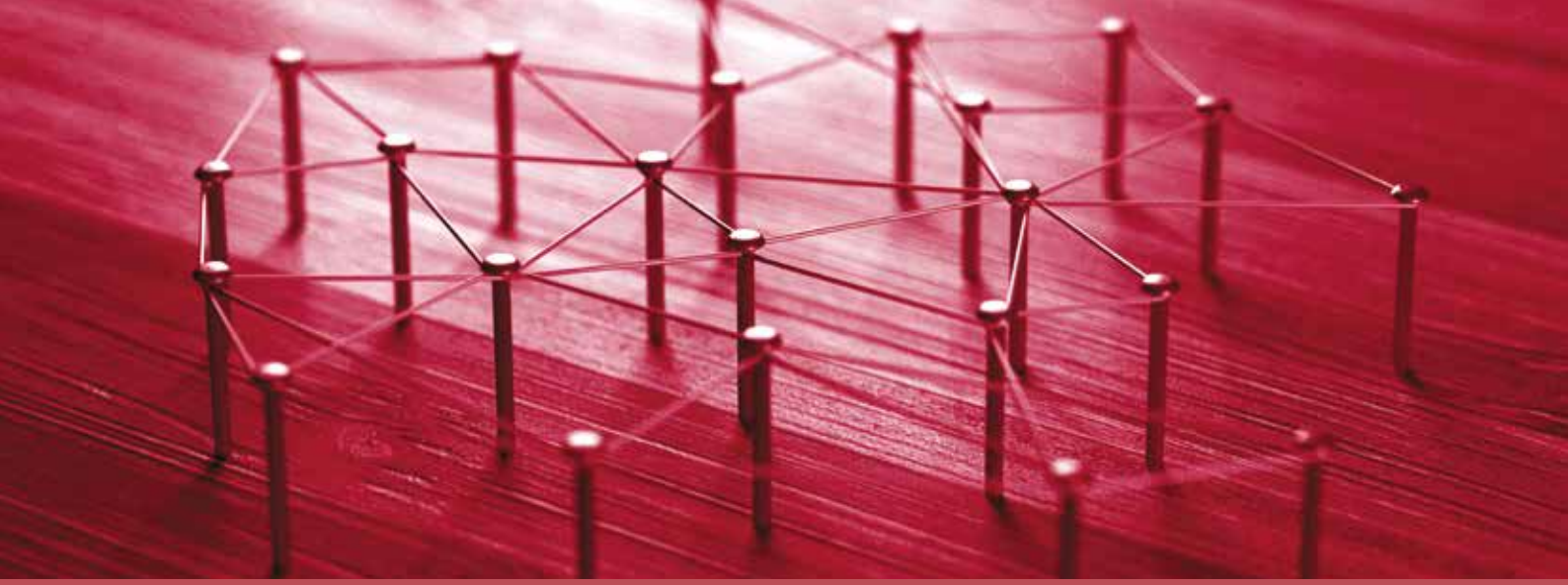

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The International Comparative Legal Guide to:

Merger Control 2019

15th Edition

A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

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

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an 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 laws and regulations in 55 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 editor, Nigel Parr of Ashurst LLP, for his 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.com.

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1 Relevant Authorities and Legislation

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

In the European Union ("**EU**") and the slightly broader European Economic Area (which comprises the Member States of the EU plus Iceland, Liechtenstein and Norway) ("**EEA**"), a one-stop-shop principle applies for concentrations (see question 2.1) that meet certain jurisdictional thresholds (see question 2.4), subject to certain exceptions (see question 2.7).

The European Commission ("**EC**") in Brussels is the "one-stop-shop" to which such concentrations must be notified. The Directorate-General for Competition ("**DG COMP**") is the EC department responsible for vetting the concentrations. The European Commissioners decide as a body to clear or prohibit notified concentrations based on the outcome of DG COMP's review under the "significant impediment to effective competition" test (see question 4.1). For concentrations cleared at the end of a phase I review (see question 3.6), however, the body of Commissioners have delegated the power to adopt the clearance decision to the Commissioner responsible for competition policy. Margrethe Vestager (Denmark) took over from Joaquín Almunia (Spain) as Competition Commissioner in November 2014 for a term of five years ending in late 2019.

Concentrations not caught by the EU jurisdictional thresholds may be reviewable by the national competition authorities ("**NCAs**") of EU/EEA countries under their respective national merger control rules. Mechanisms are in place allowing for referrals of concentrations between the EC and the NCAs (see question 2.7).

1.2 What is the merger legislation?

The Merger Regulation, Council Regulation (EC) No 139/2004 of 20 January 2004 (the "**MR**"), contains the rules for notification and assessment of concentrations, including the transactions covered, the jurisdictional thresholds, the notification requirement, the obligation to suspend implementation pending clearance, the substantive assessment standard and the fundamental procedures and administrative sanctions.

Commission Regulation (EC) No 802/2004 of 21 April 2004 (as last amended by Regulation (EU) No 1269/2013) (the "**Implementing Regulation**") addresses procedural matters relating to notifications (including forms), time limits, the right to be heard, file access, treatment of confidential information, and submission of commitments.

Five sets of EC guidelines address substantive assessment issues on: the Relevant Market (1997); Horizontal Mergers (2004); Acceptable Remedies (2004); Restrictions Directly Related and Necessary to Concentrations (2005); and Non-Horizontal Mergers (2008).

The EC has also issued procedural guidelines, including the important Consolidated Jurisdictional Notice ("**CJN**") (2008) addressing issues relating to the concept of concentration and the jurisdictional thresholds. Other EC procedural notices cover: Case Referral between the EC and NCAs (2005); Access to the File (2005); the Hearing Officer (2011); and a Simplified Procedure for concentrations not raising competition concerns (2013).

To accompany the foregoing, the EC has also published "best practice" guidelines on: the Conduct of Merger Control Proceedings (2004); Submission of Economic Evidence (2011); Divestment Commitments (2013); Disclosure of Information in Data Rooms (2015); and Preparation of Public Versions of Decisions (2015).

See the DG COMP website for the texts of all of the foregoing documents: (http://ec.europa.eu/competition/mergers/legislation/legislation.html).

1.3 Is there any other relevant legislation for foreign mergers?

Yes. The EEA Agreement between the EU, its Member States and three of the countries belonging to the European Free Trade Association – Iceland, Liechtenstein and Norway (the "**EFTA States**") extends the one-stop-shop principle so that transactions caught by the EU jurisdictional thresholds are not reviewable by the EFTA States, even if all of the parties to the transaction are from the EFTA States (see question 6.1). (See also the discussion of the cooperation agreements with the U.S. and Canada in question 6.1.)

It is also worth noting that the EC put forward a proposal in September 2017 for a Regulation of the European Parliament and the Council to establish a framework for the Member States and in some cases the EC to screen and under certain conditions oppose foreign direct investments in EU companies and sectors considered to be strategically important. Adoption of the Regulation is expected in late 2018 or in 2019.

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

No, but see question 1.4 above and question 3.2 below.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Transactions are caught when they constitute a "concentration" [MR Art. 3(1)]. A transaction constitutes a concentration when it results in a change in the control of an undertaking on a lasting basis.

In the context of competition law, the concept of an "undertaking" encompasses, according to the case-law, every entity under common control engaged in an economic activity, irrespective of its legal status and the way in which it is financed (Case C-41/90 *Höfner and Elser* [1991] ECR I 2010, para. 21).

The "change" of control on a lasting basis may result from the merger of two or more independent undertakings; it may also result from the acquisition of direct or indirect control of an undertaking by one or more persons already controlling another undertaking or by one or more other undertakings. Both share and asset acquisitions are caught. The creation of a new joint venture that will be jointly controlled by two or more undertakings and will perform on a lasting basis all the functions of an autonomous economic entity is also deemed to constitute a concentration (see question 2.3).

"Control" is defined as the possibility of exercising decisive influence [MR Art. 3(2)]. The CJN (11–90) explains the EC's interpretation of the concept of control in detail. Control results from ownership or the right to use all or part of an undertaking's assets. It also results from rights, contracts or any other means conferring decisive influence on the composition, voting or decisions of the organs of an undertaking. Control can be exercised on a *de jure* or *de facto* basis. Veto rights over the appointment of senior management or the determination of the budget typically confer the power to exercise decisive influence on the undertaking concerned. Veto rights over a business plan will normally also do so if the business plan sets out details on the company's aims and measures for achieving those aims. Veto rights over the company's investment policy are also considered to confer control if investments constitute an essential feature of the market in which the company is active. In contrast, veto rights relating to decisions on the essence of the company (changes in the statutes or the capital, liquidation, etc.) are considered normal protection of minority shareholders' rights and do not confer decisive influence.

For conceptual purposes, a distinction is made between "sole" control, in which one undertaking exercises decisive influence over another undertaking, and "joint" control in which two or more undertakings exercise such influence jointly. Many different types of control situations are possible. A classic example of "joint" control is where two shareholders each own 50% of the shares and voting rights of a company. The owner of the majority of a company's shares and voting rights will normally have the power to exercise decisive influence over that company. If none of the minority shareholders has veto rights relating to the company's business policy (see above), the majority shareholder will normally exercise "sole" control. In contrast, if one or more minority shareholders have such veto rights, those minority shareholders and the majority shareholder will exercise "joint" control over the company. Similarly, if there is no majority shareholder but a minority shareholder has such veto rights, that minority shareholder will normally exercise what can be called *negative* "sole" control over the company. If there is no majority shareholder and two or more minority shareholders have such veto rights, they will exercise "joint" control. A minority shareholder may also exercise *de facto* sole control if it is the largest shareholder and is highly likely to achieve a majority at the shareholders' meeting. The failure of an acquirer of a leading and substantial minority shareholding to realise that it had acquired *de facto* sole control has led to EC fines (see question 3.3).

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

The acquisition of a minority shareholding in a company can amount to a "concentration" if the minority shareholder thereby acquires control of the company (see question 2.1).

In contrast, the acquisition of a minority shareholding not conferring control on the acquirer is not a concentration caught by the MR.

2.3 Are joint ventures subject to merger control?

The creation of a new jointly controlled joint venture ("**JV**") is deemed to constitute a concentration but only if the JV will perform on a lasting basis all the functions of an autonomous economic entity [MR Art. 3.4]. That is the case whether the new JV is established as a so-called "greenfield operation" or whether the parties contribute existing assets to it.

Moreover, the EU Court of Justice held (Case C-248/16) in 2017 that a change in the control of an existing undertaking from sole to joint results in the creation of a JV and will constitute a concentration under the MR only if the JV will perform on a lasting basis all the functions of an autonomous economic entity. Prior to that ruling, the Commission had considered (CJN 91) that such a change resulted in a concentration even if the existing undertaking did not have a full-function character after the transaction.

A JV has a full-function character when it will operate on a market on a lasting basis and perform functions that are normally performed by other undertakings operating on that market. It is not full-function if it will only take over from its parents one or more specific functions without having its own market presence or market access. Sales to the parents accounting for more than half of the JV's turnover may undermine the JV's full-function character unless the parties can demonstrate that the JV will be free to sell its goods or services to third-party customers and will deal with its parents at arm's length.

The CJN (91-109) explains these requirements in detail.

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

Concentrations must be notified to the EC for clearance prior to implementation if they have a so-called "**Community dimension**" [MR Art. 1(2)].

A concentration has a Community dimension where (i) the combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR 5,000 million, and (ii) the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR 250 million.

A concentration that does not meet the foregoing primary thresholds will nevertheless have a Community dimension where: (i) the combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR 2,500 million; (ii) in each of at least three EU Member States the combined aggregate turnover of all of the undertakings concerned exceeds EUR 100 million; (iii) in each of at least three of those same EU Member States the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR

25 million; and (iv) the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR 100 million.

Even if the above primary or secondary thresholds are met, however, the concentration will not have a Community dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU Member State (the "**two-thirds rule**").

In applying the thresholds, the "**undertakings concerned**" are the merging parties in the case of a merger, the acquirer(s) of control and the target in the case of a share or asset acquisition, and the jointly controlling companies in the case of the creation of a new full-function JV. In the case of such a new JV, if a parent undertaking will transfer a business to the JV, the business to be transferred is considered part of that parent undertaking for the purposes of the thresholds. In all cases the "undertaking" includes not just the entity that is a direct party to or subject of the agreement or bid but also all other entities in a relationship of common control with that entity (e.g. the target entity and all of its controlled subsidiaries).

The CJN (124–194) explains the concept of undertaking concerned, the notion of turnover (net sales revenue), what the relevant turnover is (external sales net of rebates and taxes directly related to turnover) and how to determine it (most recent audited financial accounts with adjustments for subsequent acquisitions and divestitures). The CJN (195–220) also describes the methods for allocating turnover geographically (normally to the country where the customer is located) and explains the special rules for determining the turnover of financial and insurance undertakings.

Finally, there are two mechanisms that can result in the EC obtaining jurisdiction over transactions that fall below the Community dimension thresholds and, in addition, two mechanisms that allow the EC to transfer jurisdiction over all or parts of a transaction that has a Community dimension but threatens to affect competition in a distinct market located within an EU Member State (see question 2.7).

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

Yes. All concentrations (see question 2.1) with a Community dimension (see question 2.4) must be notified whether or not there is a substantive overlap between two or more of the undertakings concerned. However, a simplified procedure may apply in the absence of a substantive overlap (see question 3.9).

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

A foreign-to-foreign transaction is caught by the MR's notification and clearance requirements if it is a concentration (see question 2.1) and has a Community dimension (see question 2.4).

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

Under the two-thirds rule (see question 2.4), a concentration meeting the primary or secondary turnover thresholds is deemed not to have a Community dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU Member State.

Where a concentration does not have a Community dimension, it may be reviewable in one or more EU/EEA Member States. All of the EU/EEA Member States except Luxembourg and Liechtenstein have their own national merger control laws that may apply. Each such national law has its own distinct set of jurisdictional thresholds.

There are two mechanisms that can result in the EC obtaining jurisdiction over transactions that fall below the Community dimension thresholds even if they are reviewable under national merger control laws.

First, the parties to a concentration that does not have a Community dimension under the primary or secondary turnover thresholds (see question 2.4) may request the EC to examine their transaction if it is capable of being reviewed under the national competition laws of at least three EU Member States [MR Art. 4(5)]. The request must be made using the Form RS attached as Annex III to the Implementing Regulation (see question 1.2). If none of the EU Member States competent to examine the concentration expresses disagreement, the concentration is deemed to have a Community dimension. It must then be notified to the EC, and no EU Member State may apply its national competition law to the transaction. In contrast, an expression of disagreement by any of the competent Member States renders the mechanism inapplicable.

Second, one or more EU Member States may ask the EC to examine a concentration that does not meet the Community dimension thresholds if the transaction affects trade between EU Member States and threatens competition within the requesting country [MR Art. 22]. Other EU/EEA countries may join such a request. If the EC accepts to intervene, the scope of its jurisdiction is limited to the requesting country (or countries). This has led in some cases to parallel investigations of the same transaction, i.e. by the EC for the requesting country and by NCAs in other EU Member States.

There are two further mechanisms that allow the EC to transfer jurisdiction over all or parts of a transaction that has a Community dimension but threatens to affect competition in a distinct market located within an EU Member State. Before notifying such a transaction to the EC, the parties may request for it to be examined by the NCA of that EU Member State [MR Art. 4(4)]. Moreover, whether or not the parties make such a request, the NCA of that country may do so [MR Art. 9].

The EC's Notice on Case Referral (2005) reviews the legal criteria that have to be fulfilled for each of the above four referral mechanisms to apply and sets out the factors that have to be taken into account when referral decisions are made.

Finally, as an exception to the one-stop-shop principle, EU Member States may take appropriate measures to protect legitimate interests other than those the MR takes into consideration, provided those interests are compatible with EU law [MR Art. 21(4)]. These provisions allow EU Member States to impose restrictions on and possibly prohibit a notified concentration cleared by the EC. Public security, plurality of the media and prudential rules are expressly recognised as constituting legitimate interests compatible with EU law. A Member State wishing to take any other public interest into consideration in reviewing concentrations must first notify that interest to the EC for assessment of compatibility with EU law.

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?

Where the same buyer and seller undertakings engage in two or more transactions with each other within a two-year period, all of those transactions are treated as a single concentration arising on the date of the last transaction.

Two or more transactions also constitute a single concentration if (i) they are interdependent because they are conditioned on each other in the sense that one would not have been carried out without the other, and (ii) control is ultimately acquired by the same undertaking(s).

A single concentration also arises where the same undertaking acquires control of another undertaking through a series of transactions in securities that take place within a reasonably short period of time.

The CJN (36–50) explains in detail the circumstances in which these rules can come into play.

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?

Notification is compulsory. There is no filing deadline, though, subject to very limited exceptions (see question 3.7), a concentration meeting the thresholds must be notified before implementation and may not be implemented prior to clearance [MR Arts 4(1) and 7(1)].

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

Application of the MR is without prejudice to Article 346 of the Treaty on the Functioning of the European Union ("**TFEU**"), which permits EU Member States to take measures they consider necessary to protect essential security interests connected with the production of or trade in arms, munitions and war material. A similar provision applies with respect to the EFTA States under the EEA Agreement (see question 1.3). In a number of cases, EU Member States have instructed parties to concentrations meeting the jurisdictional thresholds not to notify the parts of those transactions relating to the defence sector.

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

The EC is empowered to impose fines not exceeding 10% of the aggregate worldwide turnover of each of the undertakings concerned where they intentionally or negligently fail to notify a concentration [MR Art. 14(2)].

The risk of the EC imposing a fine if it establishes failure to notify is high, but so far the EC has needed to do so only rarely. The most recent instances date from 2009 and 2014 when acquirers of substantial minority shareholdings conferring *de facto* sole control (see question 2.1) failed to notify and implemented their respective acquisitions without obtaining clearance (Cases M.4994, 2009 and M.7184, 2014). Although the EC cleared the two transactions after their belated notifications, it imposed fines of EUR 20 million, respectively, on the acquirers.

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

In principle, no. The legal obligation not to implement a concentration with a Community dimension prior to clearance is discussed below (see question 3.7). This "standstill" obligation applies to the whole of the concentration, including parts outside the EEA. In principle, completion of any part of a concentration with a Community dimension anywhere in the world prior to obtaining EC clearance is a violation of this "standstill" requirement. However, the EC may, exceptionally in an appropriate case, grant a derogation from this requirement (see question 3.7). It has allowed completion of non-EEA parts pending MR clearance in at least one case (Case M.4151, 2006) but has refused in at least one other (e.g. Case M.5969, 2011).

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

The notification can be filed before an agreement is concluded if the parties can demonstrate to the EC both their intention to enter into an agreement and a concrete plan to do so, for example, based on an agreement in principle, a memorandum of understanding or a letter of intent. In the case of a public bid, the earliest point would normally be immediately after announcement of the intention to launch the bid.

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?

The timeframe for scrutiny essentially depends on whether the notified concentration can be cleared during the initial – "phase I" – investigation (25 working days), or needs to go through the detailed – "phase II" – investigation (additional 90 working days). At both stages, the review period can be extended and/or suspended, depending on the circumstances (see below). In addition to the review periods, the timeframe must take account of the pre-notification phase. The EC's Best Practices on the Conduct of Merger Control Proceedings (2004) provides guidance for interested parties on the main stages and the day-to-day conduct of the regulatory process.

Pre-notification Period: The period before the notification is formally filed is an important part of the overall timeframe for scrutiny (but less so for transactions qualifying for the simplified procedure, see below and question 3.9). The notifying parties start the pre-notification period by filing a case team allocation request. Following DG COMP's identification of the case team and assignment of a case number, the next step is generally an informal contact with the case team to discuss timing. Pre-notification discussions with the case team are generally started with submission of a detailed draft of the Form CO (see question 3.8) for their review. The case team's review normally requires five working days, after which representatives of the notifying parties generally meet with the case team either in person or by telephone to obtain the case team's comments and discuss timing. After that meeting, the case team may send requests for additional information to the notifying parties, the responses to which will need to be incorporated into a new draft of the Form CO. The responses to the initial requests for information may lead to further case team requests for additional information. In some cases, it may be necessary to submit multiple Form CO drafts for the case team's review. DG COMP recommends that the notifying parties (see question 3.10) submit, as early as possible in the pre-notification period, internal documents – such as board presentations, surveys, analyses, reports and studies – discussing the planned transaction, its economic rationale, its competitive significance and its market context. It is also a growing practice for case teams to request and carry out a site visit of relevant facilities in the pre-notification period, to facilitate the team's understanding of the production processes and businesses involved.

Before the notifying parties formally file the final Form CO, it is important to ensure that the form reflects all of the information the DG COMP case team considers necessary for its investigation. If the notifying parties do not do so, the case team may – and has done in practice – reject the formal filing as being incomplete. Partly for that reason, this pre-notification period can take many months in complex cases. The *Halliburton/Baker Hughes* transaction (Case M.7477), in which the pre-notification period lasted around 13 months, provides an extreme example. For concentrations qualifying for the simplified procedure (see question 3.9), the pre-notification period can require only a couple of weeks, but for transactions not qualifying for that procedure, the pre-notification period often takes more than a month even in non-complex cases.

Phase I Investigation: The formal filing of the final Form CO, if accepted as complete, starts the clock running on the case team's "phase I" investigation. The EC has 25 working days, which start to run on the first working day after the formal filing. By the end of that period, the EC has to clear the transaction or open a detailed 90-working-day "phase II" investigation. The case team starts its phase I investigation by sending market test questionnaires to customers, competitors and suppliers. After accepting the filing as complete, DG COMP publishes an information page on its website with the names of the parties, the case number, the date of the notification and the provisional phase I end date, and updates this information page with other key dates as the review progresses. Several days after the filing, the EC publishes a notice in the EU Official Journal inviting third parties to submit their observations within a specified period following the date of the publication.

If the case team's review does not raise serious doubts as to the compatibility of the concentration with the internal market (i.e., risk that the transaction would significantly impede effective competition in the EU's internal market, see question 4.1), the EC will adopt a clearance decision on or before the review period's 25th working day. Since the 1990 inception of EU merger control, the EC has cleared about 90% of all notified concentrations unconditionally in phase I. Since the introduction of the simplified procedure (see question 3.9) in 2000, clearances by that procedure account for about 60% of all unconditional phase I clearances.

In contrast, if the review raises serious doubts, the case team will hold a "state of play" meeting with the notifying parties on or around the 15th working day of phase I. The notifying parties then have the option of submitting remedies removing those serious doubts (see question 5.2). To avoid the opening of a phase II investigation, they must submit the remedies before the expiry of the 20th working day. If they do not submit timely remedies and if the case team's continuing investigation does not remove the serious doubts, the EC will open a phase II investigation.

If the notifying parties submit timely remedies, the phase I period is automatically extended by 10 working days. During that period, the case team will assess the remedies and market-test them with customers and competitors. On or before the 35th working day, the EC will adopt a conditional clearance decision if it finds that the remedies remove the serious concerns or will open a phase II investigation if it concludes that they do not. Concentrations cleared conditionally at the end of phase I and concentrations moving to phase II account, respectively, for around 4% of all notified concentrations.

Phase II Investigation: If the EC opens a phase II investigation, the clock on the 90-working-day investigation period starts to run from the end of the phase I period. Voluntary extensions of the 90-working-day period are possible. The notifying parties can ask the EC to extend if they make the request before expiry of the 15th working day of the period. The EC can extend this period at any time with the notifying parties' agreement. However, the aggregate duration of these extensions may not exceed 20 working days in total. The EC can also suspend the period's running if the investigation is impeded due to circumstances for which one of the undertakings involved in the concentration is responsible.

The EC opens phase II by adopting a confidential decision describing in detail the reasons for its serious concerns. The case team normally then holds a "state of play" meeting with the notifying parties within two weeks of the decision. Before that meeting, the notifying parties normally submit written comments on the decision for discussion with the case team. The case team conducts its detailed investigation through further requests for information to the notifying parties and contacts with interested third parties.

If the further investigation reveals that the transaction will not significantly impede effective competition (see question 4.1), the EC will adopt a decision clearing the transaction. In contrast, if the investigation confirms that the transaction will significantly impede effective competition, the EC will start work on a so-called "statement of objections" ("**SO**") setting out its findings and conclusions in detail. Before it issues the SO, however, DG COMP will hold another "state of play" meeting with the notifying parties. At or shortly after that meeting, the notifying parties may be able to avoid issuance of the SO if they signal a willingness to submit remedies and proceed forthwith to do so. If the notifying parties do not do so, the EC will issue the SO, which is confidential, to its addressees. It issues an SO in about 40% of phase II cases, and usually does so no later than seven or eight weeks into phase II. The notifying parties then have an opportunity to reply in writing to the SO and can also request an oral hearing.

The notifying parties can submit remedies to remove competitive concerns at any time before expiry of the 65th working day of the phase II review period. If they submit remedies on or after the 55th working day, the period is automatically extended by 15 additional working days. By or before the end of the period, the EC will adopt a conditional clearance decision if it finds that the offered remedies remove the competitive concerns or a prohibition decision if it finds that they do not (or if the notifying parties do not submit remedies). Around 30% of phase II cases end in unconditional clearance, 60% in conditional clearance and the rest (so far 27 cases) in prohibition.

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, completion before clearance is prohibited [MR Art. 7(1)]. In May 2018, the EU Court of Justice held (Case C-633/16) that a transaction is implemented in violation of this "standstill" requirement only by actions contributing in whole or in part to the change in the control of the target undertaking.

An exception to the "standstill" requirement applies to the implementation of a public bid or of a series of transactions in securities, provided the concentration is notified without delay and the acquirer does not exercise the voting rights attached to the securities. The EC considers that the exception for a series of acquisitions in securities does not apply where an undertaking first acquires a substantial minority shareholding conferring *de facto* sole control (see question 2.1) over a company with the intention of later acquiring a majority stake through a public bid.

The EC may also grant a derogation from the standstill requirement upon a reasoned request demonstrating exceptional circumstances [MR Art. 7(3)]. Although the bar is set relatively high, the EC has granted derogations in about 25 cases over the last 10 years, including three in 2017.

The risks in completing without authorisation before obtaining clearance are the possible invalidity of the transaction and the likely imposition of significant fines. The validity of the transaction depends on whether or not the transaction complies with the MR's substantive test (see question 4.1). In contrast, the risk of a significant fine is not contingent on that factor. The EC is empowered to impose fines not exceeding 10% of the aggregate worldwide turnover of each of the undertakings concerned where they intentionally or negligently implement a concentration without authorisation before it is cleared [MR Art. 14(2)]. The EC imposed its first fine ever for unlawful "gun-jumping" in April 2018 (Case M.7993) – a fine of EUR 62.25 million on a buyer for including in the share purchase agreement with the seller certain provisions aimed at preserving the value of the target in the period before completion of the transaction. The EC recognised in its decision that it is both common and appropriate to include clauses aimed at protecting the value of the target prior to completion, provided the clauses are strictly limited to that which is necessary to ensure the maintenance of the target's value. It found, however, that clauses exceeded that threshold of necessity and violated the standstill requirement where they allowed the buyer to exercise decisive influence through the power to approve the target's appointment of senior management, its pricing policy and commercial terms and conditions with customers, and its ability to enter, terminate or modify a wide range of contracts.

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

Yes. Notifications must be submitted in the manner prescribed by Form CO, which is attached as Annex I to the Implementing Regulation. A Short Form CO, attached as Annex II to the Implementing Regulation, may be used for certain transactions (see question 3.9).

An EC communication published in the EU Official Journal (most recently in OJ 2014 C 270/9-10) specifies the number of paper and electronic copies to be submitted along with the signed original, and also sets out the rules for formatting electronic submissions.

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?

Simplified Procedure: The EC's Notice on a Simplified Procedure (2013) sets out a simplified procedure for the review of concentrations that do not raise competition concerns. This procedure applies to the acquisition by two or more undertakings of joint control of an undertaking that has negligible actual or foreseen activities in the EEA, such as where the joint venture (plus any assets contributed to it by the acquirers) has turnover and total asset values, respectively, of less than EUR 100 million in the EEA at the time of notification.

The procedure also applies to concentrations where the undertakings concerned are not engaged in business activities in the same product and geographic market (no horizontal relationship) or in product markets upstream or downstream of each other (no vertical relationship). Even if there is such a relationship, moreover, the EC also applies the simplified procedure if:

- the combined market share of all the undertakings concerned that are in a horizontal relationship is less than 20%; and
- the individual or combined market shares of all the undertakings concerned that are in a vertical relationship are less than 30%.

A Short Form CO (attached as Annex II to the Implementing Regulation) may be used in notifying the above types of concentrations.

The EC may also apply the simplified procedure if the combined market share of all the undertakings concerned that are in a horizontal relationship is less than 50% and the increment in the Herfindahl-Hirschman Index ("**HHI**") resulting from the concentration is below 150. In these latter cases, however, the EC will decide on a case-by-case basis whether it will accept a Short Form CO.

For the purposes of determining qualification for the simplified procedure in the case of a concentration involving the acquisition of joint control, relationships between the acquirers of joint control outside the field of the joint venture are not considered horizontal or vertical relationships.

According to the Notice (22–27), and in contrast with the normal procedure (see question 3.6), pre-notification contacts should be initiated at least two weeks before the expected date of notification, and it may be possible to dispense with submission of a draft notification. The notice published in the EU Official Journal (see question 3.12) will indicate that the concentration may qualify for a simplified procedure. After verifying that the criteria for a simplified procedure are satisfied, the EC will then normally issue a short-form unconditional clearance decision and will endeavour to do so as soon as practicable after expiry of the 15th working day of phase I.

Informal Ways to Speed Up: For transactions not qualifying for the simplified procedure, preparing a thorough draft of the Form CO and engaging in robust cooperative discussions with the EC case team during the pre-notification period (see question 3.6) may help avoid hiccups and surprises during phase I.

3.10 Who is responsible for making the notification?

Who is responsible for making the notification depends on the concentration's nature:

- for mergers, the merging parties;
- for an acquisition of sole control, the acquirer of control;
- for an acquisition of joint control, the acquirers of joint control; or
- for creation of a full-function JV, the undertakings that will have joint control.

3.11 Are there any fees in relation to merger control?

There are no filing fees.

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

An exception to the "standstill" requirement applies to the implementation of a public bid, provided the concentration is notified without delay and the acquirer does not exercise the voting rights attached to the securities (see question 3.7). The requirement not to exercise the voting rights also applies to the acquisition of a non-controlling minority shareholding as part of the bid. The undertaking launching the bid may request the EC to grant a derogation from the "standstill" requirement allowing it to exercise the voting rights solely for the purpose of maintaining the full value of its investment.

3.13 Will the notification be published?

The fact of the notification will be published. Several days after the formal filing of the final Form CO, the EC publishes a brief

notice in the EU Official Journal. The notice indicates the parties and the nature of the transaction and invites third parties to submit their observations within a specified period following the date of the publication. The notifying party or parties draft the text of the notice (as part of the Form CO). The EC also indicates the date of the notification and the provisional end of the phase I period on an information page for the case on the DG COMP website.

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?

The EC must prohibit – as incompatible with the internal market – concentrations that would significantly impede effective competition in all or a substantial part of the internal market, in particular as a result of the creation or strengthening of a dominant position [MR Art. 2(3)]. The detailed test used to determine whether that is the case depends on whether the concentration is horizontal or vertical. An additional test specifically applies to assess the potential "spill-over" effects of a joint venture.

Horizontal Concentrations: The EC's Guidelines on Horizontal Mergers (2004) explain in detail the various circumstances in which concentrations involving a horizontal relationship between the undertakings concerned may significantly impede effective competition. The theories of harm fall under the broad headings of "non-coordinated" and "coordinated" effects.

Under the guidelines, a horizontal concentration may produce "non-coordinated" anticompetitive effects if the loss of competition between the parties is likely to allow the post-closing undertaking to reduce output and increase prices. That can be the case, for example, if the concentration is likely to create or strengthen a dominant position for the post-closing undertaking in the relevant market. It can also be the case, for example, under certain circumstances if a significant number of customers consider the merging parties to be the closest competitors in a market for differentiated products.

A horizontal concentration can also impede effective competition through non-coordinated effects in an oligopolistic market if the undertakings concerned exert important competitive constraints on each other before the transaction and if the loss of those constraints post-closing is likely to reduce competitive pressure on the remaining competitors, leading to significant price increases.

In certain concentrated markets, moreover, it may make rational business sense for suppliers to engage in coordination by responding to each other's price increases or output decreases by following the leader instead of competing aggressively. In such a market, a horizontal concentration may significantly impede effective competition by producing "coordinated" anticompetitive effects. It may do so by increasing the likelihood that the main players will coordinate to increase prices or by making existing coordination among the main players easier, more stable or more effective.

Non-horizontal Concentrations: The EC's Guidelines on Non-Horizontal Mergers (2008) recognise, and the EC's decisional practice generally confirms, that concentrations that do not involve a horizontal relationship are generally less likely to impede effective competition than horizontal concentrations. The principal focus of the guidelines is on the limited sets of circumstances in which a concentration involving a vertical relationship will significantly harm competition by foreclosing competitors. However, the guidelines also discuss other possible ways in which vertical concentrations, as well as concentrations between undertakings active in closely related markets (e.g. suppliers of complementary products), may impede effective competition.

JV "Spill-Over" Effects: In addition to the significant impediment to competition test, the creation of a full-function JV (see question 2.3) is also subject to an additional substantive test to determine the JV's compatibility with the EU's internal market. The JV's creation will be incompatible with that market if it will give rise to "spill-over" effects on competition between the jointly controlling parent undertakings, resulting in appreciable anticompetitive effects that would not be offset by pro-competitive efficiencies. In principle, spill-over effects could occur if the jointly controlling parent undertakings are active on the same market as the JV or on a market that is closely related to the JV's market. To date, however, the EC has never prohibited a concentration due to such spill-over effects.

4.2 To what extent are efficiency considerations taken into account?

The MR (recital 29) recognises that it is appropriate for the EC to take account of any substantiated and likely efficiencies put forward by the undertakings concerned, and notes the possibility that efficiencies resulting from a concentration may counteract its anticompetitive effects. According to the EC's Guidelines on Horizontal Mergers (77), the EC: "considers any substantiated efficiency claim in the overall assessment of the merger. It may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the [internal] market [...]. This will be the case when the [EC] is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have." The EC has taken efficiency arguments into account in assessing many notified concentrations. To date, however, efficiencies do not appear to have been a decisive factor in the EC's clearance of a concentration.

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

No. The criteria the EC is required to take into account in assessing concentrations under the significant impediment to effective competition substantive test focus on competition issues [MR Art. 2(1)].

As phase II decisions are adopted *in camera* by the full college of European Commissioners, it cannot be excluded that non-competition political considerations could play a role in their deliberations, but allegations of such considerations influencing decisions have arisen only rarely. Since taking office in November 2014, moreover, Competition Commissioner Vestager has stated publicly on several occasions that political factors do not play a role in EC merger control decisions.

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

The scope for the involvement of third parties in the EC's procedure is large (see question 3.6).

The EC is entitled to hear third parties showing a "sufficient interest" in the EC's procedure [MR Art. 18(4)]. As summarised in its Best Practices on the Conduct of Merger Control Proceedings (34), parties considered to have a "sufficient interest" include customers,

suppliers, competitors, members of the management organs of the undertakings concerned, and recognised workers' representatives of those undertakings.

In practice, third parties – and especially customers and competitors – play a crucial role in the EC's assessment of concentrations, and particularly in those that appear likely to raise competition concerns. Shortly after receiving the formal notification, the EC publishes a notice inviting third-party comments (see question 3.13). Almost immediately after receiving the notification (and sometimes already in the pre-notification period if the notifying parties consent) the case team seeks the views of the transaction parties' principal customers, competitors and suppliers, asking them to complete sometimes very detailed (but usually tick-the-box and/or short answer) questionnaires about the relevant markets, the principal players, the market impact of the transaction, and so forth. The case team follows up with some third-party market players by telephone or in person meetings. Such contacts with market players intensify substantially in a phase II investigation.

It is not unusual for customers or competitors with concerns about a concentration to bring their concerns pro-actively to the case team's attention. The case team pays particularly close attention to the views of customers but also listens to competitors, while factoring in their possible interests in complicating a rival's transaction (including the possible aim of picking up part of the target business that may have to be divested as part of a remedy package). If the notifying parties submit remedies to overcome competitive concerns (see question 5.2), moreover, the EC market tests the proposal with a wide range of market players.

If the EC issues an SO to the notifying parties (see question 3.6), it is open to the case team in appropriate cases to provide a non-confidential version of the SO (with business secrets removed) to third parties that have shown a sufficient interest, so they can make their views on the EC's assessment known. However, the EC requires the third parties to accept strict confidentiality obligations and use restrictions.

Third parties may also appeal against an EC clearance or prohibition decision if they can demonstrate that the decision directly and individually concerns them (see question 5.9).

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

See the discussion of the main stages of the regulatory process in question 3.6. During the pre-notification period, the Commission often requests substantial information and documents and is prepared to accept a notification as complete only if the Form CO incorporates all of the information the Commission deems necessary to conduct its phase I investigation. The EC may impose fines not exceeding 1% of the aggregate turnover of the undertaking concerned for supplying incorrect or misleading information in the notification [MR Art. 14(1)]. It has so far imposed fines on this ground in only six cases (Cases M.1543, 1999, M.1608, 1999, M.1610, 1999, M.2624, 2001, M.3255, 2004 and M.8228, 2017). Until 2017, the highest fine imposed was €50,000 (M.1543, 1999). However, the Commission imposed a heavy fine of €55 million in a case (M.8228) in 2017.

In the pre-notification period, as well as in phase I and phase II, the EC may, either by simple request or by decision, require the parties to the concentration and third parties to provide all necessary information [MR Art. 11(1)]. Requests for information ("**RFIs**") in EC merger control procedures are usually by simple request, with the EC normally using a request ordered by decision only rarely where a simple request for important information proves ineffective in eliciting information the EC considers especially important.

Both kinds of RFIs must: state the legal basis and purpose of the request; specify what information is required; fix the time limit within which the information is to be provided; and specify the penalties for intentionally or negligently supplying incorrect or misleading information (a fine of up to 1% of the aggregate turnover of the undertaking concerned). The EC has imposed fines for incorrect or misleading information in RFIs so far in three cases (Cases M.1610, 1999 – €50,000; M.3255, 2004 – €45,000; and M.8228 – €55 million).

An RFI ordered by decision must, in addition: state the penalties for intentionally or negligently supplying incomplete information or for not supplying information within the required time limit (also a fine of up to 1% of aggregate turnover); indicate the EC's power to impose periodic penalty payments to compel supply of missing information (up to 5% of the average daily aggregate turnover of the undertaking concerned); and specify the recipient's right to have the decision reviewed by the EU Court of Justice. To date, the EC has never imposed a fine on a party to a concentration for an incomplete response or failure to respond to an RFI ordered by decision. In 2000, however, the EC fined a third party €50,000 (Case M.1634, 2000) for failing to respond to repeated RFIs, including a final RFI ordered by decision, requesting information the EC deemed important for its assessment of the notified concentration. In that case, the EC also imposed periodic penalty payments on the third party totalling €900,000 to compel compliance with the final RFI.

The EC may also revoke a clearance decision where the decision was based on incorrect information for which one of the undertakings is responsible, or which was obtained by deceit [MR, Art. 6(3)(a)]. This has happened only once (Case M.1397).

The EC also has the power to conduct all necessary inspections of undertakings, including the powers to: enter any premises, land and means of transport; examine the undertaking's books and other records; take or obtain any form of copies or extracts of such books and records; seal premises, books and records for the duration of the inspection; and ask for explanations of facts or documents relating to the subject matter and purpose of the inspection. The inspection may be announced in advance, or it may be a surprise (i.e., a so-called "dawn raid", which is a misnomer as it is carried out in normal business hours). The EC has conducted inspections in a merger control context only rarely.

The inspection may be carried out under a simple authorisation or ordered by decision. Refusal to submit to an inspection ordered by decision can lead to imposition of a fine of up to 1% of aggregate turnover. Whether the inspection is based on a written authorisation or a decision, the undertaking also risks fines of up to that same maximum if it intentionally or negligently produces its required books or other records in incomplete form or if a representative or member of staff gives an incorrect or misleading answer to a question, fails or refuses to provide a complete answer or breaks a seal attached to evidence to protect its integrity for later inspection. The EC has so far not imposed any fines relating to merger control inspections.

The EC may request officials of the NCA in the country concerned to assist in the inspection. Or it may instead request the NCA itself to undertake the inspection, in which case the NCA will exercise its powers in accordance with its national law. Where the NCA takes the lead, the EC may also request that its own personnel assist the NCA.

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

Information obtained by the EC in application of the MR may be used only for the purposes of the relevant request, investigation or

hearing [MR Art. 17(1)]. Moreover, EC and NCA personnel are legally required not to disclose information covered by professional secrecy except as expressly permitted under the MR [Art. 17(2)].

If the EC addresses an SO to the notifying party or parties, the addressee of the SO is entitled to gain access to the EC's file on the case. The right of access does not extend to internal EC documents, nor does it extend to correspondence between the EC and NCAs or other public authorities with which the EC has concluded an agreement governing confidentiality of information they exchange with the EC. The right of access does, however, extend to all other information in the file, except business secrets of other undertakings or other confidential information, unless the EC considers disclosure of that information to the addressee of the SO to be necessary for the purposes of the procedure.

The EC's Notice on Access to the File (2005) provides guidance on what are regarded as business secrets or other confidential information for the foregoing purposes. If the EC considers that disclosure of such information is necessary, its practice is to disclose the information only to external economic and/or legal advisors with appropriate safeguards. It has set out the rules and procedures it applies for this purpose in its Best Practices on the Disclosure of Information in Data Rooms (June 2015).

The EC is required to publish every decision adopted after a phase II investigation in the EU Official Journal, provided it does not disclose business secrets. In addition, it publishes a notice of its adoption of every phase I and phase II decision in the Official Journal. Its established practice since the 1990s has also been to publish on the DG COMP website a non-confidential text (public version) of each phase I and phase II decision. The EC's Guidance on the Preparation of Public Versions of Decisions (May 2015) sets out ground rules for the information that undertakings can claim for redaction as business secrets and confidential information in public versions and describes the procedure for settling confidentiality claims.

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

5.1 How does the regulatory process end?

See the discussion of the main stages in the regulatory process in question 3.6. The regulatory process ends with the EC's adoption of a decision either:

- finding that the concentration falls outside the scope of the MR (phase I);
- clearing the concentration unconditionally (phase I or phase II);
- clearing the concentration conditionally, subject to compliance with commitments relating to remedies (phase I or phase II); or
- prohibiting the concentration (phase II).

In the case of a decision prohibiting a concentration that has already been implemented, the EC may also take interim measures to maintain conditions of effective competition and order the parties to undo the concentration.

The regulatory process may also end without a decision if the parties demonstrate to the EC's satisfaction that they have abandoned the concentration. A DG COMP information note on abandonment of concentrations (2004, available on the DG COMP website) sets out the requirements for this satisfaction to be achieved. In theory, the process can also end if the time periods expire and the EC has taken no decision. In those cases, the concentration is deemed cleared [MR, Art. 10(6)], though in practice the EC takes decisions rather than allow the time to expire.

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

It is possible, and indeed not an uncommon occurrence (see question 3.6), for the notifying parties to propose "remedies" that involve modifying the transaction so as to gain the EC's clearance if it accepts that the modifications entirely eliminate the competition concern.

The EC does not formally "negotiate" the remedies with the notifying parties. It is up to the notifying parties (see question 3.10) to propose remedies and to convince the EC that they can be implemented effectively within a short period of time and will be sufficiently workable and lasting to ensure that the competition concern will not materialise. If the EC is convinced, the remedies are formally submitted in the form of a "commitment" and the clearance decision is subject to conditions and obligations intended to ensure compliance with the commitment.

The EC's Notice on Acceptable Remedies (2008) provides guidance on the basic conditions for acceptable commitments, the appropriateness of different types of remedies, as well as the procedures for the notifying parties' submission and for the EC's acceptance of the remedies. Generally structural remedies involving divestiture of a viable and competitive business are preferred over other types of remedies (e.g. access to infrastructure, networks or key technologies; change of long-term exclusive contracts). Structural remedies are particularly preferred over so-called "behavioural" remedies involving promises by the parties to abstain from certain commercial conduct. According to the Notice (69), the EC will consider behavioural promises only exceptionally in specific circumstances, such as where competition concerns result from conglomerate structures (as opposed to horizontal or vertical relationships).

As regards structural remedies involving a divestiture, the Notice distinguishes three situations. The first, and by far the most common in practice, involves a commitment to sell the divestiture assets or business within a fixed period after the clearance decision. The second, which is used in cases where there may be substantial obstacles to identify a suitable purchaser, is an "up-front buyer" remedy, in which the notifying parties commit not to complete the conditionally cleared concentration before a binding agreement is entered into with a purchaser of the divestiture assets or business approved by the EC. The third, which is the least common in practice, is a so-called "fix-it-first" remedy, where a legally binding agreement with a purchaser of the divestiture business must be entered into before the EC clears the concentration.

The Notice also describes the requirements for the implementation of commitments, including the divestiture process, the procedures for the EC to accept the suitability of the purchaser of the divestiture assets or business and of the sale and purchase agreement, and the obligations on the notifying parties in the interim period pending the completion of the divestiture. The divestiture has to be completed within a fixed time period agreed between the notifying parties and the EC. Pending such completion, the divestiture assets or business will need to be held separate and operated by a hold-separate manager under the supervision of a monitoring trustee. In its practice, the EC divides the divestiture process into two periods: the period for entering into a binding agreement with the divestiture purchaser; and a subsequent period for closing the divestiture transaction. It normally divides the period for entering into a binding agreement into a period in which a suitable purchaser can be sought; and a shorter period thereafter in which a divestiture trustee is mandated to divest the assets or business at no minimum price.

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

The EC accepts remedies that remove competition concerns without regard to whether the transaction involves EU companies or is foreign-to-foreign.

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

See question 3.6 above. The deadline for submitting phase I remedies is before expiry of the 20th working day of the review period. Submission of timely phase I remedies results in automatic extension of the review period from 25 to 35 working days.

The deadline for submitting phase II remedies is before expiry of the 65th working day of the review period. However, the EC has accepted commitments submitted for the first time after the 65th working day in exceptional circumstances. A submission of remedies after the 54th working day results in automatic extension of the review period by an additional 15 working days. (If the EC and the notifying parties agree to extend the phase II review period by up to 20 working days (see question 3.6) before the 54th and 65th working days, those deadlines are also extended.)

The notifying parties may submit remedies at any point before the deadlines (see also the discussion of "fix-it-first" remedies in question 5.2 above).

The notifying parties (see question 3.10) must submit a formal commitment, accompanied by a completed Form RM (attached as Annex IV to the Implementing Regulation, see question 1.2), describing the commitment, explaining its suitability to remove the competition concern, identifying any deviations from the EC's model texts (see question 5.5) and providing detailed information on the divestiture business. The normal practice is to submit a draft of the commitment and completed Form RM to the EC's case team for review and comment. The case team may then come back with questions that will need to be answered before the case team gives the "green light" for submission of the final formal commitment and final Form RM. After receiving the formal commitment, the EC market-tests it with other market players before accepting it.

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 EC has a model text for divestment commitments as well as a model text for the mandates of the monitoring trustee and the divestiture trustee. The EC has issued best practice guidelines on these model texts (available on the DG COMP website). If the submitting parties deviate from the models, they have to explain and justify the deviations in the Form RM (see question 5.4). The EC Notice on Acceptable Remedies (see question 5.2) provides further guidance on the EC's normal approach to the terms and conditions to be applied to the divestment.

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

The answer depends on the nature of the remedy. See question 5.2 above. The most common form of divestment remedy involves a commitment to sell the divestiture business within a fixed period after the clearance decision. If the remedy takes this form, the parties can complete the concentration after clearance but before the remedies have been complied with. In contrast, when the EC requires an "up-front buyer" remedy, the notifying parties commit not to complete the concentration before entering into a binding agreement with a purchaser of the divestiture business approved by the EC.

5.7 How are any negotiated remedies enforced?

Clearance of the concentration is subject to compliance with the remedy commitment. In its Notice on Acceptable Remedies (19–20), the EC distinguishes between conditions and obligations. The requirement to achieve the divestment of the divestiture business within the timeframe in the commitment is a condition, while the implementing steps necessary to achieve that result (e.g. appointment of the divestiture trustee) are generally obligations.

Breach of a "condition" automatically results in the clearance decision no longer standing and may lead the EC to take interim measures to maintain conditions of effective competition. The EC *may* then proceed to open a phase II investigation, without, however, being bound by the time limits of the MR [MR Art. 8(7)(a)]. Where appropriate, the EC may also order the parties to undo the concentration. The EC may also sanction the breach of condition with a fine of up to 10% of the aggregate turnover of the undertaking concerned.

If an "obligation" is breached, revocation of clearance is not automatic but the EC may exercise its discretion to do so. It may also impose a fine (up to 1% of the aggregate turnover) for the breach, as well as periodic penalty payments (up to 5% of the average daily aggregate turnover) to compel compliance with the obligation.

Until now the EC has never taken any of these measures.

5.8 Will a clearance decision cover ancillary restrictions?

Yes. An EC decision clearing a concentration is deemed to cover ancillary restrictions, i.e., restrictions directly related and necessary to the implementation of the concentration [MR Arts 6(1)(b), 8(1) and 8(2)]. The EC's Notice on Restrictions Directly Related and Necessary to Concentrations (2005) provides guidance on the interpretation of the notion of ancillary restraints. A classic example is a seller obligation not to compete with the transferred business. Under the Notice (20), a seller non-compete obligation with a proportionate subject matter and geographic scope can generally qualify as an ancillary restraint for a period of up to two years when the transferred undertaking includes goodwill, and up to three years when it includes both goodwill and know-how.

5.9 Can a decision on merger clearance be appealed?

Yes. EC decisions may be appealed in the first instance to the EU's General Court [under Art. 263 TFEU]. The appeal can be lodged by addressee(s) of the EC decision. Third parties (potentially, e.g., the target in a hostile public offer, competitors, customers, employee representatives) may also be admissible to lodge an appeal, provided, however, that they are directly and individually concerned by the decision.

The General Court may not substitute its assessment of the concentration for that of the EC and instead must confine its review to whether the EC was competent to adopt the decision, complied with the rules of procedure, adequately stated the reasons for its decision, accurately stated the facts, did not manifestly err in its appraisal and did not misuse its powers. Judgments of the General Court may be appealed to the EU Court of Justice but only on issues of law.

If the General Court (or the Court of Justice on appeal) annuls the decision, the EC must re-examine the concentration in a fresh phase I procedure, in light of the then current market conditions, and where necessary pursuant to a new notification [MR Art. 10(5)].

5.10 What is the time limit for any appeal?

The time limit is two months and 10 days from (i) notification of the decision in the case of the addressees of the decision, or (ii) the day the decision came to their knowledge in the case of third parties.

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

Yes. The EC's power to impose fines or penalties is subject to a limitation period of three years in the case of infringements of provisions concerning notifications, RFIs and inspections (see Council Regulation (EEC) No 2988/74, which governs limitation periods for the imposition of fines or penalties and the enforcement of the decisions imposing the fines or penalties; for the circumstances in which the EC may impose fines or penalties, see questions 3.3, 3.7, 4.5 and 5.7 above). Time begins to run on the day on which the infringement was committed or in the case of continuing or repeated infringements on the day on which the infringement ceases. Any action by the EC or an NCA acting at the EC's request for the purpose of a preliminary investigation or proceedings relating to the infringement (an RFI, a written authorisation or decision ordering an inspection, the commencement of proceedings, issuance of an SO) interrupts the period and starts it running afresh.

The EC's power to enforce decisions imposing fines or penalties is subject to a limitation period of five years that starts to run on the day on which the decision was taken.

6 Miscellaneous

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

Cooperation with the EU NCAs: The EC transmits to the EU NCAs copies of all Form CO notifications as well as copies of the most important documents lodged with or issued by the EC, including remedy commitments. The EC also carries out its merger control procedures in close liaison with the NCAs, which may express their views on those procedures. Mechanisms by which jurisdiction over transactions may be transferred between the EC and EU NCAs are discussed in question 2.7 above. Representatives of the EU NCAs also sit on an advisory committee that the EC must consult before adopting a phase II decision or a decision imposing a fine or penalty.

In 2010, the EC and the EU NCAs established the EU Merger Working Group with the objective of fostering increased consistency, convergence and cooperation among EU merger jurisdictions. In November 2011, the group issued a set of best practices relating to cooperation in transactions reviewable in more than one EU Member State.

Cooperation with the EFTA Surveillance Authority: Under the EEA Agreement between the EU, its Member States and the EFTA States (see question 1.3), concentrations that have a Community dimension are not reviewable by the EFTA States. Protocol 24 of the EEA Agreement provides for the EC to cooperate in its investigation, under certain circumstances, with the EFTA Surveillance Authority, the EC's counterpart in relation to the EFTA States.

Cooperation with the US Authorities: The EC cooperates with the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice pursuant to an agreement dating from the 1990s. The US-EU Merger Working Group set up by the three agencies has issued Best Practices on Cooperation in Merger Investigations (2011) providing an advisory framework for their cooperation. Representatives of the three agencies contact one another on learning of a merger that may require review in both the U.S. and the EU. Where appropriate, the authorities coordinate on timing and exchange evidence, subject to the parties to the concentration providing waivers of confidentiality. The agencies also cooperate on remedies.

Cooperation with the Canadian Authorities: The EU also has an agreement with Canada that provides for merger control cooperation similar to that with the U.S. authorities summarised above.

Multilateral Cooperation: The EC also cooperates with third-country competition authorities on policy issues, in particular through the International Competition Network ("**ICN**").

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

Statistics: DG COMP publishes monthly, in the mergers section of its website, updated statistics indicating the annual numbers of notifications, referrals, phase I decisions, phase II proceedings initiated, phase II decisions, and other decisions. In 2017 and 2018 through July, the EC received 612 notifications. In that period, the EC cleared the vast majority (517) of the notified transactions after a phase I review: 447 unconditionally under the simplified procedure; 45 unconditionally under the normal procedure; and 25 conditionally based on remedies. Of the notified transactions that underwent an in-depth phase II review in the above period, the EC cleared one unconditionally (M.8394), cleared six conditionally based on remedies (M.7932, M.7962, M.8084, M.8306, M.8444 and M.8451) and prohibited two (M.7878 and M.7995). All but one of these phase II cases involved concerns resulting from horizontal market overlaps.

Phase II Prohibitions: The two prohibitions followed after the EC found that proposed remedies did not suffice to remove horizontal concerns. In the first (M.7878), which involved the cement market, the EC found that the proposed remedy of granting access to a storage facility would not redress the transaction's effects of removing competitive pressure from imports into the relevant geographic market in Croatia. In the second (M.7995), which involved complex financial infrastructure markets, the EC found that the proposed merger of two European stock exchanges would have created a *de facto* monopoly in clearing financial transactions involving fixed income instruments in Europe and would also have removed horizontal competition for trading and clearing single stock equity derivatives. The EC rejected the proposed remedy of divesting LSE's France-based clearing house as addressing the second concern but not the first.

Phase II Conditional Clearances: Of the five phase II conditional clearances involving horizontal concerns, one (M.7932) merits special mention, as, in addition to raising concerns in markets for existing and pipeline crop protection products, the transaction also raised issues in so-called "innovation spaces" relating to certain herbicides, insecticides and fungicides. The EC found that the transaction would eliminate innovation competition between two of only a handful of global companies with the R&D capability to innovate in those spaces. The parties addressed the innovation competition concerns by agreeing to divest the global R&D organisation of one of the parties.

The phase II conditional clearance (M.8306) that did not involve horizontal market concerns instead raised concerns about possible conglomerate effects resulting from the fact that the parties manufactured complementary or closely related semiconductor components. That led to concerns that the merged entity would have the ability and the incentive to foreclose competitors through bundling or tying strategies. The acquirer was able to address those concerns through various time-limited behavioural remedies (to license relevant technology on commercially advantageous terms and ensure interoperability of competitors' products; not to assert, except for defensive purposes, certain patents acquired from the target and to license those patents on a worldwide royalty-free basis upon request; and not to acquire certain other target patents).

EU Court Rulings: In the period covered here, the General Court ruled against the EC in two appeals against decisions under the MR. In Case T-194/13, the General Court found that the EC had infringed the rights of defence of an acquirer of a competitor by failing to disclose during the phase II proceedings a revised econometric analysis on which the EC relied in its 2013 decision prohibiting the proposed acquisition (M.6570). In Case T-712/16, the General Court found that the EC had manifestly erred in failing to undertake a careful assessment of a request for waiver of pricing commitments given to obtain the approval of an acquisition of a competitor.

Procedural Violations: Finally, for the EC's recent enforcement record concerning procedural violations, see questions 3.3, 3.7 and 4.5.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The EC issued a White Paper in July 2014 on proposed revisions to the MR to bring acquisitions of certain non-controlling minority shareholdings within its scope, simplify the system for case referrals between the EC and NCAs, strengthen convergence among national merger regimes and streamline MR procedures.

Building on the public consultation on the White Paper, the EC launched a further consultation in October 2016 in the context of its examination of certain procedural and jurisdictional points. In the Commission Staff Working Document accompanying the EC's Report on Competition Policy 2017, the EC observed that replies to the public consultation by public and private stakeholders suggested that the current EU merger control regime generally works well and does not require any fundamental changes. One of the points on which the public consultation focused was the possible introduction of a complementary jurisdictional threshold based on transaction value that would catch some high-value transactions, especially in the digital sector, that currently escape control under the MR because the target has low turnover. According to the Staff Working Document, while certain stakeholders supported the introduction of such complementary thresholds, many other stakeholders thought the current MR referral mechanisms (see question 2.7) sufficed to prevent an enforcement gap. The EC is still evaluating the need for potential changes to the MR but has so far not put forward any concrete proposals.

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

The answers are up to date as of 17 October 2018.

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Steve Spinks has over 35 years of experience advising on EU competition law matters, including merger control, cartels, abuse of dominance and antitrust counselling. He is the author of *EU Competition Law: Tools for Assessing Business Agreements* (*Lexis Nexis* 2015, 2016, 2017).

Highly regarded by clients and peers for his technical legal capabilities, Steve features prominently in the competition and communications rankings of the leading Bar publications such as *Chambers*, *Best Lawyers* in Belgium and *Who's Who Legal*. He is praised for his "detailed understanding of his clients' cases and his consistently up-to-date competition law knowledge, for his creative approach and tenacious representation of his clients' interests and for being especially detail-oriented and strong in technical legal analysis". He is described by clients as "always responsive and absolutely on top of all issues" and "his attention to detail is incredible" (*Who's Who Legal* 2016). He has also been described as having "excellent technical skills, good business knowledge and a strong work ethic. He also provides practical and solution-oriented advice in a timely and responsive manner" (*Chambers Europe* 2017).

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Ken Daly focuses his practice on EU competition and EU regulatory matters across a wide variety of industries and business sectors. He has over 20 years' experience in competition law, including merger control, advising on European Commission investigations in cartel and abuse of dominance cases, advisory work in relation to selling practices and market behaviour, and all aspects of competition litigation.

He features prominently in the competition rankings of the leading bar publications such as *Chambers, Best Lawyers and Who's Who Legal*. Most recently, he has been listed in the 2019 edition of *Best Lawyers* in Belgium. In *Chambers Europe* 2018, clients underlined the fact that Ken "understands the business and is responsive". Sources from *Chambers Europe* 2016 said that Ken is an "outstanding lawyer" and *Who's Who Legal* 2016 noted: "He is doing great work", "I would hire him in a heartbeat". Previously, sources have commented that Ken is "really top-notch – just phenomenal to work with" (*Chambers Europe* 2017), and that he is a "superior analytical thinker" (*Chambers Europe* 2013).

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