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Mergers judicial review

Judicial review of merger decisions: An overview of EU and national case law

MERGERS, FOREWORD, JUDICIAL REVIEW

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I came to Brussels to practise competition law a week after the EU Merger Regulation (the "EUMR") [*1*] entered into force in 1990 and can well remember the antitrust community's sense of expectation, trepidation, and excitement. Expectation because of the long period of gestation that followed the Court of Justice's judgment in *Continental Can [2]* and the uncertainty around the European Commission's (the "Commission's") ability to implement an EU-wide system of merger control. Trepidation because of the significant practical challenges, open questions of law, and untested principles that were raised by the EUMR. Excitement because of the realization that the practice of EU competition law would almost certainly be permanently and materially changed.

Among the many open questions was the role that would be played by the EU Courts and the scope for effective and timely judicial review of Commission decisions. In particular, notwithstanding the important role played by the EU Courts in the evolution of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), there was uncertainty whether the EU Courts would act as an effective check on the Commission's application of the EUMR and exert discipline on its decisions in the same way as U.S. courts discipline the U.S. federal agencies' determinations of whether mergers should be allowed to proceed. [*3*] There was also uncertainty as to the scope for timely judicial review as, in contrast to decisions taken under Articles 101 and 102 TFEU, which relate to past conduct, EUMR decisions necessarily concern transactions that have not yet been implemented and where the consequences of error at the administrative level are harder to correct.

History has proven the sceptics wrong. The EU Courts have played a highly significant role in shaping the law and holding the Commission to account, recognizing that "no amount of … internal checks and balances can provide the same amount of scrutiny as comprehensive review by an independent, external body." [*4*] Although the EU Courts have recognized that judicial deference is embedded in the EU system of merger control, they have nevertheless been ready to subject Commission decisions to careful and comprehensive review, [*5*] interpreting broadly the "manifest error" standard. [*6*] Also, while recognizing the constraints imposed on the Commission by the EUMR's time limits, the EU Courts have protected merging companies' rights of defence, striking down decisions that have been insufficiently substantiated or based on findings inadequately presented to the merging parties during the administrative process. And, most importantly, the EU Courts have helped to shape the law, clarifying important principles of interpretation and application, imposing high evidentiary standards on the Commission, and provoking the Commission to modernize its enforcement practice.

The EU Courts have also been responsive to criticism about the limited scope for timely judicial review in merger cases, [*7*] introducing in 2001 an expedited or "fast-track" procedure [*8*] that was recognized at the time would be particularly suitable for appeals of decisions rendered under the EUMR. [*9*] Former Commissioner Monti viewed the expedited procedure as "truly represent[ing] a giant step towards the speeding up of judicial review of merger decisions in the EU" [*10*] and, in the intervening years, the EU Court has admitted requests for application of the expedited procedure in a significant number of cases, shortening the time to judgment to around 11 months on average. [*11*]

This Foreword describes the EU Courts' contribution to merger control and identifies some of the leading judgments rendered at the national level, where courts have also played an active role in shaping merger control.

I. Judicial Review By The EU Courts

The Commission has recognized that the EU Courts are "a constant driver of control and change," [*12*] echoing comments made by Advocate General Tesauro that "judicial review is essential … even in systems where, unlike ours, there is already a predetermined assessment criterion to guide the administrative authorities in their task." [*13*]

In contrast to Articles 101 and 102 TFEU, where a large proportion of Commission decisions have been appealed to the EU Courts, almost 30 years after the entry into force of the EUMR, only around 50 of the approximately 6,500 decisions rendered by the Commission have been appealed, although the incidence of appeals has increased in recent years. [*14*] In total, the EU Courts have overturned 12 Commission decisions (in whole or in part), including five prohibition decisions (of only 30 rendered since the EUMR came into force), six approval decisions, and one decision rejecting a request for a waiver of commitments. [*15*] Notwithstanding the modest number of appeals, the EU Courts' contribution to EU merger control has been significant. [*16*]

The EU Courts' review of Commission decisions rendered under the EUMR has been "close, comprehensive, and effective." [*17*] Although the EU Courts have recognized that "[t]he rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not … allow the judicature to go further, and … to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution," [*18*] they have come close to engaging in full reviews on the merits, rigorously reviewing findings of fact [*19*] and, in addition to establishing whether evidence relied on by the Commission is "factually accurate, reliable and consistent," critically examining "whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it." [*20*] By subjecting EUMR decisions to close review, the EU Courts have over time imposed a heightened evidentiary standard on the Commission. Meeting that standard has protracted the EUMR review periods and increased the burden on both the Commission and merging parties.

The most influential judgments rendered by the EU Courts were the trilogy of cases decided in 2002, when the EU Courts overturned three Commission prohibition decisions (*i.e.*, *Airtours*, [*21*] *Schneider*, and *Tetra Laval [22]*). These judgments were scathing in their criticism of the Commission's appreciation of the facts and treatment of evidence. (By way of example, the Court in *Airtours* undertook a detailed factual analysis that identified "errors, omissions and inconsistencies of utmost gravity." [*23*]) The Court's judgments received wide coverage in the media and caused the Commission to conduct a swift review of the underlying weaknesses in its application of the EUMR. [*24*] Immediately following publication of the Court's judgment in *Tetra Laval*, then-Commissioner Monti conceded that "our record in the merger area is less glorious after these … Court rulings." [*25*] And, in December

2002, the Commission approved 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 Community." [*26*] The package included a proposal for a wide-ranging revision of the EUMR, [*27*] Draft Horizontal Mergers Guidelines, [*28*] and Draft Best Practices Guidelines. [*29*]

The consequences of these reforms have been profound and far-reaching. Among other things, they required the Commission to accelerate reliance on sound economics, to establish a Chief Economist's Team, to formalize its procedural rules, to improve the quality of its analysis, and to ensure that its decisions were firmly based on persuasive probative evidence. In part as a result of these reforms, Commission investigations have become more protracted and more burdensome for both investigating officials and merging parties. The tension that potentially existed between the deadlines prescribed in the EUMR and the evidentiary standards demanded by the EU Courts were resolved in practice through longer and more thorough investigations.

The EU Courts have also played an important role in clarifying an array of questions that have arisen under the EUMR.

- As to the EUMR's jurisdictional ambit, the EU Courts have confirmed the extra-territorial application of the EUMR, finding that the Commission has jurisdiction "when it is foreseeable that a proposed concentration will have an immediate and substantial effect [in the EEA]." [*30*]

- As to evidentiary matters, the EU Courts have held that the Commission bears the burden both when it approves and prohibits transactions. [*31*] In respect of the standard of proof, the EU Courts have confirmed a "balance of probabilities" test [*32*] that must be discharged on the basis of "convincing evidence" that a transaction would "in all likelihood" [*33*] create or strengthen a dominant position. Finally, the EU Courts have held that, where the Commission challenges a transaction based on a speculative theory of harm, the evidence relied upon should be "particularly plausible." [*34*]

- As to the definition of dominance under the original version of the EUMR adopted in 1989, the EU Courts confirmed that the EUMR should be interpreted expansively to capture concentrations that created or strengthened a collective dominant position in markets prone to tacit collusion, [*35*] and subsequently provided important guidance on the application of the EUMR to situations of collective dominance. [*36*]

- As to defenses, the EU Courts have confirmed the availability of the "failing firm" defense. [*37*] And, in respect of remedies, the EU Courts have confirmed that the Commission may accept behavioral remedies, [*38*] but may not compel a company to divest a non-controlling minority shareholding obtained before a proposed acquisition of control. [*39*]

- As to procedural matters, the EU Courts have overturned Commission decisions due to procedural irregularities that were inconsistent with a proper respect for merging parties' rights of defense. [*40*] Importantly, where the EU Courts have identified procedural errors, they have been increasingly ready to annul Commission decisions not only where the outcome might have been different absent that error, but also where the error prevented the company in question from defending itself fully. [*41*]

- Finally, the EU Courts have ordered the Commission to partially compensate a company for losses incurred as a result of an unlawful prohibition decision rendered under the EUMR. [*42*]

Although there continues to be a lively debate about the respective strengths of administrative and judicial systems, these judgments went "a long way toward dispelling concerns about a lack of effective judicial review of Commission merger decisions." [***43***]

II. Judicial Review By National Courts

As the following overview of important cases in five major EU countries shows, by comparison with the EU Courts, national courts have generally played a less significant role in shaping the application of national merger control enforcement, confining themselves largely to refining jurisdictional and procedural rules, rather than effecting major change in the assessment of mergers by national agencies.

- France

In the landmark *Coca-Cola* case, the Council of State held that it had jurisdiction to review all merger control decisions rendered by the French Competition Authority ("FCA"), [***44***] including in relation to gun jumping [***45***] and breaches of commitments. [***46***]

The Council of State is empowered to review procedural aspects and the merits of the FCA's decisions. Phase 2 decisions must be approved by the board of the FCA (unlike Phase 1 decisions, which are approved by the President of the FCA alone). In *Direct 8*, the Council of State annulled an FCA decision where the FCA board had not ruled on the final version of commitments attached to a Phase 2 decision. The Council of State also deferred the effects of its judgment to avoid application of commitments attached to the annulled decision pending issuance of a new decision. [***47***] In *Interbrew*, where the Council of State also annulled an FCA clearance decision, it found that third parties' rights of defense had been violated because they had not been given an opportunity to comment on remedies that would have directly affected them. [***48***]

As to substance, the Council of State has in a number of cases focused on commitments given to secure approval of transactions to verify that (i) they sufficiently addressed the risk of anticompetitive effects otherwise generated by the transaction, [***49***] and/or (ii) they were proportionate. [***50***] In *Groupe Canal Plus*, the Council of State held that the FCA must assess the anticompetitive risks potentially generated by a merger on a forward-looking basis, taking into account all relevant information and a plausible economic assessment. In *Société Royal Philips Electronic*, the Council of State annulled a clearance decision on the ground that the regulator had failed to properly assess the likely effect on competition of the acquisition of a failing firm by a competitor. [***51***]

- Germany

Merger control decisions of the German Federal Cartel Office ("FCO") and "ministerial authorisations" of the Federal Minister for Economic Affairs and Energy [***52***] are subject to judicial review by the Düsseldorf Court of Appeals ("DCA") and the Federal Court of Justice ("FCJ").

As to the scope of judicial review of merger control decisions, the FCJ clarified in the *Ampere* case that (informal) Phase I clearance decisions are not subject to judicial review. [***53***] The DCA in *Edeka/Tengelmann* suspended ministerial authorization of a transaction prohibited by the FCO. [***54***] In *Springer/ProSiebenSat.1*, the FCJ held that the parties may seek judicial review of a prohibition decision even after abandoning their merger plans, if they can demonstrate a legitimate interest regarding potential future transactions. [***55***]

As to standing for judicial review, in relation to Phase II merger control decisions the DCA held in *Akzo/Metlac* that

the merging parties do not have standing to challenge an unconditional clearance decision that does not adversely affect their rights. [***56***] The FCJ confirmed in the *pepcom* case that third parties have standing to challenge an FCO decision that directly and individually affects their competitive interests. [***57***]

The DCA and the FCJ have also contributed to the main substantive areas of German merger control. In *Phonak/GN Store*, the FCJ emphasized the need to examine whether a market is prone to tacit collusion. [***58***] The *Edeka/Tengelmann* saga led to the first prohibition decision based on the then-newly introduced test of whether a transaction would significantly impede effective competition. [***59***]

- Italy

Merger control decisions of the Italian Competition Authority ("ICA") have been subject to relatively limited review. The Italian administrative courts – the *Tribunale Amministrativo regionale del Lazio* ("TAR Latium") and the *Consiglio di Stato* (the "Council of State") – have nonetheless contributed to the development of the Italian merger control regime, particularly in the areas of jurisdiction and remedies.

With respect to jurisdiction, the Italian courts have helped to define the scope of the concept of a concentration. In *Assicurazioni Generali/Toro Assicurazioni*, the TAR Latium clarified that the concept of "control" under Italian merger control rules is broader than in other areas (*e.g.*, national company law) as it includes any possibility of exercising decisive influence over an undertaking. [***60***] In *Emilcarta/Agrifood Machinery*, the Council of State found that, contrary to the position adopted by the ICA, for a situation of economic dependence to lead to *de facto* control, structural links must also be present. [***61***] In *RAI-Vari impianti radiofonici*, the Council of State held that an important criterion for identifying the existence of a concentration is whether the structure of the market is likely to be affected. [***62***] The Council of State considered that the sale of assets did not constitute a concentration where the seller could continue to carry out the economic activity connected to those assets without losing market share. [***63***]

As to remedies, by endorsing the ICA's administrative practice in a number of instances, the Italian courts have effectively broadened its powers. Notably, the Italian administrative courts validated the ICA's practice of *de facto* accepting remedies in Phase I (a possibility not provided for by legislation), by allowing the parties to withdraw the notification and re-notify a revised transaction that includes remedial measures. [***64***] They have also upheld remedies imposed on markets other than those on which a concentration is found to create or strengthen a dominant position, to the extent that divestitures in those markets were indispensable for the creation of a new, credible competitor. [***65***] Finally, in *Enel France Telecom-New Wind*, the court confirmed that the ICA can reassess a transaction after judicial annulment of a decision.

- Spain

The Spanish High Court and the Supreme Court have helped to shape Spanish merger control since the entry into force of the Law on the Defence of Competition ("LDC") in 2007, in particular by controlling the legality of administrative acts by the Spanish competition authority, the Comisión Nacional de los Mercados y la Competencia ("CNMC") principally regarding procedure and jurisdiction.

As to the jurisdictional scope of the CNMC's review, in *Gestamp/Essa/Bonmor*, the Spanish courts clarified the grounds on which the CNMC may fine undertakings for "gun jumping" pending approval by the CNMC. [***66***] In assessing whether the LDC's market share threshold is met, the High Court clarified in *Bergé/Maritima Candina*

that companies cannot be sanctioned for "gun jumping" if they decide to implement a transaction based on market definitions that they could not have foreseen at the time. [*67*] In *Consenur/Ecotec*, the Spanish courts examined *de novo* the CNMC's approach to market definition. [*68*]

In *Redsys/Redys*, the Supreme Court clarified the rules for interpreting commitments and defined the scope of the CNMC's powers to ensure their implementation. The Court held that the CNMC may not interpret commitments beyond the wording submitted to, and accepted by, the CNMC, but may require more precise and detailed language to reduce the scope for discrepancies. [*69*] The Supreme Court confirmed in *Telecinco/Cuatro* that remedies may be applied only in those markets where competition concerns have been identified. [*70*] As to fines imposed by the CNMC, the Supreme Court scrutinized the calculation and proportionality of fines in *Gestevisión Telecinco*. [*71*]

- U.K.

The specialist Competition Appeal Tribunal ("CAT") and U.K. courts have made significant contributions to the development of U.K. merger control.

As to the jurisdictional scope of U.K. merger control, the U.K. courts and CAT have helped to define the scope of the Enterprise Act 2002. In *Eurotunnel*, the Supreme Court defined the concept of a "merger" expansively; [*72*] in *BSkyB/ITV*, the CAT held that two enterprises "cease to be distinct" where the acquirer is able to exercise "material influence" over the target; [*73*] and in *AKZO*, the Court of Appeal confirmed the power of the U.K. Competition & Markets Authority ("CMA") to prohibit a merger between parties based outside the U.K., provided they have sufficient involvement in a business conducted at least partly in the U.K. [*74*]

As to the substantive test (whether a transaction results in a "substantial lessening of competition"), the CAT has determined that, to be "substantial", the lessening of competition need not be "large", "considerable", or "weighty"; only "significant." [*75*] More importantly perhaps, the CMA's Merger Assessment Guidelines [*76*] were amended to take into account a Court of Appeal ruling that the CMA may refer a merger for Phase 2 review if it holds a reasonable and more than "fanciful" belief that it could substantially lessen competition and must make a referral if it believes that a merger is more likely than not to result in a substantial lessening of competition. [*77*]

As to procedural matters, in *Sainsbury and Asda*, the CAT encouraged the CMA to give "urgent consideration" to revising the statutory deadlines for mergers, noting the risk to the public interest caused by "unreasonably compressed" timelines in complex cases. [*78*] It remains to be seen whether the CMA will heed the CAT's call.

Finally, as to third-party rights of appeal, the CAT has held that third parties have standing to challenge CMA decisions where they have "specific interest and strong feeling[s]" that render them "aggrieved." [*79*] Separately, the CAT has found that an application for judicial review against a preliminary decision would not be premature if it resulted in real injustice and could lead to a final determination that affected an appellant's legal rights. [*80*]

III. Conclusion

Judicial review of EU and national agency merger decisions is alive, well, effective, and timely. The EU and national courts have played an important role in reviewing agency decisions and subjecting them to thorough review. Despite some inevitable differences in approach, EU and national courts have demonstrated a willingness and ability to provide effective judicial review in judgments that have shaped enforcement practice and provided checks on agency decision-making.

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[*1*] The EUMR was adopted in 1989 and came into force in 1990. Council Regulation 4064/89 of December 21, 1989, on the control of concentrations between undertakings, 1990 O.J. L257/13; with amendments introduced by Council Regulation 1310/97, 1997 O.J. L180/1, corrigendum 1998 O.J. L40/17. In 2004, a revised and significantly recast version of the EUMR came into force. Council Regulation 139/2004 of January 20, 2004, on the control of concentrations between undertakings, 2004 O.J. L24/1.

[*2*] Europemballage and Continental Can v. Commission ("*Continental Can*"), Case 6/72 EU:C:1973:22 (Court established that what is now Article 102 TFEU could be applied to an acquisition by an already-dominant company).

[*3*] The U.S. antitrust agencies do not authorize concentrations. Rather, they review them and, for those concentrations considered likely to lessen competition, either negotiate conditions upon which they will not litigate in court or challenge the merger before a judge, who decides whether to enjoin a merger. For concentrations found unlikely to lessen competition, the U.S. agencies simply refrain from challenging the transactions. *See, e.g.*, William J. Kolasky, Mario Monti's Legacy: A U.S. Perspective, 1 Competition Policy International, 155, 167 (2005) ("It is often noted that in merger cases the Commission acts as investigator, judge, and prosecutor. Unlike in the United States where the DOJ must obtain an injunction to prevent a merger, Commission decisions are not, in the normal course of events, subject to judicial review. The knowledge that facts will have to stand up to judicial scrutiny and that witnesses will have to survive the cauldron of cross-examination acts as a disciplining tool on DOJ officials. The Commission's decision-making, on the other hand requires essentially only self-discipline").

[*4*] Bo Vesterdorf, Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement, Competition Policy International, Vol. 1, No. 2, Autumn 2011, pp. 2-27.

[*5*] French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission ("*Kali und Salz*"), Joined Cases C-68/94 and C-30/95 EU:C:1997:54, paras. 223-224 ("the basic provisions of the Regulation, in particular Article2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations"). See ***Nicole Hacker***, *The European Court of Justice annuls for the first time a Commission's decision under the merger regulation (Kali+Salz / MDK / Deutsche Treuhand), 9 July 1998, e-Competitions Bulletin Mergers judicial review, Art. N° 39373.*

[*6*] *See, e.g.*, Marc Jaeger, The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?, Journal of European

Competition Law & Practice, 2011, Vol. 2, No. 4, pp. 295-314. *See too* A. Kalintiri, Evidence Standards In EU Competition Enforcement, Oxford, 2019, at 173-195.

[*7*] *See, e.g.*, Antoine Winckler and François Brunet, La Pratique Communautaire du Contrôle des Concentrations, 2nd ed. (Paris Bruxelles, 2000), p. 73; Rachel Brandenburger and Thomas Janssens, European Merger Control: Do the Checks and Balances Need to Be Re-Set?, 2001 Fordham Corp. L. Inst. 135 (Barry E. Hawk, ed. 2002), pp. 73–83; and Christopher Bellamy, Ten Years of Merger Control, in EC Merger Control: Ten Years On (International Bar Association, 2000), p. 12.

[*8*] Art. 76(a), Rules of Procedure of the General Court, and Practice Directions to Parties Before the General Court, paras. 69–80. *See too* Arts. 133–136, Rules of Procedure of the Court of Justice, and Practice Directions to Parties Concerning Cases Brought Before the Court, para. 17.

[*9*] *See, e.g.*, Bo Vesterdorf, Recent CFI Rulings on Merger Cases, Interim Measures and Accelerated Procedures and Some Reflections on Reform Measures Regarding Judicial Control, EC Merger Control: A Major Reform in Progress, Götz Drauz and Michael Reynolds, ed. (Richmond: Richmond Law & Tax, 2003).

[*10*] Mario Monti, Review of the EC Merger Regulation—Roadmap for the Reform Project, Conference on Reform of European Merger Control, British Chamber of Commerce, Brussels, June 4, 2002 (Commission Press Release SPEECH/02/52).

[*11*] Energias de Portugal SA v. Commission ("*Energias*"), Case T-87/05 EU:T:2005:333 (seven months); Endesa v. Commission ("*Endesa*"), Case T-417/05 EU:T:2006:219 (seven months); Tetra Laval (nine months); Schneider Electric v. Commission, Case T-310/01 EU:T:2002:254 (decided concurrently with Schneider Electric v. Commission, Case T-77/02 EU:T:2002:255. The two cases are collectively referred to as "*Schneider*") (10 months); Royal Philips Electronics v. Commission ("*Philips*"), Case T-119/02 EU:T:2003:101 (12 months); BaByliss v. Commission ("*BaByliss*"), Case T-119/02 EU:T:2003:101 (15 months); Cableuropa v. Commission ("*Cableuropa*"), Case T-346/02 EU:T:2003:256 (13 months); and Sun Chemical Group v. Commission ("*Sun Chemical*"), Case T-282/06 EU:T:2007:203 (13 months). {{{{

[*12*] Mario Monti, remarks at the Antitrust Policy in the 21st Century Conference, Brussels, May 15, 2002.

[*13*] *Kali und Salz*, Opinion of Advocate General Tesauro, para. 22.

[*14*] Between 1989 and 2001, only 14 Commission decisions were appealed to the EU Courts. *See, e.g.*, Giuliano Marenco, Judicial Review of the First Ten Years of the Merger Regulation, EC Merger Control: Ten Years On, 2000 International Bar Association 304 ("considering the conspicuous financial interests and the lawyer-intensive work involved in merger control, judicial activity has remained limited"). Since then, more than 40 decisions have been appealed. *See too* G. Vallindas, Le contentieux des concentrations dans l'Union européenne: une coquille devenue vide, in Contentieux du Droit de la Concurrence de l'Union Europeene, Bruxelles, 2017, at 205-249.

[*15*] Deutsche Lufthansa AG v. Commission, Case T-712/16 EU:T:2018:269. See ***Porter Elliott***, *The EU General Court orders Commission to re-examine a request to review merger commitment (Lufthansa), 16 May 2018, e-Competitions Bulletin Mergers judicial review, Art. N° 87151* ; ***Clara García Fernández, Miguel Troncoso Ferrer, Sara Moya Izquierdo***, *The General Court of the EU finds that the Commission must re-assess compagnies request to waive their*

pricing commitments (Lufthansa), 16 May 2018, e-Competitions Bulletin Mergers judicial review, Art. N° 87200 ; ***Philip Bentley, Jacques Buhart, Mai Muto**, The EU General Court annuls the Commission's rejection of an airline's request for a waiver of pricing commitments, ordering that they be reviewed (Lufthansa), 16 May 2018, e-Competitions Bulletin Mergers judicial review, Art. N° 89761.*

[**16**] *See, e.g.*, Mark Leddy, Christopher Cook, James Abell and Georgina Eclair-Heath, Transatlantic Merger Control: The Courts and the Agencies, [2010] 43 Cornell Int. L.J., pp. 25–54; and James S. Venit, The Scope of EU Judicial Review of Commission Merger Decisions, 15th Annual EU Competition Law and Policy Workshop – Merger Control in European and Global Perspective, Florence, Italy, November 12–13, 2010.

[**17**] Bo Vesterdorf, Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement, Competition Policy International, Vol. 1, No. 2, Autumn 2011, pp. 2-27, at p. 11.

[**18**] Commission v. Tetra Laval B.V. ("*Tetra Laval CJ*"), Opinion of Advocate General Tizzano, Case C-12/03 P EU:C:2004:318, para. 89. See ***Claus-Dieter Ehlermann, John Ratliff**, The EU Court of Justice rules on the standard of judicial review in merger cases and clarifies the burden of proof upon the Commission in conglomerate mergers cases (Tetra Laval / Sidel), 15 February 2005, e-Competitions Bulletin Mergers judicial review, Art. N° 37199.*

[**19**] *Tetra Laval CJ*, Opinion of Advocate General Tizzano, para. 86 ("With regard to the findings of fact, the review is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained").

[**20**] *Tetra Laval CJ*, para. 38.

[**21**] Airtours plc. v. Commission ("*Airtours*"), Case T-342/99 EU:T:2002:146. See ***Kay Parplies, Mary Loughran, Roosmarijn Schade**, The EU Court of First Instance annuls the Commission's decision to prohibit a merger between two UK based holiday tour operators (Airtours / First Choice), 6 June 2002, e-Competitions Bulletin Mergers judicial review, Art. N° 38925* ; ***James Killick**, The EU Court of First Instance overturns the EU Commission decision's to block a merger between two UK tour operators addressing the issue of collective dominance (Airtours / First Choice), 6 June 2002, e-Competitions Bulletin Mergers judicial review, Art. N° 37057.*

[**22**] Tetra Laval B.V. v. Commission ("*Tetra Laval*"), Case T-5/02 EU:T:2002:264.

[**23**] *Airtours*, para. 404.

[**24**] *See, e.g.*, Francesco Guerrera and Guy de Jonquières, Something Is Rotten Within Our System, Financial Times, October 28, 2002 ("The European Union's top economic policemen have been put on trial—and found guilty. Three times in five months, European Commission vetoes of high-profile corporate mergers have been overturned by the EU's second highest court. The unprecedented defeats, coupled with scathing reprimands by the court, are more than just a crushing blow for Mario Monti, Europe's competition commissioner, and his elite team of enforcers. By cutting the Commission down to size, the [General Court]—the lower chamber of the Luxembourg-based [Courts of the European Union]—has sparked the beginning of a revolution in the way the EU regulates mergers").

[25] Saeed Shah, European Court Deals Crushing Blow to Monti's Merger Policy, The Independent, October 25, 2002.

[26] Commission Press Release IP/02/1856 of December 11, 2002. See ***Stephen Ryan***, *The European Commission decides upon a comprehensive reform of the EU merger control system, including the adoption of proposals for legislative change and for substantive guidance on merger analysis, 11 December 2002, e-Competitions Bulletin December 2002, Art. N° 38923.*

[27] Proposal for a Council Regulation on the control of concentrations between undertakings, COM(2002) 711. As noted at the outset, agreement was reached on a recast version of the EUMR in November 2003 (*see* Commission Press Release IP/03/1621 of November 27, 2003).

[28] Commission Guidelines on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2002 O.J. C331/18. These Guidelines were adopted in early 2004. Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. C31/05 ("*Horizontal Mergers Guidelines*"), available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF* ↗. See ***Tiina Pitkänen, Mario Todino, Thalia Lingos, Mary Loughran***, *The European Commission issues an amended implementing regulation after the adoption of a new merger regime, 20 January 2004, e-Competitions Bulletin January 2004, Art. N° 37331.*

[29] DG Competition Best Practice Guidelines on the conduct of EC merger control proceedings. These Guidelines were adopted in January 2004.

[30] Gencor v. Commission, ("*Gencor*"), Case T-102/96 EU:T:1999:65, para. 90. See ***Peder Christensen, Philip Owen***, *The EU Court of First Instance confirms the Commission's decision prohibiting a merger in the platinum and rhodium markets (Impala Platinum / Gencor / Lonrho), 25 March 1999, e-Competitions Bulletin March 1999, Art. N° 39345.*

[31] Impala v. Commission, Case T-464/04 EU:T:2006:216. See ***Porter Elliott***, *The EU Court of First Instance dismisses an appeal against Commission's first decision on a joint venture in the music sector (Impala), 30 June 2009, e-Competitions Bulletin Mergers judicial review, Art. N° 41754.*

[32] Bertelsmann and Sony v. Impala, Case C-413/06 P EU:C:2008:392, para. 52. ***Johannes Luebking, Peter Ohrlander***, *The EU Court of Justice annuls the Court of First Instance's judgment relating to a joint venture in the music publishing sector (Sony / BMG), 10 July 2008, e-Competitions Bulletin Mergers judicial review, Art. N° 35032.*

[33] *Tetra Laval*, para. 153.

[34] *Tetra Laval CJ*, para. 42.

[35] *Gencor*, para. 126.

[36] *Airtours*, para. 294.

[37] *Kali und Salz*, paras. 111-124.

[**38**] *Gencor*, paras. 319-320.

[**39**] Aer Lingus Group plc v. Commission ("*Aer Lingus*"), Case T-411/07 EU:T:2010:281, para. 65. See ***Oliver Koch***, *The EU General Court dismisses an airline's appeal against the Commission's decision not to divest a minority shareholding post-merger (Ryanair / Aer Lingus), 6 July 2010, e-Competitions Bulletin Mergers judicial review, Art. N° 34847*.

[**40**] *See, e.g.*, Commission v. Schneider Electric SA ("*Schneider CJ*"), Case C-440/07 P EU:C:2009:459. (Court annulled a prohibition decision that was based in part on a theory of harm not properly advanced by the Commission during the administrative procedure). See ***Porter Elliott***, *The European Court of Justice orders Commission to pay € 50,000 in damages for errors made in a merger control proceedings (Schneider Electric), 9 June 2010, e-Competitions Bulletin Mergers judicial review, Art. N° 41459*.

[**41**] *See, e.g.*, Commission v. United Parcel Service ("*UPS CJ*"), Case C-265/17 P EU:C:2019:23, para. 56, see ***Charlotte Breuvart, Eric Barbier de la Serre, Serge Clerckx, Henry de la Barre***, *The EU Court of Justice rules that the EU Commission violated rights of defence when it failed to share the final economic model used in its decision to block a merger (UPS / TNT), 16 January 2019, e-Competitions Bulletin Mergers judicial review, Art. N° 89313* ; ***James Killick, Assimakis Komninos***, *The EU Court of Justice dismisses the Commission's appeal against the annulment of its decision to prohibit a merger in the parcel delivery market (UPS / TNT), 16 January 2019, e-Competitions Bulletin Mergers judicial review, Art. N° 89214* ; ***Porter Elliott***, *The EU Court of Justice upholds the General Court's ruling that annulled the Commission's decision prohibiting a merger in the parcel delivery market (UPS / TNT), 16 January 2019, e-Competitions Bulletin Mergers judicial review, Art. N° 88964*, confirming the judgment in Case C-440/07 P EU:C:2009:459; and United Parcel Service v. Commission ("*UPS*"), Case T-194/13 EU:T:2017:144, see ***Ian Small, Simon Chisholm***, *The EU General Court annuls the Commission's decision to prohibit a merger in the International express package delivery sector (UPS / TNT), 7 March 2017, e-Competitions Bulletin Mergers judicial review, Art. N° 83635* ; ***Porter Elliott***, *The EU General Court annuls a prohibition merger decision and finds that the Commission had failed to properly communicate the final version of its econometric analysis (UPS / TNT), 7 March 2017, e-Competitions Bulletin Mergers judicial review, Art. N° 83649* (Court annulled a prohibition decision that relied in part on an economic report, the final version of which had not been disclosed to the merging parties during the administrative procedure, as "there was even a slight chance that [UPS] would have been better able to defend itself"), applying Solvay v Commission, C-109/10 P, EU:C:2011:686, para. 57, and following Advocate General Kokott, in Commission v. United Parcel Service, Case C-265/17 P EU:C:2018:628, para. 40 ("For the rights of defence to be observed, it is essential that the undertakings concerned be placed in a position in which they can effectively make known their views as regards all elements on which the Commission intends to rely in a merger control decision. It is not the Commission but rather the undertaking concerned itself which examines whether specific elements from the case file may be helpful for the purposes of its defence. In order that the undertaking can make this decision, it has to be made aware, without distinction, of all of the elements on which the Commission intends to rely"). See ***Porter Elliott***, *The EU Court of Justice Advocate General Kokott issues an opinion supporting the rights of defence of merging parties (UPS / TNT), 25 July 2018, e-Competitions Bulletin Mergers judicial review, Art. N° 87551*.

[**42**] Schneider Electric SA v. Commission ("*Schneider II*"), Case T-351/03 EU:T:2007:212.

[**43**] William J. Kolasky, Global Competition: Prospects for Convergence and Cooperation, speech before the American Bar Association Fall Forum, Washington D.C., November 7, 2002. *See too* remarks of a former President of the General Court, "Obviously if you have an administration

which has been used to not having decisions like this in the area of merger rules and you get three high profile decisions with a negative result within six months, then it's a sort of wake-up call" (Interview with Bo Vesterdorf, former President of the General Court, FT.com, December 18, 2003).

[**44**] Decision of the Council of State no. 201853 of April 9, 1999, Société The Coca-Cola Company ("*Coca-Cola*"). The jurisdiction of the Council of State over merger decisions has since been included in the French Administrative Code (see Article R. 311-1, 4°).

[**45**] Decision of the Council of State no. 375658 of April 15, 2016, Société Copagef.

[**46**] Decisions of the Council of State nos. 362347, 363542 and 363703 of December 21, 2012, Société Groupe Canal Plus ("*Groupe Canal Plus*"), see ***Porter Elliott***, *The French Council of State reduces € 30 M fine imposed on pay-TV operators for failure to comply with commitments in merger case (Vivendi / Canal Plus), 21 December 2012, e-Competitions Bulletin Mergers judicial review, Art. N° 58205* ; no. 409770 of September 28, 2017, Société Altice Luxembourg et Société SFR Group.

[**47**] Decisions of the Council of State nos. 363702 and 363719 of December 23, 2013, Société Métropole Télévision et Société Télévision Française 1 ("*Direct 8*").

[**48**] Decision of the Council of State no. 191654 of April 9, 1999, Société Interbrew France.

[**49**] *See, e.g.*, decisions of the Council of State no. 338197 of December 30, 2010, Société Métropole Télévision ("*Métropole Télévision*"); Direct 8; and nos. 390457 and 390774 of July 6, 2016, Sociétés Primagaz et Vitogaz.

[**50**] Decisions of the Council of State in Société Métropole Télévision; no. 403730 of October 17, 2016, Sociétés Soufflet Agriculture et Sobra; nos. 395284, 395247 and 395278 of June 14, 2017, Coopérative carburant d'intérêt régional public privé.

[**51**] Decision of the Council of State nos. 249262-252297-252350-252809, Société Royal Philips Electronic et autres.

[**52**] If the negative effects of a merger on competition are outweighed by benefits to the economy as a whole, or if the merger is justified by an overriding public interest, the Federal Minister for Economic Affairs and Energy can issue a ministerial authorisation overruling a prohibition decision.

[**53**] FCJ, decision of November 13, 2007, case KVZ 10/07.

[**54**] DCA, decision of July 12, 2016, case VI-Kart 3/16 (V). See ***Porter Elliott***, *The Higher Regional Court of Düsseldorf suspends ministerial authorisation of an acquisition (Kaiser's Tengelmann / EDEKA), 12 July 2016, e-Competitions Bulletin Mergers judicial review, Art. N° 80689.*

[**55**] FCJ, decision of September 25, 2007, case KVR 30/06. See ***Porter Elliott***, *The German Federal Court of Justice finds that merger prohibition decisions can still be appealed even after the parties abandoned the transaction (Springer / ProSiebenSat.1 Media), 25 September 2007, e-Competitions Bulletin Mergers judicial review, Art. N° 44887* ; ***Max Klasse***, *The German Federal*

Court of Justice acknowledges the right to a declaratory judgement on blocked mergers (Springer / ProSiebenSat.1), 25 September 2007, e-Competitions Bulletin Mergers judicial review, Art. N° 14294.

[**56**] DCA, decision of June 6, 2012, case VI-Kart 6/12 (V), confirmed by the FCJ, decision of October 9, 2012, case KVZ 27/12.

[**57**] FCJ, decision of November 7, 2006, case KVR 37/05.

[**58**] FCJ, decision of April 20, 2010, case KVR 1/09. The FCJ took a similar approach in Total/OMV, decision of December 6, 2011, case KVR 95/10, although it stressed the general importance of the presumption of collective dominance where the actual competitive dynamics are inconclusive. See ***Börries Ahrens***, *The German Federal Court of Justice finds a merger lawful, reversing the Court of Appeal's prohibition ruling (Phonak / GN Store), 20 April 2010, e-Competitions Bulletin Mergers judicial review, Art. N° 31621* ; ***Silke Heinz***, *The German Federal Court of Justice reverses the Düsseldorf Court of Appeal's decision ruling in favor of a merger in the hearing aids sector and addressing the issue of collective dominance test under German law (Phonak / GN ReSound), 20 April 2010, e-Competitions Bulletin Mergers judicial review, Art. N° 35661.*

[**59**] The DCA confirmed the FCO's prohibition decision. DCA, decision of August 23, 2017, case VI-Kart 6/16 (V). This test was introduced in 2013, reducing the importance of the old substantive test of the creation or strengthening of a dominant position. See ***European Competition Network Brief***, *The German Higher Regional Court in Düsseldorf upholds the decision by German Competition Authority to prohibit merger between two supermarket chains (EDEKA / Kaiser's Tengelmann), 23 August 2017, e-Competitions Bulletin Mergers judicial review, Art. N° 86358.*

[**60**] TAR Latium, judgment of July 10, 2007 No. 6230, Assicurazioni Generali/Toro Assicurazioni.

[**61**] Council of State, judgment of December 29, 2010 No. 9554, Emilcarta/Agrifood Machinery. See ***Filippo Amato***, *The Italian Supreme Administrative Court sets aside a decision of the NCA imposing a fine for failure to comply with a decision prohibiting a merger (Tetra Pak), 29 December 2010, e-Competitions Bulletin December 2010, Art. N° 34796.*

[**62**] Council of State, judgment of May 24, 2002 No. 2869, RAI-Vari impianti radiofonici.

[**63**] Council of State, judgment of March 31, 2009 No. 1894, Lidl Italia. See ***Igor Taccani***, *The Italian Supreme Administrative Court sets aside a judgment confirming fines imposed by the NCA for failure to notify a series of mergers (Lidl), 17 February 2009, e-Competitions Bulletin February 2009, Art. N° 26597.*

[**64**] *See, e.g.*, TAR Latium, judgment of August 24, 2010 No. 31278, Groupe Adeo/Castorama; Council of State, judgment of July 14, 2011 No. 4283, Groupe Adeo/Castorama Italia.

[**65**] Council of State, judgment of October 1, 2002 No. 5156, Enel France Telecom-New Wind.

[**66**] Case 136/2012, judgment of the Spanish High Court of April 24, 2015, Gestamp/Essa/Bonmor, upheld by the Supreme Court in Case 2681/2015, judgment of October 10, 2016.

[67] Case 3736/2012, judgment of the Spanish High Court of September 28, 2012, Bergé/Maritima Candina. Article 55(2) LDC establishes a formal procedure for the CNMC to assess whether the transaction is an economic concentration. See ***Alberto Escudero***, *The Spanish National Court annuls a fining decision in a gun-jumping case (Bergé), 28 September 2012, e-Competitions Bulletin Mergers judicial review, Art. N° 57366.*

[68] Case 3959/2012, judgment of the Spanish High Court of September 19, 2012, Consenur/Ecotec, see ***Alberto Escudero***, *The Spanish National Court annuls a merger control clearance decision because the notification thresholds were not reached (Consenur / Ecotec), 19 September 2012, e-Competitions Bulletin Mergers judicial review, Art. N° 57365* ; Case 2186/2015, judgment of the Spanish Supreme Court of May 25, 2015, see ***Patricia Sánchez-Calero Barco***, *The Spanish Supreme Court upholds a judgment of the National Court of Appeal and its assessment of the evidence regarding the definition of the relevant product market (Consenur / Ecotec), 25 May 2015, e-Competitions Bulletin May 2015, Art. N° 74718.*

[69] Case 2832/2016, judgment of the Spanish Supreme Court of June 17, 2016, Redsys/Redys.

[70] Case 4580/2015, judgment of the Spanish Supreme Court of November 2, 2015, Telecinco/Cuatro.

[71] Case 3871/2015, judgment of the Spanish Supreme Court of September 21, 2015, Gestevisión Telecinco.

[72] Société Coopérative de Production SeaFrance SA v Competition and Markets Authority ("*Eurotunnel*"), [2015] UKSC 75, December 16, 2015. See ***Tristan Jones***, *The UK Supreme Court overturns the Competition Appeals Tribunal judgment on whether acquisition of assets upon liquidation is subject to merger control (Eurotunnel / SeaFrance / MyFerryLink), 16 December 2015, e-Competitions Bulletin December 2015, Art. N° 80135* ; ***UK Competition Authority***, *The UK Supreme Court confirms the CMA's decision to treat an acquisition of 3 ferries and related assets as a merger (Eurotunnel / SeaFrance / MyFerryLink), 16 December 2015, e-Competitions Bulletin December 2015, Art. N° 77152.*

[73] British Sky Broadcasting Group plc v Competition Commission ("*BSkyB/ITV*"), [2008] CAT 25, January 21, 2010, upheld by the Court of Appeal ([2010] EWCA Civ 2). See ***Ilan Sherr***, *The English Court of Appeal confirms divestment remedies in a TV merger (BSkyB / ITV), 21 January 2010, e-Competitions Bulletin Mergers judicial review, Art. N° 30786.*

[74] Akzo Nobel NV v Competition Commission ("*AKZO*"), [2014] EWCA Civ 482, April 14, 2014. See ***Kyriakos Fountoukakos***, *The UK Court of Appeal upholds the Competition Commission's prohibition of a merger in the metal packaging coatings for beer and beverages market (Akzo / Competition Commission), 14 April 2014, e-Competitions Bulletin April 2014, Art. N° 66729* ; ***Joseph Tomlinson***, *The UK Court of Appeal holds that a foreign business can be blocked by the UK Competition Commission from acquiring another non-UK company where there is sufficient UK involvement (Akzo Nobel / Metlac), 14 April 2014, e-Competitions Bulletin April 2014, Art. N° 66322.*

[75] Global Radio Holdings Ltd v Competition Commission Case No 1214/4/8/13 [2013] CAT 26, November 15, 2013.

[76] Merger Assessment Guidelines, CC2 (Revised), OFT 1254, September 2010, paras. 2.2–2.7, see ***Porter Elliott***, *The UK competition authorities publish new merger guidelines, 16 September*

2010, e-Competitions Bulletin September 2010, Art. N° 41443 ; Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2, January 2014, para. 3.7.

[*77*] OFT v IBA Health Ltd [2004] EWCA Civ 142, February 19, 2004.

[*78*] J Sainsbury plc and Asda Group Limited v Competition and Markets Authority ("*Sainsbury and Asda*"), [2019] CAT 1, January 18, 2019.

[*79*] Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform [2008] CAT 36, December 10, 2008.

[*80*] Sports Direct International plc v Competition Commission [2009] CAT 32, December 14, 2009.