We have been asked to update the foreword to this impressive publication. [1] We take great pride in accepting this assignment and we hope that our contribution to this important piece of work helps set the scene in an ever more complex world of merger control procedures.

Mergers and acquisitions [2] are key functions of the capital markets. Combined with the fact that nowadays a merger control regime is in force in almost every country of the world, the need for merger clearance is often seen as a potentially frustrating bump on the road. Time is money, and every day spent awaiting merger clearance has an impact on the profitability calculations behind a deal. Hence, the parties are eager to speed up the merger control process as much as possible. Bearing that in mind, it is hard to imagine a more tragic outcome of a merger control process than a prohibition, and a withdrawal is effectively the same.

The number of mergers notified with the European Commission increases every year; in 2019 it being 378. From that significant number, only a minor part lead to competitive concerns that mostly can be resolved, and the bulk are handled in simplified procedures. However, some ultimately end up in prohibitions or withdrawals. The number of prohibitions/withdrawals seems to be on the rise, cf. further below. Nevertheless, competition practitioners can learn the most from the latter, i.e. what could have been handled differently to potentially secure another outcome.

The following is primarily based on the European Commission’s practice. We will seek to make some high-level observations of the most recent trends and developments regarding prohibited mergers. We pin out a few of the most important cases without pretending that this foreword covers all details. For that (very interesting!) exercise,
we refer to the publication itself in which great colleagues of ours throughout the world elaborate in detail on each case included in this publication.

The first edition of this foreword, in 2018, identified five trends:

- The number of prohibitions and withdrawn mergers is on the rise.
- Increased intensity of the substantive review makes it hard to negotiate acceptable remedies within the legal time frame.
- Primarily horizontal mergers have been prohibited, but vertical integrations are also in focus.
- Going towards more concentrated markets.
- Lack of judicial review blurs the boundaries of the authorities’ discretion.

From an analysis of the most recent case-law, all five trends remain relevant. In addition, we have identified two further trends which is also covered in this updated version of the foreword:

- Increased intensity in the judicial review, although still a rarity.
- Industrial mergers face harder times.

**The number of prohibitions and withdrawn mergers is on the rise**

The very first prohibition in European merger control was the 1991-decision in *Aerospatiale/Alenia/De Havilland* [3] where the European Commission found that the merger would have created a dominant position. Later, in 1999 and 2001, three far-reaching prohibitions were issued by the European Commission in *Airtours/First Choice* [4], *Schneider/LeGrand* [5], and *Tetra Laval/Sidel*. [6] The subsequent overturning of all these three prohibitions by the Court of First Instance [7] both strengthened the legal position of undertakings and led to the merger control reform embodied by Regulation 139/2004, which is still in force. The Court of First Instance’s siding with the applicants in all three appeals within a very short period was seen by many as a ‘wake-up call’ that the European Commission had gone too far in its autonomous reasoning and application of advanced theories of harm.

Only looking at the actual formal prohibitions would give a skewed statistic - withdrawing a merger as the only alternative outcome to a prohibition is largely as burdensome and commercially detrimental to the undertakings involved as waiting to have the prohibition decision served. Accordingly, both prohibitions and withdrawals need to be considered when assessing the true extent of mergers frustrated by concerns voiced by competition authorities.

The number of formal prohibitions has remained small and quite stable over the years, even though a slight increase has been observed in the recent years. [8] The same tendency seems to be true from a worldwide perspective and over a longer period. [9] From the most recent statistics, it seems like the number of deals frustrated by merger control procedures are now somewhat stabilising. [10] However, the number of formal decisions cannot stand alone. Statistics document that the number of withdrawn mergers, in our view, generally has been on the rise, and most of the withdrawals can, for all practical purposes, be equated with a prohibition. Most recently in 2019, 15 mergers were withdrawn (compared to only 3 formal prohibition decisions) whereas in 2018 the number was 7 (with no formal prohibition decisions).
This tendency is partly a result of (i) a general macroeconomic tendency going towards more concentrated markets, (ii) competition authorities in general becoming more activist in their substantive review of complicated mergers, and (iii) merging undertakings generally applying a more commercial view on merger control. The latter is demonstrated by many parties to concentrations often at an early stage having discussed a pre-empted catalogue of potential remedies with clear views as to which can be accepted, and which will constitute ‘deal breakers’. That results in the parties generally being more impatient and reluctant to even accept a phase II review - they struggle with the process not being fully transparent. It does, however, also mean that business is becoming more used to accepting that a merger review process may be something that requires a year or more to get done. [17]

It makes the work of competition lawyers even more important than ever, especially in providing clients with realistic expectations to the merger they are about to pursue. Realising that remedies might be necessary and creating a catalogue of expected remedies are musts in good merger control advice, but it is just as crucial that clients take an early stance as to which buttons can be pushed if the competition authorities reveal concerns beyond expectations. On the other side, it is also crucial that the parties are not deadlocked on certain remedies, and not least that they are able to act within the considerable time constraints of the merger control process. Quite a number of prohibition decisions are the result of the clock simply running out, and sometimes because there was simply not enough time for the parties to come to terms from a business perspective of the need for certain remedies.

**Increased intensity of the substantive review makes it hard to negotiate acceptable remedies within the legal time frame** [12]

Having to offer remedies, either structural or behavioural, is painful for undertakings. Remedies often lower the synergies of the deal directly and may in the worst-case scenario destroy the rationale behind a deal. The negotiation for remedies is classic game theory at its very best - the undertakings have a great interest in offering remedies substantial enough not only to ensure clearance, but also to ensure clearance within the nearest future. Moreover, the parties to a concentration obviously have an interest in not offering too extensive remedies. The authorities, on the other hand, have a duty to ensure that their competitive concerns are sufficiently alleviated.

Lately, some notified mergers have been withdrawn simply because the parties were not able to negotiate acceptable remedies within the legal time frames. An example of this is **SCJ/Sara Lee** [13] where three rounds of suggested remedies and three extensions of the deadlines did not prove sufficient to reach a clearance. Further examples of the same problem, but which came to prohibition decisions being issued by the European Commission, are **Deutsche Börse/NYSE Euronext** [14] and **Deutsche Börse/London Stock Exchange Group** [15], where remedy requirements became too painful. Other examples of recent unsuccessful remedies processes leading to prohibitions are the much discussed and rather politicised **Siemens/Alstom** [16] and **Tata Steel/ThyssenKrupp** [17] cases. From a practical perspective, it is important to be aware that when the remedies offered are not accepted, it easily becomes a hard game to play - both against the substance but definitely also against time.

As a result of this time problem, across jurisdictions, procedural rules have continuously been adjusted. Recently in our own jurisdiction, Denmark, ‘stop-the-clock’ rules have been introduced, meaning that the authority can stop the clock if the parties do not deliver on time on the authority’s requests for information. This rule, however, is a two-edged sword as it can both prolong the process to the detriment of the parties but can also serve to ensure that sufficient time is available to agree on remedies capable of providing a clearance.
In prohibited mergers, be it formal or withdrawn, the possibilities of prolonging the legal time frames are typically seen to be fully exhausted. This, in our view, shows that the analysis has gotten so complex that it - for complex mergers - can be difficult to reach a clearance with acceptable remedies within the legal time frame. Even a prolonged and detailed prenotification will not always solve this problem, especially not as theories of harm develop and become more refined with the progress of the review procedure and market testing.

**Primarily horizontal mergers have been prohibited, but vertical integrations are also in focus**

An analysis of prohibited mergers shows that almost all are horizontal mergers. That might not come as a big surprise, as horizontal mergers (and agreements) are generally most capable of impeding the effective competition. Moreover, it seems that the reasons for prohibiting horizontal mergers are primarily classical in scope, i.e. post-merger market shares exceeding 40% and too high levels of post-merger HHI and HHI deltas. Beyond this, however, we see more innovative theories of harm which can be hard to predict and more specific to the unique circumstances of each concentration. In *Dow/DuPont* [18], the European Commission investigated the possible harmful effect of cross-ownership (common ownership), and in *s [19]*, the main issue related to a dampening of innovation.

Notwithstanding this apparent trend, it seems that competition authorities also look increasingly at vertical mergers. Vertical integrations/mergers generally tend to improve economic efficiency (as is the case with vertical agreements). However, a vertical merger may be anti-competitive if it provides the merged entity with the ability and incentive to foreclose its competitors. A recent matter having such competitive concerns in focus is the *AT&T/Time Warner* deal, which was challenged by the US Department of Justice, but ultimately cleared and upheld by both the US District Court and the US Court of Appeals siding with the parties following an intensive trial and public discussion. Even though vertical concerns are still not mundane in merger control, they are not completely alien. In *Nordic Satellite Distribution* [20] from 1995, the European Commission issued a prohibition due to vertical concerns. In its latest clearance decision with commitments, *Altice/Omers/Allianz/Covage* [21], one of the concerns were vertical foreclosure leading to significant remedies.

**Going towards more concentrated markets**

Following the macroeconomic post-crisis recovery, a ‘merger mania’ has been described, i.e. a period with extraordinary high activity within mergers and acquisitions. Such great activity in the market naturally leads to a general concentration of the market. As a result, mergers in this ‘new reality’ will inherit a higher pre-merger HHI than before, making the substantive review more critical already from the start.

Examples of mergers being frustrated as a result of already highly concentrated markets are *TeliaSonera/Telenor/JV* [23] (withdrawn) and *Hutchison 3G UK/Telefónica UK* [24] (prohibited but subsequently overturned [25], cf. also below). Commissioner Vestager said that the European Commission in the *TeliaSonera/Telenor/JV* deal was ‘[…] on the road to prohibit the merger’ [26], and the main concern in *Hutchison 3G UK/Telefónica UK* was a post-merger market share exceeding 40% combined with the fact that Hutchison 3G UK had been a strong driver for competition on the market. Both cases show that the European Commission does not hesitate to intervene in mergers on concentrated markets.

This trend has also been the cause of the recent speculations as to whether private equity funds’ minority shareholdings in different undertakings which, in principle, are active on the same market(s), may be considered to constitute a competition law problem, even though there is no overlap in controlling stakes.
The more important it is to realise that much is possible, but the parties have to offer suitable and deliberate remedies at an early stage in the process. Sometimes, it may be recommendable to offer certain remedies up-front to alleviate the most imminent competitive concerns and at the same time show the competition authorities that the parties take the risk of a prohibition seriously.

**Lack of judicial review blurs the boundaries of the Authorities’ discretion**

In general, it is fair to say that merger control decisions only very rarely undergo judicial review. When it does go into a substantive review, implications may be profound. Most merger control regimes being *ex ante* in nature are affected by a significant degree of commercial common sense. It goes without saying that parties facing a prohibition would normally not have a commercial interest in pleading for judicial review of the merger. The problem, however, is that when a court potentially overturns a prohibition decision, the commercial deal is already dead.

This general lack of judicial review means that the merger control systems in general will easily suffer from the lack of the ‘checks and balances’ of a normal judicial decision-making system. Naturally, the authorities have an interest in testing the boundaries through own case-law, but when the parties’ commercial interests block the testing from actually being censored by the Courts, the boundaries may slide over time. This not only is undesirable; it is also a reason why merger control processes are becoming less transparent.

A recent example of a ‘teleological’ construction and application of merger control rules - albeit on a jurisdictional issue - could be the European Commission’s decision in *HeidelbergCement/Schwenk/CEMEX Hungary/CEMEX Croatia*. [27] In this case, the European Commission found the acquiring undertaking to be only a ‘joint venture vehicle’ for the acquisition and thus decided to include the two parent companies’ turnovers, leading to Commission jurisdiction, despite the fact that the joint venture undertaking was an established and stand-alone player on the market. The reasoning behind this call was that the European Commission held it decisive that HeidelbergCement and Schwenk (the two parent companies of the joint venture) were ‘[…] the drivers of the transaction […]’. The question of jurisdiction was challenged before the General Court but ended up being dismissed as inadmissible. [28]

A much-welcomed example of judicial review was the General Court’s overturning [29] of the European Commission’s prohibition decision in the *UPS/TNT* [30] merger. The General Court held that the European Commission had committed a procedural mistake by not complying with the principle of contradiction in respect of the econometric analysis which was the sole foundation for prohibiting the merger. Such judgments are rare, but they serve to remember basic legal principles of due process which can never be slackened upon despite of the time pressure, not least given the significant complexity in merger control processes. On a side note, *UPS* subsequently led a claim for damages resulting from the European Commission’s unlawful and overturned prohibition decision. [31]

A more recent and possibly very important example is the General Court’s ruling in *CK Telecoms (Hutchison 3G UK/Telefónica UK)* [32], in which the General Court overturned the European Commission’s prohibition decision in *Hutchison 3G UK/Telefónica UK* [33]. The General Court not only overturned the prohibition decision, but also carried out an intensive and detailed review of the European Commission’s theories of harm and the applied economic analyses, cf. the following.

**Increased intensity in the judicial review, although still a rarity**
In *CK Telecoms (Hutchison 3G UK/Telefónica UK)* [34] the General Court started out by noting its full discretion of review. It first and foremost criticised the European Commission for not having met the relevant burden of proof in respect of the SIEC test. It went on stating that the burden of proof is stricter than *more likely than not (on the basis of a ‘balance of probabilities’)*; but less strict than *beyond all reasonable doubt*. An important feature that may possibly have led the General Court to come to this conclusion was its analysis of the UPP model used in the case. It became abundantly clear to the General Court that the model itself will inherently always show that any horizontal merger will lead to a rise in prices, irrespective the size of the merging parties. Clearly, that is hard to believe and called for action. Furthermore, the General Court carried out an in-depth assessment of the European Commission’s conclusions based on the facts at hand, and further to the applied economic analysis, it clarified the two-fold nature of the concept of efficiency gains, i.e. both general efficiency gains and merger-specific efficiency gains must be taken into account; the former in the overall appraisal of the concentration, and the latter as one of multiple components of the applied quantitative models.

The General Court’s judgment is, in our view, an expression of a rarely seen in-depth judicial review serving as a painful reminder for the European Commission, or any other competition authority, that their discretion in predicting the future in the merger review is not unlimited and that the reasoning needs to be fair, transparent, and objective in order to meet the rule of law and the need for legal certainty. As it was the case in 1999 and 2001 (cf. above), the legal position of parties to concentrations has in principle been strengthened with this ruling as well as the *UPS/TNT* [35] ruling, although the European Commission itself, in the wake of the *CK Telecoms (Hutchison 3G UK/Telefónica UK)* [36] ruling, warned that it might lead to an increased burden on the merging parties to provide even more data during the review procedure [37]. However, it is yet to be reflected in practice, where the rulings hopefully will result in a more balanced and neutral approach to the often complex economic analyses which cannot serve as bulletproof evidence of the theories of harm which they are designed to test.

That being said, judicial review of merger cases, including prohibition decisions, is still a rarity, thus leaving room for increased legal certainty and up-front guidance on the substantive review procedure ahead of a contemplated merger. The European Commission’s *Horizontal merger guidelines* [38] and *Non-horizontal merger guidelines* [39] have not been updated since 2004 and 2008, respectively, and it appears that the ongoing increase in the intensity of the substantive review as well as the widespread application of complex economic models would warrant a revision of the guidelines. In our view, it would be essential for such a revision to consider the need for legal certainty for parties to concentrations to rely upon in the preceding feasibility analyses often carried out ahead of the more complex mergers.

**Industrial mergers face harder times**

As the markets have become more and more concentrated, industrial mergers seemingly face harder times. Notable examples are the *Siemens/Alstom* [40] and *Tata Steel/ThyssenKrupp* [41] cases, which demonstrate that heavy products do not travel long, and as the customers need timely delivery, even Chinese entry and an increased globalisation has yet to demonstrate its sufficiency to alleviate competitive concerns from the creation of ‘European Champions’.

In the press release on the *Tata Steel/ThyssenKrupp* prohibition [42], the European Commission specifically emphasised that the competitive pressure from imports from third countries was not sufficient to alleviate its competitive concerns. It mentioned delivery time requirements and local quality requirements as the drivers for this conclusion, but it is difficult in practice to imagine an industrial merger case without similar factors, which, *de*
facto, makes it difficult to fully take into account ‘competition from far-east’. [43] What has been the underlying discussion in the cases has been the issue of Chinese influence in Europe, and the discussion of when Chinese competition could be expected acting as a restraint on competition.

The aftermath of the Siemens/Alstom case was an intense discussion of policy aims of European merger control, led by France and Germany. While the notion of ‘creating European Champions’ and using merger control as an instrument of industrial policy has always been firmly rejected by the European Commission, it remains to be seen if the future cases in this area will to a greater extend be influenced in their analysis of the Chinese competition.

Conclusively, industrial mergers seem to face harder times in the coming years, stressing the need for realistic and timely merger control advice as well as a commercial analysis of the room for manoeuvring when considering remedies. [44]

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This is our humble foreword of an impressive publication of a comprehensive number of Concurrences bulletins, all within the subject-matter of prohibited mergers. It is our hope that this foreword can inspire the reader to draw his/her own conclusions on recent trends when reading the included bulletins.

One thing is certain: Merger control is an unavoidable and important delicate task for any competition lawyer and for competition economists as well. The impact on the undertakings concerned is great and the balance between obtaining clearance or facing a prohibition can be silk-thin.

Our foreword includes certain reasoned views; however, case-law can obviously be ambiguous. Thus, we would welcome any comments and/or openings for discussion following the discussions as set forth above.

Note from the Editors: Although the e-Competitions editors are doing their best efforts to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database can not be guaranteed. The present foreword provides readers with a fair view of the existing trends based on cases reported in e-Competitions and alternative sources gathered by the author. Readers are welcome to bring to the attention of the editors any other relevant cases.


[2] The term 'merger' is - in accordance with general practice - used to describe all kinds of notifiable transactions, i.e. mergers between previously independent undertakings, acquisitions of sole control, acquisitions of joint control, and the establishment of full-function joint ventures.


As an example, see the European Commission’s Staff Working Document of 31 May 2017, Report on Competition Policy 2016, page 18. See also Allen & Overy, Global Trends in Merger Control Enforcement 2017, page 6. In the European Commission’s more recent Staff Working Document of 9 July 2020, Report on Competition Policy 2019, page 19, it is concluded that the level of intervention has remained stable, although slight deviations (too insignificant to be conclusive) are identified.


See in support of this conclusion Allen & Overy, Global Trends in Merger Control Enforcement 2019, page 8.

In the currently pending FCA (Fiat Chrysler Automobiles N.V.)/PSA (Peugeot S.A.) merger, pending the European Commission’s clearance (case M.9730), the parties announced an expected closing of more than one year ahead of the announcement of the merger, see e.g.: https://www.reuters.com/article/us-fiatchrysler-m-a-psa-idUSKBN1YM0MV (last visited 30 November 2020).

The increased use of complex economic analyses also plays a role in the timing getting squeezed. However, this trend is left out of scope for this foreword which focuses on the legal trends within the (narrow) field of prohibited mergers.

Notified with the European Commission on 3 November 2010 under case number M.5969 and officially withdrawn 9 May 2011.

The European Commission’s decision of 1 February 2012 in case M.6166, Deutsche Börse/NYSE Euronext. See Jeffrey May, The EU Commission blocks proposed merger of stock exchange groups as it would create a quasi-monopoly in the European exchange-traded derivatives industry (NYSE Euronext / Deutsche Börse), 1 February 2012, e-Competitions Prohibited


[19] The European Commission’s decision of 21 March 2018 in case M.8084, Bayer/Monsanto; see European Commission, The EU Commission clears a merger, subject to remedies, in the seeds, pesticides and digital agriculture sector (Bayer / Monsanto), 21 mars 2018, e-Competitions.


[22] See as an example the Financial Times, Merger mania whips up $120bn of tie-ups in just one day, 30 April 2018.

[23] Notified with the European Commission on 27 February 2015 under case number M.7419 and officially withdrawn 11 September 2015.


[25] The General Court’s judgment of 28 May 2020 in case T-399/16, CK Telecoms UK Investments Ltd. v. Commission (currently under appeal pending before the European Court of Justice, case C-376/20 P). See Veronica Roberts, Kyriakos Fountoukakos, Christon Shenolikar, The EU General Court annuls the Commission’s decision prohibiting an oligopolistic merger between two mobile network operators in the telecommunication sector on the basis that it did not result in the creation or strengthening of a dominant position (Hutchison / Telefónica UK), 28 May 2020, e-Competitions May 2020, Art. N° 95202, General Court of the European Union, The EU General Court annuls the Commission’s decision to block the proposed merger in the UK sector of the mobile telephony market (Telefónica UK / Hutchison 3G UK), 28 May 2020, e-Competitions May 2020, Art. N° 95141.

[26] Speech, 'The values of competition policy', given by Commissioner Margrethe Vestager in Brussels on 13 October 2015 at CEPS Corporate breakfast, 'one year in office'.


[31] The damages case is currently pending before the General Court, case T-834/17, United Parcel Service, Inc. (UPS) v. Commission.

[32] The General Court’s judgment of 28 May 2020 in case T-399/16, CK Telecoms UK Investments Ltd. v. Commission (currently under appeal pending before the European Court of Justice, case C-376/20 P). See Veronica Roberts, Kyriakos Fountoukakos, Kristien Geurickx, Christon Shenolikar, The EU General Court annuls the Commission’s decision prohibiting an oligopolistic merger between two mobile network operators in the telecommunication sector on the basis that it did not result in the creation or strengthening of a dominant position (Hutchison / Telefónica UK), 28 May 2020, e-Competitions May 2020, Art. N° 95202.


[34] The General Court’s judgment of 28 May 2020 in case T-399/16, CK Telecoms UK Investments Ltd. v. Commission (currently under appeal pending before the European Court of Justice, case C-376/20 P). See Veronica Roberts, Kyriakos Fountoukakos, Kristien Geurickx, Christon Shenolikar, The EU General Court annuls the Commission’s decision prohibiting an oligopolistic merger between two mobile network operators in the telecommunication sector on the basis that it did not result in the creation or strengthening of a dominant position (Hutchison / Telefónica UK), 28 May 2020, e-Competitions May 2020, Art. N° 95202.


[36] The General Court’s judgment of 28 May 2020 in case T-399/16, CK Telecoms UK Investments Ltd. v. Commission (currently under appeal pending before the European Court of Justice, case C-376/20 P).

[37] See e.g. Guillaume Loriot’s speech at the 24th Annual Competition Conference, International Bar Association, 8-11 September 2020.


[43] In Allen & Overy, Global Trends in Merger Control Enforcement 2020, page 17, it is concluded that nearly half of all prohibition decisions (from a global perspective) were within the ‘industrial and manufacturing’ sectors.

[44] As an example, the German Bundeskartellamt has issued proportionally more prohibition decisions than any other national competition authority in the EU within the most recent years. In
Allen & Overy, *Global Trends in Merger Control Enforcement 2020*, page 4, the German enforcer is also pointed out as being rather harsh in its merger review. Illustratively, approximately one third of the national Concurrences bulletins on prohibited mergers released since the first edition of this foreword concerns German cases.