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EU MERGER CONTROL:

A BRIEF HISTORY

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EU MERGER CONTROL: A BRIEF HISTORY[1]

On September 21, 1990, the Merger Regulation came into force, introducing into EU competition law a legal framework for the systematic review of mergers, acquisitions, and other forms of concentration.[2]

The Merger Regulation is based on three key propositions. First, that "the completion of the internal market and of economic and monetary union, the enlargement of the European Union, and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations."[3] Second, that mergers and other concentrations should be "welcomed" where they are "in line with the requirements of dynamic competition and [are] capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community."[4] Third, that "Community law must…include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it."[5] The Merger Regulation is intended to "permit effective control of all

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[1] A prior version of this paper entitled *EU Merger Control: From Birth to Adolescence* was published in *World Competition*, Volume 26, Number 2, June 2003. Both papers contain extracts from a book on the Merger Regulation, *European Merger Control Law: A Guide to the Merger Regulation*, LexisNexis Matthew Bender, the second edition of which will be published in 2004. Its author bears sole responsibility for the judgments, opinions, and any errors.

[2] Council Regulation 4064/89 of December 21, 1989, on the control of concentrations between undertakings, 1990 O.J. L257/13 ("1989 Merger Regulation"), http://europa.eu.int/comm/competition/mergers/legislation/ 4064_en.html; with amendments introduced by Council Regulation 1310/97, 1997 O.J. L180/1, http://europa.eu.int/comm/competition/mergers/legislation/131097_en.html, corrigendum 1998 O.J. L40/17, http://europa.eu.int/comm/competition/mergers/legislation/cr131097_ en.pdf. Further changes to the Merger Regulation were agreed in November 2003 (Commission Press Release IP/03/1621 of November 27, 2003) and formally adopted in January 2004 (Commission Press Release IP/04/70 of January 20, 2004). The recast Merger Regulation, Council Regulation 139/2004 of January 20, 2004, on the control of concentrations between undertakings, 2004 O.J. L24/1, available at http://europa.eu.int/ comm./competition/mergers/legislation/regulation/, will enter into force on May 1, 2004.

[3] Recital 3, Merger Regulation.

[4] Recital 4, Merger Regulation. *See also* XXIst Report on Competition Policy (1991), para. 5 ("Mergers may be carried out in the interests of economic efficiency, permitting improved exploitation of economies of scale and the pooling of expertise, and may thus help Community industry adjust its structure to the challenge posed by the integration of the internal market and the internationalization of the economy").

[5] Recital 5, Merger Regulation.

concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations."[6]

This paper contains a short introduction to the Merger Regulation: it describes its objectives and principal provisions, identifies certain key developments in its application, and considers some of the leading decisions of the Commission and judgments of the Community courts.

[1]—Objectives and General Principles

From its inception, the Commission has viewed the Merger Regulation as a "vital additional instrument made available…to ensure a system of undistorted competition in the Community."[7] The Commission has consistently rejected suggestions that its appraisal of transactions take account of industrial, social, or employment considerations and has firmly resisted attempts to politicize application of the Merger Regulation.[8] Significant resources and energy have been dedicated to ensuring its effective and rigorous application and to obtaining the confidence of Member States, lawyers, companies, and the financial community. The scope, purpose, and objectives of the Merger Regulation were articulated at the time of its adoption by Sir Leon Brittan Q.C., now 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 [81] and [82] [EC] 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

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6 Recital 6, Merger Regulation.

7 XXth Report on Competition Policy (1990), para. 20.

8 *See, e.g.*, Sir Leon Brittan Q.C., now Lord Brittan, The Early Days of EC Merger Control, EC Merger Control: Ten Years On (London: International Bar Association, 2000), p. 3 ("I was determined that the Merger Regulation should not be used as a way of imposing an industrial policy on Europe, although there were quite a number of participants in the debate who wanted to do just that. Whether it was because they wished to create European champions, or wanted to allow social considerations to have an important impact, they wanted the wording of the Regulation to be sufficiently broad for the Commission to be able to consider matters going well beyond the effects of the merger on competition in the relevant market. In the end, the supporters of an industrial policy were effectively beaten back, and the Regulation gives clear primacy to the competition criterion, with only the smallest nod in the direction of anything else").

> 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."[9]

More recently, the Commission has emphasized the Merger Regulation's "fundamental objective of protecting consumers against the effects of monopoly power (higher prices, lower quality, lower production, less innovation),"[10] and Commissioner Monti has sought to underline the common features of EU and U.S. 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."[11]

[2]—Principal Provisions

The Merger Regulation is based on four main principles: (1) the exclusive competence of the Commission to review concentrations of Community 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 Merger Regulation are set forth below:

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9 Sir Leon Brittan Q.C., now Lord Brittan, The Law and Policy of Merger Control in the EEC, [1990] 5 E.L.Rev. 351, p. 357.

10 XXXIst Report on Competition Policy (2001), para. 252.

11 Mario Monti, Competition Commissioner, The Future for Competition Policy in the European Union, speech at Merchant Taylor's Hall, July 9, 2001 (Commission Press Release SPEECH/01/340 of July 10, 2001). *See too* Mario Monti, Europe's Merger Monitor, The Economist, November 9, 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 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").

(1) The Merger Regulation applies to lasting changes in corporate control, including mergers, acquisitions, and the formation of jointly controlled, autonomous, full-function joint ventures.

(2) All concentrations that meet certain "size" tests are deemed to have Community dimension and, as such, are subject to mandatory notification under the Merger Regulation, irrespective of whether they have any effect in the Community. The Commission has exclusive jurisdiction over such transactions (the "one-stop-shop" principle) "irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there."[12] Transactions that fall below these thresholds may be subject to national competition rules. In exceptional circumstances, a Member State may request either that the Commission refer a concentration of Community dimension to its national authority or that the Commission review a concentration that does not have a Community dimension. As of May 1, 2004, companies may petition the Commission to take jurisdiction over transactions that would otherwise be subject to national merger control rules.

(3) Notifiable concentrations are subject to strict and short deadlines. Transactions must be notified on a prescribed form according to mandated time periods, a waiting period must be observed before notifiable transactions can be put into effect, and the Commission must render a decision no later than seven months (150 working days) following notification. Fines may be imposed for failure to notify, late notifications, or the provision of incorrect or misleading information. Where reportable transactions have been implemented prior to having received approval, the Commission may take remedial action.

(4) The Merger Regulation provides considerable scope for third parties to comment on notified concentrations, including the right to be heard orally. The Commission encourages customers, competitors, suppliers, and other interested parties to play an active role in EU merger control.

(5) The substantive test under the Merger Regulation is whether a transaction "significantly impede[s] 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 shall be declared compatible with the common market."[13] The Commission's appraisal under the Merger Regulation has two main elements: (i) definition of the relevant market; and (ii) competitive assessment of the notified transaction. The Commission generally focuses first on unilateral exercises of market power and then on whether a transaction creates or strengthens a position of collective or oligopolistic dominance. Horizontal

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12 Recital 10, Merger Regulation.

13 Art. 2, Merger Regulation.

mergers, *i.e.*, those involving firms active in the same markets, have accounted for the large majority of challenged transactions, although the Commission has also examined (and, on occasion, prohibited) mergers that have had vertical or conglomerate effects.

(6) The Commission is not empowered to exempt or authorize, on public interest or other grounds, concentrations that are considered incompatible with the common market. The Commission may condition its approval of transactions on undertakings or commitments offered during the initial ("phase I") or in-depth ("phase II") investigative periods.

(7) An appraisal under Article 81, which prohibits anti-competitive agreements, may also be warranted under the Merger Regulation where a full-function joint venture gives rise to spill-over effects between its parent companies. Non-full-function joint ventures fall outside the Merger Regulation and may be subject to Articles 81 or 82, which prohibits abusive conduct by dominant companies, as well as national competition rules.

(8) Decisions of the Commission are subject to judicial review by the Community courts.

[3]—Application and Evolution

Since the Merger Regulation entered into force, the Commission has rendered around 2,400 decisions, of which around 2,050 (85%) approved notified concentrations unconditionally; around 55 (2%) found the Merger Regulation to be inapplicable; around 60 (2.5%) referred concentrations in whole or in part to Member State authorities; around 105 (4.5%) approved transactions subject to undertakings given at the end of phase I;[14] around 25 (1%) approved transactions unconditionally during phase II; and around 60 (2.5%) approved concentrations subject to undertakings given at the end of phase II. The Commission has prohibited 18 (1%) transactions,[15] although three of those decisions have been overturned by the Community courts

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14 The Commission has had explicit authority to condition decisions rendered at the end of the initial investigative period since March 1, 1998.

15 *Aerospatiale-Alenia/de Havilland*, Case IV/M.53, Commission decision of October 2, 1991 (1991 O.J. L334/42) (aircraft); *MSG Media Service*, Case IV/M.469, Commission decision of November 9, 1994 (1994 O.J. L364/1) (telecommunications); *Nordic Satellite Distribution*, Case IV/M.490, Commission decision of July 19, 1995 (1996 O.J. L53/20) (television); *RTL/Veronica/Endemol*, Case IV/M.553, Commission decision of September 20, 1995 (1996 O.J. L134/32) (television); *Gencor/Lonrho*, Case IV/M.619, Commission decision of April 24, 1996 (1997 O.J. L11/30) (platinum); *Kesko/Tuko*, Case IV/M.784, Commission decision of November 20, 1996 (1997 O.J. L110/53) (consumer products retailing); *Saint-Gobain/Wacker-Chemie/NOM*, Case IV/M.774, Commission decision of December 4, 1996 (1997 O.J. L247/1) (abrasive materials); *Blokker/Toys "R" Us*, Case IV/M.890, Commission decision of June 26, 1997 (1998 O.J. L316/1) (toy retailing); *Bertelsmann/Kirch/Premiere*, Case IV/M.993, Commission decision of May 27, 1998 (1999 O.J. L53/1) (television); *Deutsche Telekom/BetaResearch*, Case IV/M.1027, Commission decision of May 27, 1998

on appeal.[16] More than 80 notifications have been withdrawn, of which around 20 (1%) were withdrawn following the opening of phase II investigations, in many instances to avoid prohibition decisions. Thus, around 1.5% of all transactions notified under the Merger Regulation have been either prohibited or abandoned in the course of phase II investigations.[17] The Commission's "challenge rate" is broadly comparable to those of other major jurisdictions.[18]

[4]—Principal Differences Between EU and U.S. Merger Control

The principal differences between EU and U.S. merger control rules are as follows:

(1) The dominance standard under the Merger Regulation is differently worded from the U.S. "substantial lessening of competition" test, although the practical consequences of this distinction may be slight, particularly in light of the EU's

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(1999 O.J. L53/31) (television); *Airtours/First Choice*, Case IV/M.1524, Commission decision of September 22, 1999 (2000 O.J. L93/1) (packaged holidays); *Volvo/Scania*, Case COMP/M.1672, Commission decision of March 14, 2000 (2001 O.J. L143/74) (trucks and buses); *MCI WorldCom/Sprint*, Case COMP/M.1741, Commission decision of June 28, 2000 (not yet reported) (telecommunications); *SCA/Metsä Tissue*, Case COMP/M.2097, Commission decision of January 31, 2001 (2002 O.J. L57/1) (household hygiene paper products); *General Electric/Honeywell*, Case COMP/M.2220, Commission decision of July 3, 2001 (not yet reported) (aerospace engines, avionics, and aerospace components); *Schneider Electric/Legrand*, Case COMP/M.2283, Commission decision of October 10, 2001 (not yet reported) (electrical equipment); *CVC/Lenzing*, Case COMP/M.2187, Commission decision of October 17, 2001 (not yet reported) (man-made fibers); and *Tetra Laval/Sidel*, Case COMP/M.2416, Commission decision of October 30, 2001 (not yet reported) (food and beverage packaging).

16 Airtours plc v. Commission ("*Airtours*"), Case T-342/99, 2002 E.C.R. II-2585; Schneider Electric v. Commission, Case T-310/01, not yet reported; and Tetra Laval v. Commission ("*Tetra Laval*"), Cases T-5/02 and T-80/02, not yet reported.

17 *See* Commission website at http://europa.eu.int/comm/competition/mergers/cases/stats.html for a statistical review of the Commission's decisional practice.

18 For perspective, of the 17,404 transactions notified in the United States between 1998 and 2002, requests for additional information were issued in 455 instances (2.6%) and 330 transactions (around 2%) resulted in enforcement actions (http://www.globalcompetitionreview.com/ara/us_government.cfm). It should be noted, however, that the filing thresholds in the United States are quite low, despite having been raised from $15 million to $50 million as of February 1, 2001 (*see* Pub. L. No. 106-553, 114 Stat. 2762). Therefore, U.S. notifications are filed for a large number of relatively insignificant transactions that are not likely to be of interest to U.S. regulators. The "challenge rate" is broadly similar at the Member State level. In the United Kingdom, for example, the Office of Fair Trading ("OFT") examined 355 transactions between January 2002 and March 2003, of which only 14 (4%) were referred for further investigation to the Competition Commission. Undertakings were accepted in an additional five cases (less than 1.5%) in lieu of a reference, although others may have been abandoned. *See* OFT Annual Report 2002-2003, Annex C. The December 3, 2003, decision of the Competition Appeal Tribunal in *IBA Health v. The Office of Fair Trading*, Case 1023/4/1/03, [2003] CAT 27, may, however, increase the incidence of referrals to the Competition Commission.

decision to refashion the Merger Regulation's substantive test in such a way as to bridge any gap between the two tests.

(2) While the large majority of cases challenged by both the Commission and the U.S. federal agencies have been horizontal mergers, the Commission has also challenged certain conglomerate mergers on grounds not generally pursued in the United States.

(3) The Commission requires notifying parties to furnish detailed information and explanations at the outset of the investigative process, taking explicit positions on product and geographic market definition, while the U.S. agencies initially require completion of a fairly basic form, together with the submission of internal business planning documents and the coordinates of industry participants, but may subsequently request extensive additional materials.

(4) The EU system makes specific provision for the involvement of Member States, while the U.S. system envisages no formal role for the U.S. states, although they are entitled to challenge transactions independently and often coordinate their investigations with the federal agencies.

(5) The Merger Regulation is based on strict deadlines, while the U.S. process is more open-ended.

(6) The EU system is administrative and permits the Commission to approve or prohibit mergers, while the U.S. system is judicially based and requires the agencies to persuade a court to enjoin a transaction from being completed.

[5]—Trends and Implications

The Commission's implementation and application of the Merger Regulation is widely regarded as having been highly successful.[19] In the 13 years since it came into force, the Merger Regulation has evolved into an integral part of Community antitrust practice. Unlike other areas of EU competition law, where few formal decisions have been adopted,[20] the Merger Regulation has produced a rich and extensive jurisprudence containing guidance on a range of issues,

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[19] *See, e.g.*, The Review of the EC Merger Regulation, 32nd Report of the House of Lords Select Committee on the European Union, HL Paper 165, Session 2001-02, para. 21 ("The Merger Regulation has become one of the cornerstones of EC competition law and many witnesses (from business to regulators) have spoken to us about how highly they regard the Regulation and what a success its operation has been. The Committee recognises the good work of the Commission in applying the ECMR. We endorse the [U.K.] Government's view that the Commission 'has responded with great success to the huge challenge of enforcing the regulation rigorously, but fairly, despite an exponential increase in its caseload'").

[20] For perspective, the Commission has rendered around 55 decisions applying Article 82 since the EC Treaty came into force in 1965.

including the competitive assessment of a wide variety of transactions affecting a broad array of product and geographic markets.[21] Further, the Commission has adopted a pragmatic, open, and informal approach to the Merger Regulation's application. Perhaps the most visible manifestation of this approach has been the Commission's use of informal, pre-notification meetings to clarify jurisdictional issues, discuss the scope of notifications, obtain a preliminary understanding of the relevant markets, and consider any procedural questions. Commissioner Monti has strongly defended the Commission's achievements:

> "The Merger Regulation, far from standing in the way of industrial restructuring in Europe, has facilitated it, while ensuring that it did not result in damages to competition. It has provided a 'one stop shop' for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions here in the EU. It has guaranteed that merger investigations are completed within tight, pre-determinable deadlines; a remarkable degree of transparency has been maintained in the rendering of decisions – each and every merger notified to the Commission results in the communication and publication of a reasoned decision. Above all, we have put in place a merger control system which is characterised by the complete independence of the decision-maker, the Commission, and by the certainty that mergers will be exclusively assessed for their impact on competition."[22]

The Merger Regulation has had several important and far-reaching implications for the practice of competition law in Europe: (1) the publication of a decision at the end of every investigation has made the Commission's practice more transparent and predictable;[23] (2) the introduction of mandatory notification for mergers at the EU level has stimulated the adoption of merger control laws at the Member State level; (3) the explicit emphasis placed on market definition, economic methodology, and competition-based criteria has been paralleled in other areas of EU competition law, including, importantly, the modernized treatment of vertical and

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[21] Of the operations notified, by far the largest proportion has involved joint ventures (around 45% of all notified transactions), with the remainder comprising acquisitions (41%), takeover bids (8%), and other forms of concentration (6%). *See* XXXIInd Report on Competition Policy (2002), p. 92. As of late 2000, the market sectors examined had broken down as follows: over 260 cases (representing more than 20% of all notified operations) have involved oil, gas, mining, and chemical markets; more than 250 operations (around 20% of all notifications) have concerned consumer products; over 150 transactions (equivalent to 10-15% of all notified operations) have concerned financial and insurance markets; and over 125 transactions (around 10% of all notifications) have involved wholesale and retail trade. The single largest other major categories have been telecommunications, media, and transportation.

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

[23] This is in marked contrast to the U.S. system, in which regulators need not provide any formal explanation when a notified transaction is cleared, other than in cases where a consent decree with undertakings is accepted, in which case an explanation is provided.

horizontal agreements; (4) the open and informal approach to the Merger Regulation's application, together with the importance attached to "market testing," has influenced other Directorates of the Commission's Directorate-General for Competition; (5) the Commission has processed notifications effectively, taken decisions quickly, and applied merger control rules free from political pressures; and (6) the Commission has worked closely with Member State authorities and other competition law regulators, using the Merger Regulation to forge a common appreciation of competition law and policy across the EU and to foster international cooperation with non-EU agencies, particularly those in the United States.

The Commission's application of the Merger Regulation has evolved considerably over the years. Seven aspects of this evolution may be identified: (1) the Merger Regulation's scope of application has been broadened to include all full-function joint ventures (as well as mergers, acquisitions, and other forms of concentration); (2) the Commission has over time employed an increasingly rigorous and economically orientated approach to market definition and substantive assessment; (3) the Commission has applied the Merger Regulation's dominance standard to a wide array of situations, including conglomerate mergers, vertical transactions, and situations of collective dominance; (4) the Commission has used the Interpretative Notices to codify the law and bring greater transparency; (5) the Commission has developed a flexible and open-minded approach to the implementation of the Merger Regulation's procedural rules; (6) the Commission has devoted increasingly greater time, effort, and resources to shaping and enforcing remedies; and (7) the Commission has attached importance to fostering international cooperation and convergence in merger control.

[6]—The Four Eras of Community Merger Control

[a]—1990-1994: The Years of Discovery. The coming into force of the Merger Regulation raised a wide array of legal and practical issues, and the years immediately following its implementation were in large part devoted to exploring, addressing, and resolving those issues. During this period, the Commission's application of the Merger Regulation exceeded the expectations of even the most optimistic commentators in several important respects: (1) the Commission met the tight deadlines prescribed in the Implementing Regulation in virtually every case;[24] (2) the Commission was flexible and open in its application of the procedural rules of the Merger Regulation, notwithstanding the significant innovations in practice;[25] (3) the Commission

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[24] *See, e.g.*, Donald L. Holley, EEC Competition Practice: A Thirty-Year Retrospective, 1992 Fordham Corp. L. Inst. 728 (Barry E. Hawk, ed., 1993) ("The Commission was of course faced with an enormous practical challenge when it began administration of the Merger Regulation, for the adoption of which it had worked so hard. The Commission's credibility was hanging in the balance. Counsel and the business community soon agreed that the administration of the Merger Regulation was turning out to be a big success. It is rare to see such unanimity on any one point within the Community").

[25] As described elsewhere, the innovations contained in the Merger Regulation as they relate to work of lawyers include the first mandatory notification rules under the EC Treaty; the first subjection of the Commission to strict time limits (outside of the opposition procedure provided for in certain cases under Council Regulation 17/62); the allocation of jurisdiction in a rigid and precise way; and the issuance of a notification form requiring detailed data and an up-front definition of the market.

began to use economic evidence and systematic market testing; (4) the Commission proved itself able to withstand political pressure; (5) the Commission worked closely with Member State authorities, using the Merger Regulation to develop a common appreciation of competition law and policy across the EU; and (6) the Commission started the process of fostering international cooperation with other antitrust authorities, including, in particular, the U.S. federal agencies.

A significant and disproportionate amount of time during this initial period was devoted to addressing issues that arose from the distinction made in the original version of the Merger Regulation adopted in 1989 between joint ventures that have "as [their] object or effect the coordination of the competitive behaviour of undertakings which remain independent" (so-called "cooperative" joint ventures) and "joint venture[s] performing on a lasting basis all the functions of an autonomous economic entity, which [do] not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture" (so-called "concentrative" joint ventures).[26] Because of the substantive and procedural advantages associated with forming joint ventures that are reportable under the Merger Regulation, considerable effort was devoted to structuring joint ventures so as to satisfy the "concentrative" criteria, including by defining markets narrowly in order to exclude a finding that a joint venture would be rendered cooperative because it would be active on the same market as one or both of its parents. Over time, the Commission issued a number of Notices intended to provide guidance on the jurisdictional and substantive scope of the Merger Regulation, and the circumstances in which a joint venture might be considered concentrative were expanded.[27]

During this initial period, the Commission staff – tentatively at first, but with increasing confidence as the years went by – developed a structured analytical framework for appraising reportable transactions that served as a foundation for the increasingly detailed analyses of the late 1990s. The starting point of the Commission's analyses, then as now, was the definition of a relevant market. Cases in which market definition was central to the Commission's assessment

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26 Art. 3(2), 1989 Merger Regulation.

27 In the years immediately following the adoption of the Merger Regulation, the Commission considered joint ventures to be cooperative where one or more parents were present on the same market as the joint venture or on a closely neighboring market. (*See* Commission Notice regarding the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89 of December 21, 1989, on the control of concentrations between undertakings, 1990 O.J. C203/10.) Beginning in late 1991, the Commission began to accept that joint ventures could be characterized as concentrative in situations where only one parent remained active on the same or a related market as the joint venture, provided that parent was the "industrial leader." (*See, e.g., Thomson/Pilkington*, Case IV/M.86, Commission decision of October 23, 1991.) By 1994, the Commission had accepted that joint ventures would be treated as concentrative where only one parent remained active on the same market as the joint venture, irrespective of whether that parent was the "industrial leader." (*See* Commission Notice on the distinction between concentrative and cooperative joint ventures under Council Regulation (EEC) 4064/89 of December 21, 1989, on the control of concentrations between undertakings, 1994 O.J. C385/1.) The Commission's reasoning at the time was that coordination within the meaning of the Merger Regulation should be considered to arise only where the formation of a joint venture created a risk of coordination between the joint venture's parents.

included *DuPont/ICI*, where the Commission's assessment was based on the identification of distinct markets for different types of fiber used to produce carpets,[28] *Nestlé/Perrier*, where the Commission identified a market for bottled mineral water distinct from other non-alcoholic commercial beverages,[29] and *Procter & Gamble/VP Schickedanz II*, where the Commission relied on evidence of consumer behavior to identify separate markets for different feminine protection products.[30]

Also during this period, the Commission signaled a determination to apply the Merger Regulation's dominance standard flexibly, including to transactions that threatened to create or strengthen situations of collective dominance. The Merger Regulation is silent on the question of whether the dominance standard applies to situations of collective dominance and, for many years, there was uncertainty as to whether the reference in the Merger Regulation to a (unitary) dominant position (in contrast to Article 82, which explicitly prohibits the abuse of a dominant position "by one or more undertakings") excluded the Merger Regulation's application to situations where a small number of suppliers operate in parallel as an oligopoly. In *Nestlé/Perrier*, the Commission first developed the concept of collective dominance under the Merger Regulation and required substantial divestitures to prevent the creation of joint dominance in the supply of bottled mineral water in France.

An important milestone in the application of the Merger Regulation came in 1991, when the Commission for the first time prohibited a transaction, the proposed joint acquisition of the Canadian-based de Havilland division of the Boeing Company by Aerospatiale SNI, a French company, and Alenia-Alitalia e Selenia SpA, an Italian company.[31] The Commission determined that the merged entity's 64% share of global regional commercial aircraft sales would confer a dominant position. The prohibition decision was taken in the face of considerable opposition from within the Commission, in particular from the Industrial Policy Commissioner, as well as from certain Member State Governments. The decision assuaged those, including in the United States, who had feared that the Commission might be unduly influenced by industrial and political considerations. The fierce debate at the time is recalled by Sir Leon Brittan Q.C., now Lord Brittan, then-Competition Commissioner:

> "Different considerations arose when we had to resist those who simply wanted us to encourage the emergence of European champions, irrespective of the impact that that would have on competition. The *De Havilland* case was the watershed. What was

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28 Case IV/M.214, Commission decision of September 30, 1992 (1993 O.J. L7/13).

29 Case IV/M.190, Commission decision of July 22, 1992 (1992 O.J. L356/1).

30 Case IV/M.430, Commission decision of June 21, 1994 (1994 O.J. L354/32).

31 *Aerospatiale-Alenia/de Havilland,* Case IV/M.53, Commission decision of October 2, 1991 (1991 O.J. L334/42) (aircraft). It was not until 1994 that the Commission prohibited a second transaction, *MSG Media Service*, Case IV/M.469, Commission decision of November 9, 1994 (1994 O.J. L364/1) (telecommunications).

proposed was a merger between European firms which was going to create a monopolistic situation in the world market. Nonetheless, the most intense political pressure was placed on the members of the Commission in an effort to have the merger permitted. Indeed the French and Italian Governments regarded it as almost inconceivable that the Commission would ban a merger between French and Italian firms of this kind, and there is reason to believe that they were given high level assurances that this would not happen. Fortunately, the Commission resisted these pressures and voted to ban the merger. What was important was not so much that the merger would in fact have been damaging, but rather that the Commission showed itself able to resist political pressure from whatever quarter it came, and determined to decide the issue on the merits as it saw them. That was the first merger that the Commission actually banned, and its ability to do so showed that it was a serious competition authority, which could operate both efficiently and with integrity."[32]

[b]—1995-1998: The Years of Consolidation. During this period, the Commission addressed certain of the shortcomings in the original Merger Regulation adopted in 1989. First, the distinction made between "concentrative" and "cooperative" joint ventures was abandoned,[33] and the Commission started to carry out under the Merger Regulation's procedure and timetable a substantive assessment under Article 81 of any spill-over effects arising from the formation of full-function joint ventures.[34] Second, the Commission introduced a "short form" procedure for unproblematic transactions. Third, in an effort to address concerns about the costs incurred in multinational merger review, the Commission introduced a second and lower set of thresholds intended to confer Commission competence over cases that affect three or more Member States, but fell below the Merger Regulation's original thresholds.[35] Fourth, the Commission formalized

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32 Sir Leon Brittan Q.C., now Lord Brittan, The Early Days of EC Merger Control, EC Merger Control: Ten Years On (London: International Bar Association, 2000), pp. 5 and 6. For a U.S. perspective, *see* Robert Pitofsky, EU and U.S. Approaches to International Mergers – Views from the U.S. Federal Trade Commission, EC Merger Control: Ten Years On (London: International Bar Association, 2000), p. 50 ("In the fall of 1991, in an immensely important EC decision, the Commission blocked ATR's proposed acquisition of de Havilland, signalling DG-IV's and the Commission's faithfulness to competition policy over industrial policy. My own view is that the industrial policy defense is almost always a bankrupt concept – first, because size (as opposed to efficiency) is no assurance of success in any market, global or local, and second, because antitrust enforcement is a blunt and ineffective device to provide solutions to issues like balance of trade or employment. Other government policies are much more likely to be effective").

33 Among other things, the 1997 revision of the Merger Regulation, expanded the Regulation's scope as of March 1, 1998, to include the formation of all full-function joint ventures, including those giving rise to spill-over effects between the parent companies.

34 *See, e.g., Telia/Telenor/Schibsted*, Case IV/JV.1, Commission decision of May 27, 1998 (telecommunications), the first joint venture to be appraised following the 1997 revision of the Merger Regulation.

35 In 2001, as described below, this reform was revisited, in part because, in the Commission's view, the supplementary thresholds introduced in 1997 had "not solved the multiple filing problem which

its approach to market definition and adopted the Market Definition Notice. Finally, the Commission corrected the lack of explicit authority to accept undertakings during the initial investigative period.[36]

The years 1995-1998 saw an increasing maturity, confidence, and sophistication in the Commission's substantive review of reportable transactions. During this period, Commission decisions rendered following phase II investigations became increasingly detailed and lengthy.[37] Between 1995 and 1998, the Commission prohibited eight transactions,[38] four of which involved telecommunications and broadcasting markets. The Commission's concerns in these cases were based largely on vertical effects.[39] Also during this period, the Commission began to consider conglomerate or "portfolio" effects in a trilogy of cases involving commercial beverages, *Coca-Cola Enterprises/Amalgamated Beverages GB*,[40] *The Coca-Cola Company/Carlsberg A/S,*[41] and

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they were designed to tackle," because only a small proportion of the cases they were intended to catch have in practice fallen within the scope of the Merger Regulation. Green Paper on the Review of Council Regulation (EEC) 4064/89 (COM(2001) 745/6 final) executive summary, para. 24.

[36] Between March 1, 1998, when the applicable amendment to the Merger Regulation came into force, and December 31, 2002, 80 transactions had been approved subject to undertakings given during the initial investigative period, representing around 6% of all notified transactions. In the same period, the Commission initiated in-depth investigations in 72 cases, representing around 5% of all notified transactions.

[37] *See, e.g.*, *Skanska/Scancem*, Case IV/M.1157, Commission decision of November 11, 1998 (1999 O.J. L183/1) (non-metallic mineral products).

[38] *Nordic Satellite Distribution*, Case IV/M.490, Commission decision of July 19, 1995 (1996 O.J. L53/20) (television); *RTL/Veronica/Endemol*, Case IV/M.553, Commission decision of September 20, 1995 (1996 O.J. L134/32) (television); *Gencor/Lonrho*, Case IV/M.619, Commission decision of April 24, 1996 (1997 O.J. L11/30) (platinum); *Kesko/Tuko*, Case IV/M.784, Commission decision of November 20, 1996 (1997 O.J. L110/53) (consumer products retailing); *Saint-Gobain/Wacker-Chemie/NOM*, Case IV/M.774, Commission decision of December 4, 1996 (1997 O.J. L247/1) (abrasive materials); *Blokker/Toys "R" Us*, Case IV/M.890, Commission decision of June 26, 1997 (1998 O.J. L316/1) (toy retailing); *Bertelsmann/Kirch/Premiere*, Case IV/M.993, Commission decision of May 27, 1998 (1999 O.J. L53/1) (television); and *Deutsche Telekom/BetaResearch*, Case IV/M.1027, Commission decision of May 27, 1998 (1999 O.J. L53/31) (television).

[39] *See Nordic Satellite Distribution, supra*; *RTL/Veronica/Endemol, supra*; *Bertelsmann/ Kirch/Premiere*, *supra*; and *Deutsche Telekom/BetaResearch*, *supra*. *See also MSG Media Service, supra*. Other cases involving similar issues include and *WorldCom/MCI (II)*, Case IV/M.1069, Commission decision of July 8, 1998 (1999 O.J. L116/1) (telecommunications); *MCI Worldcom/Sprint*, Case COMP/M.1741, Commission decision of June 28, 2000 (not yet reported) (telecommunications); *AOL/Time Warner*, Case COMP/M.1845, Commission decision of October 11, 2000 (2001 O.J. L268/28) (communications and entertainment); and *Vivendi/Canal+/Seagram*, Case COMP/M.2050, Commission decision of October 13, 2000 (telecommunications and leisure).

[40] Case IV/M.794, Commission decision of January 22, 1997 (1997 O.J. L218/15).

Guinness/Grand Metropolitan.[42] In *Gencor/Lonrho*, the Commission developed and refined its approach towards oligopolistic dominance, prohibiting the merger of two leading global suppliers of platinum. In 1998, the Court of Justice confirmed in *Kali und Salz* that transactions giving rise to situations of oligopolistic dominance could be prohibited under the Merger Regulation.[43] The Court also confirmed in that case the availability of a "failing firm defense" under the Merger Regulation.[44]

The first significant case where the Commission and U.S. federal agencies failed to arrive at the same conclusions about the competitive effects of a merger occurred during this period, in *Boeing/McDonnell Douglas*.[45] The U.S. Department of Justice viewed the transaction as competitively benign and concluded that no remedies were necessary, while the Commission was concerned about the reduction in the number of global producers of large commercial aircraft and the strengthening of Boeing's existing position, and conditioned its approval of the transaction on a package of remedies. After this episode, EU and U.S. officials invested considerable time and effort in enhancing transatlantic cooperation and day-to-day coordination.[46] It was not until 2001 and the *General Electric/Honeywell* transaction[47] that the

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[41] Case IV/M.833, Commission decision of September 11, 1997 (1998 O.J. L145/41).

[42] Case IV/M.938, Commission decision of October 15, 1997 (1998 O.J. L288/24).

[43] French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission ("*Kali und Salz*"), Joined Cases C-68/94 and C-30/95, 1998 E.C.R. I-1375. The lack of any explicit reference to collective dominance in the Merger Regulation had led some commentators to suggest that transactions raising joint dominance concerns could not be prohibited under the Regulation. The Court of Justice in *Kali und Salz* made a purposive interpretation of the Merger Regulation, emphasizing that to do otherwise would deprive the Regulation of a "not insignificant aspect" that would be inconsistent with the EC Treaty.

[44] *See too BASF/Eurodiol/Pantochim*, Case IV/M.2314, Commission decision of July 11, 2001 (2002 O.J. L132/45), where the "failing firm defense" was modified and extended.

[45] Case IV/M.877, Commission decision of July 30, 1997 (1997 O.J. L336/16).

[46] *See, e.g.,* Mario Monti, Cooperation between Competition Authorities – A Vision for the Future, The Japan Foundation Conference, Washington, D.C., June 23, 2000 (Commission Press Release SPEECH/00/234); and Charles A. James, former Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Antitrust In The Early 21st Century: Core Values And Convergence, Program on Antitrust Policy in the 21st Century, Brussels, May 15, 2002 (http://www.usdoj.gov/atr/public/speeches/11148.pdf).

[47] Case COMP/M.2220, Commission decision of July 3, 2001 (not yet reported) (aerospace engines, avionics, and aerospace components). Following *General Electric/Honeywell*, the Commission and U.S. agencies took steps to strengthen transatlantic cooperation. *See, e.g.*, the adoption in October 2002 by the Commission and U.S. federal agencies of guidelines regarding best practices on cooperation in merger investigations, which reflected an increasing alignment in EU and U.S. merger policy and enforcement. International Cooperation Best Practices on Cooperation in Merger Investigations (Commission Press Release IP/02/1591 of October 30, 2002).

Commission and the U.S. authorities again differed as fundamentally and publicly as they had done in *Boeing/McDonnell Douglas*.

[c]—1999-2001: The Years of Controversy. The 10th anniversary of the Merger Regulation's entry into force in 2000 witnessed an increasingly forceful, confident, and creative approach to its application. This manifested itself in several ways. First, the Commission prohibited an increasing number of transactions,[48] with several others being abandoned to avoid prohibition decisions.[49] Second, the Commission employed an increasingly wide array of antitrust theories, including: (1) neighboring market and potential entrant theories;[50] (2) conglomerate and portfolio effects;[51] (3) vertical effects;[52] and (4) spill-over effects.[53] Third, the Commission for the first time identified single-firm dominance concerns where the post-

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48 In 1999-2001, eight concentrations were prohibited (*Airtours/First Choice*, Case IV/M.1524, Commission decision of September 22, 1999 (2000 O.J. L93/1) (packaged holidays); *Volvo/Scania*, Case COMP/M.1672, Commission decision of March 15, 2000 (2001 O.J. L143/74) (trucks and buses); *MCI WorldCom/Sprint*, *supra*; *SCA/Metsä Tissue*, Case COMP/M.2097, Commission decision of January 31, 2001 (2002 O.J. L57/1) (household hygiene paper products); *General Electric/Honeywell*, *supra*; *Schneider Electric/Legrand*, Case COMP/M.2283, Commission decision of October 10, 2001 (not yet reported) (electrical equipment); *CVC/Lenzing*, Case COMP/M.2187, Commission decision of October 17, 2001 (not yet reported) (man-made fibers); and *Tetra Laval/Sidel*, Case COMP/M.2416, Commission decision of October 30, 2001 (not yet reported) (food and beverage packaging)). For perspective, between 1990 and 1998, the Commission prohibited 10 transactions.

49 *See, e.g.*, *Alcan/Pechiney*, Case IV/M.1715, Commission Press Release IP/00/258 of March 14, 2000 (aluminum); and *Time Warner/EMI*, Case COMP/M.1852, Commission Press Release IP/00/1122 of October 5, 2000 (recorded music).

50 *See, e.g.*, *Telia/Telenor,* Case IV/M.1439, Commission decision of October 13, 1999 (2001 O.J. L40/1) (telecommunications); and *Air Liquide/BOC*, Case COMP/M.1630, Commission decision of January 18, 2000 (not yet reported) (gases).

51 *See, e.g., General Electric/Honeywell*, *supra* (transaction prohibited, *inter alia*, because of concern as to post-merger bundling of General Electric engines with Honeywell avionics and aerospace components); and *Tetra Laval/Sidel*, *supra* (transaction prohibited, *inter alia*, because of concern that Tetra Laval would leverage its dominant position in aseptic packaging into Sidel's leading position in the closely neighboring PET packaging market). Overturned on appeal (Cases T-5/02 and T-80/02, judgment of October 25, 2002 (not yet reported)) and subsequently approved (Case COMP/M.2416, Commission decision of January 13, 2003).

52 *See, e.g., AOL/Time Warner*, *supra* (remedies required, *inter alia*, because of concern that AOL could foreclose Time Warner's entertainment content competitors from obtaining access to AOL's Internet access and on-line services).

53 *See, e.g., Volvo/Scania, supra* (Commission required Volvo, the acquirer, to sell a non-controlling minority shareholding in a competitor active on the market directly affected by the transaction and required Renault, the vendor, to sell a non-controlling minority shareholding in a competitor active on a neighboring market).

transaction market shares would have been below 40%.[54] Fourth, the Commission endeavored to expand and develop the original notion of collective dominance.[55] Fifth, the Commission applied the Merger Regulation's procedural rules more rigorously, including, in particular, those barring consideration of remedies offered out-of-time.[56] Sixth, the Commission become more demanding in regard to the scope, implementation, and detail of remedies, including by vetting potential purchasers of divested businesses more carefully[57] and proposing greater use of independent trustees to monitor compliance with remedies.[58]

These developments attracted comment and some criticism. First, it was said that significantly increased numbers of notifications[59] and the enhanced scope and detail of phase II investigations had strained the Commission's resources,[60] and that the informality and flexibility

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54 *See, e.g., Carrefour/Promodes*, Case COMP/M.1684, Commission decision of January 25, 2000 (2000 O.J. L164/5) (consumer products retailing) (remedies required to address concern that the merging parties, which accounted for 20-30% of consumer products sold to French supermarkets, could exert market power over suppliers).

55 *See Airtours/First Choice*, *supra* (transaction prohibited on the basis of a concern that four companies would together have a position of joint dominance in a dynamic market with no evidence or finding of the existence of an effective retaliation mechanism). Overturned by the Court of First Instance on appeal. Airtours plc v. Commission ("*Airtours*"), Case T-342/99, 2002 E.C.R. II-2585.

56 *See, e.g., Volvo/Scania*, *supra* (transaction prohibited where Commission rejected remedies offered after the expiry of the three-month period provided for in the Merger Regulation).

57 *See, e.g., TotalFina/Elf,* Case COMP/M.1628, Commission decision of February 9, 2000 (2001 O.J. L143/1) (petroleum) (Commission vetoed selection of company chosen to acquire divested businesses); *Solvay/Montedison-Ausimont*, Case COMP/M.2690, Commission decision of April 9, 2002 (chemicals); and *Telia/Sonera*, Case COMP/M.2803, Commission decision of July 10, 2002 (telecommunications).

58 *See, e.g.,* Standard Model Texts for Divestiture Commitments and Trustee Mandates, available at http://europa.eu.int/comm/competition/mergers/legislation/. *See also* Commission Press Release IP/03/614 of May 2, 2003.

59 In 1991, the first full year in which the Merger Regulation was in force, 63 transactions were notified. In 2000 and 2001, the comparable figures were 345 and 335. Of the around 2,400 transactions notified under the Merger Regulation between 1990 and 2003, over 1,400 (58%) were notified in the years 1998-2002.

60 *See, e.g.,* Peter Sutherland, Global Consolidation: Views on Future Market Dynamics, EC Merger Control: Ten Years On (London: International Bar Association, 2000), p. 70 ("It is clear that the MTF needs more resources immediately to deal with existing transaction volumes"). *See too* Colin Overbury, Postscriptum, EC Merger Control: Ten Years On (London: International Bar Association, 2000), p. 450 ("There is no doubt that the resources of the MTF are now stretched to the limit. During the time that I was the Director, there was an annual average of about 55 decisions. With some 32 officials available to examine the notified cases, the ratio of decided notifications to case handler was less than 2:1…. The annual ratio of cases to each official has now risen to nearly 8:1, which represents a fourfold increase in

that had characterized the early years had given way to a more bureaucratic approach. Second, it was suggested that the possibility open to the Commission since March 1, 1998, to condition phase I approval decisions on undertakings had occasionally led the Commission to seek remedies that were arguably not merited by the concerns identified. Third, the Commission's limited resources were at times said to have encouraged undue reliance on (and insufficient skepticism of) third-party testimony, especially that submitted by competitors. Fourth, concern was expressed as to the degree to which the Commission had at times relied on speculation about future anti-competitive conduct as a ground for challenging transactions, in particular in the context of conglomerate mergers. (The Commission's prohibition of *General Electric/Honeywell* generated particularly strong criticism from senior U.S. antitrust officials[61] and an assertive response from the Commission.[62]) Fifth, it was suggested that the Directorate-General for Competition had become less susceptible to external review and scrutiny than before.[63]

Most fundamentally, however, the Commission's role as investigator, prosecutor, and judge in EU merger control was called into question.[64] 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.

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their workload in less than seven years. Even if one takes into account the increased competence which the officials have undoubtedly gained through intense experience, which is, in any event, balanced by the increasingly complex and sophisticated nature of the transactions submitted for control, such an increase cannot be good").

61 *See, e.g.,* Charles A. James, International Antitrust in the 21st Century: Cooperation and Convergence, OECD Global Forum on Competition, Paris, October 17, 2001 (http://www.usdoj.gov/atr/public/speeches/9330.pdf) ("[The Commission's decision] is neither soundly grounded in economic theory nor supported by empirical evidence, but rather, is antithetical to the goals of sound antitrust enforcement").

62 *See, e.g.,* Mario Monti, Commissioner Monti Dismisses Criticism of the *GE/Honeywell* Merger Review and Rejects Politicization of the Case (Commission Press Release SPEECH/01/855 of June 18, 2001).

63 *See*, *e.g.*, Joseph Gilchrist, former Commission Hearing Officer, Rights of Defence and the Role of the Hearing Officer in EU Merger Cases, 2001 Global Competition 19 and 20, who conceded that "[i]t is difficult to pinpoint exactly the causes and relative importance of the factors making for this disquiet," but identified, *inter alia,* "the unique position of the European Commission in being effectively investigator, prosecutor, jury, judge and executioner in its own cause" and "the methods by which solutions to perceived competition problems are negotiated between the parties and the Merger Task Force."

64 *See*, *e.g.*, Jack Welch, then-Chairman of General Electric, following the Commission's prohibition of the *General Electric/Honeywell* transaction, complained that "it's very difficult to be in a process where the prosecutor is also the judge," (The Prosecutor is Also the Judge, Time, July 16, 2001, p. 42).

A comparison was drawn with the United States,[65] 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.[66] The impression had also developed that, in the 12 years since the Merger Regulation's adoption, certain of the internal checks and balances on Commission decision making in competition cases had become less effective.[67] Among other things, the reforms of the role of the Hearing Officer introduced in 2001 had been limited because the Hearing Officer's role was confined to dealing with procedural matters, not substantive issues, legal arguments, or conclusions drawn from the evidence.[68]

Finally, there was increasing criticism of the limited opportunity for timely judicial review. The backlog of cases at the Court of First Instance and the consequent delay in hearing appeals made recipients of prohibition decisions increasingly skeptical of the practical benefits of appealing such decisions, thereby insulating the Commission from judicial review. In 2001,

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[65] The U.S. antitrust agencies do not authorize concentrations. Rather, they review them and, for those concentrations considered likely to lessen competition, either negotiate conditions upon which they will not litigate in court or challenge the merger before a judge, who decides whether to enjoin a merger. For concentrations found unlikely to lessen competition, the U.S. agencies simply refrain from challenging the transactions.

[66] *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, D.C., November 9, 2001 (http://www.usdoj.gov/atr/public/speehces/9536.pdf) ("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").

[67] *See, e.g.*, The Review of the EC Merger Regulation, 32nd Report of the House of Lords Select Committee on the European Union, HL Paper 165, Session 2001-02, para. 4 ("The top priority for reform should be to ensure objectivity and fairness in the ECMR process. The many concerns about due process are best addressed by improving the procedural safeguards in the current system. Efforts must focus on improving the internal checks and balances in the ECMR regime. To achieve this, the Commission should take the following action: (1) Responsibility for the consideration of cases in Phase I and Phase II should be divided between two separate teams of officials. (2) The role of the Hearing Officer should be strengthened so that they take a prominent role in the negotiation of remedies. (3) The Commission needs to strengthen its overall capacity for economic analysis in merger cases. In particular, DG Competition should appoint a Chief Economist").

[68] *See, e.g.,* John Temple Lang, former Commission Hearing Officer, who observed of the 2001 changes that "most of the benefit of [the recent reform] has been taken away again, by providing very clearly that the Hearing Officer is only intended to comment on procedure and not on substance. In other words, he may say whether the companies have been given a chance to speak, but not whether what they said was right or not. This does little or nothing to get over the objection that the Commission is both 'prosecutor' and 'judge.'" Qtd. by Mark Griffiths, Is the Commission Toughening Its Stance on Mergers?, The European Lawyer, July-September 2001, p. 13.

partly in response to these criticisms, an expedited or "fast-track" procedure was introduced by the Court of First Instance that may be used for merger cases. Certain commentators, including the President of the Court of First Instance, went as far as to suggest that the Commission might consider handing over its authority to block mergers to the Court of Justice.[69]

[d]—2002-2003: The Years of Reckoning and Reform. At the end of 2001, the Commission adopted a Green Paper on the review of the Merger Regulation (the "Green Paper").[70] Announcing its publication, Commissioner Monti stated that "the time has come to look at whether more mergers should benefit from the one-stop review and to adapt the rules to the realities of an increasingly globalised business environment and to an enlarging Union."[71] The Green Paper's stated ambition was to propose changes to the Merger Regulation that "meet the challenges posed by global mergers, monetary union, market integration, enlargement and the need to cooperate with other jurisdictions."[72] (The Commission subsequently received over 120 written submissions on the Green Paper.[73])

The Green Paper focused on four principal areas:[74] (1) the Merger Regulation's thresholds, where the Commission proposed reforming the jurisdictional provisions of the Merger Regulation to extend the Commission's exclusive competence to review transactions that fell below the existing thresholds, but were reportable in three or more Member States;[75] (2) the

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69 *See* David Lawsky, Interview with Judge Bo Vesterdorf, President of the Court of First Instance, Reuters News Service, September 19, 2002 ("Bo Vesterdorf, President of the EU Court of First Instance, told Reuters in an interview that the Commission would do well to look at the U.S. system, where the federal government needs court approval to stop a merger…. In the cautious phrasing of a jurist, Vesterdorf said, 'The Commission might consider whether the sole responsibility to prohibit mergers should remain with the Commission, or whether one should change the system into something like the U.S. system.' In the United States, he noted, 'if (a merger) is to be prohibited, (the government) must to go court.'").

70 Green Paper on the Review of Council Regulation 4064/89, COM(2001) 745/6 final, http://europa.eu.int/comm/competition/mergers/review/.

71 Mario Monti, Commission Launches Wide-Ranging Discussion on Reform of Merger Control Regime, Commission Press Release IP/01/1795 of December 11, 2001.

72 Green Paper, p. 6.

73 *See* Submissions Received on the Green Paper on the Review of Council Regulation (EEC) No. 4064/89, http://www.europa.eu.int/comm/competition/mergers/review/comments.html.

74 Other matters dealt with in the Green Paper included the joint referral of concentrations to the Commission; the concept of "concentration;" the simplified procedure process; enforcement issues; due process; and checks and balances.

75 Green Paper, para. 59. The Green Paper proposed switching to an effects-based test, under which the Commission would have automatic jurisdiction over transactions that would otherwise require notification under three or more national regimes. The rationale for this proposal is that, for such cases,

referral of concentrations to Member State authorities, where the Green Paper proposed simplifying the requirements for referral requests made by national competition authorities;[76] (3) the substantive test of the Merger Regulation, where the Green Paper invited a "thorough debate" on the respective merits of the dominance test of the Merger Regulation and the substantial lessening of competition ("SLC") test applied in certain other jurisdictions, including the United States, Canada, and Australia;[77] and (4) various procedural provisions of the Merger Regulation, where, to take account of criticism that notifying parties may in certain situations have insufficient time to present remedies, the Green Paper proposed a "stop-the-clock" provision to introduce greater flexibility into the time limits for proffering commitments.[78]

The relatively modest package of measures envisaged in the Green Paper and its essentially cautious approach to change were comprehensively undermined by three judgments of the Court of First Instance rendered in 2002 that annulled prohibition decisions adopted by the Commission in 1999-2001 (*i.e.*, *Airtours*, *Schneider*,[79] and *Tetra Laval*[80]). These judgments, two of which were conducted under the Court's fast-track procedure (*Schneider* and *Tetra Laval*), were scathing in their criticism of the Commission's appreciation of the facts and treatment of evidence. (By way of example, the Court in *Airtours* undertook a detailed factual analysis that identified "errors, omissions and inconsistencies of utmost gravity."[81]) The Court's judgments received wide coverage in the media and caused the Commission to conduct a swift review of the

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the Commission's powers of investigation and enforcement action are "more appropriate than the more limited means available to the Member States." Green Paper, para. 17.

76 Green Paper, paras. 69-83. In essence, the requesting national regulator would no longer need to show that the concentration might be expected to create or strengthen a dominant position and could instead motivate a request for a reference by making a "substantiated claim of effect on competition in a distinct market within the Member State." Green Paper, para. 81.

77 Green Paper, paras. 159-179. The Green Paper noted that there are "many similarities between the dominance test and the SLC-test" and that the vast majority of cases dealt with under both tests have revealed "a significant degree of convergence in the approach to merger analysis." Green Paper, para. 162.

78 Green Paper, para. 213. The "stop-the-clock" period would operate for a short period (*e.g.*, 20-30 working days) at the request of the parties. In the case of commitments offered during phase I, the Commission would have discretion whether to accept such a request. The Commission reasoned that it would be inefficient to use more than the current six weeks for cases where there was no possibility for adopting an authorization decision, even on the basis of a new or substantially revised proposal.

79 Schneider Electric SA v. Commission ("*Schneider*"), Case T-310/01, judgment of October 22, 2002 (not yet reported).

80 Tetra Laval B.V. v. Commission ("*Tetra Laval*"), Case T-5/02, judgment of October 25, 2002 (not yet reported).

81 *Airtours, supra*, para. 404.

underlying weaknesses in its application of the Merger Regulation.[82] Immediately following publication of the Court's judgment in *Tetra Laval*, Commissioner Monti conceded that "our record in the merger area is less glorious after these Court rulings."[83]

Following the Court's judgments in *Airtours*, *Schneider*, and *Tetra Laval*, the Commission acknowledged that "the system put in place in 1990 [was] showing some signs of strain"[84] and recognized that a "radical"[85] package of measures was needed to allay criticism, ensure that future decisions would be based on firm evidence and solid investigative techniques that could be tested against "the cold metal of economic theory,[86] and maintain the existing institutional framework in which the Commission approves or prohibits mergers. 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 that originally envisaged."[87]

On December 11, 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 [EU]."[88] The package included a proposal for

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82 *See, e.g.*, Francesco Guerrera and Guy de Jonquières, 'Something Is Rotten Within Our System,' Financial Times, October 28, 2002 ("The European Union's top economic policemen have been put on trial – and found guilty. Three times in five months, European Commission vetos of high-profile corporate mergers have been overturned by the EU's second highest court. The unprecedented defeats, coupled with scathing reprimands by the court, are more than just a crushing blow for Mario Monti, Europe's competition commissioner, and his elite team of enforcers. By cutting the Commission down to size, the Court of First Instance – the lower chamber of the Luxembourg-based European Court of Justice – has sparked the beginning of a revolution in the way the EU regulates mergers").

83 Qtd. in European Court Deals Crushing Blow to Monti's Merger Policy, The Independent, October 25, 2002.

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

85 Philip Lowe, Director-General for Competition, Future Directions for EU Competition Policy, International Bar Association, Fiesole, Italy, September 20, 2002 ("we will propose radical changes in areas where radical changes are needed"). Available at http://europa.eu.int/comm/competition/speeches/text/sp2002_034_en.pdf.

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

87 Mario Monti, Merger Control in the European Union: A Radical Reform, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, November 7, 2002 (Commission Press Release SPEECH/02/545). *See too* Mario Monti, Competition Enforcement Reforms in the EU: Some Comments by the Reformer, Georgetown University, Washington D.C., April 4, 2003 ("[t]here is no doubt that we deepened some of [the] reforms after the three annulments of merger decisions by the [Court of First Instance] last year. While dealing with different problems, the three decisions have a point in common: they have set a high standard of proof for the Commission to match when blocking a deal").

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

a wide-ranging revision of the Merger Regulation (the "Draft Merger Regulation"),[89] a Draft Horizontal Mergers Notice,[90] and Draft Best Practices Guidelines.[91] Announcing the proposals, Commissioner Monti predicted that "[t]he reforms will significantly improve our merger control system making it, I believe, a model to be emulated worldwide."[92] Following extensive discussion with Member State competition agencies, the Commission's proposals were, with only relatively minor changes, adopted by the Council in late 2003.[93] The changes, which will come into force on May 1, 2004,[94] have seven principal elements.

First, having decided against further reducing the Merger Regulation's jurisdictional thresholds on the ground that they "continue to function effectively as proxies for those cases that are most appropriately dealt with at the Community level,"[95] the EU introduced reforms intended to simplify the allocation of cases between the Commission and Member States and to reduce the incidence of multiple filings through a streamlined system of referrals.[96] The overall

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89 Proposal for a Council Regulation on the control of concentrations between undertakings, COM(2002) 711. As noted at the outset, agreement was reached on a recast version of the Merger Regulation in November 2003 (*see* Commission Press Release IP/03/1621 of November 27, 2003).

90 Draft Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2002 O.J. C331/03. This Notice was adopted in early 2004. Commission Notice on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. C31/05. It is available on the Commission's website at http://europa.eu.int/comm/competition/mergers/legislation/regulation/.

91 DG Competition Best Practice Guidelines on the conduct of EC merger control proceedings, http://europa.eu.int/comm/competition/mergers/others/best_practices_public_cons.pdf. These Guidelines were adopted in January 2004 and are available at http://europa.eu.int/comm/competition/mergers/ legislation/regulation/).

92 Mario Monti, Commission Adopts Comprehensive Reform of EU Merger Control, Commission Press Release IP/02/1856 of December 11, 2002.

93 Commission Press Release IP/03/1621 of November 27, 2003.

94 Also on May 1, 2004, Council Regulation No. 1/2003 of December 16, 2002 (the "Modernization Regulation") on the implementation of Articles 81 and 82 will come into force. The Modernization Regulation, which replaces Council Regulation No. 17/62 of February 6, 1962, will effect a very significant change in the application of Articles 81 and 82 across the EU. Its principal provisions include: (1) ending the system of notification of agreements to the Commission for exemption under Article 81(3); (2) empowering national authorities and courts to apply Article 81(3) directly; (3) increasing the Commission's powers of investigation and enforcement; and (4) establishing a network for coordination and information exchange between national authorities, national courts, and the Commission.

95 Explanatory Memorandum to Draft Merger Regulation, para. 11.

96 Mario Monti, Commission Adopts Comprehensive Reform of EU Merger Control, Commission Press Release IP/02/1856 of December 11, 2002 (The Commission proposal envisages that "[a] simplification of the system for the referral of merger cases from the Commission to Member State

objective of the reforms is to use the rules relating to the referral of cases between the Commission and national agencies as "an effective corrective mechanism in the light of the principle of subsidiarity [that]…take[s] due account of legal certainty and the 'one-stop-shop' principle."[97] The principal change gives companies the possibility to request "one-stop" review by the Commission, thereby avoiding the need to notify the same transaction to a number of different national agencies. The modalities of the Commission's proposal are, however, complex and their practical implications will likely emerge only with experience.

Second, the Commission clarified the law in three significant ways:

(1) Although the Commission declined to adopt an SLC test, it recast the substantive test under the Merger Regulation in an effort to capture horizontal mergers in oligopolistic markets that do not create a risk of tacit collusion or create a position of single firm dominance, but nevertheless raise market power concerns due to the loss of competition between the merging firms.[98] This clarification is intended to address any "enforcement gap" between the dominance and SLC tests, and to ensure that the EU and U.S. agencies apply effectively the same analytical framework. The Commission has indicated that "a significant impediment to effective competition [will] generally result from the creation or strengthening of a dominant position."[99] As a practical matter, the Commission has not to date challenged mergers of this kind and a broad application of the Merger Regulation to transactions meeting these criteria could imply regulatory intervention to address unilateral effects in situations where the post-transaction market shares are below those challenged to date.

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competition authorities for investigation, and *vice versa*, is also foreseen. This reform will seek to ensure, consistent with the principle of subsidiarity, that the best-placed authority should examine a particular transaction, while at the same time seeking to reduce the incidence of 'multiple filing', *i.e.* notification to numerous competition authorities within the EU").

97 Recital 11, Merger Regulation.

98 *See* Recital 25, Merger Regulation ("In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition.… [I]n the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market").

99 Recital 26, Merger Regulation.

(2) With respect to collective dominance, the Commission accepted the analytical framework applied by the Court of First Instance in *Airtours*, which identified three cumulative conditions that must be met to support a finding of collective dominance: (i) in light of the characteristics of the relevant market, each member of the oligopoly must know how the other members are behaving in order to be able to adopt the same policy; (ii) members of the oligopoly must be deterred over time from departing from the policy thus adopted; and (iii) that policy must be able to withstand challenge by competitors and customers. In affirming a notion of collective dominance based on a demonstrable risk of sustainable tacit collusion, the Commission has aligned its approach in the United States.

(3) The Commission recognized that assessments made under the Merger Regulation should "take account of any substantiated and likely efficiencies put forward by the undertakings concerned" as "[i]t is possible that the efficiencies brought about by the concentration [may] counteract the effects on competition."[100]

Third, with respect to the substantive assessment of mergers, the Commission adopted its long-awaited Horizontal Mergers Notice. This Notice, which is viewed as being "one of the cornerstones of the comprehensive reform of [EU] merger control,"[101] is intended to explain the Commission's enforcement standards, "provide a sound economic framework for the assessment of concentrations,"[102] and give the Commission's decision making "new transparency and clarity."[103] The Horizontal Mergers Notice explains how mergers should be analyzed and identifies the factors that may mitigate an initial finding of competitive harm. The adoption of the Horizontal Mergers Notice is intended to create a more predictable climate for the assessment of reportable transactions and to achieve benefits in the EU similar to those achieved by the implementation in 1982 of the first version of the U.S. Horizontal Merger Guidelines. (The Commission has announced its intention to adopt, at a later stage, guidance on its approach to the appraisal of vertical and conglomerate mergers.) Because of the similarities between the Horizontal Mergers Notice and the 1992 U.S. Horizontal Merger Guidelines, EU merger enforcement is expected to become more closely aligned with U.S. merger control.

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100 Recital 29, Merger Regulation.

101 Commission Press Release IP/03/1744 of December 16, 2003 available at http://www.europa.eu.int/rapid/start/cgi/guesten.ksh. ("This is the first time the Commission sets out comprehensively the analytical approach it takes when assessing the competitive impact of mergers between competing firms. By providing clear and detailed guidance to the legal and business communities as to whether a deal is likely to face regulatory problems or not they will enhance the predictability of merger control in Europe").

102 Recital 28, Merger Regulation.

103 Philip Lowe, Developments in EC Competition Policy, Richards Butler Annual Competition Forum, London, November 29, 2002, available at http://europa.eu.int/comm/competition/speeches/text/sp2002_044_en.pdf.

Fourth, following the Court's judgments in *Airtours*, *Schneider*, and *Tetra Laval*, the Commission recognized that "the level of proof required by the [Court of First Instance] is high, which implies that the Commission's enquiries should be more extensive and detailed than at present."[104] Accordingly, with a view to "strengthen[ing] further the economic underpinnings of [its] competition analysis" and permitting "more rigorous testing of the economic models we apply in our investigations," the Commission undertook an "across-the-board increase in the economic expertise in our case teams."[105] In July 2003, the Commission appointed its first Chief Economist, Lars-Hendrik Röller,[106] to provide methodological guidance on economic policy, general guidance in individual cases, and detailed guidance in complex cases, in particular those requiring sophisticated quantitative analysis.[107] Professor Röller reports directly to the Director-General for Competition and is supported by around 10 economists.

Fifth, in an effort to improve internal decision making, the Commission implemented a range of measures, including: (1) deepening the nature and extent of Member State involvement;[108] (2) giving additional resources to and expanding the mandate of the

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[104] Mario Monti, EU Competition Policy, Fordham Annual Conference on International Antitrust Law & Policy, New York, October 31, 2002 (Commission Press Release SPEECH/02/533).

[105] Philip Lowe, Future Directions for EU Competition Policy, International Bar Association, Fiesole, Italy, September 20, 2002 ("[T]his economic function needs in our view to be closely associated with the day-to-day work of our case teams, giving guidance on analytical methodology, giving upstream advice on the direction of investigations and direct assistance in the most complex cases. An independent opinion on the economic aspects of a case should also be available to the Commissioner and the Commission and should be in the file"). Available at http://europa.eu.int/comm/competition/speeches/text/sp2002_034_en.pdf.

[106] Commission Press Release IP/03/1027 of July 16, 2003.

[107] Mario Monti, EU Competition Policy, Fordham Annual Conference on International Antitrust & Policy, New York, October 31, 2001 (Commission Press Release SPEECH/02/533) ("Obviously this new role will have to be defined carefully. I believe it needs to be closely associated with the day-to-day work of our case teams, giving guidance on analytical methodology, advice on the direction of investigations and direct assistance in the most complex cases. At the same time, it will provide to the Competition Commissioner…an independent opinion on the economic aspects of a case before he proposes a final decision to the Commission").

[108] *See*, *e.g.*, Philip Lowe, The Interaction Between the Commission and Small Member States in Merger Review, The Competition Authority Merger Review Day, Dublin, October 10, 2003 ("[a]t present we are looking at how the functioning of the Advisory Committee on Concentrations might be improved and strengthened. Some Member States have taken the opportunity of the ongoing reforms in the area of EU merger control to call for a strengthening of the Advisory Committee. Particular concern has been expressed about the short time within which the Advisory Committee must absorb key documentation relating to individual merger cases. There have also been some calls for the meetings to be conducted more effectively and for the Committee's opinion to be rendered more transparent"). Available at http://europa.eu.int/comm/competition/speeches/ text/sp2003_037_en.pdf.

Commission's Hearing Officers,[109] the independent officials charged with ensuring that companies' rights of defense are respected;[110] (3) establishing a unit devoted to scrutiny and litigation;[111] (4) dissolving the Merger Task Force, the cadre of around 60 specialized officials established in 1990 to apply the Merger Regulation, and progressively integrating those officials into the various sectoral Directorates of the Directorate-General for Competition;[112] and (5) establishing and systematically using a peer-review "panel" system, independent of the case team. In regard to the last proposal, panels of experienced officials are now routinely appointed for all phase II investigations to scrutinize the case team's conclusions with a "fresh pair of eyes" at key points of the inquiry. The Commission's intention is that such panels should become "a real and effective internal check on the soundness of the investigators' preliminary conclusions."[113] This initiative falls short of proposals intended to divorce the initial investigative team from the group of officials assigned to carry out in-depth investigations.[114]

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109 The Terms of Reference of Hearing Officers in Certain Competition Proceedings, Commission decision of May 23, 2001 (2001 O.J. L162/21). Three main changes were effected: (1) the Commission accepted that Hearing Officers need no longer be Commission officials and would in future report directly to the Competition Commissioner; (2) Hearing Officers were empowered to intervene before the submission of a draft decision to the Competition Commissioner; and (3) the Hearing Officer's report would in future be made available to each national competition authority.

110 *See*, *e.g*., Philip Lowe, Review of the EC Merger Regulation – Forging a Way Ahead, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, November 8, 2002, available at http://europa.eu.int/comm/competition/speeches/text/sp2002_043_en.pdf. ("[T]he more resources that the Hearing Officers have at their disposal, the greater the likelihood is that they will be able to exercise their mandate in the truly independent way that their mandate implies").

111 *See*, *e.g*., Philip Lowe, Review of the EC Merger Regulation – Forging a Way Ahead, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, November 8, 2002 ("[t]his 'Scrutiny Office' [will] follow cases throughout their development and organise panels at key moments, for example before statements of objection are issued and on final decisions in the second phase of a merger investigation").

112 Commission Press Release IP/03/603 of April 30, 2003.

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

114 *See, e.g.*, Kai-Uwe Kühn, Reforming European Merger Review: Targeting Problem Areas in Policy Outcomes, The Use of Economics in EC Competition Law, IBC Conference, Brussels, January 30, 2002, p. 19 ("I would suggest to either split the Merger Task Force into an investigative and a decision making branch or, alternatively, leave only investigative powers to the MTF and leave decision making to another entity in DG Competition. What is crucial is that both branches have the same level in the organizational hierarchy. This separation could leave much of the existing structure in place. Case teams would be conducting phase 1 of the merger and could decide whether to start a more in depth investigation as phase 2. If phase two were reached the case team would investigate further and either clear the merger or put together the statement of objections. From this point onwards the control over the process would shift to the decision making body. It would receive the parties' responses to the statement of objections, conduct the oral hearing and then write a decision on the basis of the submitted papers, the

Also, these panels operate "behind closed doors" and would therefore lack transparency. The Commission's initiative has nevertheless introduced a degree of internal oversight that some believe had diminished in recent years.

Sixth, the Commission introduced greater flexibility into the investigative timetable and strengthened notifying parties' rights of defence. As to the investigative timetable, two main changes were adopted: (1) merging parties may now notify transactions before signing definitive agreements or announcing a public bid, provided they can "satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete;"[115] and (2) the investigative timetable in phase II cases may now be extended by up to 35 working days.[116] With respect to the rights of notifying parties, the Commission adopted Best Practices Guidelines dealing with "the day-to-day handling of merger cases and the Commission's relationship with the merging parties and interested third parties, in particular concerning the timing of meetings, transparency, and due process in merger proceedings."[117] Two significant new measures were introduced: (1) the Commission intends providing notifying firms with "key documents," *i.e.*, complaints and substantiated third party submissions, at an earlier point in the investigative timetable than had previously been the Commission's practice;[118] and (2) the Commission intends formalizing its practice of organizing "state-of-play" meetings at various points in the investigative process,[119] as well as "triangular" meetings involving third parties.[120]

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oral hearing, and the inclusion of any advisory bodies that would be maintained. I would also give the decision making body the power to consult with external expert advice at some point in the procedure").

115 Recital 34, Merger Regulation. *See too* Art. 4(1) Merger Regulation. This provision is consistent with the International Competition Network's Recommended Practices for Merger Notification Procedures, point III.A, at http://www.international competition network.org/ 2003_practices.pdf.

116 *See* Art. 10(3), Merger Regulation.

117 Commission Press Release IP/03/1744 of December 16, 2003.

118 Best Practices Guidelines, paras. 45-46. *See too* Philip Lowe, Future Directions for EU Competition Policy, International Bar Association, Fiesole, Italy, September 20, 2002 ("As in the field of antitrust, it should be standard practice for us to provide notifying parties with access to submissions which contest their own market definitions or competitive assessment").

119 Best Practices Guidelines, paras. 30-37. "State-of-play" meetings are envisaged at five points in the investigative process: (1) where it becomes clear during phase I that the Commission is likely to have "serious doubts" and that it may be possible to offer remedies capable of addressing those concerns during phase I; (2) within two weeks of phase II having been opened; (3) before the Commission issues a statement of objections; and (3) following the parties' response to the statement of objections and the oral hearing; and (4) following a meeting of the Advisory Committee, which comprises representatives of Member State agencies.

120 Best Practices Guidelines, paras. 38-39.

Seventh, recognizing that "a proper functioning judicial review is essential to ensure that we maintain a high level of quality in our decisions,"[121] the Commission underlined its willingness to work with the Community courts "to speed up the delivery of judgments, particularly when the merging parties are keen to keep a deal alive pending the outcome of the appellate process."[122] To that end, the Commission has expressed the hope that appeals in merger cases might be further accelerated and has started to explore the notion of a specialized chamber for competition matters within the Community courts, as well as other measures intended to ensure a speedier review of Commission decisions.[123] At the same time, the Commission has strongly resisted adopting a judicial-based system similar to that used in the United States. Under such a system, the Commission would act as a prosecuting agency (in the same way as the Department of Justice and Federal Trade Commission in the United States): if the Commission found that a merger raised serious competition concerns, it would have to take the case to a court, where the decision and power to enjoin a merger would lie with the court. In addition to perhaps requiring amendment of the EC Treaty, such a system would "fundamentally alter the current working of the Commission and the Merger Regulation."[124]

[7]—Future Challenges

A wide array of jurisdictional, substantive, and procedural issues are likely to arise following the entry into force of the recast Merger Regulation on May 1, 2004.

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121 Mario Monti, The Main Challenges of a New Decade of EC Merger Control, EC Merger Control 10th Anniversary Conference, Brussels, September 14-15, 2000 (Commission Press Release SPEECH/00/311).

122 Mario Monti, Europe's Merger Monitor, The Economist, November 9, 2002. *See too* Commission Press Release IP/02/1856 of December 11, 2002 ("The Commission will continue to push for speedy review by the Courts of appeals in merger cases. The use by the Court of First Instance of a fast-track procedure in recent cases already represents considerable progress, but the goal should be to ensure that judicial review takes place in a period of time that makes sense for all commercial transactions").

123 Mario Monti, Commission Adopts Comprehensive Reform of EU Merger Control, Commission Press Release IP/02/1856 of December 11, 2002 ("The Commission, in parallel with the discussions in the Council of Mi[ni]sters on the revision of the Merger Regulation, will explore with Member States several options aimed at ensuring speedier judicial review in merger cases. The Commission will also pursue contacts with the [Community courts] on this matter").

124 The Review of the EC Merger Regulation, 32nd Report of the House of Lords Select Committee on the European Union, HL Paper 165, Session 2001-02, para. 239 ("This is an important debate that raises questions of justiciability, institutional balance and resources. Whether a court is better suited to analysing and taking decisions on the economic issues arising in merger cases is arguable. Further reflection is needed before any such fundamental change is proposed. If the EU were to give consideration to such a move, it would require a more comprehensive exploration of the issues involved than was instigated by the Green Paper. Such an exercise would have to include a more extensive consultation and a review of the experiences of other jurisdictions").

Jurisdictionally, the Commission's decision to retain the pre-existing turnover thresholds could, particularly in light of the simultaneous accession to the EU of a further 10 Member States,[125] result in a potentially material increase in the number of cases falling within the Commission's jurisdictional remit. That number may increase still further as a result of the new rules permitting companies, in cases not having a Community dimension but capable of being reviewed under the competition laws of at least three Member States, to petition the Commission to take jurisdiction over those transactions. It is to be hoped that this additional flexibility in allocation of jurisdiction will facilitate the obtaining of competition approval in multi-jurisdictional cases, and will not result in undue delay or administrative complexity.

Substantively, the recast Merger Regulation develops the current dominance standard. In future, mergers will be prohibited where they "would significantly impede effective competition." This may arise particularly through the creation or strengthening of a dominant position, as before, but may also have consequences extending beyond the oligopoly "enforcement gap" that the reform is designed to address. Although the Commission takes the view that the substantive test adopted in 1989 was sufficiently broad to capture transactions of the kind that are now expressly identified, no such transaction has in fact been challenged to date and it will be interesting to see whether the Commission uses the recast substantive test to oppose transactions that do not give rise to dominance, but which have unilateral effects in concentrated markets. Should the Commission proceed against such transactions, the new standard might in practice be considered equivalent to an SLC test.

Procedurally, the extensions to the Commission's current deadlines at the request of notifying parties will lead to a general lengthening of the merger clearance timetable in most phase II cases. The practical likelihood is that these extensions will become semi-automatic. The cost and uncertainty that may result from these additional delays will need to be carefully balanced against the advantages of the more rigorous and disciplined examination of evidence that the proposals are designed to achieve. In addition, the Commission staff will need to discipline themselves to ensure that at least part of the additional time permitted under the recast Merger Regulation is made available to the notifying parties so that they might more effectively address the Commission's concerns within the prescribed timetable.

In sum, notwithstanding the breadth and ingenuity of the reform package, significant challenges remain if the Commission is to ensure that the errors exposed by the Community courts in *Airtours, Schneider*, and *Tetra Laval* are not repeated and that future decision making is well grounded in fact, law, and sound economics.

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[125] Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.