (Commission Press Release IP/18/3522). On 5 July 2018, Altice brought an action for annulment of the decision imposing the fine in *Altice Europe v. Commission* (*Altice*) Case T-425/18.

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

75 *Ernst & Young P/S v. Konkurrencerådet* (*Ernst & Young*) Case C-633/16 EU:C:2018:371 (the Court of Justice held that KPMG Denmark's termination of a cooperation agreement with KMPG International,

Sixth, 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[76] and strengthening the role of monitoring trustees in the package of reforms adopted in late 2013.[77] Most significantly perhaps, the Commission has required up-front buyer commitments in an increasing number of cases. Around half of all Phase II commitments decisions rendered between 2014 and 2020 contained up-front buyer provisions, including *INEOS/Solvay/JV*,[78] *Hutchison 3G UK/Telefónica Ireland*,[79] *Orange/Jazztel*,[80] *General Electric/Alstom*,[81] *Staples/Office Depot*,[82] *Dow/DuPont*,[83] *BASF/Solvay's EP and P&I Business*,[84] *Novelis/Aleris*[85] and *PKN Orlen/Grupa Lotos*.[86] Up-front buyer provisions in Phase I clearances have also become more common,[87] and were included in several Phase I cases in 2020, including *Synthomer/Omnova Solutions*,[88] *Assa Abloy/Agta Record*,[89] *Gategroup/LSG European Business*,[90] *Mylan/Upjohn*,[91] *Elanco Animal Health/Bayer Animal Health Division*,[92] *AbbVie/Allergan*[93] and *Mastercard/Nets*.[94]

Additionally, as the Commission's scrutiny of divestment packages has increased, requirements for divestments that extend beyond the strict competition concerns identified

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).

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

77 Model Text for Divestiture Commitments.

78 *INEOS/Solvay/JV*, Case COMP/M.6905, Commission decision of 8 May 2014.

79 *Hutchison 3G UK/Telefónica Ireland*, Case COMP/M.6992, Commission decision of 28 May 2014.

80 *Orange/Jazztel*, Case COMP/M.7421, Commission decision of 19 May 2015.

81 *General Electric/Alstom*, Case COMP/M.7278, Commission decision of 8 September 2015.

82 *Staples/Office Depot*, Case COMP/M.7555, Commission decision of 10 February 2016.

83 *Dow/DuPont*, Case COMP/M.7932, Commission decision of 27 March 2017.

84 *BASF/Solvay's EP and P&I Business*, Case COMP/M.8674, Commission decision of 18 January 2019.

85 *Novelis/Aleris*, Case COMP/M.9076, Commission decision of 1 October 2019.

86 *PKN Orlen/Grupa Lotos*, Case COMP/M.9014, Commission decision of 14 July 2020.

87 See, e.g., *CrownHoldings/Mivisa*, Case COMP/M.7104, Commission decision of 14 March 2014; *Holcim/Lafarge*, Case COMP/M.7252, Commission decision of 15 December 2014; *IMS Health/Cegedim Business*, Case COMP/M.7337, Commission decision of 19 December 2014; *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; and *Boehringer Ingelheim/Sanofi Animal Health Business*, Case COMP/M.7917, Commission decision of 9 November 2016.

88 *Synthomer/Omnova Solutions*, Case COMP/M.9502, Commission decision of 15 January 2020.

89 *Assa Abloy/Agta Record*, Case COMP/M.9408, Commission decision of 27 February 2020.

90 *Gategroup/LSG European Business*, Case COMP/M.9546, Commission decision of 3 April 2020.

91 *Mylan/Upjohn*, Case COMP/M.9517, Commission decision of 22 April 2020.

92 *Elanco Animal Health/Bayer Animal Health Division*, Case COMP/M.9554, Commission decision of 8 June 2020.

93 *AbbVie/Allergan*, Case COMP/M.9461, Commission decision of 10 July 2020.

94 *Mastercard/Nets*, Case COMP/M.9744, Commission decision of 17 August 2020.

to enhance the viability and competitiveness of the divestment business have become more common.[95] The Commission has also increased scrutiny of compliance with commitments, issuing its first-ever statement of objections for breach of commitments in 2018.[96]

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.[97] 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.[98]

Finally, the Commission has faced pressure to accept behavioural remedies, particularly following the *Siemens/Alstom* decision, when the French, German and Polish governments encouraged 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)'.[99] In 2020, the Commission accepted behavioural remedies in its Phase I clearance of *Alstom/Bombardier Transportation*[100] and its Phase II approval of *Google/Fitbit*.[101]

Seventh, as to the defences available under the EC Merger Regulation, the Commission approved two transactions on the basis of the failing firm defence, including *Aegean/Olympic (II)*,[102] which had been prohibited in 2011, and started to show greater willingness to take positive account of efficiencies,[103] including in *FedEx/TNT Express*.[104] However, more recent attempts to rely on the failing firm defence have been less successful,[105] even in cases where the target assets hailed from a bankrupt company.[106] The Commission's

95 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.

96 *Telefónica Deutschland/E-Plus*, Case COMP/M.9003, see also, 'Mergers: Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition', 22 February 2019 (Commission Press Release of IP/19/1371).

97 *Nidec/Whirlpool (Embraco Business)*, Case COMP/M.8947, Commission decision of 15 May 2020.

98 *Takeda/Shire*, Case COMP/M.8955, Commission decision of 28 May 2020.

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

100 *Alstom/Bombardier Transportation*, Case COMP/M.9779, Commission decision of 31 July 2020.

101 *Google/Fitbit*, Case COMP/M.9660, Commission decision of 11 May 2021.

102 *Aegean/Olympic (II)*, Case COMP/M.6796, Commission decision of 9 October 2013.

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

104 *FedEx/TNT Express*, Case COMP/M.7630, Commission decision of 8 January 2016, Paragraphs 498–588 and 776–804.

105 See e.g., *Arcelor Mittal/Ilva*, Case COMP/M.8444, Commission decision of 7 May 2018, Paragraphs 404–436.

106 *Easyjet/Certain Air Berlin Assets*, Case COMP/M.8672, Commission decision of 12 December 2017; and *Lufthansa/Certain Air Berlin Assets*, Case COMP/M.8633, Commission decision of 21 December 2017 (in which Air Berlin was bankrupt and yet no failing firm defence applied and divestitures were required).

Horizontal Merger Guidelines set a high bar for the failing firm defence,[107] and Commissioner Vestager has made clear that the coronavirus pandemic 'shouldn't be a shield to allow mergers that would hurt consumers and hold back the recovery'.[108] Indeed, taking note of the abandonment of the *AirCanada/Transat* transaction following opposition from the Commission, she made clear that 'EU merger control policy standards and framework also apply in times of severe shocks affecting the economy'.[109]

Eighth, as to judicial review, 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'.[110] According to the Court, this standard of proof is stricter than a balance of probabilities standard, but less strict than a beyond reasonable doubt standard. The Commission has appealed the General Court's judgment to the Court of Justice.

Finally, collaboration between the Commission and other antitrust agencies around the world has continued to deepen[111] and instances of disagreement have remained infrequent. By way of example, in 2021, the Commission joined the FTC, the US Department of Justice, the Canadian Competition Bureau, the CMA and three offices of US state attorneys general in a multilateral working group to assess the effects of pharmaceutical consolidation on innovation and prices.[112] Within Europe, as noted, following the UK's withdrawal from the EU, the CMA may review concentrations that are reportable under the EC Merger Regulation in parallel to the Commission. This creates a possibility for divergence between the Commission and the CMA. Although formal arrangements have yet to be put in place, the

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On the *Air Berlin* cases, see also Fanny Dumont, Ngoc-Lan Lang, Melanie Schmillen, Mauro Sibilia and Simon Vande Walle, 'Lufthansa/Air Berlin The Slot Machine', Competition Merger Brief 1/2018, available at http://ec.europa.eu/competition/publications/cmb/2018/kdal18001enn.pdf.

107 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.

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

109 Natalie McNelis and Nicholas Hirst, 'Air Canada-Transat merger review exposes impossible task facing EU regulators', MLex, 12 May 2020.

110 *Three/O2*, Case T-399/16 EU:T:2020:217, Paragraph 118.

111 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', June 2013 (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.

112 'Competition: The European Commission forms a Multilateral Working Group with leading competition authorities to exchange best practices on pharmaceutical mergers', 16 March 2021 (Commission MEMO/IP/13/1098).

CMA intends to cooperate closely with the Commission and 'continue [its] close engagement and cooperation with the European Commission, other competition and consumer agencies of the Member States in the EU and globally'.[113]

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 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

113 CMA Annual Plan 2021/22, 23 March 2021, p. 18, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972070/CMA_Annual_Plan_2021_to_2022_---.pdf.

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 Article 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.[114]

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 decisions have been adopted,[115] 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*

114 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*, Case C-633/16 EU:C:2018:371 (clarifying EU rules on gun-jumping).

115 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.

'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.[116]

Between September 1990, when it entered into force, and 31 December 2020, the Commission had rendered around 7,800 decisions, of which around 7,000 (90 per cent) approved concentrations unconditionally in Phase I; 56 (1 per cent) found the Merger Regulation to be inapplicable; 331 (4 per cent) approved transactions subject to undertakings given in Phase I;[117] 63 (1 per cent) approved transactions unconditionally during Phase II; and 137 (2 per cent) approved concentrations subject to undertakings given in Phase II. As at 31 December 2020, the Commission had rendered 30 prohibition decisions,[118] representing less than 0.5 per cent of all notified concentrations, six of which have been overturned on

116 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).

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

118 *Aerospatiale-Alenia/de Havilland*, Case IV/M.53, Commission decision of 2 October 2 1991; *MSG Media Service*, Case IV/M.469, Commission decision of 9 November 1994; *Nordic Satellite Distribution*, Case IV/M.490, Commission decision of 19 July 1995; *RTL/Veronica/Endemol*, Case IV/M.553, Commission decision of 20 September 1995; *Gencor/Lonrho*, Case IV/M.619, Commission decision of 24 April 1996; *Kesko/Tuko*, Case IV/M.784, Commission decision of 20 November 1996; *Saint-Gobain/Wacker-Chemie/NOM*, Case IV/M.774, Commission decision of 4 December 1996; *Blokker/Toys 'R' Us (II)*, Case IV/M.890, Commission decision of 26 June 1997; *Bertelsmann/Kirch/Premiere*, Case IV/M.993, Commission decision of 27 May 1998; *Deutsche Telekom/BetaResearch*, Case IV/M.1027, Commission decision of 27 May 1998; *Airtours/First Choice*, Case IV/M.1524, Commission decision of 22 September 1999; *Volvo/Scania*, Case COMP/M.1672, Commission decision of 14 March 2000; *MCI WorldCom/Sprint*, Case COMP/M.1741, Commission decision of 28 June 2000; *SCA/Metsä Tissue*, Case COMP/M.2097, Commission decision of 31 January 2001; *General Electric/Honeywell*, Case COMP/M.2220, Commission decision of 3 July 2001; *Schneider Electric/Legrand*, Case COMP/M.2283, Commission decision of 10 October 2001; *CVC/Lenzing*, Case COMP/M.2187, Commission decision of 17 October 2001; *Tetra Laval/Sidel*, Case COMP/M.2416, Commission decision of 30 October 2001; *ENI/EDP/GDP*, Case COMP/M.3440, Commission decision of 9 December 2004; *Ryanair/Aer Lingus*, Case COMP/M.4439, Commission decision of 27 June 2007; *Olympic/Aegean Airlines*, Case COMP/M.5830, Commission decision of 26 January 2011; *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; *Wieland/Aurubis Rolled Products/Schwermetall*, Case COMP/M.8900, Commission decision of 5 February 2019; *Siemens/Alstom*, Case COMP/M.8677, Commission decision of 6 February 2019; and *Tata Steel/ThyssenKrupp/JV*, Case COMP/M.8713, Commission decision of 11 June 2019.

appeal by the EU courts.[119] Around 220 notifications have been withdrawn, of which 46 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 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.[120]

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*,[121] *Schneider*[122] and *Tetra Laval*[123]). 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 whether to approve or prohibit a transaction. A comparison was drawn with the United States,[124] 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.[125]

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'[126] and recognised that a 'radical'[127] package of measures was needed to allay criticism, ensure

119 *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*), Joined Cases T-5/02 and T-80/02 EU:T:2002:264, upheld on appeal in *Commission v. Tetra Laval BV* (*Tetra Laval CJ*), Case C-13/03 P EU:C:2005:88; *MCI v. Commission* (*MCI*), Case T-310/00 EU:T:2004:275; *UPS*, Case T-194/13 EU:T:2017:144, upheld on appeal in *UPS CJ*, Case C-265/17 P EU:C:2019:23; and *Three/O2*, Case T-399/16 EU:T:2020:217.

120 For perspective, of the 17,362 transactions notified in the United States between fiscal years 2007 and 2016, 'second requests' for additional information were issued in 531 instances (3 per cent). It should be noted, however, that the filing thresholds in the United States are quite low (adjusted to US$92 million in February 2021 (see Federal Register Vol. 86, No. 20, 7870)). 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' December 2014, *European Competition Journal*, pp. 523–549.

121 *Airtours*, Case T-342/99 EU:T:2002:146.

122 *Schneider*, 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*.

123 *Tetra Laval*, 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*.

124 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').

125 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').

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

127 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').

that future decisions would be based on firm evidence and solid investigative techniques that could be tested against 'the cold metal of economic theory',[128] and maintain the existing institutional framework in which the Commission approves or prohibits mergers.[129] 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'.[130] 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'.[131]

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*[132] and *Menarini*[133] 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 by an independent and impartial tribunal'.[134] 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

128 J A Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Brothers, 1942).

129 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.'

130 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).

131 'Commission adopts comprehensive reform of EU merger control', 11 December 2012 (Commission Press Release IP/02/1856).

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

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

134 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.

competition agencies.[135] This agreement has led to high level dialogue at political, senior management and academic level, about convergence on jurisdictional, substantive and procedural issues.[136]

The last significant disagreement between the Commission and US agencies occurred in 2001 in connection with the *General Electric/Honeywell* transaction.[137] The US Department of Justice 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.[138] This disagreement represented the most significant divergence between Commission and US regulators since *Boeing/McDonnell Douglas*.[139] 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'.[140]

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 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

135 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.

136 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"').

137 *General Electric/Honeywell*, 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.

138 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).

139 *Boeing/McDonnell Douglas*, Case IV/M.877, Commission decision of 30 July 1997.

140 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', 27 January 2017, *Global Competition Review*, pp. 1–2.

a complaint by the FTC. Following a government shutdown that delayed the US process further, a consent agreement was finally reached with the FTC in April 2019, based on North American divestitures similar to those agreed one year earlier with the Commission.[141]

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. 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, 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.

The challenges for the coming years will be to protect the Commission's independence from pressure to inject political oversight and industrial policy into merger control; to ensure that the certainty and predictability resulting from the EC Merger Regulation's 'brightline' jurisdictional thresholds and the established division of powers between the Commission and Member State agencies are not jeopardised by the referral mechanism provided for in the Guidance Paper; to continue to identify ways in which the administrative burden placed on notifying parties can be reduced, thereby expediting merger review and avoiding unnecessary (and costly) data-gathering; to explore the scope for approving more transactions without the need for lengthy, motivated decisions, thereby freeing resources for complex cases; and to continue to render sensible, well-reasoned decisions substantiated by sound data and hard evidence.

Finally, the pandemic has affected many markets and many companies. In the coming years, the Commission is likely to be confronted with numerous transactions involving companies that have been adversely affected by the crisis. In some markets, the crisis has had little effect, in others the effect has been devastating, at least in the short term. The challenge for the Commission will be to distinguish those markets that have experienced permanent structural change from those in which the effects are temporary.

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

Appendix 1

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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 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 American Bar Association'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 he featured in *Who's Who Legal Future Leaders: Competition 2017* and *2018*.

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, Université libre de Bruxelles and the College of Europe.

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

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