Few can quibble with the notion that the whole of European Union competition law has undergone profound change in 2004, what with, among other things, the devolution of enforcement powers to Member States, the removal of the prior notification regime under Article 81, enhanced EU powers to uncover and pursue hard core cartel conduct, and the revised merger control regulation, all made effective May 1, 2004. The European Commission (the “Commission”) has taken bold steps towards debottlenecking private and public antitrust enforcement and better orienting its enforcement regime for a future of more pervasive influence of norms that help protect the competitive process. This paper, however, focuses on the substantive and procedural changes made in the revised EC Merger Control Regulation (the “New ECMR”), interesting points of convergence with merger control in the United States, and the extent to which those points of convergence are likely to result in significant change for the better. We think the answer to the last question is yes, for reasons discussed below, but even that prediction turns on a number of different factors, not the least of which is how successful will the Commission be at meaningfully integrating the work of the new Chief Economist office and established industrial organization economic theory into its analyses, and using the new tools it has at its disposal to ensure its economic theories of harm are firmly grounded in fact.

This paper first explains why looking at the changes in the New ECMR through the lens of convergence, or addressing incongruencies, with merger control elsewhere matters. Second, we identify and discuss the key drivers for the reform of the previous ECMR. Third, we briefly identify and describe the fundamental substantive and procedural changes introduced in the New ECMR. Fourth, we highlight select points of convergence with US merger control. Finally, we explore whether, and in what respects, those points of convergence will likely produce positive change.

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I. Significance of Convergence

There are three fundamental categories of changes in the New ECMR implemented by the recent reform – (i) new procedural rules paralleling best practices recommendations recently espoused by the International Competition Network (“ICN”), \(^4\) (ii) change in the substantive test for assessing mergers, and (iii) internal organisation and process changes within the Directorate General for Competition (“DG-Comp”). Importantly, the reforms in at least two of these three categories, and indeed arguably all three, are direct responses to urgent pleas by the business community and international organizations alike for convergence in the regulation and assessment of mergers and acquisitions.

The fact of the matter is that competition law enforcement globally is at an all-time high – more than one hundred countries have competition laws, with nearly 50% of these enacting competition legislation for the first time in the 1990s. \(^5\) More than 80 jurisdictions now have some form of mandatory merger notification requirement, and this number continues to increase. \(^6\) This explosion in antitrust enforcement – and more specifically in merger control – has raised transaction costs considerably as firms scramble to identify and meet reporting obligations, suffer delays caused by suspension rules and waiting periods, and respond to information requests by regulators and all-too-often spurious objections by competitors. \(^7\)

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\(^4\) See ICN Recommended Practices for Merger Notification Procedures (the “ICN Recommended Practices”), available at: http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf. The formation of ICN was formally announced on October 25, 2001, by leading antitrust enforcement officials from Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, United States and Zambia.


\(^6\) ABA Competition Laws Compilation, supra note 1 at 14, ch. 1; See also J. William Rowley & Donald I. Baker, International Mergers – The Antitrust Process at I-1 (2d ed. 2000). We can attribute this growth to a number of forces: (i) the globalization of trade and economic activity, including transnational mergers and acquisitions, (ii) the overwhelming embrace of free market principles by formerly centralized economies in the 1990s, and (iii) the influence of multi-national organizations like the European Union, the International Monetary Fund, the United Nations, and the World Bank that universally advocate the adoption and enforcement of competition law rules. All of these forces likely will be as prevalent tomorrow as they are today.

\(^7\) For example, just figuring out where exactly a transaction needs to be notified is complicated by widely divergent tests that bear little to no relation to whether the transaction will raise competitive concerns, leaving transaction parties no choice but to assess notifiability in every jurisdiction that it does business, regardless of the magnitude of that business or whether the counter-party does business in the same jurisdiction. Most jurisdictions rely solely on thresholds based on some measure of individual or combined revenues or asset value either in the relevant jurisdiction or worldwide, see, e.g., Law on Competition (Albania), No. 8044 of 7 December 1995, Article 4; EC Merger Regulation Article 1(2), Council Regulation 4064/89/EEC on the control of concentrations between undertakings, OJ 1989, L 395, p. 1, amended by Council Regulation 1310/97/EC, OJ 1997, L 180, p. 1 (the Old ECMR), and Council Regulation 139/2004/EC, OJ 2004, L 24, p. 1 (the New ECMR); Act LVII of 1996 on Unfair Trade Practices and the Restraint of Competition (Hungary), Article 24; Competition and Fair Trading Act (Italy), Law 287 of 10 October 1990, Section 16; Federal Law on Cartels and Other Restrictions on Competition (Switzerland), Acat, October 6, 1995, Article 9(1); others also incorporate some form of size-of-transaction threshold, see, e.g., Sec. 7A(a), Clayton Act, 15 USC. 18a(a), as added by Sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L.94-435, 90 Stat. 1390, as amended, Pub.L. No. 106-553, 114 Stat. 2762 (January 25, 2001) (United States) (hereinafter “Hart-Scott-Rodino Act”); Federal Economic Competition Law (Mexico), D.O., December 24, 1992, Article 20; yet relatively few appear to acknowledge the importance of an overlap between the parties’ activities and resulting concentration and use a market share threshold, but often then only as an alternative to the revenue or asset value tests – see, e.g., Law
In addition to transaction costs concerns, there is an increasing expectation, voiced unanimously by members of the business community and also increasingly by economic policymakers, that transactions reviewed and approved under the competition laws in one jurisdiction should likewise be approved by other reviewing jurisdictions where the market/economic facts across jurisdictions are substantially similar. Transactions that relate to global businesses that compete in global markets raise the highest expectations in this regard. This expectation alone (however wishful) is not unreasonable. After all, if competition law is predicated on the belief that the free interplay of market forces is the best way to organize productive activity and maximize consumer welfare, and that those forces are governed by economic principles that are universal, i.e., the laws of supply and demand, then it would seem reasonable to expect that the norms for assessing harm to competition should also be the same and thus yield the same results in like conditions.

This expectation, however, has not always been met in practice, and in some cases for good reason. Predicting the future competitive effects of a merger is no simple task. Free markets are fundamentally dynamic in character. Industries transform constantly, sometimes overnight, influenced by a score of factors that likewise change over time. Merger control is, in effect, a discipline that depends on a meticulous and studied analysis of a variety of moving parts, and relies heavily on logical inferences drawn from usually far less than perfect economic evidence. Bottomline, reasonable studied minds can and do differ in this area.

Nevertheless, divergence is not easily tolerated. Consider the furor caused by opposite US-EC outcomes with respect to the proposed GE/Honeywell transaction in July 2001. Different outcomes to the same question under circumstances where the analysis should yield consistent results, as one might reasonably expect where the relevant market is global, are confusing, raise risk, and create uncertainty, potentially causing firms to forego

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8 See, Northern Pacific Railway Co. v. United States, 356 US 1, at 4 (1958): “[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . .”.

9 That furor prompted the then-head of the Antitrust Division of the United States Department of Justice (“US Antitrust Division”) to take the very unusual and unorthodox step of declaring the proposed transaction, as approved with conditions in the United States, procompetitive and beneficial to consumers:

“Having conducted an extensive investigation of the GE/Honeywell acquisition, the Antitrust Division reached a firm conclusion that the merger, as modified by the remedies we insisted upon, would have been procompetitive and beneficial to consumers. Our conclusion was based on findings, confirmed by customers worldwide, that the combined firm could offer better products and services at more attractive prices than either firm could offer individually. That, in our view, is the essence of competition. The EU, however, apparently concluded that a more diversified, and thus more competitive, GE could somehow disadvantage other market participants. Consequently, we appear to have reached different results from similar assessments of competitive conditions in the affected markets. Clear and longstanding US antitrust policy holds that the antitrust laws protect competition, not competitors. Today’s EU decision reflects a significant point of divergence.”

transactions or business strategies that in fact are competitively neutral or even pro-competitive. Compounding this intolerance for inconsistent outcomes is the general wariness commonly directed towards intervention in markets. Competition law enforcement is intended to protect a process that by definition is supposed to operate free from intervention. Many commentators have observed that one of the most impressive attributes of the free market system is that it places decisions regarding marketplace behavior in the hands of those persons that have the most to lose, or win, in any given situation – those who will suffer if things go wrong; and that regulatory intervention puts decisions about market behavior in the hands of persons who do not share the same risk/reward profile. This observation can easily be applied to competition law enforcement.

Those who agree that the purpose of competition law is to protect the competitive process would most likely also agree that in the absence of strong evidence of competitive harm the market should be allowed to operate unfettered by regulation. In other words, the default rule should be that market behavior must not be restricted without a comprehensive analysis of competitive effects and the exercise of sound judgment in consideration of all available economic facts and reasonable theoretical models about what those facts tell us about present and future competitive effects. Perfectly divergent outcomes in the merger control setting raise the specter (justified or not) that this is not being done.

Accordingly, in an increasingly global marketplace, high transaction costs and the risk of inconsistent results in circumstances where they should be the same counsel in favor of some level of convergence in merger control norms. This is not a novel idea. Indeed, over the past four years substantial efforts have been undertaken by leading antitrust authorities and practitioners, primarily under the auspices of the ICN, to identify and promote guiding principles and recommended practices for merger notification and review. These efforts have been strictly focused on fostering convergence in principles of process rather than substance, with the implicit hope that if merger review processes are similarly rigorous and transparent about the identification, consideration and testing of all relevant market facts against credible theories of economic harm, then they will ultimately yield like results in like market circumstances – a convergence that hopefully will mean the next GE/Honeywell is decided correctly and consistently by all reviewing authorities.

As a practical matter, an important marker for this sort of convergence is the extent to which the antitrust enforcement regimes of the European Union and the United States move closer together. This is true not only by virtue of the size of the markets they guard, but also because these enforcement regimes represent today the two most influential spheres of antitrust enforcement influence worldwide. Because each remains fundamentally different in the way it reaches decisions and each has different strengths and weaknesses, the fact that these regimes move closer together in process or substance does not, by itself signal progress. Nevertheless, assessing the ways these regimes do move together as a result of the New ECMR may present a useful basis to begin considering the likelihood that the New ECMR will foster positive change.

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11 However, the EU-US Merger Working Group that in 2002 produced (procedural) best practices concerning bilateral co-operation in merger investigations (“EU-US Best Practices”), see Commission Press Release No IP/02/1591 of October 30, 2002 (available at http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf), is also looking at substantive issues, such as conglomerate mergers and efficiencies. As of this writing no report nor recommendation has been made by the EU-US Merger Working Group.
II. Seeds of ECMR Reform

A. Self Evaluation and Reflection Mandated by the Old ECMR

1. Sufficient Experience for a Revision?

Article 1(4) of the Old ECMR called for the Commission to submit to the Council before July 1, 2000 a report on the operation of the thresholds and criteria for determining whether a concentration has a Community dimension and must therefore be notified in Brussels. Accordingly, in June 2000, the Commission launched the reform of the Old ECMR. The Commission, however, laudably took this opportunity to go further than what was required by Article 1(4). With thirteen years and nearly 2,000 transactions worth of experience applying the Old ECMR under its belt, the Commission decided to conduct a more expansive inquiry and in its Report to the Council containing the findings of this review called for a more general review of the Old ECMR. On December 11, 2001 the Commission produced a Green Paper on the Reform of Merger Control (the “Green Paper”). The Green Paper discussed in detail the first 13 years of EC merger control practice. Some of the key points addressed in it and the ensuing proposals included:

- **the need to adapt the substantive test to a globalized environment** – critically, it was considered that a more flexible substantive test would have provided the Commission with the possibility of effectively tackling issues such as unilateral effects and merger-specific efficiencies. However, while the Commission was prepared for this reason to amend the substantive test in a way that would have substantially brought it considerably closer to the US test set out in Section 7 of the Clayton Act, it was concerned that any changes should preserve the value of thirteen years of both Commission and Community Courts precedents.

- **the need for procedural improvements in terms of timing and case management** – the Commission proposed changes that included bolstering pre-notification contacts, more flexible timing during the review where remedies were proposed, regular meetings between the parties and the Commission’s staff throughout the review, and affording the Commission in merger reviews enforcement powers close to those it now enjoys as a result of the overhaul of the rules for the applications of Articles 81 and 82 EC (the so called “Modernization” of the EU antitrust rules, particularly as regards Article 81(3) EC).

- **the need to simplify the referrals to and from the Member States** – the referral mechanisms in force at the time were considered too lengthy and did not foresee the possibility for the parties to request a referral at the pre-notification stage. The

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12 In its Report to the Council of June 28, 2000, the Commission suggested that, besides the operation of the thresholds and the criteria for determining whether a concentration has a Community dimension, a number of procedural and substantive issues should be investigated, e.g., the referral system between Brussels and the Member States, the time limits, the role of the advisory committee where remedies were offered, fines and the meaning of some of the expressions used in Article 4, such as “agreement” and “acquisition of control”.

13 “No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital […], the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 USC. § 18 (2004)(emphasis added).
relevant test for the referral was judged too cumbersome in that it required preliminary conclusions that the transaction would likely give rise to (a) the creation or strengthening of a dominant position (b) as a result of which effective competition would have been significantly impeded (see Article 9(2)(a) Old ECMR). It was proposed that the time limits and the test be amended. One of the simplifications was that a Member State no longer needed to show that the distinct market in its territory constituted a substantial part of the common market.

2. GE/Honeywell

By mid-2001 the motivations for study and reform were well in place, and spurring action first at the legislative level and then also internally (see next section). Nevertheless, it is hard to ignore the sense of urgency that was imparted to this task by the divergent US-EC outcomes in the GE/Honeywell case decided by the Commission in July 2001. GE/Honeywell was the classic case for jurisdictional conflict. General Electric (“GE”) proposed to purchase Honeywell. GE is a worldwide conglomerate with a wide range of businesses, including, among others, insurance, finance, electrical products and appliances, and aircraft engines and parts. Honeywell’s business scope is narrower and heavily weighted towards defense industry products, including aircraft components, where GE also operates. Accordingly, nearly all of the potential antitrust issues in this case involved aircraft components and services. These product and services relate to markets that are global in scope, such that the exercise of assessing the competitive effects of the proposed transaction in the United States and the European Union was substantially similar.

The US Antitrust Division decided to limit its concerns primarily to horizontal product overlaps and required relief with respect to helicopter engines and related maintenance and overhaul services. GE and the US Antitrust Division entered into a consent decree that resolved all US concerns. The Commission, however, focused also on vertical or complementary product issues and required additional relief with respect to non-overlap avionics and aircraft financing services. It determined that GE would have too much market power by virtue of its ability to offer (i) both avionics with aircraft engines and (ii) better leasing terms to those aircraft customers that agree to purchase planes with GE engines. The parties could not reach agreement with the Commission on relief and the Commission thereafter rejected the transaction.

Furor followed from a number of quarters. The business community and press, particularly in the United States, reacted with alarm and criticism, arguing that the Commission had turned antitrust on its head in heeding the calls to reject the deal by competitors rather than protecting the competitive process. They also complained that the Commission’s theory of long-term competitive harm in the face of presumed short-term efficiencies and lower prices was too speculative to warrant marketplace intervention. The Commission in its July 3 press statement14 announcing the rejection of the transaction defended itself, explaining in substance that GE/Honeywell is a “rare” case that involved important conglomerate effects that in this case negatively impacted competition and that European merger control is not about protecting competitors but ensuring long-run market competitiveness.

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No case more perfectly reflects tensions in analysis than a case where opposite outcomes are reached nearly simultaneously on the very same facts. The Commission utilized theories of harm premised on bundling, conglomerate effects and monopoly leveraging that have either been rejected or severely limited by US antitrust authorities in a merger analysis context. Moreover, they did so applying a standard – the creation or strengthening of a dominant position – that is not well-suited for a situation such as this where there were essentially no direct horizontal overlaps. Some practitioners as well as Commission officials consider that had there been a different substantive test at the time of the GE/Honeywell decision the Commission may have been able to assess and deal with the case differently. In any event, while most antitrust practitioners had recognized tensions in United States and European competition law analysis – but those tensions have rarely been so effectively captured in one case as it had in GE/Honeywell.

B. Striking Out at the CFI

The Court of First Instance of the European Communities (the “CFI”) plays a critical role in defining the boundaries of EC competition law enforcement, including the application of the EC merger control rules by DG-Comp. At no time was this more evident than in 2002, precisely when discussions for the reform of merger control rules were fully underway. Within a period of approximately six months that year, the CFI rendered three momentous decisions annulling Commission merger prohibition decisions.

1. Airtours/First Choice

On September 22, 1999, following an in-depth Phase II investigation, the Commission prohibited the merger between Airtours and First Choice.\textsuperscript{15} The Commission took the view that the merger would have created a situation of collective dominance in the market for short-haul foreign package holidays in the UK, since, following the merger, the three remaining large operators would have been able to coordinate their behavior by restricting the capacity put on sale and thereby raising prices in Britain.

Even though the deal was abandoned in the wake of the Commission’s prohibition, Airtours challenged the Commission decision. On June 6, 2002, the CFI annulled it.\textsuperscript{16} After setting out, on the basis of the existing case law, the conditions necessary for a finding of collective dominance,\textsuperscript{17} the CFI unambiguously stated that it was incumbent upon the Commission to produce “convincing evidence” that “a merger should be prohibited because it will create a situation of collective dominance”.\textsuperscript{18} In particular, since the Commission appeared to consider that, prior to the proposed merger, the four leading operators did not enjoy a position of collective dominance, the CFI decided that it was for the


\textsuperscript{17} These conditions are: (i) sufficient market transparency for the members of the oligopoly to monitor each other conducts and hence know that they are tacitly colluding; (ii) sustainability of the coordination over time \textit{i.e.} existence of incentives not to depart from the common policy on the market; and (iii) proof that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardize the results expected from the common policy (Airtours, supra, para 62).

\textsuperscript{18} Airtours, supra, para 63.
Commission to prove that the merger would have created such a position. The CFI found that the evidence on which the Commission had relied to support its findings on the creation of a position of collective dominance was insufficient. Moreover, the CFI found that the decision was vitiated by a series of errors of assessments such as “incomplete and incorrect assessment of the data submitted […] during the administrative procedure” and the failure to prove factual allegations.

Airtours was the first time that a Commission merger prohibition decision was overturned. It was remarkable also for its findings of grave error in the way the Commission went about selecting and assessing evidence used to support its case. The Commission up to that point in time had enjoyed what appeared to be a long “win streak” in applying the ECMR – more than ten years without suffering a CFI reversal. In fairness, the appearance of any “win streak” is only just that – an appearance – because so many Commission objections to mergers are frequently addressed through undertakings by the parties, as in the United States, and few cases are decided by the CFI. The CFI had considered only three prohibition decisions since the ECMR was entered into force. Nevertheless, Airtours was unexpected and signaled for the first time that the Commission could be wrong, severely wrong, in making the judgments the ECMR requires it to make as the gatekeepers of mergers and acquisitions in Europe. The Airtours ruling naturally had a powerful effect on DG-Comp staff, and appeared likely to change negotiations dynamics between the Commission and supplicant parties in future transactions when two more CFI decisions – Schneider/Legrand and Tetra Laval/Sidel – drove home similar messages.

2. Schneider/Legrand

The second major setback for the Commission came with the case Schneider/Legrand. On October 10, 2001, the Commission prohibited a proposed merger between Schneider and Legrand, two major French manufacturers of electrical equipment. The combination of the two businesses would have created the single largest electrical equipment manufacturer in Europe. In short, the prohibition was based on:

- the creation and the strengthening of dominant position in several product markets within France, in particular due to the combination of the parties’ product lines;

- the creation and the strengthening of a dominant position in several specific electric equipment product markets, in six other countries outside France.

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19 Airtours, supra, para 127.
20 Airtours, supra, para 172.
On October 22, 2002, roughly one year after the Commission decision and less than five months after the Airtours judgment, the CFI overturned the prohibition decision.\textsuperscript{23} The annulment was founded on two grounds:

- The CFI disagreed with the Commission’s conclusions regarding the effects of the merger outside France. It noted that “errors, omissions and inconsistencies […] of undoubted gravity […] in the Commission’s analysis of the impact of the merger”\textsuperscript{24} were such to “deprive of probative value the economic assessment”\textsuperscript{25} of the concentration. In particular, the Commission had assessed the competitive conditions of the markets outside France on the basis of abstract assertions applicable to all markets such as the importance of strong brands or the significance of the merged company’s product portfolio.\textsuperscript{26}

- The CFI found that the Commission committed a serious procedural error – resulting in a violation of the parties’ rights of defense – because in its final decision it based the analysis of the French markets on a theory that was substantially different from the theory that formed the basis for the Commission’s initial Statement of Objections.

3. \textit{Tetra Laval/Sidel}

On October 30, 2001, the Commission prohibited the proposed acquisition by Tetra Laval (“Tetra”), a company belonging to the Tetra group, which leads in the manufacture of carton packaging and carton packaging equipment, of Sidel, a French company and a leader in PET packaging equipment.\textsuperscript{27} Although the Commission found some horizontal and vertical effects arising from the concentration, it justified the prohibition on the basis of the conglomerate effects of the proposed transaction.\textsuperscript{28} The Commission also assessed the structural and behavioral commitments offered by Tetra concluding, and concluded that they were “insufficient to eliminate the major competition concerns”.

Tetra Laval appealed, and on October 25, 2002, the CFI annulled the Commission’s decision.\textsuperscript{29} It must be noted, first, that in what is widely acknowledged as an important endorsement of the Commission’s expansive use of economic theories to show that


\textsuperscript{24} \textit{Schneider}, supra, para 404.

\textsuperscript{25} \textit{Schneider}, supra, para 411.

\textsuperscript{26} Overall, the CFI accepted Schneider’s argument that the Commission had developed theories about the effects of the joint product portfolio and the range of brands in the context of the French market and transposed these theories from France to other national markets without much probative support.


\textsuperscript{28} The prohibition relied on three main pillars: (i) the creation of a dominant position in the market for PET packaging equipments by leveraging Tetra’s existing dominant position in the market for aseptic carton packaging through foreclosing practices such as tying and bundling and consequent marginalization of competitors; (ii) the strengthening of Tetra’s dominant position in aseptic carton packaging through the elimination of a growing competitive constraint in the closely neighboring market for PET packaging systems; and (iii) the strengthening of a dominant position in the overall end-use sector of packaging of “sensitive” products.

a merger can be anticompetitive, the CFI upheld the Commission’s view that the use of conglomerate analysis is admissible under the (Old) ECMR. However, it held that “the proof of anticompetitive conglomerate effects of [...] a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produced those effects.”\textsuperscript{30} Furthermore, the CFI decided that, if the Commission relies on foreseeable conduct which is likely to constitute an abuse of a dominant position, it is required to consider not only the incentives to engage in anticompetitive practices but also those elements that may reduce or even eliminate such incentives\textsuperscript{31} as well as the behavioral commitments offered regarding the future conduct of the merged entity.\textsuperscript{32} The CFI concluded that the Commission failed to establish to the required legal standard that a dominant position on the PET markets would be established as a consequence of the merger and that it had not sufficiently considered the elements reducing and eliminating the incentives for anticompetitive conduct.

Taking into account the findings of the CFI, on January 13, 2003 the Commission cleared the acquisition in a new proceeding.\textsuperscript{33} The Commission, though, also lodged an appeal against the CFI ruling with the Court of Justice of the European Communities (“ECJ”). That appeal is still pending and the ruling by the ECJ is expected before the end of the year. The Commission decided to challenge the Tetra Laval ruling because it disagreed with (i) the (excessive) scope of the judicial review exercised by the CFI in that case, (ii) the CFI’s treatment of the standard of proof incumbent on the Commission, and (iii) the CFI’s decision as regards the relevance of incentives not to engage in anticompetitive practices and the Commission’s obligation to consider structural as well as behavioral commitments.\textsuperscript{34}

On May 25, 2004, Advocate General (“AG”) Tizzano published his Opinion.\textsuperscript{35} In recommending the dismissal of the Commission’s appeal, AG Tizzano endorsed all the key legal issues decided by the CFI: the standard of proof\textsuperscript{36} and the extent to which the

\textsuperscript{30} Tetra Laval, supra, para. 155, emphasis added. The CFI further stated that the Commission should prohibit a conglomerate-type merger only if it “is able to conclude that a dominant position would, in all likelihood, be created or strengthened in the relatively near future” (para. 153, emphasis added).

\textsuperscript{31} The CFI identified such elements in “the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue” (Tetra Laval, supra, para. 159).

\textsuperscript{32} Tetra Laval, supra, para. 161.

\textsuperscript{33} Decision of 13 January 2003, in Case No COMP/M.2416, Tetra Laval/Sidel.

\textsuperscript{34} See notice of appeal (OJ 2003, C 70, p. 3).

\textsuperscript{35} Opinion of AG Tizzano of May 25, 2004, in Case C-12/03 P, Commission v Tetra Laval, pending. While the 8 Advocates General are full members of the ECJ, their role is not that to decide a case but to suggest to the Court, in complete independence, a legal solution to the cases pending before it. An Advocate General is assigned to most of the cases (but for the less significant or complex ones). Even though the Advocate Generals’ opinions are not binding on the ECJ, their role is an influential one. Statistically, in about 80% of the cases the ECJ agrees, at least in part, with the solution suggested by the Advocate General.

\textsuperscript{36} The Commission complained that the high standard of proof required by the CFI would excessively reduce its discretion in assessing mergers. AG Tizzano substantially upheld the CFI’s ruling and considered that the Commission should prohibit a merger only when it is persuaded that the notified transaction would very probably lead to the creation or strengthening of a dominant position. In particular, in those border-line cases where it is especially difficult to foresee the effects of the concentration the correct solution would be an authorization (AG Tizzano’s Opinion, supra, paras. 76 and 77).
Commission should take into account the unlawfulness of conducts and the commitments offered by the parties. 37 As regards, however, the bounds of judicial review, 38 AG Tizzano clearly noted that the CFI had overstepped them in more than one instance in what constitutes a severe rebuke to the members of that Court. But he ultimately considered that none of those mistakes was such to justify an annulment of the ruling under appeal. AG Tizzano took this opportunity to confirm that the CFI may not substitute its own view to that of the Commission.39

4. Key Lessons from the Rulings of 2002 – An annus horribilis?

The three CFI judgments of 2002 constitute an unprecedented series of setbacks for the Commission and have exercised a strong influence both on the reform of the EC merger control rules and on the internal reorganisation of DG-Comp. As practitioners engaged in merger control work have quickly come to realize, one of the key lessons of the 2002 rulings is the speed at which two of them were adopted, each within about one year after a Commission decision. These were among the first applications of the so called “fast-track” procedure, which entered into force on February 1, 2001. By giving priority to the treatment of a particular case, the CFI has shown that it is able to decide sophisticated legal and technical issues in large and complex cases in less than one third of the time previously taken to decide similar cases (Airtours, for example, took almost three years to decide). Speed to decision on appeal can have powerful ramifications in that it brings judicial review into the parties’ calculus as to when to abandon a challenged transaction. Meaningful and timely judicial review also impacts DG-Comp Staff who no doubt now more fully appreciate the risks attendant to not conducting as thorough and complete an investigation and assessment as possible.

Another key takeaway that should not be overlooked given the ultimate outcomes in these cases is the apparent endorsement by the CFI of the theories of economic harm employed by the Commission. In all three cases, the CFI substantially upheld the economic theories which served as background of the Commission’s decisions, and provided guidance on concepts such as collective dominance and conglomerate mergers that is now reflected in the Commission’s Guidelines on the treatment of Horizontal Mergers (the “EC Horizontal Merger Guidelines”)40 or are likely to be reflected in the forthcoming guidelines on conglomerate and vertical mergers.

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37 The Commission argued that imposing on it the obligation to consider the unlawfulness of certain conducts and the behavioral commitments offered by the parties (as disincentives for the leveraging practices deemed capable of creating a dominant position in the market for PET packaging equipments) is not consistent with the letter and the spirit of the (Old) ECMR. AG Tizzano, however, supported the CFI’s conclusion that in the absence of an immediate and automatic creation of a dominant position the Commission ought to have taken into consideration the various factors that might have influenced the likelihood of the merged entity behaving in a way that would have enabled it to acquire the predicted dominant position, including the illegality of the conduct and the proposed behavioral commitments (AG Tizzano’s Opinion, supra, paras. 122 et seq.).

38 The Commission argued that the CFI had carried out a far too incisive review tackling the substance of the issues decided in the prohibition decision and not limiting itself to a review of the “manifest errors of assessment”.

39 AG Tizzano’s Opinion, supra, paras. 82 et seq..

In all three cases, however, the CFI was also sharply critical of the evidentiary basis of the Commission’s decisions. The CFI used severe words in condemning the Commission’s analysis as erroneous, contradictory and inconsistent. Moreover, by requiring the Commission to provide “convincing evidence” of the anticompetitive effects of the merger, the CFI has set at least what the Commission considers a stringent standard of proof for merger cases. The ECJ judgment in the Tetra Laval is eagerly awaited and both Commission officials and antitrust practitioners believe – and the authors agree – that it will represent a landmark ruling.\footnote{While there is likely some room to debate what constitutes “convincing evidence” for private parties (real world market participants) and their counsel, it is hard to fathom tolerating any burden of proof standard below requiring that evidence be convincing before sustaining a merger prohibition decision. Even though the Commission does not challenge the notion that the evidence must be “convincing”, it disagrees with the level of probability (or the standard of proof) required by the CFI in Tetra Laval. The Commission believes that it should prove the anticompetitive outcome is “more probable than not.” In effect, the Commission is seeking a lower standard of proof than that endorsed by AG Tizzano (“very probable”) and comparable to the standard that, according to a recent ruling of the Competition Appeal Tribunal, must be satisfied by the OFT to refer (or not to refer) a case to the Competition Commission under the UK Merger Control rules (see ruling of December 3, 2003, IBA Health v OFT, available at http://www.catribunal.org.uk/documents/JdgIBA031203.pdf, (upheld on appeal by the UK Supreme Court, February 19, 2004 (available at http://www.catribunal.org.uk/documents/IBAJudgmentCA190204.pdf). The disagreement between the CFI and AG Tizzano, on one side, and the Commission on the other, on such a key element of merger control rules contributes to the build-up of interest in the coming judgment from the ECJ.}

Crucially, this ruling will determine the extent of the standard of proof imposed on the Commission and will, therefore, have a profound impact on how DG Comp’s staff will apply in the coming years the New ECMR, the EC Horizontal Merger Guidelines and the future guidelines on vertical and conglomerate mergers.

Finally, the CFI appeared to uncover weaknesses in the Commission’s internal procedures and organization. The challenge to the Commission in fully safeguarding parties’ procedural rights in highly complex cases while rushing to investigate and produce well reasoned decisions within the tight deadlines mandated by the ECMR is tremendous. The CFI sent a loud message that there must be a better way to meet that challenge, and as described in more detail below, the Commission heard that message and made substantial changes to its internal organization and procedures.

In conclusion, even if 2002 was an \textit{annus horribilis} for DG-Comp\footnote{More generally, to underline the effect of the 2002 rulings on the Commission, it is worth noting that, while it prohibited a concentration under the EC merger rules in only 18 cases out of more than 2,200, its prohibition decisions, when challenged, have been upheld by the CFI only in 50% of the 6 cases it decided so far. For three prohibition decisions the appeals are still pending (against the MCI WorldCom/Sprint decision of 2000, with an appeal brought by WorldCom in Case T-310/00, WorldCom v Commission, OJ 2000, C 355, p. 35, and against the GE/Honeywell decision of 2001, with appeals brought by both Honeywell – Case T-209/01, Honeywell International v Commission, OJ 2001, C 331, p. 23 – and GE – Case T-217/01, General Electric v Commission, OJ 2001, C 331, p. 24; and finally against the Tetra Laval/Sidel decision of 2001, see Case C-12/03 P, supra, pending before the ECJ).}, it has also prompted bold and beneficial changes in the way mergers are vetted by the Commission. By largely undermining the relatively modest package of measures envisaged in the Commission’s Green Paper of the year before and its cautious approach to change, the three rulings have ultimately led the Commission to approve on December 11, 2002 a “comprehensive merger control reform package, which is intended to deliver a world class regulatory system for firms seeking approval for their mergers and acquisitions in the [EU]”.\footnote{Commission Press Release No IP/02/1856 of December 11, 2002.}
III. The New ECMR and the New DG-Comp

Based on the findings contained in the Green Paper, the experience of the GE/Honeywell case and the lessons drawn from the three 2002 rulings of the CFI, the EU eventually adopted a package of new merger control rules: the New ECMR, the Commission Implementing Regulation, and notices communicating EC Horizontal Merger Guidelines and DG-Comp Best Practices.

This package entered into force on May 1, 2004. Most of the changes were welcomed and largely regarded as an improvement to the system. Moreover, these legislative reforms were complemented by internal reforms at the level of DG-Comp:

- the dismantling of the Merger Task Force and the parallel reorganization of antitrust and merger control staff along sectoral/industry specific lines so as to allow for better focus on market developments and a more flexible approach to resources and case management;
- the establishment of a peer review mechanism for major cases, with the systematic appointment of a “review team” to take a fresh look at these cases;
- the creation of the new position of Chief Economist, to introduce a more consistent and informed use of economic reasoning and econometrics in important cases; and
- the reinforcing of the role of the Hearing Officer as guardian of basic procedural rights, such as the right to be heard and the right to have access to the file.

In effect, the reforms in the ECMR and at DG-Comp can be grouped into three categories for purposes of the ensuing discussion: (i) procedural changes largely consistent with ICN Recommended Practices, (ii) the change in the substantive test for assessing mergers, and (iii) internal organization and process changes within DG-Comp.

A. The Procedural Changes

Importantly, the procedural changes introduced with the reforms are largely consistent with the ICN Recommended Practices. The adoption of these changes so promptly reflects the Commission’s leadership by example within the ICN and should bode well for a future of increased convergence of merger control rules.

1. Bolstering Practice of Pre-Notification Contacts

The DG-Comp Best Practices strongly encourage pre-notification contacts with the Commission. Although not mandatory, such contacts are now standard practice. Relative to the pre-2001/2002 experience, the level of the contacts has increased in

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sophistication to the extent that it is now considered normal process for the parties to have an economist present during some of the pre-notification meetings.

Moreover, such pre-notification contacts are now intended to address the possibility of referral of the case to a Member State (see below) and are thus no longer limited to establishing what information, and at what level of detail, should be provided in a merger filing. A pre-notification phase can take on average three weeks, but might extend to even several months if substantial issues have to be sorted out with the Commission prior to submission of the final notification. The aim is to filter as early as possible the issues, if any, that may attract scrutiny so as to position the notification for either early clearance, in the absence of serious competitive concerns, or a more efficient and meaningful process for allaying any such concerns where they do exist.

2. Streamlining and Simplifying the Referral System

Transaction parties can now either request a referral to a Member State where they consider that the transaction could significantly affect competition within a distinct market,46 or from the Member States to the Commission, where a transaction does not meet the ECMR thresholds but is likely to be reviewed by at least there Member States.47 Such requests – unknown under the Old ECMR – are discussed during the pre-notification contacts. Referrals to and from the Commission at the request of one or more Member States still take place only after the transaction has been notified.48

Certain referrals from the Commission to a Member State can now be decided on the basis of simplified criteria. In particular, when a Member State requests a referral, it does not longer need to show that the proposed transaction gives rise to the creation or the strengthening of a dominant position.49

The new referral system is clearly in line with the spirit of the recommendations issued by the ICN that there be a “nexus to the reviewing jurisdiction” and that such a nexus be “determined on the activity within that jurisdiction, measured by reference to the activities of [...] the parties”.50 However, the difficulties of the new system are already becoming apparent. For instance, when considering requesting the Commission to refer the case to a Member State before the concentration is notified to the Commission, parties should bear in mind that the Commission may take up to 25 working days to decide. Moreover, regardless of whether the Commission agrees to refer the case, the parties will still need to notify the proposed transaction to the Commission, to the National Competition Authority of the Member State concerned or possibly to both when the referral is only partial. Only time will tell how significant or chilling these difficulties may be for regulators and parties alike.

46 See Article 4 (4) of the New ECMR.
47 See Article 4 (5) of the New ECMR.
48 See Articles 9 and 22 of the New ECMR.
49 See Article 9(2)(a) of the New ECMR.
50 See ICN Recommended Practices, Section I.C.
3. Filing on a Nonbinding Letter of Intent

The New ECMR no longer requires a binding or final agreement for the parties to be able to notify. Now, the parties may notify a concentration as soon as they can show “the good faith intention to conclude an agreement”. This mirrors the recommendations issued by the ICN that “[p]arties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.” This reform, coupled with effective use of pre-notification contacts, gives to transaction parties some important control over the timing of the merger review process that they did not have before.

4. Removal of the Time Limit for Filing

Further, the New ECMR no longer requires that a transaction be notified within seven days of signing of a binding agreement (or, now, a letter of intent). With a solution also consistent with ICN Recommended Practices, Article 4(1) now simply provides that a concentration be notified prior to its implementation. This change likewise provides transaction parties more flexibility and more control over the timing of the EC merger review process than they had before. Moreover, it allows for a better coordination with other non-EU premerger notification filings worldwide with respect to global deals.

5. The Revised Merger Review Timetable: More Flexibility But Also More Time to Completion

To provide both the parties and the Commission with enough time to develop and assess additional evidence, conduct market tests, prove their case, or discuss proposed undertakings, Article 10 of the New ECMR provides for longer periods for both Phase I and II reviews. Phase I is now 25 working days long instead of one month, and Phase II is 90 working days long rather than four months. Phase I can now be further extended to 35 working days if the parties offer remedies or a Member State requests that the case be referred in whole or in part. Phase II can now be further extended to 105 working days if the parties have offered commitments at least 55 working days after the beginning of the in-depth review. Additionally, where requested by the parties or with their consent, 20 working days can be added to a Phase II review. This will generally occur when proposed remedies require more time to be market tested or when the case is particularly complex and thus requires the collection and analysis of an unusual amount of information.

In addition, the DG-Comp Best Practices have introduced the possibility for numerous “state-of-play” meetings with the Commission as well as triangular meetings, during the whole review process (both in Phase I and II). Yet again, this is intended – among other things – to streamline and simplify the process by enabling the Commission to determine early on which of the issues that have come to its attention do require a competitive assessment and which ones, on the contrary, can be quickly disposed.

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51 See Article 4 (1), second paragraph, of New ECMR.
52 See ICN Recommended Practices, Section III.A.
53 Again, this is consistent with the ICN Recommended Practices (see Section IV – the Review Period). Triangular meetings see the participation of the transaction parties, DG Comp officials and third parties (typically complainants), such as customers, suppliers, competitors, members of the administration or management organs of the companies concerned or recognized workers’ representatives of those companies.
6. Benefits of These Procedural Changes

The benefits which ensue from these procedural reforms are notable in that the parties are no longer as pressed for time as in the past nor subject to an inflexible time frame when notifying their transaction. Moreover, and more importantly for complex transatlantic cases, there is no longer the forced dichotomy in timing between the US and the EU merger review processes which should facilitate more efficient and effective coordination of filings. Such coordination may not only benefit the parties’ dealings with regulators, but also cooperation as between regulators in different jurisdictions. Indeed, in the context of the bilateral cooperation between the EU and the US in the merger area, the EU-US Merger Working Group include in its EU-US Best Practices encouraging parties to contact the agencies as soon as feasible after the transaction is announced to discuss coordination on timing.54

Greater flexibility on timing also complements nicely the opportunity – which already exists – of conducting informal, but detailed discussions with the Commission prior to the submission of a notification. While diluting the value or having a precise timetable for review, this flexibility offers two additional benefits: (i) it reduces the risk of returned filings for incompleteness – whether the result of hasty work to meet a deadline or a desire to gain timing relief by suspending the timetable – and thus ensures the clock is ticking as of day one, and (ii) it allows for critical yet time-consuming threshold issues like market definition or the scope of overlaps to be advanced and/or defined during the informal discussion phase, thus either reducing or illucidating differences or discrepancies, which in turn should save time.

B. The New Substantive Test: Significantly Impeding Effective Competition (the SIEC Test)

Article 2(2) of the New ECMR provides for a new substantive test:

“A concentration which would significantly impede effective competition, in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market” (emphasis added).

Article 2(2) of the Old ECMR provided:

“A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market” (emphasis added).

54 “Cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel, recognizing there are differences between US and EU merger review processes. […] In appropriate cases, the reviewing agencies should offer the merging parties an opportunity to confer with the relevant EU and US staffs jointly to discuss timing issues. […] At this conference, the agencies and parties should be prepared to discuss ways to synchronize the timing of the US and EU investigations, to the extent possible under EU and US law respectively. Topics addressed may include the appropriate times to file in the US and EU …” EU-US Best Practices, supra n. 11, at paras. 4-5 (emphasis added).
The reversal in threshold emphasis opens up the test widely to accommodate theories of economic harm that arguably fall in gaps that were not covered by the old test, while at the same time preserving the value of the Commission’s past practice and the Community Courts’ case law.\textsuperscript{55} According to the Commission, the new test allows it to review the effects of concentrations in oligopolistic market structures also where coordination, or “collective dominance” is not likely (“unilateral effects” or “non-coordinated effects” theory).\textsuperscript{56} It is difficult to tell whether the change in the substantive test will likely result in more mergers being challenged, as there is no evidence to suggest that anticompetitive transactions may have in the past slipped past the Commission. Arguably, though, in the past the Commission has shown its willingness to pursue “unusual” anticompetitive transactions by relying on more established theories (i.e., collective dominance) instead of reviewing them under the unilateral effects theory when this would have been more appropriate from an economic point of view (e.g., Airtours).

In conjunction with the adoption of the new substantive test, the EC Horizontal Merger Guidelines, released with the New ECMR, include two apparently new developments. First, Section VII of the EC Horizontal Merger Guidelines introduces a more structured and transparent approach to considering efficiencies as a counterbalance to anticompetitive effects.\textsuperscript{57} The Commission indicates that it is now prepared to take into account efficiencies provided that the efficiencies benefit consumers and are merger-specific and verifiable.\textsuperscript{58}

This is a welcome development, since efficiencies analysis should play an important role in sound economics-based merger review.\textsuperscript{59} One of the the principal societal benefits arising from mergers is their potential to generate resource savings through

\textsuperscript{55} See Recital 26 of the New ECMR.
\textsuperscript{56} See Recital 25 of the New ECMR and the EC Horizontal Merger Guidelines (paras. 24 to 38).
\textsuperscript{57} See also Recital 29 of the New ECMR, that has no equivalent language in the Old ECMR (even though both regulations contain in their Articles 2(1)(b) the same language that now forms the basis for all the efficiencies analysis: “[c]oncentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into account […] the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition” (emphasis added).
\textsuperscript{58} See Section VII, EC Horizontal Merger Guidelines. Even though the new framework improves the transparency of the Commission approach to a debated theme in borderline mergers, where clearance may depend on efficiencies, the standard of proof incumbent on the notifying parties for the consideration of efficiencies is somehow more precise under the Commission Guidelines on the application of Article 81(3) of the Treaty (OJ 2004, C 101, p. 97) (“Article 81(3) Guidelines”). Under the Article 81(3) Guidelines the requirement for proving efficiencies comprises a list of exactly what needs to be substantiated: (a) the nature of the claimed efficiencies; (b) the link between the agreement and the efficiencies; (c) the likelihood and magnitude of each claimed efficiency; and (d) how and when each claimed efficiency would be achieved, whereas the EC Horizontal Merger Guidelines are less specific. One is left to wonder why this is the case, as there is no apparent reason to differentiate between merger-specific efficiencies (see page 40 of the Green Paper) and Article 81(3) efficiencies.
\textsuperscript{59} However, the role that efficiencies will play in the EU should not be overstated. In a recent interview, Dr. Röller, the EU Chief Economist, suggested that the incorporation of efficiencies in the merger control analysis has been done in a “very conservative way” and that only marginal costs efficiencies will play an important role. See “The Role of Economics in EC Antitrust, Interview with Lars-Hendrink Röller”, ABA’s Antitrust, vol. 18, no. 3, at 78 (Summer 2004).
efficiencies. At least until 2001 the Commission had adopted, at best, an ambiguous attitude as regards efficiencies. Indeed, at least until 1995, the Commission suggested that there is no scope for applying an efficiencies defense under the EC Merger Regulation:

“There is no real legal possibility of justifying an efficiency defense under the Merger Regulation. Efficiencies are assumed for all mergers up to the limit of dominance – the “concentration privilege.” Any efficiency issues are considered in the overall assessment to determine whether dominance has been created or strengthened and not to justify or mitigate that dominance in order to clear a concentration which would otherwise be prohibited”.

Similarly, in its decisions up to the second half of the ‘90s, while the Commission has in a number of cases considered the Old ECMR’s Article 2(1)(b) “development of technical and economic progress” provision, it has never found that such developments would counteract the creation or strengthening of a dominant position. The Commission had always rejected notifying parties’ attempts to rely on efficiencies arguments to counterbalance anticompetitive effects of proposed mergers. In fact, in the past the Commission had more usually viewed efficiencies as means by which the merging entities would strengthen their dominant position. Only since 2001 has the Commission begun hinting that it endorses and applies the notion of an efficiency defense:

“We distinguish clearly between – on the one hand – mergers leading to price reductions that are the result of strategic behavior on the part of a dominant firm, the purpose of which is to eliminate or marginalize competitors with a view to exploiting consumers in the medium term, and – on the other – mergers which will objectively lead to significant and durable efficiency gains that are likely to be passed on to the consumer.”

Second, the Commission has now embraced for the first time in a quasi-legislative instrument or “soft law” – the EC Horizontal Merger Guidelines – the consumer welfare-price effects standard and it did so in a forceful way that clearly shows commitment: “Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms.”

C. Internal Reforms

The reorganization of DG-Comp. One of the consequences of the reorganization of antitrust and merger staff along sectoral lines has been the dissolution of the Merger Task Force (MTF). As a result, cases are now allocated along sector lines and there is a greater chance that a case is handled by staff with prior understanding and knowledge of that particular sector. Further, it has brought about a better focus on market developments.

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62 See EC Horizontal Merger Guidelines, at para. 8.
The approach to case review has been a blending of both merger and antitrust styles. Ex-MTF case-team members are familiar with notification procedure, the amount of information that it provided upfront, and are used to dealing with the time constraints; whereas, the antitrust case-team members are more familiar with having to bring a case against the parties and are more practiced at identifying and producing credible evidence to substantiate theories of harm. This has already given rise to some interesting results. First, case methodology has become more rigorous and, second, information gleaned as a result of a merger review is now more readily available for use in non-merger antitrust actions.

However, to date, this reorganization has not been only favorable. One of the limitations of this reform is the fact that there is no longer a dedicated number of merger review staff, thus in practice DG-Comp now finds it difficult to staff adequately both merger and antitrust cases, considering on the one hand the tight procedural deadlines of merger cases and the current policy to actively pursue cartel cases.

The other three internal reforms, the establishment of a peer review mechanism for important cases, the new position of Chief Economist and a strengthened Hearing Officer, seem to be functioning well and appear to improve the quality of both the proceedings leading to and the analysis contained in merger decisions.

Peer review panel. An ad-hoc peer review mechanism already had been slowly creeping into the way the MTF worked. On major cases, the MTF used to hold informal “devil’s advocate panels” that staff members could attend. These panels served a dual purpose, as a means of information dissemination and learning, as well as a means of challenging the case team’s perception and analysis of the case. A pre-reform example of the use of this early form of devil’s advocate panel is in the Carnival/P&O Princess case. In this case, an embryonic peer review session, which was more widely attended than usual and ran for longer than usual, reportedly resulted in the case team changing its approach to the case.

The difference under the reforms is that the peer review mechanism now has been institutionalized with a dedicated team fashioned on an ad-hoc basis depending on the type of case and the resources needed. Such a team is clearly necessary in the review process. One of the value-added benefits for the parties is that in bringing a fresh mind and set of eyes to the case a Commission decision is judged for its validity and strength of argument before having to defend it before the CFI (not by coincidence, it is not uncommon to have among the members of the “devil’s advocate” panel Commission officials that have previously worked as senior clerks, or référendaires, for a judge of either of the Community Courts). In addition, to assist in the process of peer review as well as other issues, there is a new “horizontal” unit that coordinates issues and offers strategic support in merger cases.

The Chief Economist. The introduction of a Chief Economist was long overdue. The Commission has as members of staff several highly qualified economists but an office of dedicated economists, all of whom have PhDs, is an additional layer of improved case management. The Chief Economist’s Office boasts 10 members and Lars-Hendrik

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63 See Decision of July 24, 2002, in Case No COMP/M. 2706, Carnival Corporation/P&O Princess.

64 The introduction of peer review panels, though, falls short of proposals intended to divorce the initial investigative team from the group of officials assigned to carry out in-depth investigations.
Röller, the first incumbent Chief Economist, has signaled his wish to ensure that across the board (be it merger, antitrust or State aid) Commission decisions be economically sound and benefit from having one of the Chief Economist team as a member of the case team.

A good example of the impact of internal reforms is the recent Sony/BMG clearance decision,\(^{65}\) where it is reported that the “devil’s advocate” team and the Chief Economist were very much involved in substantially modifying the case team’s initial assessment of the case.\(^{66}\) Indeed, ultimately the Commission determined that the evidence and sound economic reasoning did not substantiate the concern that tacit coordination was or could take place on the market, and decided to unconditionally clear the transaction.

The Hearing Officer. As the internal reforms were being adopted and the Old ECMR was under review, the Commission felt it necessary, in 2001, to reinforce the role of the Hearing Officer. The effort was directed at improving the accountability of the Commission’s decision-making process in mergers and antitrust proceedings. As guardian of the parties’ procedural rights, impartiality and independence were fundamental, thus from 2001 onwards the Hearing Officer became only accountable to the office of the Commissioner responsible for Competition Policy (and no longer attached to the office of the Director General). Moreover, the Hearing Officer’s Office has been given greater resources in terms of staff members, an element that has certainly contributed to its increased relevance.

IV. Points of Convergence with Merger Control in the United States

A. Embrace of Industrial Organization Economics Tools and Analysis

The Commission’s establishment of a Chief Economist’s Office and its expressed commitment to a consumer welfare standard that focuses on the likelihood of increased market power as measured by price and output effects represent a potentially substantial point of convergence with the United States merger control regime. In its EC Horizontal Merger Guidelines and elsewhere, the Commission has gone on record with an unequivocal embrace of a consumer welfare price effects standard, drawing a point of departure with commentators that have argued the Commission has applied what might be considered a competitor welfare standard employed in the context of Article 82 EC challenges and in merger cases such as GE/Honeywell.\(^{67}\)

The US authorities have for years relied heavily on their own internal economist resources, including extensive econometrics capabilities, in their analysis of

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\(^{65}\) Decision of July 19, 2004, in Case No COMP/M.3333, Sony/BMG (not yet published).

\(^{66}\) In this case the parties had between them six economists and produced over 100,000 pages of economic data.

\(^{67}\) See, e.g., Commission Decision 2002/405/EC of June 20, 2001, in Case COMP/E-2/36.041/PO, Michelin II (OJ 2002, L 143, p. 1), upheld (for several observers, unexpectedly) by the CFI in Case T-203/01, Michelin v Commission, ruling of September 30, 2003, not yet published in the European Court Reporter. Several commentators have observed that the emphasis placed on the protection of competitors by the Commission, in contrast to the US emphasis on consumer welfare, contributes to a divergence in outcomes in the assessment of single firm conduct (or, in mergers, likely single firm conduct) between authorities in the US and EU, notwithstanding how closely the law on this issue in each jurisdiction appear to parallel on another. See, e.g., Fox, Eleanor M., Antitrust and Regulatory Federalism: Races Up, Down, and Sideways, 75 N.Y.U.L. Rev. 1781, at 1785 (Dec. 2000); Spinks, S.O., Exclusive Dealing, Discrimination, and Discounts Under EC Competition Law, 67 Antitrust L.J. 641, at 642 (2000).
mergers. Observed practice in recent cases since the creation of the Chief Economist’s Office reflects that an economist belonging to this office is being assigned to the case team in virtually every important case, thus adding useful skills to those of the economists belonging to DG-Comp’s regular staff. These enhancements within the Commission should help minimize the failings identified by the CFI in Airtours, Schneider and Tetra Laval. In short, they can and should be a powerful check within the Commission review process that will enhance the rigor – and thus the creditability – of its analysis. Moreover, the breadth of the new substantive test, and the flexibility it affords the Commission in openly pursuing novel theories of competitive harm, put an even larger premium than before on checks and balances.

B. Adoption of SIEC test

Clearly the most obvious point of convergence between the EU and US merger control regimes in the New ECMR is the SIEC test. Legal tests, as applied, are not always what they seem when viewed as words on paper, but “significant impediment to effective competition” looks like the identical twin sister to “substantially to lessen competition” (or “SLC”) standard of Section 7 of The Clayton Act. As discussed above, this was clearly by design so as to close the gap in theories of competitive harm perceived to be afforded by the prior dominance-based test and the SLC test.

An argument can be made that the adoption of the SIEC test alone is a great deal less significant as a point of convergence than the more explicit embrace of the consumer welfare-price effects standard implied in the EC Horizontal Merger Guidelines. While the Old ECMR’s “creation or strengthening of a dominant position” requirement on its face at least would appear to narrow the theories of competitive harm that might otherwise be available to the Commission under a SIEC or SLC test, the Commission had a pretty good run – about thirteen years – at interpreting the dominance standard broadly so as to capture most theories of competitive harm considered as credible at one point or another under the SLC test by US courts.

Mental and semantic gymnastics aside, the dominance-based test did not deter use of coordinated effects theories under the rubric of “collective dominance.”68 Nor did the dominance test constrain the Commission in its pursuit of conglomerate effects or portfolio power.69 The dominance test on its face surely has limits as compared to an SLC test, but what those limits are has never been well-defined.


Happily, we will never find out, even though one can reasonably suspect that any attempt by the Commission to push the dominance test to cover non-leading firm unilateral effects cases would have been very closely scrutinized by the CFI. Indeed, under the Old ECMR a critical interest has always been providing legal certainty and only by closing any perceived gap with a new substantive test could the EU spare itself the trouble of having to have another *Airtours* type of ruling to determine the boundaries of the old dominance test.

The new test and the guidelines issued with it match closely the analytical framework for assessing mergers in the United States. At a minimum, this convergence should mean that regulators and practitioners alike will be speaking the same language of competitive effects analysis on both sides of the Atlantic. How this will work in practice remains to be seen.70

C. Procedural Convergence Spells Timing Relief and Fuller Factual Development

For practitioners who must deal with notification of antitrust-sensitive transactions on both sides of the Atlantic, one of the biggest headaches has been dealing with critical differences in procedure and timing of notification and review in the US and EU merger control processes. With respect to the notification itself, the up-front information requirements to complete a filing under both the Old and the New ECMR are far more burdensome and substantive than those in a US filing, resulting in European practitioners needing more lead time to prepare an effective presentation of the transaction. Moreover, notification under the Old ECMR had to be made within seven days of a binding agreement. This trigger was somewhat pointless given that the parties could not in any event close a notifiable transaction under the ECMR. A similar suspension rule governs in the United States but there is no requirement that a filing must be made within a certain time, and additionally, filings may be made on a nonbinding letter of intent or memorandum of understanding as opposed to waiting for a binding agreement to be negotiated.

While the Form CO itself has not substantially changed under New ECMR, undertakings concerned now have far more flexibility and control over when they will submit a notification to the Commission. Now, as in the United States, filings can be made on a letter of intent and there is no deadline within which a filing need be made (but for the need to file before consummating the proposed transaction, and then complying with the stand-still obligation). This convergence is important as it alleviates some unnecessary stressors on filing parties and allows more time to prepare a careful and thoughtful presentation of market facts in those circumstances where one is necessary, *e.g.*, where there is heightened risk of scrutiny.

Another important release valve on timing presented in the New ECMR are the enhanced prospects for extensions of both Phase I and Phase II described above. By operation the US process puts more control on the length of regulatory review in the hands of the filing parties. There is no deadline under which US authorities must complete their review and a variety of other factors allow the filing parties substantial lee-way in controlling

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70 Also because, when comparing the application of US and EU merger control rules to date, “there seems to have been much less convergence on the assessment of competitive effects” (F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, Investment Strategy and Competition Policy: Help or Hindrance?, The Royal Institute of International Affairs, June 4, 2004, London).
the timing of review, including their obligations to respond to exhaustive document requests and interrogatories in “Second Requests” and the freedom to negotiate standstill agreements with respect to closing to avoid forcing regulatory action that limits the prospects of meaningful discussions about concerns and potential ways to address them through undertakings. There has been a perception that the tight deadlines the Commission operates under in the ECMR (especially the old one), particularly in difficult cases, may prevent the development of a more complete factual record. On the other hand, one of the advantages of the ECMR has always been the certainty of knowing that the deadlines ensure an outcome within a reasonable period of time. The changes to the ECMR relating to timing attempt to strike a balance between these two concerns and appear to provide a greater degree of flexibility for the cases that need it most.

D. Implementation of Peer Review Panels and Other Internal Changes

Citing this development as a point of convergence may seem, at least in the eyes of most US practitioners, either trivial or a gross exaggeration, but anything that bridges the most substantial point of procedural divergence between US and EU merger control regimes (and in fact between US and a great majority of merger control regimes worldwide) is in our view significant. That divergence is the fact that in the United States, with respect to merger control matters, antitrust authorities must seek an order from a court to stop the parties from completing a merger or acquisition, but in the EU the Commission has the authority to (clear or) block a transaction in the first instance. A Commission decision is reviewable by the CFI but as a practical matter such review cannot be completed within a timeframe that is tolerable to proposed merger parties.\(^71\) The fact that both the Tetra Laval/Sidel and Schneider/Legrand transactions have been consummated cannot suggest that the current system of judicial review of Commission decisions, even conducted under the “fast-track” procedure in less than one year, is a sufficient remedy for the merging parties.\(^72\) The uncommon features of these transactions forced the parties to a closing without waiting for the Commission decision.\(^72\) And only the Tetra Laval/Sidel transaction survived the prohibition decision and withstood long enough the uncertainty inherent in all appeal proceedings before the CFI. It has thus become the first – and only – concentration that has been successfully consummated despite a Commission prohibition. Moreover, should the

\(^71\) The Commission has recognized this problem. Commissioner Monti, when announcing the merger reform package on December 11, 2002, stated that “the Commission will continue to push for speedy review by the Courts of appeals in merger cases. The use by the Court of First Instance of a fast-track procedure in recent cases already represents considerable progress, but the goal should be to ensure that judicial review takes place in a period of time that makes sense for all commercial transactions.” (Commission Press Release No IP/02/1856 of December 11, 2002; emphasis added). To this end, the Commission expressed the hope that appeals in merger cases might be further accelerated and explored the idea of a specialized chamber for competition matters within the Community Courts, as well as other measures intended to ensure a speedier review of Commission decisions—. Id.

\(^72\) Schneider and Tetra Laval could consummate the proposed transactions before the end of the merger control proceedings – and thus long before knowing the outcome of both these proceedings and the ensuing appeals before the CFI – in part because forced to proceed as they did by the then-applicable French stock exchange rules and as a result of the exception to the standstill obligation provided for in Article 7(3) Old ECMR (equivalent to Article 7(2) of the New ECMR), allowing for the implementation of public bids which have been notified to the Commission, provided that the purchaser does not exercise the voting rights attached to the securities concerned.
Commission lose before the CFI, the merging parties always face the prospect of appellate proceedings before the ECJ.73

More generally, the “fast-track” procedure before the CFI is not an adequate fix to the judicial review problem because, to qualify for such a procedure, the parties challenging a Commission decision are limited in the number and scope of the arguments they can raise.74 This of course makes sense when one considers the nature of the procedure and the CFI’s institutional setting, making it challenging for the CFI to review in a few months only a complex case where the appeal runs for hundreds of pages to address numerous grounds for annulment. The need to “streamline” the subject matter of fast-track cases derives from the objectively limited resources of the CFI, especially when a few such cases are running in parallel (as it happened in 2002 with Tetra Laval and Schneider). Attempts to limit the “size” of fast-track cases are also justified with the need to ensure that exceedingly long delays are not imposed on all other cases – the “normal” cases – as a result of the priority given to the fast-track cases. All of these elements mean that there is only so much capacity available for “fast track” procedures, and even then, they carry limitations that effectively deny full consideration of all issues that likely deserve attention.

In effect, the Commission wears the proverbial hat of both prosecutor and judge and does not face the “hammer” of disinterested third party adjudication, at least until it is usually too late to keep the deal alive.75 As with any matter where the stakes are high (both philosophically – we are after all talking about intervention in a process that by definition should operate free from intervention – and financially) and the issues complex, getting to the right answer turns on the adequacy of the means for discovering and testing all relevant facts, and disciplined rigorous analysis of those facts.

The troika of losses before the CFI in 2002 raised the profile of this difference in approach in deciding merger cases. The CFI essentially told the Commission it is not being rigorous enough in its development and consideration of relevant market facts. It did not carry its burden of proof.

Might these outcomes have been avoided if the Commission were put to its proof before blocking the transaction? Hard to tell, but the move to implement peer review panels and create more systematic checks and balances internally so as to challenge the facts and conviction of those who see a viable challenge to a deal is no doubt an acknowledgement that merger control benefits tremendously from some form of a priori contested proceedings

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73 Note that as of this conference, appeal proceedings before the ECJ in the Commission v Tetra Laval case have now entered into their 21st month, despite the fact that the ECJ has agreed to give them priority, in a quasi fast-track procedure (see Article 55(2) of the Rules of Procedure, whereas the fast-track procedure before the ECJ is governed by Article 62bis of the Rules of Procedure).

74 See “Practice Directions” of the Court of Justice and the Court of First Instance, Section VI, with reference to the “expedited procedure” under Article 76a (now Article 76bis) of the CFI’s Rules of Procedure (OJ 2002, L 87, p. 48).

75 In the wake of the three losses suffered before the CFI in 2002, the perception that the Commission acts as both prosecutor and judge, at least within DG-Comp, is arguably weakened. However, there is no escaping the reality that it is the Commission that decides in the first instance, and that parties have no choice but to suffer a prohibition and await review at the CFI before getting to this “hammer.” Likely time to a decision and the noted limits of EU judicial review, even if on a “fast-track,” still make the costs of awaiting judicial review very expensive for transaction parties.
of fact and analysis (bearing in mind, though, that such proceedings are internal and thus not capable of ensuring the level of control that an independent party could have). An acknowledgement alone does not address at all the degree of testing of fact and analysis that should be required, but it is a move in the right direction.

V. Prospects for Positive Change

Profound change or more of the same? The answer of course lies in the course of future events and how the reforms to the ECMR play out in practice. In the wake of repeated misgivings voiced by the CFI on the Commission’s rigor in developing and analyzing relevant market facts, the hope is that these reforms are sufficient to provide profound change for the better.

The apparent embrace of empirical analysis of price effects and industrial organization economics may offer the greatest prospects for profound change. First, it commits the Commission to a more disciplined and focused analysis that emphasizes empirical analysis of market information. Greater use of econometrics and other accepted methods of calculating and testing future price effects should orient merger control towards a more intense search for, and reliance upon, objective data points. Second, this enhanced focus on a consumer welfare standard should mean that the language of competitive effects analysis utilized in the two most influential merger control regimes in the world today becomes the same (or at least closer to the same). That does not mean identical results, but it should improve the odds of similar results in similar cases, particularly in transactions like GE/Honeywell that involve global relevant product markets. Speaking the same “language” of competitive effect at a minimum enhances transparency and understanding, and should also increase the chances that the evidence that matters most is either produced or discovered early enough in the merger assessment process. For transaction parties that have to navigate different merger control processes this convergence should be regarded as a welcome relief. Finally, bear in mind that while merger control can benefit from more careful and empirical economic analysis, economic analysis itself also benefits from repetition and the continual flow of opportunities that merger control provides for the practiced application of sound empirical analysis to real world data. In short, each can feed off, and improve, the other.

In the same vein, the ECMR modifications relating to timing elements described above should also be materially positive. Most practitioners in Brussels, and in particular those that increasingly captain deals on both sides of the Atlantic, likely would agree that the rigid adherence to deadlines, both for filing a notification and for the review process itself, substantially limited opportunities for fuller development and analysis of relevant market facts in antitrust-sensitive transactions. In reality, complex cases require substantial work on all sides. Transaction parties know that the Commission and the US antitrust authorities are going to thoroughly investigate these cases and will attempt to undertake an exacting analysis. So while transaction parties do not carry any formal burden of proof at the outset, in antitrust-sensitive cases they are well-advised to prepare for the merger review as if they do on critical issues such as market definition, coordinated effects risks, or the elimination of any competitive constraints that may result from the proposed transaction. Such an approach requires preparation and time. So in difficult cases, not having to file within a prescribed time period allows transaction parties more time to do a more effective job of presenting their case. It is a subtle point but convergence on this process element actually gives the parties greater incentive and ability to do their part in
ensuring fuller development of relevant market information before the review process actually begins. On the flip side, in cases that do raise no antitrust risks, the ability to file “early” on a nonbonding letter of intent helps transaction parties at least manage better, if not avoid altogether, delay caused by suspension rules.

The increased flexibility in extending the Phase II review deadlines under the New ECMR are also a move in the right direction, albeit not parity as the US does not use set deadlines but rather relies on production obligations under a Second Request and the careful balance of litigation risks each side carries to dictate the timing of the merger control review and negotiation process. Nevertheless, the recognition of the benefits of more time and flexibility in the New ECMR offers some degree of convergence. Again, the flexibility to take more time and allow fuller market fact development and analysis before taking a decision in the hard cases should be helpful, but how helpful will depend on whether changes to decisionmaking processes within the Commission are material enough to make these changes in the timing of the review process useful.

The prospects for positive change, or even profound change, of the remaining two areas of convergence with US merger control described above – the SIEC test and the implementation of internal organization and decision-making changes – are far more difficult to predict than the embrace of empirical economic analysis and procedural changes discussed thus far in this section.

The adoption of the SIEC test is most challenging in this respect. On the one hand, there is no question that the formulation of words that make up the SIEC test is far more transparent than the “creation or strengthening of a dominant position” standard of the prior test if the objective is to capture and regulate all anticompetitive mergers. For years now the prior test has been used precisely for this purpose even though the words alone did not, on their face, appear to cover so much space. As discussed above, the concept of “collective dominance” and use of conglomerate and portfolio effects theories are excellent examples of the agility of the previous test. On the other hand, if the old test, however short it was on transparency, managed to do the job, what is behind this new test and what does it mean going forward? There are several points of tension that raise questions about the prospects for positive change with respect to what otherwise appears to be an obvious point of convergence.

First, a primary driver behind the new test is the apparent desire to more readily fill the perceived “gap” between the prior dominance-based test and the impediment to effective competition standard, and thus cover “non-collusive oligopoly” or non-dominance-derived unilateral effects theories of competitive harm. But what exactly does that mean for EU merger control and can we expect the European experience with unilateral effects theory to track that of the United States, which thus far cannot be said to have veered far from the traditional framework of leading firm dominance in a properly defined relevant market?

76 “The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market.” (Recital 25 of the New ECMR; emphasis added).
Unilateral effects theories come in several stripes. The leading US treatise cites four, the first two of which are captured by the dominance test, while the later two arguably are not:

“(a) creating a monopoly or dominant firms;
(b) perpetuating a monopoly or dominant firm by eliminating a nascent rival;
(c) giving one firm stronger control of its “niche” in a product-differentiated market; or
(d) strengthening a firm’s power to make noncompetitive bids that buyers will be unable to refuse.”77

As reflected best in subpart (c) above, unilateral effects theory at its most extreme centers less on the traditional framework of defining the relevant market and determining if there is single firm dominance, but more on assessing the closeness of competitors and the competitive constraints the merging firms place on one another. This variant of unilateral effects theory relies heavily on econometric analysis and has most often been applied in differentiated consumer goods markets where consumers representing a substantial share of the relevant market regard the merging firms as sufficiently distinct from the products offered by other suppliers yet close enough to one another so as to regard the products of the merging firms as their first and second choices.78

The New ECMR and accompanying EC Horizontal Merger Guidelines make clear that the EU wants to pursue this type of unilateral effects theory but, unlike the guidelines used in the United States, they fall short on defining precise boundaries to its use. Indeed, the US experience with unilateral effects theory suggests that the circumstances where it can be relied upon to prohibit a merger in the absence of leading firm dominance are limited. Only two mergers can be said to have been enjoined by courts in the United States on the basis of unilateral effects theory and in both cases the courts found that the merger would produce leading and dominant firms.79 Perhaps looking at judicial decisions misses the point. One of the weaknesses of the US system is that a large portion, indeed a substantial majority, of challenged mergers are resolved through negotiation of remedies where no reasoned decision is published so it is difficult to discern with precision the influence of unilateral effects theory.80 Most US practitioners likely would agree, however,

80 The EC system experiences a high settlement rate too, raising the question whether the levers of delay or uncertainty against transaction parties in the US system effectively gives US authorities something close to the same prohibition power as the Commission has in the first instance. This is a fair observation in those cases where the remedy is obvious, does not destroy the economics or strategic rationale of the transaction, and is readily palatable to the parties; probably far less so, however, where the remedy is less clear and more painful.
that empirical analysis of unilateral effects is playing an increasingly more important role at
the reviewing agencies in the United States. Nevertheless, the calculus of what a court will
be prepared to accept in terms of theory is absolutely critical in the US process since
prohibition will not happen without a court decision.

Indeed, the recent challenge by the United States of Oracle’s proposed
acquisition of PeopleSoft relies heavily on unilateral effects theory – arguably more than any
other litigated merger case in the United States. In that case, the Antitrust Division has
asserted narrow relevant product markets for financial management software and human
resource management software that serve “high function” needs of large, complex,
multinational organizations, excluding from its definition the many financial management
and human resource management software offerings of all but three software providers.
Because of the differentiated nature of the products and unique characteristics of the alleged
market, the case for all intents and purposes was litigated strictly as a unilateral effects case.
More importantly, because SAP, the third participant in the alleged relevant product market,
will remain the leading firm globally post-merger, the Antitrust Division’s challenge includes
unilateral effects theory in its most extreme form. As of this writing, the case has been fully
submitted and a decision is expected soon.

The US Horizontal Merger Guidelines and US experience in applying
unilateral effects theory in contexts outside of traditional leading firm dominance suggests
that this variant of unilateral effects analysis is limited to relatively narrow circumstances.
The New ECMR and the accompanying EC Horizontal Merger Guidelines, however, appear
to suggest far broader application. The lack of guidance as to the boundaries the
Commission will apply the tremendous responsibility the Commission bears to not only
investigate but also decide merger cases, and the difficulties it has had in the recent past
meeting its burden of proof, suggest that the added flexibility of the new rule may only serve
to increase the risk of prohibiting deals that are on balance competitively neutral or even pro-
competitive.

Second, there arguably is some tension with adopting a broad test for the
purpose of capturing the full panoply of competition problems that arise in the merger
context, yet endorsing and preserving in its entirety all legal precedent to date under the
dominance standard. It would appear that the SIEC test provides the Commission with a
virtually open-ended arsenal of economic theories that it can use to prohibit a merger.
However, the SIEC test should be read in conjunction with the last sentence of Recital 25 of
the New ECMR, according to which “[t]he notion of ‘significant impediment to effective
competition’ in Article 2(2) and (3) should be interpreted as extending, beyond the concept of
dominance, only to the anticompetitive effects of a concentration resulting from the non-

81 For instance, the Commission’s approach to non-coordinated effects (as unilateral effects is termed in the EC
Horizontal Merger Guidelines) lends itself to any situation where important competition constraints have been
removed, thus not just situations of market dominance. Obviously, the larger the combined parties’ market
share, the more important the value of the competition constraints that have been removed. In addition, the
structure of the market, i.e., oligopoly or alternative sources of supply, plays its part in any assessment of
uncoordinated effects (EC Horizontal Merger Guidelines, paras. 24 to 38).
coordinated behaviour of undertakings which would not have a dominant position on the market concerned” (emphasis added).  

Recital 25 should assuage the fear that members of DG-Comp staff use the SIEC test as “license to kill” under any possible economic theory of harm. Moreover, whatever new theory the Commission wishes to apply to a given case will have to be complemented by a thorough investigation, a proper assessment of the facts and a convincing reasoning in the decision that is ultimately adopted, all elements that the CFI will scrutinize using the standard that the ECJ will likely set forth in the forthcoming Tetra Laval ruling.

In addition to fears related to the “horizontal effects” of the new substantive test resulting from a wider weaponry in the hands of the Commission, some commentators have also expressed the concern that the Commission be tempted to rely on the new test to block a deal where the level of anticompetitive effects resulting from it is lower than that generally required to block a merger under a pure dominance test (the “vertical effects” risk). In this respect, it has been argued that under the new test the Commission is entitled to block a merger only when it can show that on the relevant market(s) it would have an impact analogous to that inherent in the notion of “creation or strengthening of a dominant position”.

Finally, the New ECMR takes the laudable step of incorporating in its text the assessment of efficiencies in merger control, almost as if on par with the assessment of anticompetitive effects, yet in its guidelines it appears to suggest severe limitations as to the circumstances wherein efficiencies will be considered. Indeed, the Commission’s treatment of efficiencies in the EC Horizontal Merger Guidelines appears to closely parallel that of the United States in its guidelines. In effect, it appears that what the New ECMR gives on efficiencies the guidelines take away. This is unfortunate. Given the Commission’s dual role as both prosecutor and judge in merger control matters, it does not seem fair that the Commission takes the same rigid stance as US authorities on this issue where the negotiation dynamics in the merger control setting – one informed by risk of loss at trial for both sides -- is completely different.

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82 This sentence was added at the request of a Member State as a condition for its positive vote during the very last phase of the negotiations that ultimately led to the unanimous approval within the Council of the SIEC test as it currently stands.

83 M. Siragusa, “La riforma del sistema comunitario di controllo delle concentrazioni”, Antitrust between EC law and national law, VI UAE Conference, May 13-14, 2004, Treviso, where reference is made to the “vertical effects” that could be read into the new test, where “dominance” is no longer at the core of the substantive test, but simply represents one example, albeit the most important one, of the situations that lead to a significant impediment of effective competition.

84 Id., where the author notes that the centrality of the notion of dominance is confirmed by Recital 26 of the New ECMR, according to which “[a] significant impediment to effective competition generally results from the creation or strengthening of a dominant position”, and that the Council’s intention not extend “vertically” but only “horizontally” the Commission’s power of intervention is confirmed in Recital 25 of the New ECMR, where the Council specified that “[t]he notion of ‘significant impediment to effective competition’ in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned”.

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As with the SIEC test, the prospects for positive change in the implementation of peer review panels and other organizational changes are difficult to gauge. Based on the results achieved so far with the introduction of the peer review panel and the Chief Economist, the prospects look quite good. However, the benefits resulting from these reforms face the risk of being diluted by a number of factors, some of which we have discussed above. They include the loss of cohesiveness and “esprit de corps” of the MTF, now dismantled; the difficulties attached to not having anymore dedicated and experienced staff to review merger cases, which unlike antitrust cases are subject to strict procedural deadlines; the passage of time, that could dilute in the memory of DG-Comp staff the effects of the *annus horribilis*; the arrival of new inexperienced staff, especially after the enlargement of May 1, 2004 and the arrival of new leadership which may not be as ardent as Commissioner Monti in ensuring that internal reforms are successfully implemented.

On balance, these sorely-needed reforms should produce positive change. How much is far more difficult to tell. What is certain is that increasingly high levels of industrial concentration will necessitate greater sophistication in the economic analysis contained in the “reasoned” decisions of the Commission, as a classic ground for judicial challenge is “lack of reasoning.” Under these conditions, DG-Comp staff will be hard pressed to satisfy the standards established in *Airtours, Schneider* and (if confirmed by the ECJ) *Tetra Laval*.

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85 And further dilution cannot be excluded, should the Commission end up winning in the *Tetra Laval* appeal still pending before the ECJ – despite the conclusions reached by AG Tizzano in his Opinion – as such an outcome would probably be understood as showing that DG-Comp’s overall past merger control performance was not as poor as one would have otherwise concluded.