The Merger Control Review

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Editor

Ilene Knable Gotts

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Chapter 16

EUROPEAN UNION

Mario Todino, Piero Fattori, Alberto Pera[1]

I INTRODUCTION

The European Union ('EU') merger control regime was first introduced in 1989, with the adoption of the EC Merger Regulation. In 2004, an important reform introduced a new substantive test and a number of procedural changes. The current regime is governed by Regulation No. 139/2004[2] (the 'Merger Regulation' or 'EUMR'), Regulation No. 802/2004[3] (the 'Implementing Regulation') and a number of Notices and Guidelines issued by the European Commission (the 'Commission').

i The main principles underlying the EUMR

The EUMR system is based on three pillars: (1) one-stop-shop, according to which the Commission has exclusive jurisdiction to assess a merger having an EU dimension, while any other National Competition agency ('NCA') of the EU is precluded from reviewing the transaction; (2) *ex ante* control, meaning that mergers having an EU dimension have to be notified and assessed by the Commission prior to their implementation; (3) expedited review, (i.e., the Commission is required to make its appraisal of the concentration within short and mandatory deadlines) (see below).

1 Mario Todino, Piero Fattori and Alberto Pera are partners at Gianni, Origoni, Grippo, Cappelli & Partners. The authors wish to acknowledge the contribution of Elisabetta Botti and Annagiulia Zanazzo, associates at the firm.

2 Council Regulation No. 139/2004 of 20 January 2004 on control of concentrations between undertakings, OJ L 24 of 29 January 2004, p. 1.

3 Commission Regulation No. 802/2004 of 21 April 2004, implementing Council Regulation No. 139/2004 on the control of concentrations between undertakings ('Implementing Regulation'), OJ L 133 of 30 April 2004, p. 1.

ii Notion of concentration

Under the EUMR, notifiable concentrations are all those mergers or acquisitions of all or parts of undertakings involving a change of control on a lasting basis.

'Control' under EU Competition Law is defined in a very broad way as the possibility by a company of exercising a 'decisive influence' over another company. Such decisive influence consists of the power to determine or to block the adoption of the most important strategic decisions concerning the commercial behaviour of a company, such as the determination of the budget, the business plan, major investments and the power to appoint senior management. Control can be established on a *de jure* or *de facto* basis and it can be acquired through an acquisition of shares, assets, on a contractual basis or by a purely economic relationship. For instance, a situation of economic dependence resulting from long-term supply agreements coupled with structural links could give rise to control over an undertaking.[4]

Change of control on a lasting basis

The EUMR only deals with transactions bringing about a lasting structural change in the market. Operations that are purely transitory thus fall outside the scope of the EUMR. Accordingly, when several undertakings jointly acquire another company only with a view to dividing the acquired assets among themselves, the Commission considers that the first transaction does not constitute a concentration.[5]

Similarly, where an operation envisages a joint control for a start-up period not exceeding one year followed by a conversion to sole control, the first acquisition can be regarded as purely transitory and therefore not amounting to a concentration.[6]

The same issue arises in the case of warehousing operations, where a financial investor temporarily acquires an undertaking on behalf of an ultimate acquirer. In such circumstances, the Commission only examines the acquisition of control by the ultimate acquirer, while the temporary acquisition by the interim buyer does not amount to a concentration.[7]

Acquisition of sole control

In the simplest cases, sole control occurs when an undertaking acquires the majority of the share capital of another undertaking and symmetrically the majority of voting rights in the shareholders' meetings and the majority in the board of directors.

Sole control also arises when a minority shareholder owns shares that confer special rights to determine the strategic decisions on the target undertaking.

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4 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings ('Jurisdictional Notice'), Paragraph 20.

5 Provided that the following conditions are met: i) the subsequent break-up is agreed in a legally binding way; ii) there is no uncertainty as to the circumstance that second step will take place within a period not exceeding one year; iii) the second-step operations are concentrations according to the EUMR (Jurisdictional Notice, Paragraphs 30–33).

6 Jurisdictional Notice, Paragraph 34.

7 Jurisdictional Notice, Paragraph 35.

In certain circumstances, a minority shareholder may also be deemed to have sole control on a *de facto* basis, in particular when such shareholder is likely to achieve a majority at the shareholders' meetings given the level of its stake and the evidence resulting from the presence of other shareholders in the previous years' meetings[8].

Sole control also occurs when one minority shareholder acquires the power to veto the strategic decisions of a target company, without being able on its own to impose such decisions (negative control).

Acquisition of joint control

Joint control occurs where two or more undertakings can both exercise a decisive influence on the target enterprise. This situation typically arises when two or more shareholders have the same voting rights or the same veto rights relating to strategic decisions. In addition, even in the absence of specific veto rights, two or more minority shareholders may acquire joint control of a company when they agree on how to exercise their voting rights by virtue of an express or tacit agreement, or as a matter of fact, because of 'strong common interest'. Joint control is characterised by the possibility of a deadlock situation resulting from the fact that two or more companies share the same powers on the target's strategic decisions. It follows that these companies have to find an agreement in determining the commercial policy of the target undertaking and they are therefore required to cooperate.[9]

When the minority shareholders do not have – neither by virtue of agreements nor *de facto* – control of the undertaking, and the majority is represented by possible different combinations of minority shareholders (shifting majorities), a concentration does not materialise.

Change in the nature of control

A concentration also arises when changes in the nature of control take place. However, mere changes in the level of shareholdings of the same controlling shareholders does not amount to a change in the nature of control – and therefore to a notifiable concentration.

Full-function joint ventures

The constitution of a joint venture performing all the functions of an autonomous economic entity on a lasting basis ('full function-joint venture') is also a concentration within the meaning of the EUMR (Article 3.4). In order to be deemed full-function, the joint venture must have management dedicated to its daily activities and access to sufficient resources including finance, staff and assets to conduct its business independently on the market.

A joint venture is not full-function if it only takes over one specific function within the parents' business activities, without having independent access to the market (e.g., a production joint venture). In addition, when the parent companies have a strong presence as either suppliers or purchasers, the joint venture may be considered

8 Jurisdictional Notice, Paragraph 59.

9 Jurisdictional Notice, Paragraph 63.

not sufficiently autonomous, unless the dependence on the parents is limited to a start-up period which should not normally exceed three years. Normally, the Commission considers joint ventures selling more than 50 per cent of their output on the market to be full-function.

Finally, in order to be full-function the joint venture must be established on a lasting basis. Accordingly, if a joint venture is established for a finite period, for example in order to carry out a specific project, it may not be considered long-lasting.

Exceptions

The following operations do not constitute a concentration[10]: the acquisition of securities by a financial or credit institution, to the extent the securities are acquired with a view to their resale, voting rights are not exercised other than to protect the investment and the securities are sold within one year; the acquisition of control by an office holder in a liquidation or winding-up procedure; and acquisitions of control carried out by financial holding companies whose sole purpose is to acquire holdings in other undertakings without involving themselves in the management of these undertakings. These exceptions have to be interpreted restrictively and have rarely been applied in practice.

iii Commission's jurisdiction: EU turnover thresholds

The Commission's jurisdiction is established based on the fulfilment of one of the two alternative sets of turnover thresholds set out by the EUMR, namely if the parties to the concentration either:

a have a combined worldwide turnover of more than €5000 million, while at least two of the parties have each an EU aggregate turnover of more than €250 million, unless each of the parties achieves more than two-thirds of its aggregate EU-wide turnover within one (and the same) Member State'; or

b have a combined worldwide turnover of more than €2500 million; their combined aggregate turnover exceeds €100 million in each of at least three Member States and in each of those three Member States the revenues of each of at least two of the merging parties exceeds EUR 25 million; and the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million, except where each of the merging parties achieves more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

For the purpose of the calculation of the relevant turnover, only net revenues (excluding rebates, VAT and other turnover taxes) generated in the last audited financial year are taken into account. On the acquiring side, the whole of the turnover of the group to which the party belongs should be computed, while on the seller's side only the turnover generated by the target company (the sold business) has to be considered. As to the geographic allocation of the turnover, the general rule is that turnover should be attributed to the place where the customer is located.

10 EUMR, Article 3.5.

iv Reallocation of cases: the referral procedures

The above described jurisdictional rules based on turnover related criteria are complemented with a referral mechanism enabling cases to be reattributed by the Commission to Member States of the EU and vice versa upon request and provided that certain criteria are met. The objective of the referral system is to achieve a more rational system of allocation of cases, by enabling the Commission to assess those concentrations without an EU dimension that have nonetheless a significant cross-border impact, while NCAs should deal in principle with concentrations having a EU dimension whose impact on competition is mostly limited to their domestic market. Such referrals can take place either prior to any filing upon the parties' request, or pending assessment by the Commission or the competent NCAs, upon requests by one or more NCAs or the Commission itself.

Conditions for referral from the Commission to the NCAs

As regards referrals from the Commission to a NCA, under Article 4.4 EUMR, prior to notification, the parties to a concentration having an EU dimension may request that the Commission refers the case to a NCA on the ground that the impact on competition is mainly confined to a domestic market or narrower, upon which that NCA is competent[11]. Consent of both the NCA involved and the Commission is needed in order to have the case referred to the NCA.

Moreover, referrals can also be triggered by a request filed by a NCA to the Commission pending the assessment of the latter, on the ground that the concentration threatens to affect competition in a market within a Member State that has all the characteristics of a distinct market.[12]

Conditions for referral from the NCAs to the Commission

As regards referrals from NCAs to the Commission in a pre-filing phase, only transactions that are reviewable by at least three Member States of the EU (so called multiple filings) can be reattributed to the Commission following the parties' requests. Consent by all the

11 The Commission transmits the parties' request for referral to the NCA concerned without delay; within 15 days from the date of receipt of the the request, the NCA shall express its agreement or disagreement as regards the request to refer the case. When the NCA does not take such a decision within this period, it is deemed to have agreed. If the Member State does not disagree and the Commission agrees with the parties that the concentration would significantly affect competition in a distinct market, referral is made within 25 working days from the receipt of the request. The concentration will therefore be examined by one or more NCAs under national competition law.

12 See EUMR, Article 9. In this case, the referral request must be filed by the requesting NCA within 15 working days from receipt of the copy of the form CO that the parties have filed with the Commission. The Commission in turn has to take a decision within 35 working days from notification, or, where the Commission has launched an in-depth investigation, within 65 working days.

Member States competent to review the transaction is needed in order to have the case referred to the Commission.[13]

Post-filing, a concentration without an EU dimension may also be referred to the Commission upon the request of one or more Member States, on the ground that competition within the territory of the Member States involved may be significantly affected. Such type of referral typically involves cases having cross-border impact that would be best addressed at Community level by the Commission.[14]

II YEAR IN REVIEW

Between May 2011 and May 2012 (the 'reference period') a total of 331 transactions were notified to the Commission, of which 275 were cleared in Phase I and four were cleared in Phase I subject to remedies. Furthermore, the Commission examined 14 transactions in Phase II, of which three were cleared subject to remedies and one was prohibited.

i Prohibition decision

The most prominent case in the reference period is the Commission's prohibition decision of the merger between Deutsche Börse and NYSE Euronext,[15] almost one year after the prohibition of the merger between Olympic Air and Aegean Airlines.[16] The Commission defined the market very narrowly by placing exchanged and 'over-the-counter' (OTC) derivatives in two separate markets, and focusing on financial derivatives based on European underlyings. The Commission concluded on this basis that the merger would have created a near monopoly in the market for European financial derivatives globally traded on exchanges, and neither the efficiencies claimed, nor the commitments offered by the two companies[17], were deemed sufficient to remedy the competition concerns. In order to assess the likely effects of the merger, the Commission heavily relied on qualitative evidence, such as company internal documents and questionnaires sent to

13 The request is transmitted by the Commission to the competent national authorities which have to reply within 15 working days from receipt of the request. If at least one NCA vetoes the referral, the whole procedure collapses; as a result, all the NCAs competent to review the transaction retain their jurisdiction. On the contrary, if no NCA disagrees, the concentration is deemed to have a EU dimension and shall be notified to the Commission according to the EUMR. See EUMR, Article 4.5.

14 EUMR, Article 22.

15 Case M. 6166, 01.02.2012.

16 Case M. 5830, 26.01.2011.

17 The remedy package put forward by the parties consisted of: (1) a divestment of a part of Liffe's European single stock derivatives business, (2) access to the merged entity's clearing house for materially 'new' interest rate, bond and equity index derivatives contracts, and (3) a licence to Eurex's interest rate derivatives trading software. The Commission, based on the results of the market test, overall deemed the said commitments insufficient in scope, difficult to implement and unlikely to be effective in practice.

customers and competitors, whereas it did not engage in extensive econometric analysis. This casts a light on the critical role that is still played by qualitative evidence, despite the prominent space that quantitative economic analysis has taken in EU merger control cases over the past few years.

ii Phase II decisions with remedies

As regards the transactions cleared following an in-depth investigation, the Commission cleared with remedies the acquisition of Synthes by Johnson & Johnson ('J&J'),[18] both companies active in the area of orthopaedic medical devices, whose activities overlapped in particular in the areas of spinal care and orthopaedic trauma implants. In line with its most recent practice, in dealing with mergers involving differentiated products, the Commission's investigation focused on the issue of closeness of substitution, and came to the conclusion that the merger would remove J&J's most significant competitive constraint in a number of national markets in the EU. Another element that appears to bear significant weight in the Commission's analysis is the importance of entry barriers characterising the sector of medical devices: reputation and the reliability of trauma implants in the eyes of physicians are key to success and cannot be built overnight. The Commission was able to clear the transaction following J&J's commitment to divest its DePuy trauma business in the EEA.

The Commission also cleared with remedies the acquisition of ED & F Man, the second largest sugar trader and largest molasses trader worldwide, by Südzucker, the European largest sugar and molasses producer.[19] In order to address the competition concerns identified by the Commission in the market for sugar in Italy, the parties committed to divest ED & F Man's controlling stake into a raw cane sugar refinery operated through a joint venture with a third party (SFIR). An interesting aspect of the case is to do with the procedural safeguards that are needed in case the commitments affect third-party rights. According to the Commission's jurisdictional notice, the Commission should opt for an 'up-front buyer' solution where there are either considerable obstacles for a divestiture, such as third-party rights, or uncertainties as to finding a suitable purchaser, or where there are considerable risks of preserving the competitiveness of the business in the interim period until divestiture. Under the 'up-front buyer' procedure, the transaction can only be completed after the parties have entered into a binding agreement with a purchaser approved by the Commission. In this case, however, the Commission concluded that a standard divestiture process would be adequate, (i.e., the parties could implement the remedy (sell their controlling stake into the joint venture refinery) under an ordinary time frame while being allowed in the meantime to complete their transaction).

Another prominent case decided by the Commission in the relevant period was the acquisition by the leading engine manufacturer Caterpillar of MWM, a German maker of reciprocating engine generator sets[20]. Due to the significant horizontal overlap

18 Case M. 6266, 18.04.2012.

19 Case M. 6286, 16.05.2012.

20 Case M. 6106, 19.10.2011.

resulting from the merger, concerns were raised that the remaining competitors in the market for gensets may not exert a sufficiently strong constraint on the behaviour of the combined entity and that the latter may restrict access to the installation and servicing of its gensets. However, following an in-depth investigation, the Commission concluded that the combined entity's market position was unlikely to give rise to unilateral anti-competitive behaviour due to the presence of strong alternative suppliers and foreclosure was unlikely. Key to the unconditional clearance was the finding in the course of the investigation that other competitors competed more strongly than the merging parties between each other. This case is also interesting as inspections were carried out by the Commission at the premises of Caterpillar during the review of the transaction. Although the Commission hardly ever resorts to inspections in the context of its merger control enforcement powers, in this case inspections were instrumental to collect information (bidding data) crucial for the assessment of the merger. Inspections were also triggered by the suspicion of anti-competitive behaviour unrelated to the merger.

In the relevant period, two parallel mergers involving the market for hard disk drives (HDDs) were notified to the Commission within one day of each other: the acquisition of the HHDs business of Samsung by Seagate[21], and the acquisition of Viviti Technologies (a subsidiary of Hitachi) by Western Digital[22]. In such cases, the Commission (1) may either decide to opt for the 'combined approach', thereby assessing the effects on competition of both transactions simultaneously; or (2) it may apply the so-called 'priority rule', thereby assessing them separately, and taking into account the increased market consolidation resulting from the first transaction, only in the review of the second one. The latter approach was adopted in the review of *Seagate/Samsung* and *Western Digital/Viviti Technologies*. While both transactions were ultimately cleared, only the one that was given priority having been notified first (*Seagate/Samsung*) was cleared without remedies. Western Digital, on the contrary, in order to obtain the clearance had to divest its 3.5-inch HDD business to a third party approved by the Commission before the closing (an 'up-front buyer' remedy). The Commission considered that, after the approval of the first merger, the sector had already experienced significant consolidation.

iii Other relevant cases

In the reference period the Commission also reviewed a number of transactions involving leading players in the IT sector. The issue of interoperability between the merging parties' products and third-party competitors was at the core of the Commission's concerns in all these cases. *Intel/McAfee*[23], a merger between the worldwide leading manufacturer of computer processors and a developer of security software, raised conglomerate concerns resulting from the integration of operators active in two complementary markets. The Commission's theory of harm was that post-merger the new entity would have the ability and the incentive to reduce/degrade the interoperability of all other security software vendors with Intel processors. In particular, concerns were voiced that, post-merger, the

21 Case M. 6214, 19.10.2011.

22 Case M. 6203, 23.11.2011.

23 Case M. 5984, 26.01.2011.

new entity could implement a 'close' system by integrating McAfee software into Intel chipsets. The transaction was cleared in the first phase conditional upon Intel committing to timely disclosure of the information necessary for the interoperability with new Intel chipsets to security software vendors.

In two other cases decided later in the year, which also involved conglomerate issues, the outcomes were different. In October 2011, the Commission unconditionally cleared the acquisition by Microsoft of Skype[24], the market leader for video calls for consumers. In this case, concerns stemming from the horizontal overlap in the market for consumer communication services (mainly video calls) were discarded due to the strong competition coming from important new entrants (Facebook and Google). As for conglomerate issues, the main concern was that the merging entity could degrade either interoperability of Skype products with Windows competing platforms, or interoperability of Windows with other providers of consumer communication services. However, the Commission noted that Microsoft would have no economic incentive to degrade interoperability as Skype operates on many platforms, will increasingly run on smartphones and tablets rather than PCs, and its value is precisely based on its large user base (network effects), which would be irremediably jeopardised by such a foreclosure strategy. Interestingly, the decision has been appealed by Cisco, a manufacturer of various video conference products, which claims that the Commission failed to properly assess the strengthening of the parties' dominant positions and underestimated the risks of elimination of any incentive to offer standard-based interoperability.

Finally, in February 2012 the Commission also cleared the acquisition of Motorola Mobility (a developer of smartphones and tablets) and its patent portfolio, by Google [25]. The latter is the largest company for internet search and search advertising services, and is also the developer of Android, one of the most popular mobile operating systems. Again, in line with the analytical framework spelt out in its guidelines on non-horizontal mergers, the Commission assessed whether, as a result of the integration with a smartphones supplier, Google would have the ability and the economic incentive to prevent Motorola's competitors from using Google's Android operating system. The Commission's investigation showed Android helps to drive the spread of Google's other services. Consequently, given that Google's core business model is to push its online and mobile services and software to the widest possible audience, the Commission concluded that it was unlikely that Google would restrict the use of Android solely to Motorola, a minor player in the European Economic Area as compared to operators such as Samsung and HTC. The Commission also assessed whether following the acquisition of Motorola's valuable patent portfolio in 3G and 4G technology Google would be in a position to leverage on such patents and obtain preferential treatment for its services, including search and advertising. The Commission found that Google already had many ways in which to incentivise customers to take up its services and that the acquisition of Motorola would not materially change this. The Commission thus unconditionally approved the transaction, adding though that the clearance did not rule out concerns

24 Case M. 6281, 07.10.2011.

25 Case M. 6381, 13.02.2012.

over the possible abuse of the newly acquired patents by Google. In this respect, it threatened to act against any misuse of patents essential to mobile standards contrary to FRAND commitments.

III THE MERGER CONTROL REGIME

i Procedural requirements: form CO and short form

Transactions meeting the EUMR turnover thresholds (see above) must be notified to the Directorate-General for Competition ('DG Comp') of the Commission, in the format known as form CO,[26] following the conclusion of an agreement, the announcing of a public bid or the acquisition of a controlling interest, but prior to their implementation.[27] Notification may also be made where the parties demonstrate to the Commission a good faith intention to conclude an agreement (e.g., by providing a memorandum of understanding or a letter of intent), or have publicly announced an intention to make a bid. Once notified, transactions must be suspended until the Commission has taken a clearance decision:[28] failure to comply with the stand-still obligation (known as 'gun-jumping') may lead to a fine of as much as 10 per cent of the aggregate worldwide turnover.

In case of unproblematic transactions from a competition standpoint, the parties are entitled to file a short form and take advantage of the simplified procedure. This applies in particular to: (1) joint ventures having no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA);[29] (2) mergers or acquisitions where none of the parties are engaged in business activities in the same relevant product and geographic market (horizontal overlap), or in an upstream or downstream market in which another party to the concentration is engaged (vertical relationships); and (3) mergers or acquisitions where there is a horizontal overlap between two or more of the parties, provided that their combined market share is less than 15 per cent; or there is one or more vertical relationships, provided that none of their individual or combined market shares at either level is 25 per cent or more. In all these cases, the parties are allowed to provide only certain sections of the form CO, and a short-form decision is adopted within 25 working days from the notification.

26 Annex I of the Implementing Regulation.

27 EUMR, Article 4(1).

28 Unless the Commission has specifically granted a derogation from the provisions of suspension upon reasoned request of the parties.

29 Such cases occur where (1) the turnover of the joint venture and/or the turnover of the contributed activities is less than €100 million in the EEA territory; and (2) the total value of the assets transferred to the joint venture is less than €100 million in the EEA territory. See Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 56, 5 March 2005, p. 32.

ii Timeline

As soon as the notification is received, the Commission carries out the review of a transaction, which may be done in two phases (Phase I and II). At the end of Phase I, which may take up to 25 working days,[30] the Commission may clear the transaction where the latter (1) falls outside the scope of the EUMR, or (2) does not raise competition concerns – which is the most frequent scenario. Should the transaction raise concerns, the Commission initiates an in-depth Phase II investigation. In that case, the Commission has an additional 90 working days to adopt the final decision. That period may be extended to up to 105 working days where the parties concerned offer commitments after 55 working days from the beginning of Phase II, and a further extension may be granted once upon request by the parties or the Commission, provided that overall such extensions do not exceed 20 working days.[31] Only in exceptional circumstances these strict time limits may be suspended, where the Commission has to request information or order an inspection owing to circumstances for which the parties are deemed responsible. In all other cases, the Commission is bound to adopt the decision within the prescribed time, as failure to do so will result in the automatic clearance of the transaction.

iii Third parties' involvement

Following both the notification of a concentration and the opening of a Phase II investigation, the Commission publishes a notice in the Official Journal inviting third parties (competitors, customers and suppliers) to submit comments. Furthermore, the Commission as a standard practice carries out extensive market tests, sending questionnaires to the parties as well as to third parties. The latter may also voluntarily submit comments and apply to be heard by DG Comp's team at every stage of the procedure.[32] Moreover, in Phase II investigations, third parties that show a sufficient interest can also be admitted to participate in the formal oral hearing.[33] Access to file is mainly reserved to the parties to the transaction,[34] while third parties have no such right, although they may be granted limited access to the redacted version of some documents in the Commission's file (statement of objections, proposed commitments), upon the parties' consent. Care must thus be taken to submit all information deemed confidential in the notification, as well as in all other following documents, and to clearly mark them as business secrets.

iv Substantive assessment

The purpose of the merger review is to determine whether the transaction does not significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position ('SIEC

30 35 working days where a Member State makes a request for referral, or commitments are offered by the parties. EUMR, Article 10.

31 EUMR, Article 10(3).

32 Up to the consultation of the Advisory Committee. See EUMR, Article 18.

33 Implementing Regulation, Article 16(2).

34 Implementing Regulation, Article 17.

test'). The substantive test was specifically amended in 2004 in order to cover cases giving rise to both anti-competitive coordinated effects (tacit collusion) and unilateral effects, including those situations where, despite the absence of a dominant position, the merger may still lead to a substantial lessening of competition due to the fact that an important competitive constraint is removed from an oligopolistic organisation. In addition to this test, full-function joint ventures are also assessed under Article 101 TFEU (the test applicable to anti-competitive agreements), in order to determine whether as a result of the joint venture the parent companies may coordinate their behaviour in those markets where they are supposed to compete or be potential competitors (so-called 'spill-over effects').

The starting point of the assessment is the definition of the relevant product and geographic markets affected by the transaction. The Commission then assesses the impact of the transaction on competition by verifying whether it eliminates important competitive constraints on one or more firms in the market, thus resulting in increased market power without resorting to coordinated behaviour (unilateral effects); and whether the change of the nature of competition in the market may constitute an incentive for firms to coordinate their behaviours in an anti-competitive way (coordinated effects).[35]

v Commitments

When a transaction raises competition concerns, the parties may offer commitments, both during Phase I and Phase II. Extensive guidance on commitments may be found in the relevant Commission Notice.[36] As a general rule, Phase I commitments are appropriate where the competition problems are easily identifiable and can easily be remedied; they should be submitted within 20 working days of the date of the receipt of the notification, and extend the deadline for the Commission to take a decision to 35 working days. Phase II commitments may be submitted either within 55 working days of the opening of the in-depth investigation, and in that case the deadline for the Commission to adopt the decision remains unchanged; or between 55 and 65 working days, and in that case the deadline is extended up to 105 working days.

vi The Commission's investigation powers

The Commission has wide powers of investigation and effective enforcement powers in merger control cases, which are aligned with those in other antitrust areas. In particular, the Commission is empowered to impose fines and periodic payments for various transgressions of the EUMR, where, for example, the parties fail to comply with the commitments or to supply correct information. Furthermore, the Commission may carry out on-the-spot investigations.

35 See EUMR, Article 2(1), for a non exhaustive list of the appraisal criteria.

36 Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No. 802/2004, OJ C 267, 22 October 2008, p. 1.

vii Judicial review

The decisions adopted under the EUMR, including those regarding fines and periodic payments, are subject to judicial review by the EU courts. Under certain conditions, the proceedings at first instance may be dealt with under the expedited procedure. A judicial application seeking annulment of a Commission's decision can also be filed with an application for an interim measure. In reviewing the legality of the Commission's decisions in first instance, the EU General Court rules on both the facts of the case and questions of law, (i.e., it can check whether the evidence upon which the Commission bases its conclusions is factually accurate, whether this evidence is sufficiently reliable and convincing to prove the Commission's case and whether the conclusions drawn are consistent with the factual premises).[37] The judgments of the General Courts are subject to appeal, on questions of law only, to the EU Court of Justice.

IV OTHER STRATEGIC CONSIDERATIONS

i Pre-notification contacts

Pre-notification contacts with DG Comp are crucial to identify and discuss the relevant issues at an early stage of the filing process. Pre-notification discussions can cover a broad range of matters, such as jurisdictional issues, the scope of information to be submitted, waivers of informational requirements or substantive matters. Such informal contacts are also useful to ensure that notification forms are complete so as to avoid a rejection of the notification post-filing. The Commission, in its Best Practices Guidelines, invites the parties to have pre-notification contact with DG Comp even in simple cases; such contacts should take place at least two weeks prior to notification and are dealt in strict confidentiality. Pre-notification discussions are particularly important in complex transactions impacting multiple markets, with a view to identifying the type of information required by the Commission for the filing. In such cases, at least one month of pre-notification should be considered.

ii Relevance of referrals

When checking the Commission's jurisdiction based on the turnover-related criteria of the EUMR, the parties should also consider whether their transaction is eligible for a referral from the Commission to the Member States or *vice versa*, and if so, whether it is opportune to opt for pre-notification referral (see Section I). This is a critical decision as unwanted post-filing referrals triggered by NCAs' requests may prove to be disruptive in many respects (e.g., the extra costs associated with the new filing, the time delays caused by the reallocation, the fresh assessment by the agency to which the case has been reattributed). This assessment requires a fine analysis not only of the legal requirements necessary to trigger a referral, but also of a number of additional factors which may plead

37 See for example Case C-12/03-P, *Commission v. Tetra Laval*, of 15 February 2005, confirming the judgment of the General Court in Case T-05/02, *Tetra Laval v. Commission*, of 25 October 2002.

in favour or against a reattribution of the case (one-stop-shop *versus* multiple filings, synchronisation of timelines, level of scrutiny expected depending on which agency will deal with the case, sector-specific expertise acquired by the Commission or a candidate NCA due to past practice in the same area, geographic focus of the transaction, national versus *supra*-national geographic markets).

iii Cooperation between EU and extra-EU jurisdictions

Another aspect that the parties to complex global transactions should consider is the jurisdiction of extra-EU countries' competition authorities and their interplay with the Commission. In particular, the US agencies (FTC or DoJ) are systematically competent to assess mergers involving large multinational corporations in parallel with the European Commission, and the level of cooperation and exchange between these agencies is very high. In such cases, it is, in principle, in the parties' interest to facilitate coordination of the investigations in order to avoid conflicting outcomes. This applies particularly to cases impacting worldwide markets where the agencies have to assess the same competition concerns and there is a real risk of conflict. To this end, the Best Practices on Cooperation in Merger investigations – prepared by the US-EU Merger Working Group – invite the parties to actively cooperate by discussing timing issues with the agencies before filing in either jurisdiction, thus 'synchronising' the two investigations. The parties can also agree to the sharing of some documents submitted to one or the other agency. Synchronisation of the timelines and submissions between the US and the EU should however be decided on a case-by-case base as it may not necessarily bring any benefit depending on the level of complexity of the transaction, the attitude of each agency, and the geographic focus of competition problems.

V OUTLOOK AND CONCLUSIONS

Following the legislative and policy reforms of the past years which have impacted both substantive and procedural issues, the EU merger control system has reached a level of maturity and sophistication which makes it one of the best-in-class review systems in the world. The current EU merger review system ensures a thorough scrutiny while remaining predictable, swift and transparent, thanks to the numerous guidance notices published by the Commission, combined with the added value of the decisions which are systematically made public.

From a substantive standpoint, after the introduction of the new substantive test (the 'SIEC') in 2004, the Commission has fully embraced a modern, economically sound effect-based analysis in assessing horizontal mergers, focused on what competitive constraints the merger removes and what constraints are left. The recent practice shows that the Commission is now much more focused on unilateral effects while theories of harm based on coordinated effects (tacit collusion) have been confined to exceptional situations. Also, in the area of vertical and conglomerate mergers, following the policy review and the introduction of the new guidelines in 2008, the Commission has gradually departed from its formalistic stance, and adopted a more balanced and economically driven approach, where the key issue in the analysis is the ability and the incentive of the merging entity to put in place a foreclosure strategy.

Also, the Commission's remedy practice has been toughened over the last years, with a view to securing more effectiveness. At present, if competition concerns are identified following an investigation, the Commission tends to require the parties to provide clear-cut and extensive commitments having, in principle, a structural nature (divestiture of stand-alone sustainable businesses), except for those cases concerning access to essential inputs which are eligible for behavioural commitments (e.g., interoperability in IT cases).

Finally, unlike other areas of EU Competition Law, the level of judicial scrutiny exerted by EC courts when reviewing the legality of the Commission's merger decisions has traditionally been quite intensive.

The improvements still to be implemented to the EUMR are therefore at the margin. A consultation process is under way to establish whether an *ex ante* review system should be extended to acquisitions of minority shareholdings, along the lines of some jurisdictions of the EU (e.g., Germany and the UK). The outcome is still unclear.

Another, more practical, issue that may deserve some attention in the near future is DG Comp's ever-increasing trend to require a significant amount of information for relatively unproblematic transactions and to extend pre-notification times. This is possibly to do with significant turnover among DG Comp staff and the increasing involvement of young and less experienced officials who sometimes feel unconfident about the level of information required for the purpose of the filing and when in doubt opt for abundant, if not redundant, information requests.

Due to the persistent crisis in the eurozone, the figures of the first semester of 2012 confirm a decline in the overall number of merger filings relative to peak years (2007 and 2008). A similar trend, if not worse, is expected for the second semester. In these times of crisis the Commission continues to enforce merger rules as usual, showing no sign of relaxation. The only, hardly perceptible, sign of softening in the Commission's enforcement policy comes from a slightly more lenient attitude towards delays and time extension requests in the context of the implementation of remedies.

Appendix 1

ABOUT THE AUTHORS

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Mario Todino has acquired an extensive and qualified experience of more than 15 years in the field of EU and national antitrust law, by working for the Italian Competition Authority, the European Court of Justice, the Directorate for Internal Market and the Directorate for Competition of the European Commission. He has a particular expertise in mergers, having worked for about seven years for the Merger Task Force of the EU Commission, and having been directly involved in the 2004 reform of the EUMR. Since joining the firm in 2007, he has built a strong EU and antitrust practice, assisting some of the major Italian and international groups on a regular basis. He is a frequent speaker in competition conferences and an author of many articles and publications in the field.

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Piero Fattori was the Head of the Italian Competition Authority's Legal Service from 1995 to 2002. He is a recognised expert in Italian and European antitrust law and procedure. He is listed in the *International Who's Who of Competition Lawyers and Economists* and is highly recommended as a competition expert by all major surveys of the legal profession. He is a frequent speaker in competition conferences and an author of many articles and publications in the field.

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