EU merger control

David Harrison, Dave Anderson and Paul Johnson

Cross-border
Country Q&A
PLC Which lawyer?
Lawyer profiles

www.practicallaw.com/acquisitionshandbook
EU merger control is governed by Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation). Under the Merger Regulation, the European Commission (Commission) has, subject to limited exceptions, exclusive jurisdiction within the EU over “concentrations” (see below, Jurisdictional matters: Concentration) that have a “Community dimension” (the one-stop shop principle) (see below, Jurisdictional matters: Community dimension).

These transactions require prior notification to, and clearance by, the Commission. Where the Merger Regulation does not apply, the transaction may be subject to the national merger control rules of the relevant EU member state(s).

Regulation (EC) 802/2004, implementing Regulation 139/2004 (Merger Implementing Regulation) governs the notification and investigation procedures applicable under the Merger Regulation. The Commission’s Directorate-General for Competition (DG COMP) has provided guidance on its practice under the Merger Regulation (see box, DG COMP guidance documents).

This chapter explains how EU merger control operates, and in particular when and how the Merger Regulation applies to transactions. Specifically, it considers:

- **Jurisdictional matters.**
- **The role of the EU member states.**
- **Triggering events for notification to the Commission and the suspension obligation.**
- **Hostile and recommended bids.**
- **Notification procedures.**
- **The assessment procedure and time limits.**
- **The substantive test set out in the Merger Regulation and how it is applied.**
- **Third party interventions.**
- **The role of remedies.**
- **Appeals.**
- **The Commission’s powers and the penalties it can impose.**
- **Confidentiality.**
- **International co-operation.**

### JURISDICTIONAL MATTERS

The Commission has jurisdiction under the Merger Regulation where a “concentration” has a “Community dimension”. These jurisdictional concepts are discussed in detail below.

### Concentration

A concentration exists where one or more undertakings acquire “whether by purchase of securities or assets, by contract or any other means direct or indirect control of the whole or parts of one or more other undertakings” (Article 3(1)(b), Merger Regulation). Therefore, a concentration can include:

- An acquisition of sole control.
- A pure merger.
- An acquisition of joint control.

Control is “the possibility of exercising decisive influence” (Article 3(2), Merger Regulation). A concentration only arises where there is a change of control on a lasting basis (Article 3(1), Merger Regulation).

The key issue in assessing whether a transaction constitutes a concentration is whether or not the possibility of exercising decisive influence over strategic commercial behaviour is conferred. The Commission considers cases involving legal and de facto control as giving rise to a concentration.

The Commission’s Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the control of concentration between undertakings (2008) (Consolidated Jurisdictional Notice) provides that sole control is most often acquired on a legal basis where one
The joint venture company must be “full function”, which entails the "key requirements:

- In the case of joint ventures, a concentration is defined by two or more parties being able each to block key strategic decisions, especially where minority shareholders hold significant interests in the target’s shareholders’ meeting. This analysis can be particularly significant in the context of “creeping takeovers”, achieved through incremental purchases made on securities markets. For example, in Aker Maritime/Kvaerner (Case COMP/M.2117, 7 December 2000), the Commission found that the proposed acquisition of a 26.7% shareholding by Aker Maritime in Kvaerner conferred control for the purposes of the Merger Regulation, and required Aker to reduce its interest in Kvaerner to 17.8% to avoid being deemed to have de facto control.

De facto sole control may arise where the Commission finds that the acquirer is highly likely to achieve a stable majority at the target’s shareholders’ meeting. This analysis can be particularly significant in the context of “creeping takeovers”, achieved through incremental purchases made on securities markets. For example, in Aker Maritime/Kvaerner (Case COMP/M.2117, 7 December 2000), the Commission found that the proposed acquisition of a 26.7% shareholding by Aker Maritime in Kvaerner conferred control for the purposes of the Merger Regulation, and required Aker to reduce its interest in Kvaerner to 17.8% to avoid being deemed to have de facto control.

The acquisition of a non-controlling minority shareholding is not required to be notified to the Commission if it does not result in control (whether de facto or de jure) being obtained. Further, where the minority shareholder has never acquired such control, the Commission has no power to request that the minority stake be divested. This was confirmed by the General Court, which held that the Commission had no power to order Ryanair to divest its 29.4% shareholding in Aer Lingus (Aer Lingus v. Commission Case T-411/07) as Ryanair had never obtained any form of control over Aer Lingus. The judgment highlighted that a number of competition authorities in member states would have jurisdiction to apply national laws to minority shareholdings. Indeed, in October 2010, the UK Office of Fair Trading launched an investigation into Ryanair’s shareholding in Aer Lingus. The Commission is currently assessing the perceived gap in the Ryanair’s shareholding in Aer Lingus. The Commission is currently assessing the perceived gap in the Ryanair’s shareholding in Aer Lingus.

In the case of joint ventures, a concentration is defined by two key requirements:

- The existence of joint control, which generally arises where two or more parties are able each to block key strategic decisions, particularly in relation to:
  - the budget;
  - the business plan;
  - major investments; or
  - the appointment of senior management.
- The joint venture company must be “full function”, which generally means that it must have sufficient financial, human and other resources to carry on its business on a lasting basis.

**Community dimension**

Assuming that there is a concentration, and subject to the possibility of referral between member states and the Commission (see below, Role of the member states: Referrals between member states and the Commission), the Merger Regulation only applies if the transaction has a Community dimension. This is determined by reference to two sets of turnover thresholds (see flowchart, Are the Community dimension thresholds met?).

The primary thresholds are satisfied if both:

- The combined aggregate worldwide turnover (in the preceding financial year) of all the undertakings concerned exceeds EUR5 billion (about US$6.7 billion).
- The aggregate Community-wide turnover of each of at least two of the undertakings concerned exceeds EUR250 million (about US$336 million).

Where these thresholds are not met, the secondary thresholds apply and are satisfied if all of the following criteria are fulfilled:

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR2.5 billion (about US$3.4 billion).
- In each of at least three member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million (about US$134 million).
- In each of those three member states, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR25 million (about US$33.6 million).
- The aggregate Community-wide turnover of each of at least two of the undertakings concerned exceeds EUR100 million (about US$134 million).

However, even where the primary or secondary thresholds are met, there is no Community dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state (the “two-thirds” exception).

Concentrations that fall below the Community dimension thresholds are still liable to be examined by the appropriate national authorities. The Commission has no further jurisdiction over the case, subject to the possibility of a referral under Article 22 of the Merger Regulation (see below, Role of the member states: Referrals between member states and the Commission).

The Consolidated Jurisdictional Notice contains detailed guidance on calculating turnover, including special rules for calculations relating to:

- Banks.
- Insurance companies.
- Financial holding companies.

The application of the Community dimension thresholds should be considered at an early stage in planning a transaction.

Difficulties can sometimes arise when seeking to generate the necessary turnover information, for example if companies account internally on a location-of-production basis rather than on the location-of-customer basis normally required by the Commission. There can also be difficulties where the normal principle of allocation of turnover by reference to the location of the customer cannot be readily applied (such as in some services industries). The Consolidated Jurisdictional Notice has sought to provide guidance on the Commission’s allocation methodology in such situations.
ARE THE COMMUNITY DIMENSION THRESHOLDS MET?

Original turnover thresholds:
- Combined worldwide turnover of all undertakings concerned exceeds EUR5 billion (about US$6.9 billion)
  - No
  - Community-wide turnover of each of at least two undertakings concerned exceeds EUR250 million (about US$345 million)
    - No
    - Yes
  - No

Secondary turnover thresholds:
- Combined worldwide turnover of all undertakings concerned exceeds EUR2.5 billion (about US$3.45 billion)
  - No
  - No
  - Yes
- Combined turnover of all undertakings concerned exceeds EUR100 million (about US$138 million) in each of three member states
  - No
  - Yes
- In each of those three member states, at least two undertakings concerned each have turnover exceeding EUR25 million (about US$34.5 million)
  - No
  - Yes
- Community-wide turnover of each of at least two undertakings concerned exceeds EUR100 million (about US$138 million)
  - No
  - Yes
- More than two-thirds of Community-wide turnover of each undertaking concerned is achieved in the same member state
  - No
  - Yes
- National competition rules may apply

© This flowchart was first published in the PLC Cross-border Mergers and Acquisitions Handbook 2011/12 and is reproduced with the permission of the publisher, Practical Law Company. For further information or to obtain copies please contact iain.plummer@practicallaw.com, or visit www.practicallaw.com/acquisitions-handbook.
Territorial jurisdiction

The Community dimension test does not require the parties to the concentration to have any links with the EU other than the requisite turnover; it is not necessary that the agreement between the parties be signed or performed in the territory of the EU. However, the General Court has confirmed that the application of the Merger Regulation is only justifiable under public international law when it is “foreseeable that a proposed concentration will have an immediate and substantial effect in the Community” (Gencor v Commission (Case T-102/96) [1999] ECR II-753).

In practice, the Commission takes the view that the Gencor test is satisfied where the turnover thresholds are met. However, in some joint venture cases where the parents’ turnover alone satisfies the turnover thresholds but the joint venture’s activities have no nexus with the EU, DG COMP staff may state informally that the transaction does not have the requisite Community effect and that a notification is not, in their view, required. However, this guidance does not ultimately bind the Commission.

ROLE OF THE MEMBER STATES

One of the basic principles of the Merger Regulation is that, subject to limited exceptions, the Commission has exclusive jurisdiction over concentrations with a Community dimension.

Exceptions to Commission jurisdiction

The limited exceptions to the Commission’s exclusive jurisdiction are:

- **The distinct market exception: Article 9.** This permits a member state to request a referral of a notified transaction from the Commission to its national competition authority, where the transaction threatens to affect significantly competition in a market within that member state which presents all the characteristics of a distinct market. The Commission may, on its own initiative, invite a member state to make such a request. In addition, the parties can make a similar request at the pre-notification stage (see below, Mechanisms for referral) (Article 4(4), Merger Regulation).

  Between 2008 and 2011, 21 requests were made under Article 9. Of these, 15 cases were fully or partially referred back to a member state from the Commission, and only two requests for jurisdiction were declined.

  In 2010 the Commission declined Italy’s request for jurisdiction to decide on the acquisition by Crédit Agricole of a number of Italian bank branches. The Commission cleared the deal in November 2010, stating that the acquisition did not raise any competition concerns (Crédit Agricole / Cassa Di Risparmio Della Spezia / Agences Intesa Sanpaolo, Case COMP/M.5960, 10 November 2010). In January 2011 the Italian government launched a legal challenge to the Commission’s Article 9 decision. This case is still ongoing.

- **National security exception: Article 346 (Treaty on the Functioning of the European Union).** This permits member states to take measures to protect their national security, and has been relied on to enable member states to retain jurisdiction over the military aspects of proposed mergers.

- **The legitimate interests exception: Article 21(4).** This permits a member state to apply its national law to protect legitimate interests as identified in the Merger Regulation or notified to, and approved by, the Commission. The interests listed in the Merger Regulation are:
  - public security;
  - plurality of the media; and
  - prudential rules.

Examples of member states attempting to intervene under Article 21 in the Commission’s review of a proposed merger include the following:

- Spain cited Article 21 as justification for imposing certain conditions on E.ON’s bid for Endesa (Case COMP/M.4110, 25 April 2006), as well as on Enel and Acciona’s bid for Endesa (Case COMP/M.4685, 5 July 2007), although both transactions had already been cleared unconditionally by the Commission.

- Poland imposed divestment conditions on the Unicredito/HVB merger (Case COMP/M.3894, 18 October 2005) under Article 21, despite the fact that the full transaction had already been authorised by the Commission.

- Italy cited Article 21 as justification for refusing to authorise the Albertis/Autostrade merger (Case COMP/M.4249, 22 September 2006), based on public concerns unrelated to competition law. This occurred during the Commission’s review of the transaction, which was subsequently cleared.

The Commission will scrutinise carefully any attempted use of the Article 21 exception to ensure that it is not being used improperly to protect and promote “national champions”.

On 6 March 2008, the European Court of Justice (ECJ) ruled that Spain had infringed EU law by not withdrawing the conditions for E.ON’s acquisition of Endesa (Commission v Spain (E.ON/Endesa), Case C-196/07 ECR I-41). In a companion judgment issued on 17 July 2008, the ECJ reiterated that the conditions imposed on the E.ON/Endesa and Acciona/Enel/Endesa transactions by Spain constituted a breach of its obligation under the principles of free movement of capital and freedom of establishment (Commission v Spain, Case C-207/07 ECR I-100111).

Regarding the Unicredito/HVB merger, Poland filed a complaint with the General Court, which it subsequently withdrew, asserting that the Commission had failed to consider Poland’s legitimate interests under Article 21(4). In Albertis/Autostrade, further to discussion between the Commission and the Italian authorities, the Italian government proposed to draft rules clarifying the regulatory framework, as a condition for the Commission’s closure of the case against Italy for breach of Article 21.

Even where the Commission has assumed jurisdiction, the member states may still play a significant role in the merger review as:

- Member states receive a copy of each notification and are consulted by the Commission.
- In Phase II investigations (see below, Assessment procedure and time limits: Phase II), the member states meet as part of the advisory committee.
In some cases, it can be advantageous for the parties, or third parties opposing the concentration, to contact the national competition authorities of the member states directly to explain their views.

Member states have an important role in the case referral mechanisms of the Merger Regulation (see below, Referrals between member states and the Commission).

**Referrals between member states and the Commission**

The Merger Regulation provides for certain referral mechanisms designed to facilitate the most appropriate allocation of cases between the Commission and member states, so that the Commission can deal with concentrations that have a significant cross-border impact (but which do not meet the Community dimension thresholds) while ensuring that member states can deal with cases having a mainly national or local impact (Articles 9 and 22). These referral mechanisms are designed to facilitate the most appropriate allocation of cases between the Commission and the member states.

In the case of pre-notification referral requests by the parties to move a case between national and Commission jurisdictions, the rules may assist the parties either by alleviating the burden of making multiple national filings (Article 4(5)) or by pre-empting a case being “bounced” between the Commission and a member state (Article 4(4) (see flowchart, Pre-notification procedures under the Merger Regulation (139/2004)).

**Mechanisms for referral**

The following provisions of the Merger Regulation govern the referral process:

- **Article 9.** This allows member states to request referral of cases to them from the Commission (the distinct market exception) (see above, Exceptions to Commission jurisdiction).

- **Article 22.** This permits referrals from member states to the Commission of transactions that do not meet the Community dimension thresholds. One or more member states can, on their own initiative or on the Commission's invitation, request the Commission to examine a concentration that does not meet the Community dimension thresholds, but which “affects trade between member states and threatens to significantly affect competition” within the member state or states concerned. However, because of the need for consultation with the member states, there is the possibility of substantial delay. Statistics from 2004 to 2011 indicate that, of the 19 Article 22 referrals requested, almost half (eight) entered into Phase II proceedings (see below, Assessment procedure and time limits: Phase II). In contrast, about 5% of cases notified to the Commission result in a Phase II investigation.

Even if a transaction is referred to the Commission under Article 22, a member state that has declined to join the referral request may still apply its national merger control rules to the transaction.

Recent examples of Article 22 referrals include the following:

- Germany, joined by Austria and Slovakia, made a referral request to the Commission in respect of Caterpillar’s acquisition of MWM, the German maker of engine generator sets (Caterpillar/MWM Case COMP/M.6106, 26 January 2011);

- Spain requested that the Commission review the acquisition of Sara Lee’s household insect control business by SC Johnson. Belgium, the Czech Republic, France, Greece and Italy also joined the request, even though the merger had not been notified to them as their national turnover thresholds had not been met. In contrast, the only other member state to which the merger was notified (Portugal) did not support the Article 22 referral, preferring instead to apply its own merger rules to the transaction and clearing the deal unconditionally in December 2010. The Commission opened a Phase II investigation in December 2010. However, before a decision was reached the parties abandoned the deal in May 2011 (SC Johnson/Sara Lee, Case COMP/M.5969, 7 September 2010).

- **Articles 4(4) and 4(5).** These pre-notification provisions are particularly important for transaction planning, given the potential delays arising from post-notification referrals under Articles 9 and 22. They can be summarised as follows:
  - **Article 4(4).** This allows parties to make a pre-notification reasoned submission requesting the referral of a transaction, in whole or in part, from the Commission to a particular member state. The Commission does not expect this provision to be used frequently, but it can save time if the parties expect the member state to request a referral back of the transaction under Article 9;
  - **Article 4(5).** This permits the parties, before making a notification to the relevant member states, to request the Commission, by reasoned submission, to examine a concentration that meets the notification thresholds of at least three member states. All member states concerned must accede to this request for the case to be referred. If this occurs, the case is automatically referred to the Commission. Article 4(5) is an important provision that can allow parties to benefit from the Merger Regulation’s one-stop shop principle and avoid the burden of multiple national filings within the EU.

Since the introduction of the referral regime in 2004 and 31 December 2011, Article 4(5) requests have been used more frequently than Article 4(4) requests, totalling 227 and 67 requests respectively. Discounting a peak in 2006 and 2007, the annual number of Article 4(5) referral requests has remained relatively steady, but 2011 saw the lowest number of requests in a single year (only 18) since the introduction of the system. Conversely, 2011 saw the number of Article 4(4) requests increase by 40% on 2010, after several years in which the number of Article 4(4) requests had declined.

**The functioning of referral mechanisms**

The Commission’s view is that the pre-notification referral mechanisms introduced in 2004 are working well. In 2009 the Commission issued a report to the European Council on the functioning of the Merger Regulation (Communication from the Commission to the Council, Report on the Functioning of
The referral system, together with the current turnover thresholds, effectively allocates cases between the Commission and member states, thereby reducing the number of parallel proceedings. In relation to circumstances where mergers do not qualify for review by the Commission but do require multiple filings, the Commission has published best practice guidance in order to foster co-operation and information sharing between national competition authorities.

The referral process has some disadvantages, including significant information burdens, duplication with the Form CO (the Commission’s form for merger notifications), significant timing delays and uncertainty as to the final result. Such issues may have led many parties to forego the referral procedure, even when it may have been available to them. The member states most frequently involved in referrals requested either by the merging parties (Article 4(4) and Article 4(5)) or by the member states themselves (Articles 9 and 22) are Germany, Spain and the United Kingdom.

**Guidance on referrals**

The Commission has published guidance on its case allocation policies and procedures in its Notice on case referral in respect of concentrations (2005) (Case Referral Notice), which gives guidance as to:
- When referrals may be appropriate.
- The factors that the Commission takes into account when deciding on a referral request.
- The factors that the Commission believes member states and parties should consider when contemplating making a referral request.

---

* Days are working days. One week has five working days, except if it includes official Commission holidays.
Time periods are the maximum number of working days.
** Commission may invite one or several member state(s) to request referral.
Article 22: referral by member state(s) to Commission

Transaction notified or made known to member states

15 days

Request for referral to Commission by one or more member state(s)**

Without delay

Commission informs the other member states concerned

15 days

Other member states concerned may join referral request

10 days

Commission accepts referral request (if no formal Article 22 decision adopted, acceptance deemed to occur)

10 days

Commission rejects referral request

Notification to Commission

Member states’ national rules are applicable

In relation to Articles 4(5) and 22 of the Merger Regulation, a number of member states have also made public their views on the relevant factors when considering referrals to the Commission, and these largely reflect the statements of the Commission in its Case Referral Notice.

A guiding principle cited by the Commission in its Case Referral Notice is that cases should only be re-allocated from one authority to another where the latter is the more appropriate authority to handle the case in view of the characteristics of the case and the abilities of the authorities involved, and where there is a compelling reason to depart from the original jurisdictional outcome.

However, despite the publication of such guidance, and good intentions on the part of the member states and the Commission, notifying parties can still find themselves being “bounced” between the member state and Commission jurisdictions, as happened in the Iberia/Clickair/Vueling case (Case COMP/M.5346, 9 January 2009).

In that case, the parties first notified the transaction to four member states, including Spain, and the Spanish Competition Authority (CNC) initially agreed to take jurisdiction. However, following the CNC’s acceptance of jurisdiction, the Commission also claimed jurisdiction, resulting in the CNC referring the case to the Commission. During the Commission’s review, the CNC made an Article 9 request for referral of the case back to Spain. The CNC subsequently withdrew this request, and in January 2009 the Commission cleared the merger with conditions following a Phase II investigation.

The Iberia/Clickair/Vueling case highlights the importance of confirming jurisdiction with the Commission in cases involving “close calls” on turnover.

TRIGGERING EVENTS AND SUSPENSION OBLIGATION

The following section examines when a concentration needs to be notified to the Commission, and the obligation to suspend such a notified transaction.

Triggering events

A concentration with a Community dimension must be notified to the Commission before its implementation and following any of these triggering events (Article 4(1), Merger Regulation):

- Conclusion of the agreement.
- Announcement of a public bid.
- Acquisition of a controlling interest.

A concentration can be notified before the occurrence of one of the above events, where the following can be demonstrated to the Commission (Article 4(1), Merger Regulation):

- A good faith intention to conclude an agreement.
- In the case of a public bid, a public announcement of an intention to make such a bid.

Suspension obligation

In general, transactions satisfying the Community dimension test must not be implemented before notification, or until the Commission has concluded its investigation. However, the Merger Regulation provides that the suspension obligation does not prevent the implementation of either a public bid or a series of securities transactions amounting to a creeping takeover, if both the following conditions are satisfied:

- The concentration is notified to the Commission without delay.
- The acquirer adheres to one of the following:
  - it does not exercise the voting rights attached to the securities in question; or
  - it does exercise the voting rights but only to maintain the full value of those investments, and on the basis of a derogation granted by the Commission.
The parties must make a reasoned request to receive a derogation in respect of any notifiable concentration (including public bids). In assessing the request, the Commission must consider, among other things:
- The effects of the suspension on one or more parties to the concentration, or on a third party.
- The threat to competition posed by the concentration.

In practice, this test is interpreted restrictively. Although details of the grant of a derogation in individual cases are confidential, the effect of certain provisions of national law on public bids, and the clear absence of risk of any significant anti-competitive effect arising from the merger, have been material factors in such cases.

**HOSTILE AND RECOMMENDED BIDS**

The Merger Regulation does not contain specific provisions distinguishing between hostile and recommended bids, and the Commission follows the same procedure in both cases.

In hostile bids, it can be more difficult to confirm the existence of jurisdiction under the Merger Regulation, and to engage in substantive pre-notification discussions with the Commission, due to the absence of detailed sales and market share information relating to the target company. The fact that a bid is hostile can also complicate the discussion of possible remedies.

**NOTIFICATION PROCEDURES**

The following section sets out the procedures involved in notifying a transaction to the Commission.

**The pre-notification stage**

A number of steps usually need to be taken before the transaction is formally notified.

DG COMP, which is responsible for the conduct of investigations, encourages parties to meet the designated case team and discuss the case before notification. These meetings enable the parties to obtain from DG COMP confirmation of its views on jurisdiction and to reach an agreement on the precise scope of the information to be provided in the Form CO concerning their activities and the markets in which they are active. The Commission's Best practices on the conduct of EC merger proceedings (Best Practice Guidelines) contain detailed guidance on the purpose, timing and content of pre-notification contacts.

Pre-notification meetings also enable the case team to gain an understanding, before notification, of the products or services that the transaction concerns. This understanding can be valuable in view of the strict time constraints under which the Commission operates once the transaction is formally notified. By agreeing in advance the approach to be followed in the notification, the risk of the notification being rejected as incomplete is reduced.

The Best Practice Guidelines stress the importance of pre-notification contacts, highlighting that cases where notifications have been deemed to be incomplete usually involve limited or no pre-notification contacts.

A recent example of a notification being deemed incomplete is provided by Norbert Dentressangle’s proposed acquisition of TDG (Norbert Dentressangle/TDG, Case COMP/M.6059, 28 January 2011). The Commission ruled that the filing was incomplete 19 working days into the Phase I review.

**Notifying parties**

The notification must be completed:
- By the bidder in the case of a public bid.
- By the acquirer in the case of any other acquisition of sole control.
- Jointly on behalf of all parties to a merger or where there is an acquisition of joint control.

**The priority filing rule**

The Commission applies a priority filing rule where two transactions in the same or similar markets have been notified to it at a similar time. The first transaction for which the Commission receives a formal notification will be assessed as if the second notification had not been made (by ignoring the potential impact on the market of the second proposed merger). The second transaction to be notified will be assessed as if the first transaction had already been implemented (by taking into account the altered market conditions). This rule may give the first party to notify its transaction to the Commission a significant advantage in cases involving transactions in the same market.

In April 2011 the Seagate/Samsung and Western Digital/Hitachi mergers (Seagate/Samsung (COMP/M.6214, 19 October 2011) and Western Digital/Hitachi (COMP/M.6203, 23 November 2011)) were notified to the Commission a day apart. The Seagate/Samsung merger (filed first) benefitted from the priority filing rule and the transaction was cleared unconditionally without taking into account the Western Digital/Hitachi merger. In contrast, and as a result of the priority filing rule, the assessment of the Western Digital/Hitachi merger took into account the Seagate/Samsung merger and was only cleared by the Commission on the condition that Western Digital made divestments. The decision is particularly striking given that Western Digital apparently commenced pre-notification discussions with the Commission before Samsung notified its deal, which had not previously been made public. Western Digital has lodged an appeal (T-452/11 Western Digital and Western Digital Ireland v Commission) against the Commission’s decision to apply the priority filing rule, claiming that the rule lacks legal basis.

**Filing fees**

There are no filing fees under the Merger Regulation.

**Notification form and supporting documentation**

Notifications must be submitted on either a Form CO or a Short Form CO.

**Form CO.** The requirements of the Form CO are onerous and involve the provision of extensive information on:
- The transaction.
- Market definition.
- Market share information.

Where one or more “affected” markets are identified, the parties must provide detailed explanations of the conditions of competition in such affected markets.
The notifying parties must also provide copies of all relevant documents that have been prepared by or for any member(s) of the board of directors, supervisory board, or shareholders’ meeting and which were created for the purpose of assessing or analysing the transaction with respect to competitive conditions, competitors, rationale of the concentration, potential for sales growth or expansion into other product or geographic markets and/or general market conditions.

However, at the pre-notification stage, the Commission may, if requested, grant waivers from the obligation to provide certain information in the Form CO where it is not necessary for the examination of the case.

Unless the Commission grants specific waivers, the notifying party or parties must answer all of the questions in the Form CO or else explain why the information requested is not reasonably available. Otherwise, the notification will be considered incomplete and will not be effective until the date on which the Commission receives all such information.

Short Form CO. This can be used where the concentration is unlikely to raise competition concerns and is therefore suitable for review under the Commission’s simplified procedure. It requires much less information than the full notification, although the following must still be supplied:

- Market definition.
- Market shares, where there are horizontal overlaps and/or vertical relationships.

The Commission’s Notice on a simplified procedure for treatment of certain concentrations under Council Regulation 139/2004 (2005) (Simplified Procedure Notice) provides guidance on the simplified procedure, which usually results in a short-form decision within 25 working days of the date of notification. The Commission reserves the right, however, to launch a full investigation and/or adopt a full decision.

Whether the Form CO or the Short Form CO is used, the notifying party or parties must submit one signed original in paper form, five paper copies and 32 electronic copies (in CD-ROM or DVD-ROM format) of the notification.

A total of 309 transactions were notified to the Commission in 2011. Although down considerably from the record high in 2007 of 402 notifications, this figure is higher than the number of transactions notified to the Commission in 2009 and 2010 (259 and 274, respectively). In addition, the number of Phase II investigations initiated increased to eight in 2011, following the lowest number of Phase II investigations in 2010 since 1993 (see below, Assessment procedure and time limits: Phase II). Phase II investigations can lead to prohibition or clearance (either conditionally or subject to conditions) (see below, Phase I remedies and Phase II remedies).

ASSESSMENT PROCEDURE AND TIME LIMITS

The Merger Regulation incorporates a two-phase procedure, with specified time-limits (see flowchart, Time periods for investigation under the Merger Regulation (139/2004)). The Commission has a wide discretion under the Merger Regulation to suspend proceedings and “stop the clock”. The General Court affirmed this discretion in Case T-145/06 Omya AG v Commission (4 February, 2009), in which it held that the Commission had acted within its powers during a merger investigation in which the clock was stopped on four separate occasions (Omya AG/J M Huber PCC, Case COMP/M.3796). More recently, the Commission stopped the clock in its merger investigation of Google’s planned acquisition of Motorola’s mobile handset business after it requested additional information from the parties. The clock was stopped on 6 December 2011 and the suspension lasted until 17 January 2012 (Google/Motorola Mobility Case COMP/M.6381).

Phase I

In the first phase of an investigation (Phase I), the Commission determines:

- Whether the notified transaction is a concentration and has a Community dimension (or is deemed to have a Community dimension by virtue of a referral procedure).
- If the transaction is found to be a concentration with a Community dimension, whether there are serious doubts as to its compatibility with the common market.

If the Commission finds that the transaction is a concentration and does not present serious doubts, or that it can be approved subject to conditions, it must issue a decision stating that the concentration is compatible with the common market. The Commission can:

- Approve a notified transaction following modifications to concentration plans made during a Phase I inquiry.
- Attach undertakings and conditions to Phase I clearance decisions.

If the transaction is not within the scope of the Merger Regulation (for example, because it is not a concentration or it does not meet the Community dimension thresholds), the Commission must issue a reasoned decision to this effect.

Transactions that are found not to be concentrations may still be open to consideration under Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) (which prohibit, respectively, certain restrictive agreements and the abuse of a dominant position).

In general, Phase I cases where remedies are not offered will be dealt with by the Commission within 25 working days (see flowchart, Time periods for investigation under the Merger Regulation (139/2004)).

If the transaction notified presents serious doubts (that is, a risk that the transaction will not meet the applicable substantive test for clearance), the Commission must publish a reasoned decision to this effect and initiate Phase II proceedings.

Decisions declaring concentrations to be compatible with the common market are deemed to cover restrictions directly related to, and necessary for, the implementation of concentrations (ancillary restraints). The Commission’s Notice on restrictions directly related and necessary to concentrations (2005) (Ancillary Restraints Notice) sets out when restrictions will be considered directly related and necessary. The Ancillary Restraints Notice provides guidance on the more commonly encountered restrictions in respect of both acquisitions and joint ventures.
TIME PERIODS FOR INVESTIGATION UNDER THE MERGER REGULATION (139/2004)*

- **Jurisdictional assessment**
  - If Community dimension, consideration of possible use of Article 4(4) “distinct market” referral mechanism
  - Total or partial referral back to member state
- **Pre-notification contacts with DG COMP (and member states if Article 4(4) referral desired)**
- **Notification to Commission**
  - Without delay
  - 25 days
- **Notification to relevant member state(s)**
- **Pre-notification contacts with DG COMP**
  - 20 days (under the Implementing Regulation)
- **Possible referral by one or more member state(s) under Article 22**
  - Total or partial referral back to member state
  - Parties may offer undertakings
- **Commission agrees extension with parties**
  - 15 days
  - Total of 90 days + up to 20 days from initiation of Phase II
- **Parties request extension**
  - 90 days
  - 65 days**
  - 65 days**
- **Member state concludes preliminary assessment under national law**
- **Parties offer undertakings on or after day 55 from initiation of Phase II**
  - Total of 105 days from initiation of Phase II
  - 65 days**
  - 65 days**
  - Within 45 days from referral
- **Member state requests referral back “distinct market” under Article 9**
  - 35 days from notification
  - Total or partial referral back to member state
  - Parties may offer undertakings
  - Notification to relevant member state(s)
  - Total or partial referral back to member state within 35 days from notification, or 65 days if Phase II investigation has been initiated
  - Total of 105 days from initiation of Phase II

* Days are working days. One week has five working days, except if it includes official Commission holidays. Time periods in Phases I and II may be suspended if, owing to circumstances for which one of the undertakings concerned is responsible, the Commission requests information by decision under Article 11 or orders an inspection under Article 13. Time periods are the maximum number of working days under the relevant provision.

** In addition, if the parties and/or the Commission agree to extend the time period for decisions, the 65 days for submission of undertakings will be extended by the same number of working days. Commission may accept undertakings after 65 days, in exceptional circumstances.
In the unlikely event that the Commission fails to take any decision within Phase I, the transaction is deemed to be compatible with the common market.

**Phase I remedies**

The parties may be able to avoid a Phase II inquiry, or, ultimately, the prohibition of the merger, by agreeing to give undertakings (or “commitments”) that provide remedies, which make the proposed transaction acceptable to the Commission (see below, The role of remedies).

In Phase I proceedings, undertakings must be submitted within 20 working days after notification. In practice, this can present difficulties for the parties, as the Commission may still be receiving comments in response to its requests to third parties well into that period. As a result, it may not become clear until relatively late in Phase I whether undertakings are needed, or which particular concerns they should address. This can result in pressure on the parties to make changes to the transaction that are more extensive than needed to remedy any perceived harm in order to secure clearance during Phase I.

In some instances, guidance on acceptable remedies may be obtained through more extensive pre-notification discussions with the Commission’s case team. In other cases, however, the Commission will be reluctant to discuss potential remedies until it has seen the results of its third party consultation.

It is possible to submit complex remedies in Phase I that result in a clearance decision. This was illustrated in the Agilent/Varian decision (Case COMP/M.5611, 21 January 2010) in which the Commission approved the transaction subject to four divestments comprising assets from both parties and sold to different buyers. In addition, the remedies in the Cisco/Tanberg (Case COMP/M.5669, 29 March 2010) and the T-Mobile/Orange (Case COMP/M.5650, 1 March 2010) cases, both of which included significant behavioural elements, provide further guidance on the willingness of the Commission to accept complex sets of remedies in Phase I.

**Phase II remedies**

In Phase II proceedings, the Commission normally has 90 working days to complete its investigation, although this can be extended to a maximum of 125 working days (see flowchart, Time periods for investigation under the Merger Regulation (139/2004)).

If undertakings to remedy competition concerns are offered after 55 working days from the opening of Phase II, the investigation period is extended from 90 to 105 working days. Extension of Phase II is also possible for up to an additional 20 working days by one or both of the following:

- The parties’ request of an extension before the 15th working day of Phase II.
- The Commission’s extension of Phase II (at any time) with the consent of the parties.

The 20-day extension is cumulative with the 15-day extension, if that is granted. The use of such extensions can be expected where additional time facilitates the consideration and discussion of complex substantive arguments or the proposal of suitable undertakings.

Under the Merger Implementing Regulation, undertakings can be offered in Phase II up to 65 working days after the opening of Phase II, but if Phase II is extended this time frame is extended accordingly. In exceptional circumstances, the Commission can accept undertakings offered after the expiry of the applicable Phase II deadline.

**SUBSTANTIVE TEST AND ITS APPLICATION**

The substantive test used in the Merger Regulation is whether a concentration will “significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position”. This test is designed to cover all types of anti-competitive mergers, regardless of whether the merger will create or strengthen a sole or collective dominant position (the “traditional” test) or whether the merger will result in the merged entity being able to exert market power even where it may not hold the strongest market position (the “unilateral effects” test (see below, Horizontal Merger Guidelines)).

While the Commission continues to rely on the traditional dominance test in the vast majority of its cases, it has sought, in a few high-profile cases, to test out its unilateral effects powers. An example from 2006 involved the Commission’s decision in the T-Mobile Austria/tele.ring merger (Case COMP/M.3916), where the number two player in the Austrian mobile telephone market sought to merge with the number four player in that market. The Commission’s concerns, based on a form of unilateral effects analysis, were sufficient to result in the parties offering remedies to achieve clearance.
**Horizontal Merger Guidelines**

The Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004) (Horizontal Merger Guidelines) reflect the Commission's increasingly rigorous and more economics-oriented (“effects-based”) approach to merger assessment, and address the following topics:

- The Commission's approach to market shares and concentration levels.
- Possible anti-competitive effects of horizontal mergers (see below).
- Buyer power as a countervailing factor.
- Barriers to entry as a countervailing factor.
- The role of efficiencies (for example, costs savings that benefit consumers through lower prices).
- The conditions for a failing firm defence (where the target would exit the market but for the merger).

The Horizontal Merger Guidelines identify two main ways in which concentrations between competitors operating at the same level of the market (horizontal mergers) may harm competition: non-co-ordinated or unilateral effects; and co-ordinated effects.

**Non-co-ordinated or unilateral effects.** This is where a concentration eliminates important competitive constraints on one or more companies, giving it or them greater market power without resorting to co-ordinated behaviour. The vast majority of horizontal mergers are reviewed by the Commission for non-co-ordinated effects.

Evidence of non-co-ordinated effects can include:

- High combined shares.
- Combinations of close competitors.
- Customers with limited switching possibilities.
- A weak likelihood of competitors increasing supply in response to price increases.
- Merged entities being able to hinder expansion by competitors.
- The elimination of important competitive forces, such as rival innovators.

**Co-ordinated effects.** This is where a concentration leads to, facilitates or makes more effective the co-ordinated behaviour of companies within a market.

Co-ordinated effects, according to the Horizontal Merger Guidelines, are more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of the co-ordination. The ECJ specified that co-ordination is likely if competitors can easily arrive at a common perception as to how the co-ordination should work (Case C-413/06 P, Bertelsmann AG and Sony Corp. of Am. v Impala (2008), ECR I-04951). For co-ordination to be sustainable, three conditions must be satisfied:

- The co-ordinating firms must be able to monitor to a sufficient degree whether the terms of co-ordination are being adhered to. For example, there must be sufficient transparency in the relevant market to enable the co-ordinating firms to monitor the conduct of other participants.
- There must be some form of credible deterrent mechanism.
- The reaction of outsiders, such as current and potential competitors, as well as customers, should not be such as to jeopardise the expected results of the co-ordination.

These criteria are similar to the General Court’s three-pronged test in Airtours (Case T-342/99 (2002) ECR II 2585). In applying these criteria in Sony v Impala, the ECJ stated that “it is necessary to avoid a methodical approach involving separate verification of each of those criteria taken in isolation”. The ECJ’s judgment suggests that, in addition to satisfying the three criteria above, the Commission must also show that its theory is plausible in the overall economic context of the market under consideration.

**Non-Horizontal Merger Guidelines**


The Non-Horizontal Merger Guidelines make a clear distinction between the co-ordinated and non-co-ordinated effects that may arise from such transactions. These Guidelines recognise that vertical and conglomerate mergers may provide substantial scope for efficiencies through the integration of complementary products and/or services, and that these pro-competitive effects should be weighed against potential anti-competitive aspects of the mergers.

The Guidelines also incorporate relevant case law from the ECJ and the General Court, in particular, the General Court’s judgment in General Electric v Commission (Case T-210/01).

When assessing non-horizontal aspects, the Commission examines vertical links between the parties to ensure that the transaction will not have any significant foreclosure effects in any relevant market, either upstream or downstream. In conglomerate transactions, it examines the extent to which the combined financial resources and/or the pooling of technical and commercial expertise (which could result in the “bundling” of products) might give cause for concern.

In 2008, the Commission applied the Non-Horizontal Guidelines to a number of cases, including the high-profile Google/Doubleclick case (Case COMP/M.4731, 11 March 2008) and TomTom/Tele Atlas case (Case COMP/M.4854, 14 May 2008).

**THIRD PARTY INTERVENTIONS**

There is no express provision for formal complaints to the Commission under the Merger Regulation. However, the Best Practice Guidelines acknowledge the important role played by third parties, including consumer organisations. The Commission usually investigates cases of alleged infringement of the competition rules brought to its attention.

Any third party can participate in the Commission’s investigation process by submitting comments in response to the notice published by the Commission in the Official Journal stating that...
it has received a merger notification. Third parties may be asked by the Commission to respond to a request for information. Third parties able to demonstrate that they have sufficient interest (for example, through having submitted comments to the Commission) may be allowed to participate further by either or both:

- Commenting on a redacted version of the Statement of Objections (if issued).
- Providing evidence at the Commission’s oral hearing.

Third parties can provide the Commission with submissions and documents, or request a meeting with the Commission in relation to a concentration under investigation. In suitable circumstances, the Commission may invite third parties to “triangular” meetings with the case team and the notifying parties.

The Best Practice Guidelines state that the Commission will seek to provide notifying parties with key documents relating to the concentration, which include substantiated submissions from third parties opposing the proposed transaction. However, DG COMP respects requests from third parties for non-disclosure of their submissions before the issuance of the Statement of Objections, if the requests are justified by genuine confidentiality concerns.

THE ROLE OF REMEDIES

Parties to a proposed merger may offer remedies to eliminate competition concerns and obtain approval for an otherwise problematic merger (see also above, Assessment procedure and time limits: Phase I remedies and Assessment procedure and time limits: Phase II remedies). In 2011, only 2% of mergers notified and approved under the Merger Regulation involved the use of remedies to eliminate competition concerns.

Merger Remedies Notice

In 2008, the Commission published a revised notice on remedies in merger control, Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 [2008] (Remedies Notice), replacing its 2001 notice. The Commission has also published a set of standard terms as a basis for remedy negotiations (Model Divestiture Commitments) and a standard trustee mandate (Model Trustee Mandate).

The Remedies Notice emphasises that the responsibility of proposing adequate remedies to eliminate competition concerns lies with the notifying parties. If the parties fail to propose such remedies where the Commission has identified serious concerns in Phase I, the Commission will have no choice but to adopt a Phase II decision. If proposed remedies are deemed inadequate during Phase II, the Commission will adopt a prohibition decision as demonstrated in recent prohibition decisions such as Deutsche Börse/NYSE (Case COMP/M.6166, 1 February 2012) and Olympic Air/Aegean Airlines (Case COMP/M.5830, 26 January 2011). To be adequate, the remedies must achieve the following objectives:

- Eliminate the competition concerns entirely.
- Be comprehensive and effective.
- Be capable of being implemented effectively within a short period of time.

The Commission generally prefers structural remedies (divestment). While the Commission does accept behavioural commitments in merger cases, these are rare. The Commission will also accept a mix of divestiture and behavioural commitments (Thomson Reuters, Case COMP/M.4726, 19 February 2008).

However, it seems that the Commission is becoming more amenable to pure behavioural commitments, at least in the information and communications technology sector. In January 2011 it cleared Intel’s proposed acquisition of McAfee on the basis that Intel committed to ensuring the interoperability of the merged entity’s products with those of competitors (Intel/McAfee Case COMP M.5984, 26 January 2011).

Form RM

The Commission has created a standardised remedies form (Form RM) to aid parties in their submission of proposed commitments. The Form RM concerns both divestitures and other types of remedies. Parties must identify the types of commitments offered and the terms or conditions for their implementation.

While the information requested under the Form RM is largely similar to that already provided in the Commission’s Model Divestiture Commitments, it requires the parties to explain the activities of the business to be divested, as well as the reasonable expectation of a suitable purchaser for the divestment.

Trustee

A trustee is generally required to oversee compliance with commitments made by the parties and, in particular, to oversee the parties’ obligations during the divestiture process. The choice of trustee should reflect practical considerations, with the candidate having experience in the role and an established presence before the Commission.

The Remedies Notice sets out five non-exclusive tasks of the trustee, which can be summarised as follows:

- In the interim period, to oversee the safeguards for the business to be divested.
- In carve-out cases, to monitor the splitting of assets and the allocation of the personnel between the divested business and retained businesses, and the replication of assets and functions in the business previously provided by the parties.
- To oversee the parties’ efforts to find a potential purchaser and to transfer the business.
- To act as a contact point for any requests by third parties.
- To report on these issues to the Commission in periodic compliance reports.

Monitoring compliance

The Commission monitors compliance with commitments given by the parties. It can impose sanctions for breach of an undertaking attached as a condition of a clearance decision, ranging from fines and periodic penalty payments to revocation of the decision. The Commission only amends or re-opens previous decisions in exceptional circumstances. Certain officials in DG COMP are charged with monitoring compliance with commitments.
Analysis

The Commission’s position being upheld (in whole or in part).

An annulment of the Commission’s decision (in whole or in part).

Parties, including third parties and member states, can appeal to the General Court and to the ECJ are governed by their respective sets of procedural rules.

Appeals against Commission decisions under the Merger Regulation must be initiated within two months of the publication of the measure or its notification to the appellant (or, if this is not applicable, of the day on which it came to the appellant’s knowledge).

In the *Sony/BMG* case (Case T 464/04), the General Court annulled the Commission’s unconditional clearance decision on the merits, following a third party challenge by Impala. This raised concerns about the robustness of the Commission’s clearance decisions even after an intensive Phase II investigation. The ECJ later set aside the General Court’s ruling in *Sony Impala* (Case C-413/06P) and upheld the Commission’s clearance decision (see above, *Horizontal Merger Guidelines*). While the ECJ was considering the case, the merger was re-notified to the Commission and subsequently cleared.

*Sony/BMG* highlights the ability of third parties to bring appeals, and the length of time involved in such proceedings. Despite the initial success of the third party appeal in *Sony/BMG*, a number of recent third party challenges have been unsuccessful at the General Court level.

Nevertheless, third parties continue to appeal. For example, Cisco has recently brought a third party challenge (joined by Messagenet, a European video-calling provider) to appeal the Commission’s unconditional clearance of Microsoft’s acquisition of Skype (Case T-79/12, 15 February 2012).

An expedited procedure exists for urgent cases, which focuses on oral submissions and has the effect of limiting the arguments to key points. The introduction of the expedited procedure appears to have contributed to the large number of actual and pending appeals, both by the merging parties (against prohibition decisions) and by third parties (against clearance decisions).

The General Court’s judgments under the expedited procedure (such as *Tetra Laval v Commission* (Case T-5/02) (2002) ECR II-4381), which annulled the Commission’s decision in *Tetra Laval/Sidel* (Case COMP/M.2416, 30 October 2001)) have established the expedited procedure as an important check on the Commission’s powers under the Merger Regulation.

In practical terms, the *Tetra Laval/Sidel* case has shown that, under the expedited procedure, a ruling may be obtained by the merging parties from the General Court within a time frame that can result in a transaction being saved or resurrected if the appeal is successful.

More recently, Olympic and Aegean have lodged an appeal under the expedited procedure, challenging the Commission’s decision to block the merger of the two airlines (Case T-202/11, 4 April 2011). Western Digital has also filed an appeal under the expedited procedure to challenge the Commission’s conditional merger clearance of its buyout of rival hard disk drive producer Viviti Technologies. The deal was approved in November 2011, subject to Western Digital’s divestment of certain assets and the Commission’s approval of the purchaser of those assets (Western Digital and Western Digital Ireland v Commission, Case T-60/12, 17 February 2012).

 Appeals and damages

Successful appeals of prohibition decisions have also led to two damages actions against the Commission, resulting in differing conclusions. In the first case, Schneider Electric sued the Commission for damages in relation to the Commission’s prohibition of its 2001 merger with Legrand. In July 2007, the General Court awarded damages to Schneider, holding that Schneider should be partially compensated for the losses it suffered related to the prohibition of the merger (Schneider Electric SA v Commission of the European Communities (Case T-351/03)).

The Commission appealed the General Court’s decision and, in September 2009, the ECJ overturned in part the General Court’s decision, limiting the compensation available to Schneider to the expenses incurred in having to re-notify the merger (Commission v Schneider Electric (C-440/07 P)).

FOR MORE INFORMATION | about this publication, please visit www.practicallaw.com/acquisitions-mig
about Practical Law Company, please visit www.practicallaw.com/about/practicallaw

---

**CHECKLIST: PRACTICAL TIPS FOR MANAGING NOTIFICATIONS**

Although there can be no standard formula for managing a notification under the Merger Regulation, the following are some relevant practical suggestions:

- **Consider competition issues early.**
- **Beware of the risk of inadvertently acquiring de facto control.**
- **Allow time to resolve jurisdictional issues and gather market information.** Thorough preparation is essential. Aim not just to file early, but also to close early.
- **Allow time for pre-notification contacts with the Commission, including submission of a briefing paper and/or draft notification, and pre-notification meeting(s).**
- **Ensure the notification is complete and accurate.**
- **Consider timing of other filings with a view to the need for co-ordination by different authorities.**
- **In appropriate cases consider possible remedies at the outset.**
- **Consider allocation of regulatory risk.**
- **In integration planning, avoid jumping the gun.**
- **Avoid the inadvertent creation of documents containing careless language.**
- **Control public relations. Avoid making statements that prejudge the Commission’s assessment.**

---

**FOR MORE INFORMATION | about this publication, please visit www.practicallaw.com/acquisitions-mig**
**about Practical Law Company, please visit www.practicallaw.com/about/practicallaw**
In contrast, the General Court rejected the claim for damages brought by MyTravel Group (formerly Airtours) *Airtours v Commission* (Case T-342/99), concluding that the Commission cannot be held liable unless it manifestly and gravely infringes EU law.

Third party claimants are also able to bring actions for damages against the Commission for failure to ensure compliance with the commitments agreed with merging parties. In March 2010, a French local authority sued the Commission for damages of EUR10 million for failure to ensure that Celanese complied with its pledge to keep a local plant open which was a condition of the Commission’s clearance decision. However, the General Court dismissed the action because the French local authority did not take action against the firms. The General Court also ruled that the Commission was under no obligation to pursue Celanese for non-compliance (*Communauté de communes de Lacq v Commission* (Case T-132/10, 1 September 2010) (Blackstone/Acetex, Case COMP/M.3625, 13 July 2005)).

### POWERS AND PENALTIES

The following section concerns the Commission’s enforcement powers and the penalties it can impose.

#### Powers of Commission during a merger investigation

The Commission has the following powers during a merger investigation:

- To seek the views of interested third parties by publishing in the Official Journal a notice of initiation of proceedings.
- To consult customers, suppliers and competitors, usually by means of a written questionnaire.
- To request further information from the notifying parties.
- To enter any premises and conduct on-site investigations, during which the Commission (and authorised accompanying persons) can seal business premises and records for the duration of inspections, as well as to ask personnel to explain facts of documents and record the responses given. However, the power to enter premises is only used rarely.

The Merger Regulation also requires assistance from member states when carrying out investigations, including, if appropriate, police support.

If these inquiries confirm the Commission’s serious concerns regarding the proposed transaction, the Commission then drafts a Statement of Objections. Third parties showing sufficient interest may obtain a version of the Statement of Objections. The original notification or a response to a request for information.

If requested by the notifying parties, the Commission must hold an oral hearing, which focuses on the Commission’s understanding of the facts and the competition concerns set out in the Statement of Objections.

#### Non-compliance with notification and procedural requirements

The Merger Regulation links fines and penalty payments to aggregate group turnover. Fines of up to 1% of worldwide group turnover can be imposed for:

- Providing incorrect or misleading information in a notification or a response to a request for information.
- Failing to supply information within the period fixed by the Commission.
- Failing to co-operate fully with an inspection.
- Providing incorrect or misleading answers to Commission questions asked during inspections (or failing to rectify, within a time limit, incorrect or misleading answers given by staff members).
- Breaking seals attached in the course of Commission inspections.

In addition, the failure to supply full information can result in an extension of the time period in which the Commission must reach a decision on whether to open proceedings, or can result in rejection of the notification.

The Commission’s enforcement powers extend to third parties that fail to provide information or provide inaccurate information. While the Commission to date has fined only one third party with respect to an information request, it was a significant fine of EUR950,000 (about US$1.3 million). The fine was imposed on Mitsubishi Heavy Industries for supplying incomplete information.

#### Implementation without clearance

The Commission can impose fines of up to 10% of the aggregate turnover of the undertakings concerned if they intentionally put into effect a concentration before notification or before it has been declared compatible with the common market (“gun jumping”) (*Merger Regulation, Article 7(1)*).

From 1990 to 2006, there were no gun jumping cases reported under the Merger Regulation. However, in late 2007, the Commission opened an investigation into suspected “gun jumping” with the first ever “dawn raids” of merging parties, conducting unannounced inspections of the UK offices of Hydro Polymers and Ineos, in connection with the planned acquisition of Hydro Polymers by Ineos (*Case COMP/M.4734, 30 January 2008*).

Although the Commission closed its investigation into the alleged “gun jumping” in January 2008 without taking any action, it made clear that it would not hesitate to use this power fully where appropriate.

In June 2009, the Commission did use that power, fining Electrabel EUR20 million (about US$26.9 million) for implementing its acquisition of Compagnie Nationale du Rhône (CNR) without prior Commission approval (*Case COMP/M.4994*). The original notification of the transaction was cleared by the Commission in March 2008. However, the Commission discovered during its investigation that...
Electrabel had actually acquired de facto control of CNR in 2003 (see above, Jurisdictional matters: Concentration). Electrabel has appealed this decision and the appeal was heard before the General Court on 30 November 2011. Judgment is still pending at the time of writing (Electrabel v Commission (Case T-332/09)).

The Commission may also impose high fines in cases involving:

- The implementation of a blocked concentration.
- Non-compliance with the terms of a conditional clearance decision.

The Merger Regulation contains powers to order interim measures where a concentration has been implemented without clearance or in contravention of a conditional clearance decision. In such cases, the Commission can then proceed to take a Phase II decision to clear the concentration (with or without conditions) or block it.

CONFIDENTIALITY

The Commission and the member states’ officials are bound by obligations of professional secrecy, under which information received by them can only be used for the purposes of the relevant request, investigation or hearing (Merger Regulation). The Commission must provide the member states’ competition authorities with copies of all notifications. The Commission must also publish the fact of notification wherever it finds that a notified merger falls within the scope of the Merger Regulation.

DG COMP frequently asks the parties whether they have notified or intend to notify a transaction to other competition authorities and, if so, whether the parties consent to sharing confidential information provided in the Form CO with such other authorities. The Commission cannot share this information without the express consent of the parties.

INTERNATIONAL CO-OPERATION

DG COMP maintains close contact with merger regulators worldwide through formal and informal bi-lateral and multi-lateral contacts and agreements at both EU level (for example, through the European Competition Network) and at a worldwide level (for example, through the International Competition Network). This improved level of international co-operation has led to more international convergence on procedural and substantive merger control issues.

*The authors are grateful for the assistance of Rachel Cuff, Jennifer Varley and Stuart Stock of Berwin Leighton Paisner LLP in the preparation of this article.
DAVID HARRISON
Berwin Leighton Paisner LLP
T +44 20 3400 1000
F +44 20 3400 1111
E david.harrison@blplaw.com
W www.blplaw.com

Qualified. England and Wales, 1987
Areas of practice. Abuse of dominance; aviation; cartels; central and local government; competition compliance and disputes; corporate investigations; defence and aerospace; EU law; market investigations; merger control; public procurement; sectoral regulation; state aid.
Recent transactions
- Advising the Association for Financial Markets in Europe in connection with the European Commission’s Phase II investigation and prohibition of the proposed merger between Deutsche Börse and NYSE Euronext.
- Advising Sports Direct on the Sports Direct/JJB investigation by the Competition Commission and related litigation.
- Advising Canadian mining and metals company Inco Limited on the European Commission’s Phase II investigation into the competition aspects of its EUR19 billion (about US$25.5 billion) offer for Falconbridge.

DAVE ANDERSON
Berwin Leighton Paisner LLP
T +32 2792 2011
F +32 2792 2222
E david.anderson@blplaw.com
W www.blplaw.com

Qualified. Pennsylvania, 1994; Washington DC, 1995; England and Wales, 1996; Minnesota, 1996; on the E-list of the Brussels bar since 2001
Areas of practice. Abuse of dominance; aviation; cartels; competition compliance and disputes; EU law; market investigations; merger control; sectoral regulation; technology, media and telecoms.
Recent transactions
- Advising China-based AVIC Auto and PCM/Nexteer on the European Commission’s merger clearance of AVIC’s acquisition of PCM/Nexteer.
- Advising Pacific Century Motors (PCM) on the international merger control aspects of its acquisition of steering systems manufacturer, Nexteer Automotive, from General Motors.

PAUL JOHNSON
Berwin Leighton Paisner LLP
T +32 2792 2011
F +32 2792 2222
E paul.johnson@blplaw.com
W www.blplaw.com

Qualified. England and Wales, 2006; on the E-list of the Brussels bar since 2007
Areas of practice. Abuse of dominance; cartels; competition compliance and disputes; EU law; market investigations; merger control; sectoral regulation; technology, media and telecoms.
Recent transactions
- Advising the Association for Financial Markets in Europe in connection with the European Commission’s Phase II investigation and prohibition of the proposed merger between Deutsche Börse and NYSE Euronext.
- Advising China-based AVIC Auto and PCM/Nexteer on the international merger control aspects of AVIC’s acquisition of PCM/Nexteer.
- Advising Solectron Corporation on the international merger aspects of its EUR3 billion (about US$4.4 billion) acquisition by Flextronics International, including on clearances from the European Commission and competition authorities in Brazil, China, Singapore and Turkey.
An extraordinary world needs a remarkable legal service

If you need help with a legal or business issue, please visit www.blplaw.com for details of our lawyers.

- A full service, international law firm
- 5 times winner of “Law Firm of the Year”
- Ranked in 67 areas of the law
- Clients or work in 130 countries
- Client base includes over 30 FTSE 100 companies and 8 of the world’s top ten banks
- Top-class international Competition, EU & Trade team of 30+ specialists based in London, Brussels and Moscow

Get in touch

David Harrison
T: +44 (0)20 3400 4269
E: david.harrison@blplaw.com

David Anderson
T: +322792 2421
E: david.anderson@blplaw.com

An extraordinary world needs a remarkable legal service.
www.blplaw.com