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# Merger Control

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# Law and Practice

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## Contents

**Dechert LLP's** global antitrust/competition practice has an unmatched reputation for innovative antitrust advice. Clients looking for strategic guidance to accomplish critical goals choose Dechert for its commitment to understanding the fine points of their businesses and its success in shepherding complex matters through to resolution. Across industries and regions, clients rely on Dechert's market knowledge and proven counsel to secure clearance for intricate or challenged deals, litigate monopolization claims, resolve cartel or civil investigations, defeat class actions, and promote and ensure antitrust compliance. Dechert combines its knowledge of antitrust/competition law with hands-on experience in government affairs, economics, communications, and a pragmatic approach to commercial issues.

## Authors

**James Fishkin** is a partner in Dechert LLP's Washington, DC office and a member of the firm's antitrust/competition practice. He combines both government and private sector experience within his practice, which focuses on advising clients on M&A covering a wide range of industries, including supermarket chains and other retailers, consumer and food product manufacturers, healthcare firms, industrial manufacturing, internet-based firms, and chemical and industrial gas firms. He has been a key participant in several of the most significant litigated merger cases that have set important precedents, including representing Whole Foods Market, Inc in FTC v Whole Foods Market, Inc and the Federal Trade Commission in FTC v Staples, Inc and FTC v H.J. Heinz Co. Mr Fishkin has also obtained successful outcomes for clients in high-profile FTC and Department of Justice (DOJ) merger investigations, including Ritchie Bros./IronPlanet, Dollar Tree/Family Dollar, Albertsons/Safeway, CVS Health/Target Corporation, OfficeMax/Office Depot, and Monster/HotJobs. He was also selected by the DOJ to serve as the court-appointed divestiture trustee for the Grupo Bimbo/Sara Lee merger.

**Mike Cowie** is a partner in Dechert LLP's Washington, D.C. office and a member of the firm's antitrust/competition practice. He guides industry leaders past antitrust obstacles, enabling them to grow their business and protect their strategic interests. Mr. Cowie has handled strategic projects for some of the world's largest and most successful companies. He also served in the Federal Trade Commission's Bureau of Competition as assistant director, where he managed a 25-attorney team responsible for antitrust merger investigations. Most recently, he led Dechert's antitrust team for CVS Health in its merger with Aetna, a landmark USD70 billion deal that is the largest ever healthcare services transaction. The merger raised novel vertical theories of competitive harm and prompted one of the broadest-ever merger investigations, which involved scrutiny by the Department of Justice, 19 state attorneys general, 38 state insurance departments, and Congress.

**Rani Habash** is a partner in Dechert LLP's Washington, D.C. office and a member of the firm's antitrust/competition practice. He advises clients on the antitrust aspects of mergers, acquisitions and joint ventures. He has helped guide industry-leading companies to successful strategic transactions in the face of intense antitrust scrutiny by the US Department of Justice, US Federal Trade Commission, Senate and House Judiciary Committees, state attorneys general and international competition authorities. Using his expertise in economics and significant experience in dealing with antitrust agencies, Mr. Habash has helped clients secure regulatory clearance in numerous high-profile transactions, including deals between CVS Health/Aetna, American Airlines/US Airways, Albertsons/Safeway, CVS Health/Target Corporation, FMC Corporation/DowDuPont, Medco/Express Scripts, Monster.com/Yahoo! HotJobs, and OfficeMax/Office Depot, among others. Recently, The National Law Journal named Mr. Habash a "D.C. Rising Star." The award recognizes innovators with superior legal expertise in their practice areas, strong leadership qualities, and a commitment to professional volunteer work.

**Beverly Ang** is counsel in Dechert LLP's New York office, and a member of the firm's antitrust/competition practice. She advises clients on obtaining required premerger clearances and serves as the firm's specialist on Hart-Scott-Rodino (HSR) Act issues and filings. Ms. Ang has extensive experience in counseling clients, including private equity and other investment fund managers, as well as privately and publicly held companies, on HSR compliance in matters ranging from routine investments to transformative mergers. She has guided clients through the HSR process on numerous transactions in diverse industries, including CVS Health's acquisition of Aetna, Court Square Capital Partners' sale of Rocket Software to Bain Capital, Cerberus Capital Management's sale of PaxVax Global to Emergent BioSolutions, Differential Brands Group's acquisition of Global Brands Group's North American business, Crown Holdings' acquisition of Signode, and Concentra's combination with U.S. HealthWorks.

## 1. Legislation and Enforcing Authorities

### 1.1 Merger Control Legislation

The Clayton Act is the primary merger control legislation in the USA and precludes acquisitions of stock or assets the effect of which may be substantially to lessen competition. Mergers may also be challenged under the Sherman Act, which prohibits agreements that unreasonably restrain trade as well as monopolisation, attempted monopolisation and conspiracy to monopolise, or the Federal Trade Commission Act (FTC Act), which focuses on unfair methods of competition and unfair or deceptive acts or practices. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), which governs the premerger notification process in the USA, is incorporated into the Clayton Act. Every state, as well as the District of Columbia, Puerto Rico and the Virgin Islands, also has its own antitrust law. Most of these antitrust laws are comparable to the federal antitrust laws.

The FTC and the Antitrust Division of the Department of Justice (DOJ) (collectively, the Agencies) share jurisdiction for reviewing proposed mergers. The Agencies jointly issued the current version of the Horizontal Merger Guidelines in 2010, which outline the principal analytical techniques, practices and enforcement policy regarding mergers of actual or potential competitors under the federal antitrust laws. The Agencies also jointly issued the Commentary on the Horizontal Merger Guidelines in 2006, which provides detailed insights into the Agencies' decision-making process regarding a large number of merger matters, and the 1996 Statements of Antitrust Enforcement Policy in Health Care for hospital mergers. The DOJ does not currently rely on its 1984 Non-Horizontal Merger Guidelines for vertical merger analysis; however, these guidelines have not been formally superseded or rescinded. At the time of writing, the DOJ is currently working on new vertical merger enforcement guidelines.

Parties to a proposed joint venture or other type of business combination outside the scope of the HSR Act may request an opinion by the DOJ as to whether the proposed conduct is lawful under its Business Preview programme. Similarly, the FTC's Rules of Practice provide that the Commission or its staff may issue advisory opinions to help clarify FTC rules and decisions relating to proposed conduct. FTC advisory opinions concerning a proposed merger or acquisition are unlikely to be appropriate except in rare circumstances such as small hospital mergers that may fall within the "safety zone" described in the 1996 Statements of Antitrust Enforcement Policy in Health Care.

Pursuant to the HSR Act, the FTC is authorised to prescribe the regulations and format of notification that are "necessary and appropriate" to carry out the purposes of the HSR Act. The FTC's Premerger Notification Office also occasionally issues guidance relating to the application of the HSR Act and related regulations, in the form of both formal and informal interpretations, as well as posts on its Competition Matters blog.

### 1.2 Legislation Relating to Particular Sectors

While the federal antitrust laws apply to most transactions, both foreign and domestic, transactions in heavily regulated industries – such as banking, healthcare, telecommunications, pharmaceuticals, railroads and defence – may also be subject to additional approvals.

Banking transactions may require separate prior approval from the Federal Reserve Board; telecommunications transactions may require separate approval from the Federal Communications Commission; certain mergers and acquisitions by electric utility companies may require prior approval by the Federal Energy Regulatory Commission; and the Food and Drug Administration may require separate approval for transactions involving companies in the food safety, tobacco, pharmaceutical, biopharmaceutical and medical device industries. The Surface Transportation Board has exclusive authority to approve proposed railroad mergers, although it must "accord substantial weight" to recommendations by the DOJ regarding competitive effects. Although each of the respective agencies has different authority to block or approve transactions, parties should take care to ensure all relevant approvals are granted for each transaction.

The Committee on Foreign Investment in the United States (CFIUS) is authorised to review acquisitions of control of US businesses by non-US persons to determine the effect of such transactions on US national security. While most reviews are initiated voluntarily by transaction parties, CFIUS may initiate a review on its own. CFIUS reviews are more likely to occur where target entities involve defence-related activities, critical infrastructure or critical technologies, or are located near sensitive US governmental facilities. Although rare, the President may block any such transaction that would cause a national security threat after CFIUS review.

### 1.3 Enforcement Authorities

The FTC and DOJ are the authorities tasked with enforcing the federal antitrust laws, and they share authority over merger cases under the Clayton Act and the HSR Act. The FTC also has authority to challenge merger cases under the FTC Act.

In practice, the Agencies typically allocate merger cases through a clearance process that is based on the particular expertise of each Agency. The FTC tends to investigate mergers in the industries of defence, pharmaceuticals and retail, whereas the DOJ typically investigates mergers relating to financial services, telecommunications and agriculture.

As discussed in **5.1 Authorities' Ability to Prohibit or Interfere with Transactions**, to block a proposed merger

the Agencies must obtain injunctive relief from a federal district court. The FTC, which is an independent administrative agency, may seek a preliminary injunction if necessary from a federal district court pending the completion of a trial before an administrative law judge. The DOJ must seek a preliminary injunction at the time it initiates litigation if the merging parties do not stipulate or agree not to merge prior to the trial as well as a permanent injunction after a trial before a federal district court, although the preliminary and permanent injunction proceedings are frequently combined.

Certain transactions that require non-antitrust regulatory approvals are exempt from the requirements under the HSR Act. For example, banking transactions often require approval by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System or the Federal Deposit Insurance Corporation, and may be exempt from the HSR Act, provided in certain circumstances that copies of filings with the relevant federal agency are contemporaneously filed with the FTC and DOJ.

## 2. Jurisdiction

### 2.1 Notification

Merger control requirements in the USA are compulsory. If the parties meet the jurisdictional thresholds of the HSR Act, absent an exemption, they must file a Notification and Report Form (HSR Form) with the FTC and DOJ, pay a filing fee and observe a 30-day waiting period (15 days in the case of cash tender offers and certain bankruptcy transactions) prior to consummating their transaction.

### 2.2 Failure to Notify

Parties failing to file a required notification under the HSR Act are subject to a civil penalty of up to USD42,530 per day of non-compliance. The maximum civil penalty is subject to a cost-of-living adjustment, which is based on the percentage change in the US Department of Labor's Consumer Price Index for All-Urban Consumers (CPI-U) for the prior year. The adjusted maximum civil penalty figures typically are announced in January and the changes take effect immediately upon announcement. Civil penalties are calculated based on the number of days in which the party is in violation – from the day a filing should have been made until the day the party makes a corrective filing in connection with the consummated transaction.

In practice, penalties are rarely levied at the maximum civil penalty amount. The Agencies have had a longstanding 'one free bite at the apple' approach pursuant to which they will generally not seek civil penalties for a person's first violation as long as that person self-reports the violation, makes a corrective filing and details the circumstances demonstrating that the failure to file was inadvertent. Repeat offenders, on the other hand, are often fined several hundred thousand dollars to several million dollars per violation, even if the violation was inadvertent or under advice of experienced counsel. The largest fine ever levied for a failure to make an HSR notification under the HSR Act was USD11 million against affiliates of ValueAct Capital Management LP in 2016 to settle the DOJ's lawsuit arising from improper reliance on the "solely for the purpose of investment" exemption under the HSR Act.

### 2.3 Types of Transactions

The HSR Act covers all types of transactions involving the acquisition of voting securities, assets or non-corporate interests (ie, partnership or membership interests) that meet certain jurisdictional thresholds, across all industry sectors, with limited exceptions for transactions exempt from the federal antitrust laws and subject to approval by a federal agency. "Voting securities" include any securities that, at present or upon conversion, entitle the holder to vote for a director of the issuer. Acquisitions of convertible voting securities (eg, options, warrants, non-voting convertible preferred stock) are generally exempt from the filing requirements because they do not have the present right to vote for directors. A notification could be required, however, prior to the exercise or conversion of such securities.

Whether a transaction constitutes a potentially reportable acquisition under the HSR Act will depend on whether the transaction results in a transfer of beneficial ownership of voting securities, assets or non-corporate interests from one ultimate parent entity to a different ultimate parent entity (see **2.4 Definition of 'Control'**). The concept of beneficial ownership under the HSR Act differs materially from the US securities law concept of the same name, although they do overlap to a certain degree. The HSR Act does not provide a definition of beneficial ownership but its underlying Statement of Basis and Purpose highlights the following relevant factors: (i) the right to obtain the benefit of any increase in value or dividends; (ii) the risk of loss of value; (iii) the right to vote the stock or to determine who may vote the stock; and (iv) investment discretion, including the power to dispose of the stock. As such, certain restructurings or reorganisations may require a filing under the HSR Act if there is transfer involving different ultimate parent entities. For example, a transaction between a corporation and its majority-owned subsidiary is likely to be exempt as an "intraperson transaction", whereas a transaction between one private equity fund and another related fund sharing a common manager may be reportable.

Similarly, with respect to goods and real property, relevant factors include: (i) which party maintains insurance on the goods or property, (ii) the right to benefit from any increase in value, (iii) the risk of loss of value and (iv) the ability to dispose of the goods or property. Therefore, a long-term lease that exhausts the useful life of the underlying asset, or

a grant of a licence that is exclusive in any field of use, may be reportable as an asset acquisition.

In contrast to acquisitions of voting securities of a corporation, acquisitions that do not confer control of a non-corporate entity are not reportable under the HSR Act.

### 2.4 Definition of 'Control'

The concept of 'control' for HSR purposes is a bright line test that is generally more narrow than group concerns, which focus on entities under common management. Control of a corporation means ownership of 50% or more of its outstanding voting securities, or having the present contractual right to designate 50% or more of its board of directors. Control of a non-corporate entity means having the right to 50% or more of its profits or, upon dissolution, its assets. The entity (or individual) at the top of the ownership structure that is not controlled by any other entity (or individual) is deemed to be the 'ultimate parent entity'. The relevant 'groups' for HSR Act purposes are the ultimate parent entity of the acquiring party together with all entities it controls directly or indirectly (collectively, the Acquiring Person) on one hand, and the ultimate parent entity of the acquired party together with all entities it controls directly or indirectly (collectively, the Acquired Person) on the other hand. (Certain exemptions, such as the foreign issuer exemption, focus instead on the acquired entity rather than the Acquired Person as a whole.)

While an acquisition of a non-corporate entity is only reportable if it confers control, minority acquisitions of voting securities – even small percentages that do not carry any special governance or veto rights – may be reportable if they meet the jurisdictional thresholds, provided that no exemption applies.

### 2.5 Jurisdictional Thresholds

Whether a particular transaction is subject to the requirements of the HSR Act depends on the application of three jurisdictional tests:

- the 'size of transaction' test;
- the 'size of person' test; and
- the commerce test.

Dollar-denominated thresholds in the HSR jurisdictional tests are indexed annually to prior year changes in gross national product (GNP). The FTC typically releases the revised HSR thresholds in January, taking effect 30 days later. (In 2019, the announcement of the revised thresholds was delayed until mid-February, due to the US government shutdown.)

With very few exceptions, all transactions will satisfy the commerce test (as either the Acquiring or Acquired Persons will be engaged in commerce or some activity affecting commerce).

The size of transaction test is met if, as a result of the transaction, the Acquiring Person will hold voting securities, assets or non-corporate interests of the Acquired Person valued in excess of USD90.0 million. In determining the size of transaction, one must generally include the value of any voting securities, assets and non-corporate interests of the Acquired Person already held by the Acquiring Person. There are other factors to consider in calculating the size of transaction (eg, assumed liabilities, amounts paid for non-voting securities, or third-party debt of the acquired entity) that may differ depending on the transaction structure, such that the calculation of the size of transaction is not as straightforward as it may otherwise seem.

The size of person test is applicable for transactions valued at USD359.9 million or less. The size of person test is met if a transaction involves:

- voting securities or assets of a person engaged in manufacturing with worldwide annual net sales or total worldwide assets of USD18.0 million or more being acquired by any person with total worldwide assets or worldwide annual net sales of USD180.0 million or more;
- voting securities or assets of a person not engaged in manufacturing with total assets of USD18.0 million or more being acquired by any person with total worldwide assets or worldwide annual net sales of USD180.0 million or more; or
- voting securities or assets of a person with annual net sales or total assets of USD180.0 million or more being acquired by any person with total worldwide assets or worldwide annual net sales of USD18.0 million or more.

### 2.6 Calculations of Jurisdictional Thresholds

The jurisdictional thresholds for purposes of the size of transaction test are calculated based on the value of the voting securities, assets and non-corporate interests that the Acquiring Person will hold in the Acquired Person as a result of the transaction.

Publicly traded voting securities are valued based on the greater of the Market Price (the lowest closing quotation during the 45 days prior to closing) or the Acquisition Price (all consideration to be paid, whether in cash or in kind).

Non-publicly traded voting securities are valued based on the Acquisition Price or the Fair Market Value of the stock if the Acquisition Price is undetermined.

Assets are valued based on the Fair Market Value of the assets or, if determined and greater than the Fair Market Value, the Acquisition Price.

Non-corporate interests are valued based on the Acquisition Price or the Fair Market Value of the non-corporate interests if the Acquisition Price is undetermined.

If necessary, a Fair Market Value determination must be made in good faith by the board of directors of the Acquiring Person or its delegee as of any date within 60 calendar days prior to filing (if filing is required) or within 60 days prior to closing (if filing is not required).

The jurisdictional thresholds for purposes of the size of person test are calculated on the basis of worldwide sales or assets of the Acquiring and Acquired Persons. Annual net sales are determined by reference to the Acquiring or Acquired Person's latest consolidated annual income statement; total assets are based on the book value of the assets contained in the Acquiring or Acquired Person's most recent regularly prepared consolidated balance sheet(s). Where the Acquiring or Acquired Person does not have a regularly prepared annual income statement or balance sheet, such person may need to prepare a pro forma balance sheet listing all assets held at the time of the acquisition (in the case of the Acquiring Person, not including any cash to be used as consideration for the acquisition or for expenses incidental thereto, nor any securities of the same Acquired Person).

Sales or assets booked in a foreign currency should be converted based on the Interbank Exchange Rate. For an annual income statement, the parties should use the average exchange rate for the year reported. For a regularly prepared balance sheet or pro forma balance sheet, the parties should use the exchange rate in effect for the date of the relevant balance sheet.

### 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The jurisdictional thresholds are calculated with respect to the Acquiring and Acquired Persons, which are deemed to include all entities under common control (ie, having the same ultimate parent entity) (see **2.4 Definition of 'Control'**). If the seller is not included within the Acquired Person, its sales and assets do not need to be counted for the size of person test. This could be the case, for example, when a holder of a small percentage of stock in a widely held corporation sells those shares to a third-party buyer in a private sale. The seller's revenues and assets would be irrelevant but the sales and assets of the corporation and the Acquiring Person would be relevant.

Changes in the business during the reference period, such as acquisitions, divestments or business closures, should be reflected by adjusting the financials to include all controlled entities at the time of the acquisition as if only those controlled entities (at the time of the acquisition) were held by the ultimate parent entity for the reference period.

### 2.8 Foreign-to-foreign Transactions

The HSR Act applies to all acquisitions of voting securities, assets or non-corporate interests that meet the jurisdictional thresholds. However, certain foreign-to-foreign transactions may qualify for an exemption from the HSR Act reporting requirements.

- Acquisitions of assets located outside the USA are exempt, unless the assets generated sales in or into the USA exceeding USD90.0 million in the most recent fiscal year. Even if such threshold is exceeded, if both Acquiring and Acquired Persons are foreign under the HSR rules, the transaction is nonetheless exempt if valued at USD359.9 million or less and the aggregate sales of the Acquiring and Acquired Persons in or into the USA are less than USD198.0 million and the aggregate total assets of the Acquiring and Acquired Persons located in the USA are less than USD198.0 million.
- Acquisitions of voting securities of a foreign issuer by a US Acquiring Person are exempt unless the issuer holds assets located in the USA having a Fair Market Value of over USD90.0 million or made sales in or into the USA of over USD90.0 million, in the aggregate with its controlled entities, in the most recent fiscal year.
- Acquisitions of voting securities of a foreign corporate issuer by a foreign Acquiring Person are exempt unless the acquisition will confer control of the issuer and the issuer holds assets located in the USA having a Fair Market Value of over USD90.0 million, or made sales in or into the USA, on an aggregate basis with its controlled entities, of over USD90.0 million in the most recent fiscal year. The transaction is nonetheless exempt if it is valued at USD359.9 million or less, the aggregate sales of the Acquiring and Acquired Persons in or into the USA are less than USD198.0 million, and the aggregate total assets of the Acquiring and Acquired Persons located in the USA are valued at less than USD198.0 million.
- Acquisitions by or from foreign governmental entities are exempt if the ultimate parent entity of either the Acquiring or Acquired Person is controlled by a foreign state, foreign government, or agency thereof, and the acquisition is of assets located within the foreign state or of voting securities or non-corporate interests of an entity organised under the laws of that jurisdiction.

### 2.9 Market Share Jurisdictional Threshold

The HSR Act does not use a market share test, although market share information may become relevant if the Agencies initiate a substantive antitrust inquiry into the transaction.

### 2.10 Joint Ventures

Joint ventures are subject to the HSR Act and the relevant reporting requirements. Specific rules apply to determine whether joint ventures meet the jurisdictional thresholds.

Generally speaking, the formation of joint ventures or other corporations is reportable under the HSR Act if an Acquiring Person has annual sales or total assets of USD180.0 million or more, the joint venture or other corporation will have total assets of USD18.0 million or more, and at least one other Acquiring Person has annual sales or total assets of USD18.0 million or more. A formation is also reportable under the HSR Act where an Acquiring Person has net sales or total assets of USD18.0 million or more, the joint venture or other corporation will have total assets of USD180.0 million or more, and at least one other Acquiring Person has annual sales or total assets of USD18.0 million or more.

A formation of an unincorporated entity (eg, a partnership or limited liability company) is reportable under the HSR Act where an Acquiring Person has annual sales or total assets of USD180.0 million or more, and the newly formed entity has total assets of USD18.0 million or more, provided that the Acquiring Person will have control of the newly formed entity. Alternatively, a formation is also reportable under the HSR Act where an Acquiring Person has annual sales or total assets of USD18.0 million or more, and the newly formed unincorporated entity has total assets of USD180.0 million or more, provided that the Acquiring Person will have control of the newly formed entity.

For the purposes of satisfying the thresholds, contributors to the joint venture or newly formed entity shall be deemed Acquiring Persons, and the joint venture, corporation or newly formed entity shall be deemed the Acquired Person.

For the size of person test, corporate joint ventures require a second Acquiring Person to meet the defined size of person test, whereas non-corporate joint ventures omit this requirement but mandate that the Acquiring Person must gain control (eg, the right to 50% or more of the profits or assets upon dissolution) of the non-corporate joint venture.

### 2.11 Power of Authorities to Investigate a Transaction

Even if a transaction does not meet the jurisdictional thresholds of the HSR Act, it is still subject to the other antitrust laws. The Agencies may choose to review a non-reportable transaction either before or after consummation. Given that investigations challenging conduct under the Sherman Act, the Clayton Act or the FTC Act do not have a statute of limitations, the potential for Agency scrutiny could continue indefinitely post-consummation. If a consummated merger violates the antitrust laws, the same types of remedies are available as in the case of reportable mergers.

### 2.12 Requirement for Clearance Before Implementation

The HSR Act is suspensory and, if a filing is required, parties may not close the transaction until the expiration or termination of the HSR waiting period. The statutory waiting period is 30 days for most transactions and typically begins after both parties submit their corresponding HSR filings, the filings have been deemed to be complete by the FTC's Premerger Notification Office and the filing fee has been paid. In the case of open-market purchases, option exercises and certain other transactions where the Acquiring Person makes a filing and serves notice on the Acquired Person, the waiting period begins once the Acquiring Person makes the filing and serves notice on the Acquired Person. Unless the Agencies take action prior to the expiration of the waiting period, the waiting period expires automatically on the 30th day at 11:59pm Eastern Standard Time and the parties are able to consummate their transaction thereafter. In cash tender offer and certain bankruptcy transactions, the waiting period is shortened to 15 days. Note that the waiting period extends to the next business day when a waiting period expires over a weekend or on a legal public holiday.

### 2.13 Penalties for the Implementation of a Transaction Before Clearance

Parties that close a transaction prior to the expiration or termination of the HSR waiting period are subject to a civil penalty of up to USD42,530 per day of non-compliance.

In addition, parties that engage in 'gun-jumping' activities, including the transfer of beneficial ownership – construed broadly – of the acquired company prior to expiration or termination of the HSR waiting period, are also subject to civil penalties of up to USD42,530 per day of non-compliance. When penalties are imposed, they are made public.

### 2.14 Exceptions to Suspensive Effect

There are no exceptions to the suspensory requirement of the HSR Act. Although some transactions have shorter waiting periods than the standard 30-day waiting period, such as cash tender offers and certain bankruptcy transactions, all transactions that are reportable under the HSR Act must observe the applicable waiting period prior to consummation. The Agencies may, however, grant early termination of the waiting period (see **3.11 Accelerated Procedure**).

### 2.15 Circumstances Where Implementation Before Clearance is Permitted

The Agencies will not permit closing before the expiration or early termination (see **3.11 Accelerated Procedure**) of the applicable waiting period and will not allow carve-outs, ring fencing or hold separate agreements that allow certain portions of the transaction to close while the businesses or assets in the USA are segmented and not closed on until after clearance. Premature closing of the transaction may subject the parties to civil penalties of up to USD42,530 per day of non-compliance.

## 3. Procedure: Notification to Clearance

### 3.1 Deadlines for Notification

There are no specific deadlines for making HSR filings. Other than in the case of tender offers, certain bankruptcy transactions, and open-market purchase and similar transactions, a filing cannot be made under the HSR Act prior to the execution of a transaction agreement between the parties. The agreement between the parties, upon which the HSR filing is made, must be signed but need not be binding or otherwise formalistic.

The parties must also close the transaction within one year after the expiration or early termination of the waiting period in order to avoid making a second filing with respect to the same transaction. Where less than a controlling interest is being acquired in a corporation, the Acquiring Person will have one year to cross the notification threshold selected in the HSR Form. Once this notification threshold is crossed, subsequent acquisitions of voting securities of the same Acquired Person by such Acquiring Person will be exempt for a period of five years after the expiration or early termination of the waiting period, provided that the Acquiring Person does not cross a higher notification threshold. The various notification thresholds are as follows: (i) USD90.0 million, (ii) USD180.0 million, (iii) USD899.8 million, (iv) 25% of the outstanding voting securities of an issuer if valued at greater than USD1,799.5 million, or (v) 50% of the outstanding voting securities of an issuer if valued at greater than USD90.0 million.

Apart from the above, there are no specific statutory timing requirements for when a notification must be made after the execution of a transaction agreement, other than that the applicable waiting period must expire or be terminated prior to the consummation of a reportable transaction.

### 3.2 Type of Agreement Required Prior to Notification

Generally speaking, a signed agreement must be submitted with each HSR filing, with the exception of certain types of transactions, such as open-market purchases or select bankruptcy cases. There is no obligation that the agreement is formal or binding. Filings may be made on a basic letter of intent or similar document that identifies the parties to the transaction and discusses the general nature of the transaction.

### 3.3 Filing Fees

The filing fees range from USD45,000 to USD280,000 and must be paid on or prior to the date of filing, or the filing will be deemed incomplete and the waiting period will not begin to run until the fee is paid. Although both the Acquiring and Acquired Persons submit separate filings, only one fee is paid with respect to each reportable acquisition, which is the obligation of the Acquiring Person unless the parties have agreed otherwise. The filing fee amount is based on the size of transaction listed on the HSR Form, which includes the value of all voting securities, assets and non-corporate interests of the Acquired Person to be held as a result of the acquisition. The filing fee for transactions valued at greater than US90.0 million but less than USD180.0 million is USD45,000. For transactions valued at USD180.0 million or greater but less than USD899.8 million, the filing fee is USD125,000. For transactions valued at USD899.8 million or greater, the filing fee is USD280,000.

### 3.4 Parties Responsible for Filing

Under the HSR Act, both the Acquiring and the Acquired Persons must submit separate HSR filings. The filings are made on behalf of each of the respective ultimate parent entities. See **2.4 Definition of 'Control'** for more detail on how an ultimate parent entity is determined.

### 3.5 Information Included in a Filing

The elements of a filing under the HSR Act are relatively straightforward and consist of the completed HSR Forms, the attachments to the HSR Form, including copies of financial statements and the so-called 4(c) and 4(d) documents (documents prepared by or for directors or officers for the purpose of evaluating or analysing the transaction with respect to competition, competitors, markets, market shares, potential for sales growth or expansion into product or geographic markets, synergies or efficiencies), and the filing fee.

In addition to describing the structure of the transaction and the relationship of parties to the proposed transaction, the HSR Form requires the parties to list US revenues for the most recent completed year by North American Industry Classification System codes (NAICS Codes). Parties must also disclose information about their controlled entities, significant shareholders and minority shareholdings. To the extent that the parties both report revenues in the same NAICS Codes, additional disclosures need to be made with regard to overlapping lines of business.

An Acquiring Person needs to respond on behalf of itself and all controlled entities. In the case of a private equity fund or holding company that controls a number of operating companies, for example, the required disclosures can be lengthy and include detailed information regarding other companies that have no relation to the reportable transaction. By contrast, an Acquired Person's filing is largely limited to disclosures concerning the entities or assets being sold.

Unlike antitrust or merger control filings in other jurisdictions, there is no narrative required to discuss the impact on the market, changes to competition, competitors of the relevant parties, or the like. Instead, the Agencies use the '4(c) and 4(d)' documents to obtain a view of the competitive impact of the transaction through the eyes of the parties. The FTC's Premerger Notification Office takes a broad view of

the type of documents that meet the 4(c) and 4(d) criteria. However, parties are not required to translate 4(c) and 4(d) documents that are in a language other than English.

The HSR Form and an accompanying affidavit must be signed by an authorised signatory of the Acquiring or Acquired Person, attesting to the completeness and accuracy of the information provided in the HSR filing and to the good faith intention to consummate the transaction. In lieu of notarisation, the signatory may swear under the penalty of perjury.

### 3.6 Penalties/Consequences of Incomplete Notification

A 'substantial compliance' standard applies with respect to the necessary disclosures under the HSR Act. If the HSR filing is incomplete, the waiting period will not begin until the requisite information is provided. As long as the parties observe the waiting period and take steps to cure the deficiencies in the filing, no fines are levied. Once the deficiency is cured, the Agencies will issue written confirmation setting forth the start and end dates of the initial waiting period.

Acquiring or Acquired Persons (as well as any of their respective officers, directors or partners) that consummate a reportable transaction prior to the expiration or termination of the waiting period are subject to potential civil penalties under the HSR Act of up to USD42,530 per day of non-compliance.

An individual who knowingly signs an HSR Form on behalf of the Acquiring or Acquired Person that is not complete may be subject to criminal punishment for committing an act of perjury. Acquiring or Acquired Persons (as well as any of their respective officers, directors or partners) that consummate a reportable transaction based on an HSR Form that is not complete may also be subject to potential civil penalties under the HSR Act of up to USD42,530 per day of non-compliance.

### 3.7 Penalties/Consequences of Inaccurate or Misleading Information

An HSR filing that contains inaccurate or misleading information may not satisfy the substantial compliance standard, and the waiting period will not begin until the filing is in substantial compliance. If the parties were to consummate the transaction prior to the expiration or termination of the waiting period, they would be subject to potential civil penalties under the HSR Act of up to USD42,530 per day of non-compliance.

An individual who knowingly signs an HSR Form on behalf of the Acquiring or Acquired Person that is not true and correct may be subject to criminal punishment for committing an act of perjury. Acquiring or Acquired Persons (as well as any of their officers, directors or partners) that consummate a transaction based on an HSR Form that is not true and correct may also be subject to potential civil penalties under the HSR Act of up to USD42,530 per day of non-compliance.

### 3.8 Review Process

As discussed in **3.1 Deadlines for Notification**, the Acquiring and Acquired Persons are not required to complete HSR filings by any specific time and they can file any time after the binding transaction agreement or letter of intent has been executed. The review process typically begins after the Acquiring and Acquired Persons complete their HSR filings unless the parties engage in pre-notification discussions with the Agencies (see **3.9 Pre-notification Discussions with Authorities**).

The 'initial waiting period' is 30 calendar days (15 days in the case of cash tender offers and certain bankruptcy transactions), which commences when the FTC's Premerger Notification Office determines that the HSR filings by the parties to a proposed transaction are complete and the filing fee has been received. Under the HSR Act, if the initial waiting period expires without either Agency taking any action, the HSR process ends and parties may consummate their transaction. If the transaction does not involve a substantive overlap or competitive issue, the overall timeline for clearance is typically 30 calendar days after the HSR filing is submitted (15 days for cash tender offers and certain bankruptcy transactions), subject to the grant of early termination, which is discussed in **3.11 Accelerated Procedure**.

During the initial waiting period, one of the Agencies may seek clearance from the other to open a preliminary investigation of the proposed transaction and decide if further information is required. Under the HSR rules, parties to a transaction can effectively extend the initial 30-day waiting period (15 days in the case of cash tender offers and certain bankruptcy transactions) by withdrawing their HSR filing and refiling within two business days to avoid paying an additional filing fee. The process of formally withdrawing an HSR filing and refiling, generally referred to as 'pull-and-refile', provides the reviewing Agency staff and the parties with a second initial 30-day waiting period (15 days in the case of cash tender offers and certain bankruptcy transactions) to address competitive issues that remain unresolved and potentially avoid a second request.

Prior to the end of the typical initial 30-day waiting period, if the reviewing Agency chooses to formally request additional documents and information – generally referred to as a 'second request' – the waiting period under the HSR Act is suspended while the parties respond to and certify substantial compliance with their second requests, which may add months to the review timeline as the second requests can be rather burdensome. Once each party has substantially complied with its second request, the waiting period resumes and extends by statute for an additional 30 calendar days.

In addition to the several months that it may take parties to substantially comply with a second request, parties to the transaction may enter into timing agreements with Agency staff that typically add time to the review process.

According to the Dechert Antitrust Merger Investigation Timing Tracker (DAMITT), significant merger investigations resolved during the twelve months ending Q1 2019 lasted an average of 11.3 months from announcement of the transaction to the conclusion of the Agency investigation. The 11.3-month average covers 19 merger investigations of proposed HSR reportable transactions concluded by the DOJ and FTC during this twelve-month time period that resulted in either a closing statement, consent order, complaint challenging a transaction, or transaction abandonment for which the Agency issued a press release.

### 3.9 Pre-notification Discussions with Authorities

Pre-notification discussions with the antitrust Agencies are not required. In transactions with substantive overlap or potential competitive issues, however, counsel to the parties may engage the Agencies in pre-notification discussions in order to discuss the merits of the transaction and provide additional time for the Agencies to review the transaction with the goal of avoiding the issuance of a second request. Information provided to the Agencies prior to an HSR filing is treated as confidential information.

### 3.10 Requests for Information During Review Process

During fiscal year 2017 (1 October 2016 to 30 September 2017), at the time of writing the most recent fiscal year with reported data available to the public, the FTC and DOJ collectively sought clearance from the other to open preliminary investigations and further review 277 of 1,992 HSR transactions (13.9%) during the initial waiting period (see **3.8 Review Process** regarding the initial waiting period). For transactions subject to a preliminary investigation during the initial waiting period, the Agency staff typically issue a 'voluntary request letter' (also called a 'voluntary access letter') seeking key relevant information that is not requested in the HSR filing, such as strategic and market plans, a list and description of overlapping products manufactured and sold, market share information for overlapping products, top customer contact information, customer win/loss data, a list of competitors and suppliers, and other relevant information. The DOJ issued a revised Model Voluntary Request Letter in November 2018. The FTC's August 2015 Best Practices for Merger Investigations contains a list of requests that are typically requested in a voluntary access letter. The voluntary requests vary in the burden they impose on the parties and many can be responded to within a few days, especially if the parties prepare in advance. This information enables the staff to more quickly focus on competitive issues and to help resolve questions about the proposed transaction. Although these requests are voluntary, parties are strongly urged to provide responses as quickly as possible.

During fiscal year 2017, the FTC and DOJ collectively issued 51 second requests, representing 2.6% of the 1,992 HSR transactions during that period. Responses to second requests, which consist of a combination of requests for documents and data as well as detailed interrogatories, are extraordinarily burdensome and costly. A typical second request response includes millions of pages of documents and may take several months for the parties to comply. See **3.8 Review Process** for a summary of the DAMITT data regarding the length of time for significant merger matters that receive second requests. The DOJ issued its most recent Model Second Request in June 2015. The FTC issued its most recent Model Second Request in April 2019. Virtually all parties that receive Second Requests enter into a timing agreement that establishes protocols for compliance with a Second Request, various milestone dates for events leading up to substantial compliance, as well as extensions of time for the Agency to make an enforcement decision after expiration of the HSR waiting period. The DOJ issued its most recent Model Timing Agreement in November 2018. The FTC issued its most recent Model Timing Agreement in August 2018.

### 3.11 Accelerated Procedure

There is no short-form procedure for review; all transactions are subject to the same requirements with respect to the required elements of an HSR Form.

However, there is a procedure by which filing parties can apply for an accelerated review, which is known as 'early termination'. By checking a box on the HSR Form – with no additional fee or justification for the request – the parties can request that the Agencies terminate the HSR waiting period prior to its expiration.

Although a request for early termination of the HSR waiting period is subject to Agency discretion, early termination is often granted about two to three weeks into the standard 30-day waiting period if the proposed transaction does not raise significant competitive issues. Early termination is infrequent for transactions that qualify for the shorter 15-day waiting period, such as cash tender offers and certain bankruptcy transactions.

During fiscal year 2017 (1 October 2016 to 30 September 2017), at the time of writing the most recent fiscal year with reported data available to the public, 77.9% of the 1,992 adjusted HSR filing transactions included a request for early termination. The Agencies granted early termination for 78.6% of the requests. In total, 61.2% of the HSR filings in fiscal year 2017 received early termination.

If early termination of the HSR waiting period is granted, the names of the parties to the transaction are published in the Federal Register and posted on the FTC's website.

## 4. Substance of the Review

### 4.1 Substantive Test

Section 7 of the Clayton Act, the primary substantive merger provision under the federal antitrust laws, prohibits the acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly". The key question the Agencies ask is whether the proposed (or consummated) merger is likely to create or enhance market power, or facilitate its exercise.

See **1.1 Merger Control Legislation** for the analytical techniques used by the Agencies.

### 4.2 Markets Affected by a Transaction

Relevant product and geographic markets in which to assess where the potential adverse competitive effects may occur are typically narrowly defined. To determine the relevant product market under the 2010 Horizontal Merger Guidelines, the Agencies identify a product or group of products such that a hypothetical profit-maximising firm that was the only present and future seller of those products likely would impose at least a small but significant and non-transitory increase in price (SSNIP) on at least one product sold in the market by at least one of the merging firms. The Agencies may also define a product market based on a targeted subset of customers to whom a hypothetical monopolist likely would profitably impose a SSNIP. The Agencies typically use a SSNIP of 5% of the price paid by consumers, but the SSNIP test is not a tolerance test for price increases that may result from a merger. Any price increase that may result from a merger is generally considered unlawful.

The Agencies identify the relevant geographic market by applying the same techniques used to define a relevant product market. The relevant geographic market is the area where a hypothetical profit-maximising firm that was the only present and future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one of the merging parties' locations in the market. The Agencies may also define a relevant geographic market based on the location of targeted customers if a hypothetical monopolist could discriminate based on the customer's location.

The Agencies also analyse ease of entry into the relevant market since a merger is unlikely to enhance market power if entry is so easy that the merged firm could not profitably raise prices or reduce competition. Entry is considered easy if it would be timely, likely, and sufficient in its magnitude, character and scope to deter and counteract the adverse competitive effects at issue. Timeliness is generally defined as entry that is "rapid enough" to make unprofitable overall the actions causing the adverse effects. Entry is considered likely if it would be profitable. Sufficiency is new entry by one or more firms that will replicate the scale and strength of the merging firms.

In addition to analysing relevant markets and ease of entry, the Agencies analyse competitive effects, which is discussed in **4.4 Competition Concerns**, and potential economic efficiencies, which is discussed in **4.5 Economic Efficiencies**.

### 4.3 Case Law from Other Jurisdictions

Although the Agencies seek to build strong bilateral relations with foreign competition authorities and to co-operate on individual merger investigations (see **7.4 Co-operation with Other Jurisdictions**), the Agencies do not rely on case law from other jurisdictions in making enforcement decisions.

### 4.4 Competition Concerns

The Agencies typically will investigate mergers on theories involving unilateral effects, co-ordinated effects, the elimination of potential competition, foreclosure and raising rivals' costs. Both monopoly power and monopsony power concerns may be the subject of investigation. Horizontal and vertical effects are considered. In the absence of the merged firm potentially raising prices, restricting output, decreasing innovation, or otherwise exercising market power, the Agencies do not typically consider conglomerate or portfolio effects.

### 4.5 Economic Efficiencies

The Agencies will consider efficiency claims asserted by the merging parties, although the burden on the merging parties for successfully asserting efficiencies is substantial. The Agencies will only recognise verifiable efficiency claims that are merger-specific, cognisable and likely to reverse the proposed merger's likely harm to consumers.

Merger-specific efficiencies are efficiencies that can only be accomplished with the proposed merger and are unlikely to be accomplished by another means. As stated in the 2010 Horizontal Merger Guidelines, the parties also must substantiate their efficiency claims so that "the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when they would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." The Agencies will not consider efficiency claims that are "vague, speculative, or otherwise cannot be verified by reasonable means."

Cognisable efficiencies are verified merger-specific efficiencies that are not derived from anti-competitive reductions in output or service. The Agencies "will not challenge a merger

if cognisable efficiencies are of a character and magnitude such that the merger is not likely to be to anticompetitive in any relevant market." To make this determination, the Agencies "consider whether the cognisable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market" by preventing price increases in the relevant market.

The Agencies utilise a sliding scale analysis in comparing the magnitude of cognisable efficiencies against the magnitude of likely harm to competition absent the efficiencies – the "greater the potential adverse competitive effect, the greater must be the cognisable efficiencies, and the more they must be passed on to the consumer for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market." When the potential adverse effect is likely to be particularly substantial, "extraordinarily great cognisable efficiencies would be necessary to prevent the merger from being anticompetitive." The Agencies specifically state in their 2010 Horizontal Merger Guidelines that efficiencies almost never justify a merger to monopoly or near-monopoly.

### 4.6 Non-competition Issues

In general, the Agencies limit their review to the substantive antitrust merits of a transaction. On occasion, the Agencies may co-ordinate their review of a proposed transaction with other regulatory agencies – such as the Federal Communications Commission, the Federal Energy Regulatory Commission and the Department of Transportation – that may also be reviewing the proposed transaction. However, the Agencies' review does not account for non-competition issues.

Over the last two years there has been a growing interest in 'Hipster Antitrust', which seeks to reject the long-held consumer welfare paradigm in favour of a broader public interest standard requiring the Agencies and courts to consider social and political concerns in merger analysis such as the loss of jobs, lower wages and the impact on small businesses. Senior Agency officials have recently noted potential concern with harm to workers resulting from mergers creating monopsony power in labour markets, but at the time of writing the Agencies have not specifically adopted elements from the Hipster Antitrust movement in their decision-making and are continuing to follow the consumer welfare paradigm.

### 4.7 Special Consideration for Joint Ventures

Joint ventures are typically evaluated using the same criteria as applied to mergers (see **4.1 Substantive Test**).

Joint ventures may be pro-competitive in that they allow participants to realise a number of otherwise unattainable market efficiencies through economies of scale or combining research and marketing activities. However, joint ventures may also be anti-competitive if they reduce the joint venture parties' incentives to compete against one another, or if their independent decision-making is limited outside of the joint venture because of combined control or combined financial interests in production, assets, or other business operations. The lawfulness of a joint venture may also be evaluated under Sections 1 and 2 of the Sherman Act and under Section 5 of the FTC Act using rule of reason analysis.

## 5. Decision: Prohibitions and Remedies

### 5.1 Authorities' Ability to Prohibit or Interfere with Transactions

The DOJ and FTC each have extensive statutory powers that enable them to initiate enforcement actions. The Agencies, however, do not have the power to prohibit a potentially anti-competitive merger after the expiration of the HSR waiting period. Only the courts may issue an order to block a transaction. The judicial processes that each Agency may pursue to seek such an order differ.

Section 15 of the Clayton Act enables the DOJ to file in federal district court a complaint and motions for a preliminary injunction (if necessary), and ultimately a permanent injunction to block a proposed transaction that may substantially lessen competition in violation of Section 7 of the Clayton Act. DOJ merger challenges are decided in bench trials before federal district court judges. The DOJ has the burden to demonstrate with a reasonable probability of success (ie, greater than 'mere possibility' and less than 'certainties') that the merger may substantially lessen competition. The party that loses may appeal to the appropriate federal court of appeals. The DOJ can also seek judicial action to unwind a consummated merger.

Unlike the DOJ, which can seek a permanent injunction to block a merger after a bench trial, the FTC only possesses the power to seek in a federal district court preliminary injunctive relief to block a proposed merger pending the completion of an administrative trial. To obtain preliminary injunctive relief, Section 13(b)(2) of the FTC Act requires the FTC to make "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."

At the same time that the FTC seeks preliminary injunctive relief, it typically issues a parallel administrative complaint charging that the proposed merger may constitute an unfair method of competition in violation of Section 5 of the FTC Act and may substantially lessen competition in violation of Section 7 of the Clayton Act. The FTC also has the authority to pursue an administrative trial even if it is not successful in obtaining a preliminary injunction; however, in April 1995 the FTC issued a formal policy statement in which it said it would only pursue administrative litigation following the denial of a preliminary injunction in rare cases. Since that

time, the FTC has not continued with an administrative trial after failing to obtain a preliminary injunction. The FTC can also seek to unwind a consummated merger through the administrative trial process when there is no opportunity to obtain a preliminary injunction.

The FTC's administrative complaint is litigated in a trial before an administrative law judge (ALJ), an FTC employee appointed by the Office of Personnel Management with partially protected tenure and status. The ALJ's initial decision and order may be appealed to the full Commission, whose decision may then be reviewed in the federal courts of appeal.

### 5.2 Parties' Ability to Negotiate Remedies

Negotiations between the merging parties and the Agencies regarding remedies may take place at any stage in the review process and may be initiated by the merging parties, but it is unlikely that the Agencies will negotiate until after they have investigated the merits of a transaction. Remedies negotiations typically commence after the Agency staff express their concerns with the transaction. See **5.4 Typical Remedies** and **9.3 Current Competition Concerns** regarding the scope of acceptable remedies.

### 5.3 Legal Standard

In September 2018 the DOJ withdrew the 2011 Policy Guide to Merger Remedies. The 2004 Policy Guide to Merger Remedies will be in effect until an updated policy is released. The 2004 Policy Guide to Merger Remedies states: "The Division will insist upon relief sufficient to restore competitive conditions the merger would remove. Restoring competition is the 'key to the whole question of an antitrust remedy,' and restoring competition is the only appropriate goal with respect to crafting merger remedies." Similarly, the FTC's Bureau of Competition states in its Frequently Asked Questions About Merger Consent Order Provisions that "[e]very order in a merger case has the same goal: to preserve fully the existing competition in the relevant market or markets."

### 5.4 Typical Remedies

Structural remedies consisting of a partial divestiture of an ongoing standalone business unit have been the most common remedies for a horizontal merger that the Agencies have determined would likely have an adverse competitive effect. The FTC Bureau of Competition's 2012 Negotiating Merger Remedies policy statement says that "the Commission prefers structural relief in the form of a divestiture to remedy the anticompetitive effects of an unlawful horizontal merger." Similarly, the DOJ's 2004 Policy Guide to Merger Remedies states that "[s]tructural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market."

Structural divestitures are likely to include all assets (or licences to those assets) necessary for the divestiture purchaser to be an effective long-term viable competitor of the merged entity but have typically not consisted of an entire ongoing standalone business unit. Assistant Attorney General Makan Delrahim and other senior DOJ officials have expressed strong concerns that partial or carve-out divestitures of less than an ongoing standalone business unit are not sufficient, in part due to the relatively high failure rate of partial divestitures reflected in the FTC's January 2017 Merger Remedies study. The FTC Merger Remedies study found that for the 2006-12 period, approximately 30% of partial divestitures of ongoing standalone business units failed, while divestitures of an entire ongoing standalone business unit had a 100% success rate. Joseph Simons, the Chairman of the FTC, also stated that the 30% failure rate for partial divestitures "is too high and needs to be lowered substantially, or ideally zeroed out altogether."

The Agencies may seek behavioural or conduct remedies in very limited circumstances for horizontal and vertical mergers. As discussed in **9.3 Current Competition Concerns**, Assistant Attorney General Makan Delrahim has expressed strong views against behavioural remedies, which are regarded as less effective than structural relief and require ongoing regulatory obligations. The FTC's Bureau of Competition has also recently stated that it "disfavors behavioral remedies and will accept them only in rare cases based on special circumstances of an industry or particular transaction."

The Agencies generally define what these conduct or behavioural remedies might be – firewall provisions, non-discrimination provisions, mandatory licensing provisions, transparency provisions, anti-retaliation provisions, prohibitions on certain contracting practices and long-term supply contracts – but, as the DOJ notes in its 2004 Policy Guide to Merger Remedies, "other conduct remedies are also possible." The FTC Bureau of Competition's 2012 Negotiating Merger Remedies policy statement similarly says that conduct relief may be required to remedy the anti-competitive effects of a vertical merger and that the conduct relief may include a requirement to erect firewalls to protect confidential information or a requirement not to favour certain entities.

As discussed in **4.6 Non-competition Issues**, the Agencies only focus their remedy on competition-related issues.

### 5.5 Negotiating Remedies with Authorities

The FTC and DOJ have different procedures for accepting and finalising consent agreements.

The FTC staff negotiate a proposed consent agreement with the parties to the transaction that is incorporated into an Agreement Containing Consent Order (ACCO). The ACCO is signed by the staff and the merging parties, and

then submitted to the Director of the Bureau of Competition for approval based on a recommendation by staff. Upon approval by the Director of the Bureau of Competition, the ACCO, staff recommendation and related materials are then submitted to the Commission for a vote to accept or reject the proposed consent agreement. If a majority of the commissioners voting on the matter find "reason to believe" that the proposed transaction is unlawful and that the ACCO will accomplish the remedial goals, the FTC will accept the proposed consent agreement for a 30-day public comment period and will also issue a Complaint, provisional Decision and Order, and Analysis of Proposed Consent Order to Aid Public Comment. The FTC's acceptance of an ACCO and provisional Decision and Order for public comment typically enables the parties to close their transaction. The staff will respond to all comments. Following the public comment period, the FTC can accept the Decision and Order as final, reject it or revise it.

The DOJ staff negotiate a consent agreement with the parties to a transaction in the form of a Proposed Final Judgment that is submitted for approval to the Assistant Attorney General in charge of the Antitrust Division based on the recommendation of the staff. The Antitrust Procedures and Penalty Act of 1974, as amended in 2004, commonly called the Tunney Act, requires the DOJ to submit its consent agreement in the form of a Proposed Final Judgment and a Competitive Impact Statement to a federal district court to determine if the consent agreement is "in the public interest." Following a 60-day public comment period during which the public may submit comments on the proposed settlement, the DOJ must file a response to the public comments and may then request that the judge enter the Proposed Final Judgment. In determining whether the consent agreement is in the public interest, the judge must consider, among other things, (i) the provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations upon the adequacy of the judgment, and (ii) the impact of the consent agreement upon competition in the relevant market or markets, the public generally and any individuals alleging specific injury from the violations alleged in the complaint. The Tunney Act does not prohibit the merging parties from closing their transaction before this judicial review process is complete.

### 5.6 Conditions and Timing for Divestitures

In cases involving negotiated settlements, typically the parties may close the merger upon entry of the consent agreement for public comment. Such remedies must be completed within a specified time period in the consent agreement after the closing of the transaction. Where the Agencies require a contractually bound upfront buyer for the divested assets, which occurs in most consent agreements, the parties to the transaction must obtain prior approval of the upfront buyer before the Agencies will approve the consent agreement. The upfront buyer, however, is not always required to close its acquisition of the divested assets at the same time that the parties close their transaction as long as it is contractually obligated to complete the acquisition within the agreed-upon specified period in the consent agreement.

The Agencies monitor and enforce compliance with negotiated remedies. Parties to consent agreements may have a trustee appointed by the Agencies to monitor compliance and ensure the effectiveness of the remedy. In cases of divestiture remedies, the Agencies may also appoint a divestiture trustee to ensure that an agreed-upon divestiture or a 'crown jewel' package of assets is completed if the parties fail to complete the required divestiture in the agreed-upon time period.

At the FTC, the Compliance Division in the Bureau of Competition oversees enforcement of merger remedies. Failure to comply with a remedial agreement is a violation of Section 5(l) of the FTC Act and may result in civil penalties of up to USD42,530 per day for non-compliance as well as injunctive and other equitable relief.

On 19 April 2018, Assistant Attorney General Makan Delrahim announced plans to establish an Office of Decree Enforcement in the Antitrust Division of the Department of Justice with the sole goal to ensure compliance with, and enforcement of, consent decrees. (At the time of writing, the new office has not been established.) The DOJ may seek a contempt order, including a monetary fine, from the appropriate federal district court if the parties to the Final Judgment fail to comply with the terms. Prior to the autumn of 2017, the DOJ needed to show "clear and convincing" evidence to seek a contempt order for a violation of a Final Judgment. Beginning in the autumn of 2017, the DOJ began requiring parties to agree to a lower "preponderance of the evidence" standard for seeking a contempt order for a violation of a Final Judgment.

### 5.7 Issuance of Decisions

The Agencies do not issue decisions affirmatively approving or permitting proposed mergers. Instead, the parties to a proposed HSR reportable merger can only consummate their transaction if the HSR waiting period has either expired or been terminated early.

All notices of early termination of the HSR waiting period are published in the Federal Register and posted on the FTC website. There are no public announcements for other transactions where the Agencies allow the waiting period to expire.

An FTC decision to seek a preliminary injunction and to commence administrative litigation to block a proposed merger or to accept a consent order reflecting negotiated remedies requires a majority of the commissioners voting on

the matter after considering a recommendation by staff and management. The same procedure applies to challenges to consummated mergers. The Director of the Bureau of Competition or another official in the Bureau of Competition will notify counsel for the parties shortly after the commissioners have made their decision. A press release, non-confidential version of the complaint and, if applicable, the draft consent order and an analysis to aid public comment are made public.

The Assistant Attorney General in charge of the Antitrust Division makes the final decision for the DOJ to seek injunctive relief in a federal district court to block a proposed merger (or unwind a consummated merger) or to accept a consent order reflecting negotiated remedies after reviewing a recommendation by staff and management. A senior DOJ official will notify the parties either shortly before or after the complaint has been filed in a federal district court. A press release, non-confidential version of the complaint and, if applicable, the draft consent order and a competitive impact statement are made public.

Although the Agencies historically only issued press releases announcing adverse determinations, including when a complaint had been filed in court, both Agencies sometimes issue press releases or make public statements when closing out significant matters. For example, in August 2017 the FTC's Acting Director of the Bureau of Competition issued a statement regarding the FTC's decision not to further investigate Amazon's proposed acquisition of Whole Foods, in March 2018 the FTC issued a formal Statement of the Commission regarding its decision to close the investigation of the proposed merger of European eyewear makers Essilor and Luxottica Group, and in November 2018 the FTC issued a formal Statement of the Commission regarding its decision to close its investigation of the proposed merger of CareGroup and Lahey Health System, Seacoast Regional Health System, and BIDCO Hospital and Physician. Similarly, in September 2018 Assistant Attorney General Makan Delrahim issued a statement regarding the closing of the DOJ's investigation of Cigna Corporation's proposed acquisition of Express Scripts and in June 2019 he issued a statement regarding the closing of the DOJ's investigation of Louisiana Health Service & Indemnity d/b/a Blue Cross Blue Shield of Louisiana's acquisition of Vantage Holdings.

### 5.8 Prohibitions and Remedies for Foreign-to-foreign Transactions

As discussed in **2.8 Foreign-to-foreign Transactions**, certain types of foreign-to-foreign transactions are exempt from the HSR Act reporting provisions. Other types of foreign-to-foreign transactions, however, require HSR filings. Over the last two years the Agencies sought and obtained remedies for several foreign-to-foreign transactions. The FTC obtained an enforcement action against China National Chemical Corporation and Swiss global agricultural company Syngenta AG's proposed merger in April 2017 where the parties agreed to divest three types of pesticides to settle charges that the proposed merger would cause significant consumer harm in the USA. The DOJ obtained the following enforcement actions during this period against foreign-to-foreign transactions: the UK's Smiths Group plc's proposed acquisition of Morpho from France's Safran SA in March 2017 where the merging entities were two of the only three suppliers of desktop explosive trace detection services in the USA; Japan's Showa Denko KK's proposed acquisition of Germany's SGL Carbon SE in September 2017 where the parties agreed to divest SGL Carbon SE's entire US graphite electrodes business; and France's Thales SA's proposed acquisition of the Netherlands' Gemalto NV in February 2019 where the two firms accounted for 66% of GP HSM's secure encryption processing and key management device sales in the USA, and where Thales agreed to divest its General Purpose Hardware Security Module business.

## 6. Ancillary Restraints and Related Transactions

### 6.1 Clearance Decisions and Separate Notifications

Each HSR filing requires the filing party to include the transaction agreement, as well as agreements not to compete and other agreements between the parties. Although parties to a reportable transaction are required to include any non-competition and other agreements as a part of their HSR filings, there are no assurances that such ancillary agreements will be reviewed during the HSR waiting period. The Agencies have the authority to challenge these restrictions at a later date even if they do not challenge the transaction as anti-competitive.

## 7. Third-party Rights, Confidentiality and Cross-border Co-operation

### 7.1 Third-party Rights

Input from third parties such as competitors, customers, distributors, suppliers and other industry participants is often critical in shaping the review of the Agencies. Information provided by third parties may cause the Agencies to look closely at certain aspects of a transaction, commence an investigation or seek an enforcement action.

For transactions that are not reportable under the HSR Act but which may be anti-competitive, it is often the input of third parties, such as customers or competitors, that brings competitive concerns to the attention of the Agencies. Customer complaints are typically the type of third-party input that is given the most weight, although competitors and other third parties also typically make their concerns known to the Agencies during the course of a merger review.

Confidential information that the Agencies seek from third parties is protected by various statutory provisions. For FTC matters, the FTC Act contains protections against disclosure of confidential information obtained from third parties. Section 6(f) of the FTC Act prohibits the FTC from disclosing any trade secret or any commercial or financial information obtained from any person, with the exception of providing the information to appropriate federal law enforcement agencies where its confidentiality will be maintained and it will be used only for official domestic law enforcement purposes or any foreign law enforcement agency under the same circumstances. Sections 21(b) and 21(f) of the FTC Act protect the confidentiality of information obtained through compulsory process in investigations – including civil investigative demands (CID) and subpoenas, or submitted voluntarily by a party when compulsory process could have been used – from disclosure. The exception to these provisions is that they do not prevent the FTC from disclosing confidential information obtained during an investigation to any committee or subcommittee of Congress.

For DOJ matters, confidential information obtained from third parties that is submitted in response to a CID under the Antitrust Civil Process Act (ACPA) is protected from public disclosure under the Freedom of Information Act, although such information may be disclosed to a committee or subcommittee of Congress. The DOJ can also use information that it receives in response to a CID before any "court, grand jury or federal administrative agency" and it may use the information in a deposition pursuant to another CID. Similarly, the DOJ can also provide the information to the FTC, although the FTC is subject to the same confidentiality provisions that apply to the DOJ. Third-party confidential information that is submitted voluntarily to the DOJ and not in response to a CID is not protected by the provisions of the ACPA or HSR Act. Parties submitting information voluntarily under these circumstances typically request and receive a confidentiality letter providing written assurances that the information they submit will be protected from public disclosure or that they will be provided with adequate advance notice.

### 7.2 Contacting Third Parties

As discussed in **7.1 Third-party Rights**, the Agencies typically seek input from third parties in investigating proposed transactions. The Agencies generally request telephone interviews with senior officers. The Agencies also may subpoena individuals from third parties for depositions or investigational hearings. The Agencies also frequently request documents and information from third parties either voluntarily or through compulsory process in the form of CIDs and subpoenas. The information that the Agencies seek voluntarily or from CIDs and subpoenas includes sales data, business and strategic plans, and documents relating to the proposed transaction under investigation. The Agencies also may seek input from third parties to ensure that the merger remedies will be effective.

### 7.3 Confidentiality

All material submitted by the Acquiring and Acquired Persons under the HSR Act is confidential and protected from public disclosure under the Freedom of Information Act, subject only to the information becoming public in the event of a challenge to the transaction by one of the Agencies. The 'fact of filing' is also confidential, unless early termination of the waiting period is requested and granted, in which case the names of the parties to the transaction are published in the Federal Register and posted on the FTC's website. Although materials submitted by the Acquiring and Acquired Persons are exempt from public disclosure under the Freedom of Information Act, such information may be disclosed to a committee or subcommittee of Congress.

### 7.4 Co-operation with Other Jurisdictions

Employing both formal and informal agreements, the Agencies co-operate with foreign competition authorities. The USA has bilateral co-operation agreements with 11 jurisdictions: Germany (1976); Australia (1982); the EU (1991); Canada (1995); Brazil, Israel and Japan (1999); Mexico (2000); Chile (2011); Colombia (2014); and Peru (2016). The Agencies entered a Memorandum of Understanding with the Russian Federal Antimonopoly Service in November 2009, with the three Chinese antitrust agencies in July 2011, with the Indian competition authorities in September 2012 and with the Korea Fair Trade Commission in September 2015. The Agencies are also often called upon to assist emerging or nascent regimes in connection with drafting merger control thresholds, guidelines and regulations.

The Agencies also have multilateral arrangements regarding international mergers, including the 2014 Recommendation of the Organisation for Economic Co-operation and Development (OECD) Council Concerning Co-operation on Competition Investigations and Proceedings, which promotes enforcement co-operation, emphasising the importance of informal communications through the sharing of non-confidential information. The Agencies also participate in the International Competition Network (ICN) Merger Working Group (MWG), which most recently updated its recommended practices for reviewing proposed mergers in March 2018. In May 2019, the Agencies were part of 62 participating governmental authorities in establishing a Framework on Competition Agency Procedures (CAP).

In cases involving competition concerns in more than one jurisdiction, the Agencies and their foreign counterparts often exchange information, which may include both publicly available information and 'agency confidential' information. This latter information includes information that the Agencies do not routinely disclose publicly but on which no statutory disclosure prohibitions exist. Examples of 'agency

confidential' information can include staff views on market definition, competitive effects and remedies.

In order to disclose information submitted by the parties, however, an Agency must obtain a waiver of confidentiality. Merging parties often waive confidentiality protections to assist with the facilitation of co-operation, reduce information production burdens and avoid incompatible remedies. In 2013, the Agencies released a joint model waiver of confidentiality designed to streamline the waiver process, reducing the time and resources previously involved in negotiating waivers. In January 2017 the Agencies also revised their Antitrust Guidelines for International Enforcement and Cooperation, which provide guidance relating to investigative tools and co-operation with foreign authorities.

## 8. Appeals and Judicial Review

### 8.1 Access to Appeal and Judicial Review

As discussed in **5.1 Authorities' Ability to Prohibit or Interfere with Transactions** and **5.7 Issuance of Decisions**, the FTC and DOJ must typically seek a preliminary or permanent injunction in federal district court to prevent the closing of a transaction after the expiration of the HSR waiting period, which may take several months or longer. An appeal of the decision reached by the district court may be made in the federal court of appeals by either the parties or the Agencies. Merging parties may also appeal adverse FTC administrative trial initial decisions by the ALJ to the full Commission, and an adverse decision by the Commission to a federal court of appeals.

### 8.2 Typical Timeline for Appeals

Although there may be expedited processes for appeals available to the parties, appeals will typically take over ten months from a decision by a federal district court to a decision by a federal court of appeals concerning a proposed merger based on the average length of time for FTC and DOJ merger matters on appeal since 1995 as compiled by Dechert LLP. Using the same Dechert LLP database for consummated mergers, the appellate timeframe is much longer. The average time from a district court decision in a DOJ challenge to a consummated merger to a decision by a federal court of appeals is approximately 23 months. For FTC challenges to consummated mergers, the average time is approximately 27 months.

The FTC has succeeded in appealing the last two denials of a preliminary injunction motion seeking to block a merger. See FTC v Hershey Medical Center/PinnacleHealth System (2016) and FTC v Advocate Health Care/NorthShore (2016). In February 2019 the DOJ was unsuccessful in seeking an appeal of the June 2018 district court decision denying its attempt to block AT&T's proposed acquisition of Time Warner.

The merging parties have had no recent success appealing their loss to the Agencies in district court. In April 2017 the Court of Appeals for the District of Columbia Circuit affirmed an appeal by Anthem and Cigna of the February 2017 decision from a district court issuing a permanent injunction sought by the DOJ blocking Anthem's acquisition of Cigna. In June 2019 the Court of Appeals for the Eighth Circuit affirmed an appeal by Sanford Health and Mid Dakota Clinic of the December 2017 decision from a district court issuing a preliminary injunction sought by the FTC and the North Dakota Attorney General blocking Sanford Health's proposed acquisition of Mid Dakota Clinic.

### 8.3 Ability of Third Parties to Appeal Clearance Decisions

If the FTC or DOJ clears a merger, adversely affected third parties do not have a right of appeal under the HSR Act. Third parties with standing do, however, have separate rights to bring a private action against the merging parties under the Clayton Act.

## 9. Recent Developments

### 9.1 Recent Changes or Impending Legislation

The jurisdictional thresholds applicable under the HSR Act are adjusted annually, typically in January of each year, and become effective 30 days later based on changes in GNP. Apart from these annual adjustments, changes to the HSR Act are not particularly common, although changes to the interpretations of the HSR Act and regulations – issued by the Premerger Notification Office of the FTC – are common.

One significant legislative proposal is the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018, known as the 'SMARTER Act', which seeks to ensure that the FTC will be subject to the same standard as the DOJ when seeking a preliminary injunction to block a proposed merger. The SMARTER Act also eliminates the ability of the FTC to pursue administrative litigation for proposed mergers after the FTC seeks to obtain a preliminary injunction in federal court. The SMARTER Act (H.R. 5645) was passed by the House of Representatives on 9 May 2018; it did not receive a vote by the Senate in 2018.

In January 2019 Senator Amy Klobuchar re-introduced the Merger Enforcement Improvement Act (S. 306) that would modernise antitrust enforcement by improving the Agencies' ability to assess the impact of merger settlements, require studies of new issues, adjust merger filing fees and increase funding for the Agencies. At the same time, Senator Klobuchar re-introduced the Consolidation Prevention and Competition Act of 2019 (S. 307) that would strengthen the current legal standard to stop consolidation that may materially lessen competition. In May 2019 Senator Cory Booker re-introduced The Food and Agribusiness Merger

Moratorium and Antitrust Review Act of 2019 (S. 1596) that would put an 18-month moratorium on large agribusiness, food and beverage manufacturing, and retail grocery M&A. Several Democratic presidential candidates have also proposed strengthening the antitrust laws.

### 9.2 Recent Enforcement Record

Parties failing to file a required notification under the HSR Act are subject to civil penalties of up to USD42,530 per day of non-compliance. Adjustments are made to the maximum civil penalties annually as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The next annual adjustment is expected in early 2020. Although first-time violators typically may avoid a fine if a corrective filing is made and the antitrust Agencies are lenient, parties that have violated the HSR Act previously are often fined. Although such fines may not amount to the maximum allowed under the maximum civil penalties amount, fines typically range from several hundred thousand dollars to several million dollars.

During the period from 1 July 2018 to 30 June 2019, the FTC and DOJ obtained two enforcement actions against parties for violating the HSR Act. In December 2018 the FTC referred a complaint to the DOJ against James L Dolan, the executive chairman of Madison Square Garden Company, for failing to observe the required HSR Act waiting period when he acquired additional shares of the company due to the vesting of restricted stock units (part of his compensation package). Mr Dolan agreed to pay USD609,810 in civil penalties. In June 2019 the FTC referred a complaint to the DOJ against Canon Inc and Toshiba Corporation for deliberately structuring a transaction to avoid making timely HSR filings. Canon and Toshiba Corporation each agreed to pay USD2.5 million in civil penalties. The largest fine imposed to date for failure to make a notification is USD11 million, which was levied in 2016 in connection with the settlement by affiliates of ValueAct Capital Management LP with the DOJ for improper reliance on the 'solely for the purpose of investment' exemption.

The Agencies have continued to seek enforcement matters against proposed mergers, although at a rate and amount lower than the prior several years. During the period from 1 July 2018 to 30 June 2019, the FTC settled ten merger matters with consent agreements. During this period, the DOJ settled six merger matters. The threat of enforcement action has also caused several parties to abandon their transactions, including Securus Technologies Inc and Inmate Calling Solutions LLC in April 2019 after an investigation by the DOJ, and Republic National Distributing Company and Breakthru Beverage Group in April 2019 after an investigation by the FTC.

The Agencies have also recently challenged proposed transactions in court. The FTC prevailed in obtaining preliminary injunctions in FTC v Wilhelmsen Maritime Services/Drew Marine Group (July 2018) and FTC v Tronox Limited/Cristal (September 2018). The FTC also prevailed in administrative trials against the proposed Tronox Limited/Cristal merger (December 2018) and the consummated Otto Bock/FIH Group Holdings merger (May 2019). The FTC also prevailed in a Court of Appeals decision in June 2019 affirming the December 2017 preliminary injunction granted in FTC v Sanford Health/Mid Dakota Clinic. The DOJ failed to prevail at trial in US v AT&T/Time Warner (June 2018) and was unsuccessful in its appeal of the district court decision in February 2019. In June 2019, the DOJ commenced litigation seeking to block Quad/Graphics Inc.'s proposed acquisition of LSC Communications Inc. In July 2019, Quad/Graphics and LSC Communications agreed to terminate their merger due to the "added delay, uncertainty and cost of legal challenges."

### 9.3 Current Competition Concerns

Both the DOJ and the FTC have the same appointees in place from last year. Makan Delrahim was confirmed as the Assistant Attorney General for the Antitrust Division on 27 September 2017. For the first time since the FTC was founded in 1915, the US Senate confirmed at the same time five presidential nominees to serve as commissioners. Joseph Simons was appointed Chairman and sworn in on 1 May 2018. Noah Phillips, Rohit Chopra and Rebecca Kelly Slaughter were sworn in on 2 May 2018. The fifth confirmed nominee, Christine Wilson, was sworn in on 26 September 2018 after Commissioner Maureen Ohlhausen's term expired.

In terms of merger enforcement trends, as noted in **9.2 Recent Enforcement Record**, the Agencies continue seeking to block certain mergers and to settle other merger matters, although at a lower rate than the prior several years. The FTC established a Technology Task Force to monitor technology markets in February 2019 and to improve its ability to investigate technology mergers. The formal announcement of the task force states that its responsibilities include "prospective merger reviews in the technology sector and reviews of consummated technology mergers." At the time of writing, the Technology Task Force has not obtained an enforcement action for a technology merger.

Two recent FTC enforcement matters demonstrate that the commissioners do not all share the same views on vertical merger enforcement. In Staples/Essendant (January 2019) and Fresenius Medical Care/NxStage Medical (February 2019) the FTC commissioners voted 3-2 along party lines to accept consent agreements. In both of these matters, Democratic Commissioners Chopra and Slaughter dissented since they believed the consent agreements did not adequately address vertical issues. As stated in **1.1 Merger Control Legislation**, at the time of writing, the DOJ is currently working on new vertical merger enforcement guidelines.

The Agencies today are far less inclined to settle for remedies that they perceive as providing anything less than complete relief and that entail even a relatively slight risk of failure, due in part to several high-profile failed divestitures over the last several years. Under Assistant Attorney General Makan Delrahim, the DOJ is significantly stepping up demands for structural relief consisting of ongoing standalone business units rather than partial carve-out divestitures of select assets. One recent example is the extent of structural divestitures in the May 2018 Bayer/Monsanto settlement. The DOJ is also strongly opposed to behavioural remedies because it believes they are typically less effective than structural relief and require ongoing regulatory review. One example of this new policy is the DOJ's decision in November 2017 to attempt to block AT&T's acquisition of Time Warner, a vertical merger that may have been settled as a behavioural remedy in prior administrations in a manner similar to Comcast/NBC Universal, a comparable transaction, in 2011.

Similarly, FTC Chairman Simons has stated that one of his priorities is to improve the effectiveness of merger remedies. As discussed in **5.4 Typical Remedies**, the January 2017 FTC Merger Remedies study found that approximately 30% of the partial divestitures in merger orders from 2006 to 2012 failed. Chairman Simons stated that this rate of failure "is too high and needs to be lowered substantially, or ideally zeroed out altogether."

FTC Chairman Simons also stated that another one of his priorities for the FTC is to "devote substantial resources to determine whether its merger enforcement has been too lax, and if that's the case, the agency needs to determine the reason for such failure and to fix it." Between September 2018 and June 2019, the FTC conducted 14 sessions of Hearings on Competition and Consumer Protection in the 21st Century. Many of the hearings and panels focused on merger enforcement and merger remedies. At the time of writing, the FTC has not issued a report based on the hearings.

**Dechert LLP**

1900 K Street, NW
Washington
DC 20006-1110

Tel: +1 202 261 3300
Fax: +1 202 261 3333
Web: www.dechert.com

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The authors would like to acknowledge the contributions of the associates Adam Kidane (Brussels), Delphine Strohl (Brussels), Marion Provost (Paris) and Simon Hetsch (Paris).

## Authors

**Alec Burnside** practises in the field of EU competition law, working equally on cartels, dominance, mergers and state aid. Alongside his client practice he has written and commented extensively on developments in the law, as an advocate for reform in both substantive law and in procedures. He has frequently worked on cases in sectors characterised by heavy regulation, and so focused on relevant sectoral rules and their impact on competitive dynamics. This has included cases in the energy, financial services, military, pharmaceuticals, technology and transport sectors. Having worked in Brussels continuously since 1989, he has worked on cases before the European Commission under the leadership of six successive Competition Commissioners.

**Hans Jürgen Meyer-Lindemann** practises German and European competition law. He has handled high-profile merger control cases before the European Commission and national competition authorities; major cartel investigations in a variety of industries, including automotive, broadcasting and media, chemicals, consumer products, energy, financial services, health care, logistics, packaging, paper, pharmaceuticals, steel and telecommunications; and numerous litigation matters concerning both public and private enforcement before local and district courts, Germany's Federal Supreme Court and the European courts. He is a frequent speaker and has published extensively on competition law matters. He is the co-editor and co-author of one of the leading commentaries on European and German competition law and honorary professor at Heinrich-Heine-University in Düsseldorf.

**Mélanie Thill-Tayara** is a partner in Dechert's Paris office. She focuses her practice on antitrust and competition law, and she regularly represents leading companies in merger notifications before the French and European regulators and co-ordinates multi-jurisdictional filings. She has handled a significant number of cartel and abuse of dominant position cases before EU and French authorities and courts. She is noted for her strengths with respect to life sciences, pharmaceuticals and biotech, and also counsels clients on issues pertaining to sectors such as financial services, consumer goods, luxury goods and leisure, transport, technology goods, chemicals and press distribution.

**Clemens Graf York von Wartenburg** focuses on EU and German competition law. He advises clients on a wide array of competition law issues, with a particular focus on complex merger control proceedings as well as cartel and abuse of dominance investigations before the European Commission and the German Federal Cartel Office. He also regularly oversees multi-jurisdictional merger clearance processes in countries throughout the world. In addition, he advises clients on a variety of business practices including the establishment and maintenance of compliance programmes. Mr York has significant experience in advising multinational corporations across a broad range of industries, including automotive, air cargo, biotechnology, broadcasting and media, chemicals, consumer products, energy, financial services, manufacturing, pharmaceuticals and telecommunications. He is a frequent speaker and author on antitrust/competition topics.

## 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 (the 'Implementing Regulation'), most recently amended by Commission Regulation 1269/2013 (the '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 (the '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); and
- 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 practice' 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 (2015).

Draft best practice guidelines on the submission of internal documents were prepared in May 2018 and in early 2019 Commission officials indicated in that they were being finalised. 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. Although there are no substantive EU rules on the control of foreign investments, an EU framework for the screening of foreign direct investments (Regulation (EU) 2019/452) was adopted in March 2019 and entered into force in April 2019. This framework provides for co-operation mechanisms between Member States, and allows the Commission to issue opinions when an investment threatens security or public order in more than one Member State. To date, 14 Member States have rules governing foreign investments (notably France, Germany and the United Kingdom) and several are considering introducing similar rules. The provisions of the new regulation will apply in full as of 11 October 2020.

### 1.3 Enforcement Authorities

The Directorate General for Competition (the 'DG COMP') is the part of the Commission that discharges the responsibility for the enforcement of the EUMR, under the direction of the Competition Commissioner, currently 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 Co-operation with Other Jurisdictions**, below).

The EUMR and the one-stop shop principle will cease to apply to the UK if and when it leaves the EU, which is currently scheduled to take place at the latest on 31 October 2019. At the time of publication, the Withdrawal Agreement, including transitional provisions for merger control, has yet to be approved by the UK Parliament. If the Withdrawal Agreement is passed in its current form, the UK will de facto remain in the 'one-stop shop' until the end of the transition period. 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 of the 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 of the TFEU.

In addition, Article 21(4) of the 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 meets 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) of the 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) of the 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.

Second, under Article 9 of the 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 affect competition significantly 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.

Third, Article 22 of the EUMR provides that 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 affect competition significantly 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 of the EUMR 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:

- 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
- 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 Implementation**, below).

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. In April 2018, Altice was fined EUR125 million for implementing its acquisition of Portugal Telecom prior to notification and merger control clearance (Altice/PT Portugal). In June 2019, Canon was fined EUR28 million for partially 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 facto sole 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. By way of comparison, the highest fine recorded for gun-jumping

in the United States totalled to USD11 million (see the US chapter of this guide for more information).

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 of a decision by the Danish competition authority (DCCA) which had 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 of 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; or
- the creation of 'full-function' joint ventures (see **2.10 Joint Ventures**, above).

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'**, below).

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:
  (a) does not exercise the attached voting rights except in the preparation of the disposal of all or parts of the undertaking; and
  (b) 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; or
- 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 is illustrated by the fine imposed on Canon in 2019 for gun-jumping since it failed to notify the first step of a 'warehousing' transaction (see **2.2 Failure to Notify**, above).

### 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 use all or part of the assets of an undertaking or 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;
  - (b) the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR100 million;
  - (c) in each of at least three member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million; and
  - (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 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

'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**, below), 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 to '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). 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:

- 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
- 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 at member state level, notably Germany and the UK, which have rules applicable to acquisitions of lower levels of 'control'.

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**, above), the Commission has no competence to review or investigate concentrations which do not have an EU dimension.

### 2.12 Requirement for Clearance Before Implementation

The EUMR has suspensory effect. Subject to limited exceptions (see **2.14 Exceptions to Suspensive Effect**, below), 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 the 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**, above).

### 2.14 Exceptions to 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:

- the concentration is notified to the Commission without delay; and
- 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 they remain rare in practice.

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 Implementation 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**, above).

### 3.2 Type of Agreement Required Prior to Notification

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 an acquisition, the undertaking acquiring control is solely responsible for notifying the concentration. In the case of a merger of two or more undertakings (or parts of undertakings) or the acquisition of joint control, the merging parties or the undertakings acquiring joint control are jointly responsible for notifying the concentration.

### 3.5 Information Included 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 Pre-notification Discussions with Authorities**, below).

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 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 of Incomplete Notification

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 Pre-notification Discussions with Authorities**, below).

### 3.7 Penalties/Consequences of 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, and in 2018 a fine of EUR52 million was imposed on General Electric for providing incorrect information when acquiring LM Wind. Further such proceedings are also pending in at least one other case.

### 3.8 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**, below). The Phase I review period is extended to 35 working days if:

- the Commission receives a request for a downward referral from a member state within 15 working days following the date of notification; or
- 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 (SIEC)).

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, between 2011 and 2018 the Commission issued an SO in 55% 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**, below). At the end of

Phase II the Commission will decide to either clear the concentration unconditionally, clear the concentration subject to commitments, or 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, to 'stop the clock') 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:

- one the parties has failed to provide information in response to an informal request for information within the specified time limit; or
- 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 Pre-notification Discussions with 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 taking account of the Commission's comments and incorporating 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 the Dechert Antitrust Merger Investigation Timing Tracker, the average duration of pre-notification discussions in Phase II investigations has increased from three months in 2011 to nearly six months in 2018. In practice this means that the actual length of the review timeline has averaged approximately 12-13 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 Review Process**, above).

### 3.10 Requests for Information During 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 issues arise from third parties' responses to requests for information 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 2018, data from the Dechert Antitrust Merger Investigation Timing Tracker shows that the Commission used 'stop the clocks' in 42% of Phase II investigations, increasing the length of the review period by an average of 23 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 where the parties are not active in the same product and geographic market (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 where 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 Included in a Filing**, above) 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 data from the Dechert Antitrust Merger Investigation Timing Tracker, 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' or 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-co-ordinated effects of a merger in an oligopolistic market can be caught (ie, so-called 'gap cases'). The SIEC test has widened the Commission's scope for action, thus limiting any regulatory gaps.

The Commission's Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines provide detailed guidance on 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 increases 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 Case Law from Other Jurisdictions

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-co-ordinated) 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 an SIEC will arise as a result of:

- 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 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
- 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 an SIEC will arise as a result of unilateral effects due to:

- 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
- 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 outgoing Competition Commissioner Margrethe Vestager. This was reflected in the decision to block Siemens' proposed acquisition of Alstom despite political pressure from France and Germany to allow the creation of a European champion; and the decision to conditionally clear Bayer's acquisition of Monsanto in the face of calls to block the merger invoking product safety concerns.

### 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 TFEU, which prohibits anti-competitive agreements, to determine whether the concentration could potentially give rise to anti-competitive co-ordination 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) TFEU to determine whether spill-over effects arising from the joint venture are outweighed by pro-competitive effects.

## 5. Decision: Prohibitions and Remedies

### 5.1 Authorities' Ability to Prohibit or Interfere with Transactions

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

Article 8(3) empowers the Commission to issue a prohibition decision where it concludes that the concentration threatens competition in the internal market as a result of an SIEC (see **4.1 Substantive Test**, above). The Commission is able to adopt the prohibition decision under its own authority without taking its concerns before a judge, although its decisions can subsequently be subjected to judicial review (see **8. Appeals and Judicial Review**, below).

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 June 2019 the Commission adopted ten 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), Siemens/Alstom (2019), Wieland/Aurubis Rolled Products/Schwermetall (2019), Tata Steel/Thyssenkrupp/JV (2019).

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 of Inaccurate or Misleading Information**, above), 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, providing 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 has the power to accept only 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 if the concentration had not occurred. 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 an 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 will be 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**, below).

### 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, 83% of conditional clearances were subject to structural remedies, whereas 11% were subject to behavioural remedies. The remaining 6% of conditional clearance decisions were subject to a combination of structural and behavioural remedies.

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

### 5.5 Negotiating Remedies with 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 proposed. 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 Review Process**, above).

In Phase II, the parties must submit remedies within 65 working days of the initiation of Phase II proceedings (see **3.8 Review Process**, above). 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**, below). It will also consult the NCAs and, in some cases, the EFTA Surveillance Authority; 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 Co-operation with Other Jurisdictions**, below).

### 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 parties may at once close their transaction, with the divestment process proceeding thereafter. 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 a period for entering into an agreement with a buyer of around six months, and a period to close the transaction of around three months. If the parties are unable to find a suitable purchaser during the first divestiture period (typically six months), then a divestiture trustee will be given an irrevocable mandate to sell the divestment business at no minimum price, typically within three months. Until the sale of the divestment business is completed, the parties are required to comply with a hold separate obligation, ie, ring-fencing the divestment business from the retained business.

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 (and most demanding) 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 identified purchaser. 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 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 Issuance of Decisions

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 Review Process**, above). The decision is notified to the parties and the competent authorities of the member states. A non-confidential version of any Phase II decision is published in the Official Journal of the EU and the website of the Commission. Phase I decisions are not published in the Official Journal, only on the website of the Commission (there is no obligation to publish but the practice is to do so), but it is notable that short form decisions (approximately 50% of cases leading to a decision) contain no reasoning. Prior to the publication of the non-confidential version of the decision, the Commission and the parties will discuss and redact information qualifying 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 2018, 414 concentrations were notified to the Commission, of which 366 were cleared unconditionally in Phase I, and 17 were cleared in Phase I subject to commitments. Phase II investigations were initiated in 12 cases, four of which were cleared unconditionally, whereas six were cleared subject to commitments (see **5.1 Authorities' Ability to Prohibit or Interfere with Transactions, above**). In addition, two cases were withdrawn in Phase II.

## 6. Ancillary Restraints and Related Transactions

### 6.1 Clearance Decisions and Separate Notifications

Certain 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 Co-operation

### 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 shortly after the formal submission of the 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 such meetings 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 party/ies choose(s) 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.

### 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 the Form CO.

### 7.4 Co-operation 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:

- the turnover generated by the undertakings concerned in the territory of EFTA States exceeds certain levels;
- there is a risk of an SIEC in the territory of the EFTA States; or
- 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 long-standing 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. Furthermore, in the acquisition of Monsanto by Bayer, the Commission allowed Bayer to amend the commitments already accepted in the clearance decision to enable it to align them with the remedies required by the United States Department of Justice.

In terms of multilateral co-operation, the Commission is an active participant in the Merger Working Group of the International Competition Network (ICN), a forum that aims to promote the adoption of best practices in the design and operation of merger review regimes. In April 2019, the ICN approved an opt-in international Framework on Competition Agency Procedures to promote fair and effective procedures in competition enforcement. To date, the framework has been adopted by 62 jurisdictions, including the EU, the US, Canada and Brazil.

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

Notifying parties (as well as interested third parties, see **7.1 Third-party Rights** and **7.2 Contacting Third Parties**, above) can refer decisions of the Commission to the EU General Court for annulment 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 (ie, application to annul) must be lodged within two months and ten days from:

- the date of the notification of the decision in the case of addressees of the decision; or
- the date the decision comes to its knowledge in the case of a third party.

When a decision is annulled, the case goes back to the Commission which is required to reassess the transaction and decide anew on whether or not to authorise the concentration. The annulment does not constitute an approval of the concentration.

### 8.2 Typical Timeline for Appeals

The timeframe for appeals to the General Court is typically between two and 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 be 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 Ability of Third Parties to Appeal Clearance Decisions

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.

Following a public consultation that ended in January 2017, the Commission is expected to publish a further paper evaluating the jurisdictional and procedural aspects of the EUMR. The consultation sought 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'. According to comments from Commission officials, the general conclusion is that the merger control regime does not require a major overhaul but that there may be scope to simplify the regime.

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**, above), but coverage is not systematic and the outgoing 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**, above, for the Commission enforcement record in 2018. The Commission has recently taken enforcement action against companies for breaching EUMR procedural rules by gun-jumping and providing misleading/inaccurate information (see **2.2 Failure to Notify** and **3.7 Penalties/Consequences of Inaccurate or Misleading Information**, above).

### 9.3 Current Competition Concerns

There has been an increased reliance on parties' internal documents in merger control reviews (see **3.5 Information Included in a Filing**, above). 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 cited as 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 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 of Inaccurate or Misleading Information**, above).

The Commission's growing focus on innovation competition has also seen it intervene in a number of concentrations (see **5.3 Legal Standard**, above). 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.

In addition, the Commission took common ownership into account as an 'element of context' in its review of the Dow/DuPont and Bayer/Monsanto mergers. Common ownership refers to simultaneous non-controlling minority equity interests in competing firms by institutional investors. The

underlying theory of harm is that competition between firms with shareholders in common may be weakened due to reduced incentives to compete, even when those shareholders have non-controlling minority interests. This theory of harm remains highly controversial and has sparked a vigorous academic debate.

From a procedural standpoint, 'pull and refiles', ie, where the notifying party withdraws its first notification and refiles it later on, are gaining steam. According to the Dechert Antitrust Merger Investigation Timing Tracker, since 2013 their occurrence is slowly increasing and the two 'pull-and-refiles' observed in the EU in 2019 to date already matches the annual total of 'pull and refiles' in 2017 and 2018.

**Dechert LLP**

480 Avenue Louise
Box 13A
Brussels 1050

Tel: +32 2 535 5411
Fax: +32 2 535 5400
Web: www.dechert.com