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Making Merger Review Work

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I. Introduction

Mergers between companies can have positive effects for society. They can result in better products, more efficient production and stronger competitors. They can increase the competitiveness of an industry, thereby raising the standard of living. This is why the Regulation on the control of concentrations between undertakings (the “Merger Regulation”)² expressly welcomes such reorganisations³ even though it establishes a regime to control them. Such control is necessary to ensure that there is no lasting damage, no significant impediment of effective competition by such reorganisations.⁴ Ultimately, it is indispensable to make markets work fairly.⁵

1 The authors would like to thank *Julia Brockhoff* and *Jose Maria Carpi Badia* for their valuable comments and suggestions. The views in this article are those of the authors and do not necessarily reflect the official position of the European Commission.

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

3 See Merger Regulation, recital 4.

4 See Merger Regulation, recital 5.

5 See speech of *Margrethe Vestager*, Commissioner for Competition, at the GCLC Annual Conference at 25 January 2018, available under https://ec.europa.eu/commission/commis-sioners/2014-2019/vestager/announcements/fairness-and-competition_en.

This basic dichotomy of merger control – being faced with a majority of beneficial or at least not harmful mergers (well above 90 % of all cases notified to the European Commission are cleared unconditionally) at the same time as a number of problematic or even very problematic mergers (the Commission intervenes typically in around 5-8 % of all cases notified) – is at the core of all of the rules of the Merger Regulation and the Implementing Regulation⁶ with its annexes as well as the notices, guidelines and best practices published by the European Commission. From this situation follows a basic principle for merger control procedures: not to stand in the way of mergers that are positive or at least not harmful for competition while at the same time preventing mergers that negatively affect competition from taking place.

It will not come as a surprise that different views are taken as to how best to balance these two elements. Companies tend to argue in favour of less control. For them, regulatory procedures increase administrative burden – even for companies not directly involved in a merger. They are, on the other hand, often very committed to these procedures if they think that a merger between competitors, customers or suppliers might have negative effects on their own position.

Dirk Schroeder has always been a vigilant advocate of not tipping towards the side of too much control in the application of the Merger Regulation. We, at the Directorate-General for Competition, listen very carefully to such warnings – especially if voiced by lawyers as experienced and rational as Dirk Schroeder. But the task of the Commission as the European Union's competition authority is to secure a balance: avoid both over- and under-enforcement.

In our view, the Commission manages generally to strike the right balance in conducting its merger investigations. This holds true in particular when taking into account the overall legal, procedural and institutional framework governing the EU merger control procedure, including the strict scrutiny of all possible outcomes by the European courts⁷ and the tight deadlines within which the Commission not only has to reach a decision but also to support it by sufficiently clear and well-founded arguments and convincing evidence. Even though the Commission might, with hindsight, not always strike the balance exactly in the middle, it is determined to balance all these aspects and to “make merger review work” for everyone involved.

This article will explain the approach taken by the Commission in applying the procedural rules of merger control based on three pairs of recent cases. We will set out the rules and principles applying to EU merger review, show how they are applied in these cases and look ahead at further improvements.

6 Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.04.2004, p. 1.

7 For example by the recent judgements of the General Court in T-194/13, *United Parcel Service, Inc. v European Commission*, 7 March 2017, ECLI:EU:T:2017:144, and T-394/15, *KPN BV v European Commission*, 26 October 2017, ECLI:EU:T:2017:756.

II. Rules and principles applying to EU merger review

1. Brief history of EU merger rules

Merger review in general and European merger review in particular is a rather new area of law. Although not explicitly mentioning mergers, the Commission had the competence to review potential anti-competitive effects of mergers under Articles 85 and 86 of the Treaty Establishing the European Economic Community which entered into force in 1958.⁸

The consequent, next milestone was the enactment of the first framework for European merger review, Regulation No 4064/89, which entered into force on 21 September 1990. This regulation established for the first time a systematic regime of merger control at the European level.

Following the launch of a review of the Merger Regulation in June 2000 which resulted in the Green Paper on the Review of the Council Regulation (EEC) No 4064/89⁹ at the end of 2001¹⁰ and fuelled by the three annulments of merger decisions by the European Court of First Instance in 2002,¹¹ a fundamental reform of many substantive and procedural aspects of EU merger control was introduced in 2003 and 2004. The adoption of the current Merger Regulation in January 2004 introduced the “Significant Impediment to Effective Competition” (SIEC) test which broadened the scope of potential competition concerns and allowed for taking efficiencies into account.¹² As a further reform, in September 2003, the first Chief Competition Economist took office within the Directorate-General for Competition.¹³ He and the Chief Economist

⁸ See *Continental Can v Commission*, Slg 1973, 215 and *Joined Cases 142 and 156/84 British-American Tobacco & Reynolds v Commission*, E.C.R. 4487. Later these articles became Articles 81 and 82 following the renumbering of the EC Treaty pursuant to Article 12 of the Treaty of Amsterdam. Today, they are Article 101 and 102 of the Treaty on the Functioning of the European Union.

⁹ COM(2001) 745.

¹⁰ On the review process, see the speech of *Mario Monti*, European Competition Commissioner, on “Review of the EC Merger Regulation – Roadmap for the reform project” of 4 June 2002, available under http://europa.eu/rapid/press-release_SPEECH-02-252_en.htm?locale=en.

¹¹ Judgement of 6 June 2002, case T-342/99 *Airtours plc v Commission of the European Communities* (2002 II-02585); judgement of 22 October 2002, case T-310/01 *Schneider Electric SA v Commission of the European Communities* (2002 II-04071); judgement of 25 October 2002, case T-5/02 *Tetra Laval BV v Commission of the European Communities* (2002 II-04381). According to *Dirk Schroeder*, these judgements also had a direct impact on the work of the Directorate-General for Competition: “Those who deal with European merger control on a day-to-day basis will readily agree that the quality of the Commission’s practice has greatly improved”. *Dirk Schroeder*, *The Merger Control Patchwork*, in *Legal Issues of Economic Integration* 37, no. 1 (2010), p. 10.

¹² Council Regulation (EC) No 139/ 2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

¹³ See the article “The Office of the Chief Competition Economist at the European Commission” of May 2005 by *Lars-Hendrik Röller*, the first Chief Competition Economist,

Team are a visible commitment of the Directorate-General for Competition to the “more economic approach” in competition law.¹⁴

The Merger Regulation provides for the possibility of the Commission to publish further guidance “which should provide a sound economic framework for the assessment of concentrations”.¹⁵ The first of several of such guidance papers was published shortly after the adoption of the EU Merger Regulation.¹⁶ Following insights gained by an analysis of the likely effectiveness of remedies proposed by companies in 40 cases from 1996 to 2000,¹⁷ the Commission’s notice on remedies had been adopted in October 2008.¹⁸

The most recent, important change in the European merger rules was made with effect as of 2014. In December 2013, the Commission adopted a package to simplify its merger procedures, revising the Notice on simplified procedures and the Implementing Regulation. Due to these changes, more cases fall under the simplified procedure and less information is required to notify a merger.¹⁹

2. Principles of EU merger review

EU merger review is informed by a number of principles: Merger investigations must comply with due process and be efficient, consistent and transparent. A merger posing significant competition concerns requires remedies that fix the problems identified, lest it must be prohibited. Furthermore, enforcement actions have to be firmly rooted in economic theory and legal rules and based on solid evidence and analysis.

These three principles are fundamental to the work of the Directorate-General for Competition as the Commission’s service that prepares the Commission decisions. The first principle guides the investigation of the likely effects of a transaction on competition, the second principle governs the assessment of any remedy proposal and

and *Pierre Buigues*, available under http://ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf.

14 On the then and today still relevant interplay between judicial control and economic analysis, see *Dirk Schroeder*, Normative and institutional limitations to a more economic approach, in *Drexler/Kerber/Podszun*, Competition Policy and the Economic Approach (2011), p. 279.

15 See recital 28 of the EU Merger Regulation.

16 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5.

17 Merger Remedies Study of October 2005, available under <http://bookshop.europa.eu/uri?target=EUB:NOTICE:KD7105376:EN:HTML>.

18 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, available under [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC1022\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC1022(01)).

19 See the Commission’s Press Release dated 5 December 2013, IP/13/1214, available under http://europa.eu/rapid/press-release_IP-13-1214_en.htm, and the accompanying memo, MEMO/13/1098, available under http://europa.eu/rapid/press-release_MEMO-13-1098_en.htm.

the third principle is pivotal for the drafting of a decision in which the results of the investigation and of the remedy assessment are comprehensively and exhaustively presented.

To these three principles, we would like to add a fourth one, following from the dichotomy mentioned before: unproblematic cases are dealt with in a way that imposes as little of a burden on the companies involved as possible, whereas problematic cases are carefully scrutinised with as much effort as necessary to prevent any significant impediment to effective competition.

Although this principle is particularly relevant for the investigative step also addressed with the first principle, it also relates to the assessment of remedies and to the level of detail of a decision.

III. Recent cases showing how the Commission applies these rules and principles in practice

In order to show how the Commission applies these principles in practice, we will first provide a general overview over all merger cases the Commission dealt with in the recent past before turning to a select number of individual case examples.

1. Overview over merger procedures in the recent past

2017 has been the second busiest year in the history of the Merger Network with 380 new notifications, representing an average annual growth of more than 8 % during the last four years.²⁰ Simultaneously, the number of phase I or phase II decisions increased on average by more than 8 % since 2013 as well.

Whereas the number of prohibitions might not have too much of a probative value due to their infrequent nature,²¹ the overall intervention rate²² moved within the typical band of 5 % to 8 % – more towards the lower end in 2017, down from a percentage more towards the higher end in 2016.

A trend that continued in 2017 is the growing proportion of simplified cases. Following the introduction of the simplification package in 2014, an ever more significant number of cases are dealt with under the simplified procedure. Whereas the percentage of simplified cases was only slightly above 60 % in each of 2011, 2012 and 2013, it jumped to almost 70 % in each of 2014, 2015 and 2016. In 2017, simplified cases made up even 74 % of all cases. In other words: three out of four cases were dealt with under

20 See the statistics published on the DG COMP website: <http://ec.europa.eu/competition/mergers/statistics.pdf>.

21 Two in 2017, one in 2016 and none in 2015 or 2014.

22 Comparing the number of remedy decisions, prohibitions and abandonments in phase II over the total number of decisions.

simplified procedures last year whereas before the adoption of the simplification package it had been only three out of five cases.

2. Some recent mergers in three different industries

These figures, however, may only provide a rough first impression of the overall situation of EU merger control. In order to discuss how merger review works in practice, one has to turn to individual cases. This article will therefore look into three pairs of cases within three different industries.

a) Mergers between mobile network operators

The first pair of cases is located in the telecom industry, a sector that produced a steady flow of significant merger cases within the last years. When discussing how the Commission implements the principles of EU merger review in practice, we would like to focus on two of the most recent mergers between mobile network operators (MNOs).

The first case is *M.7612 Hutchison 3G UK/Telefónica UK*,²³ a proposed acquisition of Telefonica's British subsidiary, operating under the brand O2, by the market challenger Hutchison. Hutchison failed to offer suitable remedies fully eliminating the serious competition problems identified and the transaction was eventually prohibited by the Commission on 11 May 2016. Hutchison appealed the Commission's decision and the court case is pending.²⁴

The second case is *M.7758 Hutchison 3G Italy/WIND/JV*.²⁵ In this case, the Commission assessed the creation of a joint venture combining the Italian operations of Vimpelcom and of the market challenger Hutchison. The transaction was cleared by the Commission on 1 September 2016, subject to remedies consisting of a fix-it-first divestment²⁶ including all assets needed to create a new mobile network operator in Italy.

b) Mergers in the agro-chemical industry

The second pair of cases concerns transactions in the agro-chemical industry.

23 Further case-related information can be found at the Commission's website under http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7612.

24 *CK Telecoms UK Investments v Commission*, T-399/16.

25 Further case-related information can be found at the Commission's website under http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7758.

26 In the terminology of the Commission Notice on remedies, a "fix-it-first" remedy is a remedy for which the respective parties already entered into legally binding agreements during the Commission procedure, see Remedy Notice, paragraph 56. As stated in the Remedy Notice, a fix-it-first remedy can be of particular importance if the identity of the purchaser is crucial for the effectiveness of the remedy.

The Directorate-General for Competition recently reviewed under case number M.7932 the merger between the two companies *Dow* and *DuPont*.²⁷ The main concerns arising in this merger related to product and innovation competition in crop protection. Innovation is of key importance to this industry characterized by particularly significant entry barriers and the merging parties were two of only five global players active at all stages of the product lifecycle. The Commission's main remedy elements comprised a divestment of significant parts of DuPont's pesticide business, including its R&D organisation. They were designed to address concerns on product and innovation competition and to enable the creation of another global R&D integrated company.

The second case in this sector is M.7962 *Chemchina/Syngenta*.²⁸ In this case, the Directorate-General for Competition found a lack of remaining alternatives and close competition between Chemchina's wholly-owned subsidiary Adama and Syngenta. Because of this, the Commission raised competition concerns in more than one hundred markets in which the activities of the parties overlapped. However, the remedies proposed by the parties eliminated all concerns identified with the divestment of significant parts of Adama's pesticide business, including a number of Adama's generic pesticides under development, and of Adama's plant growth regulator business for cereals as well as of some of Syngenta's pesticide business.

c) Mergers in the cement industry

The final pair of cases is situated in the building materials industry.

In M.7054 *Cemex/Holcim Assets*,²⁹ the Commission cleared the acquisition of the Spanish operations of Holcim by its Mexican rival Cemex, both global suppliers of cement and other building materials. After opening an in-depth investigation, the Commission concluded that the acquisition would not raise competition concerns since the merged entity will continue to face sufficient competition from its rivals.

In the case M.7252 *Holcim/Lafarge*,³⁰ the Commission cleared after a phase I investigation the creation of a global player in the building materials industry. In order to obtain such clearance, the parties offered to divest a thereto unprecedented size of assets. The commitments include a divestment of all the business activities of Lafarge in Germany and Romania as well as all Lafarge's business activities in the UK carried out through a joint venture and a divestment of all business activities of Holcim in

27 Further case-related information can be found at the Commission's website under http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7932.

28 Further case-related information can be found at the Commission's website under http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7962.

29 Further case-related information can be found at the Commission's website under http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7054.

30 Further case-related information can be found at the Commission's website under http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7252.

Slovakia and the Czech Republic as well as most of Holcim's business activities in France and certain assets in Spain.

3. Pre-notification

In practice, the first stage of merger procedures is the pre-notification stage. Although still at an informal stage, it is an important part of the overall process. Details of pre-notification contacts are not regulated by rules of the EU Merger Regulation or the Implementing Regulation. Such contacts are mentioned though in recital 11 of the Implementing Regulation. Further guidance on how to make efficient use of such contacts can be found in the Commission's Best Practices on the conduct of EC merger control proceedings.³¹

Pre-notification contacts allow the Commission and the parties to discuss the proposed concentration in confidence, in particular questions concerning the jurisdiction of the Commission, but also the relevance of certain information for the completeness of the notification. While parties are not required to have any pre-notification contacts, a well-used pre-notification period generally allows for a much smoother merger review process following the notification and reduces the risks of unwelcome surprises and their potential grave consequences during or even after the merger procedure.

One of the most important purposes of pre-notification contacts is for the Commission to review a draft notification for completeness. In its Best Practices, the Commission stated that it will normally review a draft Form CO within five working days.³² Equally, the Commission will consider the request to waive the obligation to provide certain information in the Form CO in accordance with Article 4(2) of the Implementing Regulation within five working days.³³

We do not want to delve into complaints that the pre-notification period takes too long. We would only like to underline that, to a significant or in reality decisive extent, it is the parties that have control over such contacts with the Commission. While merging parties and case teams at the Directorate-General for Competition may have different views in individual cases about whether certain information that case teams ask for in pre-notification is absolutely necessary for a complete notification, the Directorate-General for Competition generally commits itself to reviewing and commenting upon all drafts and questions by the parties within five working days in order to keep such contacts as effective as possible.

While such pre-notification contacts take place in strict confidence, we can state that the Commission is committed to using the time as efficiently as possible by pre-loading, particularly in the more complex cases, some of the work for the parties that would otherwise have to be achieved under strict time-pressure within the merger

31 Best Practices on the conduct of EC merger control proceedings, paragraphs 3-25.

32 Best Practices on the conduct of EC merger control proceedings, paragraph 15.

33 See 1.4 of Annex I to the Implementing Regulation.

deadlines. This is particularly true for requests for internal documents in complex merger procedures.³⁴ In case the Commission can already envisage that its review will require such documents beyond the requirements of section 5.4 of the Form CO, the scope and procedure of such requests are often already discussed during pre-notification. In addition to such influence on the request itself, such discussions allow the parties to start gathering the relevant documents even before the formal request is issued.

Another potential issue that parties may want to address already during pre-notification can be remedy proposals. In certain cases, parties have been trying to avoid the opening of an in-depth investigation by addressing all competition concerns already in phase I even in complex cases. However, since the Commission will not yet have conducted its market investigation, meaningful discussions can only take place when the parties are willing to propose clear-cut remedies which eliminate essentially the entire overlap (or close to the entire overlap) between their business activities in affected market. Furthermore, even if such remedies are offered, a final assessment whether such remedies address the competitive concerns can only be made following the phase I investigation.

While we would not disclose the content of pre-notification discussions ourselves, a trend towards discussing remedies already during pre-notification has been observed by some practitioners.³⁵ The parties in *Holcim/Lafarge* mentioned in a press release that they amended the list of proposed assets for divestment in Europe during “constructive pre-notification discussions”³⁶. Despite the considerable size of the assets the parties proposed to divest, the Commission cleared this case following a phase I investigation.

All in all, the Commission is well aware that pre-notification contacts might delay the notification date. However, in our experience, such delays are limited if the time is used efficiently by the parties as case teams typically provide timely feedback on draft submissions received from the parties. In addition, pre-notification contacts regularly allow the Commission to point out missing information that could have led to an incompleteness decision. Finally, in some cases, extensive pre-notification contacts allowed to resolve a case in phase I that otherwise might have required an in-depth assessment per lack of clear-cut remedies to otherwise persisting concerns over the concentration.

³⁴ On this topic more in-depth, see point 4 below.

³⁵ See, for example, *Christopher Cook*, Real review timetables under the EU Merger Regulation, Concurrences No 2-2017, p. 6.

³⁶ See press release by Holcim and Lafarge of 28 October 2014, available under <http://www.lafargeholcim.com/holcim-and-lafarge-formally-notify-proposed-merger-european-commission>.

4. Document requests

An essential element of making merger review work is the efficient handling of requests for internal documents from the merging parties. In complex cases, internal documents have provided significant insights into the rationale of the transaction. While parties have to file certain internal documents already together with the notification,³⁷ these are limited to certain documents “prepared by or for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions ([...]), or the shareholders’ meeting”. In particular in large organisations, these documents can only provide a very high-level overview over some of the issues a case team has to investigate.

a) Legal framework

Pursuant to Article 11 of the EU Merger Regulation, the Commission may request “all necessary information” for carrying out its duties under the regulation.³⁸ Most often, such “Requests for Information” or “RFIs” ask for factual information like sales data, descriptions of certain events or products, further clarifications on information contained in the Form CO or any other issue relevant for the Commission’s assessment of the case. However, the Commission may also ask for the submission of documents.

There is again a wide variety of what the Commission can ask for, ranging from a specific contract or presentation to a more general request for documents meeting certain criteria. This article will refer to the latter when speaking about requests for internal documents.

b) Importance and practice of internal documents

Internal documents can serve several purposes. First and foremost, if considered in their proper context, they reflect thoughts and views from within the merging parties. As such, they can provide solid evidence for many elements of the Commission’s assessment: Product or geographic scope of the relevant markets, closeness of competition, the parties’ role within the market, the role of other market players (at least in the eyes of the parties), likely evolution of the market, likelihood of new entrants or the incentives of the merged entity to compete following the transaction. They often allow the Commission to verify factual claims made by the parties and verify data they submit.³⁹

37 See point 5(4) of the Form CO, Annex I to the Implementing Regulation.

38 Whether information is necessary has to be assessed “by reference to the view the Commission could reasonable have held, at the time the request in question was made, of the extent of the information necessary to examine the concentration”, judgement of the Court of First Instance of 4 February 2009, T-145/06, Omya AG v Commission of the European Communities, ECLI:EU:T:2009:27, paragraph 30.

39 The Commission is aware that undertakings know of the importance of internal documents as a source of evidence which is likely to be requested by competition authorities during a merger review. In attributing the probative value to specific internal documents, the

In short, information provided in response to a request for internal documents can form – alongside other pieces of evidence available to the Commission such as responses to market investigation and economic analysis – an important element in either proofing a theory of harm or in dismissing it.

However, requests for internal documents increase at the same time the burden on the parties as well as on the case teams. For the parties, looking for documents responsive to requests for documents often requires the help of external data specialists. Filtering responsive documents for legally privileged documents can add to such burden. Providing incorrect or misleading information in response to a request for information can result in a fine of up to 1 % of the aggregate turnover of the company responsible for the response under Article 14(1) EUMR.⁴⁰

For the Commission, the task of reviewing several (hundreds of) thousands of internal documents in addition to all other investigative steps that are to be taken is also significant. Modern software tools help to review more documents within the strict legal deadlines of merger procedures than in the past. Case teams can therefore request and review more documents than several years ago when evaluating potentially anti-competitive mergers.

The Commission makes an assessment in each case whether a request for internal documents is to be issued. Generally, the Commission requests extensive submissions of such documents only in a small minority of cases in which it reasonably expects a very complex assessment to follow. Due to these restrictions, far-reaching requests for internal documents are most often only issued in cases that will require an in-depth investigation.

As to the overall extent of such requests, we would like to note that looking at a recent two year period, the Directorate-General for Competition had less than a dozen cases with a case file of more than 100 000 documents. In only four of these cases, the case file consisted of more than 200 000 documents. The documents included in the case file do not only contain responses to requests for internal documents but also all responses to market investigations, all submissions by the merging parties and third parties including all documents submitted as annexes to the Form CO.

Requests for internal documents typically contain search terms the parties are asked to look for in internal documents. They often define the term “document” as all

Commission takes into account the timing and context in which they were prepared. In particular, internal documents prepared in the ordinary course of business, for example before the proposed merger was agreed upon or without the knowledge of the preliminary competition concerns, may have higher probative value than internal documents prepared for the Commission or influenced by the Commission's review of the proposed merger.

⁴⁰ See, for example, the fine against *Facebook* for information submitted during the merger review of the acquisition of *WhatsApp*. More information is available in the respective press release, available under http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

computer files⁴¹ in possession, custody or control of the addressee of the request for internal documents. The request would specify a period in which to look for documents, countries or products concerned and legal entities to be included in the request. Email searches are limited to certain persons identified either by name or position within the company (the “custodians”).

Due to the time it takes to gather all internal documents responsive to such a request and depending on the stage of the procedure,⁴² the Commission often discusses a draft request with the party concerned before it is sent out and allows for significantly more time to respond to these requests than for most other RFIs. During such discussions, the case teams are also more than willing to discuss the scope and necessity of all or part of the request.⁴³ In addition, as it has happened often, the Commission is ready to consider extending the deadline for a reply should the parties justifiably request such extension.

c) Document requests in practice

In the *Hutchison 3G UK/Telefónica UK* case, the parties submitted more than 300 000 internal documents in response to RFIs by the Commission. Internal documents had been referred to in the prohibition decision in relation to possible market segments,⁴⁴ the competitive constraints exerted by the parties,⁴⁵ the role of other competitors in the market and in particular of small competitors without an own network infrastructure (non-MNOs), in assessing the network consolidation plans of the parties⁴⁶ and conditions on the wholesale market for the supply of call termination services⁴⁷ – to name just a few of the relevant areas. These frequent references in the decision show their relative importance for these issues.

41 Such computer files include, but are not limited to, word processing files, spreadsheets, presentations, PDFs, e-mails and instant messages files, including any attachments thereof, as is explained below.

42 Should the need for a request for internal documents only become apparent at a later point during the merger review process, the Commission might not be able to engage with the parties before sending such request. But even then the case team is open to suggestions the party might have on the scope of the request.

43 A suggestion made by *Wilson*, Document request in complex EU merger cases, ZWeR 2017, p. 151 that is already widely practiced.

44 See for example recital 275 of the Article 8(3) decision in M.7612 Hutchison 3G UK/Telefónica UK about a potential segmentation between SIM-only contracts and handset subscriptions. The decision is available under http://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf.

45 See, for example, recitals 418 to 432 of the Article 8(3) decision in M.7612 Hutchison 3G UK/Telefónica UK.

46 See, for example, recitals 1386 to 1388 of the Article 8(3) decision in M.7612 Hutchison 3G UK/Telefónica UK.

47 See, among others, recitals 1840 to 1844 of the Article 8(3) decision in M.7612 Hutchison 3G UK/Telefónica UK.

In the *Hutchison 3G Italy/Wind/JV* case, internal documents were particularly relevant for the assessment of the rationale of the transaction. Evidence in internal documents indicated that one of the driving rationales of the transaction was the achievement of “market repair”⁴⁸ – most often a euphemism for higher prices due to a reduction of competition. In addition to revealing this as a very aim of the transaction, internal documents also indicated that the remaining competitors had been willing to support the parties in achieving such decrease of competition by envisaging a sale of certain assets to these competitors as a way to re-distribute the value of the decrease in competition.⁴⁹ Absent the requests for internal documents, these facts would likely have not become known to the Commission by any other of its investigative tools.

Other areas in which the Commission referred to internal documents include the competitive constraint exercised by Hutchison before the transaction,⁵⁰ the closeness of competition between the merging parties⁵¹ and the alignment of incentives when assessing horizontal coordinated effects.⁵² According to a count mentioned in a recent article, internal documents are referred to in this decision on almost 300 pages.⁵³

In its *Dow/DuPont* decision, the Commission underlined that internal documents have played a key role in its assessment and have been useful for assessing the impact of the transaction in practically all of the relevant markets. Internal documents also played an important role in the conclusion of the Commission that the transaction would significantly reduce the parties’ incentives to innovate. In some of the relevant markets, in which no concerns had been raised, this was due to evidence found in internal documents.⁵⁴

The latter is an important point. The Commission considers internal documents as one out of several sources of evidence in its competitive assessment. Such evidence can influence the Commission both ways: in favour of the parties’ arguments and position or contrary to their claims.

Another case in which internal documents showed that a merger was not likely to reduce competition in certain markets was *Wabtec/Faiveley*. In this case, the Commission was assessing whether the merger between Wabtec and Faiveley would give rise to competition concerns in the market for complete friction brake systems for trains. Within such assessment, the Commission found that Wabtec’s internal documents support Wabtec’s submission “that it is not at present capable of supplying competitive complete electro-pneumatic friction brake systems for non-freight trains

48 See recitals 243 to 356 of the Article 8(2) decision in M.7758 Hutchison 3G Italy/Wind/JV. The decision is available under http://ec.europa.eu/competition/mergers/cases/decisions/m7758_2937_3.pdf.

49 See the conclusion in recital 356 of the Article 8(2) decision in M.7758 Hutchison 3G Italy/Wind/JV.

50 See recitals 463 to 529 of the Article 8(2) decision in M.7758 Hutchison 3G Italy/Wind/JV.

51 See recitals 793 to 795 of the Article 8(2) decision in M.7758 Hutchison 3G Italy/Wind/JV.

52 See recitals 999 to 1001 of the Article 8(2) decision in M.7758 Hutchison 3G Italy/Wind/JV.

53 *Wilson*, Document requests in complex EU merger cases, ZWeR 2017, p. 147.

54 See recital 49 of the Article 8(2) decision in M.7932 Dow/DuPont.

to be used in Europe”⁵⁵. With regard to a new integrated electro-pneumatic brake control system developed by Wabtec, the decision states that “Wabtec is internally doubtful of [such project] being suitable for or competitive in the European market”⁵⁶. Despite concerns raised by customers of the companies during the market investigation, the Commission therefore concluded that “on balance and in light of the evidence available to it, [...] in this particular case, the evidence available is not sufficient to establish to the requisite standard that Wabtec would already have significant constraining influence on Faiveley and Knorr-Bremse in the supply of complete friction brake systems in the EEA or that there would be a significant likelihood that Wabtec would grow into an effective competitive force following an entry into the market in a relatively short period of time”⁵⁷.

5. Legal Professional Privilege claims

When asking for internal documents, the Commission recognises in accordance with the rulings of the European courts, that certain correspondence between an independent lawyer and its client is privileged.

a) Court rulings forming the legal basis for LPP claims

Legal Professional Privilege (“LPP”) for proceedings before the Commission was first recognized by the Court of Justice of the European Union in its *AM&S* decision.⁵⁸ The court held that written communications between an external lawyer and his client are to remain confidential “provided that, on the one hand, such communications are made for the purposes and in the interests of the client’s rights of defence and, on the other hand, they emanate from independent lawyers”⁵⁹. Communications with in-house lawyers were excluded from the scope of LPP by the court.

The next decision further scoping the extent of LPP was taken by the court in the *Hilti* case.⁶⁰ In an order, the court held that “the principle of protection of written communication between lawyer and client must, in view of its purpose, be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications”⁶¹.

In addition, in its judgement in the *Akzo* case, the court reiterated both previous judgments and held that preparatory documents – even if not exchanged with a

55 Recital 146 of the Article 8(2) decision in M.7801 Wabtec/Faiveley, available under http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7801.

56 Recital 161 of the Article 8(2) decision in M.7801 Wabtec/Faiveley.

57 Recital 199 of the Article 8(2) decision in M.7801 Wabtec/Faiveley.

58 Judgment of 18 May 1982, C-155/79, *AM&S Europe Limited v Commission of the European Communities*, ECLI:EU:C:1982:157.

59 *Ibid*, paragraph 21.

60 Order of 4 April 1990, T-30/89, *Hilti AG v Commission of the European Communities*, ECLI:EU:T:1991:70.

61 *Ibid*, paragraph 18.

lawyer – which were created “for the purpose of being sent physically to a lawyer, may none the less be covered by LPP, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence”⁶². Upon appeal, the Court of Justice confirmed that Legal Professional Privilege only applies to external lawyers as lawyers employed by the undertaking itself would not be independent.⁶³

b) Practical implementation

While none of these cases concerned merger control procedures specifically, the Commission is applying their principles when assessing the merit of confidentiality claims by parties. An LPP claim over certain documents falls under these judgments in one of the three following situations:

- It contains written communications with an independent lawyer made for the purposes of exercising the client’s rights of defence (*AM&S*),
- It contains internal notes confined to reporting the content of communications falling under the *AM&S* judgment (*Hilti*), or
- It contains working documents and summaries prepared by the client and drawn up exclusively for the purpose of seeking legal advice from an independent lawyer in exercising the rights of defence (*Akzo*).

In order to efficiently review a large number of confidentiality claims, the Commission often requests parties to submit a privilege log containing certain information about the relevant documents to assess the plausibility of the confidentiality claims. Such information includes for example in case of emails the date, time, sender, addressee, persons in copy and subject line.

Based on the information in such privilege log, the Commission is often willing not to challenge confidentiality claims for certain categories of documents. However, not every email with a lawyer in copy or with the words “privileged & confidential” or “external counsel” necessarily falls within the scope of LPP as defined by the courts.

c) Legal Professional Privilege in case practice

As already mentioned above, internal documents played a significant role in a number of the cases discussed in this article.

In a few of these cases, the case team engaged in extensive discussions about the scope of LPP claims by the parties. For example, in *Dow/DuPont*, the Commission asked for certain internal documents by way of three RFIs. Upon request of the parties,

62 Judgement of 17 September 2007, T-125/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, ECLI:EU:T:2007:287, Paragraph 123.

63 Judgement of 14 September 2010, C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, ECLI:EU:C:2010:512, paragraphs 46-50.

the Commission extended the deadline for all three RFIs and agreed to several amendments of the RFIs by narrowing the relevant timeframe for which documents have to be provided and the number of custodians. However, the parties provided only a partial response within the extended deadlines claiming that they needed more time to review whether the relevant documents were covered by LPP. The Commission adopted a decision according to Article 11(3) of the Merger Regulation. Until the parties responded to this request, the timing of the merger review procedures was suspended.

After submitting all responsive documents together with a privilege log, the Commission considered that the parties seemed to have applied a deficient methodology in determining whether a document falls within the scope of LPP. After communicating these concerns, the parties reviewed their LPP claims and submitted additional documents together with an updated privilege log. This process was repeated once more: The Commission outlined concerns about the documents for which LPP continued to be claimed and the parties further amended their response to the initial RFIs by submitting additional documents.

It is evident that such a prolonged process takes time and efforts from both the parties and the Commission. The Commission carefully reviews whether the different LPP claims appear sufficiently justified. Sometimes companies invoke patently too broad LPP claims.

This being said, we are happy to notice that in the majority of our cases, even if only cases involving internal document requests are to be considered, very extensive and time consuming discussions about the scope and extent of LPP are not necessary.

6. Stop-the-clock

a) Legal basis

A suspension of the timing in a merger review procedure, also called “stop-the-clock”, has just been mentioned in the context of discussions about LPP in *Dow/DuPont*. The Merger Regulation provides for strict deadlines for the Commission’s assessment of a merger: 25 working days in phase I, extended to 35 working days in case of a referral request from a Member State or the submission of remedies,⁶⁴ and 90 working days for a phase II investigation, extended to 105 working days in case the parties submit a remedy proposal at working day 55 or later.⁶⁵ The deadlines for a phase II investigation can be extended by an additional up to 20 working days.⁶⁶ With the limited exception of the up to 20 working days extension, these timelines are fixed. They cannot be moved by either the parties or the Commission.

⁶⁴ Article 10(1) of the Merger Regulation.

⁶⁵ Article 10(3) first subparagraph of the Merger Regulation.

⁶⁶ Until working day 15 by request from the notifying parties, after such date by Commission decision with the agreement of the notifying parties, Article 10(3) second subparagraph of the Merger Regulation.

These fixed deadlines, however, might endanger the integrity of the Commission's investigation in case certain necessary information is not provided by the parties or third parties in due course. Discussions about Legal Professional Privilege are only one example, the reasons for not providing a complete response to a request for information can be many.

In such circumstances, the Merger Regulation provides in Article 10(4) that the relevant time periods can be suspended if, for circumstances for which one of the parties is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13. Article 9 of the Implementing Regulation provides further details on the suspension of time limits.

b) Stop-the-clock in decision practice

While Article 9 of the Implementing Regulation expressly refers to Article 10(1) and Article 10(3), thus the time limits for phase I and phase II decisions, the Directorate-General for Competition generally only suspends time limits during a phase II investigation as insufficient information to clear a case in phase I will likely trigger the opening of an in-depth investigation.

But also in phase II cases, the Directorate-General for Competition weighs the interests involved in a timely assessment of the merger against having all available evidence to make a well-informed decision. It is due to the nature of most phase II cases of likely involving the risk of potential harm to competition, that the Directorate-General's mission and obligation to fully investigate a potentially harmful merger is more pertinent than the increase of administrative burden for the merging parties by a suspension of the time limits. Furthermore, before suspending the time limits, the Commission will generally extend the deadlines for replying to the underlying RFIs one or even several times.

As the Directorate-General only suspends time limits during an in-depth investigation, the overall number of cases in which the clock had been stopped is in any case very small – approximately around 1 % of all cases. Even looking only at phase II cases, usually in less than half of them the Commission made use of such measure. However, the Commission might have to suspend time limits more than once in a case if there are several instances of information not provided in due course.

c) Stop-the-clock in example cases

The six example cases provide a representative selection when it comes to the suspension of time limits. Out of the five phase II cases within the example cases, the Commission adopted stop-the-clock decisions in two cases: *Dow/DuPont* and *Hutchison 3G UK/Telefónica UK*.

In *Dow/DuPont*, the time limits had been suspended twice. Once, as already explained before, this was due to discussions about the scope of LPP claims the parties have made. As the parties had not provided the requested documents within the time limits of the relevant requests – which had been extended following such request from the parties –, the Commission stopped the clock from 1 September 2016 until 26 September 2016, the date on which the parties provided the majority of the missing documents.⁶⁷ This represents a suspension during 18 working days.

The second suspension in *Dow/DuPont* related to a request for a certain type of internal documents. After the Commission became aware of a specific internal document for the analysis of competitive interaction, it requested similar documents of such type. While the parties provided some of those documents within the deadline of the request, the Commission considered that not all of those documents had been provided. It therefore suspended the time limits with effect from 13 October 2016 until the parties submitted further documents and the suspension ended on 7 November 2016. In total, this second suspension lasted for 16 working days.

Similarly, in the case *Hutchison 3G UK/Telefónica UK*, the Commission adopted an Article 11(3) decision on 10 December 2015 following the failure of a party to provide complete information in response to an RFI. Before, the Commission had already extended the deadline to provide such information. When the party provided the missing information, the suspension ended on 15 December 2015 after 4 working days.

In all these situations, the missing documents which caused the adoption of an Article 11(3) decision were very substantial. In particular, the second suspension in *Dow/DuPont* related to internal documents that contained highly relevant information about the respective party's view of the competitive dynamics in affected markets. Also, in the *Hutchison 3G UK/Telefónica UK* case, the missing information was very important.

In both cases, the Commission's investigation would have been significantly impaired by not receiving the information requested. Due to the strict time limits in EU merger procedures, even having received such documents with a delay of 16 to 18 working days as in *Dow/DuPont* would have significantly hampered the Commission's ability to fully reflect the relevant information and to implement its findings within the merger procedure.

7. Removal of serious doubts during an in-depth review

The question whether cases are “problematic” or “unproblematic” is obviously not always clear and certainly the answer most often not binary. Some cases might appear problematic at first sight but raise no competition concerns once investigated further. Mostly, this is caused by one of two reasons: Either an in-depth assessment by the Commission has revealed that the serious doubts the Commission had are unfounded

⁶⁷ See recitals 110 to 124 of the decision.

or the parties have offered clear-cut remedies that address the concerns in a way that makes further investigation unnecessary.

In such a situation, the application of the principle to deal efficiently with unproblematic cases and to carefully scrutinise problematic cases will cause the Directorate-General for Competition to reduce any further burdens on the companies involved. This principle is also reflected in Article 10(2) of the Merger Regulation that states that a clearance decision in an in-depth investigation should be taken as soon as the serious doubts as to the compatibility with the common market have been removed.

Therefore, in case the market investigation in phase II allows the Commission to dismiss concerns that had not been sufficiently unlikely to dismiss them already in phase I, the Commission will clear the transaction without several of the sometimes for merging parties rather burdensome procedural steps usually preceding the adoption of a phase II decision. As the case may be, the following procedural steps can in this situation often be avoided: adoption of a statement of objections, access to the Commission's case file, reply to the statement of objections, discussion of the case at an Oral Hearing, submission of commitments together with a Form RM and improvements thereof following a market test. An example of this type is the merger *M.7054 Cemex/Holcim Assets*.

Similarly, if parties propose remedies that address the competition concerns of the Commission before the Commission issues a statement of objections, a phase II investigation can be concluded without the need to go through all formal steps foreseen in the Implementing Regulation. This was, for example, the case in *M.7758 Hutchison 3G Italy/Wind/JV* and *M.7962 Chemchina/Syngenta*.

IV. Summary and Outlook

This was just a short overview over how the Commission conducted its merger review in recent years by applying the principles outlined above in a few selected cases. We would like to underline that the Directorate-General for Competition is committed to implementing the rules and principles applicable to merger review to the benefit of the economy, undertakings and consumers. To do so, we distinguish between likely unproblematic cases in which we try to reduce the burden on companies as much as possible, and problematic cases in which we use all investigative tools available to us to carefully scrutinise the likely impact of the merger on competition.

The Directorate-General for Competition is sometimes criticised for various aspects of its handling of merger cases. Dirk Schroeder has never been reluctant to share his often critical view on these matters both privately and in public. Such criticism serves as an important reminder to carefully weigh the balance between "as little burden as possible" and "as much investigation as necessary" during our handling of cases.

We have reviewed and continue to review what can be done to achieve our mission best. As to further room for improvements, the Directorate-General for Competition

is well aware of the burden faced by companies in responding to extensive requests for internal documents. Even though this affects only a very small percentage of cases each year, *Commissioner Vestager* has therefore decided in early 2018 to start preparing a set of best practices for such requests. These guidelines will reflect past experience and aim at helping companies to respond more efficiently to requests for internal documents – hopefully making measures such as the suspension of time-limits occur less often.

To conclude, we would like to underline that the vast majority of merger cases dealt with by the Directorate-General for Competition are processed in a simplified, fast and efficient manner. Following the simplification package of 2014, almost 3 out of 4 cases in 2017 were simplified cases. In our view, the Commission's handling of the cases discussed in this article shows that the Directorate-General for Competition has generally been reasonable but firm in conducting its merger investigations even in potentially problematic cases. In this way, we do what we consider to serve the Commission's mission best: making merger review work in order to achieve a fair and level playing field for all companies in the internal market.

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