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ABSTRACT

This article presents the results of an empirical analysis of how long EU Merger Regulation reviews, and in particular pre-notification discussions, actually take. Our research shows that pre-notification and overall review periods for all types of cases—Short Form/simplified, normal Phase I, and Phase II—have increased steadily and substantially over the last 15-25 years, despite some Commission efforts to minimise the burden of its review on notifying parties. The article outlines some reasons why EC merger reviews are taking longer and longer, points out a few adverse consequences of this trend for the business and legal communities, and offers some suggestions for ways the Commission might streamline the notification and review process.

Cet article présente le résultat d'une analyse empirique sur la durée d'un contrôle, et en particulier de la phase de pré-notification, réalisé en application du règlement concentrations de l'UE. Notre étude démontre que les périodes de pré-notification et de l'examen global ont augmenté constamment et considérablement depuis ses 15-25 dernières années pour tous types d'affaires – en procédure simplifiée, en Phase I ou en Phase II – et ce, malgré les efforts de la Commission pour minimiser son contrôle de l'obligation de notification des parties. L'article souligne les raisons pour lesquelles les contrôles européens de concentration ne cessent de s'allonger, relève quelques effets négatifs de cette tendance pour le milieu juridique et des affaires, et offre des suggestions sur la façon dont la Commission pourrait rationaliser les procédures de notification et de contrôle.

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I. Introduction

1. The basic task of a merger control regulator is to identify and prevent the implementation of anti-competitive transactions, while clearing competitively benign deals in the least intrusive way consistent with this. Almost all critical debate around merger control policy centres on the first part of the job: To identify the anti-competitive transactions, should regulators apply a "consumer welfare" or a "total welfare" standard? When (if ever) should efficiencies outweigh predicted price increases? Are "portfolio effects" likely to bring about anti-competitive outcomes? Etc. But the regulator's attention to the little-discussed second objective—streamlining the review process, particularly for non-problematic deals—affects far more transactions and is surely the more important factor in determining the global "cost" of merger control to the business community.

2. The EU Commission recognises that it has a responsibility to minimise the burden on business associated with its merger review, and over the years has implemented a series of procedural changes under the EU Merger Regulation[1] aimed at reducing the time and cost for companies to get their deals cleared. The most notable of these amendments was the introduction of the simplified review procedure and Short Form CO in 2000 and 2004.[2] Subsequent tweaks to the system have been incremental. Most recently, under the headline "Commission cuts red tape for businesses," the Commission introduced a series of reforms effective as of 1 January 2014 to increase the proportion of reviewable concentrations falling under the simplified procedure.[3] In announcing the package the Commission stated in particular that "*the overall reduction of information requirements that result from the Merger Simplification Package will shorten the time that is needed for pre-notification contacts*."[4] And the Commission subsequently reported success in this area, as Commissioner Vestager observed that "*the pre-notification stage has become shorter for both normal and simplified cases.*"[5]

1 Council Regulation (EC) No 139/2004, OJ L 24/1, 29.1.2004 ("EUMR" or the "Merger Regulation").

2 Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89, OJ C 217, 29.07.2000, p. 32; Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Implementing Regulation"), OJ L 133, 30.04.2004, pp. 1–39.

3 Commission Press Release IP/13/1214 of December 3, 2014, available at: http://europa.eu/rapid/press-release_IP-13-1214_en.htm. Some further moves to streamline the merger review process are currently under consideration. *See* Public Consultation, Evaluation of procedural and jurisdictional aspects of EU Merger Control, available at: https://ec.europa.eu/eusurvey/runner/EUMergerControlSurvey2016.

4 Commission FAQs, MEMO/13/1098 of 5 December 2013, available at: http://europa.eu/rapid/press-release_MEMO-13-1098_en.htm.

5 Commissioner Margrethe Vestager, Thoughts on merger reform and market definition, 12 March 2015, available at: https://ec.europa.eu/commission/2014-2019/vestager/announcements/thoughts-merger-reform-and-market-definition_en.

3. The notion that EU merger reviews—and pre-notification processes in particular—have become quicker and less burdensome may come as a surprise to companies that have been through the process of late. Short Form notifications take time to prepare, and almost invariably draw questions requiring follow-up. And for transactions that involve significant competitive overlaps or where scrutiny is otherwise anticipated, companies now routinely project that the merger control process will take a year or more.[6] Holding major transactions together for this long prior to closing is a significant challenge for the global business community; the prevailing sentiment seems to be that the review process is becoming longer and more burdensome. To investigate, we decided to look empirically at how long EU merger reviews actually take, focusing in particular on the duration of pre-notification discussions, which are not subject to statutory time limits. Our research indicates that pre-notification discussions, and the time required to obtain a decision under the EU Merger Regulation, have become steadily longer in all types of cases.

4. This paper presents our research and sets forth some thoughts on the drivers behind and implications of today's typical EU Merger Regulation review timetable.

II. Note on methodology

5. The main objective of our research has been to study the evolution over time of the duration of pre-notification discussions in different types of cases under the EU Merger Regulation. The pre-notification stage is the time when the notifying parties are in contact with the Commission case team prior to formally submitting the Form CO and starting the statutory review clock. This is a period when we file briefing papers and drafts of the Form CO, and the case team requests information and explanations intended to advance the case team's competitive assessment and get the Form CO to a point where the Commission is ready to accept it as complete. Completing a Form CO to the case team's satisfaction, even for transactions that evidently raise no concern, typically involves multiple rounds of questions and information that is extensive and seems anecdotally to be increasing, e.g., often including detailed market share estimates on numerous alternative bases and large volumes of the notifying parties' internal documents. We present below our findings on how long this process actually takes.

6. As a proxy for "pre-notification timing," we looked at the time from the date a transaction is publicly announced to the date the final Form CO is filed. It is worth pausing to consider whether these are the most appropriate triggering events for measuring how long it takes before merging parties can file their notification.

7. First, as to the starting point of pre-notification discussions, the date of public announcement is not theoretically optimal, since not all notified transactions are publicly announced when the initial agreement is reached. There are therefore limitations to the data available, but the sample size remains large (e.g., our data cover over 1,100 Phase I cases, averaging around 200 decisions per year) and we can see no reason why the exclusion of deals that are not publicly announced upon signing should significantly distort the data, particularly as regards long-term trends. Still, other triggering events might be considered. Arguably, the most appropriate starting point could be any of (1) the date the merging parties first contact the Commission (often by filing a case team allocation request); (2) the date when the Commission appoints a case team (usually a few days after receipt of the allocation request); or (3) the date of the merging parties' first substantive submission to the Commission (be it a briefing paper, introductory meeting, or draft notification, after which real interaction with the case team is likely to begin). However, each of these alternatives suffers from the fact that the dates are not generally known other than to the Commission and the notifying parties, making them unsuitable for study. Even if this were not so, they are not clearly superior measures. The events based on case team allocation—particularly in straightforward cases, which represent the large majority of notifications—usually take place within a couple of weeks of the public announcement date, so there is no significant difference between the measures. And using the first substantive submission as the trigger would systematically understate the real duration of pre-notification from the parties' perspective. When the objective is to understand how long it takes before parties to an agreed merger can file their notification, time spent preparing the first briefing paper or draft Form CO should surely count, even if the case team has not yet become engaged substantively on the matter.[7]

8. It also bears noting that using the date of a transaction's public announcement as the pre-notification starting point should not introduce any systematic bias into the data, since this measure will both overstate and understate the amount of time parties spend drafting materials and talking to the case team prior to notification, depending on the case. Using public announcement as the trigger will overstate the real length of pre-notification work in cases where the parties were not in a hurry and allowed significant time to pass after announcement before engaging with DG Competition (for example, because other conditions to closing were expected to take

6 To cite just one example, the Ball/Rexam transaction was announced on 19 February 2015, at which time the parties forecast that regulatory clearances would be obtained during the first half of 2016 (*see* http://www.prnewswire.com/news-releases/ball-announces-proposed-acquisition-of-rexam-plc-300038342.html); the transaction ultimately closed on 30 June 2016.

7 From the Commission's perspective, the date of the first substantive submission might be a better measure, since notifying parties will not all be equally fast in preparing their first submission (and will therefore be at least partially responsible for any delay at this stage) and the case team will normally not start working seriously on a matter until a substantive submission has been received. But again, the date of the first substantive submission is not publicly known, and we can think of no reason why the long-term trend should be different as between the two possible starting points.

longer than EU merger control). In the data we see some examples of uncontroversial cases where merger filings were not made until long after public announcement, which probably fall into this category. At the same time, using public announcement as the trigger will understate the real length of pre-notification in cases where the parties started pre-notification discussions with the case team on a confidential basis before the transaction was announced. Experience suggests that this is probably the more common scenario, as merging parties regularly seek to engage the Commission on a confidential basis pre-announcement, for example in cases where they want to close the transaction as soon as possible after announcement or where lengthy pre-notification discussions are anticipated. These scenarios are also reflected in the data, which show several cases that involved zero days of pre-notification discussions (i.e., the dates of public announcement and Form CO notification are the same). Commission best practices in most cases do not allow for notifications to be filed without any prior discussion with the case team,[8] and in practice doing so would be virtually impossible; these examples are therefore instances where using public announcement as the trigger understates the real length of pre-notification contacts. In an attempt to control for the possible distorting influence of such outlying cases we have filtered the data reported below to exclude cases where pre-notification periods were either (i) 5 days or less or (ii) longer than 300 days.

9. Second, as to the most suitable endpoint, the date a Form CO is formally notified to the Commission is the literal end of "pre-notification" and is both objective and knowable. There may be instances where pre-notification discussions are "complete" (i.e., the case team has no further questions and there is agreement on the content of the final Form CO) some time before the notifying parties actually file the Form CO, but in our experience such occasions are rare. By far the more common scenario is that the parties file the Form CO virtually as soon as they have reached an understanding with the case team that the draft notification is complete. Using the date of formal notification as the end-point of pre-notification may therefore overstate the real length of those discussions, but only marginally. There is also no reason to think the amount of any such overstatement has changed over time (so it is irrelevant for the purpose of comparison and identifying trends) and possible earlier dates when pre-notification discussions might be considered complete are not knowable. The exclusion from the data of cases where pre-notification lasted beyond 300 days provides further assurance that any such cases will not skew the data. The appropriateness of this triggering event therefore seems beyond much debate.

8 *See*, e.g., DG Competition Best Practices on the conduct of EC merger proceedings, 20/01/2004 ("Best Practices Guidelines"), §§ 5–15. Since January 1, 2014, the Commission has accepted that pre-notification discussions may not be needed in cases where there are no reportable markets (i.e., the parties are not active in any horizontally or vertically overlapping markets). Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04), § 23. As discussed further below, experience to date is that case teams are often hesitant to allow merging parties to take advantage of this provision, preferring to receive a draft Short Form even in these circumstances.

III. Results of the empirical analysis

10. This section presents the results of our empirical analysis. Some observations and lessons drawn from the data are provided in the next section.

1. Pre-notification in Phase I cases

11. We looked first at the universe of all cases that were decided in Phase I where the relevant data were available. To see the trend over time we looked at all cases decided during the years 2000, 2005, 2010, 2014, 2015, and 2016.

12. Average pre-notification duration. The first measure we considered was the average duration of pre-notification. Our findings are summarised in table 1.

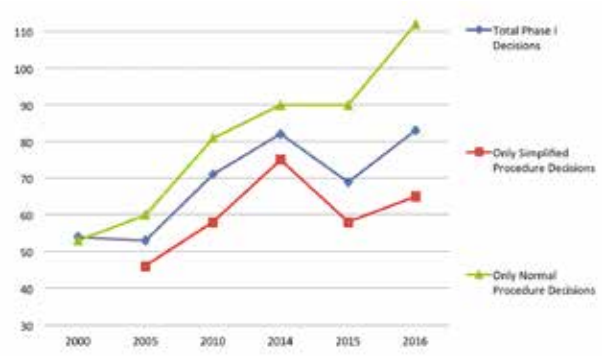
Table 1. Phase I decisions: Average time from public announcement to notification[9*]

Phase I decisions: Average time from public announcement to notification						
	2000	2005	2010	2014	2015	2016
Average number of days	54	53	71	82	69	83
Normal procedure	53	60	81	90	90	112
Simplified procedure	N/A	46	58	75	58	65

13. The data show relatively steady and uniform increases in the average duration of pre-notification across this time horizon. We observe a slight decline in the average for all Phase I cases between 2000 and 2005, attributable to the introduction of Short Form CO in 2004, which will have brought down the average. As graph 1 illustrates, the trend for regular procedure cases (full Form CO) increases steadily through 2016. Pre-notification times for simplified procedure cases also increased, though less rapidly (a fall in average pre-notification times for simplified procedure cases from 2014 to 2015 reversed itself in 2016).

9 * Phase I data are based on information available for: 196 of 305 decisions (2000); 182 of 291 decisions (2005); 165 of 265 decisions (2010); 161 of 333 decisions (2014); 208 of 311 decisions (2015); and 248 of 352 decisions (2016); excludes cases with pre-notification periods of (1) 5 days or less and (2) longer than 300 days.

Graph 1. Phase I decisions: Average pre-notification period



14. Long pre-notifications. In addition to examining the average duration of pre-notification, we considered another measure of pre-notification timing: the number of cases involving "long" pre-notifications (> 100 days). Table 2 shows the number and proportion of Phase I cases in 2000, 2005, 2010, 2014, 2015, and 2016 that involved pre-notification periods of 100 to 300 days.

Table 2. Phase I decisions: Long pre-notification periods

Phase I decisions: Long pre-notification periods						
Total	**2000**	**2005**	**2010**	**2014**	**2015**	**2016**
100-300 days	22 cases (11.22%)	26 cases (14.29%)	39 cases (23.64%)	44 cases (27.33%)	43 cases (20.87%)	80 cases (32.26%)
100-149 days	12 cases (6.12%)	14 cases (7.69%)	26 cases (15.76%)	21 cases (13.04%)	27 cases (13.12%)	46 cases (18.55%)
150-300 days	10 cases (5.1%)	12 cases (6.59%)	13 cases (7.87%)	23 cases (14.29%)	16 cases (7.77%)	34 cases (13.71%)

15. To eliminate the effect of the different number of notifications filed in different years, we think the proportion figures are more instructive than the absolute number of cases. The data show that the proportion of Phase I cases involving long pre-notifications has increased fairly steadily since 2000, reaching virtually one third of all notifications by 2016. This figure is striking when one considers that the data include simplified procedure cases notified on Short Form, which represent around 75% of all notifications filed. In other words, in 2016 the proportion of Phase I cases involving pre-notification of longer than 100 days exceeded the proportion of Phase I cases decided under the normal procedure. Within these figures, the proportions of cases involving pre-notification of 100–149 days and of very long Phase I pre-notifications (150–300 days) both virtually trebled.

2. Timing in Phase II cases

16. We also studied the timing of cases decided after a Phase II investigation. As there are far fewer Phase II decisions, to get a full picture and avoid year-to-year distortions caused by exceptional cases or small numbers, we studied the timelines of all Phase II cases since 1990 where data were available.

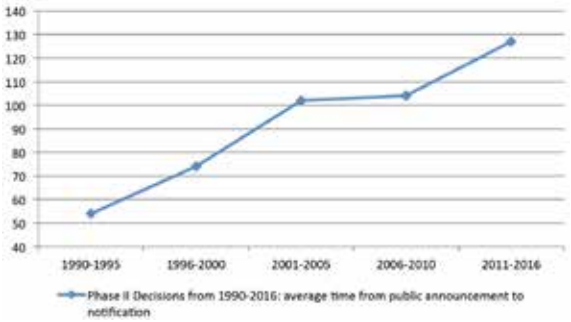
17. Pre-notification. We first examined the average time from public announcement to notification in Phase II cases. Our findings are summarised in table 3.

Table 3. Phase II decisions: Average time from public announcement to notification[10]

Phase II decisions: Average time from public announcement to notification	
Year of notification	**Average number of days**
1990–1995	54
1996–2000	74
2001–2005	102
2006–2010	104
2011–2016	127

18. As with the Phase I cases, the data here show a continuous increase in the duration of pre-notification in Phase II cases across the relevant time period. As graph 2 illustrates, since the 2001–2005 period the increase in average pre-notification duration for Phase II cases has been proportionally less than in the Phase I cases (e.g., since 2005, normal procedure Phase I pre-notification times have almost doubled, while Phase II pre-notification times have increased by about 25%), but still steady.

Graph 2. Phase II decisions: average time from public announcement to notification



19. As discussed in the next section, the relatively greater increase in Phase I pre-notification duration may be due in part to merging parties sometimes purposely shifting effort into the pre-notification stage in order to avoid Phase II investigations.

10 Phase II data based on information available for 131 of 202 Phase II decisions; excludes cases with pre-notification periods of (1) 5 days or less and (2) longer than 300 days.

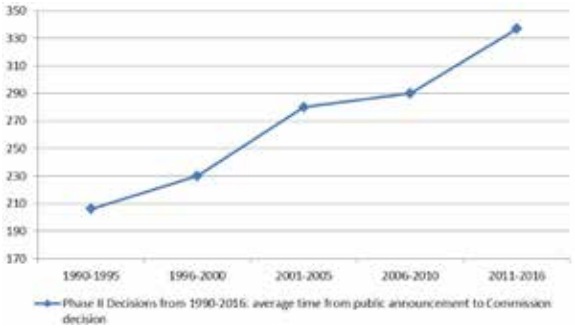
20. Timing until Commission decision. In addition to looking at pre-notification, we also examined the average amount of time it takes from announcement of a transaction until the issuance of the Commission's decision after a Phase II proceeding. Again, the data show the time periods becoming steadily longer (table 4).

Table 4. Phase II decisions: Average time from public announcement to Commission decision

Phase II decisions: Average time from public announcement to Commission decision	
Year of notification	**Average number of days**
1990–1995	206
1996–2000	230
2001–2005	280
2006–2010	290
2011–2016	337

21. Graph 3 illustrates the steep and steady upward trend in total time to decision in Phase II cases, which shows no sign of reversing and has, if anything, accelerated in recent years.

Graph 3. Phase II decisions: average time from public announcement to Commission decision



22. As explained below, the trend over the last decade is very likely attributable—aside from the lengthening of pre-notification—to the introduction of several mechanisms for extending deadlines and stopping the clock during Phase II reviews.

IV. Observations on the data

23. Our research shows that pre-notification and overall review periods under the EU Merger Regulation for all types of cases—Short Form/simplified, normal Phase I, and Phase II—have increased steadily and substantially over the last 15–25 years. In all types of cases, merger reviews by the EU Commission are taking longer than ever, and this trend shows no sign of reversing.

24. To be sure, the increasing complexity and length of EU merger control proceedings—and pre-notification in particular—has been driven by several factors, some of which are not entirely within the Commission's control. DG Competition merger case teams do their jobs diligently and within the generally reasonable time frames provided in the Best Practices Guidelines. While hard to quantify, anecdotal experience is that case teams have, if anything, become faster in reviewing drafts and reverting with questions and comments. Thus, to the extent pre-notification timetables have become longer, this does not seem attributable to any decline in case team responsiveness. Rather, in broad terms pre-notification periods are getting longer because the review process has become more front-loaded, with far more extensive information being required for a notification to be deemed complete. Two factors may be particularly relevant in driving this phenomenon.

1. Are lengthening review periods an unavoidable consequence of heightened judicial scrutiny?

25. One factor that has no doubt contributed to the lengthening of EU Merger Regulation review timetables is the increased scrutiny and evidentiary requirements that the European courts have imposed on the Commission over the years. The courts' influence here can be traced mainly to two developments.

26. First, the shock in 2002 of having three merger prohibition decisions—*Airtours*, *Schneider*, and *Tetra Laval*—overturned in quick succession by the General Court prompted a period of reckoning and reform by the Commission. The Commission recognised at the time that "*the level of proof required by the* [General Court] *is high, which implies that the Commission's enquiries should be more extensive and detailed than at present.*"[11] This led to, among other internal changes, the appointment of DG Competition's first chief economist in 2003. Since that time quantitative analysis of mergers has become both more common and more complex, with associated

11 M. Monti, EU Competition Policy, Speech at Fordham Corporate Law Institute, New York, 31 October 2002.

increased data requirements from notifying parties adding burden and time to the pre-notification process. The Commission also amended the Merger Regulation to permit the investigative timetable in Phase II to be extended by up to 35 working days.

27. Second, the General Court's 2006 *Impala* judgment[12]—overturning a Commission merger clearance decision on appeal by a third party—and the subsequent Court of Justice judgment in *Bertelsmann and Sony*[13] established that the Commission bears the burden of proving the factual elements underpinning a clearance decision, i.e., in effect, the burden of proof is symmetrical as between clearance and prohibition decisions. So the Commission cannot simply drop issues that do not raise concern—decisions must provide at least some explanation of their conclusions, even when no concern is identified. This has had the practical consequence of increasing the amount of attention given by the Commission to markets and issues where no competitive concerns arise. In turn, more information and explanations are required from the notifying parties, increasing burden and time.

28. Much of this increased burden falls into the pre-notification stage. Once a transaction is formally notified, the Commission must operate within relatively fixed and tight deadlines. With some exceptions in Phase II proceedings, these deadlines have remained constant over the years. Yet the amount of output the Commission generates within those deadlines has increased markedly. Major decisions can now exceed 500 pages in length, which is 3–4 times longer than decisions from the 2001 era before the impact of the court developments took hold. To some extent, this necessitates front-loading the review process, shifting information-gathering and analysis to the pre-notification stage.

29. Thus, the added demands from the courts, and the Commission's responses to them, have certainly contributed to lengthening merger review processes. But the timing trend is not entirely traceable to developments in the courts. First, the heightened scrutiny required in complex cases is largely irrelevant for the significant majority of cases (70%+) that are notified under the simplified procedure and where the Commission does not draft a reasoned decision.[14] As the statistics above show, pre-notification times in simplified procedure cases have lengthened too. Second, the major court developments influencing merger review timing occurred in 2002 and 2006. During the decade since, there have been no discernible changes in the level of court scrutiny or evidentiary requirements in merger decisions. Yet Commission pre-notification and review timetables have continued to trend steadily upward.

2. Are merging parties choosing long pre-notification periods?

30. Another development that has contributed to lengthening average pre-notification periods has come at the instigation, not of the Commission or courts, but the notifying parties. In recent years several complex cases that would traditionally have been clear Phase II candidates have been resolved in Phase I. In these cases the merging parties appear to have purposely shifted the investigation stage, and even remedy discussions, into pre-notification as a means of avoiding (presumably, even longer) Phase II review.

31. Some examples of complex recent cases that were decided in Phase I after very long pre-notification periods are: *GSK/Novartis*[15] (220 days pre-notification), *Chiquita/Fyffes*[16] (216 days), *Airbus/Safran JV*[17] (201 days), *Holcim/Lafarge*[18] (204 days), and *Facebook/WhatsApp*[19] (191 days). While we do not know the parties' legal strategies or the content of their confidential pre-notification discussions with the Commission that led to these outcomes, one possibility is that in these cases the parties effectively substituted extended pre-notification for what might well otherwise have been a Phase II review.

32. Cases fitting this pattern would lengthen average Phase I pre-notification timetables for reasons that are substantially outside the Commission's control. The effect is impossible to quantify, since the cases in which this legal strategy was applied cannot be identified. But they cannot be so numerous as to have a great effect on the overall averages: for example, from 2011–2016 the Commission cleared 69 mergers in Phase I subject to commitments, from a total of 1,709 Phase I clearances (4%). The proportion of cases fitting the hypothesised pattern is likely smaller than this (not all Phase I remedy cases are particularly complex, and not all involve pre-notification remedy discussions). Thus, those cases where notifying parties consciously extended pre-notification in order to obtain Phase I clearance would have raised the overall averages, but likely not substantially.

12 Judgment of 13 July 2006 in *Impala v. Commission*, T-464/04, EU:T:2006:216.

13 Judgment of 10 July 2008 in *Bertelsmann and Sony v. Impala*, C-413/06 P, EU:C:2008:392.

14 It is understood that in simplified procedure cases, where the Commission does not issue a reasoned decision, the case team drafts an internal note setting out the affirmative reasons behind the clearance decision. But this is not exposed to public scrutiny.

15 Commission decisions of 28 January 2015, Case M.7275 – *Novartis/GlaxoSmithKline Oncology Business* and Case M.7276 – *GlaxoSmithKline/Novartis Vaccines Business (excl. influenza) /Novartis Consumer Health Business*.

16 Commission decision of 3 October 2014, Case M.7220 – *Chiquita Brands International/Fyffes*.

17 Commission decision of 26 November 2014, Case M.7353 – *Airbus/Safran/JV*.

18 Commission decision of 15 December 2014, Case M.7252 – *Holcim/Lafarge*.

19 Commission decision of 3 October 2014, Case M.7217 – *Facebook/WhatsApp*.

V. Concluding remarks

33. Having seen above how long EC merger reviews are taking, and considered possible explanations for why the periods are lengthening, this section provides brief observations on some practical consequences that increasing merger review times have for companies and some thoughts as to what might be done to alleviate these difficulties.

1. Is the system providing predictable timing?

34. The EU Merger Regulation was designed with the laudable goal of providing the business community with reasonably certain review timetables, consistent with business needs. As the Court of Justice stated in 2003, the Merger Regulation "*contains provisions whose purpose is to restrict, for reasons of legal certainty and in the interest of the undertakings concerned, the length of the proceedings for investigating transactions which are the responsibility of the Commission*."[20] A few years later the court reaffirmed the message, emphasising that the EU legislature "*had wished to ensure a control of mergers within the deadlines compatible with both the requirements of sound administration and the requirements of the business world.*"[21]

35. In view of the substantial lengthening of merger review timetables in all types of cases, it is fair to ask whether these objectives are still being achieved. The "provisions" whose importance the court underlined in *Schlüsselverlag* are the statutory review timetables under Phase I (at the time, one month) and Phase II (at the time, a further four months). But as the statistics presented above show, these basic statutory review periods under the Merger Regulation represent, on average, only about one quarter to one third of the time from when a transaction is announced to when the Commission issues its final decision. In Phase I cases, average pre-notification time today exceeds the review period given to the Commission under the Merger Regulation (now 25 working days) by a factor of more than three—this is striking in a context where about 70% of notified transactions are simplified procedure cases that should raise no issues at all, and well over 90% are unconditional Phase I clearances. Even in Phase II cases, where the Merger Regulation grants the Commission substantial extra time for its in-depth investigation, average pre-notification discussions now almost equal the total amount of time spent under the statutory review clock.

36. Thus, the Merger Regulation's basic statutory review thresholds today provide little guidance as to how long a review is actually going to take. Aside from the lengthening pre-notification periods, recent decisions that include remedies in Phase II virtually all involve the maximum extension under Article 10(3) EUMR (the provision that allows extension of the regular Phase II timetable by up to 20 working days, upon agreement of the parties and the Commission) and many also involve the additional 15 working-day extension for remedies submitted after day 55 of Phase II. The Commission is also increasingly "stopping the clock" under Article 11(3) EUMR where the parties fail to respond to an information request by the deadline—such suspensions may happen either with or without the implicit assent of the notifying parties. Phase II reviews therefore routinely take 125 or more working days; cases decided within the basic 90 working-day calendar have all but disappeared.

37. In sum, to the extent notifying parties are looking for predictability and legal certainty, the safe assumption is that the Commission's review is going to take at least as long as the average figures presented above: simplified procedure cases can be expected to take about three months; normal Phase I cases will take at least four to five months; and for Phase II cases the parties should anticipate that a Commission decision will not arrive for at least a year after public announcement.

2. Are extended pre-notification discussions compatible with the Commission's "priority rule"?

38. The de facto requirement for long pre-notification discussions, particularly in complex transactions, is in tension with the Commission's chosen approach for dealing with "parallel mergers," i.e., transactions affecting the same markets that take place near-contemporaneously, thus creating overlapping review periods.

39. In two sets of parallel mergers examined about 15 years ago, the Commission applied a "combined approach," taking into account the effects of a subsequently notified transaction affecting the same markets in assessing a previously notified transaction.[22] More recently, however, the Commission has applied a "priority rule" according to which parallel mergers are reviewed independently and in sequence, based on the date each transaction is formally notified. In other words, the first transaction to be notified is assessed based on the market situation prevailing at the time of the notification, while the second transaction is assessed based on the assumption that the first has already been implemented.[23]

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20 Judgment of 25 September 2004 in *Schlüsselverlag v. Commission*, C-170/02, EU:C:2003:501, § 33.

21 Judgment of 18 December 2008 in *Cementbouw Handel & Industrie BV v. Commission*, C-202/06 P, EU:C:2007:814, § 37.

22 One pair of parallel mergers involved the accounting sector (Commission decision of 20 May 1998, Case IV/M.1016 – *PriceWaterhouse/Coopers & Lybrand*; and Commission decision of 4 February 1998, Case COMP/M.1044 – *KPMG/Ernst & Young*); the other involved petrochemicals (Commission decision of 20 December 2001, Case COMP/M.2389 – *Shell/DEA*; and Commission decision of 20 December 2001, Case COMP/M.2533 – *BP/E.ON*).

23 This approach has been confirmed in at least three sets of parallel mergers, involving the UK package holiday market (Commission decision of 4 May 2007, Case COMP/M.4601 – *KarstadtQuelle/MyTravel*; and Commission decision of 4 June 2007, Case COMP/M.4600 – *TUI/First Choice*), satellite navigation systems (Commission decision of 14 May 2008, Case COMP/M.4854 – *TomTom/Tele Atlas*; and Commission decision of 2 July 2008, Case COMP/M.4942 – *Nokia/NAVTEQ*), and hard disk drives (Commission decision of 23 November 2011, Case COMP/M.6203 – *Western Digital Ireland/Viviti Technologies*; and Commission decision of 19 October 2011, Case COMP/M.6214 – *Seagate/HDD Business of Samsung*). *See also* Commission decision of 27 March 2017, Case COMP/M.7932 – *Dow/DuPont*.

40. The Commission's priority rule places companies planning a merger in a concentrated industry in a difficult position. The parties to the first publicly announced transaction would have assessed and planned their deal based on the market structure existing at the time it was announced. But if there is a perceived risk of a subsequent transaction that would adversely affect the competitive analysis of the first, there will be strong pressure to file the Form CO—and thereby establish priority—as quickly as possible. In ordinary circumstances companies are content to follow the Commission's Best Practices Guidelines, engage constructively with the case team, and try to answer all questions that are reasonably posed in pre-notification. But this can have the effect of extending pre-notification and to some extent taking the timetable out of the parties' control. In some situations the risk of being trumped by a subsequent parallel transaction may be too great to bear, leading the parties to notify as quickly as possible, at risk of alienating the case team and potentially having a notification declared incomplete.

41. Short of changing the Commission's priority rule—for example, moving to a rule that gives priority to the first parallel transaction that is publicly announced—there is no evident way of resolving this tension. As the situation stands, parties to announced mergers in concentrated industries will face the risk that their assumed place in the Commission's review queue may be seized by an interloping subsequent deal. This unavoidably places pressure on the pre-notification timetable. The Commission will want to maintain confidentiality and to treat all companies even-handedly; part of that duty must be a recognition that pre-notification time is limited and it may not be realistic to expect companies in such circumstances to engage in endless discussions prior to formally submitting their Form CO.

3. A few modest proposals

42. As explained above, there are likely several reasons—some of which are not driven principally by the Commission—why EC merger reviews are taking longer and longer. In complex cases, long pre-notification discussions driven by extensive Commission information requirements may be inevitable given the evidentiary requirements established by the courts. They may even be preferable for the notifying parties if the alternative is a higher likelihood of a Phase II investigation. And in cases that do go into Phase II, "getting it right" is usually a more important consideration than timing, which explains the near-universal usage today of the Article 10(3) extension.

43. But these considerations do not apply where competition concerns quite evidently will not arise. This means not only simplified procedure cases, but also particular markets in more complex cases where the parties' combined shares are low or where market share increments are small. The Commission professes to want to streamline its merger control processes to the extent compatible with effective enforcement; we submit that the most fertile ground for that is here.

44. Today, in practice, the requirement for notifying parties to provide extensive information on all "*plausible alternative market definitions*" in Form CO creates wide latitude for case teams to issue extremely broad, burdensome pre-notification information requests; for the parties, the path of least resistance is often to respond even to unreasonable requests rather than to argue. Notifying parties and their counsel want to maintain a cooperative, constructive working relationship with the case team, and will normally escalate disagreements over information requests to a higher level in DG COMP or to the hearing officer (who in any case has limited powers to intervene in such disputes, and tends to exercise them judiciously) only in exceptional circumstances, and then usually with limited success. The usual response is to complain a bit, but put heads down and soldier on. We think there is room for improvement, and would offer three practical suggestions that the Commission could implement more or less immediately.

45. First, let simple cases have simple reviews. The Commission is currently considering[24] ways of expanding the use of the simplified procedure and abolishing notification requirements for types of transactions that meet EUMR jurisdictional thresholds but self-evidently cannot affect competition in the EEA (e.g., joint ventures that will have no or negligible activities in the EEA); such steps are to be warmly welcomed. The Commission's recent informal practice of often clearing simplified procedure cases in advance of the 25 working-day deadline is another step in the right direction. But reducing or eliminating pre-notification in these cases would do more to reduce overall waiting time and provide legal certainty. The notice on a simplified procedure[25] already accepts that in cases involving no reportable markets (i.e., the parties are not active in any horizontally or vertically overlapping markets), pre-notification discussions may not be needed. This should be not just a theoretical possibility, but the expected norm in simplified procedure cases. If the Commission identifies shortcomings in a notification or (which should rarely happen) has real questions about the competitive effects of a transaction that meets the requirements for simplified procedure, there is enough time within the statutory review timetable to allow the parties to address them, since the case team does not have the time pressure associated with drafting a reasoned decision. If timing pressure ever did become insurmountable, a pull-and-refile strategy could always be employed to avoid Phase II being opened pointlessly.

46. Second, drop non-issues more quickly. While impossible to quantify, anecdotal experience is that in the EC process, notifying parties are forced to spend far more time and effort discussing markets and issues where no concern is ever identified than is usual in

24 Consultation on evaluation of procedural and jurisdictional aspects of EU merger control, available at: http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.

25 Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04), § 23.

other jurisdictions. The contrast with the United States review process is particularly striking here. Commission case managers might respond that they are only being diligent and that the courts require clearance decisions to be affirmatively reasoned, and this may explain the phenomenon to some extent. But the reasoned decision requirement is not relevant in simplified procedure cases, yet Short Form CO still contains burdensome information requirements (even more so under the recently introduced "*plausible alternative markets*" requirement) and parties routinely receive substantial additional pre-notification information requests. Further, in complex cases, parties often have the impression that case teams keep non-issues on the table for longer than necessary as a way of gaining leverage. Since such issues are largely in the Commission's discretion, improvement would likely need to come from within. At a minimum, as part of its internal management procedures DG COMP should find ways of rewarding efficiency and disciplining case teams to focus information requirements on real overlaps that could raise competitive issues.

47. Third, have more regard for the burden and cost that responding to information requests entails, and tailor requests accordingly. In complex cases that involve many products and markets, particularly novel ones, it is fair for the Commission to use information requests to "rattle the bushes" and not rely entirely on initial presentations by the notifying parties. No one disputes the Commission's right to probe for issues, or to require extensive information on markets where significant competitive concern could realistically arise. But this is not to justify the scorched earth information-gathering approaches that are too often on display today (e.g., requiring full Form CO information on markets with low combined shares or *de minimis* overlaps, or employing burdensome but marginally relevant information requests as a tactical tool to gain time). Notifying parties today have virtually no recourse against disproportionate or unfair information requests. The optimal solution would be a quick and effective dispute resolution mechanism, which might be overseen by the mergers policy unit, the hearing officer, or the legal service. Short of that, the EC review procedure would be more efficient for everyone if the Commission's general investigative approach was not to issue broad, untargeted data requests, then see whether the results turn up anything of interest, but instead to advance the analysis by way of open, targeted discussions on specific questions. Rather than hearing "Please provide all your documents and data," notifying parties would welcome "We are looking at this potential theory of harm; here is what we would need in order to dismiss it." ■

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