The Merger Control Review

Fourth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. This book provides an overview of the process in 45 jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture ('JV') that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view, by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Serbia) for mandatory pre-merger review by federal antitrust authorities. Most jurisdictions have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal).

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged), parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission ('the JFTC') announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings, and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period for challenging a notified transaction.

As discussed below, it is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia and Slovenia similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Some jurisdictions (e.g., the EU and Ireland currently) have as their threshold test for pre-merger notification whether there is an acquisition of control. Such jurisdictions will often consider relevant joint control (e.g., the EU) or negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey). Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia, at any amount exceeding 20 per cent of the target). This past year, several agencies analysed partial ownership acquisitions on a stand-alone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past year imposed a variety of such behavioural remedies (e.g., China, EU, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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New York
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Chapter 12

EUROPEAN UNION

Mario Todino, Piero Fattori and 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 'the 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:

a one-stop-shop, according to which, if the Commission has exclusive jurisdiction to assess a merger having an EU dimension, the national competition agencies ('NCAs') of the EU are precluded from reviewing the transaction;

b *ex ante* control, meaning that mergers having an EU dimension have to be notified and assessed by the Commission prior to their implementation; and

c expedited review, i.e., the Commission is required to make its appraisal of the concentration within short and mandatory deadlines (see below).

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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, 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.

The concept of control under EU competition law is broadly defined as the possibility for a company to exercise a 'decisive influence' over another company. Such decisive influence consists of the power to determine or to block the adoption of most important strategic decisions concerning the commercial behaviour of a company, such as the determination of the budget, the business plan and major investments, as well as the power to appoint senior management. Control can be established on a *de jure* or *de facto* basis, and it can be acquired through acquisition of shares or 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, while purely transitory operations fall outside the scope of the EUMR. Hence, 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 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 as 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, as well as 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 of 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: the subsequent break-up is agreed in a legally binding way; there is no uncertainty as to the circumstance that the second step will take place within a period not exceeding one year; and 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 previous years' meetings.[8]

Sole control also occurs when one minority shareholder acquires the power to veto 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 control – neither by virtue of agreements, nor *de facto* – the undertaking concerned, and the majority is represented by various combinations of minority shareholders (shifting majorities), a concentration is not deemed to arise.

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 reportable 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 takes over only 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.

Lastly, 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]

a 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;

b the acquisition of control by an office holder in a liquidation or winding-up procedure; and

c 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 €5,000 million, while at least two of the parties each have 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 €2,500 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 €25 million; and the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than e100 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

10 EUMR, Article 3(5).

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.

iv Reallocation of cases: the referral procedures

The above-described jurisdictional rules based on turnover-related criteria are complemented by 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 nonetheless have a significant cross-border impact, while NCAs should deal in principle with concentrations having an 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 an 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 an NCA on the ground that the impact on competition is mainly confined to a domestic or narrower market for 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 an 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]

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 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 make a decision within 35 working days from notification or, where the Commission has launched an in-depth investigation, within 65 working days.

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 (multiple filings) can be reattributed to the Commission following the parties' requests. Consent from all the 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 2012 and May 2013 ('the reference period'), a total of 293 transactions were notified to the Commission, of which 251 were cleared in Phase I and eight were cleared in Phase I subject to remedies. Furthermore, the Commission opened seven in-depth investigations, cleared four transactions in Phase II subject to remedies and adopted two prohibition decisions.

i Prohibition decisions

The two most prominent cases in the reference period are the Commission's prohibition decisions in *Ryanair/Aer Lingus*[15] and *UPS/TNT Express*.[16]

The *Ryanair/Aer Lingus* case represents the third attempted takeover by Ryanair of Aer Lingus: the Commission prohibited the first bid in 2007, with a second bid notified and later abandoned in 2009. The Commission grounded its first prohibition decision on the fact that the combination would have controlled 80 per cent of all European flights from and to Dublin; the remedies proposed at that time (slot divestments only) were deemed insufficient to overcome the competition concerns. In the second in-depth investigation, Ryanair proposed different sets of commitments, the final one being comprised of two main parts: asset divestment with respect to operations on several routes from and to Ireland and other destinations in Europe, which would have been operated as such during a minimum period of three years; and slot divestments with respect to certain routes connecting London to Ireland, also for a period on three years. However,

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 an 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.6663 *Ryanair/Aer Lingus III*, decision of 27 February 2013.

16 Case M.6570 *UPS/TNT Express*, decision of 30 January 2013.

the Commission ultimately decided that the proposed commitments were still insufficient to overcome its concerns, particularly in light of the stronger market position gained by the parties over the past few years. Indeed, on several routes the transaction would have created a monopoly; on others, the only competitive constraints would have come from charter airlines or scheduled operators, which have different business models from Ryanair and Aer Lingus. Moreover, both Ryanair and Aer Lingus are airlines with large bases at the same 'home' airport, a factor which further complicated the Commission's assessment. In this respect, it may also be recalled that the other prohibited transaction in the airline sector (the proposed acquisition by Olympic Airlines of Aegean Airlines in 2011) also concerned two carriers having large bases at the same 'home' airport.[17]

Lastly, although Ryanair had already identified a purchaser both for the asset divestment (Flybe) and the slot divestment (IAG/British Airways), the former could not be deemed a suitable purchaser in the hands of which the divested business could have secured long-term effective competition in the marketplace; nor could IAG exert sufficient competitive constraints on the merged entity on a lasting basis. In particular, the Commission considered, among other things, that both Flybe and IAG would most likely have no incentive to keep fighting Ryanair in its home market at the end of the three-year period. This shows once again that the Commission is increasingly tough about remedies, and is willing to accept structural commitments only to the extent that the ability of the buyer to secure long-lasting competition may be demonstrated with a sufficient degree of certainty.

The other prohibition decision in the reference period was *UPS/TNT Express*, which concerned the logistics and transport sector. The Commission's in-depth investigation focused on the segment of intra-EEA small package express deliveries: such services are predominantly used by business users for shipping-sensitive items (e.g., time-critical documents, spare parts, etc.), and mainly provided by integrators that control international integrated air and ground delivery networks. Due to the limited number of integrators operating in Europe (four, and in a number of countries only three), the insufficient competitive constraints exerted by non-integrators, and the existence of a high barrier to entry in such market segment, the Commission concluded that the transaction would have lead to high price increases in a significant number of EU countries, despite the fact that the combined entity resulting from the merger would not have become the market leader (this being DHL). In this respect, the case is interesting insofar it as it represents one of the few examples of 'gap' cases – that is, cases that would not have been caught under the dominance test laid down by the old EU merger regulation, despite raising serious competition concerns.[18]

17 A second attempted takeover by Olympic Airlines of Aegean Airlines is currently undergoing an in-depth examination by the Commission, the outcome of which is still uncertain (see Case M.6796 *Aegean/Olympic II*).

18 Indeed, the test under the original Merger Regulation simply asked whether a merger would 'create or strengthen a dominant position'; it did not cover those situations in which a merger raised serious competition concerns because the merged entity had the ability to unilaterally raise prices without being dominant (for more information, see *infra*).

Another interesting aspect of this case is the great emphasis the parties put on the merger-related efficiencies (cost savings), which however were not considered by the Commission to be sufficient to outweigh the adverse effects on competition. This casts a light on the limited role still played by efficiency defences to overturn a finding of adverse effect on competition under the EUMR. While UPS tried to address the Commission's concerns by offering the divestment of a number of TNT subsidiaries, as well as a five-year access to its own intra-EEA air network, there was uncertainty as to whether a suitable purchaser with the ability to compete effectively could be found. Further, UPS was unwilling to commit itself to divest the assets to a third party approved by the Commission before closing the transaction ('up-front buyer' remedy).[19] Instead, UPS attempted to sign an agreement with a suitable purchaser before the end of the Commission's investigation ('fix-it-first solution'). However, such purchaser did not materialise within the strict deadlines to which EU merger investigations are submitted, which clearly shows the importance of engaging in timely discussions on remedies whenever an agreement with a suitable buyer is needed ahead of the Commission's merger deadlines.

ii High-profile Phase II decisions with remedies

As regards transactions cleared following an in-depth investigation, the first noteworthy case is the conditional clearance of the acquisition by Universal of EMI's recorded music business.[20] The transaction raised significant concerns in the wholesale markets for physical and digital music, both at the national and the EEA level. In particular, the Commission's in-depth investigation focused on the fast-growing digital music markets, where the size of a record company has a clear impact in terms of bargaining power and ability to impose onerous licensing terms. In the Commission's view, if excessively increased, such power would be particularly harmful to the smaller digital platforms, which compete with bigger players such as Apple and Spotify by offering innovative ways for consumers to buy and listen to digital music. The Commission ultimately cleared the transaction after Universal proposed an extensive set of remedies, including the divestment of various EMI labels and local entities, as well as a commitment not to include most-favoured nation clauses in any agreement with digital customers in the EEA for a period of 10 years.

19 See the 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. According to the Notice, the Commission should opt for an 'up-front buyer' solution where there are considerable obstacles for a divestiture, such as third-party rights, or uncertainties as to finding a suitable purchaser; or where there are considerable risks to preserving the competitiveness of the business in the interim period until divestiture.

20 Case M.6458, *Universal Music Group/EMI Music*, decision of 21 September 2012. The sale of the publishing business of EMI to a consortium led by Sony and Mubadala was separately cleared subject to remedies (Sony committed to sell various music catalogues and other assets). See Case M.6459, *Sony/Mubadala Development/EMI Music Publishing*, decision of 19 April 2012.

Another prominent case decided by the Commission in the relevant period was the acquisition by Hutchinson 3G ('H3G') of Orange Austria,[21] which involved the combination of the assets of the third and fourth-largest mobile operators in the Austrian market. Despite the fact that the combined market share of the merged entity was only 22 per cent, the transaction raised concerns due to the presence of high barriers to entry into the market, the absence of countervailing buyer power, as well as the fact that, as indicated by the economic analysis conducted by the Commission, the parties' actual market power was understated by their market shares. Interestingly, this case represents another 'gap' case as defined above, where the Commission held that unilateral adverse effects would arise out of the transaction even though the merged entity would not have become the market leader.

The importance of the case lies primarily in the fact that it set the Commission's merger enforcement policy in the telecom sector. Despite the claim frequently raised by mobile operators that excessive fragmentation in national mobile markets is harmful, insofar as it threatens investments in next-stage technologies, the case stands as a warning for future deals in the sector, and clearly shows the unwillingness of the Commission to associate greater concentration with greater investments in the mobile markets. In addition, and perhaps more importantly, the Commission's tough stance in this case shows the Commission's clear preference for cross-border integration as opposed to national consolidation. The quite extensive remedies required to clear the transaction were designed to facilitate the entry of new market players. Indeed, in order to address the Commission's concerns, H3G submitted a package of commitments that included:

a divestiture of radio spectrum and additional rights to an interested new entrant in the Austrian mobile telephony market to enable such an operator to build up a physical network for mobile telecommunication services in Austria;

b the provision, on agreed terms, of wholesale access to its network for up to 30 per cent of its capacity to up to 16 mobile virtual network operators ('MVNOs') for the next 10 years; and

c an up-front commitment ensuring that H3G would not complete the acquisition of Orange before it has entered into such a wholesale access agreement with one MVNO.

The Commission also cleared with remedies Glencore's acquisition of Xtrata,[22] which represented the biggest deal of the year; it brought together the world's leading metals and thermal coal trader, and the world's fifth-largest metals and mining group, respectively. The Commission faced a number of challenging issues in this assessment, including the fact that Glencore's business covered all steps in the commodities value chain, being an integrated trader and producer, while Xtrata was a producer active at the mining and refining level; as such, the merger had both horizontal and vertical effects. The Commission ultimately cleared the transaction conditional upon the termination of Glencore's take-off arrangement for zinc metal in the EEA with Nyrstar, the world's

21 Case M.6497, *Hutchison 3G Austria/Orange Austria*, decision of 12 December 2012.

22 Case M.6541, *Glencore/Xstrata*, decision of 22 November 2012.

largest zinc metal producer, and the divestment of Glencore's minority shareholding in the same company. Those remedies were deemed sufficient to address the Commission's major concern that the merged entity could unilaterally raise the price of zinc metal, which is a key input for many EU industries.

Substantial divestments were also required for the clearance of the acquisition of Inoxum, the stainless steel division of ThyssenKrupp, by the Finnish stainless steel company Outokumpu;[23] as well as for the acquisition of aviation equipment company Goodrich by rival United Technologies Corporation ('UTC').[24] In the former case, the Commission's in-depth investigation focused on the production of cold rolled stainless steel products in the EEA, a market in which the parties were the first and second-largest suppliers. Concerns were raised that the combined entity's market position would have likely given rise to unilateral anti-competitive behaviour due to the significant horizontal overlap resulting from the merger, the substantial level of concentration in the market, as well as the fact that imports were not considered fully substitutable by final customers, so that overall, the price increases resulting from the transaction were unlikely to be outweighed by any potential synergy. The acquisition was ultimately approved by the Commission subject to a substantial set of remedies designed to ensure that the merged entity will continue to face sufficient competitive constraints in the EEA: this included the divestment of Inoxum's stainless steel plant in Terni, as well as a number of distribution centres in Europe.

On the other hand, in *UTC/Goodrich* the Commission found that the transaction would have reduced competition in the aerospace markets for electrical power generation, and had detrimental effects in the markets for engine controls for small engines. Hence, the Commission approved the transfer conditioned upon the divestiture of Goodrich's businesses in those two markets.

III THE MERGER CONTROL REGIME

i Procedural requirements: Form CO and Short Form CO

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,[25] following the conclusion of an agreement, the announcing of a public bid or the acquisition of a controlling interest, but prior to their implementation.[26] 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

23 Case M.6471, *Outokumpu/Inoxum*, decision of 7 November 2012.

24 Case M.6541, *UTC/Goodrich*, decision of 26 July 2012.

25 Annex I of the Implementing Regulation.

26 EUMR, Article 4(1).

a clearance decision:[27] 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 the 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:

a joint ventures having no, or negligible, actual or foreseen activities within the territory of the EEA;[28]

b 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

c 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. It should also be noted that a reform of the filing requirements for the simplified procedure, which will sensibly improve the current regime, is currently underway and will likely be adopted in the near future.[29]

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,

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

28 Such cases occur where the turnover of the joint venture or the turnover of the contributed activities, or both, is less than €100 million in the EEA territory; and 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.

29 Particularly, the reform will extend the scope of the simplified merger procedure for non-problematic cases by raising the relevant market share thresholds for mergers with limited horizontal overlaps or vertical relationships to 20 per cent and 30 per cent, respectively; and allowing the application of the simplified procedure also to those horizontal mergers where the combined market share of the parties is above the 20 per cent threshold, but the increase in market share resulting from the merger is limited. Further, the reform is aimed at updating, streamlining and reducing the information requirements for notifying a merger that does not fall under the simplified procedure, or making a request to refer a merger case to the Commission or to a Member State. For more information, see http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html.

which may take up to 25 working days,[30] the Commission may clear the transaction where the latter falls outside the scope of the EUMR or does not raise competition concerns – which is the most frequent scenario. Should the transaction raise concerns, the Commission opens 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 may these strict time limits be suspended, when 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-party 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 the 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 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,

30 Thirty-five 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.

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 ('gap' cases). In addition to this test, full-function joint ventures are also assessed under Article 101 of the Treaty on the Functioning of the European Union (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 ('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 powers of investigation

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.

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

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.

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 Court 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 with 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, *supra*). 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 that may plead 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 supranational geographic markets).

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.

iii Cooperation between EU and extra-EU jurisdictions

Another aspect that should not be overlooked by parties to complex global transactions is the interplay between the Commission and other extra-EU countries' competition authorities. In particular, the US agencies (the FTC or the Department of Justice) are systematically competent to assess mergers involving large multinational corporations in parallel with the Commission, and the level of cooperation and information exchange between these agencies is high. In such cases, in principle it is 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 basis, 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 the competition problems. Another important aspect to consider is the cooperation on competition matters between the Commission and China's antitrust authorities, which was further strengthened recently with the signing of a memorandum of understanding in September 2012. Indeed, parties to complex global transactions should pay particular attention to merger filings in China, which are increasingly becoming a major regulatory hurdle for companies involved in cross-border deals. This applies particularly to those transactions regarding strategic resources and key commodities, which risk facing extensive scrutiny by the Chinese authorities, insofar as they take into account both consumer welfare and macro-industrial policy issues in their review process.

V OUTLOOK AND CONCLUSIONS

Following the legislative and policy reforms of past years that have impacted both substantive and procedural issues, the EU merger control system has reached a level of maturity and sophistication that 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. Recent practice shows that the Commission continues to be focused on unilateral effects, while theories of harm based on coordinated effects (tacit collusion) have been confined to exceptional situations. In addition, 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.

On the other hand, the Commission's remedy practice has been toughened 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 standalone sustainable businesses), except for those cases concerning access to essential inputs that 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. Possible amendments and improvements to the EU system of merger control 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 EU jurisdictions (e.g., Germany and the UK). In addition, a reform of the system of pre- and post-notification referrals[38] is currently under discussion. However, the outcome of both is still uncertain.

On the other hand, a more practical aspect that should be mentioned 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 a 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. However, this is being addressed by the ongoing reform of the filing requirements mentioned above.

Due to the persistent crisis in the eurozone, the figures for the first half of 2013 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, and 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 toward delays and time extension requests in the context of the implementation of remedies.

38 In this respect, a possible amendment could involve those transactions without a Community dimension capable of being reviewed by the authorities of at least three EU Member States, and that the parties believe should be examined by the Commission instead (prior notification referral; see Article 4(5) EUMR). In such cases, the possibility for the parties to file a notification directly with the Commission is under discussion, so that it would no longer be necessary to also file the relevant reasoned submission prior to notification (Form RS). For more information, see Commission Staff Working Document *Towards more effective EU merger control*, and related Annex I (*Economic Literature on Non-Controlling Minority Shareholdings – 'Structural links'*) and Annex II (*Non-controlling minority shareholdings and EU merger control*), available at http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.

Appendix 1

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He has 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 listed in the *International Who's Who of Competition Lawyers and Economists* as a specialist in EU matters. He is a frequent speaker at competition conferences and an author of many articles and publications in the field.

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