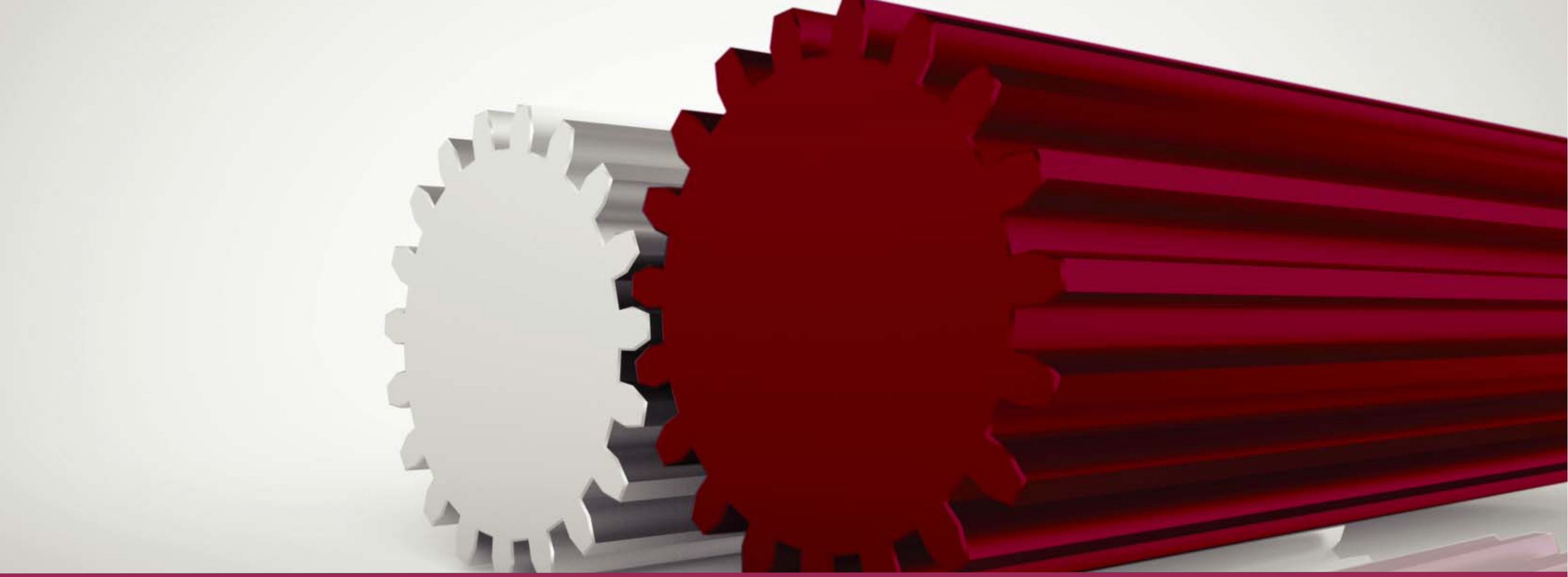

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The International Comparative Legal Guide to:

Merger Control 2014

10th Edition

A practical cross-border insight into merger control

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Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 52 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

European Union

Dr. Werner Berg

Crowell & Moring

Sean-Paul Brankin

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The European Commission (the "Commission") has exclusive jurisdiction over transactions caught by EU merger control rules. Enforcement is handled by the Commission's Directorate General for Competition ("DG Comp"). Cases are allocated between five enforcement units within the DG Comp on broadly sectoral lines, see: http://ec.europa.eu/dgs/competition/directory/organi_en.pdf.

National merger control rules (and other related laws) in the EEA may not be applied to transactions falling within the Commission's exclusive jurisdiction, creating a "one-stop-shop" for most such transactions (but see questions 1.4 and 2.7). Transactions falling outside the scope of the EU rules may be caught by national merger control rules in the various EEA states.

1.2 What is the merger legislation?

The primary legislation is the EU merger regulation, Council Regulation 139/2004 (the "EUMR"). Additional procedural rules are set out in Regulation 802/2004 (as amended by Regulation 1033/2008) (the "Implementing Regulation").

In addition, the Commission has issued a series of important guidelines and notices, including the Consolidated Jurisdictional Notice 2008 (the "Consolidated Jurisdictional Notice"), Guidelines on the Assessment of Horizontal Mergers 2004 (the "Horizontal Guidelines"), Guidelines on the Assessment of Non-horizontal Mergers 2008 (the "Non-horizontal Guidelines"), the Notice on Acceptable Remedies 2008 (the "Remedies Notice"), the Notice on Case Referral (the "Referral Notice") and Best Practice Guidelines on Merger Proceedings 2004 (the "Best Practice Guidelines").

All of this legislation is available on the DG Comp website: http://ec.europa.eu/competition/mergers/legislation/legislation.html.

1.3 Is there any other relevant legislation for foreign mergers?

No, there is not.

1.4 Is there any other relevant legislation for mergers in particular sectors?

There is no sector-specific merger legislation at the EU level: the EUMR applies to all transactions regardless of the sector involved. However, the EUMR provides that, as an exception to the one-stop-shop principle, EEA states may take appropriate measures to protect legitimate interests not taken into consideration under the EUMR, including public security, media plurality and prudential rules.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The EUMR applies to "concentrations". A concentration is deemed to arise where:

- two (or more) previously independent undertakings merge; or
- one or more undertakings acquire control of the whole or parts of another undertaking on a lasting basis.

The formation of a "full function" joint venture will also constitute a concentration (see question 2.3).

Control may be acquired "by purchase of securities or assets, by contract or by any other means". Control is defined as the ability to exercise "decisive influence" on an undertaking. Decisive influence may be exercised on a legal or *de facto* basis. It is sufficient to have the ability to block strategic commercial decisions through veto rights. A distinction is made between:

Sole control: where one undertaking alone enjoys the power to determine strategic commercial decisions, e.g. by holding a majority of the voting rights or otherwise exercising a decisive influence on the composition, voting or decision of the organs of an undertaking. A minority shareholder may exercise sole control where it has a legal right to manage the activities of the undertaking and determine its business policy (e.g. the general partner in a limited partnership) or has sufficient votes that it is highly likely to achieve a majority at shareholders' meetings.

Joint control: where two or more undertakings exercise decisive influence over another undertaking, e.g. two shareholders with equal voting rights in a 50:50 joint venture. Joint control often arises as a result of veto rights governing strategic commercial decision making, in particular veto rights over annual budgets, business plans, the appointment of key management or major investments. In contrast, veto rights of the type normally granted to minority shareholders to protect their interest as investors, e.g. over change of business, capital increases or liquidation, will not be sufficient to give control.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, if the acquisition results in the acquisition of sole or joint control (see questions 2.1 above and 6.2 below).

In 2013, the Commission consulted on the possibility of extending the scope of the EUMR to non-controlling minority shareholdings (see question 6.2 below). However, no concrete proposals have yet been announced.

2.3 Are joint ventures subject to merger control?

The EUMR applies to "full function" joint ventures. A joint venture will qualify as full function if it is active on a market and performs all the functions usually carried out by an independent undertaking active on that market on a lasting basis. Among others, this means it must have its own dedicated management and sufficient staff, financing and other resources (e.g. IP).

A joint venture will not be full function if it simply takes over a specific function for its parent companies (e.g. manufacturing or R&D) without having its own access to the market, or is dependent on its parents for sales, supplies or resources. Access to parental resources on an arm's length basis under commercial terms will not however undermine the full function nature of a joint venture.

A joint venture established for a short, defined period – e.g. for a single, time-limited project – will not be active on a lasting basis and will not therefore qualify as full function.

2.4 What are the jurisdictional thresholds for application of merger control?

Two alternative sets of thresholds apply. A concentration meeting either one will require mandatory notification.

Primary thresholds: A concentration will be caught by the EUMR if:

- the parties' combined worldwide turnover exceeds €5 billion; and
- each of at least two parties has a Union-wide turnover exceeding €250 million,

unless all of the parties generate at least two-thirds of their individual Union-wide turnover in one and the same Member State.

Alternative thresholds: Alternatively, a concentration will be caught by the EUMR if:

- the parties' combined worldwide turnover exceeds €2.5 billion;
- each of at least two parties has a Union-wide turnover exceeding €100 million; and
- in at least three Member States (i) the parties' combined turnover exceeds €100 million, and (ii) at least two parties each have turnover exceeding €25 million,

unless all of the parties generate at least two-thirds of their individual Union-wide turnover in one and the same Member State.

The thresholds are based on the turnover of the parties – specifically the acquirer(s) and the target – in the preceding financial year. For an acquirer, the relevant turnover is that of the entire group to which it belongs. For the target, the relevant turnover excludes that of parts of the seller's group that are not being acquired.

Detailed rules apply to the calculation and geographic allocation of turnover for EUMR purposes. These are set out in the Consolidated Jurisdictional Notice. Sector-specific rules apply to banks, other financial institutions and insurance undertakings.

Parties may request that a concentration which does not meet the above thresholds but is notifiable in at least three Member States be referred to the Commission for review (see question 2.7 below).

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. The EUMR applies to all concentrations that meet the jurisdictional thresholds, regardless of whether or not there is a substantive overlap.

2.6 In what circumstances is it likely that transactions between parties outside the EU ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

Foreign-to-foreign transactions will be caught by the EUMR if they qualify as concentrations and meet the jurisdictional thresholds. The EUMR applies to all concentrations meeting the jurisdictional thresholds, regardless of the location of the parties involved.

In 2013, the Commission consulted on the possibility of limiting the jurisdiction of the EUMR in relation to concentrations that have no effect in the EEA, such as certain full-function joint ventures that are located and operate outside the EEA (see question 6.2 below).

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The EUMR provides for both (i) transactions meeting its jurisdictional thresholds to be referred from the Commission to national competition authorities ("NCAs"), and (ii) transactions not meeting those thresholds to be referred from NCAs to the Commission. Referrals may be initiated either by the parties or by the relevant authorities (the Commission or the NCAs). The Commission, in cooperation with the Member States, has issued the Referral Notice which provides guidance on case allocation. Most referral requests have led to actual referrals in full or in part.

If the parties wish to have their concentration referred they need to apply for this before submitting notifications to any authorities (so-called pre-notification referrals). By far the most frequent requests (almost 30 per year) are from parties seeking referral to the Commission in order to enjoy one-stop-shop review. Such requests are possible if the concentration is notifiable or capable of being reviewed under the national law of at least three Member States (whether notification is mandatory or voluntary). To initiate a referral, the parties must file a reasoned submission to the Commission on Form RS. The Commission will then forward the request to Member States. The Member States whose national law applies must express disagreement within 15 working days from receiving the Form RS. Where no Member State has expressed its disagreement, the concentration will be notified to the Commission on Form CO for review under its exclusive jurisdiction. It is important to note that referral to the Commission may enlarge the geographic area over which the effects of the transaction are assessed, since the Commission will investigate the impact of the concentration in the entire EU/EEA while NCAs typically focus only on effects in their own jurisdiction.

Requests for referrals from the Commission to NCAs are much less frequent (approximately 9 per year), probably because the parties have to argue that the concentration "may significantly affect competition" in a market within a Member State. If a transaction is referred to an NCA in part only, the NCA will apply national law to the referred part while the remainder will be reviewed by the Commission under the EUMR.

NCAs may request that a transaction caught by the EUMR is referred back to them for review (in whole or in part) if and to the extent it threatens to significantly affect competition in a distinct market within that Member State. The Commission must inform parties if it receives a referral request. Phase I will then be extended to 35 working days, within which the Commission must "as a general rule" decide whether to refer the concentration to the NCA (in full or in part). If a case is referred to an NCA, that NCA has to inform the parties of its preliminary assessment within 45 working days from the referral or, in case where a national filing is required, 45 working days from submission of the notification. On average, 4.5 referrals to Member States at the request of NCAs are made each year, i.e. in approximately 2% of the notified concentrations.

NCAs may also ask the Commission to examine concentrations not caught by the EUMR that affect trade between Member States and threaten to "significantly affect competition within the territory of the Member State or States making the request". This provision was introduced to allow Member States that did not have merger laws to refer concentrations to the Commission for review. Where such a request is made, national time limits are suspended. If the Commission takes jurisdiction, the parties have to file a Form CO notification. Requests of this type are rare (slightly more than one per year). However, in 2010 several NCAs referred a concentration over which they did not have jurisdiction to the Commission for review (M.5969 *SC Johnson/Sara Lee*).

In 2013, the Commission consulted on various proposed changes to the mechanisms for referring cases between the Commission and the NCAs, including limiting the ability to refer cases to the Commission to those NCAs with jurisdiction (see question 6.2 below).

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Separate transactions involving a single acquirer (or acquiring group) will be treated as a single transaction if they stand or fall together. Separate transactions linked by conditions will be considered to stand or fall together. *De facto* links may also be sufficient.

A series of transactions in securities within a reasonably short period of time that together lead to an acquisition of control will also be treated as a single concentration.

Finally, transactions taking place between the same acquirer and seller within a two-year period will be treated as a single concentration taking place on the date of the last transaction, whether or not the transactions or businesses involved are linked.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Yes, where the jurisdictional thresholds are met, notification (and clearance) is mandatory prior to implementation. There is no deadline for notification, provided it is made before implementation.

It should be noted, however, that the Commission acts on a "first come, first served" basis regarding its substantive assessments. The filing in case M.6214 *Seagate/Samsung HDD* was made one day earlier than that in case M.6293 *Western Digital/Hitachi*. Both mergers concerned the same market. The Commission assessed the *Seagate/Samsung HDD* case on the basis of the existing market situation and cleared it without commitments. It then took the *Seagate/Samsung HDD* deal into account in assessing *Western Digital/Hitachi*, which it cleared subject to commitments. An appeal to the General Court against that decision has been withdrawn (Order of the GCEU of 20 September 2012 in case T-60/12 *Western Digital and Western Digital Ireland/Commission*).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Member States have ordered parties not to notify certain aspects of mergers in the defence sector that relate to national security (M.528 *British Aerospace/VSEL*). More recently, the Commission has required information in relation to mergers in the defence sector on the basis that this would not require disclosures that threaten national security (M.1797 *Saab/Celsius*).

There is no *de minimis* exception to the clearance requirement for small or unproblematic transactions that meet the notification thresholds. However, in certain cases, such transactions may be subject to more limited Short Form notification requirements and simplified procedure review (see question 3.9 below).

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Subject to limited exceptions (see question 3.7 below), parties that implement a transaction in breach of notification and clearance requirements under the EUMR expose themselves to a risk of fines and the possibility that the Commission will order the transaction to be unwound.

The Commission may impose fines of up to 10% of worldwide group turnover on undertakings that fail to notify a transaction prior to implementation and/or implement a transaction prior to obtaining clearance. In 2009, the Commission fined Electrabel €20 million for implementing a concentration arising from a minority shareholding acquisition without notifying or obtaining clearance (M.4267 *Electrabel/Compagnie Nationale de Rhone*). The General Court has confirmed the Commission's decision including the fine (GCEU, judgment of 12 December 2012 in case T-332/09 *Electrabel/European Commission*). The fine is currently under appeal to the Court of Justice of the European Union ("CJEU") (case C-332/09).

In addition, the validity of any transaction implemented in contravention of a requirement to notify and/or obtain clearance under the EUMR is subject to a final decision by the Commission. If the Commission finds such a transaction incompatible with the common market, it may require the parties to dissolve the concentration and restore the *status quo ante* (as far as possible).

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Notifiable concentrations, including foreign-to-foreign transactions, may not be implemented outside the EU without breaching the stand-still provisions under the EUMR, unless one of the narrow exemptions allowing completion prior to clearance applies (see question 3.7 below).

3.5 At what stage in the transaction timetable can the notification be filed?

Notification can be made before the signing of a definitive agreement or the formal announcement of a public bid, provided the parties can demonstrate a good faith intention to conclude an agreement, or have publicly announced their intention to make a public bid. An agreement in principle, a memorandum of understanding ("MoU") or a letter of intent signed by all parties will generally be sufficient. In 2006, the Commission accepted a notification from Deutsche Börse of a proposed merger with Euronext in the absence of an agreement in principle, MoU or letter of intent. Euronext had entered a merger agreement with a third party and Deutsche Börse had publicly stated that it would not make a hostile bid. However, Deutsche Börse had for some time made it publicly known that it was interested in a merger with Euronext.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Pre-notification contacts with the Commission are normally the first stage in the regulatory process, even in the least problematic cases. Such contacts normally involve one or more meetings with the case-team on the basis of a draft Form CO (see question 3.9 below). Officials will assess the draft notification, provide comments and may seek additional information. They may also grant waivers for some of the information requirements under Form CO if not required for the assessment of the specific case. Formal notification should only be made once issues raised by the case team have been addressed. Unless this is done, parties run the risk that their notification will be declared incomplete. Pre-notification contacts can last from approximately one month, in simple cases, to up to 6 months or more in complex cases (pre-notification contacts lasting close to a year are not unknown).

Submission of a completed Form CO triggers formal time limits for a Commission decision. Initially, the Commission has 25 working days to issue a decision ("Phase I"). Phase I will be extended by 10 working days if the parties offer commitments (see questions 5.2 and 5.4 below) or the Commission receives a referral request from a Member State (see question 2.7 above).

If, after Phase I, the Commission concludes that the concentration raises serious doubts as to its compatibility with the common market (see question 4.1 below), it will initiate a Phase II investigation. Statistically this happens in less than 5% of cases. The review period is extended by 90 working days. This may be further extended to 105 working days if commitments are offered (see question 5.4 below). The Commission may also extend the deadline by up to 20 working days at any time with the consent of the parties. Parties may request such an extension within 15 working days of the opening of Phase II.

In Phase II, the Commission will further investigate the case mainly through requests for information, which are often complex and subject to extremely short deadlines (see question 4.5 below). If the Commission wants to prohibit a concentration, it must send a statement of objections to the parties usually between working day 40 and 45. The parties usually have two weeks to reply to a statement of objections and may request an oral hearing, usually just one week later. Third parties (including complainants) may be invited to attend the oral hearing.

The Commission has the power to suspend the timeframe and it makes increasing use of this. Such a stop-the-clock decision is normally taken when the parties have not fully complied with a request for information (e.g. recently in M.6570 *UPS/TNT Express*).

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Yes. Subject to narrow exceptions, transactions caught by the EUMR may not be implemented prior to notification and clearance. Parties that implement transactions in breach of these obligations expose themselves to fines and the risk that the transaction will be unwound (see question 3.3 above).

The exceptions are:

- public bids, which may be implemented provided that notification is made without delay and voting rights are not exercised by the acquirer; and
- cases in which the Commission grants a derogation following an application by the parties.

The Commission grants derogations only exceptionally, taking into account the threat of harm to the parties or to third parties and the risk to competition posed by the concentration. Applications may be made at any time (including before notification or after completion) and must be reasoned. Derogations are often subject to conditions such as hold-separate obligations and/or supervision by a trustee.

During the financial crisis, the Commission granted a number of derogations – at least 10 between June 2007 and December 2009, including one in a case raising substantive concerns requiring remedies (M.5384 *BNP Paribas/Fortis*). However, it now appears to have returned to its former practice, granting only five derogations in the three years from 2010 to 2012.

3.8 Where notification is required, is there a prescribed format?

Yes. Notifications must be made on the basis of Form CO. The decision deadlines under the EUMR will not start to run until submission of a completed Form CO. Certain cases deemed unlikely to raise significant concerns may be notified on a Short Form CO (see question 3.9 below).

Form CO is a detailed questionnaire that requires notifying parties to provide detailed information as to the parties, their activities and turnover, their customers and competitors, internal documents provided to senior management in the planning of the transaction, and the market impact of the transaction on "affected markets", including:

- horizontally affected markets – where the merging parties have overlapping activities with a combined share of 15% or more;
- vertically affected markets – where the merging parties are active upstream or downstream of one another and one party has a share of 25% or more; and
- other affected markets – where one party has a share of at least 25% and another party is a potential entrant, has important IP rights, or is active in a closely related neighbouring market with a 25% share or more.

The extent and detail of information required makes the completion of Form CO a potentially burdensome and time-consuming process, which parties need to plan for carefully. The Commission can provide waivers and it regards pre-filing contacts, generally on the basis of a draft Form CO, as best practice and an important part of the overall process, even in relatively straightforward cases.

One original and five paper copies of the completed Form CO and annexes must be submitted together with 32 copies on CD or DVD-ROM. Submissions may be in any official EU language. However, parties wishing to ensure their cases are handled by senior and experienced officials often choose to notify in English, French or German.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

A simplified procedure and notification on a Short Form CO is available for concentrations meeting the following criteria:

- joint ventures with no or very limited actual or foreseen activities in the EU (turnover and assets in the EU each less than €100 million);
- concentrations involving no or very limited horizontal or vertical overlaps (parties' combined share below 15% in all horizontal overlap markets and below 25% in all vertically related markets); and
- acquisitions of sole control of an undertaking over which the acquirer already had joint control.

The Short Form CO is substantially less burdensome to complete than a full Form CO. However, the Commission retains the right to require a full notification if it deems it necessary. The Commission's Notice on the simplified procedure emphasises the desirability of pre-notification contacts in Short Form cases. In simplified procedure cases, the Commission is sometimes able to grant clearances within 20 working days from notification. Under the normal procedure, the Commission is rarely able to grant clearance before the 25 working-day Phase I deadline. During the financial crisis, however, the Commission was prepared to issue certain decisions on an accelerated basis. Other than that, there are no informal ways to speed up the clearance timetable other than careful planning, preparation and use of pre-notification contacts.

In 2013, the Commission consulted on the possibility of extending the concentrations to which the simplified procedure may apply, in particular by lifting the market share thresholds to 20% in the case of horizontal overlap markets and 30% in the case of vertically related markets (see question 6.2 below).

3.10 Who is responsible for making the notification and are there any filing fees?

Notification must be made by the acquiring party (sole control) or parties (joint control). True mergers (where the merging parties cease to exist in favour of a new legal entity) must be notified by the merging parties.

Where multiple parties are responsible for notification (i.e. for joint acquisitions and mergers), a joint notification must be made.

There are no filing fees.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

As set out above (see question 3.7), the EUMR allows the implementation of public bids prior to notification and clearance, subject to certain conditions. Other than this, there is no special status for public bids under the EUMR.

3.12 Will the notification be published?

The text of the notification will not be published. Following notification, the Commission will publish a short notice in the Official Journal summarising the concentration and inviting third-party comments. Form CO requires the parties to submit a draft for this notice.

The Commission will also issue press releases announcing its final decision and, where relevant, the opening of a Phase II investigation.

A non-confidential version of the Commission's decision will ultimately be published on the Commission's website: parties' business secrets will be removed.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

Under the EUMR, a concentration will be prohibited if it **significantly impedes effective competition** in the common market, or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position (the "SIEC test"). The SIEC test is similar to the "substantial lessening of competition" test in the US and UK. The incorporation of the former "creation or strengthening of a dominant position" test, applicable until 1 May 2004, allows the Commission to refer to its previous case-law under the SIEC test.

For the substantive analysis, three kinds of concentrations have to be distinguished:

- horizontal concentrations, i.e. concentrations between undertakings active actually (or potentially) in the same product and geographic market;
- vertical concentrations, i.e. concentrations between undertakings operating at different levels in the supply chain (upstream or downstream); and
- conglomerate concentrations, i.e. concentrations between undertakings whose businesses are complementary without being in a horizontal or vertical relationship.

The Commission has issued guidelines on the assessment of horizontal mergers (2004) and non-horizontal mergers (2008).

Horizontal Guidelines: The Commission emphasises the consumer benefits of effective competition, such as low prices, high quality products, a wide selection of goods and services, and innovation. The Commission seeks to prevent mergers that would be likely to deprive customers of these benefits by significantly increasing market power. "Increased market power" means the ability of one or more firms to profitably increase prices, reduce output, choice or quality, diminish innovation, or otherwise influence the parameters of competition. Market shares and concentration levels provide useful first indications for its assessment. Market shares in excess of 50% may in themselves constitute evidence of the existence of a dominant position while a post-merger HHI below 2,000 or an HHI increase of less than 250 will not normally create competition concerns.

For horizontal concentrations the Commission identifies two possible anti-competitive effects:

- <u>non-coordinated/unilateral effects</u>, i.e. the elimination of important competitive constraints on one or more firms resulting in increased market power; and
- <u>coordinated effects</u>, i.e. changes in the nature of competition such that firms that were not previously coordinating their behaviour are now significantly more likely to do so, or that make coordination easier, more stable or more effective for firms which were coordinating prior to the concentration.

The Horizontal Guidelines provide a non-exhaustive list of factors which may indicate that non-coordinated/unilateral effects are likely to result from a concentration. These include:

- the merging firms have large market shares;
- the merging firms are close competitors;
- customers have limited scope to switch suppliers (e.g. due to limited alternatives or high switching costs);
- competitors are unlikely to increase supply if prices increase;
- the merged entity is able to hinder expansion by competitors; and/or
- the merger eliminates an important competitive force.

Similarly, the Horizontal Guidelines provide a non-exhaustive list of factors which may indicate that co-ordinated effects are likely, particularly in highly concentrated, oligopolistic markets. These include:

- the likelihood of reaching terms of coordination (e.g. market concentration is high, the market is transparent with regard to prices and capacity, products are homogeneous, and entry barriers are high);
- deviations can be monitored easily (e.g. because the market is stable and transparent or the participants are linked through cross-directorships);
- deterrent mechanisms exist (e.g. where the deviator might be pushed out of the market through price war); and
- reactions of outsiders are unlikely to undermine the coordination.

The Horizontal Guidelines recognise that countervailing buying power or actual or potential entry may prevent even firms with high market shares from increasing prices and significantly impeding effective competition. In addition, the Commission may conclude that, as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market. This requires that the efficiencies benefit consumers, are merger-specific and are verifiable (see question 4.2).

Recent cases: unilateral and coordinated effects

In case M.6360 *Nynas/Shell/Harburg Refinery*, the Commission cleared Nynas' acquisition of the Harburg Refinery from its competitor Shell, despite this resulting in a reduction in competitors in the relevant market from 3 to 2, on the basis of a "failing firm defense". The Commission found that absent the merger the Harburg Refinery would close in any event as there were no alternative buyers (see also case M.6796 *Aegean/Olympic II*).

In case M.5658 *Unilever/Sara Lee*, the Commission considered the parties to be close competitors with regard to certain brands of deodorants and that Sara Lee had contributed to important innovations in the market. In addition, the Commission conducted a merger simulation which showed that price increases would be likely post-merger. The Commission nonetheless cleared the transaction on the basis of divestiture commitments.

In case M.6166 *Deutsche Börse/NYSE Euronext*, the Commission considered the parties' exchanges, EUREX (Deutsche Börse) and LIFFE (NYSE), to be the closest competitors in the provision of exchange-based services for the trading of European financial derivatives. The Commission defined separate markets for European as opposed to US financial derivatives and for those traded on exchanges as opposed to "over-the-counter" (OTC). The Commission found that interest rate products based on different currencies are not generally substitutable and that OTC and exchange-traded derivatives are not generally considered substitutes by customers. Based on that market definition, the proposed deal would have created a quasi-monopoly in a number of asset classes. The remedies offered by the parties were regarded as insufficient. As a consequence, the Commission prohibited the transaction. The Commission decision is currently under appeal to the General Court (case T-175/12 *Deutsche Börse/Commission*). The grounds for appeal include that the Commission did not conduct any empirical, economic or econometric studies in relation to its market definition for derivatives.

In case M.6106 *Caterpillar/MWM*, the Commission concluded that the merger was unlikely to lead to coordinated effects. The Commission was initially concerned that the merger would remove the strongest challenger from the market, giving rise to a slowdown in technological innovation and reduced competition on prices and services. Also, it considered that the market was relatively transparent in terms of volume, providing market participants with a clear view of their respective market shares in very detailed market segments. The Phase II investigation revealed however that the merger would not bring about a change in the market structure conducive to coordination, and would not necessarily increase the future sustainability of any coordination.

Non-horizontal Guidelines: The Commission recognises that non-horizontal mergers are generally less likely to impede competition than horizontal mergers because they do not entail the loss of direct competition between the merging firms and provide substantial scope for efficiencies.

Vertical mergers: Although the Non-horizontal Guidelines identify both non-coordinated (unilateral) and coordinated effects as potential impediments of effective competition, the focus of the Non-horizontal Guidelines is clearly on non-coordinated effects. The Commission's key concern is foreclosure. A merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. Such foreclosure is regarded as anti-competitive where the merging companies are able to profitably increase prices charged to consumers as a result. The Non-horizontal Guidelines distinguish between input and customer foreclosure. Input foreclosure is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input. Customer foreclosure is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base.

The Non-horizontal Guidelines set out a framework of assessment for both types of foreclosure comprising three steps:

- ability to foreclose, e.g. whether the merged entity could, by reducing access to its own upstream products or services, negatively affect the overall availability of inputs for the downstream market in terms of price or quality (e.g. in cases of capacity constraints);
- incentive to foreclose, i.e. whether the foreclosure would be profitable; and
- whether the merger will have a likely impact on effective competition, e.g. because it would lead to increased prices in the downstream market.

The Non-horizontal Guidelines usefully illustrate each of these steps on the basis of several years of Commission practice. They recognise that, for input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market. Equally, for customer foreclosure to be a concern, the merger must involve a company which is an important customer in the downstream market with a significant degree of market power. No non-horizontal concerns are deemed to arise if the merged entity has a market share of less than 30% on both the upstream and the downstream market.

The guidance on coordinated effects follows that in the Horizontal Guidelines (see above).

Conglomerate mergers: The main concern in the context of conglomerate mergers is foreclosure, in particular through bundling or tying. The guidance follows the methodology for vertical mergers.

Recent vertical and conglomerate cases

In case M.6381 *Google/Motorola Mobility*, the Commission examined two vertical relationships between the parties: (i) Google's Android mobile operating system and Motorola's smart mobile devices; and (ii) Motorola's standard essential patents and the smart mobile devices industry. The Commission concluded that Google would not have an incentive to prevent Motorola's competitors from using Android. Also, with regard to concerns that Google would be in a position to use Motorola's standard essential patents to obtain preferential treatment for its services, the Commission found that Google already had many ways to incentivise customers to take up its services and that the acquisition of Motorola would not materially change this.

In case M.6166 *Deutsche Börse/NYSE Euronext*, the Commission stated that both Eurex and Liffe operate "closed vertical silos linking their exchange to their own clearing house". Since the transaction would have resulted in a single vertical silo that would trade and clear more than 90% of the global market for European financial exchange-traded derivatives, the Commission considered it difficult for a new player to enter the market. The advantages of clearing similar contracts through a single clearing house were such that customers would have been reluctant to trade similar derivatives on another exchange. This would have reinforced the monopolistic position created by the merger resulting in higher prices and lower incentives to innovate.

The Commission conducted a conglomerate effects analysis in case M.6281 *Microsoft/Skype*, assessing the possibility that Microsoft would degrade Skype's interoperability with competing services and/or tie its own products (in particular its Windows operating system) with Skype. The Commission found that Microsoft would have the ability but not the incentive to do both. Microsoft would have no incentive to degrade Skype's interoperability as it was essential that Skype's services were available on as many platforms as possible in order to maintain and enhance the Skype brand. As regards tying or bundling, the Commission noted that consumers use multiple communications services on multiple platforms, such as Apple iOS and Android, that offer their own built-in communications applications (Facetime and Google Talk) and that some online communications applications, such as Facetime and Viber, are not made available on the Windows platform but remain very successful. In addition, consumers increasingly prefer services that offer online communications as part of a broader user experience, such as Facebook, Google+ and Gmail, all of which run on Windows. The Commission cleared the case unconditionally.

Joint ventures: Full function joint ventures are assessed primarily under the SIEC-test. In addition, the Commission will assess (in accordance with the principles applicable under Articles 101 (1) and (3) TFEU) whether the object or effect of the transaction is to coordinate the competitive behaviour of the parents to the joint venture. Such coordination can occur where two or more parents retain activities in the same market and that market is closely related to one in which the joint venture is active.

4.2 To what extent are efficiency considerations taken into account?

In principle, the Commission will take account of efficiencies if they are of direct benefit to consumers, merger-specific, substantial, timely and verifiable. It is for the parties to substantiate the efficiencies and demonstrate that they are likely to counteract the merger's adverse effects on competition (see also question 4.1 above).

The Commission has undertaken fully-fledged efficiency assessments in numerous cases, but to date it has not cleared a merger it would otherwise have prohibited on the basis of efficiencies (see e.g. M.4000 *Inco/Falconbridge*, M.4439 *Ryanair/Aer Lingus* (analysis upheld in T-342/07) and M.4854 *TomTom/Tele Atlas* (in a vertical context)). However, in case M.6570 *UPS/TNT Express*, the Commission seems to have accepted that cost-savings would be passed on to customers as a result of the combination of UPS and TNT's air networks and were sufficient to outweigh the expected price increases in several of the national markets for international express deliveries of small packages. Nonetheless, since there were several (mainly smaller) markets in which the efficiencies did not outweigh the negative effects of the merger and since the remedies offered by the parties were deemed insufficient, the Commission prohibited the transaction.

4.3 Are non-competition issues taken into account in assessing the merger?

The EUMR does not provide for any account to be taken of non-competition issues. However, in 2003, a consumer-liaison officer was created in order to facilitate input from consumer organisations. The practical impact of this office has been limited. Further, in Phase II cases where the college of Commissioners ultimately decides the matter, decisions may be open to political influence. Finally, the Commission has considered whether state aid measures, in combination with other market elements may confer on the merged entity a position which would result in a significant impediment to effective competition (*Santander/B&B Assets*, December 2008, para. 34). In most cases, there is, however, a separate procedure to assess state aid issues.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third party input is critical to the Commission's review process. The Commission has a duty to take account of third party complaints and such complaints, including those from competitors, can have an important impact on the process.

Following notification, the Commission will publish a short notice summarising the concentration in the EU's Official Journal ("OJ") and on its website. Notices invite comments from third parties within 10 days of publication in the OJ, but comments may be submitted at any time, including before notification. Comments may be made as formal complaints or more informal contacts.

Third parties showing a sufficient interest have a right to be heard by the Commission, both orally and in writing, and the Commission must thoroughly and impartially investigate complaints that are submitted within a reasonable period.

In addition, the Commission's practice, in all but the simplest cases, is to send information requests in the form of questionnaires to a wide range of third parties, in particular the customers, suppliers and competitors of the merging parties. Information requests will often be detailed and extensive and the information gathered will frequently form the basis for the Commission's analysis.

Third parties that are directly and individually concerned may appeal the Commission's final decision (see questions 5.9 and 5.10). Such appeals have had limited success (e.g. Impala's appeal of M.3333 Sony/BMG). Third parties that fail to participate in the formal Commission procedure may struggle to show that they are directly and individually concerned (in case T-224/10 *test-achats/Commission*, test-achats was denied standing for that reason; the fact that test-achats had submitted comments before notification did not help).

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

Most information gathering is done via information requests in the form of questionnaires, which are often long and detailed. The Commission may send information requests to parties and third parties. Responses may be compulsory (requests by decision) or, more usually, voluntary (simple requests). The Commission will typically set short deadlines for responses, although extensions may be sought. Penalties may be imposed for providing false or misleading responses or for failing to respond to a compulsory request within the deadline. Failure by the parties to provide a full response to an information request may "stop-the-clock" on the time limits for decision making.

Where no confidentiality issues arise, the Commission may issue informal information requests prior to notification, in consultation with the parties.

The Commission also has the power to conduct "dawn raids". Such raids are rare, and have mainly related to parties suspected of implementing a transaction before notification and/or clearance (see e.g. M.1157 *Skanska/Scancem*). Recently, however, the Commission undertook raids because it had doubts as to the accuracy of the parties' responses (see M.6106 *Caterpillar/MWM* where the Commission undertook raids that were based both on merger and on antitrust concerns).

Finally, in more difficult cases the Commission increasingly undertakes site visits to learn more about the relevant business of the parties (e.g. M.6570 *UPS/TNT Express*).

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The Commission is obliged to protect business secrets – information whose disclosure would harm a party's commercial interests – and other confidential information whose disclosure is not necessary in the context of the procedure (see CJEU judgment in cases C-404/10 P *Commission/Éditions Odile Jacob* and C-477/10 P *Commission/Agrofert Holding* of 28 June 2012). Confidential information submitted by the merging parties is also protected against disclosure requested by third parties based on the EU rules on access to documents.

Parties providing information to the Commission are required to identify business secrets and/or confidential information and to provide a non-confidential version of submissions.

Business secrets and confidential information are removed from the published versions of Commission decisions and other publications in relation to the transaction (see question 3.12 above).

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

See question 3.6 above. If the parties decide to withdraw their notification, the Commission will close its file without a formal decision, unless the parties have already implemented the concentration (or parts of it). In such cases, the Commission may order restoration of the *status quo ante*.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes, the parties have the right to offer remedies in the form of commitments. Usually, parties will offer commitments having received an indication of the Commission's likely competition concerns. In Phase I this is typically after the first state-of-play meeting around 15 working days from notification. In principle it is for parties to determine the exact scope of commitments and their form (divestment, licences, etc.) but the Commission will assess the offer and usually road-test it by consulting market participants on the basis of a non-confidential version of the commitments. The parties may then have to amend or fine-tune the commitments. Parties must submit formal commitments on Form RM. When filling in this form, parties must, *inter alia*, describe the commitments in detail and explain why they remove significant impediments to effective competition.

Proposed commitments should be proportionate and entirely eliminate competition problems. The Commission will assess all relevant factors, including market structure, the type, scale and scope of the commitments proposed, and the likelihood of successful implementation. It is for the parties to propose commitments sufficient to remove competition concerns and to submit the necessary information to assess them.

Structural commitments (e.g. divestments) are generally preferred. However, an assessment will be made on a case-by-case basis and the European courts have made it clear that the Commission must take behavioural commitments offered by the parties into account. Structural remedies may relate to the divestment of assets (M.6203 *Western Digital Ireland/VIVITI Technologies*) or shareholdings (M.6286 *Südzucker/ED&F MAN*), the granting of licences (M.6455 *SCA/Georgia-Pacific Europe*) or the exit from a joint venture (M.4035 *Telefonica/O2*). Commitments must be implemented within a specified deadline from clearance, usually six months (with a possibility of extension upon application) and are often supervised by a trustee. Divestments must be made to a suitable purchaser, i.e. a purchaser which is able to keep the business viable and does not create competition concerns. Where the Commission has doubts as to the scope for a business to be divested, it may require that the parties arrange an "upfront buyer" (i.e. that they do not close the deal until they have entered into a binding agreement with a suitable purchaser, see e.g. M.3431 *Sonoco/Ahlstrom/JV*), or even enter into a legally binding agreement with a buyer during the merger control procedure (a so-called "fix-it-first" remedy; a last minute attempt to sign such an agreement failed in M.6570 *UPS/TNT Express*). In cases where the implementation of a commitment is uncertain, the Commission might require that failure to comply with the commitment within a given deadline will trigger an obligation to comply with a more extensive alternative ("divestiture of the crown jewels", e.g. M.2337 *Nestlé/Ralston Purina*). Recently accepted behavioural commitments include ensuring interoperability with Intel chips to McAfee competitors post-transaction and granting access to necessary information (M.5984 *Intel/McAfee*).

In Phase I, the Commission only accepts commitments where the competition problem is readily identifiable and can easily be remedied. According to the Remedies Notice, the commitments must be sufficient to clearly rule out 'serious doubts' with regard to the transaction. In effect, the parties may have to offer more than is required to remedy the competition concern because the Commission is not yet in a position to fully assess the situation. In

M.5141 *KLM/Martinair* and M.6106 *Caterpillar/MWM*, for example, the parties offered commitments in Phase I which the Commission rejected as being insufficient, but the Commission subsequently cleared these cases without commitments in Phase II because it found the concentrations were compatible with the common market.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

The Commission can and will require remedies in foreign-to-foreign mergers on the same grounds as in domestic cases. Recent examples in mergers between US companies are *UTC/Goodrich* (M.6410) and *Intel/McAfee* (M.5984). In recent years, the US authorities and the Commission have closely cooperated on the scope of commitments in such cases which did not, however, prevent substantial divergence in the assessment of the proposed acquisition in M.6458 *Universal Music Group/EMI Music*: no remedies were required in the US while substantial remedies were required in the EU.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Commitments can be offered at any stage in the procedure but may have different procedural consequences depending on the time of submission. The parties have the right to offer commitments within 20 working days from the receipt of the notification by the Commission and within 65 working days from the start of Phase II. Exceptionally, the Commission may accept commitments offered after these deadlines. The offer of commitments automatically extends the investigation period by 10 working days in Phase I and by 15 working days in Phase II (unless the commitments have been offered less than 55 working days after the initiation of Phase II, in which case the deadline will not be automatically extended).

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Yes. The Commission has developed best practice guidelines on divestiture commitments which include model texts for divestiture commitments and for trustee mandates both of which are available online:
http://ec.europa.eu/competition/mergers/legislation/commitments.pdf; and
http://ec.europa.eu/competition/mergers/legislation/trustee_mandate.pdf. Deviations from these texts must be explained and justified in the parties' formal offer of commitments on Form RM.

5.6 Can the parties complete the merger before the remedies have been complied with?

Normally yes, parties may complete the transaction before remedies have been implemented, provided procedural safeguards, such as hold separate obligations, are observed. However, in some cases the Commission will require an upfront buyer to be identified to give it sufficient certainty that the business will be successfully sold to a suitable purchaser. In these cases, the parties must commit not to complete the notified concentration until they have entered into a binding agreement to sell the divested businesses with a purchaser approved by the Commission (see question 5.2 above).

5.7 How are any negotiated remedies enforced?

Substantive commitments (e.g. divestiture commitments) constitute conditions for clearance. If they are breached, e.g. if business is not divested in the time-frame foreseen, the clearance decision is no longer applicable. In such circumstances, the Commission may take interim measures appropriate to maintain effective competition and may ultimately order the parties to dissolve the concentration or take other restorative measures. The parties may also be subject to fines.

Procedural commitments (e.g. hold separate or ring fencing commitments) do not generally constitute conditions. However, if parties breach such commitments the Commission may revoke the clearance decision and impose fines or periodic penalty payments.

Under the Remedies Notice, the Commission may waive commitments, if the market situation has significantly changed, a sufficient time-span has lapsed and there is no opposition by affected third parties. In 2011, the Commission found, after conducting a market investigation, that the requirements for a waiver were met with regard to Hoffman-La Roche's commitment to grant interested third parties access to certain technology on a non-discriminatory basis. The fact that Hoffman-La Roche's commitment did not include a review clause setting out the waiver requirements did not prevent a waiver being granted. Such review clauses are now normally included in the commitments pursuant to the Remedies Notice.

5.8 Will a clearance decision cover ancillary restrictions?

Yes, a clearance decision will automatically cover ancillary restrictions without the need for them to be specifically referred to or assessed by the Commission. The Commission's Ancillary Restraints Notice (2005) sets out the types of restraints it typically considers ancillary. At the request of the parties, the Commission may in principle assess restraints raising novel or unresolved issues as a "residual function". However, outside the scope of the Ancillary Restraints Notice, parties will generally have to self-assess.

5.9 Can a decision on merger clearance be appealed?

Decisions by the Commission under the EUMR may be appealed to the EU General Court on issues of substance or procedure. A General Court judgment may then be appealed to the CJEU on issues of law. Appeals do not suspend the effect of the Commission decision.

Appeals may be brought by the parties to the transaction or by third parties, including competitors, that are directly and individually concerned by the decision.

Appeals to the General Court take, on average, around 2 years. Any subsequent appeal to the CJEU is likely to take at least a further 18 months. There is an expedited procedure if an appeal is made on limited grounds, but cases may take 18 months even under this procedure. The length of delay has made appeals relatively rare, but a number of appeals have succeeded in getting the Commission decision overturned. In those cases, the transaction has been reassessed by the Commission under the EUMR.

In addition, the Commission may, in extreme cases, be liable in damages to parties suffering loss as a result of errors in enforcing the EUMR.

5.10 What is the time limit for any appeal?

Appeals have to be lodged with the court within two months and 10 days from either receipt of the decision (in case of the parties) or knowledge of the decision (in case of third parties). Knowledge of the decision means knowledge of its content, not merely knowledge of its existence.

5.11 Is there a time limit for enforcement of merger control legislation?

There is a five-year limitation period on the imposition of fines and sanctions under the EUMR, other than fines for infringements relating to notification, requests for information or investigations where the limitation period is three years. For continuing infringements, the time limits do not start to run until the infringement has ceased.

6 Miscellaneous

6.1 To what extent does the merger authority in the EU liaise with those in other jurisdictions?

Cooperation with Member States

The NCAs of the Member States receive copies of all notifications within three working days and may express their views at any time during the Commission investigation. They are formally represented in the Advisory Committee on concentrations which is consulted before a decision in Phase II is taken. The Commission shall take utmost account of the opinion issued by the Advisory Committee which is published.

Cooperation with Member States also occurs in the context of the referral system (see question 2.7 above).

Cooperation with the US and other non-EEA states

The Commission cooperates closely with the US authorities where a concentration is subject to review in both jurisdictions. In such cases, the authorities exchange information, coordinate their review procedures and, most notably, seek to align their remedies (see, recently, M.6410 *UTC/Goodrich* but compare M.6458 *Universal Music Group/EMI Music* discussed in question 5.3 above). Cooperation is based on a specific U.S.-EU bilateral agreement and on the Best Practice Guidelines on Bilateral Cooperation (2002).

Cooperation with other NCAs outside the EEA has also become more common. Cooperation with Canada and Japan is based on bilateral agreements. Interaction with other countries, notably China, is based on common understandings. International cooperation is facilitated through the International Competition Network ("ICN") in which the Commission has an active role.

6.2 Are there any proposals for reform of the merger control regime in the EU?

Yes. During 2013, the Commission conducted consultations on two sets of changes to the EUMR. Some of the proposed changes are very significant.

The first consultation, launched in March 2013, concerned proposals seeking to simplify notification procedures under the EUMR by (i) extending the range of mergers qualifying for notification under the simplified procedure (see question 3.9), and (ii) reducing the scope of information required in relation to mergers not notified under the simplified procedure. As regards the simplified procedure, the key proposal is extending the market share thresholds for treatment under the simplified procedure from 15% to 20% for markets involving horizontal overlaps and from 25% to 30% for vertically related markets. For cases that do not benefit from the simplified procedure, the parties would no longer have to submit detailed information in relation to markets where their market shares fall within the thresholds for applying the simplified procedure when completing Form CO. The consultation documents are available at:
http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html.

The second consultation, launched in June 2013, concerned proposed changes to the EUMR in two main areas: (i) extending the scope of the EUMR to cover the acquisition of non-controlling minority shareholdings; and (ii) various changes to the mechanisms for referring cases between the Commission and NCAs. Certain miscellaneous changes are also proposed. The Commission discusses various mechanisms by which non-controlling minority shareholdings might be brought within the scope of the EUMR. These include subjecting such shareholdings to the existing compulsory pre-notification requirements under the EUMR or allowing the Commission to 'call in' acquisitions post-closing by opening an investigation. The Commission also discusses the possibility of establishing "safe harbours", e.g. for acquisitions of shareholdings below 10% in the absence of special rights such as board representations or veto rights.

In relation to referral mechanisms, it is proposed to allow parties to concentrations that are notifiable under national merger control rules in at least three Member States to instead notify these transactions directly to the European Commission on Form CO, even if they do not meet the EUMR notification thresholds. Individual Member States would then have 15 working days to object to Commission jurisdiction. Currently, parties to such transactions must first submit a reasoned submission to the Commission on Form RS requesting referral before subsequently submitting a full Form CO notification if no Member State objects (see question 2.7 above). It is also proposed to amend the process by which NCAs may refer cases to the Commission by limiting the right to make such references to NCAs that have jurisdiction over a concentration under their national merger control rules and by granting the Commission jurisdiction over effects of the concentration across the whole of the EEA, rather than in relation only to the jurisdictions of the NCAs making the reference as is currently the case.

Miscellaneous proposals include limiting the jurisdiction of the EUMR in relation to concentrations that have no effect in the EEA, such as full function joint ventures that are located and operate outside the EEA and have no impact on the EEA.

The consultation documents are available at:
http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html.

6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of 15 September 2013.

Dr. Werner Berg

Crowell & Moring
7 Rue Joseph Stevens
1000 Brussels
Belgium

Tel: *+32 2 282 4082*
Fax: *+32 2 230 6399*
Email: *wberg@crowell.com*
URL: *www.crowell.com*

Dr. Werner Berg, LL.M. is a partner in the Brussels office of Crowell & Moring. His practice includes the entire spectrum of EU and German antitrust law. He has handled numerous merger control procedures for clients, such as AT&T, Nestlé or Sappi and has advised on complex mergers including second phase and remedies cases. Dr. Berg is a member of the German and the Brussels Bar (EU-List). He teaches merger control at the Academy of European Law in Trier and at the Queen Mary College in London and has published widely on EU and German merger control. Dr. Berg is recommended as a recognised expert in EU and competition law in Chambers Europe and Chambers Global, in European Legal Experts, Best Lawyers, JUVE and Legal 500.

Sean-Paul Brankin

Crowell & Moring
7 Rue Joseph Stevens
1000 Brussels
Belgium

Tel: *+32 2 282 4082*
Fax: *+32 2 230 6399*
Email: *sbrankin@crowell.com*
URL: *www.crowell.com*

Sean-Paul Brankin is a partner in the Brussels office of Crowell & Moring. His practice encompasses both EU and UK antitrust law and covers merger control and advisory work. In addition to recently advising clients such as AT&T and Nestlé on merger control issues, Sean-Paul has significant regulatory experience as a former Legal Director at the UK Office of Fair Trading where he acted as the OFT's lead internal adviser on UK mergers, with extensive involvement in complex cases including BSkyB/ITV, NASDAQ/LSE and Ryanair/Aer Lingus. Sean-Paul is a UK qualified solicitor and a member of the Brussels Bar (EU-List). He is a regular speaker and author on competition matters.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk