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EU Merger Control: From Birth to Adolescence

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On 21 September 1990, the Merger Regulation came into force, introducing into EU competition law a legal framework for the systematic review of mergers, acquisitions, and other forms of concentration. This article contains a short introduction to the Merger Regulation that: (1) explains the principal provisions of the Merger Regulation and describes the fundamental principles on which it is based; (2) identifies the main trends and developments in its application; (3) summarises the Merger Regulation's implications for the practice of competition law in Europe; (4) identifies the main differences between EU merger control and the US process; (5) examines certain of the key developments in the Merger Regulation's evolution and provides an historical overview of some of the leading decisions of the Commission and judgments of the Community courts; and (6) describes the principal elements and practical implications of the Commission's December 2002 package of proposed reforms to the Merger Regulation. The article is an extract from a forthcoming book on the Merger Regulation, European Merger Control Law: A Guide to the Merger Regulation, which is scheduled for publication by LexisNexis Matthew Bender in June 2003.

INTRODUCTION

On 21 September 1990 the Merger Regulation came into force, introducing into EU competition law a legal framework for the systematic review of mergers, acquisitions, and other forms of concentration.[1]

The Merger Regulation is based on three main propositions. First, that "the dismantling of internal frontiers [in the EU] is resulting and will continue to result in major corporate reorganisations in the Community, particularly in the form of concentrations."[2] Second, that mergers and other forms of concentration are "in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community."[3] Third, that notwithstanding the economic benefits brought about by many

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1 Council Regulation 4064/89 of 21 December 1989, on the control of concentrations between undertakings, 1990 OJ L257/13, <http://europa.eu.int/comm/competition/mergers/legislation/4064_en.html>; with amendments introduced by Council Regulation 1310/97, 1997 OJ L180/1, <http://europa.eu.int/comm/competition/mergers/legislation/131097_en.html>, corrigendum 1998 OJ L40/17, <http://europa.eu.int/comm/competition/mergers/legislation/cr131097_en.pdf>. See the consolidated version at the Commission's website, <http://europa.eu.int/comm/competition/mergers/ legislation/c406489_en.pdf>.

2 Merger Regulation, Recital 3.

3 Ibid., Recital 4. See also *XXIst Report on Competition Policy*, 1991, para. 5 ("Mergers may be carried out in the interests of economic efficiency, permitting improved exploitation of economies of scale and the pooling of

mergers, "it must be ensured that [this] process of reorganisation does not result in lasting damage to competition…Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it."[4] The Merger Regulation is intended to "permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations."[5]

This article contains a short introduction to the Merger Regulation that describes the fundamental principles on which it is based and summarises its main provisions. It also briefly describes certain of the key developments in the application of the Merger Regulation and seeks to explain them in the context of an historical overview that identifies some of the leading decisions of the Commission and judgments of the Community courts.

I. Objectives and General Principles

From its inception, the Commission has viewed the Merger Regulation as a "vital additional instrument made available…to ensure a system of undistorted competition in the Community."[6] The Commission has consistently rejected suggestions that its appraisal take account of industrial, social, or employment considerations and has firmly resisted attempts to politicise application of the Merger Regulation.[7] Significant resources and energy have been dedicated to ensuring the effective and rigorous application of the Merger Regulation and to obtaining the confidence of Member States, lawyers, companies, and the financial community. The scope, purpose, and objectives of the Merger Regulation were articulated at the time of its adoption by Sir Leon Brittan Q.C., now Lord Brittan, then-Competition Commissioner:

> "My task is to discover which mergers stifle competition. They will be stopped. All others will proceed. All mergers with a Community dimension will benefit from the one-stop-shop regime. We have clarified and simplified the law in an area which was full of uncertainties and complications. A large European merger had to be hawked around several European capitals for approval and consideration also had to be given to the precise scope of Articles [81] and [82] [EC] in this field, on the basis of two judgments of the European Court. Now we have the policy right and we have clarified the procedures and the substantive

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expertise, and may thus help Community industry adjust its structure to the challenge posed by the integration of the internal market and the internationalisation of the economy").

4 Merger Regulation, Recital 5.

5 Ibid., Recital 7.

6 *XXth Report on Competition Policy*, 1990, para. 20.

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

> rules. The Community's single market now has a proper system of merger law and policy to ensure that its benefits are passed on to consumers and will lead to the enhancement of competitive industry."[8]

More recently, the Commission has emphasised the Merger Regulation's "fundamental objective of protecting consumers against the effects of monopoly power (higher prices, lower quality, lower production, less innovation),"[9] and Commissioner Monti has sought to underline the common features of EU and US merger control, in particular the protection of consumer welfare and the pursuit of economic efficiencies:

> "[T]he goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market….Our merger policy aims at preventing the creation or strengthening of dominant positions through mergers or acquisitions. Such a market power produces competitive harm, which manifests either directly through higher post-merger prices or reduced innovation or, indirectly, through the elimination of competitors, leading ultimately to the same negative results in terms of prices or innovation. Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare."[10]

II. Principal Provisions

The Merger Regulation is based on four fundamental principles: (1) the exclusive competence of the Commission to review concentrations of Community dimension; (2) the mandatory notification of such concentrations; (3) the consistent application of market-oriented, competition-based criteria; and (4) the provision of legal certainty through timely decision making. The principal provisions of the Merger Regulation are set forth below:

(1) The Merger Regulation applies to concentrations (i.e. lasting changes in control). The concept of a concentration includes mergers, acquisitions, and the formation of jointly controlled, autonomous, full-function joint ventures. The concept of control is defined as the possibility to exercise "decisive influence."

(2) All concentrations that meet certain "size" tests are deemed to have Community dimension and, as such, are subject to mandatory notification under the Merger Regulation, irrespective of whether they have any effect in the Community. The

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8 Sir Leon Brittan Q.C., now Lord Brittan, *The Law and Policy of Merger Control in the EEC*, [1990] 5 ELRev., 351, p. 357.

9 *XXXIst Report on Competition Policy*, 2001, para. 252.

10 Mario Monti, Competition Commissioner, *The Future for Competition Policy in the European Union*, speech at Merchant Taylor's Hall, 9 July 2001, Commission Press Release SPEECH/01/340 of 10 July 2001. See too Mario Monti, *Europe's Merger Monitor*, The Economist, 9 November 2002 ("Preserving competition is not, however, an end in itself. The ultimate policy goal is the protection of consumer welfare. By supporting the competitive process, the Merger Regulation plays an important role in guaranteeing efficiency in production, in retaining the incentive for enterprises to innovate, and in ensuring the optimal allocation of resources. Europe's consumers have been the principal beneficiaries of the Commission's enforcement of the regulation, enjoying lower prices and a wider choice of products and services as a result").

Commission has exclusive jurisdiction over such transactions (the "one-stop-shop" principle). Transactions that fall below these thresholds may be subject to national competition rules. In exceptional circumstances, a Member State may request either that the Commission refer a concentration of Community dimension to its national authority or that the Commission review a concentration that does not have a Community dimension.

(3) Notifiable concentrations are subject to strict and short deadlines. Transactions must be notified on a prescribed form according to mandated time periods, a waiting period must be observed before notifiable transactions can be put into effect, and the Commission must render a decision no later than five months (90 working days) following notification. Fines may be imposed for failure to notify, late notifications, or the provision of incorrect or misleading information. Where reportable transactions have been implemented prior to having received approval, the Commission may take remedial action.

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

(5) The substantive test under the Merger Regulation is whether a transaction creates or strengthens a dominant position as a result of which effective competition is significantly impeded in the common market. The Commission's appraisal under the Merger Regulation has two main elements: (i) definition of the relevant market; and (ii) competitive assessment of the transaction. The Commission generally focuses first on unilateral exercises of market power and then on whether a transaction creates or strengthens a position of collective or oligopolistic dominance. Horizontal mergers, i.e. those involving firms active in the same markets, have accounted for the large majority of challenged transactions, although the Commission has also examined (and, on occasion, prohibited) mergers that have had vertical or conglomerate effects.

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

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

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

III. Application and Evolution

Since the Merger Regulation entered into force, the Commission has rendered more than 2,200 decisions, of which over 1,800 (86 per cent) had approved notified concentrations unconditionally; around 50 (3 per cent) had found the Merger Regulation to be inapplicable; around 50 (2 per cent) had referred concentrations notified under the Merger Regulation in whole or in part to Member State authorities; around 95 (5 per cent) had approved transactions subject to undertakings given at the end of the initial investigative period;[11] around 20 (1 per cent) had approved transactions unconditionally during phase II; around 60 (3 per cent) had approved concentrations subject to undertakings given at the end of phase II; and had rendered prohibition decisions with respect to 18 (1 per cent) transactions,[12] three of which were subsequently overturned by the Community courts on appeal.[13] More than 80 operations had been withdrawn, of which around 20 (1 per cent) were withdrawn following the opening of in-depth investigations, in many instances to avoid prohibition decisions. Thus, around 2 per cent of all transactions notified under the Merger Regulation have been either prohibited or abandoned in the course of in-depth investigations. The Commission's "challenge rate" is broadly comparable to those of other major jurisdictions.[14]

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

12 *Aerospatiale-Alenia/de Havilland*, Case IV/M.53, Commission decision of 2 October 1991, 1991 OJ L334/42, (aircraft); *MSG Media Service*, Case IV/M.469, Commission decision of 9 November 1994, 1994 OJ L364/1, (telecommunications); *Nordic Satellite Distribution*, Case IV/M.490, Commission decision of 19 July 1995, 1996 OJ L53/20, (television); *RTL/Veronica/Endemol*, Case IV/M.553, Commission decision of 20 September 1995, 1996 OJ L134/32, (television); *Gencor/Lonrho*, Case IV/M.619, Commission decision of 24 April 1996, 1997 OJ L11/30, (platinum); *Kesko/Tuko*, Case IV/M.784, Commission decision of 20 November 1996, 1997 OJ L110/53, (consumer products retailing); *Saint-Gobain/Wacker-Chemie/NOM*, Case IV/M.774, Commission decision of 4 December 1996, 1997 OJ L247/1, (abrasive materials); *Blokker/Toys "R" Us*, Case IV/M.890, Commission decision of 26 June 1997, 1998 OJ L316/1, (toy retailing); *Bertelsmann/Kirch/Premiere*, Case IV/M.993, Commission decision of 27 May 1998, 1999 OJ L53/1, (television); *Deutsche Telekom/BetaResearch*, Case IV/M.1027, Commission decision of 27 May 1998, 1999 OJ L53/31, (television); *Airtours/First Choice*, Case IV/M.1524, Commission decision of 22 September 1999, 2000 OJ L93/1, (packaged holidays); *Volvo/Scania*, Case COMP/M.1672, Commission decision of 14 March 2000, 2001 OJ L143/74, (trucks and buses); *MCI WorldCom/Sprint*, Case COMP/M.1741, Commission decision of 28 June 2000, not yet reported, (telecommunications); *SCA/Metsä Tissue*, Case COMP/M.2097, Commission decision of 31 January 2001, 2002 OJ L57/1, (household hygiene paper products); *General Electric/Honeywell*, Case COMP/M.2220, Commission decision of 3 July 2001, not yet reported, (aerospace engines, avionics, and aerospace components); *Schneider Electric/Legrand*, Case COMP/M.2283, Commission decision of 10 October 2001, not yet reported (electrical equipment); *CVC/Lenzing*, Case COMP/M.2187, Commission decision of 17 October 2001, not yet reported, (man-made fibres); and *Tetra Laval/Sidel*, Case COMP/M.2416, Commission decision of 30 October 2001, not yet reported, (food and beverage packaging).

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

14 For perspective, of the 4,926 transactions notified in the United States during the fiscal year ending 30 September 2000, requests for additional information were issued in 98 instances (2%) and 48 transactions (1%) resulted in enforcement actions (US Federal Trade Commission, Premerger Notification Office). It should be noted, however, that the filing thresholds in the United States are quite low, despite having been raised from $15 million to

IV. Principal Differences Between EU and US Merger Control

The principal differences between EU and US merger control rules may be summarised as follows:

(1) The dominance standard under the Merger Regulation is differently worded from the US "substantial lessening of competition" test, although the practical consequences of this distinction may be slight, particularly in light of the Commission's recent proposal to define "dominance" in such a way as to bridge any gap between the two tests.

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

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

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

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

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

$50 million as of 1 February 2001 (see Pub. L. No. 106-553, 114 Stat. 2762). Therefore, US notifications are filed for a large number of relatively insignificant transactions that are not likely to be of interest to US regulators. The situation is similar at the Member State level. In the United Kingdom, for example, the Office of Fair Trading examined 315 transactions in 2000, of which only 14 (4.4%) were referred for further investigation to the Competition Commission. See Office of Fair Trading, *Annual Report of the Director General of Fair Trading: January to December 1999*, p. 112. Undertakings were accepted in an additional eight cases (less than 3%) in lieu of a reference, although others may have been abandoned. See Department of Trade and Industry press releases 2000.

V. TRENDS AND IMPLICATIONS

The Commission's implementation and application of the Merger Regulation is widely regarded as having been highly successful.[15] In the 12 years since its adoption, the Merger Regulation has evolved into an integral part of Community antitrust practice. Unlike other areas of EU competition law, where few formal decisions have been adopted,[16] the Merger Regulation has produced a rich and extensive jurisprudence that provides guidance on a range of issues, including the competitive assessment of a wide variety of transactions affecting a broad array of product and geographic markets.[17] Further, the Commission has adopted a pragmatic, open, and informal approach to the Merger Regulation's application. Perhaps the most visible manifestation of this approach has been the Commission's use of informal, pre-notification meetings to clarify jurisdictional issues, discuss the scope of notifications, obtain a preliminary understanding of the relevant markets, and consider any procedural questions. Commissioner Monti has strongly defended the Commission's achievements:

> "The Merger Regulation, far from standing in the way of industrial restructuring in Europe, has facilitated it, while ensuring that it did not result in damages to competition. It has provided a 'one stop shop' for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions here in the EU. It has guaranteed that merger investigations are completed within tight, pre-determinable deadlines; a remarkable degree of transparency has been maintained in the rendering of decisions – each and every merger notified to the Commission results in the communication and publication of a reasoned decision. Above all, we have put in place a merger control system which is characterised by the complete independence of the decision-maker, the Commission, and by the certainty that mergers will be exclusively assessed for their impact on competition."[18]

The Merger Regulation has had several important and far-reaching implications for the practice of competition law in Europe: (1) the publication of a decision at the end of every investigation has made

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

16 For perspective, the Commission has rendered fewer than 50 decisions applying Article 82 since the EC Treaty came into force in 1965.

17 Of the operations notified, by far the largest proportion has involved joint ventures (around 46% of all notified transactions), with the remainder comprising acquisitions (39%), takeover bids (9%), and other forms of concentration (6%). See *XXXth Report on Competition Policy*, 2000, p. 88. As of late 2000, the market sectors examined had broken down as follows: over 260 cases (representing more than 20% of all notified operations) have involved oil, gas, mining, and chemical markets; more than 250 operations (around 20% of all notifications) have concerned consumer products; over 150 transactions (equivalent to 10-15% of all notified operations) have concerned financial and insurance markets; and over 125 transactions (around 10% of all notifications) have involved wholesale and retail trade. The single largest other major categories have been telecommunications, media, and transportation.

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

the Commission's practice more transparent and predictable;[19] (2) the introduction of mandatory notification for mergers at the EU level has stimulated the adoption of merger control laws at the Member State level; (3) the explicit emphasis placed on market definition, economic methodology, and competition-based criteria has been paralleled in other areas of EU competition law, including, importantly, the modernised treatment of vertical and horizontal agreements; (4) the open and informal approach to the Merger Regulation's application, together with the importance attached to "market testing," has influenced other Directorates of the Commission's Directorate-General for Competition; (5) the Commission has processed notifications effectively, taken decisions quickly, and applied merger control rules free from political pressures; and (6) the Commission has worked closely with Member State authorities and other competition law regulators, using the Merger Regulation to forge a common appreciation of competition law and policy across the EU and to foster international cooperation with non-EU agencies, particularly those in the United States.

The Commission's application of the Merger Regulation has evolved considerably in the 12 years following its implementation. Seven aspects of this evolution may be identified: (1) the Merger Regulation's scope of application has been broadened to include all full-function joint ventures (as well as mergers, acquisitions, and other forms of concentration); (2) the Commission has over time employed an increasingly rigorous and economically orientated approach to market definition and substantive assessment; (3) the Commission has applied the Merger Regulation's dominance standard to a wide array of situations, including conglomerate mergers, vertical transactions, and situations of collective dominance; (4) the Commission has used the Interpretative Notices to codify the law and bring greater transparency; (5) the Commission has developed a flexible and open-minded approach to the implementation of the Merger Regulation's procedural rules; (6) the Commission has devoted increasingly greater time, effort, and resources to shaping and enforcing remedies; and (7) the Commission has attached importance to fostering international cooperation and convergence in merger control.

VI. THE FOUR ERAS OF COMMUNITY MERGER CONTROL

A. 1990-1994: THE YEARS OF DISCOVERY

The coming into force of the Merger Regulation raised a wide array of legal and practical issues, and the years immediately following its implementation were in large part devoted to exploring, addressing, and resolving those issues. During this period, the Commission's application of the Merger Regulation exceeded the expectations of even the most optimistic commentators in several important respects: (1) the Commission met the tight deadlines prescribed in the Implementing Regulation in virtually every case;[20] (2) the Commission was flexible and open in its application of the procedural rules

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19 This is in marked contrast to the US system, in which no formal explanation need be provided by regulators when a notified transaction is cleared, unless a consent decree with undertakings has been accepted, in which case an explanation is provided.

20 See, e.g. Donald L. Holley, *EEC Competition Practice: A Thirty-Year Retrospective*, 1992 Fordham Corp. L. Inst. 728 (Barry E. Hawk, ed., 1993) ("The Commission was of course faced with an enormous practical challenge when it began administration of the Merger Regulation, for the adoption of which it had worked so hard.

of the Merger Regulation, notwithstanding the significant innovations in practice;21 (3) the Commission began to use economic evidence and systematic market testing; (4) the Commission proved itself able to withstand political pressure; (5) the Commission worked closely with Member State authorities, using the Merger Regulation to develop a common appreciation of competition law and policy across the EU; and (6) the Commission started the process of fostering international cooperation with other antitrust authorities, including, in particular, the US federal agencies.

A significant and disproportionate amount of time during this initial period was devoted to addressing issues that arose from the distinction made in the original version of the Merger Regulation adopted in 1989 between joint ventures that have "as [their] object or effect the coordination of the competitive behaviour of undertakings which remain independent" (so-called "cooperative" joint ventures) and "joint venture[s] performing on a lasting basis all the functions of an autonomous economic entity, which [do] not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture" (so-called "concentrative" joint ventures).[22] Because of the substantive and procedural advantages associated with forming joint ventures that are reportable under the Merger Regulation, considerable effort was devoted to structuring joint ventures so as to satisfy the "concentrative" criteria, including by defining markets narrowly in order to exclude a finding that a joint venture would be rendered cooperative because it would be active on the same market as one or both of its parents. Over time, the Commission issued a number of Notices intended to provide guidance on the jurisdictional and substantive scope of the Merger Regulation, and the circumstances in which a joint venture might be considered concentrative were expanded.[23]

The Commission's credibility was hanging in the balance. Counsel and the business community soon agreed that the administration of the Merger Regulation was turning out to be a big success. It is rare to see such unanimity on any one point within the Community").

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

22 Merger Regulation, Art. 3(2).

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

During this initial period, the Merger Task Force staff – tentatively at first, but with increasing confidence as the years went by – developed a structured analytical framework for appraising reportable transactions that served as a foundation for the increasingly detailed analyses of the late 1990s. The starting point of the Commission's analyses, then as now, was the definition of a relevant market. Cases in which market definition was central to the Commission's assessment included DuPont/ICI, where the Commission's assessment was based on the identification of distinct markets for different types of fibre used to produce carpets,24 Nestlé/Perrier, where the Commission identified a market for bottled mineral water distinct from other non-alcoholic commercial beverages,25 and Procter & Gamble/VP Schickedanz II, where the Commission relied on evidence of consumer behaviour to identify separate markets for different feminine protection products.26

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

An important milestone in the application of the Merger Regulation came in 1991, when the Commission for the first time prohibited a transaction, the proposed joint acquisition of the Canadian-based de Havilland division of the Boeing Company by Aerospatiale SNI, a French company, and Alenia-Alitalia e Selenia SpA, an Italian company.[27] The Commission determined that the merged entity's 64 per cent share of global regional commercial aircraft sales would confer a dominant position. The prohibition decision was taken in the face of considerable opposition from within the Commission, in particular from the Industrial Policy Commissioner, as well as from certain Member State Governments. The decision assuaged those, including in the United States, who had feared that the Commission might be unduly influenced by industrial and political considerations. The fierce debate at the time is recalled by Sir Leon Brittan Q.C., now Lord Brittan, then-Competition Commissioner:

> "Different considerations arose when we had to resist those who simply wanted us to encourage the emergence of European champions, irrespective of the impact that that would have on competition. The *De Havilland* case was the watershed. What was proposed was a merger between European firms which was going to create a monopolistic situation in the world market. Nonetheless, the most intense political pressure was placed on the members of the Commission in an effort to have the merger permitted. Indeed

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24 Case IV/M.214, Commission decision of 30 September 1992, 1993 OJ L7/13.

25 Case IV/M.190, Commission decision of 22 July 1992, 1992 OJ L356/1.

26 Case IV/M.430, Commission decision of 21 June 1994, 1994 OJ L354/32.

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

> the French and Italian Governments regarded it as almost inconceivable that the Commission would ban a merger between French and Italian firms of this kind, and there is reason to believe that they were given high level assurances that this would not happen. Fortunately, the Commission resisted these pressures and voted to ban the merger. What was important was not so much that the merger would in fact have been damaging, but rather that the Commission showed itself able to resist political pressure from whatever quarter it came, and determined to decide the issue on the merits as it saw them. That was the first merger that the Commission actually banned, and its ability to do so showed that it was a serious competition authority, which could operate both efficiently and with integrity."[28]

B. 1995-1998: The Years of Consolidation

During this period, the Commission addressed certain of the shortcomings in the original Merger Regulation adopted in 1989. First, the distinction made between "concentrative" and "cooperative" joint ventures was abandoned,[29] and the Commission started to carry out under the Merger Regulation's procedure and timetable a substantive assessment under Article 81 of any spill-over effects arising from the formation of full-function joint ventures.[30] Second, the Commission introduced a "short form" procedure for unproblematic transactions. Third, in an effort to address concerns about the costs incurred in multinational merger review, the Commission introduced a second and lower set of thresholds intended to confer Commission competence over cases that affect three or more Member States, but fell below the Merger Regulation's original thresholds.[31] Fourth, the Commission formalised its approach to market definition and adopted the Market Definition Notice. Finally, the Commission corrected the lack of explicit authority to accept undertakings during the initial investigative period.[32]

The years 1995-1998 saw an increasing maturity, confidence, and sophistication in the Commission's substantive review of reportable transactions. During this period Commission decisions

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28 Sir Leon Brittan Q.C., as note 7 above, at pp. 5 and 6. For a US perspective, see Robert Pitofsky, *EU and US Approaches to International Mergers – Views from the US Federal Trade Commission*, in *EC Merger Control: Ten Years On*, as note 7 above, at p. 50 ("In the fall of 1991, in an immensely important EC decision, the Commission blocked ATR's proposed acquisition of de Havilland, signalling DG-IV's and the Commission's faithfulness to competition policy over industrial policy. My own view is that the industrial policy defence is almost always a bankrupt concept – first, because size (as opposed to efficiency) is no assurance of success in any market, global or local, and second, because antitrust enforcement is a blunt and ineffective device to provide solutions to issues like balance of trade or employment. Other government policies are much more likely to be effective").

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

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

31 In 2001, as described below, this reform was revisited, in part because, in the Commission's view, the supplementary thresholds introduced in 1997 had "not solved the multiple filing problem which they were designed to tackle", because only a small proportion of the cases they were intended to catch have in practice fallen within the scope of the Merger Regulation. *Green Paper on the Review of Council Regulation (EEC) 4064/89*, COM(2001) 745/6 final, executive summary, para. 24.

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

rendered following in-depth investigations became increasingly detailed and lengthy.[33] Between 1995 and 1998, the Commission prohibited eight transactions,[34] four of which affected the telecommunications and broadcasting markets. The Commission's concerns in these cases were based largely on vertical effects.[35] Also during this period, the Commission began to consider conglomerate or "portfolio" effects in a trilogy of cases involving commercial beverages, *Coca-Cola Enterprises/Amalgamated Beverages GB*,[36] *The Coca-Cola Company/Carlsberg A/S,*[37] and *Guinness/Grand Metropolitan.*[38] In *Gencor/Lonrho*, the Commission developed and refined its approach towards oligopolistic dominance, prohibiting the merger of two leading global suppliers of platinum. In 1998, the Court of Justice confirmed in *Kali und Salz* that transactions giving rise to situations of oligopolistic dominance could be prohibited under the Merger Regulation.[39] The Court also confirmed in that case the availability of a "failing firm defence" under the Merger Regulation.[40]

The first significant case where the Commission and US federal agencies failed to arrive at the same conclusions about the competitive effects of a merger occurred during this period, in *Boeing/McDonnell Douglas*.[41] The US Department of Justice viewed the transaction as competitively benign and concluded that no remedies were necessary, while the Commission was concerned about the reduction in the number of global producers of large commercial aircraft and the strengthening of Boeing's existing position, and conditioned its approval of the transaction on a package of remedies. After this episode, EU and US officials invested considerable time and effort in enhancing transatlantic

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

34 *Nordic Satellite Distribution*, as note 12 above, (television); *RTL/Veronica/Endemol*, as note 12 above, (television); *Gencor/Lonrho*, as note 12 above, (platinum); *Kesko/Tuko*, as note 12 above, (consumer products retailing); *Saint-Gobain/Wacker-Chemie/NOM*, as note 12 above, (abrasive materials); *Blokker/Toys "R" Us*, as note 12 above, (toy retailing); *Bertelsmann/Kirch/Premiere*, as note 12 above, (television); and *Deutsche Telekom/BetaResearch*, as note 12 above, (television).

35 See *Nordic Satellite Distribution*, as note 12 above; *RTL/Veronica/Endemol*, as note 12 above; *Bertelsmann/Kirch/Premiere*, as note 12 above; and *Deutsche Telekom/BetaResearch*, as note 12 above. See also *MSG Media Service*, as note 27 above. Other cases involving similar issues include *WorldCom/MCI (II)*, Case IV/M.1069, Commission decision of 8 July 1998, 1999 OJ L116/1, (telecommunications); *MCI Worldcom/Sprint*, Case COMP/M.1741, Commission decision of 28 June 2000, not yet reported, (telecommunications); *AOL/Time Warner*, Case COMP/M.1845, Commission decision of 11 October 2000, 2001 OJ L268/28, (communications and entertainment); and *Vivendi/Canal+/Seagram*, Case COMP/M.2050, Commission decision of 13 October 2000, (telecommunications and leisure).

36 Case IV/M.794, Commission decision of 22 January 1997, 1997 OJ L218/15.

37 Case IV/M.833, Commission decision of 11 September 1997, 1998 OJ L145/41.

38 Case IV/M.938, Commission decision of 15 October 1997, 1998 OJ L288/24.

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

40 See too *BASF/Eurodiol/Pantochim*, Case IV/M.2314, Commission decision of 11 July 2001, 2002 OJ L132/45, where the "failing firm defence" was modified and extended.

41 Case IV/M.877, Commission decision of 30 July 1997, 1997 OJ L336/16.

cooperation and day-to-day coordination.[42] It was not until 2001 and the *General Electric/Honeywell* transaction[43] that the Commission and the US authorities again differed as fundamentally and publicly as they had done in *Boeing/McDonnell Douglas*.

C. 1999-2001: The Years of Controversy

The 10th anniversary of the Merger Regulation's entry into force in 2000 witnessed an increasingly forceful, confident, and creative approach to its application. This manifested itself in several ways. First, the Commission prohibited an increasing number of transactions,[44] while a number of major transactions were abandoned to avoid prohibition decisions.[45] Second, the Commission employed an increasingly broad range of antitrust theories, including: (1) neighbouring market and potential entrant theories;[46] (2) conglomerate and portfolio effects;[47] (3) vertical effects;[48] and (4) spill-over effects.[49]

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

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

44 In 1999-2001, eight concentrations were prohibited (*Airtours/First Choice*, Case IV/M.1524, Commission decision of 22 September 1999, 2000 OJ L93/1, (packaged holidays); *Volvo/Scania*, as note 12 above, (trucks and buses); *MCI WorldCom/Sprint*, as note 35 above; *SCA/Metsä Tissue*, Case COMP/M.2097, Commission decision of 31 January 2001, 2002 OJ L57/1, (household hygiene paper products); *General Electric/Honeywell*, as note 12 above; *Schneider Electric/Legrand*, Case COMP/M.2283, Commission decision of 10 October 2001, not yet reported, (electrical equipment); *CVC/Lenzing*, Case COMP/M.2187, Commission decision of 17 October 2001, not yet reported, (man-made fibres); and *Tetra Laval/Sidel*, Case COMP/M.2416, Commission decision of 30 October 2001, not yet reported, (food and beverage packaging)). For perspective, between 1990 and 1998, the Commission prohibited 10 transactions.

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

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

47 See, e.g. *General Electric/Honeywell*, as note 12 above, (transaction prohibited, *inter alia*, because of concern as to post-merger bundling of General Electric engines with Honeywell avionics and aerospace components); and *Tetra Laval/Sidel*, as note 44 above, (transaction prohibited, *inter alia*, because of concern that Tetra Laval would leverage its dominant position in aseptic packaging into Sidel's leading position in the closely neighbouring PET packaging market). Overturned on appeal (Cases T-5/02 and T-80/02, judgment of 25 October 2002, not yet reported) and subsequently approved (Case COMP/M.2416, Commission decision of 13 January 2003).

48 See, e.g. *AOL/Time Warner*, as note 35 above, (remedies required, *inter alia*, because of concern that AOL could foreclose Time Warner's entertainment content competitors from obtaining access to AOL's Internet access and on-line services).

Third, the Commission identified single-firm dominance concerns where the post-transaction market shares would have been below 40 per cent.[50] Fourth, the Commission endeavoured to expand and develop the original notion of collective dominance.[51] Fifth, the Commission applied the Merger Regulation's procedural rules more rigorously, including, in particular, those barring consideration of remedies offered out-of-time.[52] Sixth, the Commission become more demanding in regard to the scope, implementation, and detail of remedies, including by vetting potential purchasers of divested businesses more carefully[53] and proposing greater use of independent trustees to monitor compliance with remedies.[54]

These developments attracted comment and some criticism. First, it was said that significantly increased numbers of notifications[55] and the enhanced scope and detail of Commission investigations had strained the Commission's resources,[56] and that the informality and flexibility that had characterised the early years had given way to a more bureaucratic approach. Second, it was suggested that the possibility open to the Commission since 1 March 1998, to condition phase I approval decisions on undertakings had occasionally led the Commission to seek remedies that were arguably not merited by the concerns identified. Third, the Commission's limited resources were at times said to have encouraged undue

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49 See, e.g. *Volvo/Scania*, as note 12 above, (Commission required Volvo, the acquirer, to sell a non-controlling minority shareholding in a competitor active on the market directly affected by the transaction and required Renault, the vendor, to sell a non-controlling minority shareholding in a competitor active on a neighbouring market).

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

51 See *Airtours/First Choice*, as note 12 above, (transaction prohibited on the basis of a concern that four companies would together have a position of joint dominance in a dynamic market with no evidence or finding of the existence of an effective retaliation mechanism). Overturned by the Court of First Instance on appeal. *Airtours plc v. Commission* ("*Airtours*"), as note 13 above.

52 See, e.g. *Volvo/Scania*, as note 12 above, (transaction prohibited where Commission rejected remedies offered after the expiry of the three-month period provided for in the Merger Regulation).

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

54 See, e.g. Draft Model Texts for the engagement of trustees and the monitoring of compliance with undertakings.

55 In 1991, the first full year in which the Merger Regulation was in force, 63 transactions were notified. In 2000 and 2001, the comparable figures were 345 and 335. Of the over 2,200 transactions notified under the Merger Regulation between 1990 and 2002, over 1,400 were notified in the years 1998-2002.

56 See, e.g. Peter Sutherland, *Global Consolidation: Views on Future Market Dynamics*, in *EC Merger Control: Ten Years On*, as note 7 above, at p. 70 ("It is clear that the MTF needs more resources immediately to deal with existing transaction volumes"). See too Colin Overbury, *Postscriptum*, in *EC Merger Control: Ten Years On*, as note 7 above,at p. 450 ("There is no doubt that the resources of the MTF are now stretched to the limit. During the time that I was the Director, there was an annual average of about 55 decisions. With some 32 officials available to examine the notified cases, the ratio of decided notifications to case handler was less than 2:1….The annual ratio of cases to each official has now risen to nearly 8:1, which represents a fourfold increase in their workload in less than seven years. Even if one takes into account the increased competence which the officials have undoubtedly gained through intense experience, which is, in any event, balanced by the increasingly complex and sophisticated nature of the transactions submitted for control, such an increase cannot be good").

reliance on (and insufficient scepticism of) third-party testimony, especially that submitted by competitors. Fourth, concern was expressed as to the degree to which the Commission had at times relied on speculation about future anti-competitive conduct as a ground for challenging transactions, in particular in the context of conglomerate mergers. (The Commission's prohibition of *General Electric/Honeywell* generated particularly strong criticism from senior US antitrust officials[57] and an assertive response from the Commission.[58]) Fifth, it was suggested that the Directorate-General for Competition had become less susceptible to external review and scrutiny than before.[59]

Most fundamentally, however, the Commission's role as investigator, prosecutor, and judge in EU merger control was called into question.[60] The principal criticism made was that the same Commission officials assess the evidence, state the case against a notified concentration, determine how far that case is proved, and decide whether to approve or prohibit a transaction. A comparison was drawn with the United States,[61] where the prospect of independent judicial review is said to exert discipline on decision making, irrespective of whether a given transaction is challenged or abandoned.[62] The impression had also developed that, in the 12 years since the Merger Regulation's adoption, certain of the internal checks and balances on Commission decision making in competition cases had become less effective.[63] Among other things, the reforms of the role of the Hearing Officer introduced in 2001 had

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

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

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

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

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

62 See, e.g. William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, George Mason University Symposium, Washington, D.C., 9 November 2001, <http://www.usdoj.gov/atr/public/speehces/9536.pdf> ("If we decide in the US to challenge a merger, we know we may have to go to court to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition. This means that we know our witnesses will be exposed to the crucible of cross-examination before an independent fact-finder.…After just six weeks at the agency, I cannot overstate how much knowing we may have to prove our case to an independent fact-finder disciplines our decision-making").

63 See, e.g. *The Review of the EC Merger Regulation, 32nd Report of the House of Lords Select Committee on the European Union*, HL Paper 165, Session 2001-02, para. 4 ("The top priority for reform should be to ensure

been limited because the Hearing Officer's role was confined to dealing with procedural matters, not substantive issues, legal arguments, or conclusions drawn from the evidence.[64]

Finally, there was increasing criticism of the limited opportunity for timely judicial review. The backlog of cases at the Court of First Instance and the consequent delay in hearing appeals made recipients of prohibition decisions increasingly sceptical of the practical benefits of appealing such decisions, thereby insulating the Commission from judicial review. In 2001, partly in response to these criticisms, an expedited or "fast-track" procedure was introduced by the Court of First Instance that may be used for merger cases. Certain commentators, including the President of the Court of First Instance, went as far as to suggest that the Commission might consider handing over its authority to block mergers to the Court of Justice.[65]

D. 2002-2003: THE YEARS OF RECKONING AND REFORM

The Commission ended 2001 with the adoption of a *Green Paper on the review of the Merger Regulation* (the "*Green Paper*").[66] Announcing its publication, Commissioner Monti stated that "the time has come to look at whether more mergers should benefit from the one-stop review and to adapt the rules to the realities of an increasingly globalised business environment and to an enlarging Union."[67] The *Green Paper's* stated ambition was to propose changes to the Merger Regulation that "meet the challenges posed by global mergers, monetary union, market integration, enlargement and the need to

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objectivity and fairness in the ECMR process. The many concerns about due process are best addressed by improving the procedural safeguards in the current system. Efforts must focus on improving the internal checks and balances in the ECMR regime. To achieve this, the Commission should take the following action: (1) Responsibility for the consideration of cases in Phase I and Phase II should be divided between two separate teams of officials. (2) The role of the Hearing Officer should be strengthened so that they take a prominent role in the negotiation of remedies. (3) The Commission needs to strengthen its overall capacity for economic analysis in merger cases. In particular, DG Competition should appoint a Chief Economist").

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

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

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

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

cooperate with other jurisdictions."[68] (The Commission subsequently received over 120 submissions commenting on the Green Paper.[69])

The *Green Paper* focused on four principal areas:[70] (1) the Merger Regulation's thresholds, where the Commission proposed reforming the jurisdictional provisions of the Merger Regulation to extend the Commission's exclusive competence to review transactions that fell below the existing thresholds, but were reportable in three or more Member States;[71] (2) the referral of concentrations to Member State authorities, where the *Green Paper* proposed simplifying the requirements for referral requests made by national competition authorities;[72] (3) the substantive test of the Merger Regulation, where the *Green Paper* invited a "thorough debate" on the respective merits of the dominance test of the Merger Regulation and the substantial lessening of competition ("SLC") test applied in certain other jurisdictions, including the United States, Canada, and Australia;[73] and (4) various procedural provisions of the Merger Regulation, where, to take account of criticism that notifying parties may in certain situations have insufficient time to present remedies, the *Green Paper* proposed a "stop-the-clock" provision to introduce greater flexibility into the time limits for proffering commitments.[74]

The relatively modest package of measures envisaged in the *Green Paper* and its essentially cautious approach to change were comprehensively undermined by three judgments of the Court of First Instance rendered in 2002 that annulled prohibition decisions adopted by the Commission in 1999-2001 (i.e. *Airtours*, *Schneider*,[75] and *Tetra Laval*[76]). These judgments, two of which were conducted under the

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68 *Green Paper*, as note 56 above, at p. 6.

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

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

71 *Green Paper*, as note 56 above, at para. 59. The *Green Paper* proposed switching to an effects-based test, under which the Commission would have automatic jurisdiction over transactions that would otherwise require notification under three or more national regimes. The rationale for this proposal is that, for such cases, the Commission's powers of investigation and enforcement action are "more appropriate than the more limited means available to the Member States." *Green Paper*, para. 17.

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

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

74 Ibid., para. 213. The "stop-the-clock" period would operate for a short period (e.g. 20-30 working days) at the request of the parties. In the case of commitments offered during the initial investigative period, the Commission would have discretion whether to accept such a request. The Commission reasoned that it would be inefficient to use more than the current six weeks for cases where the Commission does not see any possibility for adopting an authorisation decision, even on the basis of a new or substantially revised proposal.

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

Court's fast-track procedure (*Schneider* and *Tetra Laval*), were scathing in their criticism of the Commission's appreciation of the facts and treatment of evidence. (By way of example, the Court in *Airtours* undertook a detailed factual analysis that identified "errors, omissions and inconsistencies of utmost gravity."[77]) The Court's judgments received wide coverage in the media and caused the Commission to conduct a swift review of the underlying weaknesses in its application of the Merger Regulation.[78] Immediately following publication of the Court's judgment in *Tetra Laval*, Commissioner Monti conceded that "our record in the merger area is less glorious after these Court rulings."[79]

In response to the Court's judgments in *Airtours*, *Schneider*, and *Tetra Laval*, the Commission acknowledged that "the system put in place in 1990 [was] showing some signs of strain"[80] and recognised that a "radical"[81] package of measures was needed to allay criticism, ensure that future decisions would be based on firm evidence and solid investigative techniques that could be tested against "the cold metal of economic theory,[82] and maintain the existing institutional framework in which the Commission approves or prohibits mergers.[83] The Commission expressed determination that "these setbacks [should not be allowed] to distort our view of the Community's merger control policy," and resolved to "transform them into an opportunity for even deeper reform that originally envisaged."[84]

On 11 December 2002, the Commission approved a "comprehensive merger control reform package, which is intended to deliver a world class regulatory system for firms seeking approval for their mergers and acquisitions in the [EU]."[85] The package included a proposal for a wide-ranging revision of

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

77 *Airtours*, as note 13 above, para. 404.

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

79 Quoted. in *European Court Deals Crushing Blow to Monti's Merger Policy*, The Independent, 25 October 2002.

80 Mario Monti, *Europe's Merger Monitor*, as note 10 above.

81 Philip Lowe, *Future Directions for EU Competition Policy*, International Bar Association, Fiesole, Italy, September 20, 2002 ("we will propose radical changes in areas where radical changes are needed").

82 J.A. Schumpeter, *Capitalism, Socialism, and Democracy*, Harper & Brothers, New York, 1942).

83 See too Mario Monti, *Europe's Merger Monitor*, as note 10 above, who summarised the objectives of the Commission's proposals as follows: "[T]o improve the Commission's decision-making process, making sure that our investigations of proposed mergers are more thorough, more focused, and – most importantly – more firmly grounded in sound economic reasoning, with due regard for the rights of the merging partners and of third parties."

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

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

the Merger Regulation (the "Draft Merger Regulation"),[86] which includes substantial amendments to the current Regulation, a Draft Horizontal Mergers Notice[87] and Draft Best Practices Guidelines.[88] The Draft Merger Regulation is "designed to meet the challenges of a more integrated market and the future enlargement of the European Union."[89] Announcing the proposals, Commissioner Monti predicted that "[t]he reforms will significantly improve our merger control system making it, I believe, a model to be emulated worldwide."[90] The Commission has invited comments on these proposals, which it hopes the Council will adopt in 2003 so that they may come into force on 1 May 2004.[91] The Commission's proposals have seven principal elements.

First, the Commission decided against proposing a further reduction in the Merger Regulation's jurisdictional thresholds on the ground that they "continue to function effectively as proxies for those cases that are most appropriately dealt with at the Community level,"[92] and instead proposed measures intended to simplify the allocation of cases between the Commission and Member States and to reduce the incidence of multiple filings through a streamlined system of referrals.[93] The overall objective of the Commission's proposals is to use the rules relating to the referral of cases between the Commission and national agencies as "an effective corrective mechanism in the light of the principle of subsidiarity [that]…take[s] due account of legal certainty and the 'one-stop-shop' principle."[94] The principal change proposed by the Commission would give companies the possibility to request "one-stop" review by the Commission which, provided there was no opposition from Member States, could avoid the need to notify the same transaction to a number of different national agencies. The modalities of the Commission's proposal are complex and will likely be scrutinised carefully and discussed widely among the national authorities over the course of 2003.

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86 Proposal for a Council Regulation on the control of concentrations between undertakings, COM(2002) 711.

87 Draft Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2002 OJ C331/03.

88 *DG Competition Best Practice Guidelines on the conduct of EC merger control proceedings*, <http://europa.eu.int/comm/competition/mergers/others/best_practices_public_cons.pdf>.

89 Draft Merger Regulation, Recital 6.

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

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

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

93 Mario Monti, *Commission Adopts Comprehensive Reform of EU Merger Control*, as note 90 above (The Commission proposal envisages that "[a] simplification of the system for the referral of merger cases from the Commission to Member State competition authorities for investigation, and vice versa, is also foreseen. This reform will seek to ensure, consistent with the principle of subsidiarity, that the best-placed authority should examine a particular transaction, while at the same time seeking to reduce the incidence of 'multiple filing', i.e. notification to numerous competition authorities within the EU").

94 Draft Merger Regulation, Recital 11.

Second, with respect to the substantive assessment of mergers, the Commission issued its long-awaited Draft Horizontal Mergers Notice in an effort to explain its enforcement standards, set out a framework for the assessment of horizontal mergers, and ensure that future decisions are based on sound economics. The Draft Horizontal Mergers Notice explains how mergers should be analysed and identifies the factors that may mitigate an initial finding of competitive harm. The adoption of the Draft Horizontal Mergers Notice is intended to create a more predictable climate for the assessment of reportable transactions and to achieve benefits in the European Union similar to those achieved by the implementation in 1982 of the first version of the US Horizontal Merger Guidelines.[95] (The Commission intends to adopt, at a later stage, guidance on its approach to the appraisal of vertical and conglomerate mergers.) Because of the similarities between the Draft Horizontal Mergers Notice and the 1992 US Horizontal Merger Guidelines, EU merger enforcement is expected to become more closely aligned with US merger control.

Third, the Commission proposed clarifying the law in three significant ways:

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

(2) Although the Commission declined to adopt an SLC test, it proposed including in the Draft Merger Regulation an explicit statement to the effect that the dominance test is sufficiently broad to capture horizontal mergers in oligopolistic markets that do not create a risk of tacit collusion (i.e. collective dominance) or create a "paramount market position," but nevertheless raise market power concerns due to the loss of competition between the merging firms. This clarification was intended to address any "enforcement gap" between the dominance and SLC tests, and to ensure that the EU and US agencies apply effectively the same analytical framework. As a practical matter, the Commission has not to date challenged mergers of this kind and a broad application of the Merger Regulation to transactions meeting these criteria could imply regulatory intervention to address unilateral effects in situations where the post-transaction market shares were below those challenged to date. Questions may also arise as to the Commission's proposed terminology, including the envisaged definition of this new category of

95 Mario Monti, *Commission Adopts Comprehensive Reform of EU Merger Control*, as note 90 above ("This draft Notice seeks to clearly and comprehensively articulate the substance of the Commission's approach to the

transactions as those involving companies having the "economic power to influence appreciably and sustainably the parameters of competition."[96]

(3) The Commission proposed revising the Merger Regulation to provide that merger efficiencies should be taken into account when assessing problematic cases.

Fourth, the Commission recognised that, following the Court's judgments in *Airtours*, *Schneider*, and *Tetra Laval*, "the level of proof required by the [Court of First Instance] is high, which implies that the Commission's enquiries should be more extensive and detailed than at present."[97] Accordingly, with a view to augmenting the Commission's resources devoted to dealing with merger investigations, and in particular its economic capabilities, the Commission committed itself to an "across-the-board increase in the economic expertise in our case teams and…the capacity for more rigorous testing of the economic models we apply in our investigations."[98] To that end, it proposed creating a new position of Chief Economist to provide an independent economic opinion.[99] In late 2002, the Commission began the process of looking for an eminent economist who is "very much in touch with the latest thinking in the field of industrial economics."[100]

Fifth, in an effort to improve internal decision making, the Commission proposed a number of measures, including: (1) deepening the nature and extent of Member State involvement; (2) giving additional resources to the Commission's Hearing Officers, the independent officials charged with ensuring that companies' rights of defence are respected; (3) establishing a unit devoted to scrutiny and litigation; and (4) establishing and systematically using a peer-review "panel" system, independent of the Merger Task Force. In regard to the last proposal, it is envisaged that panels of experienced officials will be appointed for all in-depth investigations to scrutinise the Merger Task Force case team's conclusions with a "fresh pair of eyes" at key points of the inquiry. The Commission's intention is that such panels should become "a real and effective internal check on the soundness of the investigators' preliminary conclusions."[101] This initiative falls short of proposals intended to divorce the initial investigative team

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appraisal of 'horizontal' mergers, thereby providing transparency and predictability regarding the Commission's merger analysis, and consequently greater legal certainty for all concerned").

96 Recital 21, Draft Merger Regulation.

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

98 Philip Lowe, as note 81 above ("[T]his economic function needs in our view to be closely associated with the day-to-day work of our case teams, giving guidance on analytical methodology, giving upstream advice on the direction of investigations and direct assistance in the most complex cases. An independent opinion on the economic aspects of a case should also be available to the Commissioner and the Commission and should be in the file").

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

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

101 Id.

from the group of officials assigned to carry out in-depth investigations.[102] Also, any such panel would operate "behind closed doors" and would therefore lack transparency. If adopted, the Commission's proposal would nevertheless introduce a degree of internal oversight of the Merger Task Force that some believe had diminished in recent years.

Sixth, the Commission proposed various measures intended to introduce greater flexibility into the investigative process and strengthen the rights of notifying parties. Four main proposals were advanced: (1) amending the Merger Regulation to permit merging parties to notify transactions before signing definitive agreements or announcing a public bid, provided they can demonstrate "a good faith intention to conclude an agreement, for instance on the basis of an agreement in principle or a letter of intent, or, in the case of a public bid, where they have publicly announced an intention to make such a bid;"[103] (2) introducing greater flexibility in the investigative timetable, including by proposing a mechanism whereby additional time could, with the agreement of the notifying parties, be added in complex merger cases; (3) giving notifying firms the opportunity to confront (and understand concerns expressed by) complainants at an earlier stage, including by granting earlier access to the Commission's file;[104] and (4) introducing a series of "state-of-play" meetings at various points in the investigative process.

Seventh, recognising that "a proper functioning judicial review is essential to ensure that we maintain a high level of quality in our decisions,"[105] the Commission indicated a willingness to work with the Community courts "to speed up the delivery of judgments, particularly when the merging parties are keen to keep a deal alive pending the outcome of the appellate process."[106] To that end, the Commission expressed the hope that appeals in merger cases might be further accelerated and started to explore the idea of a specialised chamber for competition matters within the Community courts, as well as other

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

103 Draft Merger Regulation, Recital 28.

104 Philip Lowe, as note 81 above ("As in the field of antitrust, it should be standard practice for us to provide notifying parties with access to submissions which contest their own market definitions or competitive assessment").

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

106 Mario Monti, *Europe's Merger Monitor*, as note 10 above. See too Commission Press Release IP/02/1856 of 11 December 2002: "The Commission will continue to push for speedy review by the Courts of appeals in merger cases. The use by the Court of First Instance of a fast-track procedure in recent cases already represents considerable

measures intended to ensure a speedier review of Commission decisions.[107] At the same time, the Commission has strongly resisted adopting a judicial-based system similar to that used in the United States. Under such a system, the Commission would act as a prosecuting agency (as do the Department of Justice and Federal Trade Commission in the United States): if the Commission found that a merger raised serious competition concerns, it would have to take the case to a court, where the decision and power to enjoin a merger would lie with the court. In addition to perhaps requiring amendment of the EC Treaty, such a system would "fundamentally alter the current working of the Commission and the Merger Regulation."[108]

VII. Future Challenges

The merger control reform package adopted by the Commission in December 2002 represents only the start of a legislative process that will continue through 2003. While the package is the culmination of a year-long consultation process, and takes account of submissions made to the Commission by Member States, the legal and business communities, and others, its publication offers a first opportunity for objective consideration of the Commission's proposals taken as a whole. The proposals are likely to provoke debate within the Council.

Jurisdictionally, the Commission's decision to retain the turnover thresholds of the current Merger Regulation could, considered in light of the imminent accession to the EU of a further 10 Member States as of 1 May 2004, and the reduction of the turnover thresholds inherent in that expansion, result in a potentially material increase in the number of cases falling within the Commission's jurisdictional remit. That number may increase still further if the Commission's additional proposals are accepted for the voluntary transfer of jurisdiction in cases producing "significant cross-border effects." The Council will want to consider the possible consequences of this extension for the Commission's decision-making, both in terms of resources and consistency.

Substantively, the Commission's decision to retain the existing dominance standard for the assessment of mergers, while clarifying the concept of dominance under the Merger Regulation, may have consequences that extend beyond the oligopoly "enforcement gap" that the reform is designed to address. The Council can be expected to consider in detail not only the merits of the Commission's

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progress, but the goal should be to ensure that judicial review takes place in a period of time that makes sense for all commercial transactions."

107 Mario Monti, *Commission Adopts Comprehensive Reform of EU Merger Control*, as note 90 above ("The Commission, in parallel with the discussions in the Council of Mi[ni]sters on the revision of the Merger Regulation, will explore with Member States several options aimed at ensuring speedier judicial review in merger cases. The Commission will also pursue contacts with the [Community courts] on this matter").

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

approach as against that of switching to the SLC standard, but also the general implications for merger policy of a reworking of the substantive standard. Past history suggests that discussion of these issues within the Council will be detailed.

Procedurally, the Commission has proposed various extensions to its current deadlines in order to allow the thorough examination of, and consultation on commitments that are offered by the merging parties in the course of both first and second phase merger examinations. These extensions will lead to a general lengthening of the merger clearance timetable in most remedies cases. In addition, the Commission has suggested a voluntary time extension that could be offered by the parties in "complex" phase II cases. The practical likelihood is that this extension would become semi-automatic. The cost and uncertainty that would result from these additional delays will need to be carefully balanced against the advantages of the more rigorous and disciplined examination of evidence that the proposals are designed to achieve.

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