EU Merger Control in 2004—An Overview

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The year 2004 will be remembered in EU merger control as a year of transition. The existing Merger Control Regulation 4064/89, in effect since 1990, was replaced by Reg.139/2004, which introduces a new substantive test as well as significant procedural changes. The Commission no longer displayed the rigorous interventionist attitude that had characterised its practice prior to the defeats in the Court of First Instance in 2002, and instead carefully steered a more risk-averse, middle-of-the-road course. The European courts, in particular the Court of First Instance, continued to deal with a relatively large number of cases, but there were no landmark judgments comparable to previous years. Finally, the era of Mario Monti, considered by many to be the most high-profile Competition Commissioner to date, came to an end; on November 22 he handed the important post over to Neelie Kroes, a former Dutch politician, university president, and business adviser.

This overview will concentrate on the most significant developments. These include in particular the new substantive test as well as the procedural changes introduced by Reg.139/2004; examples of cases dealing with single-firm dominance; horizontal mergers in oligopolistic markets; developments in the area of remedies and two of the more significant court proceedings.

The New Merger Control Regulation: SIEC test

The enactment of Reg.139/2004,1 which took effect on May 1, 2004, marked the most significant development in 2004.2 While the procedural changes summarised below are of greater significance for the day-to-day handling of merger control cases in Brussels and elsewhere, the change in the substantive test under which mergers are reviewed may in the long term prove to be of greater significance.

The Green Paper

The Commission, in its Green Paper of 2001,3 had opened debate on whether the substantive test of Reg.4064/89, under which the Commission could only intervene where a dominant position was being created or strengthened, should be retained. An important consideration was the desirability of harmonising the test with that applied in other major jurisdictions, such as the US, Canada and Australia where the standard of review is whether the merger will tend to substantially lessen competition (so-called SLC test); this standard has also recently been enacted into law in some member states, such as the UK and Ireland. One of the principal arguments against a radical departure from the dominance test was the fact that in this case more than 30 years of acquis, of a long-standing practice both from the courts and from the Commission, would have been lost in the application of European merger control.

Collective dominance—co-ordinated effects

On the other hand, it had become obvious that the dominance test has certain limitations. Many mergers today take place in markets that show a significant level of concentration even before the merger. Where they create a new market leader, the test for single firm dominance will be appropriate; where they reduce the number of competitors without creating a new market leader, competition will still be reduced and the only way to address this issue under the dominance test is to ask whether a group of firms—to which the merging firms belong—can be considered to hold a position of joint dominance.

That debate received a sharpened focus with the Airtours judgment of the CFI.4 According to Airtours, a (The “Implementing Regulation”) and its annexes (Form CO, Short Form CO and Form RS), [2004] O.J. L133/1.

2 For a detailed analysis of the changes brought about by the new regulation, see Soames and Maudhuit, E.C.L.R. forthcoming.


position of joint dominance will only exist where there are co-ordinated effects, *i.e.* where the merger leads to a market structure under which (tacit) co-ordination among the major market participants is likely in that they are able and incentivised to act in concert rather than competing with each other. *Airtours* laid down strict requirements for such a situation to exist, in particular the requirement of sufficient transparency of prices to detect deviations of a market participant from the pattern of tacit co-ordination and the existence of credible and effective retaliation mechanism, which allows one or more members of the oligopoly to punish another member for deviating from the co-ordinated behaviour and which would act as a deterrent to such deviation, thus stabilising the co-ordination.

**The “gap”**

Many concluded from *Airtours* that in the absence of joint dominance as defined in *Airtours* (conditions allowing tacit coordination) non-coordinated or unilateral effects from a merger were not caught by the Merger Regulation. If one considered that intervention was desirable in the case of mergers that allow the merging parties to exercise some control over price and other competitive parameters even though a dominant position is neither created nor strengthened, the acknowledgement of a “gap” in the enforcement regime was inevitable. The Commission took the view that the existing test allowed it to intervene in such situations and thus did not wish to acknowledge the existence of a gap while at the same time doing everything to close it.

**The new test**

Under the new test the Commission can intervene where a merger “would significantly impede effective competition . . . in particular as the result of the creation or strengthening of a dominant position.” This compromise, which is a remarkable and elegant exercise in semantics, not only preserves the dominance test, but in fact retains the same words as the old test, and merely reorders them. The creation or strengthening of a dominant position is now subordinated to the principal test of whether the merger is a significant impediment to effective competition (“SCIE test”). Recital 25, in particular the last sentence, is designed to indicate that the only function of that test—as opposed to dominance—is to close the gap, assuming it existed, as it relates to non-co-ordinated effects of a merger. As a result, the test brings a rapprochement with those jurisdictions that use an SLC test, while at the same time preserving the acquired learning as regards dominance.

On the basis of the SCIE test, the Commission has adopted and published Guidelines on the Assessment of Horizontal Mergers. In these Guidelines the Commission sets out the analytical framework under which it now analyses horizontal mergers. The Guidelines describe in detail the Commission’s approach to concentration levels; the different scenarios under which horizontal mergers can have anti-competitive effects; the role of countervailing buyer power; entry barriers; efficiencies and the failing company defence. Mergers involving vertical and conglomerate aspects are expected to be the subject of future guidelines.

**Procedural changes**

The new Merger Regulation also brings a number of important procedural changes which are of immediate and practical relevance in every case.

**Expanded referrals**

The new Regulation introduces a more flexible system of referrals between the Commission and the national competition authorities of Member States. The reliance

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7 Art.2, paras 2 and 3 of Reg.139/2004, see above, n.1.
8 The compromise was proposed late in the debate by the French and Spanish delegations.
9 These words had been a second element in the old test, which, however, never had enjoyed any independent meaning of its own. At best it had been considered to require that the creation or strengthening of a dominant position must be of a lasting nature (which is inherent in such position in any event).
12 The following cursory overview is limited to those changes that result from the Merger Regulation. Following the defeats in the CFI in 2002, the Commission has introduced a number of improvements in its own organisation and procedures, such as the creation of the office of the Chief Economist; the introduction of scrutiny panels; the dissolution of the Merger Task Force. See also DG Competition, “Best practices on the conduct of EC merger control proceedings”, published on DG Competition’s website: http://europa.eu.int/comm/competition/mergers/legislation/regulation/. The best practices were adopted prior to the entry into force of Reg.139/2004, but remain applicable under Reg.139/2004.
on a system of more flexible—and less predictable—referrals is based on recognition of the fact that turnover criteria, however defined and revised, are inherently ill-suited as an indicator of the community-wide relevance of a merger. 13

In parallel to the network of European Competition Authorities created by Reg.1/2003, the Commission and the competition authorities of member states are to form a network that cooperates closely to ensure that cases are dealt with by the most appropriate authority. 14 The most significant difference between the system established by Reg.1/2003 and the one under the new Merger Regulation is that the national competition authorities will apply their own substantive law in the area of merger control. 15 Referral of a merger based on considerations of administrative practicality therefore will often mean a change in the applicable substantive law—hardly a model for long-term harmony.

The new system introduces for the first time a referral to the Commission on the basis of a request by the notifying parties, if a merger would require notification in at least three Member States. If one of the competent member states disagrees, the referral to the Commission does not take place. The Commission has created a special form, a shortened version of Form CO, called Form RS (for “Reasoned Submission”), which companies must fill out when making such a request. 16 As of October 31, 2004, 12 such requests have been made, 10 of which have been granted.

More flexible deadlines

In line with similar features in other merger control regimes, the new Merger Regulation has introduced more flexibility into the strict deadlines. 17 The deadlines for taking a decision can be extended in phase I, but also in phase II, where deadlines are extended by 15 days if remedies are proposed. In addition, both parties and the Commission may unilaterally “stop the clock” for an additional 20 working days in phase II cases. The

14 Recital 14.
15 Whereas in the area of Arts 81 and 82 EC they must apply EU law. See Art.3 of Reg.I/2003.
17 Deadlines are now calculated on the basis of working days rather than on the basis of the calendar.

Commission, however, will need the consent of the merging parties. 18

New investigatory powers and increased fines

The new Merger Regulation extends the Commission’s fact-finding powers without making them identical to the powers under Reg.I/2003, e.g. the Commission is not able to search private homes. The Commission’s power to fine companies for procedural violation is also extended by increasing fines to a maximum of 1 per cent of aggregate turnover for failure to supply sufficient and correct information. 19

Self-assessment of ancillary restraints

Under Reg.4064/89 the Commission had been required to assess ancillary restraints that are part of a merger agreement, such as non-compete clauses or exclusive purchasing agreements. The Commission’s attempt to depart from that practice had effectively been stopped by the judgment of the Court of First Instance in Lagardère. 20 The new Merger Regulation now legalises the Commission’s practice of requiring companies to self-assess ancillary restraints contained in merger agreements. Such self-assessment is in line with the new policy as regards Art.81 underlying Reg.I/2003. The Commission has published a notice to assist companies in this assessment. 21

18 The mechanism used under the old regulation to stop the clock, i.e. the issuance of a formal information request from the Commission to a notifying party, which goes unanswered for the time during which the clock should be stopped, remains available under the new Regulation.
19 Previously, the maximum fine was fixed at €50,000 per violation. This was considered to be insufficient.
21 Commission Notice on restrictions directly related and necessary to concentrations, not yet published in the Official Journal, available on the website of DG Competition: http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing. The notice also leaves open the possibility that the Commission will rule on ancillary restraints if the case raises novel issues that are important from a policy setting point of view.
Single-firm dominance—Commission decisions

Following the serious setbacks in the CFI in 2002, the Commission has tended to avoid litigation with the merging parties. Instead, the Commission has sought accommodations, clearing mergers subject to remedies wherever possible. This development is probably also owed to the introduction of the scrutiny panels (also called peer review panels), which in difficult cases will provide an effective internal review of the case team’s proposal, leading to a more balanced assessment. In cases where both the principal case team and the scrutiny panel agree that intervention is warranted and where remedies are not available, the Commission will, however, prohibit a merger. On this basis, the Commission prohibited the proposed acquisition of joint control over the incumbent gas operator in Portugal by the incumbent Portuguese producer and distributor of electric and ENI, an Italian energy company. Gás de Portugal (GDP) is active at all levels of the gas chain in Portugal and has exclusive rights for import, storage, transportation, wholesale, supply of natural gas, and controls five of Portugal’s six local gas distribution companies, the sixth being controlled by one of the acquirers, Energias de Portugal (EDP). EDP is the incumbent electricity operator in Portugal and principally generates, distributes and supplies electricity in Portugal.

The Commission concluded that the transaction would strengthen GDP’s dominant position in the relevant gas markets in Portugal through the capture of a significant part of the gas demand emanating from EDP and the elimination of EDP as the most likely entrant in the gas markets. The concentration would also strengthen EDP’s dominant position in the electricity wholesale and retail markets, as it would remove GDP as a potential entrant to the electricity markets. In this relatively clear cut case the Commission felt that it had no choice but to prohibit the merger.

The following two cases provide examples for the Commission’s general tendency to seek accommodations.

Lagardère/Nataxis/VUP

After lengthy negotiations and after rejecting a request by the French authorities to refer the merger partially to France, the Commission approved Lagardère’s acquisition of Vivendi Universal Publishing (VUP, now renamed Edis), subject to the commitment to sell substantial parts of the target. VUP is the market leader in the publishing, marketing and distribution of French-language books. Lagardère, owner of Hachette, is the second player in the market. It is also active in book retailing, broadcasting and newspaper publishing and distribution.

According to the Commission, the merger would have resulted in a dominant group with seven times the turnover of that of the nearest rival. The new entity would be vertically integrated to a much greater degree than any competitors; it would control access to the “raw material” (well-known authors) and access to sales outlets that can only absorb a limited annual output of books.

Consequently, Lagardère was only allowed to acquire assets amounting to about 40 per cent of VUP, relating essentially to academic and reference works.

Air France/KLM

In Air France/KLM, the Commission dealt with the largest airline merger in Europe to date. The Commission considered that the merger would eliminate or significantly reduce competition on 14 domestic and international routes. The Commission cleared the merger in phase 1 subject to a complex package of remedies and after extended discussions with the notifying parties and the respective governments.


23 Where both the principal case team and the scrutiny panel agree that intervention is warranted, that conclusion may also be so robust as to convince the merging parties to withdraw their notification. See Case COMP/M.3093 INA/AIG/SNFA, where the notification was withdrawn in January 2004. For a summary of the Commission’s analysis in this case see Rouxel, Emberger and Koch, Competition Policy Newsletter, Summer 2004, at p.75.

The Commission’s press release in this case\(^\text{28}\) openly acknowledges that the Commission welcomes the merger as part of the necessary consolidation of European airlines. It also and stresses the benefits of the merger to passengers, who benefit from cost savings, increase in the number of destinations and better connections. These considerations indicate clearly that the Commission took into account the efficiencies resulting from the merger\(^\text{29}\); on the other hand, the clearance decision itself does not mention these efficiencies, as analytically they cannot easily be fitted into a dominance-oriented analysis.

### Mergers in concentrated markets—Commission decisions

As described above, the new Merger Control Regulation expands the scope of intervention in cases of mergers that lead to a significant increase in concentration in the market without creating a new market leader. In 2004, the Commission dealt with two high profile cases that presented this scenario; both mergers, however, were still subject to the old test.\(^\text{30}\)

#### Sony/Bertelsmann

The Commission’s decision in Sony/Bertelsmann\(^\text{31}\) demonstrates the operation and limitations of the coordinated effects test as developed in Airtours. Sony and Bertelsmann proposed to merge their recorded music business into a joint venture named Sony BMG. The joint venture is active in the discovery and development of artists and in the recording and marketing of their music; it reduces the number of major competitors in the recorded music markets from five to four (Sony BMG, Universal, EMI, and Warner Music) without Sony BMG becoming a new market leader.

The Commission investigated whether the proposed joint venture would create or strengthen a collectively dominant position in the markets for recorded music. The Statement of Objections alleged a close price parallelism for CDs released by the five majors in some national markets and other features that could indicate tacit collusion. After more careful scrutiny and applying the test enunciated in Airtours, the Commission ultimately concluded that it did not have sufficient evidence to support a decision based on a finding of coordinated pricing behaviour. In particular, the market was found not to be sufficiently transparent and companies lacked an effective mechanism for retaliation.\(^\text{32}\)

#### Oracle/PeopleSoft

The public takeover bid by US software company Oracle for its US-based competitor PeopleSoft, announced in June 2003, constitutes perhaps the most significant merger case decided by the Commission in 2004. The case involves the markets for application software for enterprises. Both the complaint of the US Department of Justice and the Commission’s Statement of Objections alleged that there were distinct product markets for human resource management and financial management software for large and complex enterprises, which require particularly high functionalities. These markets were ultimately judged to be worldwide, both in the US\(^\text{33}\) and by the European Commission. In this market, the merger was considered to be a merger from three competitors to two, with SAP, the worldwide market leader, remaining the sole competitor of the merged entity.

In the US, the merger was challenged by the Department of Justice in February 2004 on a theory of unilateral effects. The government contended that for many customers PeopleSoft was Oracle’s next closest competitor and that the merged entity would enjoy substantially greater freedom to set prices. On September 9, 2004 the US District Court rejected the government’s complaint on the basis that the government had not proven its proposed market definition and unilateral effects.\(^\text{34}\) The Department of Justice decided not to appeal.

In March 2004, the European Commission had issued a Statement of Objections taking the position that the dominance test under Reg.4064/89 extended non-

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\(^\text{29}\) Such considerations also had been instrumental in the Commission’s authorisation of alliances, see above n.25.

\(^\text{30}\) According to Art.26(2) of Reg.139/2004, the old regulation continued to apply to mergers where an agreement was concluded or a public bid announced before May 1, 2004.

\(^\text{31}\) Commission decision of July 19, 2004, Case COMP/M.3333, Sony/BMG.

\(^\text{32}\) This result stands in marked contrast to the Commission’s rejection in 2000 of the proposed merger between EMI and Warner Music on the basis of alleged coordinated effects, Case Comp/M.1852; the notification was withdrawn after the issuance of a Statement of Objections.

\(^\text{33}\) The US Department of Justice, in its challenge to the merger, had considered the markets to be geographically limited to the US, but the District Court considered them to be worldwide.

\(^\text{34}\) US v Oracle 331 F. Supp. 2d 1098 (N.D. Cal. 2004).
co-ordinated, *i.e.* unilateral effects; in addition, the Statement of Objection also took the view that following the merger there would be potential for tacit collusion between merged entity and SAP. Following the oral hearing, the Commission issued a formal information request to Oracle, requesting bidding data, which Oracle was unable to provide quickly, effectively stopping the clock and resulting in the Commission decision to be delayed until the proceedings in the US District Court had run their course.

On October 26, 2004 the Commission cleared the merger on the basis that there was not sufficient evidence for the creation of a jointly dominant position on the basis of either unilateral or coordinated effects.35

**Remedies**

The Commission’s tendency to avoid contentious outcomes can also be observed in the field of remedies, where it has lead to more innovative and in some instances stricter remedies being imposed.36

**Upfront buyer**

The Commission is making increasing use of the requirement that the parties identify, and the Commission approve, buyers of businesses that are to be divested before the merger is implemented.37 This requirement was, *e.g.* imposed in connection with the divestitures accepted in Sonoco/Ahlstrom (divestiture of the facility for the production of cores—tubes produced from cardboard)38 and GE/AGFA/NDT (divestiture of GE’s own ultrasound non-destructive testing business).39

**Market-shaping remedies—Air France/KLM**

The Commission has always used remedies in order to open up and shape markets, in particular regulated markets, in ways that it considered desirable. Most recently it employed remedies to this end in Air France/KLM.40

The Commission long has been concerned about structural impediments to competition resulting from the scarcity of take-off and landing slots at the highly contested European airports and regulatory restrictions that emanate from bilateral air transport agreements between member states and third countries. Against this background the Commission required the parties to (i) surrender 47 pairs of landing slots (94 single take-off and landing slots), which allowed for 31 new return flights per day, *e.g.* between Paris and Amsterdam and Amsterdam and New York, and (ii) to enter into so-called intermodal agreements with land transport companies (*e.g.* Thalys), to facilitate combinations of different modes of transportation (*e.g.* one way by train, return by air).41 In addition, (iii) Dutch and French national authorities have assured the Commission they will give traffic rights to competing carriers wishing to stop over in Amsterdam or Paris en route to the US or other non-EU destinations (Fifth and Sixth Freedoms), and to refrain from regulating prices on long haul routes.42

**Behavioural remedies**

Finally the Commission has displayed a greater willingness to accept remedies that previously would have been rejected as behavioural.

A case in point is Areva/Urenco/ETC.43 The case involved the formation of a joint venture (ETC) active in the development and manufacturing of centrifuges for the enrichment of uranium. The joint venture will supply both the parents and third parties, all of whom are competitors on the downstream market for enriched uranium, which represents a large part of the cost of fuel for nuclear power plants.

The Commission was concerned that the two parents would obtain a joint dominant position in the market for enriched uranium in the EU. The Commission cleared the merger subject to the following remedies: (i) the parents agreed to remove their respective veto rights in relation to any future capacity expansions; (ii) the flow of commercially sensitive information between the parents will be prevented by a series of measures which

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35 Commission press release IP/04/1312.
36 The Commission anticipates that it will issue a revised remedies notice in the relatively near future.
38 Commission decision of October 6, 2004, DG/COMP/ M.3431, *Sonoco/Ahlstrom* /J.V.
41 The development of intermodal transport is a well-established goal of the EU’s transport policy.
43 Commission decision of October 6, 2004, DG/COMP/ M.3099 *Areva/Urenco/ETC* /J.V.
will be closely monitored; (iii) ESA (European Supply Agency) has agreed to play an increased monitoring role; the parties have agreed to supply ESA with additional information for ESA to monitor the provision and pricing of enriched uranium.

To the extent that the distinction between structural and behavioural remedies is meaningful at all, the latter two remedies must be characterised as behavioural. 44

**Procedure—Court of Justice and Court of First Instance**

The European courts, and in particular the Court of First Instance, continue to play a decisive role in reviewing Commission decisions and shaping Commission practice. Third parties increasingly challenge the Commission’s clearance decisions and there are a number of such cases currently pending before the CFI. 45 In addition, MyTravel (formerly Airtours) and Schneider are seeking to recover damages from the Commission for the unlawful prohibition of their mergers with First Choice and Legrand respectively. 46

Against this background, two cases stand out:

**Advocate General Opinion in Tetra Laval/Sidel**

The Commission’s appeal against the CFI’s judgment in *Tetra Laval/Sidel* is the first significant case to come before the Court of Justice sitting as an appellate court, with review being limited to issues of law. 47 Among the most interesting issues raised by the Commission’s appeal are the standard of proof required by the Commission in order to intervene and the standard of judicial review. 48

Particularly noteworthy is the view of Advocate General Tizzano as regards the standard of proof required by the Commission in order to be able to intervene: In cases that fall within a “grey area”, marked by appreciable uncertainty as to whether or not a notified concentration is compatible with the common market, the Commission must opt to authorise the merger. 49 While it is far from clear whether the Court of Justice will concur with this clear-cut presumption in favour of allowing mergers to proceed, the Commission’s more careful practice during 2004 certainly might suggest that it has been somewhat mindful of this standard.

With respect to the issue of judicial review, the Advocate General endorsed the well-known standard according to which the community courts’ examination of the Commission’s complex economic assessments must be confined to the verification of (a) whether the rules on procedure in the statement of reasons have been complied with, (b) whether the facts have been accurately stated, and (c) whether there has been any manifest error for appraisal or misuse of powers. 50 Despite the fact that the Advocate General considered the CFI, in applying that standard, to have committed certain errors of its own in assessing the Commission’s reasoning, he concluded that these errors were far from requiring a reversal of the judgment.

**MCI Worldcom/Sprint**

As had been widely expected, the CFI annulled 51 the Commission’s decision which had, in the year 2000, prohibited the acquisition by MCI Worldcom (now bankrupt and renamed simply MCI) of its competitor Sprint. 52 The CFI did not need to reach a decision on the merits as it found that the Commission had exceeded its powers when it had insisted on prohibiting the merger despite the fact that the parties had withdrawn the notification and stated their intention no longer to implement the transaction as it had been notified.

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44 In *Tetra Laval/Sidel* the CFI had criticised the Commission’s rejection as behavioural of a similar remedy designed to prevent the flow of information between Tetra Laval and Sidel. Case T-5/02 *Tetra Laval v Commission*, see above, n.22.


47 Kali and Salz (France v Commission) came directly before the Court of Justice as an appeal by France against the Commission’s decision. See also Case C-170/02, judgment of the Court of September 25, 2003, *Schlüsselverlag J.S. Moser v Commission* [2003] O.J. C275/36. Recently, the Court of Justice also upheld under Art.2(3) of the old Merger Regulation the Commission’s clearance of a merger which had been prohibited by Portugal on the basis of a national law relating to privatised companies. Case C-42/01 *Portugal v Commission*, judgment of June 22, 2004, [2004] O.J. 201/01.

48 The case also raises other important issues such as to the analysis of conglomerate mergers and the acceptability of behavioural remedies.


50 para.[83] of the Opinion.

51 Case T-310/00 *MCI v Commission*, judgment of the Court of First Instance, of September 28, 2004.

Outlook for 2005

As one looks ahead towards 2005, one should expect the Commission to begin slowly to test the extent of its newly acquired powers to deal with unilateral effects in concentrated markets. Whether this will, over time, lead to the reappearance of a more interventionist attitude is more difficult to predict. In any event, the Commission’s decisions in the field of merger control will continue to be routinely subjected to the thorough scrutiny exercised by the CFI, which will ensure a certain level of robustness and predictability.