Chapter 16

European Union

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Relevant authorities and legislation

1 Who is/are the relevant merger authority(ies)?

Within the 25-country European Union (the EU), the European Commission (the Commission) has exclusive competence to review mergers and acquisitions between parties that meet certain size thresholds. Transactions that fall below those size thresholds are subject to national merger control legislation and the jurisdiction of national competition authorities. This basic division of competence between the Commission and national competition authorities is fine-tuned through a mutual referral system designed to ensure that transactions are reviewed by the authority best-placed to do so and to maintain, as much as possible, a "one-stop-shop" for merger review within the EU.

The Commission, the EU's executive, is a collegiate body comprising 25 Commissioners supported by a civil service organised along 25 directorates-general. A specific Directorate-General for Competition (DG Competition), under the responsibility of one of the Commissioners, is entrusted with the task of applying, inter alia, EU merger control legislation. More information on the Commission may be obtained at: http://www.europa.eu.int/comm/index_en.htm.

2 What is the merger legislation?

Merger control legislation at the EU level is set out in Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the Merger Regulation) and in Commission Regulation (EC) 802/2004 implementing the Merger Regulation (the Implementing Regulation). These legal instruments adopt a number of changes from pre-existing EU merger control legislation and entered into force on May 1, 2004. They have been complemented with various interpretative notices, guidelines, and best practice rules. These may be found at: http://www.europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing.

3 Is there any other relevant legislation for foreign mergers?

There are no foreign investment control or other prior authorization requirements for foreign mergers and acquisitions at the EU level. Such legislation may, however, exist at the national level.

4 Is there any other relevant legislation for mergers in particular sectors?

There are no sector-specific merger control or non-competition related prior authorization rules at the EU level. Such legislation may, however, exist at the national level. Where a transaction falls within the scope of the Merger Regulation, Member States may apply domestic prior authorization regimes only subject to the constraints of Article 21(4) of the Merger Regulation. This Article allows Member States to apply national legislation designed to protect legitimate national interests, such as public security, plurality of the media, and prudential rules, to the extent compatible with the general principles and other provisions of EU law.

Transactions caught by merger control legislation

5 Which transactions are caught – in particular, how is the concept of "control" defined?

The Merger Regulation applies to so-called concentrations, which are defined as transactions that lead to a lasting change of control resulting from the merger of two or more previously independent companies, or the acquisition of direct or indirect control of the whole or part of another undertaking (through the purchase of shares or assets, by contract, or by any other means). Warrants, options, or other instruments that create future equity entitlements will not normally give rise to a concentration until such time as they are exercised and confer control over a company, unless it is clear from legally binding agreements that they will be exercised in the near future.

The Merger Regulation does not apply to acquisitions that do not confer control. Control is defined as the ability (legally or *de facto*) to exercise "decisive influence" over the strategic commercial behavior of a company. Control may be exercised alone (sole control) or jointly with other companies (joint control). A concentration arises not only from the acquisition of sole or joint control, but also from a change from joint to sole control, or *vice versa*.

The acquisition of sole control typically involves one

company acquiring all or a majority of the voting rights (but not necessarily the share capital) of another company. However, sole control may also be acquired through a "qualified minority" shareholding. This might happen, for example, where a minority shareholder has the right to appoint more than half of the members of a venture's decision-making bodies, or where the remaining voting rights are widely dispersed and evidence of prior shareholders' meetings suggest that the minority shareholder is highly likely to achieve a majority at that meeting.

The typical form of joint control involves two parent companies with equal voting rights in a venture or with equal representation on the venture's decision-making bodies. However, joint control may also be exercised in other situations where two or more parent companies enjoy veto rights over strategic commercial decisions, such as the approval of annual operating and capital budgets, annual and long-range business plans and strategies, or key managerial appointments (as opposed to veto rights over matters normally associated with the financial protection of minority investors). Finally, even in the absence of specific individual veto rights, joint control may exist through a voting agreement or, in exceptional circumstances, a strong *de facto* commonality of interest among several minority shareholders who together have a majority or blocking vote over strategic commercial decisions.

The following types of acquisition of control are expressly excluded from the Merger Regulation's scope of application: (1) the acquisition of securities by companies whose normal activities include transactions and dealing in securities, provided that the acquisition is done in the framework of these businesses and the securities are held on a temporary basis; (2) the acquisition of control by an office holder in the framework of national bankruptcy proceedings or alike; and (3) the acquisition of control by a financial holding company, provided that this company exercises its voting rights only to maintain the full value of its investment.

6 Are joint ventures subject to merger control?

The formation of a joint venture qualifies as a concentration and falls within the scope of the Merger Regulation where two or more parent companies acquire control and the venture is designed to perform on a lasting basis all of the functions of an autonomous economic entity. Such "full-function" joint ventures must have the necessary financial resources, fixed assets, employees, trademarks, intellectual property rights, and research and development capacity to operate independently and perform the business functions normally carried out by other firms on the market. Partial function joint ventures are susceptible to review under Article 81 EC, which governs restrictive agreements.

Full-function joint ventures are subject to the same substantive test as other concentrations. In addition to this test, however, the Commission will review whether a full-function joint venture might give rise to the coordination of the parents' competitive behavior in their retained activities so as to cause an appreciable restriction of competition within the meaning of Article 81 EC. This review will take place within the procedural framework and time-limits of the Merger Regulation.

7 What are the jurisdictional thresholds for application of merger control?

Community dimension

The Commission's jurisdiction under the Merger Regulation is defined as a function of two alternative sets of turnover thresholds. When the parties to a transaction (in technical terms, the "undertakings concerned") meet either of these sets of turnover thresholds, the transaction is said to have a "Community dimension".

Generally speaking, the "undertakings concerned" are the direct participants to the transaction, *i.e.*, the merging parties or the acquiror(s) and the target business. Unless it retains a controlling stake, the seller is usually not considered an "undertaking concerned" for purposes of the Merger Regulation's turnover thresholds.

Concentrations have a Community dimension and fall within the scope of the Merger Regulation if all of the following three conditions are met in the last financial year:

- the combined aggregate worldwide turnover of all undertakings concerned exceeded €5,000 million (USD 5,656 million);
- the aggregate EU-wide turnover of each of at least two undertakings concerned exceeded €250 million (USD 328 million); and
- the undertakings concerned did not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

Alternatively, concentrations fall within the scope of the Merger Regulation if the following four conditions are met in the last financial year:

- the combined worldwide turnover of all undertakings concerned exceeded €2,500 million (USD 3,280 million);
- the EU-wide turnover of each of at least two undertakings concerned exceeded €100 million (USD 131.2 million);
- in each of at least three Member States, (i) the combined turnover of all the undertakings concerned exceeded €100 million (USD 131.2 million), and (ii) the turnover of each of at least two undertakings concerned exceeded €25 million (USD 32.8 million); and
- the undertakings concerned did not achieve more than two-thirds of their aggregate EC-wide turnover within one and the same Member State.

Calculation of turnover

The relevant turnover of an "undertaking concerned" is calculated as the revenues achieved in the financial year preceding the transaction from the sale of products and provision of services falling within the company's ordinary activities (excluding intra-group transactions), after deduction of sales rebates and any taxes directly related to (and included in) turnover, such as value added tax.

The aggregate turnover of the entire corporate group of the "undertaking concerned" must be considered, which comprises the relevant turnover of: (1) the undertaking concerned; (2) any undertaking controlled, directly or indirectly, by the undertaking concerned; (3) any undertaking which controls the undertaking concerned, directly or indirectly; (4) any undertakings controlled by undertakings that control the undertaking concerned, directly or indirectly; and (5) any undertaking jointly

controlled by two or more companies belonging to the same group of the undertaking concerned.

8 Does merger control apply in the absence of a substantive overlap?

The Merger Regulation applies irrespective of the existence of horizontal overlap in the parties' activities. However, transactions that involve no or only minor horizontal overlaps and vertical links may qualify for a short-form notification that is significantly less burdensome than the standard Form CO. Such transactions will be reviewed under a simplified procedure (which has largely internal administrative implications).

9 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

Foreign-to-foreign transactions are caught by the Merger Regulation to the extent the EU turnover thresholds are met. In particular with respect to the formation of joint ventures, this may give rise to situations where notification is required even though the joint venture has or will have no activities in Europe (but is caught merely because the parent companies have turnover within the EU derived from other activities). In that circumstance, the joint venture will qualify for short-form notification. In certain exceptional circumstances, the Commission has also been willing to confirm informally that no notification was required where the joint venture's charter excluded European activities and the joint venture, because of technical restrictions, was not capable of supplying European customers.

10 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The Merger Regulation provides for a system of referrals of concentrations both from the Commission to Member States and from Member States to the Commission. This system is designed to achieve an optimal allocation of cases between the Commission and national competition authorities and to reinforce the "one-stop-shop" principle for merger review in the EU.

Pre-notification referrals from the Commission to Member States

Following recent reforms, notifying parties now have the ability, during the pre-notification stage, to request that the Commission refer a concentration with a Community dimension to one or more Member States for review under domestic merger control rules. In making such request, the notifying parties must demonstrate through a reasoned submission that the transaction may "significantly affect competition" in a market within a Member State which presents all the characteristics of a distinct market (which, importantly, does not imply that the parties must demonstrate that the transaction will have a detrimental impact on competition). The referral will occur, in whole or in part, if the Commission consents and the relevant Member State(s) does not oppose the referral within 15 working days from receipt of the reasoned submission.

Pre-notification referrals from Member States to the Commission

Conversely, notifying parties also have the opportunity, during the pre-notification stage, to request through a reasoned submission that a transaction without a Community dimension be referred to the Commission for review under the Merger Regulation, in the event that it would otherwise be susceptible to review under the domestic merger control regimes of at least three Member States. The referral will occur if none of the relevant Member States that would be competent to review the transaction disagrees within 15 working days from receipt of the reasoned submission. The disagreement of a single Member State with jurisdiction is enough to block referral to the Commission.

Post-notification referrals from the Commission to Member States

Following an EU notification, Member States may still request that a transaction with a Community dimension be referred to them for review under domestic merger control rules. To this end, a Member State must within three weeks from receipt of the notification inform the Commission that the transaction threatens to "affect significantly competition in a market within that Member State, which presents all characteristics of a distinct market." The Commission may decide either to deal with the matter itself or to refer the case to the requesting Member State(s).

Post-notification referrals from Member States to the Commission

Following national notifications, Member States may still request that the Commission deal with a concentration without Community dimension under the Merger Regulation. To this end, a Member State must within 15 working days from receipt of the national notification submit a request showing that the proposed transaction affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request. Pending the Commission's review of such request, all national time limits shall be suspended (until such time as Member States inform the Commission that they do not wish to join the request). If the Commission accepts to examine the transaction, the referring Member States can no longer apply their domestic merger control rules. Member States that have opted out of the request, however, are entitled to apply their own legislation.

Notification and its impact on the transaction timetable

11 Where the jurisdictional thresholds are met, is notification compulsory?

Yes. Concentrations with a Community dimension must be notified to the Commission and, except where an express derogation has been requested and granted, may not be implemented prior to clearance.

12 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There are no such exceptions under the Merger Regulation. As noted, certain concentrations may qualify for a short-form notification and treatment under a simplified

procedure, but the general standstill obligation continues to apply.

13 Where a merger technically requires notification and clearance, what are the risks of not filing?

The implementation of transactions subject to the Merger Regulation without prior notification or "gun-jumping" (implementation prior to clearance in violation of a standstill obligation) may lead to fines of up to 10% of the aggregate group-wide turnover of the "undertaking concerned." In calculating the amount of the fine, the Commission takes into account the nature, gravity, and duration of the infringement. No criminal sanctions are provided for under EU law for failure to file a notifiable transaction. While there is no precedent for the Commission's seeking to enforce fines against companies without assets in Europe, it could in theory attach accounts receivable from European customers. The Commission has imposed fines for failure to notify a concentration on two occasions: in the Samsung/AST case, where it imposed a fine of €33,000 for a late filing of 14 months, and in the A.P. Møller case, where it imposed a fine of €219,000 for failure to notify three transactions within the prescribed time-limits.

The validity of a non-notified or prematurely implemented transaction depends on the outcome of the Commission's review on the substance. Pending its review, the Commission may take interim measures to restore or maintain effective competition. If the Commission finds that the transaction, as implemented, should be prohibited, it may require that the transaction be unwound or take any other appropriate measure to restore as much as possible the situation prevailing prior to implementation.

14 Is it possible to carve out local completion of a merger to avoid delaying global completion?

The Merger Regulation does not formally provide for the possibility to carve out the EU and close the remainder of a global transaction.

15 At what stage in the transaction timetable can the notification be filed?

Following recent reforms, a concentration can be notified to the Commission whenever the parties are able to demonstrate a good faith intention to conclude an agreement (for example, through a signed agreement in principle, a memorandum of understanding, or a letter of intent) or, in the case of a public bid, as early as such undertakings have publicly announced an intention to make such a bid.

16 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

EU merger review follows a two-stage process. The initial first-phase review lasts up to 25 working days from the day following receipt by the Commission of a complete notification. This period is automatically increased to 35 working days where the Commission receives a request for a referral from a Member State or where the undertakings concerned offer commitments within three weeks from notification.

Where the Commission at the end of its first-phase review considers that the transaction raises serious substantive issues ("serious doubts", in technical parlance), it is required to initiate an in-depth second phase investigation. A second-phase investigation lasts an additional 90 working days but is automatically extended to 105 working days where the notifying parties offer remedies, unless such commitments have been offered within 55 working days following the opening of the second phase.

Following recent reforms, an in-depth investigation may also be extended at the request of the notifying parties (within 15 working days from the opening of the second phase) or the Commission (with the notifying parties' agreement), provided that the total extension of phase 2 does not exceed 20 working days (so-called "stop-the-clock" provision).

17 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended?

The Merger Regulation has a mandatory standstill obligation and prohibits the implementation of a concentration with a Community dimension prior to Commission clearance. In certain relatively exceptional circumstances, it may be possible to obtain a formal waiver of the standstill obligation. This may be so, for example, where the transaction does not, prima facie, raise competitive concern and immediate implementation is necessary to avoid bankruptcy or other serious adverse consequences that are not normally related to a standstill obligation.

Special rules apply to public bids and transactions in traded securities. These may be implemented prior to clearance provided that (1) the concentration is notified to the Commission without delay; and (2) the acquirer does not exercise the voting rights attached to the securities or does so only to maintain the full value of its investment based on *ad hoc* derogation from the Commission.

18 Where notification is required, is there a prescribed format?

Notifications of a concentration to the Commission must be submitted on the so-called Form CO or, in the case of transactions qualifying for the simplified procedure, on a separate Short Form. Pre-notification referral requests must be submitted on Form RS. All parts of these forms must be completed, except where the Commission staff in pre-notification discussions have waived certain information requirements.

The Form CO, the Short Form, and the Form RS are annexed to the Implementing Regulation. They are also available at:

http://europa.eu.int/eurlex/pri/en/oj/dat/2004/l_133/l_13320040430en00010039.pdf.

The main information and documentation required by the Form CO can be summarised as follows:

- Name and contact details of the parties to the transaction and the nature of their businesses.
- Description of the notified transaction and its economic rationale.
- Worldwide, EU-wide, EFTA-wide, and Member State turnover of each of the undertakings concerned for the last financial year.

- Information on affiliated companies active on any affected market (see *infra*).
- Copies of all final or most recent versions of the documents bringing about the concentration and of any analysis, report, study, or survey prepared by or for any member of the parties' boards of directors or shareholders' meetings for the purposes of assessing or analysing the concentration.
- A description of the relevant product and geographic markets.
- Detailed market information will be required in the event the parties' combined share of sales is 15% or more in a market in which their activities overlap, or in the event one of the parties has a share of 25% or more in a market upstream, downstream, or neighbouring a market in which another party is active. Such information includes, *inter alia*, the total market size, the market shares of the parties and their main competitors, details on imports, transport costs, and geographic price differences, the structure of supply and demand, and the existence of barriers to entry.
- A description of any other markets where the notified operation may have a significant impact.

Pre-notification contacts with the Commission and the submission of draft notifications before the formal filing of a concentration are customary even for straightforward transactions. The Commission has issued "best practice" guidelines emphasizing the desirability of pre-notification contacts.

19 Who is responsible for making the notification and are there any filing fees?

In case of a legal merger or an acquisition of joint control, the legal obligation to file rests jointly on all parties. In all other instances, the Merger Regulation imposes the obligation to notify the concentration exclusively on the party acquiring (sole) control.

The Merger Regulation does not provide for the payment of any filing fee.

Substantive assessment of the merger and outcome of the process

20 What is the substantive test against which a merger will be assessed?

Following recent reforms, the substantive test under the Merger Regulation is whether a concentration will "significantly impede 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." This standard of review was designed to fill a perceived "enforcement gap" under the previous dominance test, which was thought by some not to cover the (perhaps rare) situation where market power might be increased as a result of unilateral or non-coordinated effects, but where no single firm dominance or risk of tacit collusion can be established. Commission officials have argued that the new test will not lead to a lower threshold for intervention, but it is probably prudent to assume that the practical implications of the new test will become apparent only with time.

In almost 14 years of EU merger control, 18 cases (or somewhat less than 1%) have been prohibited outright (and a few others abandoned in light of a likely prohibition decision). Notable examples include MCI Worldcom/Sprint, GE/Honeywell, and Schneider/Legrand. Most cases have been approved without in-depth investigation, some 95% of which involved unconditional clearances. Approximately 5% of cases have gone to a phase 2 investigation. A significant percentage of these were eventually cleared without conditions, although the majority of clearance decisions following an in-depth investigations have been subject to remedies.

The Commission's enforcement policy for horizontal mergers has recently been outlined in a set of "Horizontal Merger Guidelines", which clarify the Commission's approach in unilateral and coordinated effects cases. These show a substantial convergence between the US and EU review of horizontal mergers. The same is not necessarily true for vertical and conglomerate mergers. The Commission is widely expected to await the outcome of two cases currently pending before the Community Courts (*Tetra Laval/Sidel* and *GE/Honeywell*) before issuing guidelines in these areas.

21 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Notifying parties are required in their notification to provide contact details for their main customers, suppliers, and competitors. The Commission will contact such parties through written requests for information to solicit their comments in the first weeks following notification. In addition, a short publication in the Official Journal of the European Communities will invite interested third parties to submit written observations within 10 days from publication. The Commission's investigation attaches significant importance to the input from third parties.

While there is no formal complaints procedure, third parties have ample opportunity during phase 1 and phase 2 to make known their views. It is quite common for third parties to submit detailed written submissions, and Commission officials are generally willing to meet with credible complainants. The Commission's recent "best practice" guidelines even provide for so-called "triangular" meetings among Commission staff, notifying parties, and complainants – although such meetings are generally expected to remain rare. Committed complainants willing to dedicate the necessary resources can play an important role in EU merger proceedings.

Complainants and other interested third parties may request to participate in any oral hearing that may be organised in phase 2. They may, to that end, get access to a redacted version of the Commission's Statement of Objections. They will also be asked to comment on any remedies proposed by the notifying parties. Unlike the notifying parties, third parties are not, in principle, entitled to access to the Commission's case file. An exception applies to the seller and the target company, which may be important especially in the event of hostile bids.

22 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The Commission has three main powers of investigation: (1) written requests for information, which can take the form of simple requests or formal decisions; (2) on-site

inspections, which may or may not be announced; and (3) oral interviews, with the consent of the person to be interviewed. All of these powers may be employed with respect to both notifying and third parties.

There is no obligation to respond to a simple request for information, but if a company chooses to do so, the response must be complete and not misleading. Incomplete or misleading responses can attract fines of up to 1% the company's aggregate group-wide turnover. Companies are required to respond to a formal decision requesting information. Equally, companies are required to cooperate with on-site inspections. Again, failure to comply can attract fines of up to 1% the company's aggregate group-wide turnover. In addition, the Commission may impose periodic penalty payments not exceeding 5% of a company's average daily aggregate group-wide turnover to compel it to supply complete and correct information which the Commission has requested by decision or to submit to an inspection which the Commission has ordered by decision.

Since the Commission's investigations rely heavily on information provided by third parties, the Commission is serious about applying these powers also to third parties. For example, in the Mitsubishi Heavy Industries decision, the Commission imposed on Mitsubishi, which was not a party to the joint venture investigated by the Commission, a fine and a periodic penalty payment for supplying to the Commission incomplete information in response to a formal decision requesting such information.

23 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Confidential information cannot be withheld from the Commission when it has been requested in the notification form or subsequent requests for information. The Commission is required to maintain the confidentiality of business secrets, subject to the authority of the Hearing Officer and the Community Courts. A similar duty of confidentiality applies to the national competition authorities, which receive copies of the notification, the Statement of Objections, and other key documents.

The Commission recognises that the effectiveness of its investigations critically depends on the perceived integrity of its proceedings and the protection afforded to business secrets and other confidential information. It is generally considered to have a good track record in this respect.

24 How does the regulatory process end?

The EU merger review process ends with a formal Commission decision, which may authorise (possibly subject to conditions) or prohibit the transaction, or find that the Commission has no jurisdiction over the transaction. The Merger Regulation contains a fail-safe provision which provides that, in the absence of a formal decision within the time-limits provided for by the Merger Regulation, the notified concentration is deemed to have been authorised.

25 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The notifying party(ies) can negotiate remedies in the course of both the first phase and the second phase of the Commission's investigation. Such negotiated remedies will be incorporated as conditions or obligations in the Commission's decision clearing the transaction.

The Commission has issued a notice that provides guidance on how it will assess proposed remedies. As a general matter, the Commission favours remedies of a structural nature, such as the divestiture of a viable business. Other types of remedy are not excluded, however, including the grant of access to infrastructure or a key-technology or the termination of existing exclusive agreements.

26 At what stage in the process can the negotiation of remedies be commenced?

Negotiations of remedies between the notifying party(ies) and the Commission can start as early as the pre-notification phase and continue, if necessary, throughout most of the second phase of the Commission investigation. Critically, however, remedies must be formally submitted, in phase 1, within 20 working days from receipt of the notification or, in phase 2, within 65 working days from the start of the in-depth investigation.

27 How are any negotiated remedies enforced?

As noted, negotiated remedies are incorporated as conditions and obligations in a Commission clearance decision. Non-compliance by the notifying parties with a condition or an obligation attached to any clearance decision can be sanctioned by the Commission by imposing fines on the notifying part(ies). Periodic penalty payments can also be imposed but only for failure to comply with an obligation. The Commission is also empowered to adopt interim measures to restore or maintain conditions of effective competition where a concentration has been implemented in violation of a condition attached to a decision.

In addition, where it finds that a concentration has been implemented in contravention of a condition attached to a decision adopted following an in-depth investigation and in the absence of which the concentration would be incompatible with the common market, the Commission may require the undertakings concerned to dissolve the concentration or take any other measure necessary to restore the situation prevailing prior to the implementation of the concentration.

When, on the other hand, the undertakings concerned commit a breach of an obligation attached to a decision taken following an in-depth investigation, the Commission is entitled to revoke the previously adopted clearance decision.

28 Will a clearance decision cover ancillary restrictions?

A clearance decision under the Merger Regulation is deemed automatically to cover any competitive restrictions directly related and necessary to the implementation of the concentration. Only in exceptional circumstances, however, will the Commission expressly consider and identify such restrictions in its clearance decision. It will do so only in cases presenting novel and unresolved questions giving rise to genuine uncertainty, which implies at a minimum that the issue is not covered by the Commission's Ancillary Restraints Notice or previous published decisions. In all other cases, the notifying parties

bear the responsibility to assess for themselves whether a restriction will qualify as an ancillary restraint, subject to review, if a dispute arises, by national courts.

29 Can a decision on merger clearance be appealed?

Appeals against Commission merger decisions can be brought by the notifying parties as well as by third parties that can show that the decision is of "direct and individual concern" to them. In practice, competitors (especially when they have been involved in the administrative proceedings), employees, and third-parties that are directly affected by commitments attached to a Commission decision have been found to have standing to bring an appeal.

An appeal against a Commission decision is brought before the Court of First Instance of the European Communities (the CFI) on one or more of the following grounds: (i) lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the Treaty or of any rule relating to its application; and/or (iv) misuse of powers. A judgment from the CFI can be further appealed -- on points of law only -- to the European Court of Justice of the European Communities.

The appeal proceeding before the CFI is akin to judicial review of administrative decisions under national laws. While the CFI must be satisfied that the facts have been accurately established, it reviews the Commission's prospective assessment of the competitive impact of the transaction under the so-called "manifest error"-test, which implies a form of marginal scrutiny. A number of recent cases, however, suggest that the CFI's review of Commission decisions has become more rigorous -- in some instances drawing criticism from the Commission that the CFI has eroded the "manifest error"-test and substituted its own views of the likely competitive impact of a transaction for those of the Commission.

The normal timing of an appeal process before the CFI is often thought too long to be capable of salvaging a prohibited transaction. Largely for this reason, the CFI has introduced a so-called "fast-track" procedure that can be applied, upon request, at the CFI's discretion. This accelerated procedure features simplified written pleadings and a greater emphasis on oral pleadings. It may reduce the appeal process to approximately ten months/one year from the lodging of the application.

30 Is there a time limit for enforcement of merger control legislation?

The Commission's power to challenge an implemented concentration that should have been notified is not subject to any express statute of limitation. Where a concentration has been duly notified and approved, however, the Commission cannot subsequently reverse its clearance decision unless it turns out to have been based on incorrect information or the parties violate one of the decision's conditions or obligations. In those circumstances, the Commission is entitled to revoke its previous decision. This power is not subject to any express statute of limitation.

The Commission's power to impose fines for procedural infringements (*e.g.*, a failure to notify or to supply of complete and accurate information) is subject to a three-year limitation period. For all other infringements, the statute of limitation is five years.

Miscellaneous

31 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

The Commission is part of the European Competition Network (ECN) and the International Competition Network (ICN). The national competition authorities play an important role in the EU merger review process, in particular in cases going through an in-depth investigation. In such cases, the national competition authorities have the ability to participate in an oral hearing and must give their non-binding opinion on any proposed decision in the Advisory Committee.

In trans-Atlantic cases, despite a few high-profile exceptions, cooperation between the Commission and US antitrust agencies is strong and constructive. Parties are frequently asked to provide waivers of confidentiality restrictions and officials on both sides of the Atlantic will in many cases liaise closely.

32 Please identify the date as at which your answers are up to date.

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