ON MAY 1, 2004, THE EUROPEAN Commission (EC) took bold steps towards debottlenecking private and public antitrust enforcement and better orienting its enforcement regime to advance norms that help protect the competitive process. One of those bold steps is the revised EC Merger Control Regulation (ECMR). Since its adoption in 1989, U.S. and other practitioners have come to know intimately the previous ECMR—today only the rare transaction reportable under Hart-Scott-Rodino does not also require some assessment of reportability under the ECMR, and more likely than not, larger transactions today will require notification and navigation through the EU premerger review process. None of that will change under the new ECMR; the thresholds for reportability remain the same. What has changed, however, is the standard of review and the process for applying it.

This article focuses on these changes and key points of convergence with U.S. merger control. Viewing these changes through the lens of convergence is important. We live in a world where more than eighty jurisdictions have some form of mandatory merger notification requirement, and of these, the European Union and United States are by far the most influential. Simply put, the costs of merger control compliance and the risk of conflicting outcomes have become so great that the business community and economic policy makers have argued strenuously for convergence in merger control process and standards. 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 those forces are governed by universal economic principles, 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 similar, if not the same, and 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. It is 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. Reasonable and experienced minds can and do differ in this area. Nevertheless, divergence is not easily tolerated—recall the furor caused by opposite U.S.-EU outcomes with respect to the proposed GE/Honeywell transaction in 2001—and there is a growing consensus that efforts to reduce the risk of divergent merger control outcomes are critically important. The new ECMR is, in part, a response to this call for reform towards convergence.

Seeds of ECMR Reform and the “Perfect Storm”

The fundamental seed for the new ECMR was in fact the old ECMR itself. 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. The Commission, however, took that mandate and proposed a far more expansive inquiry in its report to the Council and, further, in December 2001 produced a Green Paper on the Reform of Merger Control (Green Paper). The Green Paper assessed nearly 2000 transactions worth of experience applying the old ECMR, and highlighted three needs: (1) a more flexible substantive test; (2) procedural improvements that enhance timing flexibility and case management; and (3) simplification of referrals to and from Member States.

The climate for change, and the initiative to make it happen, was thus well in place when something akin to the perfect storm hit in July 2001. No case better reflects tensions in analysis than one in which opposite outcomes are reached nearly simultaneously on the very same market facts. That case was GE/Honeywell, where the product markets at issue were global in scope so that likely competitive effects should
have been viewed as the same in the EU as in the United States. The Commission, however, utilized theories of harm premised on bundling, conglomerate effects, and monopoly leveraging that had long ago been rejected or severely limited by U.S. antitrust authorities, and rejected the proposed transaction in the face of U.S. approval. Moreover, the Commission applied a standard under the old ECMR—the creation or strengthening of a dominant position—that is not well-suited to a situation like GE/Honeywell, where there were essentially no direct horizontal overlaps.

The storm pointing up the need for reform did not end with GE/Honeywell, but continued throughout 2002 with three successive merger control losses by the Commission before the Court of First Instance of the European Communities (CFI). Within a period of approximately six months, the CFI rendered momentous decisions annulling Commission mergers in Airtours/First Choice, SchneiderLeGrand, and Tetra Laval/Sidel. All three cases drove home a similar message: the Commission was not doing an effective job in selecting and assessing evidence used to support its cases. The CFI condemned the Commission’s analysis of facts as erroneous, contradictory, and incomplete, and appeared to uncover weaknesses in the Commission’s ability to meet the challenge of 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. The CFI sent a loud message that there must be a better way to meet that challenge.

The New ECMR

Based on the findings in the Green Paper, the experience of GE/Honeywell, and the lessons drawn from the 2002 rulings of the CFI, the EC 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. These legislative reforms were complemented by internal organizational reforms within DG-Comp, including (1) dismantling the Merger Task Force and the parallel reorganization of antitrust and merger control staff along sectoral/industry specific lines; (2) establishing a systematic peer review mechanism for major cases; (3) creating a Chief Economist post; and (4) strengthening the role of the Hearing Officer as guardian of basic procedural rights.

The Procedural Changes

Importantly, the procedural changes introduced with the reforms are largely consistent with the best practices recommendations of the International Competition Network (ICN). Thus, their adoption is a good reflection of the Commission’s leadership by example within the ICN.

Bolstering Practice of Pre-Notification Contacts. The DG-Comp Best Practices strongly encourage pre-notification contacts with the Commission. Although never mandatory, such contacts have by now become standard practice. Relative to the pre-2001/2002 experience, the level of the contacts has increased in sophistication to the extent that it is now considered normal process for the parties to have an economist present during some 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 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.

Streamlining and Simplifying the Referral System. Transaction parties can now either request a referral to a Member State if they think that the transaction could significantly affect competition in a market within a Member State that presents the characteristics of a distinct relevant market (Article 4(4)), or from the Member States to the Commission, if a transaction does not meet the ECMR thresholds and is otherwise subject to review in at least three Member States (Article 4(5)). 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 (Articles 9 and 22).

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 no longer needs to show that the proposed transaction gives rise to the creation or the strengthening of a dominant position (Article 9(2)(a)).

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 “based on the activity within that jurisdiction, measured by reference to the activities of [. . . the] parties.” However, the difficulties of the new system are already becoming apparent. For instance, when considering whether to request that the Commission refer the case to a Member State before the concentration is notified to the Commission, parties should bear in mind that it may take the Commission up to twenty-five working days to decide. Moreover, regardless of whether the Commission agrees to refer the case, the parties will still have 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.
Filing on a Nonbinding Letter of Intent. The new ECMR no longer requires a binding or final agreement for notification. Now, parties may notify a concentration as soon as they can show “the good faith intention to conclude an agreement” (Article 4(1)). This mirrors the recommendations 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 transaction parties some important control over the timing of the merger review process that they did not have before.

Removal of the Time Limit for Filing. The new ECMR no longer requires that a transaction be notified within seven days of signing a binding agreement (or, now, a letter of intent). Again, consistent with ICN Recommended Practices, new ECMR Article 4(1) simply provides that a concentration be notified prior to its implementation. This change likewise provides transaction parties more flexibility and control over the timing of the EC merger review process. It also allows for better coordination with other notification filings worldwide with respect to global deals.

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 twenty-five working days instead of one month, and Phase II is ninety working days rather than four months. Phase I can be extended to thirty-five 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 be extended to 105 working days if the parties have offered commitments after at least fifty-five working days after the beginning of the in-depth review. Additionally, where requested by the parties or with their consent, twenty 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 require a more in-depth competitive assessment and which can be quickly disposed.

The New Substantive Test: Significantly Impeding Effective Competition (the SIEC Test). Article 2(3) 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(3) 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).

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. According to the Commission, the new test allows it also to review the effects of concentrations in oligopolistic market structures where coordination, or “collective dominance” is not likely (“unilateral effects” or “non-coordinated effects” theory).

In conjunction with the adoption of the new substantive test, the EC Horizontal Merger Guidelines, released with the new ECMR, include two new developments. First, Section VII introduces a more structured and transparent approach to considering efficiencies as a counterbalance to anticompetitive effects. The Commission indicates that it is now prepared to take into account efficiencies provided for the first time in a quasi-legislative instrument or “soft law,” the Commission has embraced—in a committed fashion—the consumer welfare-price effects standard: “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.”

Key Points of Convergence with Merger Control in the United States

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 U.S. merger control regime. In its EC Horizontal Merger Guidelines and elsewhere, the Commission has put itself on the record with an unequivocal embrace of a consumer welfare effects standard, and drawn a point of departure with commentators who have argued that the Commission applied in effect a competitor welfare standard in the context of Article 82 EC challenges and in merger cases like GE/Honeywell.

The U.S. authorities have for years relied heavily on their own internal economist resources, including extensive econometrics capabilities, in their merger analyses. 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 DG-Comp’s regular staff economists. 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 credibility—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.

Adoption of SIEC test. Clearly the most obvious point of convergence between the EU and U.S. merger control regimes in the new ECMR is the SIEC test. At least on paper, “significant impediment to effective competition” looks like the identical twin to the SLC (“substantially to lessen competition”) standard of Clayton Act Section 7. As discussed above, this was clearly intended to close the gap in theories of competitive harm perceived to be afforded by the prior E.U. dominance-based test and the U.S. 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 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 an SIEC or SLC test, the Commission had a pretty good run—about thirteen years—at interpreting the dominance standard broadly enough to capture most theories of competitive harm considered credible under the SLC test by U.S. courts. Mental and semantic gymnastics aside, the dominance-based test did not deter use of coordinated effects theories under the rubric of “collective dominance.” Nor did the dominance test constrain the Commission in its pursuit of conglomerate effects or portfolio power. On the other hand, 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.

But if the move to the SIEC test is intended to bring more, not fewer, transactions within the EC’s regulatory reach, what exactly does this mean for EU merger control and can we expect the European experience with unilateral effects theory to track that of the United States? Unilateral effects theories come in several stripes. Indeed the dominance test under the old ECMR on its face is about the most common understanding of unilateral effects—a merger that produces a leading firm with unilateral power to increase prices profitably. Some variants of unilateral effects theory, however, would potentially condemn as anticompetitive transactions that give one firm control of its “niche” in a product-differentiated market where the merger itself does not otherwise give that firm a leading or dominant position in a properly defined market. This variant naturally 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. Such unilateral effects theories rely heavily on econometric analysis and have most often been applied in markets for differentiated consumer goods. In such markets consumers representing a substantial share of sales 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.

The new ECMR and accompanying EC Horizontal Merger Guidelines make clear that the EU wants to pursue this type of unilateral effects theory but, to an even greater extent than the Guidelines used in the United States, they fall short on defining the precise boundaries of its application. Indeed, the U.S. experience with unilateral effects theory suggests that the circumstances in which 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.

Moreover, in the recent decision in United States v. Oracle Corp., a unilateral effects case, the trial court embraced unilateral effects theory, but not at the expense of traditional tools for defining markets and assessing market power. Given apparent European interest in unilateral effects theories not captured by the traditional dominance test, that case may be particularly instructive here. In Oracle, the U.S. Department of Justice sought to block an attempt to combine two of the three largest “enterprise resource planning” (ERP) software providers worldwide. The DOJ alleged narrow relevant markets for “high function” human resource management software and financial management software supplied to large complex organizations in the United States—basically large corporations or governmental entities that were presumed to have more complex needs automating financial management and human resource services—and contended that only the three largest ERP software providers were active in the alleged market. The court rejected these contentions on the facts.

However, the DOJ also asserted that there was a space (the court adopted the term “node” introduced by one of defendant’s experts) within the alleged high function financial management and high function human resource management software markets in which only Oracle and PeopleSoft participated. Thus, according to the DOJ, a combination between them would lead to higher prices in this localized
market. In essence, this unilateral effects claim was premised on the closeness of Oracle and PeopleSoft in a specified product space. The court rejected that claim on the evidence but, importantly, it clarified that a focus on competition in a localized product space should not devolve into an unstructured submarket-type analysis. It stressed that “merely demonstrating that the merging parties’ products are differentiated is not sufficient. Instead, a plaintiff must demonstrate product differentiation sufficient to sustain a small but significant and non-transitory price increase.”

With its affirmation of the SSNIP test for showing localized competition, this court suggested that a unilateral effects case is still, at its core, about merger to dominance in a properly defined relevant market. The court’s rejection of each essential factual predicate for the government’s theory, however, leaves the question whether this same reasoning would be applied to other unilateral effects claims that were both pled and—unlike the DOJ’s claim in Oracle—actually proven.

Adoption of the SIEC test should help facilitate convergence in merger control analysis simply because it will encourage more people to speak the same language of competitive effects—no doubt a good thing. But if the perception is that it will fill substantial gaps in coverage under the old test, it could provoke more divergence than convergence in the short run if the application of unilateral effects theory is less disciplined than U.S. experience to date.

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 U.S. 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 U.S. 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.

While the Form CO itself has not substantially changed under the new ECMR, parties now have far more flexibility and control over when they will submit a notification. 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 timing pressure 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 U.S. process puts more control on the length of regulatory review in the hands of the filing parties. As a practical matter, there is no deadline under which U.S. authorities must complete their review, and a variety of other factors allow the filing parties substantial leeway in controlling the timing of review. Parties are obligated to respond to exhaustive document requests and interrogatories in “Second Requests” and have 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. As a practical matter, there has been a perception that the tight deadlines 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.

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. The prospects for positive change look good. The apparent embrace of empirical analysis of price effects and industrial organization economics may offer the greatest prospects. Moreover, the new SIEC test, coupled with an 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 starts sounding the same. Procedural changes that allow for fuller fact development should complement these substantive changes, and enhancements in timing flexibility should help put merger reviews on similar timing tracks in the United States and European Union. Ultimately, however, the success of these reforms will depend on how successful the Commission is 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—no small feat in any merger control regime.

3 ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES, ch. 1, at 13 (2001) [hereinafter ABA COMPETITION LAWS
Compilations: See also J. William Rowley & Donald I. Baker, International Mergers—The Antitrust Process 1 (3d ed. 2004). We can attribute this growth to a number of forces: (1) the globalization of trade and economic activity, including transnational mergers and acquisitions; (2) the overwhelming embrace of free market principles by formerly centralized economies in the 1980s; and (3) 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.

4 See N. Pac. Ry. v. United States, 356 U.S. 1, 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 . . . .").

5 Within months of the GE/Honeywell debacle, leading antitrust enforcement officials formed the International Competition Network (ICN) which, in turn, has developed and promulgated over the last few years best practices recommendations on merger control. See ICN Recommended Practices for Merger Notification Procedures (ICN Recommended Practices), available at http://www.internationalcompetitionnetwork.org/mpnrecpractices.pdf.

6 For a more extensive discussion of the seeds of ECMR reform, see Michael Egge et al., The New EC Merger Regulation: Recipe for Profound Change or Revolution, in ANTITRUST COMPILATION]; See also J. William Rowley & Donald I. Baker, Horizontal Merger Guidelines § VII. 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, 2004 O.J. (C 101) 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 Green Paper, supra note 7, at 40, and Article 81(3) efficiencies.

21 See EC Horizontal Merger Guidelines ¶ 8.

22 See GE/Honeywell, supra note 8; Commission Decision 2002/405/EC of June 20, 2001, in Case COMP/E2/36.041/PO, Michelin II, 2002 O.J. (L 143) 1, upheld (for several observers, unexpectedly) by the CJ in Case T-203/01, Michelin v. Commission (Ct. First Instance Sept. 30, 2003). Several commentators have observed that the emphasis placed on the protection of competitors by the Commission, in contrast to the U.S. 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 U.S. and EU, notwithstanding how closely the law on this issue in each jurisdiction appear to parallel on another. See, e.g., Eleanor M. Fox, Vertical and Regulatory Federalism: Races Up, Down, and Sideways, 75 N.Y.U. L. REV. 1781, 1785 (2000); S.O. Spinks, Exclusive Dealing, Discrimination, and Discounts Under EC Competition Law, 67 ANTITRUST L.J. 641, 642 (2000).

23 "The Community courts, however, to date have not 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 ECGR (emphasis added).


29 United States v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) The authors’ law firm represented Oracle at trial in this case. The authors, however, did not participate directly on the U.S. trial team. The views and reflections expressed herein with respect to that case are those of the authors’ only and should not be attributed to anyone other than the authors.

30 Id. at 1120.