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2019

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Contributed by Dechert LLP ***Authors:*** Alec Burnside, Hans Jürgen Meyer-Lindemann, Mélanie Thill-Tayara, Clemens Graf York von Wartenburg

Law and Practice

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EU LAW AND PRACTICE

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Dechert LLP's global antitrust/competition team is a Destination Practice for clients seeking strategic representation. Clients often come to Dechert specifically for their antitrust needs, integrating our strategic guidance with input from their other advisers. We advise on a wide range of matters, including merger control, cartel and abuse of dominance investigations, class actions and other contentious proceedings, state aid and regulatory compliance. Our focus is on our clients' most business-critical situations and matters with high levels of complexity and risk, often involving multiple legal and commercial issues across jurisdictions. We complement our knowledge of antitrust/competition law with experience in government affairs, economics and communications, which we co-ordinate to deliver cohesive advice tailored to our clients' objectives. We bring to all our assignments a deep understanding of the commercial world, with a special focus on industries subject to government regulation.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The EU merger control regime is governed by Council Regulation No 139/2004 ("EUMR"). It sets out the legal and analytical framework for the assessment of concentrations including the jurisdictional thresholds, the substantive test and key features of the review process. Commission Regulation No 802/2004 ("Implementing Regulation"), most recently amended by Commission Regulation 1269/2013 ("2013 Implementing Regulation"), contains the notification forms and deals with the procedural aspects of merger reviews (including time limits). Subject to limited exceptions, the application of the EUMR is extended to Iceland, Liechtenstein and Norway by the EEA Agreement.

The European Commission ("Commission") is responsible for the enforcement of the EUMR. It has published a number of non-binding interpretative notices and guidelines on the conduct of merger control reviews under the EUMR. Jurisdictional and procedural guidance is provided in the:

- Consolidated Jurisdictional Notice (2008);
- Notice on the Simplified Procedure (2013);
- Commission Notice on Case Referrals (2005).

Guidelines on substantive issues include the:

- Horizontal Merger Guidelines (2004);
- Non-Horizontal Merger Guidelines (2008);
- Remedies Notice (2008); and
- Notice on Ancillary Restraints (2005).

The Commission has supplemented its guidance with a series of "Best Practices" guidelines, including:

- Best Practices on the Conduct of Merger Control Proceedings (2004);
- Best Practices on the Submission of Economic Evidence (2011);
- Best Practice Guidelines on Divestiture Commitments (2013); and
- Best Practices on the Disclosure of Information in Data Rooms.

In 2018, the Commission indicated that it is preparing best practice guidelines on the submission of internal documents. This reflects the growing importance of internal documents in the Commission's appraisal of concentrations.

1.2 Legislation Relating to Particular Sectors

There are no sector-specific rules for concentrations that meet the EUMR jurisdictional thresholds. In addition, there are no EU-level regulations that apply to foreign investments, although there are a number of Member States with rules governing foreign investments (notably France and Germany). A proposal for an EU Regulation establishing a framework for the screening of foreign direct investments into the EU was published on 13 September 2017, but has not yet been enacted.

1.3 Enforcement Authorities

The Directorate General for Competition ("DG COMP") is the part of the Commission that discharges the responsibility for the enforcement of the EUMR, under the direction of the current Competition Commissioner, Margrethe Vestager.

The so-called "one-stop shop principle" gives the Commission exclusive jurisdiction to review concentrations that meet the EUMR jurisdictional thresholds in the EEA (ie, EU Member States plus the "EFTA States" of Iceland, Liechtenstein and Norway). EU National Competition Authorities ("NCAs") and the competition authorities in the EFTA States have no competence to apply their national competition laws, regardless of the nationality of the parties to the concentration. However, the Commission will actively consult the NCAs and, in some cases, the EFTA Surveillance Authority (the Commission's equivalent for EFTA States) and the competition authorities of the EFTA States (see **7.4 Cooperation with Other Jurisdictions**).

The EUMR and the one-stop shop principle will cease to apply to the UK when it leaves the EU, which is currently expected to take place on 30 March 2019. At the time of publication, transitional arrangements are yet to be agreed. Consequently, the treatment of pending transactions remains to be seen, in particular those that have been announced and/or are still in the pre-notification phase.

There are limited exceptions to the one-stop shop principle, as outlined below.

Protocol 2 of the EEA Agreement excludes certain products from the scope of the EEA Agreement. It follows that neither the Commission nor the EFTA Surveillance Authority is entitled to apply competition rules in cases where the products fall outside the scope of the EEA Agreement. In such cases, jurisdiction – to the extent the concentration concerns products that are not covered by the EEA Agreement – will revert to the national competition authority of the EFTA State.

Article 346 of the Treaty on the Functioning of the European Union ("TFEU") provides that a Member State may take measures it considers necessary for the protection of the essential interests of its security connected with the production of or trade in arms, munitions and war material, provided that such measures do not adversely affect competition for products that are not specifically intended for military purposes. In such cases, Member States may intervene and direct the parties not to notify the parts of the concentration

that are covered by Article 346 TFEU. Article 123 of the EEA Agreement, which applies to EFTA States, largely mirrors Article 346. Dual-use goods/technologies fall outside the scope of Article 346 TFEU.

In addition, Article 21(4) EUMR provides that Member States may intervene in concentrations that qualify for review to take appropriate measures to protect legitimate interests other than competition. Public security, media plurality and prudential rules are expressly recognised by the EUMR as legitimate interests. If a Member State wishes to invoke another public interest, it must notify the Commission before taking any action. In practice, the Commission will review the competition aspects of the concentration, but it then falls to the competent body in the Member State to determine whether the concentration is, or may be, expected to operate against its legitimate interest(s).

2. Jurisdiction

2.1 Notification

A concentration that meet the EUMR thresholds – ie, concentrations with an EU dimension – must be notified to the Commission and cleared prior to implementation.

The EUMR contains a number of jurisdictional referral mechanisms that allow for concentrations to be transferred from the Commission to NCAs, and vice versa. Depending on the situation, referrals may be initiated by the parties to the concentration, the Commission or Member States (acting through NCAs).

First, Article 4(4) EUMR provides that, prior to the notification, the notifying parties may inform the Commission, by means of a reasoned submission, that a concentration may significantly affect competition in a distinct market within a Member State, and request that the concentration is examined in whole or in part by that Member State. Where a concentration does not have an EU dimension but is reportable to at least three Member States, Article 4(5) EUMR provides that the parties may submit a reasoned submission to request a review instead by the Commission, and thus benefit from the one-stop shop.

Secondly, under Article 9 EUMR, a Member State (acting on its own initiative or at the invitation of the Commission) may request a full or partial referral where it considers that the notified concentration threatens to significantly affect competition in a distinct market within that Member State. The Member State must make the request within 15 working days of the receipt of a copy of the notification.

Thirdly, Article 22 EUMR provides one or more Member States may request that the Commission examines a concentration that does not have an EU dimension, but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request (so-called "upward referrals"). Other Member States/EFTA States may also join the request. While Article 22 was originally conceived as a tool for Member States with no domestic merger control regime, it has come to serve as a means for Member States to act collectively so as to enable an EU-level review of concentrations that would otherwise escape EU review.

2.2 Failure to Notify

Article 14(2) EUMR provides that the Commission may impose a fine of up to 10% of the aggregate worldwide turnover of parties that (i) intentionally or negligently fail to notify a concentration with an EU dimension in accordance with Articles 4 and 22 EUMR prior to its implementation, or (ii) implement a concentration prior to the receipt of merger control clearance in breach of Article 7 EUMR (ie, the standstill obligation) (see **2.12 Requirement for Clearance Before Closing**).

In practice, the Commission has rarely had to use its powers to penalise parties for a failure to notify a concentration and/or breaching the standstill obligation (so-called "gun-jumping"). However, recent developments show that the Commission is taking an increasingly tough line against procedural violations of the EUMR including gun-jumping. Most recently, in May 2018, Altice was fined EUR125 million for implementing its acquisition of Portugal Telecom prior to notification and merger control clearance (Altice/PT Portugal). In July 2017, the Commission opened proceedings against Canon for implementing its acquisition of Toshiba Medical Systems Corporation prior to notification and merger control clearance (Canon/Toshiba Medical Systems Corporation).

Before Altice/PT Portugal, the highest fine for gun-jumping was EUR20 million. Electrabel and Marine Harvest were each fined EUR20 million in connection with their acquisitions of de factosole control of Compagnie Nationale du Rhône and Morpol, respectively (Electrabel/ Compagnie Nationale du Rhône, Marine Harvest/Morpol); both fines were upheld on appeal to the EU General Court. The judgment of the General Court in Marine Harvest v Commission is currently under appeal to the EU Court of Justice.

The EU Court of Justice recently clarified the correct interpretation of Article 7 EUMR in a preliminary ruling requested by the Danish Maritime and Commercial Court in Ernst & Young P/S v Konkurrencerade. The ruling concerned Ernst & Young's challenge to a decision of the Danish competition authority ("DCCA") which found that it violated the standstill obligation by implementing its acquisition of KPMG Denmark prior to the receipt of clearance.

The alleged violation stemmed from KPMG Denmark giving notice and subsequently terminating its co-operation agreement with KPMG International. The DCCA found that the termination of the agreement violated the standstill obligation since it was merger-specific, irreversible, and impacted the entire market. In its ruling, the court found that the standstill obligation only applied to concentrations. and that the termination of the co-operation agreement did not breach the standstill obligation since it did not contribute to a change of control of KPMG Denmark, which is necessary in order for a concentration to arise.

The initiation proceedings and gun-jumping penalties are made public, which may lead to reputational damage for the parties subject to enforcement action.

2.3 Types of Transactions

The EUMR applies to "concentrations." The term concentration covers transactions that involve a change in control on a lasting basis in the undertakings concerned – ie, the transaction leads to a lasting change in the structure of the market. An undertaking for the purposes of the EUMR refers to a business with a market presence to which a market turnover can be clearly attributed.

A concentration may arise from:

- the merger of two or more previously independent undertakings or parts of undertakings (ie, a "legal merger" in the USA, or a "fusion" in France);
- the acquisition, by one or more persons already controlling at least one undertaking or by one or more undertakings of direct or indirect control of the whole or parts of one or more other undertakings;
- the creation of "full-function" joint ventures (see **2.10 Joint Ventures**).

The form of the transaction is irrelevant to the assessment of whether a concentration will arise so long as it involves a change in control on a lasting basis (see **2.4 Definition of 'Control'**).

An internal restructuring within a group of companies will not constitute a concentration. In addition, the EUMR provides that the following transactions will not give rise to a concentration:

- the acquisition of securities, on a temporary basis, by a credit institution, insurance company or other financial institution, provided it (i) does not exercise the attached voting rights except in the preparation of the disposal of all or parts of the undertaking, and (ii) resells the securities within one year;
- the acquisition of control by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
- the acquisition of control by a financial holding company providing that the voting rights are exercised only to maintain the full value of the investment and not to determine the competitive conduct of the undertaking.

In practice, the above exceptions are rarely invoked. However, there has been significant attention and controversy around the use of "warehousing" structures (also referred to as "parking transactions"). These structures involve the acquisition of a target by an interim buyer on the basis of an agreement to sell it to the ultimate buyer at a later date. Industrial (or "strategic" buyers) may wish to warehouse the target in a first stage, particularly in competitive auction situations, in order to allow the time and space to argue substantive antitrust issues and justify clearance after a slower process. The Commission has adopted the view as a matter of policy that the combined arrangements will often constitute a single concentration. This approach was illustrated by its recent decision to open proceedings against Canon for gun-jumping (see **2.2 Failure to Notify**).

2.4 Definition of 'Control'

The concept of control in the EUMR refers to the ability to exercise decisive influence over an undertaking. It may take the form of rights, contracts or any other means that confer the right to (i) use all or part of the assets of an undertaking, or (ii) exercise decisive influence over the "commercial and strategic behaviour" of an undertaking. It follows that the means through which control may be exercised are not strictly defined. Moreover, control may be exercised on a de jure or a de facto basis.

The clearest form of control is the ownership of the majority of shares/assets or the right to exercise the majority of votes at shareholder or board meetings (positive control). Veto rights over key commercial and strategic matters, including the budget, business plan and the appointment of senior management, are also capable of conferring control (negative control). However, veto rights that are typically accorded to minority shareholders to protect their investment will not confer control. This includes, but is not limited to, vetos over changes to constituent documents, increases in share capital or the liquidation or winding-up of a company.

Control may be exercised by one undertaking (sole control) or jointly with two or more undertakings (joint control). Situations of joint control are characterised by the possibility of a deadlock situation arising as a result of two or more undertakings each having decisive influence. This may take the form of two or more undertakings exercising the same number of votes, or each undertaking being entitled to appoint an equal number of members to the board. Joint control may also arise where there is no equality in votes or

board representation, if one of the undertakings has a veto right over one or more commercial and strategic matters.

Transactions/arrangements that lead to a change in the quality of control (eg, joint to sole control) are caught by the EUMR.

The EUMR does not prescribe a precise shareholding percentage. Shareholdings as low as 24.2% and 27% have been found to confer de facto control since it was likely that the acquirer, based on historic voting patterns and widely dispersed share ownership, would have exercised a majority of votes at shareholders' meetings. The EU General Court has confirmed that a minority shareholding that does not lead to an acquisition of control does not fall within the scope of the EUMR.

2.5 Jurisdictional Thresholds

The EUMR only applies to concentrations with an EU dimension. A concentration will have an EU dimension if either of the following sets of thresholds are met.

- Primary thresholds:
  - (a) the combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR5 billion; and
  - (b) the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR250 million; unless
  - (c) each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.
- Secondary thresholds:
  - (a) the combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR2.5 billion; and
  - (b) the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR100 million; and
  - (c) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million;
  - (d) in each of at least three of the Member States included above, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR25 million; unless
  - (e) each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

The EUMR does not contain any sector-specific jurisdictional thresholds.

2.6 Calculations of Jurisdictional Thresholds

Aggregate turnover refers to revenues that are derived from the sale of products and the provision of services to external customers after the deduction of sales rebates, value added tax and any other taxes that are directly related to the turnover (ie, net turnover). The calculation of net turnover should be based on the last financial year for which audited accounts are available (adjusted to account for acquisitions or disposals). Income that does not correspond to the ordinary activities of the undertakings concerned is excluded (eg, financial income or extraordinary income from the sale of businesses or assets). As a general rule, turnover must be geographically allocated to the jurisdiction where competition with alternative suppliers takes place; this is typically where the customer is located.

The EUMR contains special rules for the calculation of the turnover of credit and financial institutions, and of insurance companies.

Annual turnover that is denominated in a foreign currency has to be converted into euros at the average exchange rate published by the European Central Bank for the 12 months concerned.

2.7 Relevant Businesses/Corporate Entities for the Purpose of Calculation

"Undertakings concerned" refers to the participants in a concentration. In general, this includes the parties to a merger or the undertaking(s) acquiring joint or sole control and the undertaking over which control is being acquired (the target undertaking). It follows that the turnover of the businesses which the seller retains are not taken into account. If an acquisition is undertaken by a joint venture, the undertakings concerned will be the parents where the joint venture is merely an acquisition vehicle. In contrast, if the acquisition is carried out by a full-function joint venture (see **2.10 Joint Ventures**), the Commission will typically treat the joint venture as the undertaking concerned.

The turnover of each of the undertakings concerned includes the turnover of undertakings that belong to the same group as a result of certain direct or indirect links. These links arise from a number of rights and powers that are fully set out in Article 5(4) EUMR. These include:

- ownership of more than half the capital or business assets;
- the power to exercise more than half the voting rights;
- the power to appoint more than half of the members of the board;
- the right to manage the undertakings' affairs (ie, de jure rights including veto rights that give rise to joint control).

These rights and powers are framed broadly and capture parent-subsidiary relationships as well as relationships of

common control. The concept of a "group" within the meaning of the EUMR goes beyond legal control and may include entities that would be excluded in other contexts (eg, under national company laws).

2.8 Foreign-to-Foreign Transactions

The EUMR applies to all concentrations with an EU dimension, irrespective of the location of the undertakings concerned. The jurisdictional thresholds are based purely on turnover. There is no local effects test and foreign-to-foreign transactions involving more than two parties may be notifiable, even where the target has no sales or assets in the EU (eg, acquisition of joint control of a non-EU target by two parents that meet the EUMR thresholds).

2.9 Market Share Jurisdictional Threshold

The EUMR does not employ market share-based jurisdictional thresholds. The thresholds are purely turnover-based.

2.10 Joint Ventures

The EUMR only applies "full-function" joint ventures. In order for a joint venture to be considered full-function, it must perform on a lasting basis all of the functions of autonomous economic entity. This means that the joint venture must have sufficient resources to operate in the market independently, including its own management and access to sufficient resources (finance, staff and assets). A joint venture will not be considered full-function if it does not have its own market access or presence and its activities are limited to taking over a specific function within the parents' business – eg, research and development ("R&D") joint venture. In addition, it must not be overly reliant on its parent(s) for sales or input purchases. A joint venture that generates the majority of its turnover from sales to third party customers is generally considered full-function.

A concentration involving a full-function joint venture may arise in one of two ways, either (i) the entry of a new joint controller alongside the original owner of a pre-existing undertaking that satisfies the full-function criteria (ie, change in quality of control from sole to joint, or the number of joint controllers), or (ii) the creation of full-function joint venture that will be jointly controlled by two or more undertakings (eg, Austria Asphalt v Bundeskartellanwalt).

Non-full-function joint ventures are still subject to the prohibition against restrictive practices and the abuse of dominance in Articles 101 and 102 TFEU. Moreover, non-full-function joint ventures may still be subject to merger control in other Member States, notably Germany and the UK.

There are rules that specifically apply to the allocation of turnover as between the joint venture and its parent(s) where the concentration involves a change from joint to sole control. In particular, the turnover of the joint venture should exclude the turnover of its parent(s), and the turnover of the parent(s) should exclude the turnover of the joint venture.

2.11 Power of Authorities to Investigate a Transaction

Unless the case is referred to the Commission at the request of the notifying parties or one or more Member States (see **2.1 Notification**), the Commission has no competence to review or investigate concentrations which do not have an EU dimension.

2.12 Requirement for Clearance Before Closing

The EUMR has suspensory effect. Subject to limited exceptions (see **2.14 Exceptions to the Suspensive Effect**), Article 7 EUMR contains a standstill obligation which provides that parties to a notifiable concentration are prohibited from implementing the concentration before the receipt of merger control clearance.

2.13 Penalties for Implementation of a Transaction Before Clearance

The Commission may impose a fine of up to 10% of the turnover of the undertakings concerned for gun-jumping (see **2.2 Failure to Notify**).

2.14 Exceptions to the Suspensive Effect

There are two exceptions to the standstill obligation.

Article 7(2) EUMR exempts public bids and creeping bids (ie, a series of transactions in publicly traded securities) which result in the acquisition of control from multiple sellers, provided that (i) the concentration is notified to the Commission without delay, and (ii) the acquirer does not use the voting rights attached to the securities to exercise control over the target but only to maintain the value of its investment.

In addition, Article 7(3) provides that parties may submit a reasoned request to the Commission to obtain a derogation from the standstill obligation. In deciding whether to grant a derogation, the Commission conducts a balancing exercise that takes into account "all pertinent factors" including the nature and gravity of damage to the undertakings concerned and the threat to competition. In practice, derogations are rare. Since 1990, the Commission has only granted derogations in around 100 cases and the trend is downward.

Most derogation decisions have involved concentrations where there has been evidence that the standstill obligation could cause significant economic harm, including but not limited to insolvency, liquidation and bankruptcy. Moreover, where the Commission grants a derogation it is typically subject to conditions and obligations necessary to ensure effective competition. In some cases where the survival of the

target was at stake, the acquirer was only permitted to take the necessary steps to preserve or restore its value/viability.

2.15 Circumstances Where Closing Before Clearance Is Permitted

The EUMR does not permit parties to implement a concentration in other jurisdictions while awaiting merger control clearance in the EEA. This includes carve-outs or any other measures designed to ring-fence or hold separate the target undertaking.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no deadline for filing a notification, but parties may not implement a concentration before the receipt of merger control clearance, subject to limited exceptions (see **2.12 Requirement for Clearance Before Closing** and **2.14 Exceptions to the Suspensive Effect**).

3.2 Type of Agreement Required

The EUMR does permit parties to notify a concentration where a binding agreement has not been concluded, provided the parties are able to demonstrate a good faith intention to conclude an agreement including on the basis of a signed letter of intent or memorandum of understanding. The EUMR is silent on whether parties must provide written evidence of a good faith intention to conclude an agreement.

In the case of a public bid, a notification can be submitted as soon as a public announcement of an intention to launch a bid has been made.

3.3 Filing Fees

There are no filing fees.

3.4 Parties Responsible for Filing

In the case of a merger or the acquisition of joint control, the merging parties or the undertakings acquiring joint control are jointly responsible for notifying the concentration. For all other concentrations, the undertaking(s) acquiring control is solely responsible for notifying the concentration.

3.5 Information Required in a Filing

Notifications are made by completing the questions set out in the forms prescribed by the 2013 Implementing Regulation (ie, Form CO or Short Form CO). The parties must submit one original of the Form CO, three hard copies and two copies on CD or DVD-ROM.

Prior to the submission of the notification, the parties will typically have engaged in pre-notification discussions with the Commission (see **3.9 Parties Engaging in Pre-Notification Discussions with the Authorities**).

The information required to complete a Form CO is extensive and the scale of the exercise particularly in complex cases that give rise to significant competitive overlaps should not be underestimated. Parties are required to provide detailed information regarding:

- the transaction(s) giving rise to the concentration;
- activities of the parties (including information on their corporate structure and turnover);
- competitive overlaps;
- the relevant market definition;
- information on the affected markets (including detailed market data and an assessment of the competitive impact of the transaction); and
- details of any merger-specific efficiencies.

Additionally, parties need to submit supporting documentation including copies of the transaction documents as well as internal documents that are relevant to the transaction. The 2013 Implementing Regulation expanded the categories of internal documents that must be provided with notifications. Parties are now required to provide copies of documents including meeting minutes, surveys, analyses, reports and studies prepared for senior management or the shareholders' meeting that discuss the following:

- the planned transaction;
- the deal rationale; and
- competitive dynamics in the affected markets in the last two years.

In recent years, there has been an increased focus on parties' internal documents in merger control reviews. This is reflected in the Commission's readiness to request large volumes of documents, notably in complex cases. Reportedly, over one million internal documents were submitted in one recent investigation. In some cases, the parties' internal documents have been pivotal to the outcome of the Commission's review.

Cases that qualify for the simplified procedure are notified using the Short Form CO, which is considerably less onerous in terms of its information and documentation requirements. In this regard, it requires fewer internal documents, less market data and information on the reportable markets (if any).

Notifications can be submitted in any official language of the EU. Supporting documents in a language that are not in an official language of the EU will need to be translated into the language of the procedure. Otherwise, supporting documents that are in an official language of the EU are to be submitted in their original language. There are no formalities or specific requirements for the submission of documents.

3.6 Penalties/Consequences if Notification Is Deemed Incomplete

There are no penalties for the submission of incomplete notifications. However, the Commission will reject the notification for incompleteness, and the Phase I review period will only commence once the Commission has satisfied itself that it has all the information it needs to conduct its assessment. In practice, parties typically engage in pre-notification discussions with the Commission before formally submitting the notification, which minimises the risk of a notification being declared incomplete (see **3.9 Parties Engaging in Pre-Notification Discussions with the Authorities**).

3.7 Penalties/Consequences if Notifying Party Supplies Inaccurate or Misleading Information

The Commission may impose a fine of up to 1% of the aggregate turnover of the undertakings concerned for supplying incorrect or misleading information. It may also impose periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertakings concerned. In addition, the Commission may revoke a clearance decision where it is based on incorrect information provided by one of the undertakings concerned. At the time of publication, the Commission has only revoked one clearance decision as a result of the parties providing misleading information (Sanofi/Synthelabo).

However, notifications are being increasingly scrutinised for the completeness and accuracy of the information provided by the parties. Before 2017, the Commission only imposed fines in six cases for the submission of incorrect or misleading information with the highest fine reaching EUR50,000. However, in 2017, the Commission imposed a fine of EUR110 million on Facebook for providing misleading information when acquiring WhatsApp. It also sent statement of objections to Merck KGaA and Sigma-Aldrich, and to General Electric for providing incorrect/misleading information connection with Merck/Sigma Aldrich and General Electric/LM Wind, respectively.

3.8 Phases of the Review Process

The Commission has 25 working days to adopt a Phase I decision following the receipt of a complete notification. During this period the Commission will conduct its market investigation which primarily consists of sending questionnaires to market participants (see **7.2 Contacting Third Parties**). The Phase I review period is extended to 35 working days if (i) the Commission receives a request for a downward referral from a Member State within 15 working days following the date of notification, or (ii) the parties offer commitments (remedies) to address competitive concerns within 20 working days after notification. At the end of Phase I, the Commission will decide either:

- the concentration does not fall within the scope of the EUMR;
- to clear the concentration unconditionally;
- to clear the concentration conditionally, subject to remedies; or
- to open an in-depth Phase II investigation due to serious doubts as to the compatibility of the concentration with the internal market (ie, concerns that the concentration will give rise to a significant impediment to effective competition).

Since the EUMR came into force in 1990, over 90% of concentrations have been cleared unconditionally in Phase I.

If the Commission opens a Phase II investigation, it must adopt a decision within 90 working days following the date of the decision to initiate proceedings. This period will be extended to 105 working days if the parties submit commitments 55 working days after the initiation of proceedings (but before the expiry of the 65th working day). In addition, the Phase II review period may be extended voluntarily either at the request of the parties no later than 15 working days after the initiation of proceedings, or by the Commission with the agreement of the parties. The total duration of voluntary extensions may not exceed 20 working days. The majority of Phase II investigations have led to the Commission issuing a statement of objections ("SO"), which sets out its preliminary conclusions and competitive concerns. According to the Dechert Antitrust Merger Investigation Timing Tracker ("DAMITT"), between 2011 and 2017, the Commission issued an SO in 59% of Phase II investigations. The SO is typically issued around the 40th working day of Phase II. If an SO is issued, the parties will be granted access to the Commission's file and will have the opportunity to respond to the SO in writing. In addition, parties may request an oral hearing, although parties frequently choose not to do so since complainants are also given the opportunity to attend (see **7.2 Contacting Third Parties**). At the end of Phase II the Commission will decide to (i) clear the concentration unconditionally, (ii) clear the concentration subject to commitments, or (iii) prohibit the concentration.

Since the EUMR came into force, 28% of concentrations that were subject to a Phase II review were cleared unconditionally, 59% were subject to commitments and the remaining 13% were prohibited.

The Commission has the power to suspend the Phase I and Phase II review periods (ie, "stop-the-clocks") where due to circumstances for which one of the parties is responsible, the Commission has to adopt a decision to request information, or to order an inspection. In practice, most stop-the-clocks are attributable to decisions to request information. The Implementing Regulation provides that a decision may be adopted where (i) one the parties has failed to provide

information in response to an informal request for information within the specified time limit, or (ii) a third party has failed to provide information in response to an informal request for information within the specified time limit owing to circumstances for which one of the parties is responsible.

If the Commission does not adopt a decision at the end of the Phase I or Phase II review period the concentration will be deemed to have been cleared unconditionally.

3.9 Parties Engaging in Pre-Notification Discussions with the Authorities

Parties invariably engage in pre-notification discussions with the Commission before the formal submission of a notification, even in relatively straightforward cases that do not give rise to any competitive issues (including cases that qualify for the simplified procedure). Although pre-notification discussions are not mandatory in the formal sense, the Commission considers that the pre-notification phase of the procedure is a critical part of the review process. Pre-notification discussions minimise the risk of the notification being declared incomplete as well as unexpected complaints/submissions by third parties. The discussions are entirely confidential and without prejudice to the handling of the case following formal notification.

Parties initiate pre-notification discussions by submitting a case team allocation request form to the Merger Registry. As part of the discussions, the parties will submit a draft notification (including supporting documentation) to the Commission, although more complex cases may involve the preparation of a briefing memorandum or meetings with the Commission. Following the submission of the draft notification, the Commission endeavours to provide the parties with its comments on the draft and if necessary request additional information within five working days. The parties are then expected to submit an updated draft incorporating the Commission's comments and the requested information. This process repeats itself until the Commission is satisfied that it has all the necessary information to assess the concentration and confirms that the parties may proceed to formal notification.

Pre-notification discussions are not subject to a statutory time limit, but parties should expect this phase to take at least two weeks. In more complex cases, it is not uncommon for the pre-notification phase to run into several months. According to DAMITT, the average duration of pre-notification discussions in Phase II investigations has increased from three months in 2011 to eight months in 2017. In practice, this means that the actual length of the review timeline has averaged approximately 15-16 months from announcement to clearance – in other words, taking into account pre-notification discussions as well as voluntary extensions and stop-the-clocks (see **3.8 Phases of the Review Process**).

3.10 Requests for Information During the Review Process

It is relatively uncommon for information requests to be issued during the Phase I review period in straightforward cases where parties have engaged in pre-notification discussions and the Commission has informally confirmed the adequacy of the draft notification. However, the Commission may send the parties an information request during a Phase I investigation if it finds that information has been omitted from the notification or new facts emerge that may impact the assessment of the concentration. Due to the time constraints in Phase I, parties are typically given one or two days to provide the requested information. A failure to provide the information within the specified time limit can lead to a declaration of incompleteness, but this has become rare in practice. Similarly, although the Commission is in theory able to stop the clock during Phase I, it is reluctant to do so and this has not happened in any recent cases.

In contrast, the Commission will regularly issue highly detailed information requests during the Phase II review process. The increased sophistication of the Commission's review has led to a corresponding increase in the volume of documents and information parties need to provide. This has led a corresponding increase in the use of stop-the-clocks. Between 2015 and 2017, DAMITT data show that the Commission used stop-the-clocks in 38% of Phase II investigations, increasing the length of the review period by an average of 32 working days.

3.11 Accelerated Procedure

The Commission's Notice on the Simplified Procedure provides for a simplified review of concentrations that are unlikely to give rise to competitive concerns. In principle, the simplified procedure will be applied to the following categories of concentrations:

- acquisitions of joint control of a joint venture where the value of each of the turnover of the joint venture and/or the turnover of the contributed activities, and the joint venture assets falls below EUR100 million in the EEA;
- concentrations that give rise to no competitive overlaps between the parties, specifically the parties are not active in the same product and geographic (horizontal relationship), or in a product market that is upstream or downstream to another party (vertical relationship);
- concentrations that give rise to competitive overlaps, but the parties' combined share in markets that give rise to horizontal relationship does not exceed 20% and/or none of the parties has a share in excess of 30% in a market that gives rise to a vertical relationship; or
- if a party is to acquire sole control of an undertaking in which it already has joint control.

In addition, the Commission may choose to apply the simplified procedure on a case-by-case basis where the parties' combined share in markets that give rise to a horizontal relationship does not exceed 50% and the increment in the Herfindahl-Hirschman Index (HHI) is below 150.

Cases that qualify for the simplified procedure are notified on the Short Form CO (see **3.5 Information Required in a Filing**) which requires considerably less information than a Form CO. The Commission Notice on the Simplified Procedure indicates that parties are in principle able to submit notifications without engaging in pre-notification discussions in cases that give rise to no horizontal or vertical relationships (although this is rare in practice). Since the 2013 reform of the EUMR regime, there has been a marked increase in the speed of the Commission's review of cases that qualify for the Simplified Procedure. The Commission will sometimes issue its clearance decision as early as the 15th working day; according to DAMITT data the average review period since 2016 has been around 18 working days.

4. Substance of the Review

4.1 Substantive Test

The EUMR prohibits concentrations that significantly impede effective competition in the internal market, or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position ("significant impediment to effective competition", "SIEC"). The SIEC test marks a departure from the substantive test under the original EUMR, which was solely framed by reference to the creation or strengthening of a dominant position. The underlying rationale of the reformulation of the substantive test was to ensure that non-coordinated effects of a merger in an oligopolistic market can be caught (ie, so-called "gap cases"). It is generally accepted that the SIEC test has widened the Commission's margin of discretion, thus avoiding any regulatory gaps.

The Commission's Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines provide detailed guidance on the how the SIEC test is applied in practice in horizontal and non-horizontal mergers, respectively.

4.2 Markets Affected by a Transaction

In concentrations that give rise to a horizontal or vertical relationship, an affected market consists of all relevant product and geographic markets, or plausible alternative relevant product and geographic markets, on the basis of which in the EEA:

- the parties' combined share in markets that give rise to a horizontal relationship exceeds 20%; or
- the parties' combined share in markets that give rise to a vertical relationship exceeds 30%.

Plausible alternative market definitions can be identified on the basis of industry reports, market studies and the parties' internal documents, in addition to Commission decisions and judgments of the EU courts. The requirement to take into account plausible alternative markets was introduced by the 2013 Implementing Regulation and arguably widens the Commission's margin of discretion in determining whether a concentration gives rise to affected markets. In particular, the requirement to take into account plausible alternative markets coupled with the Commission's approach of conducting its assessment on the basis of the narrowest market definition increasing the likelihood that an affected market will be identified.

Concentrations that give rise to no affected markets qualify in principle for the simplified procedure and are unlikely to raise any competitive concerns. However, the EUMR does not prescribe a bright line de minimis market share level below which competitive concerns are deemed unlikely.

4.3 Reliance on Case Law

Since its inception the EUMR has produced a substantial body of EU case law that provides guidance on a broad range of procedural and substantive issues. This is complemented by the extensive decisional practice of the Commission that has enabled it to build up a considerable knowledge of a wide array of markets as well as develop an analytical framework for defining relevant markets. Indeed, the Commission has a considerably larger body of published merger control decisions than antitrust regulators in other jurisdictions. Accordingly, this has to a great extent minimised the need for the Commission to rely on case law from other jurisdictions including, but not limited to, market definition precedents. However, notifying parties are able to, and regularly do, put forward decisions or case law from other jurisdictions, in particular Member States, as persuasive authorities where there is a gap in EU jurisprudence/decisional practice.

4.4 Competition Concerns

The assessment whether a concentration gives rise to an SIEC is centred on whether it will give rise to anti-competitive unilateral (non-coordinated) or co-ordinated effects. An SIEC can impact one or more competitive parameters and may take the form of increased prices, reduced output, choice or quality of goods and services as well as a reduction of innovation. In addition, the Commission's application of the SIEC test will take into account the impact of the concentration on actual and potential competition.

The Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines provide guidance on the theories of harm that will be investigated by the Commission.

In horizontal concentrations the Commission will investigate whether a SIEC will arise as a result of (i) unilateral effects due to an increase in the market power of the merged entity, either through the creation or strengthening of a dominant position or by the elimination of the competitive constraint the parties previously exerted on each other (leading to an overall reduction of competitive tension in the affected markets, or (ii) co-ordinated effects due to an increase in the ability of market players to tacitly co-ordinate their competitive behaviour including through the creation or strengthening of a collective dominant position.

In non-horizontal concentrations the Commission will investigate whether a SIEC will arise as a result of unilateral effects due to (i) the merged entity engaging in anti-competitive input or customer foreclosure – ie, restricting the access of competitors to critical inputs or customers – where there is a vertical relationship between the parties, or (ii) the merged entity engaging in an anti-competitive tying or bundling strategy (conglomerate effects) where the parties are active in the supply of complementary goods and services (neighbouring markets). The Commission may also investigate whether a non-horizontal concentration will lead to anti-competitive co-ordinated effects, although it less likely to do so in practice.

In practice, the Commission is more likely to identify competitive concerns in horizontal concentrations as a result of unilateral effects. Indeed, the unilateral effects analytical framework has been applied by the Commission to over 90% of concentrations that warranted regulatory intervention. The Commission's competitive assessment is largely concentrated on price effects, but in recent years there has been an increased focus on innovation competition where the concentration involves research-driven sectors. Conversely, concentrations that give rise to vertical or conglomerate concerns are rare, and the Commission has never adopted a prohibition decision solely on the basis of non-horizontal competitive concerns. This is largely attributable to the fact that the Commission must discharge a higher evidentiary burden to successfully demonstrate that a concentration will give rise to anti-competitive vertical or conglomerate effects. Moreover, the Commission's Non-Horizontal Guidelines acknowledge that vertical and conglomerate mergers provide substantial scope for efficiencies and are thus more likely to give rise to pro-competitive effects.

4.5 Economic Efficiencies

The EUMR recognises that it is appropriate for the Commission to take into account any substantiated and likely efficiencies put forward by the parties in its appraisal of concentrations. This is also reflected in the Horizontal Merger Guidelines and the Non-Horizontal Merger Guidelines which provide that the Commission will consider both the possible anti-competitive effects arising from a concentration as well as pro-competitive effects stemming from substantiated efficiencies. In theory, the Commission may even decide that the efficiencies brought about by a concentration fully counteract any adverse impact on competition it may otherwise have. In order for the Commission to accept an efficiency claim, the parties must be able to demonstrate that the efficiencies are of direct benefit to consumers, merger-specific and verifiable. These conditions are cumulative and the parties must satisfy a high evidentiary standard in order to successfully demonstrate that each condition is fulfilled.

The Commission's Best Practice Guidelines on the Conduct of Merger Proceedings strongly advise parties to put forward any efficiency claims at the pre-notification stage. In this regard, the guidelines note that efficiency claims are likely to require extensive analysis, which further demonstrates the difficulty in making successful claims. Indeed, to date, the Commission has accepted efficiency claims in very few cases. Moreover, efficiencies have never been found to be sufficient to fully offset competitive concerns in problematic concentrations.

4.6 Non-Competition Issues

The substantive test for the assessment of concentrations is purely competition-based. Non-competition considerations play no part in the Commission's assessment of whether a concentration gives rise to an SIEC, which is the sole basis for prohibiting a concentration under the EUMR. Decisions in Phase II proceedings are adopted by the full College of European Commissioners with responsibility for various portfolios, as opposed to only the Competition Commissioner, so issues unrelated to competition may potentially inform their thinking at the margins. However, there have been no merger control cases in recent years where non-competition issues are alleged to have had a decisive influence on the outcome of a review. Moreover, the fact that non-competition considerations have no influence on merger control reviews has been repeatedly underlined by the current Competition Commissioner Margrethe Vestager, notably in response calls to block Bayer's acquisition of Monsanto on product safety grounds.

4.7 Special Consideration for Joint Ventures

In addition to assessing whether a joint venture will give rise to an SIEC, the Commission will also undertake an assessment under Article 101, which prohibits anti-competitive agreements, to determine whether the concentration could potentially give rise to anti-competitive coordination between its parents – ie, so-called "spill-over effects". Anti-competitive co-ordination can occur where two or more parents are active either in the same market, or in a vertically related or neighbouring market to that of the joint venture. The Commission will conduct an assessment under Article 101(3) to determine whether spill-over effects arising from the joint venture are outweighed by pro-competitive effects

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5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with a Transaction

If the Commission identifies competitive concerns, it has the ability to require remedies (formally known as "commitments") as a condition of clearance, both in Phase I and Phase II (see **3.8 Phases of the Review Process**). It cannot impose conditions of its own devising, but will inform the parties of the need to propose remedies.

Article 8(3) also empowers the Commission to issue a prohibition decision where it concludes that the concentration threatens competition in the internal market as a result of a significant impediment to effective competition (see **4.1 Substantive Test**). The Commission is able to adopt the prohibition decision under its own authority without taking its concerns before a judge, although its decisions are subject to judicial review (see **8 Appeals and Judicial Review**). In practice, prohibition decisions are rare since the parties will work towards addressing the competitive concerns identified by the Commission by offering remedies. Between 2010 and 2017, the Commission adopted eight prohibition decisions: Olympic/Aegean Airlines (2011), Deutsche Börse/NYSE Euronext (2012), UPS/TNT Express (2013), Ryanair/Aer Lingus III (2013), Hutchison 3G UK/Telefonica (2016), HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia (2017), Deutsche Börse/London Stock Exchange Group (2017).

In addition, the Commission has the power to revoke a clearance decision under Article 8(6) EUMR where it finds that its assessment was based on incorrect information (see **3.7 Penalties/Consequences if Notifying Party Supplies Inaccurate or Misleading Information**), or the undertakings breached an obligation attached to the decision (eg, failure to appoint a monitoring trustee).

5.2 Parties' Ability to Negotiate Remedies

Parties are able to offer remedies in order to address the competition concerns identified by the Commission. Remedies proposals are submitted by the parties using the form prescribed by the 2013 Implementing Regulation, Form RM. Remedies can be structural (eg, divestments), behavioural or a combination of both. The Commission adopted the Remedies Notice in 2008, which provides guidance on substantive and procedural issues including the types and form of remedies that are acceptable to remove competition concerns.

5.3 Legal Standard

The Commission only has the power to accept remedies that are capable of entirely eliminating the competition concerns that are identified so as to prevent an SIEC. This means that the remedies must be capable of preserving the competitive conditions that would have prevailed, absent the concentration. In addition, the remedies must be capable of being implemented effectively within a short time.

Where the parties propose divestments, the Commission will need to satisfy itself that the new commercial structures resulting from the divestiture will be sufficiently workable and lasting to ensure that a SIEC will not materialise. The divestment package must contain all the assets and personnel which are necessary to ensure its long-term viability and competitiveness. This includes: tangible assets (eg, manufacturing, distribution and R&D facilities); intangible assets (eg, intellectual property, know-how and goodwill); licences permits and authorisations from governmental and regulatory agencies; leases, contracts and arrangements (eg, those entered into with customers and/or suppliers); and key personnel. The Commission's recent focus on innovation competition is reflected in its assessment of parties' remedies proposals. In practice, this has meant that the inclusion of an R&D component in a divestment package is increasingly viewed as critical to ensure the long-term viability and competitiveness of the divested business. This approach has not been limited to concentrations affecting research-intensive industries, and in some cases has been extended to industries that are not associated with high levels of R&D (eg, beverage cans in Ball/Rexam).

In addition, the parties need to demonstrate that the divestment package is capable of attracting a suitable purchaser. The standard purchaser requirements include:

- independence from the parties to the concentration;
- the necessary financial resources, expertise and incentive to maintain and develop the divested business as a viable and active competitive force; and
- the sale of the divestment business to the purchaser must not itself give rise to competition concerns.

In practice, the Commission has a preference for industrial as opposed to financial buyers. The purchaser of the divestment business needs to be approved by the Commission in a separate decision, unless the parties are required to offer a fix-it-first remedy (see **5.6 Conditions and Timing for Divestitures**).

5.4 Typical Remedies

The Commission has a strong preference for structural remedies, which typically involves the divestment of a viable, standalone and competitive business. This is because structural remedies involve a permanent change in the structure of the market, are easier to implement and do not require any monitoring measures (once implemented). Structural remedies may also involve the severance of links with market participants (eg, competitors or suppliers). In contrast, behavioural remedies, which relate to the future market conduct of the merged entity (eg, granting access to technology,

infrastructure or vital inputs on non-discriminatory terms), typically require some form of monitoring mechanism.

Behavioural remedies have been accepted by the Commission, but it will only do so where the remedy is at least equivalent in its effects to a divestiture. Examples include access to networks, the release and transfer of landing and take-off slots and commitments not to bundle products and guarantee interoperability.

Since 2011, 85% of conditional clearances were subject to structural remedies, whereas 11% were subject to behavioural remedies. The remaining 4% of conditional clearance decisions were subject to a combination of structural and behavioural remedies.

The Commission does not have the power to require remedies to address non-competition issues.

5.5 Negotiating Remedies with the Authorities

Remedies can be offered by the parties in Phase I or in Phase II, and even, on an informal basis, during the pre-notification phase. Although it is ultimately the responsibility of the parties to propose suitable remedies, the Commission will provide guidance as to the appropriateness of the remedies proposal. In practice, similar to pre-notification discussions, the parties will submit a draft Form RM before formally submitting the remedies.

In Phase I, remedies must be submitted to the Commission within 20 working days of the notification. Due to the time constraints of Phase I, remedies can only be accepted in cases where the competition issues are readily identifiable and can easily be addressed, without requiring an in-depth investigation. For these reasons, the overwhelming majority of remedies accepted in Phase I have been structural divestments. Moreover, since Phase I remedies should be clear-cut answers to readily identifiable competitive concerns, the Commission will only accept limited modifications that are designed to ensure that the commitments are workable and effective. The Phase I review period is extended by ten working days to 35 working days if the parties submit remedies (see **3.8 Phases of the Review Process**).

In Phase II, the parties must submit remedies within 65 working days of the initiation of Phase II proceedings (see **3.8 Phases of the Review Process**). The Phase II review period will be extended to 105 working days if the parties submit commitments 55 working days after the initiation of proceedings (but before the expiry of the 65th working day). It is not uncommon for the parties to agree to a voluntary extension where remedies are going to be submitted before the expiry of the 55th working day. Voluntary extensions extend the deadline for submitting remedies by the same number of days. In exceptional circumstances, the Commission may accept commitments submitted after working day 65, but it is under no obligation to do so.

The Commission will market test the remedies by sending out questionnaires to interested third parties (see **7.2 Contacting Third Parties**). It will also consult the NCAs and, in some cases, the EFTA Surveillance Authority (see **7.4 Co-operation with Other Jurisdictions**). Where the relevant geographic market is wider than the EEA, a redacted version of the remedies may be shared with non-EEA competition authorities (see **7.4 Cooperation with Other Jurisdictions**).

5.6 Conditions and Timing for Divestitures

The conditions and timing for the implementation of divestitures are determined by the Commission on a case-by-case basis and are dependent on a number of factors including, but not limited to, the risk of degradation of the business, difficulties in finding a suitable purchaser and any uncertainties inherent in the transfer and implementation of the divestment. The Remedies Notice foresees three ways to ensure the transfer of a divestment business to a suitable purchaser, which dictate the conditions and timing of divestitures.

In most cases, the Commission will fix a time limit from the date of the conditional clearance decision within which the sale of the divestment business must be made to a suitable purchaser. This time period is divided into two, and consists of (i) a period for entering into an agreement with a buyer of around six months, and (ii) a period to close the transaction of around three months. In this scenario, the parties are free to close the transaction after the conditional clearance decision. If the parties are unable to find a suitable purchaser within the six-month period then a divestiture trustee will be given an irrevocable mandate to sell the divestment business at no minimum price, typically within three months.

If the Commission considers that there is a risk that the remedies may not be effectively implemented, the parties may be required to propose an up-front buyer. In this scenario, the parties will not be permitted to close the transaction before entering into a binding agreement with a purchaser for the sale of the divestment business. Up-front buyer requirements are still relatively uncommon, but are being used increasingly by the Commission in complex Phase II investigations.

The third method envisaged in the Remedies Notice is a fix-it-first remedy, which involves the parties entering into a binding agreement with a purchaser during the Commission's review of the concentration. In such cases, the clearance decision will take into account the transfer of the divestment business to the purchaser. In addition, no additional purchaser approval by the Commission will be required. In practice, fix-it-first remedies are rare and typically imposed where the viability of the divestment is dependent

on the purchaser possessing specific assets or characteristics in order to be able to operate the business effectively.

A monitoring trustee will be appointed to supervise the divestment process on behalf of the Commission. The role of the monitoring trustee includes ensuring that the divestment business is being held separate and that the value and viability of the business is being preserved pending the completion of the sale.

If the parties breach a condition of a clearance decision (eg, sale of the divestment business within specified time-limit, failure to grant access to network/infrastructure), the decision becomes automatically void. The Commission may impose interim measures to preserve effective competition (ie, injunctive relief) as well as a fine of up to 10% of the aggregate turnover of the undertakings concerned. In addition, it is empowered to take measures to ensure the parties dissolve the concentration. If the parties fail to comply with an obligation attached to a condition (eg, failure to appoint a monitoring trustee), the Commission may revoke the clearance decision and impose a fine of up to of up to 1% of the aggregate turnover of the undertaking concerned and periodic penalty payments of up to 5% of the average daily aggregate turnover of the undertaking. In practice, the Commission is yet to take enforcement action against parties for a failure to observe the conditions or obligations attached to a clearance decision.

5.7 The Decision

The Commission has to adopt a formal decision at the end of the Phase I or Phase II review period, otherwise the concentration will be deemed to have been cleared unconditionally (see **3.8 Phases of the Review Process**). The decision is notified to the parties and the competent authorities of the Member States. A non-confidential version of the decision is published in the Official Journal of the EU, and the website of the Commission. Prior to the publication of the non-confidential version of the decision, the Commission and the parties will agree which information qualify as business secrets.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Commission does not make a distinction between foreign-to-foreign concentrations and those involving EEA-based parties, and has required remedies in several cases involving non-EEA undertakings.

In 2017, 380 concentrations were notified to the Commission, of which 353 were cleared unconditionally in Phase I, and 18 were cleared in Phase I subject to commitments. Phase II investigations were initiated in seven cases, two of which were cleared subject to commitments, whereas the Commission adopted a prohibition decision in two cases (see **5.1 Authorities Ability to Prohibit or Interfere with a Transaction**). In addition, two cases were withdrawn in Phase II.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Ancillary restraints are automatically covered by EUMR clearance decisions and do not need to be notified separately. More specifically, the EUMR provides that restrictions directly related to, and necessary for, the implementation of the concentration fall within the scope of clearance decisions. The Commission's Notice on Ancillary Restraints provides guidance on the treatment of ancillary restraints, including non-competition clauses as well as restrictions that relate to licensing arrangements and purchase and supply obligations. In general, parties are expected to undertake their own assessment as to whether and to what extent a restriction can be regarded as an ancillary restraint. However, the Commission exercises a residual review function; in cases that give rise to uncertainty due to the restriction presenting specific novel or unresolved issues, the parties may request a review by the Commission.

7. Third Party Rights, Confidentiality and Cross-Border Cooperation

7.1 Third Party Rights

The EUMR recognises the right of third parties to be heard, provided they show a sufficient interest. The right to be heard broadly consists of the right to express views on the impact of the concentration in writing, and in some cases orally. Third parties deemed to have a sufficient interest in the Commission's procedure include customers, suppliers and competitors as well as members of the parties' administrative or management bodies and recognised employee representatives. In concentrations involving products or services used by consumers, consumer associations may be considered to have a sufficient interest. Third parties that are not contacted by the Commission as part of its market investigation may apply to be heard by the Commission.

7.2 Contacting Third Parties

In practice, third parties play a critical role in the EUMR review process and their views – in particular, the views of customers – can play a decisive role in the outcome of the Commission's assessment. The Commission routinely consults third parties as part of its market investigation, and notifying parties are generally required to provide contact details for key customers, competitors, suppliers and trade associations as part of Form CO. The Short Form CO also requires parties to provide competitor contact details where

the notified concentration gives rise to horizontal or vertical relationships.

The Commission may exceptionally decide to initiate its market investigation during the pre-notification phase, provided the concentration is already in the public domain and the notifying parties give their consent.

In Phase I, the Commission will publish a non-confidential notice of the concentration in the Official Journal of the EU shortly after the formal submission of Form CO, inviting third parties to submit their written observations within ten calendar days. It will also send a questionnaire to the third parties identified in the notification. The purpose of the questionnaire is to gather information on the affected markets and test the various propositions put forward by the parties in the notification including, but not limited to, the relevant market definition, the prevailing competitive dynamics and the overall impact of the concentration. It is not uncommon for the Commission to send highly detailed questionnaires in more complex cases. Third parties may also be invited to participate in calls or in-person meetings with the Commission.

In addition to bilateral meetings with notifying parties and interested third parties, the Commission makes provision for triangular meetings where it is able to hear their views in a single forum (although these are rare in practice). Triangular meetings are voluntary and would take place where the Commission has received conflicting views on the affected markets or the competitive effects of the concentration.

The involvement of third parties continues in Phase II proceedings and the Commission will send a more detailed questionnaire requesting additional information on the affected markets. Third parties may also be provided with a non-confidential version of the SO, in order to enable them to submit their views on the Commission's preliminary conclusions. In addition, third parties, in particular complainants, may be invited to attend the oral hearing (if the notifying parties choose to request one).

The Commission will market test the adequacy of commitments (ie, remedies) proposed by the notifying parties. As part of the market test, interested third parties – ie, market participants identified in the notification and third parties that successfully applied to be heard – will be sent a non-confidential summary of the commitments together with a questionnaire. Unlike the market investigation in Phase I, the market testing of commitments is not a public process and the Commission does not publish a notice in the Official Journal of the EU.

7.3 Confidentiality

The non-confidential notice of the concentration that is published in the Official Journal of the EU will contain a description of the parties and the nature of the concentration. Notifying parties are required to provide a draft notice as part of Form CO.

7.4 Cooperation with Other Jurisdictions

There has been a strong push towards antitrust convergence across the globe in order to avoid divergent outcomes. To that end, co-operation between the Commission and competition authorities in other jurisdictions has become an increasingly prominent feature of EUMR reviews involving cross-border transactions.

Within the EU, the Commission co-operates very closely with NCAs throughout the procedure. This co-operation goes beyond the jurisdictional referral mechanisms in Articles 4, 9 and 22 of the EUMR. In particular, NCAs are given the opportunity to express their views on concentrations, and are provided with copies of the most important documents lodged with or issued by the Commission, including the notification and commitment(s) proposals. In Phase II, the role of NCAs is more formalised. The Commission is obliged to consult the Advisory Committee, which is made up of representatives NCAs, before adopting a decision. This consultation takes place in a joint meeting convened and chaired by the Commission. Following the meeting, the Advisory Committee issues a written opinion on the Commission's draft decision (if necessary by taking a vote), which is later published together with the decision.

In addition, the Commission will consult the EFTA Surveillance Authority in circumstances specified by Articles 2(1) and 2(2)(a) of Protocol 24 to the EEA Agreement. This includes concentrations where (i) the turnover generated by the undertakings concerned in the territory of EFTA States exceeds certain levels, (ii) there is a risk of an SIEC in the territory of the EFTA States, or (iii) the criteria for referral, which are broadly similar to those contained in the EUMR, are fulfilled. If the Commission opens a Phase II investigation in a concentration that is caught by Article 2(1) and 2(2)(a), representatives of the EFTA Surveillance Authority and EFTA States will be entitled to attend the meeting of the Advisory Committee as observers.

The EU Merger Working Group was established by the Commission and NCAs in 2010. The aim of the Group is to increase consistency, convergence and co-operation among EU Member States in connection with concentrations that do not have an EU dimension but qualify for review in multiple Member States. In 2011, it issued Best Practices on Co-operation between EU National Competition Authorities.

The Commission has also entered into several co-operation agreements and memoranda of understanding (MOUs) with competition authorities in third countries. The degree of co-operation envisaged in agreements and MOUs varies considerably. For instance, the agreements entered into by the EU with Canada, Japan, South Korea, Switzerland and the USA contain extensive co-operation and enforcement co-ordination provisions. By contrast, the agreements entered into by the EU with Brazil, China, India, Mexico, Russia and South Africa envisage much looser forms of co-operation.

The most significant and longstanding agreement is the one entered into between the EU and the USA, which dates back to the 1990s. This has been further supplemented by the 2011 guidelines on Best Practices on Co-operation in Merger Investigations issued by the US-EU Merger Working Group. The guidelines aim to facilitate communication between the Commission and the US agencies as well as enhance the co-ordination of reviews in terms of timing, and the collection and evaluation of evidence. The overwhelming majority of cases in recent years have been characterised by close co-ordination between the Commission and its US counterparts. Indeed, since General Electric/Honeywell in 2001, which was prohibited by the Commission and conditionally cleared by the US Department of Justice, there have been no fundamental divergences in the outcome of parallel reviews.

In terms of multilateral co-operation, the Commission is an active participant in the Merger Working Group of the International Competition Network, a forum that aims to promote the adoption of best practices in the design and operation of merger review regimes.

Competition authorities outside the EEA wishing to obtain information that has been submitted to the Commission need to secure a confidentiality waiver from the parties before the information can be shared between authorities. In practice, parties should expect that the Commission will co-operate with authorities in jurisdictions where a concentration is subject to parallel review, and that it will request a confidentiality waiver. It is therefore important to ensure that notifications submitted in multiple jurisdictions are consistent.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Commission decisions may be appealed to the EU General Court by the notifying parties (as well as interested third parties see **7.1 Third Party Rights** and **7.2 Contacting Third Parties**) on procedural and substantive grounds (Article 263 TFEU). Further appeals to the EU Court of Justice may be made on points of law.

An appeal must be lodged within two months and ten days from (i) the date of the notification of the decision in the case of addressees of the decision, or (ii) the date the decision comes to its knowledge in the case of a third party.

8.2 Typical Timeline for an Appeal

The time-frame for appeals to the General Court is between two to three years. In cases that qualify for the expedited procedure, which has been in place since February 2001, the General Court has rendered its judgment in as little as seven months. However, the expedited procedure is only available at the court's discretion and may denied in complex cases.

In practice, appeals are rare: since the entry into force of the EUMR, roughly 50 out of more than 6,000 decisions have been appealed. The delays associated with appeals, coupled with the sensitivity of transaction timelines, has meant that parties will typically offer the necessary concessions to obtain a conditional clearance. At the time of publication, 11 appeals have resulted in the annulment of decisions.

If an appeal results in the annulment of a Commission decision, Article 10(5) EUMR requires the Commission to re-examine the concentration.

8.3 Third Parties Appealing a Clearance Decision

Interested third parties may appeal a clearance decision. Of the 11 successful appeals, five were challenges to Commission clearance decisions by third parties.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

The EUMR has not been amended since 2004.

In October 2016, the Commission launched a public consultation on jurisdictional and procedural aspects of the EUMR. The consultation, which ended in January 2017, seeks to build on some of the themes that emerged in an earlier consultation following the publication of a 2014 White Paper "Towards More Effective EU Merger Control".

The most significant aspect of the consultation relates to the effectiveness of the EUMR jurisdictional thresholds and whether it is appropriate to introduce a size-of-transaction test, similar to the one recently introduced in Austria and Germany. The aim of the test is to capture transactions that fall below the current thresholds but could have a significant competitive impact. The Commission specifically pointed to the pharmaceutical and digital sectors as examples of areas where the competitive significance of a target may not be reflected in its turnover. Such cases are, to an extent, captured via the referral system (see **2.1 Notification**), but coverage

is not systematic and the current Commissioner Margrethe Vestager has expressed concerns in this area.

Other key areas where the Commission sought views included the functioning of the simplified procedure (and whether there is scope for further simplification), and the streamlining of the referral system.

9.2 Recent Enforcement Record

See (**5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions**) for the Commission enforcement record in 2017. The Commission has recently taken enforcement action against companies for breaching EUMR procedural rules by gun-jumping and providing misleading/inaccurate information and gun-jumping (see **2.2 Failure to Notify** and **3.7 Penalties/Consequences if Notifying Party Supplies Inaccurate or Misleading Information**).

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9.3 Current Competition Concerns

There has been an increased reliance on parties' internal documents in merger control reviews (see **3.5 Information Required in a Filing**). In addition to the widening of the scope of relevant documents and an increase in the volume of documents requested, the Commission has not restricted itself to relying on high-level board and strategic documents. "Working level" documents that were prepared by the post-integration planning team have been citedas evidence of the parties' future intentions. The growing importance of internal documents is reflected in the Commission's upcoming publication of best practice guidelines on the submission of internal documents.

Recent enforcement action by the Commission in 2017 and 2018 suggests that concentrations are being increasingly scrutinised for potential violations of EUMR procedural rules (see **2.2 Failure to Notify** and **3.7 Penalties/Consequences if Notifying Party Supplies Inaccurate or Misleading Information**.

In addition, the Commission's growing focus on innovation competition has seen it intervene in a number of concentrations (see **5.3 Legal Standard**). It has adopted an increasingly expansive approach to assessing innovation effects. This has included assessing overlaps in the parties' early-stage pipeline products and R&D projects, and anchoring its competitive assessment (and concerns) in "innovation spaces" as opposed to defined product markets. This approach has not been without controversy and has generated significant debate, notably with respect to the applicable standard of proof and the lack of clarity on limiting factors to the innovation theory of harm.