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Mario Monti's Legacy in EC Merger Control

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Mario Monti's tenure as EC Commissioner for competition policy between September 1999 and November 2004 coincided with one of the most eventful periods in EC merger control since the Merger Regulation came into force in 1990. This article places his tenure in historical perspective, describes the principal European Commission decisions and judgments of the EC courts rendered over the period, and identifies Commissioner Monti's principal achievements in the field of merger control. These achievements include the adoption of a recast and modernized Merger Regulation and Horizontal Merger Guidelines intended to ensure that the Commission's application of the Merger Regulation is firmly grounded in sound economics. The durability of Commissioner Monti's legacy will be determined by his successors' commitment to implementing the letter and spirit of the reforms instituted at his initiative and systematically taking decisions based on an objective appraisal of quantitative, economic evidence.

The author is a Partner at Cleary Gottlieb Steen & Hamilton LLP based in Brussels and London. This article draws on extracts from his two-volume loose-leaf book on the Merger Regulation, *European Merger Control Law: A Guide to the Merger Regulation* (2d ed. 2004). He bears sole responsibility for judgments, opinions, and any errors.

I. Introduction

Mario Monti's tenure as EC Commissioner for competition policy between September 1999 and November 2004 coincided with one of the most eventful periods in EC merger control since the Merger Regulation came into force in 1990.¹ His legacy includes a rich and extensive jurisprudence, comprising approximately 1,400 decisions,² among them some of the most controversial rendered by the European Commission in the field of merger control;³ a new era of judicial activism;⁴ a recast and modernized Merger Regulation; an array of administrative initiatives intended to effect significant and lasting change in the practice of EC merger control; and a series of measures designed to ensure that the Commission's application of the Merger Regulation would in the future be firmly grounded in sound economics.

Commissioner Monti's tenure had three distinct periods: (1) the early years between 1999 and 2001, when the Commission took a series of bold, often controversial, decisions, including eight prohibition decisions; (2) the turning point of 2002, when the Commission suffered a series of defeats at the hands of the EC courts; and (3) the years 2003-2004, when Commissioner Monti comprehensive-

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- 1 Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, 1990 O.J. (L 257) 13 [hereinafter *Merger Regulation*], with amendments introduced by Council Regulation 1310/97/EC, 1997 O.J. (L 180) 1, corrigendum 1998 O.J. (L 40) 17. Further changes to the Merger Regulation were adopted in Jan. 2004. See Press Release IP/04/70, European Commission, EU Gives Itself New Merger Control Rules for 21st Century (Jan. 20, 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/70&format=HTML&aged=0&language=en&guiLanguage=en>; Council Regulation 139/2004/EEC on the Control of Concentrations between Undertakings, 2004 O.J. (L 24) 1.
 - 2 Because of the delay in publishing Commission decisions, this article does not take account of decisions rendered in the course of 2004 that were not available at the end of Commissioner Monti's tenure in Nov. 2004.
 - 3 Eight transactions were prohibited during Commissioner Monti's tenure. See Commission Decision 2000/276/EC, *Airtours/First Choice*, 2000 O.J. (L 93) 1 [hereinafter *Airtours/First Choice*]; Commission Decision 2001/403/EC, *Volvo/Scania*, 2001 O.J. (L 143) 74 [hereinafter *Volvo/Scania*]; Commission Decision 2003/790/EC, *MCI WorldCom/Sprint*, 2003 O.J. (L 300) 1; Commission Decision 2002/156/EC, *SCA/Metsä Tissue*, 2002 O.J. (L 57) 1; Commission Decision 2004/134/EC, *General Electric/Honeywell*, 2004 O.J. (L 48) 1 [hereinafter *General Electric/Honeywell*]; Commission Decision 2004/275/EC, *Schneider/Legrand*, 2004 O.J. (L 101) 1; Commission Decision 2004/237/EC, *CVC/Lenzing*, 2004 O.J. (L 82) 20 [hereinafter *CVC/Lenzing*]; Commission Decision 2004/124/EC, *Tetra Laval/Sidel*, 2004 O.J. (L 3) 1 [hereinafter *Tetra Laval/Sidel*]. Shortly after Neelie Kroes replaced Mario Monti as EC Commissioner for competition policy in Dec. 2004, the Commission prohibited the acquisition of Gás de Portugal by Energias de Portugal and ENI (Commission Decision COMP/M. 3440, GDP/EDP/ENI (Dec. 12, 2004, not yet reported)).
 - 4 Between 2002 and 2004, the CFI overturned four of the eight prohibition decisions rendered during Commissioner Monti's tenure. See Case T-342/99, *Airtours plc v. Commission*, 2002 E.C.R. II-2585 [hereinafter *Airtours*]; Case T-310/01, *Schneider Electric v. Commission*, 2002 E.C.R. II-4071 [hereinafter *Schneider*]; Case T-5/02, *Tetra Laval v. Commission*, 2002 E.C.R. II-4382 [hereinafter *Tetra Laval*]; Case T-310/00, *MCI v. Commission* (Sep. 28, 2004, not yet reported) [hereinafter *MCI*].

ly reformed the Merger Regulation and implemented a range of initiatives designed to improve the clarity, analytical rigor, and robustness of Commission decisions, and the transparency, objectivity, and consistency of the Commission's decision-making.

With hindsight, the Court of First Instance's (CFI) judgments in *Airtours*, *Schneider*, and *Tetra Laval* provided Commissioner Monti with both his sternest challenge and his greatest opportunity. His response to the trilogy of judgments defined his tenure as Commissioner, served as a catalyst for change, and formed the basis of his legacy. Having conceded that "our record in the merger area is less glorious after these Court rulings,"⁵ Commissioner Monti implemented a series of reforms—the breadth, speed, and ingenuity of which surprised even his harshest critics. The effectiveness and durability of these reforms will be judged against two interrelated benchmarks: whether they create a discipline and objectivity that avoids the errors exposed by the court in *Airtours*, *Schneider*, and *Tetra Laval*; and whether they result in decisions that are well grounded in fact, law, and sound economics.

This article places Commissioner Monti's tenure in historical perspective, assesses the significance of his legacy, and identifies his principal achievements in the field of merger control. These achievements may be summarized as follows: (1) the provocation of a wide-ranging debate on the objectives of merger control that established a consensus for recasting the Merger Regulation's substantive test in a way that emphasizes the principal objectives of merger control; (2) the adoption of Horizontal Merger Guidelines that endeavor to provide a clear and consistent analytical framework for the application of the Merger Regulation;⁶ (3) the appointment of a Chief Economist and the increased emphasis given to economics; (4) the acknowledgement of the positive role played by merger-related efficiencies; (5) the implementation of measures intended to provide checks and balances on decision-making by the Commission's Directorate-General for Competition (DG COMP); and (6) the application of a more sophisticated and elaborate remedies policy.

Taken together, these developments have made the practice of EC merger control more systematic, complex, and challenging. Commission officials and legal practitioners have had to adapt to the new environment and take account of the higher evidentiary standard imposed by the EC courts and the increased emphasis placed by the Commission on quantitative assessment, scientific method, and economic rigor.

5 Mario Monti, *quoted in* Saeed Shah, *European Court Deals Crushing Blow to Monti's Merger Policy*, INDEPENDENT, Oct. 25, 2002.

6 Commission Notice on Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between Undertakings, 2004 O.J. (C 31) 5 [hereinafter *Horizontal Mergers Guidelines*].

II. A Historic Perspective

A. 1990-1993: THE BRITTAN YEARS

The entry into force of the Merger Regulation in September 1990 raised a wide array of legal and practical issues, and the years immediately following its implementation were in large part devoted to exploring, addressing, and resolving those issues. During the tenure of Sir Leon Brittan Q.C., now Lord Brittan, the Commission's application of the Merger Regulation exceeded expectations in several important respects: (1) the Commission met the Merger Regulation's tight deadlines in virtually every case; (2) the Commission was flexible and open in its application of the Merger Regulation's procedural rules; (3) the Commission progressively expanded the circumstances in which a joint venture might be reportable under the Merger Regulation;⁷ (4) the Commission began to use economic evidence and systematic market testing; (5) the Commission proved itself able to prohibit transactions, even in the face of political pressure;⁸ (6) the Commission worked closely with Member State authorities, using the Merger Regulation to develop a common appreciation of competition law and policy across the European Community; (7) the Commission started the process of fostering international cooperation with other antitrust authorities, including, in particular, the U.S. federal agencies.

During this initial period, the Commission staff—tentatively at first, but with increasing confidence as the years went by—developed a structured analytical framework for appraising reportable transactions that served as a foundation for the increasingly detailed analyses of the late 1990s. The starting point of the Commission's analyses, then as now, was the definition of a relevant market.⁹ Also during this period, the Commission signaled a determination to apply the Merger Regulation's dominance standard flexibly, including to transactions that threatened to create or strengthen situations of collective dominance. Because the original form of the Merger Regulation adopted in 1989 is silent on the question of whether the dominance standard applies to situations of collective dominance, there was uncertainty for some time as to whether the reference in the Merger Regulation to a (unitary) dominant position (in contrast to Article 82 of

7 Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, 1990 O.J. (C 203) 10; Commission Notice on the Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, 1994 O.J. (C 385) 1.

8 Commission Decision 91/619/EEC, *Aerospatiale-Alenia/de Havilland*, 1991 O.J. (L 334) 42 [hereinafter *Aerospatiale-Alenia/de Havilland*].

9 See, e.g., Commission Decision 93/9/EEC, *DuPont/ICI*, 1993 O.J. (L 7) 13 [hereinafter *DuPont/ICI*]; Commission Decision 92/553/EEC, *Nestlé/Perrier*, 1992 O.J. (L 356) 1 [hereinafter *Nestlé/Perrier*]; Commission Decision 94/893/EC, *Procter & Gamble/VP Schickedanz II*, 1994 O.J. (L 354) 32.

the EC Treaty, which explicitly prohibits the abuse of a dominant position “by one or more undertakings”) excluded the Merger Regulation’s application to situations where a small number of suppliers operate in parallel as an oligopoly. In *Nestlé/Perrier*, the Commission first developed the concept of collective dominance under the Merger Regulation and required substantial divestitures to prevent the creation of joint dominance in the supply of bottled mineral water in France.

B. 1993-1999: THE VAN MIERT YEARS

Sir Leon Brittan’s successor, Karel Van Miert, served as EC Competition Commissioner between 1993 and 1999. His tenure saw an increasing maturity, confidence, and sophistication in the Commission’s substantive review of reportable transactions. During this period, the Commission decisions that followed phase II investigations became increasingly detailed and lengthy. Between 1994 and 1998, the Commission prohibited nine transactions,¹⁰ including *Boeing/McDonnell Douglas*,¹¹ the first significant instance where the Commission and the U.S. federal agencies disagreed about the competitive effects of a merger. Also during this period, the Commission began to consider conglomerate—or portfolio—effects in three cases involving beverages, *Coca-Cola Enterprises/Amalgamated Beverages GB*,¹² *The Coca-Cola Company/Carlsberg A/S*,¹³ and *Guinness/Grand Metropolitan*.¹⁴ In *Gencor/Lonrho*, the Commission developed and refined its approach towards oligopolistic dominance. In 1998, the European Court of Justice (ECJ) confirmed in *Kali und Salz* that transactions giving rise to oligopolistic dominance could be prohibited under the Merger Regulation.¹⁵ The court also confirmed in that case the availability of a “failing firm defense” under the Merger Regulation.

10 Commission Decision 94/922/EC, *MSG/Media Service*, 1994 O.J. (L 364) 1 [hereinafter *MSG/Media Service*]; Commission Decision 96/177/EC, *Nordic Satellite Distribution*, 1996 O.J. (L 53) 20 [hereinafter *Nordic Satellite Distribution*]; Commission Decision 96/346/EC, *RTL/Veronica/Endemol*, 1996 O.J. (L 134) 32; Commission Decision 97/26/EC, *Gencor/Lonrho*, 1997 O.J. (L 11) 30 [hereinafter *Gencor/Lonrho*]; Commission Decision 97/277/EC, *Kesko/Tuko*, 1997 O.J. (L 110) 53; Commission Decision 97/610/EC, *Saint-Gobain/Wacker-Chemie/NOM*, 1997 O.J. (L 247) 1; Commission Decision 98/663/EC, *Blokker/Toys “R” Us*, 1998 O.J. (L 316) 1; Commission Decision 1999/153/EC, *Bertelsmann/Kirch/Premiere*, 1999 O.J. (L 53) 1; Commission Decision 1999/154/EC, *Deutsche Telekom/BetaResearch*, 1999 O.J. (L 53) 31.

11 Commission Decision 97/816/EC, *Boeing/McDonnell Douglas*, 1997 O.J. (L 336) 16.

12 Commission Decision 97/540/EC, *Coca-Cola Enterprises/Amalgamated Beverages GB*, 1997 O.J. (L 218) 15.

13 Commission Decision 98/327/EC, *Coca-Cola Company/Carlsberg A/S*, 1998 O.J. (L 145) 41.

14 Commission Decision 98/602/EC, *Guinness/Grand Metropolitan*, 1998 O.J. (L 288) 24.

15 Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission*, 1998 E.C.R. I-1375.

During Commissioner Van Miert's tenure, the Commission addressed certain shortcomings in the original Merger Regulation adopted in 1989. First, the distinction between "concentrative" and "cooperative" joint ventures was abandoned,¹⁶ and the Commission started to carry out under the Merger Regulation's procedure and timetable a substantive assessment under Article 81 of the EC Treaty of any spillover effects arising from the formation of fully-functional joint ventures. Second, the Commission introduced a short form procedure for unproblematic transactions. Third, the Commission introduced a second and lower set of thresholds intended to confer Commission competence over cases that affect three or more Member States, but fell below the Merger Regulation's original thresholds. Fourth, the Commission adopted the Market Definition Notice.¹⁷ Finally, the Commission corrected the lack of explicit authority to accept undertakings during the initial review period.

C. 1999-2004: THE MONTI YEARS

1. 1999-2001: The Years of Controversy

The 10th anniversary of the Merger Regulation's entry into force in 2000 witnessed an increasingly forceful, confident, and creative approach to its application. This manifested itself in several ways. First, the Commission prohibited a significant number of transactions,¹⁸ with several others being abandoned to avoid prohibition decisions.¹⁹ Second, the Commission employed an increasingly wide array of antitrust theories, including: (1) neighboring market and poten-

16 Among other things, the 1997 revision of the Merger Regulation expanded the Regulation's scope as of Mar. 1, 1998, to include the formation of all full-function joint ventures, including those giving rise to spill-over effects between the parent companies.

17 Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 37) 5.

18 Of the 18 transactions prohibited since the Merger Regulation came into force, one was prohibited during Commissioner Brittan's tenure, nine during Commissioner Van Miert's tenure, and eight during Mario Monti's tenure. Taken together, less than 1 percent of all transactions notified under the Merger Regulation have been prohibited. Of the transactions notified during Commissioner Brittan's tenure, less than 0.5 percent were prohibited; of the transactions notified during Commissioner Van Miert's tenure, 0.9 percent were prohibited; and of the transactions notified during Commissioner Monti's tenure, 0.5 percent were prohibited.

19 See, e.g., Press Release IP/00/258, European Commission, Alcan Abandons its Plans to Acquire Pechiney to Avoid the Prospect of a Decision by the European Commission to Block the Merger (Mar. 14, 2000), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/00/258&format=HTML&aged=0&language=EN&guiLanguage=en>; Press Release IP/00/1122, European Commission, EMI and Time Warner Withdraw Their Notification to the Commission (Oct. 5, 2000), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/00/1122&format=HTML&aged=0&language=EN&guiLanguage=en>.

tial entrant theories;²⁰ (2) conglomerate and portfolio effects;²¹ (3) vertical effects;²² and (4) spillover effects.²³ Third, the Commission for the first time identified single-firm dominance concerns where the post-transaction market shares would have been below 40 percent.²⁴ Fourth, the Commission endeavored to expand and develop the original notion of collective dominance.²⁵ Fifth, the Commission applied the Merger Regulation's procedural rules more rigorously, including, in particular, those barring consideration of remedies offered out-of-time.²⁶ Sixth, the Commission became more demanding in regard to the scope, implementation, and detail of remedies, including vetting potential purchasers of divested businesses more carefully²⁷ and proposing greater use of independent trustees to monitor compliance with remedies.²⁸

These developments attracted comment and criticism. First, it was said that the significantly increased numbers of notifications²⁹ and the enhanced scope

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- 20 See, e.g., Commission Decision 2001/98/EC, *Telia/Telenor*, 2001 O.J. (L 40) 1 [hereinafter *Telia/Telenor*]; Commission Decision 2004/269/EC, *Air Liquide/BOC*, 2004 O.J. (L 92) 1.
- 21 See, e.g., *General Electric/Honeywell*, *supra* note 3; *Tetra Laval/Sidel*, *supra* note 3. The Commission's decision in *Tetra Laval/Sidel* was overturned on appeal and subsequently approved. See Press Release IP/03/36, European Commission, Commission Clears Acquisition of Sidel by Tetra Laval Group (Jan. 13, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/36&format=HTML&aged=0&language=EN&guiLanguage=en>. In Dec. 2002, the Commission appealed to the ECJ the CFI's judgment. Cases C-12/03 and C-13/03, *Commission v. Tetra Laval*, ECJ judgment pending.
- 22 See, e.g., Commission Decision 2001/718/EC, *AOL/Time Warner*, 2001 O.J. (L 268) 28 [hereinafter *AOL/Time Warner*].
- 23 See, e.g., Commission Decision COMP/M.1980, *Volvo/Renault*, O.J. (C 301) 23 [hereinafter *Volvo/Renault*].
- 24 See, e.g., Commission Decision COMP/M.1684, *Carrefour/Promodes*, O.J. (C 164) 5.
- 25 See *Airtours/First Choice*, *supra* note 3, overturned by the CFI on appeal (see *Airtours*, *supra* note 4).
- 26 See, e.g., *Volvo/Scania*, *supra* note 3.
- 27 See, e.g., Commission Decision 2001/402/EC, *TotalFina/Elf*, 2001 O.J. (L 143) 1. Case T-342/00, *Petrolescence SA v. Commission*, 2003 E.C.R. II-1161, confirmed on appeal. See also, Commission Decision COMP/M.2690, *Solvay/Montedison-Ausimont*, O.J. (C 153) 11; Commission Decision COMP/M.2803, *Telia/Sonera*, O.J. (C 201) 19.
- 28 See, e.g., Standard Model Texts for Divestiture Commitments and Trustee Mandates, at http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/. See also, Press Release IP/03/614, European Commission, Commission Publishes Best Practice Guidelines for Divestiture Commitments in Merger Cases (May 2, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/614&format=HTML&aged=0&language=EN&guiLanguage=en>.
- 29 In 1991, the first full year in which the Merger Regulation was in force, 63 transactions were notified. In 2000 and 2001, the comparable figures were 345 and 335. Of the 2,550 transactions notified under the Merger Regulation between 1990 and Oct. 2004, 1,640 (64 percent) were notified in the years 1999-2004.

and detail of phase II investigations had strained the Commission's resources,³⁰ and that the informality and flexibility that had characterized the early years had given way to a more bureaucratic approach.³¹ Second, it was suggested that the possibility open to the Commission since March 1, 1998, to condition phase I approval decisions on undertakings had at times led the Commission to seek remedies that were not fully merited. Third, the Commission's limited resources were believed to have encouraged undue reliance on (and insufficient skepticism of) third-party testimony, especially that submitted by competitors. Fourth, concern was expressed as to the Commission's preparedness to rely on speculation about future anticompetitive conduct as a ground for challenging transactions, in particular in the context of conglomerate mergers. (The Commission's prohibition of *General Electric/Honeywell* attracted particularly strong criticism from senior U.S. antitrust officials³² and an assertive response from the Commission.³³) Fifth, it was suggested that DG COMP had become less susceptible to external review and scrutiny than before.³⁴

MOST FUNDAMENTALLY,
THE COMMISSION'S ROLE AS
INVESTIGATOR, PROSECUTOR,
AND ADJUDICATOR WAS
CALLED INTO QUESTION.

Most fundamentally, however, the Commission's role as investigator, prosecutor, and adjudicator was called into question.³⁵ The principal criticism made was that the same officials assess the evidence, develop and state the case against a notified concentration, determine whether that case has been proved, and propose whether a transaction should be approved or prohibited. Related to this

30 See, e.g., PETER SUTHERLAND, *GLOBAL CONSOLIDATION: VIEWS ON FUTURE MARKET DYNAMICS, EC MERGER CONTROL: TEN YEARS ON 70* (2000) ("It is clear that the MTF needs more resources immediately to deal with existing transaction volumes"). See also, COLIN OVERBURY, *POSTSCRIPTUM, EC MERGER CONTROL: TEN YEARS ON 450* (2000) ("There is no doubt that the resources of the MTF are now stretched to the limit").

31 See, e.g., Commission Decision 2004/285/EC, *BP/Erdölchemie*, 2004 O.J. (L 91) 40.

32 See, e.g., Charles A. James, *International Antitrust in the 21st Century: Cooperation and Convergence*, OECD Global Forum on Competition, Oct. 17, 2001, available at <http://www.usdoj.gov/atr/public/speeches/9330.pdf> ("[The Commission's decision] is neither soundly grounded in economic theory nor supported by empirical evidence, but rather, is antithetical to the goals of sound antitrust enforcement").

33 See, e.g., Press Release IP/01/855, European Commission, Commissioner Monti Dismisses Criticism of GE/Honeywell Merger Review and Rejects Politicisation of the Case (Jun. 18, 2001), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/01/855&format=HTML&aged=1&language=EN&guiLanguage=en>.

34 See, e.g., Joseph Gilchrist, *Rights of Defence and the Role of the Hearing Officer in EU Merger Cases*, *GLOBAL COMPETITION REV.* 19-20 (Dec. 2000/Jan. 2001).

35 See, e.g., Jack Welch, then-Chairman of General Electric, who, following the Commission's prohibition of the *General Electric/Honeywell* transaction, complained that "it's very difficult to be in a process where the prosecutor is also the judge." *The Prosecutor Is Also the Judge*, *TIME*, Jul. 16, 2001, at 42.

criticism was the impression that internal checks and balances on the Commission's decision-making had become less effective over time,³⁶ in part because the reforms of the role of the Hearing Officer introduced in 2001 had confined that official's role to dealing with procedural matters—not substantive issues, legal arguments, or conclusions drawn from the evidence. A comparison was made with the United States,³⁷ where the prospect of independent judicial review is thought to exert discipline on decision-making, irrespective of whether the federal agencies decide to challenge or approve a given transaction.³⁸ Certain commentators, including the President of the CFI, went as far as to suggest that authority to block mergers should be given to the EC courts.³⁹

2. 2002: The Turning Point

The turning point in Commissioner Monti's tenure came in 2002, when the relatively modest package of reform envisaged in *The Green Paper on the Review of Council Regulation 4064/89* (Green Paper),⁴⁰ published at the end of 2001, was comprehensively undermined by a series of judgments of the CFI rendered over

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- 36 See, e.g., *The Review of the EC Merger Regulation*, 32nd Report of the House of Lords Select Committee on the European Union, HL Paper 165, Session 2001-02, at para. 4 ("The top priority for reform should be to ensure objectivity and fairness in the ECMR process. The many concerns about due process are best addressed by improving the procedural safeguards in the current system. Efforts must focus on improving the internal checks and balances in the ECMR regime").
- 37 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.
- 38 See, e.g., William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, George Mason University Symposium, Washington, D.C., Nov. 9, 2001, available at <http://www.usdoj.gov/atr/public/speeches/9536.pdf> ("If we decide in the U.S. to challenge a merger, we know we may have to go to court to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition").
- 39 See David Lawsky, *Interview with Judge Bo Vesterdorf, President of the Court of First Instance*, REUTERS NEWS SERVICE, Sep. 19, 2002 ("In the cautious phrasing of a jurist, Vesterdorf said, 'The Commission might consider whether the sole responsibility to prohibit mergers should remain with the Commission, or whether one should change the system into something like the U.S. system.' In the United States, he noted, 'if (a merger) is to be prohibited, (the government) must go court.'").
- 40 Green Paper on the Review of Council Regulation 4064/89, COM(2001) 745/6 final, at <http://europa.eu.int/comm/competition/mergers/review/>. The Green Paper focused on four main areas: (1) the Merger Regulation's thresholds, where the Commission proposed extending its exclusive competence to transactions that were reportable in three or more Member States (at para. 59); (2) the referral of concentrations to Member State authorities, where the Green Paper proposed simplifying the requirements for referral requests (at paras. 69-83); (3) the substantive test of the Merger Regulation, where the Green Paper invited a "thorough debate" on the respective merits of the dominance test and the substantial lessening of competition (SLC) test (at paras. 159-179); and (4) improving the procedural provisions of the Merger Regulation, including a "stop-the-clock" provision to introduce greater flexibility into the time limits for proffering commitments (at para. 213).

a five-month period that annulled three prohibition decisions adopted by the Commission between 1999 and 2001 (*Airtours*, *Schneider*, and *Tetra Laval*). 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."⁴¹) The court's judgments received wide, often critical, coverage in the media and caused the Commission to conduct a swift review of the underlying weaknesses in its application of the Merger Regulation.⁴²

3. 2003-2004: The Years of Reform

Following the court's judgments in *Airtours*, *Schneider*, and *Tetra Laval*, the Commission acknowledged that "the system put in place in 1990 [was] showing some signs of strain."⁴³ The Commission also recognized that a "radical"⁴⁴ package of measures was needed to allay criticism, ensure that future decisions would be based on firm evidence and solid investigative techniques that could be tested against "the cold metal of economic theory,"⁴⁵ and maintain the existing institutional framework in which the Commission approves or prohibits mergers. The Commission expressed determination that "these setbacks [should not be allowed] to distort our view of the Community's merger control policy," and resolved to "transform them into an opportunity for even deeper reform than originally envisaged."⁴⁶

41 *Airtours*, *supra* note 4, at para. 404.

42 See, e.g., Francesco Guerrera & Guy de Jonquières, *Something Is Rotten Within Our System*, *FIN. TIMES*, Oct. 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 Court of First Instance—the lower chamber of the Luxembourg-based European Court of Justice—has sparked the beginning of a revolution in the way the EU regulates mergers").

43 Mario Monti, *Europe's Merger Monitor*, *THE ECONOMIST*, Nov. 9, 2002.

44 Philip Lowe, Future Directions for EU Competition Policy, Address at the International Bar Association, Fiesole (Sep. 20, 2002), available at http://europa.eu.int/comm/competition/speeches/text/sp2002_034_en.pdf.

45 JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942).

46 Mario Monti, Merger Control in the European Union: A Radical Reform, European Commission/IBA Conference on EU Merger Control, Brussels (Nov. 7, 2002), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/545&format=HTML&aged=1&language=EN&guiLanguage=en>. See also, Mario Monti, Competition Enforcement Reforms in the EU: Some Comments by the Reformer, Georgetown University, Washington D.C. (Apr. 4, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/200&format=HTML&aged=0&language=EN&guiLanguage=en> ("[t]here is no doubt that we deepened some of

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 [EU].”⁴⁷ The package included a proposal for a wide-ranging revision of the Merger Regulation (the Draft Merger Regulation),⁴⁸ a Draft Horizontal Mergers Notice,⁴⁹ and Draft Best Practices Guidelines.⁵⁰ Announcing the proposals, Commissioner Monti predicted that “[t]he reforms will significantly improve our merger control system making it, I believe, a model to be emulated worldwide.”⁵¹ Following extensive discussion with Member State competition agencies, the Commission’s proposals were adopted by the Council, with only relatively minor changes, in late 2003.⁵² The recast Merger Regulation, which came into force on May 1, 2004, together with the other measures implemented by Commissioner Monti in response to the EC courts’ judgments, are described below in the assessment of Commissioner Monti’s legacy.

The EC courts’ judgments in 2002 encouraged a more cautious approach and the Commission’s challenge rate fell: between 2002 and October 2004, no transaction was prohibited (the last year in which this had occurred was 1993). Of the 212 transactions notified in 2003, a large number were reported under the simplified procedure, which requires submission of only a short form notification;⁵³ 11 (5 percent) were approved with remedies at the end of phase I, including

[the] reforms after the three annulments of merger decisions by the [CFI] last year. While dealing with different problems, the three decisions have a point in common: they have set a high standard of proof for the Commission to match when blocking a deal”).

- 47 Press Release IP/02/1856, European Commission, Commission Adopts Comprehensive Reform of EU Merger Control (Dec. 11, 2002), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/1856&format=HTML&aged=0&language=EN&guiLanguage=en>.
- 48 Proposal for a Council Regulation on the Control of Concentrations between Undertakings, COM(2002) 711.
- 49 Draft Commission Notice on the Appraisal of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between Undertakings, 2002 O.J. (C 331) 3 [hereinafter *Draft Horizontal Mergers Guidelines*].
- 50 DG Competition Best Practices Guidelines on the Conduct of EC Merger Control Proceedings, at http://europa.eu.int/comm/competition/mergers/others/best_practices_public_cons.pdf [hereinafter *Best Practices Guidelines*].
- 51 Press Release IP/02/1856, *supra* note 47.
- 52 Press Release IP/03/1621, European Commission, Commission Welcomes Agreement on New Merger Regulation (Nov. 27, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1621&format=HTML&aged=1&language=EN&guiLanguage=en>.
- 53 About 70 (33 percent) transactions were notified under the simplified procedure, including several significant transactions. See, e.g., Commission Decision COMP/M.3303, General Electric/Vivendi Universal Entertainment, 2004 O.J. (C 6) 22.

Alcan/Pechiney (II),⁵⁴ which, in 2000, had been abandoned to avoid being prohibited, but in 2003 was approved, subject to wide-ranging divestiture and other commitments; and nine (4 percent) were cleared at the end of phase II, two unconditionally and the remainder subject to undertakings, including a number that required extensive relief.⁵⁵ No transaction was withdrawn.

Over the course of 2003-2004, the Commission continued to evolve the economic sophistication of its decisions and began to subject draft decisions to greater internal scrutiny.⁵⁶ Several transactions that many expected to be challenged, including *Carnival/P&O*,⁵⁷ *Sony/BMG*,⁵⁸ and *Oracle/PeopleSoft*,⁵⁹ were approved. Also, building on the broader interpretation that had been given to the “failing firm defence” in the Commission’s 2001 decision in *BASF/Eurodiol/Pantochim*,⁶⁰ Commissioner Monti adopted a pragmatic approach in cases where no less anticompetitive alternative could reasonably be identified (*Deloitte & Touche/Andersen (United Kingdom)*,⁶¹ *Ernst & Young/Andersen France*,⁶² and *Newscorp/Telepiù*).⁶³ As for judicial review, after the setbacks of 2002, the EC courts largely confirmed the Commission’s decisions; only one prohibition decision was overturned, mainly on technical grounds,⁶⁴ and a clearance decision was partially annulled.⁶⁵

54 Commission Decision COMP/M.3225, *Alcan/Pechiney (II)*, 2003 O.J. (C 299) 19.

55 See, e.g., Commission Decision 2004/322/EC, *General Electric/Instrumentarium*, 2004 O.J. (L 109) 1 [hereinafter *General Electric/Instrumentarium*]; Commission Decision 2004/422/EC, *Lagardère/Natexis/VUP*, 2004 O.J. (L 125) 54; Commission Decision 2004/311/EC, *Newscorp/Telepiù*, 2004 O.J. (L 110) 73.

56 See, e.g., Commission Decision 2003/777/EC, *Siemens/Drägerwerk/JV*, 2003 O.J. (L 291); and *General Electric/Instrumentarium*, *supra* note 55.

57 Commission Decision COMP/M.3071, *Carnival/P&O Princess*, 2003 O.J. (C 42) 7.

58 Commission Decision COMP/M.3333, *Sony/BMG* (Jul. 19, 2004, not yet reported).

59 Commission Decision COMP/M.3216, *Oracle/PeopleSoft* (Oct. 26, 2004, not yet reported).

60 Commission Decision 2002/365/EC, *BASF/Eurodiol/Pantochim*, 2002 O.J. (L 132) 45, at paras. 136-138.

61 Commission Decision COMP/M.2810, *Deloitte & Touche/Andersen UK*, 2002 O.J. (C 200) 8.

62 Commission Decision COMP/M.2816, *Ernst & Young/Andersen France*, 2002 O.J. (C 232) 6.

63 See also, Christina Caffarra & Andrea Coscelli, *Merger to Monopoly: Newscorp/Telepiù*, 24(11) Eur. COMPETITION L. REV. 625 (2003).

64 *MCI*, *supra* note 4 (Court found that the Commission had erred in prohibiting a transaction one day after being informed that the proposed merger had been abandoned).

65 Case T-114-02, *BaByliss SA v. Commission*, 2003 E.C.R. II-1279, partially overturning *SEB/Moulinex* (see Commission Decision COMP/M.2621, *SEB/Moulinex*, 2002 O.J. (C 49) 18).

III. Commissioner Monti's Legacy

This section assesses Commissioner Monti's legacy with respect to a series of procedural and substantive matters relevant to the Commission's appraisal of reportable transactions.

A. JURISDICTIONAL MATTERS

In common with his immediate predecessor, Karel Van Miert, Commissioner Monti considered changing the jurisdictional thresholds of the Merger Regulation, but ultimately decided to leave in place the bright-line thresholds prescribed in the 1989 Merger Regulation, as amended in 1997. In late 2001, the Green Paper adopted by the Commission concluded that the second set of thresholds introduced in March 1998 had failed to confer on the Commission competence over transactions that require notification in multiple Member States.⁶⁶ Accordingly, the Commission proposed amending the Merger Regulation to ensure "effective application of Community competition rules to cases with a cross-border interest, while, in a balanced way, reducing the administrative burden for the involved companies."⁶⁷ The Green Paper suggested revising the Merger Regulation to establish automatic EC competence over cases subject to notification in three or more Member States.

Although there was widespread support for reducing the number of multiple filings at the Member State level, the practical difficulties identified in the Green Paper's proposal led to its abandonment. Having decided against further reducing the Merger Regulation's jurisdictional thresholds on the grounds that they "continue to function effectively as proxies for those cases that are most appropriately dealt with at the Community level,"⁶⁸ Commissioner Monti introduced reforms intended to simplify the allocation of cases between the Commission and Member States and to reduce the incidence of multiple filings through a streamlined system of referrals.⁶⁹ The principal change gave companies the possibility to request one-stop review by the Commission, thereby avoiding the need to notify the same transaction to a number of different national agencies. Although the practical implications of the new rules will emerge only with time, experience to date suggests that, notwithstanding their complexity, compa-

66 Green Paper, *supra* note 40, at para. 24.

67 *Id.* at para. 29.

68 Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations 1017/68/EEC, 2988/74/EEC, 4056/86/EEC and 3975/87/EEC, COM(2000) 582 final, at para. 11.

69 Press Release IP/02/1856, *supra* note 47.

nies have not been deterred from making the requisite applications in a significant number of cases.⁷⁰

B. EVIDENTIARY MATTERS

One of the principal implications of the EC courts' judgments in *Airtours*, *Schneider*, and *Tetra Laval* concerned the evidentiary standard that must be met by the Commission. In *Airtours*, the CFI said that "it is incumbent upon [the Commission] to produce convincing evidence thereof"⁷¹ and to "prove conclusively" that the transaction will have anticompetitive effects.⁷² In *Schneider*, the CFI criticized the "abstract" nature of certain of the Commission's determinations, found its evidence "lacking," and held that certain of its findings were "insufficiently demonstrated in law."⁷³ In *Tetra Laval*, the CFI confirmed that the Commission's assessment should be based on "cogent evidence"⁷⁴ and held that the evidence relied upon had, at least in part, "not [been] plausible" or "sufficient in law."⁷⁵

The Commission has appealed the CFI's judgment in *Tetra Laval*,⁷⁶ inter alia, because it believes that the court "imposed a disproportionate standard of proof for Merger Regulation decisions," and, "as a result, has upset the balance between the interests of the merging parties and the protection of consumers, which is provided for in the Merger Regulation."⁷⁷ The Commission's appeal contends that "the requirement in *Tetra Laval* that the evidence be 'convincing' is materially different, both in degree and in kind, from the obligation that evidence be 'cogent and consistent.'"⁷⁸ The Commission has nevertheless recognized that

70 As of mid Oct. 2004, 14 applications had been made to have transactions referred from the national level to the Commission, of which only two had been vetoed by Member States, while one application had been filed for the transfer of a transaction from the Commission to the Member States and was accepted. Together, these transactions represented about 10 percent of all those notified under the Merger Regulation between May 1 and Oct. 15, 2004.

71 *Airtours*, *supra* note 4, at paras. 47 and 63.

72 *Id.* at para. 210.

73 *Schneider*, *supra* note 4, at paras. 209, 343, 349, and 398.

74 *Tetra Laval*, *supra* note 4, at para. 137.

75 *Id.* at paras. 246, 298.

76 *Commission v. Tetra Laval*, *supra* note 21.

77 Press Release IP/02/1952, European Commission, Commission Appeals CFI Ruling on Tetra Laval/Sidel to the European Court of Justice (Dec. 20, 2002), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/1952&format=HTML&aged=1&language=EN&guiLanguage=en>.

78 Report for the Hearing, Case C-12/03, *Commission v. Tetra Laval*, CFI judgment pending, at para. 26.

“the level of proof required by the [CFI] is high, which implies that the Commission’s enquiries should be more extensive and detailed than at present.”⁷⁹ As described below, many of the initiatives pursued by Commissioner Monti following *Airtours*, *Schneider*, and *Tetra Laval* were intended to ensure that the Commission would in future avoid the errors committed in those cases and meet the high evidentiary standard established by the EC courts.

C. HORIZONTAL MERGER GUIDELINES

The Horizontal Mergers Guidelines represent among the most significant of Commissioner Monti’s contributions to EC merger control. As explained above, the judicial defeats of 2002 provided the catalyst for a series of reforms intended, among other things, to ensure that the Commission’s review should be more structured, firmly grounded in sound economics, and consistently based on an objective assessment of quantitative evidence. In an effort to synthesize 15 years of practice, “provide guidance as to how the Commission assesses concentrations,”⁸⁰ prescribe “a sound economic framework for the assessment of concentrations,”⁸¹ and give the Commission’s decision-making “new transparency and clarity,”⁸² the Commission adopted the Horizontal Mergers Guidelines in January 2004.

The Horizontal Mergers Guidelines explain how mergers should be analyzed and identify the factors that may mitigate an initial finding of competitive harm. In addition to identifying the ways in which horizontal mergers may impair effective competition, as well as countervailing factors that may defeat a finding of competitive harm, they also formalize the Commission’s practice of using the Herfindahl-Hirschman Index (HHI) to measure concentration levels.⁸³ Their adoption was intended to create a more predictable climate for the assessment of reportable transactions and to achieve benefits in the European Community similar to those achieved by the implementation in 1982 of the first version of the U.S. Horizontal Merger Guidelines.⁸⁴ The significance lies primarily in their

79 Mario Monti, EU Competition Policy, Fordham Annual Conference on International Antitrust & Policy, New York (Oct. 31, 2002), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/533&format=HTML&aged=1&language=EN&guiLanguage=en>.

80 *Horizontal Mergers Guidelines*, *supra* note 6, at para. 5.

81 *Merger Regulation*, *supra* note 1, at recital 28.

82 Philip Lowe, Developments in EC Competition Policy, Richards Butler Annual Competition Forum, London (Nov. 29, 2002), available at http://europa.eu.int/comm/competition/speeches/text/sp2002_044_en.pdf.

83 *Horizontal Mergers Guidelines*, *supra* note 6, at 19-21.

84 See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, issued 1992, revised 1997, at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

manifestation of the Commission's appreciation of the value in providing clear, structured, and economics-based guidance concerning the analysis of horizontal transactions.

D. SUBSTANTIVE APPRAISAL

1. The Commission's Decisional Practice

Recognizing that the Merger Regulation's substantive test is not "some immovable and absolute measurement against which the future effects of a merger can be assessed," but is rather "a highly sophisticated tool that requires us to understand the dynamics of competition and to identify the key competitive factors in the markets concerned,"⁸⁵ the Commission's decisional practice evolved during Commissioner Monti's tenure: less reliance was placed on market share data and greater emphasis was given to evaluating the competitive characteristics of the market, the dynamics of competition between the merging parties, and the competitive effects of reportable transactions. During Commissioner Monti's tenure, the Commission increasingly focused on the direct substitutability of the merging parties' products,⁸⁶ and more frequently cast its assessment in terms of assessing the unilateral effects of a merger.⁸⁷

Two decisions involving Volvo's truck business illustrate how unilateral effects considerations can tip the scale toward or away from a finding of dominance when moderately high market shares are involved. In both *Volvo/Scania*, where the notified transaction was prohibited, and *Volvo/Renault*, where the transaction was approved, the Commission focused on the degree of substitutability between the parties' heavy trucks and considered direct evidence of substitutability (by surveying customers' perceptions of the trucks' characteristics), as well as economic evidence (including studies of market share fluctuations and econometric pricing models). In *Volvo/Scania*, the evidence showed that the parties' trucks were each other's closest substitute, which became a significant factor in the Commission's prohibition decision. On the other hand, in *Volvo/Renault* the Commission concluded that the transaction raised no concern on the French heavy truck market, despite a combined share of 49 percent—a share that would have been sufficient to trigger opposition in *Volvo/Scania*, primarily on the basis

85 Mario Monti, The Main Challenges for a New Decade of EC Merger Control, EC Merger Control 10th Anniversary Conference, Brussels (Sep. 15, 2000), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/00/311&format=HTML&aged=1&language=EN&guiLanguage=en>.

86 The Commission's preparedness to focus on projecting a merger's likely effect on prices through unilateral effects has precedent in some of the early decisions rendered under the Merger Regulation. See, e.g., *DuPont/ICI*, *supra* note 9; Commission Decision 96/435/EC, *Kimberly-Clark/Scott*, 1996 O.J. (L 183) 1.

87 See, e.g., Commission Decision 2003/667/EC, *Carnival/P&O Princess*, 2003 O.J. (L 248) 1, at paras. 136-138.

of evidence showing that the parties' trucks were not particularly close substitutes.⁸⁸

Finally, in a number of cases, Commissioner Monti sought to use merger control as a tool to foster structural reform in the European Community, in particular by accelerating liberalization or opening national markets to foreign competition.⁸⁹ By way of example, in *EnBW/EDP/Cajastur/HIDROCANTÁBRICO*, the Commission's approval of a transaction involving a Spanish electricity supplier and a French electricity distributor was conditional on the latter's undertaking to increase interconnection capacity between France and Spain.⁹⁰ Likewise, in *Telia/Telenor*, the Commission determined that each of the merging parties was the most significant potential competitor in the other's home market (Sweden and Norway, respectively) and required remedies designed to increase the scope for competition.

2. The Merger Regulation's Substantive Test

In the wake of *General Electric/Honeywell*, there was considerable debate as to whether the Commission and the U.S. agencies had reached opposite conclusions as a result of the different tests in the European Community and the United States. Commissioner Monti's contribution to this debate included a wide-ranging review, launched in December 2001 with the Commission's Green Paper, of the implications, if any, of replacing the pre-existing dominance test with an SLC test.

A number of reasons were advanced in favor of an SLC test. First, it was suggested that an SLC test might be a more appropriate, economics-based tool with which to assess the competitive effect of concentrations, since it arguably allows greater emphasis to be placed on inter-firm competitive dynamics, empirical evidence, and economic analysis, permits greater identification of the competition problems and associated remedies, and entails somewhat greater scope for the use of efficiency analysis.⁹¹ Second, it was said that an SLC test would require the

88 *Volvo/Renault*, *supra* note 23, at para. 33.

89 See, e.g., Mario Monti, A Reformed Competition Policy: Achievements and Challenges for the Future, Center for European Reform, Brussels (Oct. 28 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/477&format=HTML&aged=0&language=EN&guiLanguage=en>.

90 Commission Decision COMP/M.2684, *EnBW/EDP/Cajastur/HIDROCANTÁBRICO*, 2002 O.J. (C 114) 23.

91 See, e.g., John Vickers, Director General of Fair Trading, U.K. Office of Fair Trading, International Mergers: The View from a National Authority, 28th Annual Conference on International Antitrust Law and Policy, Fordham University School of Law, New York (Oct. 25, 2001) ("Dominance is not an ideal test for considering the impact of a merger on competition. Narrowly interpreted it would be far too permissive. The Commission has therefore been creative in applying the dominance test, particularly when looking at oligopolistic markets. But the concept of joint or collective dominance is not without difficulties").

Commission to focus less on whether (potentially less efficient) competitors could be marginalized by a merger and more on whether the effects on competition are good or bad from a consumer perspective in the form of lower prices. Third, there was said to be a “gap” in the dominance standard that rendered it incapable of challenging a small category of anticompetitive transactions.⁹²

Following an extensive debate among regulators, lawyers, and economists concerning the differences between the dominance and SLC tests,⁹³ the Commission concluded that “[t]he dominance test, if properly interpreted, is capable of dealing with the full range of anti-competitive scenarios which mergers may engender.”⁹⁴ Nevertheless, having identified a possible “gap” between single-firm dominance and collective dominance, the Commission explored various means of addressing the situation. Rather than replace the dominance standard with an SLC test,⁹⁵ in part because of a desire to “maintain the sizeable body of case law and case practice which has been built up over the years,”⁹⁶ the Commission proposed bridging any “enforcement gap” between the dominance and SLC tests by making specific reference in the Merger Regulation to “unilateral effects.”⁹⁷

In December 2002, in an attempt to address any “enforcement gap” between the dominance and SLC tests, the Commission proposed “clarifying”⁹⁸ the definition of dominance—for the purposes of the Merger Regulation—to undertakings that “hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output,

92 Consider, for example, a proposed merger between the #2 and #3 firms in a three-firm market where the shares are 60 percent / 20 percent / 20 percent. Since the combined entity would remain smaller than the market leader, it would be difficult to argue that it would become individually dominant. Moreover, if market conditions were not conducive to oligopoly behavior (e.g., there was “lumpy” demand or a lack of price transparency), it might prove difficult to apply a convincing collective dominance analysis. Nevertheless, based on the high level of market concentration, competition concerns could arise.

93 See, e.g., Sven B. Völcker, *Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control*, 25(7) EUR. COMPETITION L. REV. 395 (2004); Vijay SV Selvam, *The EC Merger Control Impasse: Is There a Solution to This Predicament?*, 25(1) EUR. COMPETITION L. REV. 52 (2004).

94 Monti, *Merger Control in the European Union: A Radical Reform*, *supra* note 46.

95 Monti, *EU Competition Policy*, *supra* note 79 (“I believe that the issue of choice among the two tests, dominance and substantial lessening of competition, has been excessively dramatized. I attach definitively more importance to the adoption of guidelines on the assessment of horizontal mergers, which will give clarity and predictability to the Commission policy”).

96 Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, *supra* note 68, at para. 56.

97 Monti, *Merger Control in the European Union: A Radical Reform*, *supra* note 46.

98 Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, *supra* note 68, at para. 55.

THE COMMISSION MAY BE EXPECTED TO PLACE LESS EMPHASIS ON MARKET DEFINITION AND ATTACH GREATER IMPORTANCE TO ASSESSING THE COMPETITIVE EFFECT OF PARTICULAR TRANSACTIONS.

distribution or innovation, or appreciably to foreclose competition.”⁹⁹ Instead of identifying two categories of anticompetitive effect—unilateral effects and coordinated effects—the Commission proposed a three-part framework that identified two categories of unilateral effect, those giving rise to a “paramount market position” and those that would otherwise create or strengthen a non-collusive oligopoly.¹⁰⁰ The Commission’s proposal proved controversial,¹⁰¹ in particular among Member State competition agencies, and an extensive debate took place over the course of 2003 on the merits of the Commission’s approach as against that of switching to the SLC standard, as well as the general implications for merger policy of a reworking of the substantive standard.¹⁰² In early 2004, the Council adopted a compromise proposal recasting the substantive test adopted in 1989.

As of May 1, 2004, the substantive test under the Merger Regulation has been whether a transaction “significantly impedes effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.”¹⁰³ Although the practical implications of the recast substantive test will emerge only over time, the following tentative predictions may be made. First, consistent with recent practice, the Commission may be expected to place less emphasis on market definition and attach greater importance to assessing the competitive effect of particular transactions. Second, more emphasis will likely be placed on assessing the nature and extent of competition between the merging parties, examining the competitive significance of that rivalry, and projecting the effects on the market in light of that assessment. Third, while the scope for intervention may have been widened,¹⁰⁴ emboldening the Commission to challenge transactions that might previously have been approved, the burden will remain on the Commission to make a showing to the requisite legal standard

99 *Id.* at art. 2(2).

100 *Draft Horizontal Mergers Guidelines*, *supra* note 49, at para. 11.

101 See, e.g., William Kolasky & Richard Elliott, *The European Commission Notice on the Appraisal of Horizontal Mergers*, 17 *ANTITRUST* 64 (2003).

102 See, e.g., John Fingleton, *Mind the Gap: Reforming the EU Merger Regulation*, *The Role of Economics in European Competition Policy Conference*, London (Jun. 4, 2003).

103 *Merger Regulation*, *supra* note 1, at art. 2(3).

104 See, e.g., John Vickers, *Merger Policy in Europe: Retrospect and Prospect*, 25(7) *EUR. COMPETITION L. REV.* 455 (2004) (“[The significant impediment to effective competition test] extends, in a disciplined way, beyond dominance, and it makes clear that the new test covers non-coordinated effects, thus disposing of the problem of the gap”).

that a concentration will have material anticompetitive effects. In sum, the recast substantive test is unlikely to effect a significant change in policy or support a materially greater number of prohibition decisions.¹⁰⁵

3. Efficiencies

Although there is widespread agreement among economists and lawyers that the promotion of efficiencies is a central aim of competition law,¹⁰⁶ the Commission's view of efficiencies has been controversial. At the time the Merger Regulation was adopted, the Commission resisted suggestions that it should exempt or permit concentrations that created or strengthened a dominant position by reason of projected efficiencies.¹⁰⁷ The prevailing view of Commission officials at the time was that this provision did not permit positive account to be taken of efficiencies and that "any kind of derogation [is] totally excluded."¹⁰⁸ Among other things, the Commission cited the Council's omission from the 1989 Merger Regulation of language considered in earlier drafts that would have permitted the Commission to authorize mergers contributing "to the attainment of the basic objectives of the Treaty in such a way that, on balance, their economic benefits prevail over the damage they cause to competition."¹⁰⁹

Attempts to rely on an efficiency defense failed in a series of cases, including *Aerospatiale-Alenia/de Havilland*,¹¹⁰ *Accor/Wagons-Lits*,¹¹¹ *MSG/Media Service*,

105 See, e.g., Mario Monti, Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation, IBA 8th Annual Competition Conference, Fiesole (Sep. 17, 2004) ("The introduction of the new test has reinforced the effectiveness of our basic merger law, and represents an improvement from the perspective of international convergence...[but] we are [not] about to witness radical changes in the criteria relevant for the purpose of the assessment of a merger in the European Union... So, don't expect a shift in enforcement policy or a revolution"). See also, James Venit & Frederic Depoortere, *The New EC Horizontal Merger Guidelines*, GLOBAL COMPETITION REV. 2004, at 29.

106 See, e.g., RICHARD A. POSNER, ANTITRUST LAW 2 (2d ed. 2001).

107 See, e.g., Sir Leon Brittan, Q.C., now Lord Brittan, Principles and Practice of the Merger Regulation, Centre for European Policy Studies, Brussels, Sep. 24, 1990, Commission Press Release IP/90/751.

108 Colin Overbury, *EEC Merger Regulation Panel Discussion*, 1992 FORDHAM CORP. L. INST. 605 (1993). See also, CHRISTOPHER JONES & FRANCISCO ENRIQUE GONZÁLEZ DÍAZ, THE EEC MERGER REGULATION 153-156 (1992).

109 Commission Notice on Amended Proposal for a Council Regulation on the Control of Concentrations between Undertakings, 1989 O.J. (C 22) 14, at recital 16.

110 *Aerospatiale-Alenia/de Havilland*, *supra* note 8, at paras. 65-69. See also, Frédéric Jenny, *EEC Merger Control: Economies As An Antitrust Defense Or An Antitrust Attack?*, 1992 FORDHAM CORP. L. INST. 599 (1993).

111 Commission Decision 92/385/EEC, *Accor/Wagons-Lits*, 1992 O.J. (L 204) 1, at para. 26(2)(f).

Danish Crown/Vestjyske Slagterier,¹¹² and *Mercedes-Benz/Kässbohrer*,¹¹³ and in *British Telecom/MCI (II)*, the Commission cited the notifying parties' post-trans-action ability to "benefit from the more efficient use of transmission capacity" as a factor strengthening their competitive position.¹¹⁴ Exceptionally, in *Mannesmann/Valourec/Ilva*, the Commission appeared to view favorably the prospect that a concentration giving rise to high market shares would reduce production over-capacity, achieve plant specialization, and permit more effective competition from non-European manufacturers.¹¹⁵ Efficiencies were, however, usually viewed as a means by which the merging entities would strengthen their positions.¹¹⁶ In 1999, the Commission stated in *Danish Crown/Vestjyske Slagterier* that "[t]he creation of a dominant position in the relevant markets...means that the efficiencies argument put forward by the parties cannot be taken into account in the assessment of the present merger."

Following the appointment of Commissioner Monti, the Commission became more willing to take positive account of post-concentration efficiencies, and, in 2004, the recast Merger Regulation and the Horizontal Mergers Guidelines formalized this more positive approach. The Merger Regulation adopted in early 2004 explicitly states that positive account should be taken of efficiencies in assessing reportable concentrations.¹¹⁷ Accordingly, the Commission is now required to consider "any substantiated efficiency claim in the overall assessment of the merger," and may decide, "as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible." As the Horizontal Mergers Guidelines explain:

"[t]his will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act

112 Commission Decision 2000/42/EC, *Danish Crown/Vestjyske Slagterier*, 2000 O.J. (L 20) 1, at para. 198.

113 Commission Decision 95/354/EC, *Mercedes-Benz/Kässbohrer*, 1995 O.J. (L 211) 1, at para. 66.

114 Commission Decision 97/815/EC, *British Telecom/MCI (II)*, 1997 O.J. (L 336) 1, at para. 58. See also, Commission Decision COMP/JV.54, *Smith & Nephew/Beiersdorf/JV*, 2001 O.J. (C 89) 3.

115 Commission Decision 94/208/EC, *Mannesmann/Valourec/Ilva*, 1994 O.J. (L 102) 15, at paras. 39-41, 51, and 62-67. See also, Commission Decision 97/25/EC, *ABB/Daimler-Benz*, 1997 O.J. (L 11) 1, at para. 112.

116 See, e.g., Commission Decision, *AT&T/NCR*, 91 O.J. (C 16), at para. 30; and *Nordic Satellite Distribution*, *supra* note 10, at paras. 145-152.

117 *Merger Regulation*, *supra* note 1, at recital 29.

pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.”¹¹⁸

In deciding to approve transactions that might otherwise raise competition issues because of claimed efficiencies, the Commission has effectively aligned EC policy with that applied in the United States.¹¹⁹ As in the United States, the Commission has identified relatively narrow circumstances in which positive account may be taken of efficiency claims: the efficiencies must benefit consumers, be merger-specific, and be verifiable.¹²⁰ The Horizontal Mergers Guidelines recognize that it is “highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.”¹²¹ The extent to which the Commission integrates a consideration of efficiencies into its overall competitive assessment will emerge only with time.¹²²

E. COORDINATED EFFECTS

Perhaps the greatest change effected during Commissioner Monti’s tenure in regard to the substantive appraisal of transactions concerned the analytical approach adopted towards “coordinated effects” (i.e. transactions that facilitate tacit collusion on prices or output among the merging firms and their major competitors). Five days after Commissioner Monti took office, the Commission prohibited the *Airtours/First Choice* transaction. This decision represented only the second occasion since the Merger Regulation was adopted when a transaction was prohibited on grounds of collective dominance, the first being *Gencor/Lonrho*. In June 2001, the CFI annulled the Commission’s decision in *Airtours/First Choice* in a judgment that contains extensive guidance on the conditions that must be satisfied to support a finding of collective dominance. The

118 *Horizontal Mergers Guidelines*, *supra* note 6, at para. 77.

119 See, e.g., Mario Monti, *Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: An EU Perspective*, UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Los Angeles (Feb. 28, 2004) (“[T]here is little to distinguish the approach we set out to that of our U.S. counterpart agencies. Let me stress, in particular, that for the first time the Commission has...explicitly indicated that, under certain restrictive conditions, efficiencies will be taken into account to counteract the anti-competitive effect of notified operations”).

120 *Horizontal Mergers Guidelines*, *supra* note 6, at para. 78.

121 *Id.*, at para. 84.

122 See, e.g., Christoph Luescher, *Efficiency Considerations in European Merger Control—Just Another Battle Ground for the European Commission, Economists and Competition Lawyers?*, 25(2) EUR. COMPETITION L. REV. 72 (2004).

court confirmed that the following three conditions are necessary for a finding of collective dominance:¹²³

1. Firms must have the ability to monitor and align their behavior. Thus, there must be a sufficient degree of transparency for all members of the dominant oligopoly to be aware, "sufficiently precisely and quickly," of the way in which the other members' market conduct is evolving (i.e. prices must be sufficiently transparent for each member of the oligopoly to be able to know how the other members are behaving and to detect deviation from the common policy).
2. Firms must have incentives to maintain the coordinated behavior with the ability to detect and punish deviation. Tacit coordination must, therefore, be "sustainable" over time (i.e. "there must be an incentive not to depart from the common policy on the market"). The Court held that there must be a robust and effective coordinating mechanism so that "each member of the dominant oligopoly [is] aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative."
3. The coordinated behavior must be sustainable in the face of competitive constraints in the market place. Collective dominance may only arise where such constraints are ineffective to counterbalance tacit collusion on the part of the oligopolists. In this respect, the Court held that "to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardize the results expected from the common policy."

The three-prong test laid down by the CFI and adopted in the Horizontal Mergers Guidelines¹²⁴ required the Commission to apply a more focused and systematic analytical framework. In the past, the Commission had applied a non-binding list of factors, relying on different elements as indicators of collective dominance in various cases. This practice had led to a degree of uncertainty regarding the Commission's assessment of collective dominance and the situations in which it may arise, making it difficult to predict the Commission's analysis and likely outcome. While the *Airtours* judgment does not preclude the Commission from taking into consideration a wide array of factors when assessing collective dominance, market transparency and the existence of a credible punishment mechanism have rightly assumed greater prominence. Two significant transactions that were abandoned in the early years of Commissioner Monti's tenure because collective dominance concerns could not be resolved

123 *Airtours*, *supra* note 4, at para. 62.

124 *Horizontal Mergers Guidelines*, *supra* note 6, at para. 41.

(*Time Warner/EMI* and *Alcan/Pechiney*) were, following *Airtours*, either reconstituted and approved (*Alcan/Pechiney (II)*) or provoked a parallel merger in the same market that was approved (*Sony/BMG*).

F. CONGLOMERATE EFFECTS

Among the more controversial aspects of Commissioner Monti's legacy concerns the decisions rendered during his tenure involving conglomerate mergers, in particular the Commission's prohibition of *General Electric/Honeywell*. Although the Commission had identified an interest in conglomerate mergers as early as 1989,¹²⁵ and had subjected a series of transactions to in-depth review by reason of their conglomerate effects, including *Tetra Pak/Alfa-Laval*,¹²⁶ *Coca-Cola Enterprises/Amalgamated Beverages GB*, *The Coca-Cola Company/Carlsberg A/S*, and *Guinness/Grand Metropolitan*, it was not until 2001 that the Commission prohibited a conglomerate merger by reason of its alleged anticompetitive portfolio effects.

Portfolio effects were at the heart of the Commission's prohibition decisions in *General Electric/Honeywell*, *Schneider/Legrand*, and *Tetra Laval/Sidel*. While *General Electric/Honeywell* is under appeal, the CFI annulled the Commission decisions in *Schneider/Legrand* and *Tetra Laval/Sidel*. Although the court confirmed the potential applicability of the Merger Regulation to conglomerate mergers, it said that the competitive effects of such mergers are generally "neutral" or even "beneficial." More importantly, the court prescribed a new and higher evidentiary burden on the Commission to substantiate objections based on leveraging theories: the Commission's conglomerate analyses must establish, beyond the mere possibility of leveraging, that the transaction would "in all likelihood" create or strengthen a dominant position "in the relatively near future," and such cases require "a particularly close examination of the circumstances."¹²⁷

Following the court's judgment, Commissioner Monti acknowledged that the court had required a high level of proof and stated that Commission investigations would in future need to be more extensive and detailed. He emphasized, however, that the court had taken issue with the Commission's decisions primarily on grounds of procedure and insufficient evidence, but had not found that the Commission's theories were per se problematic.¹²⁸ In December 2002, the Commission appealed the CFI's judgment to the ECJ¹²⁹ and announced that, fol-

125 European Commission, XIXth Report on Competition Policy (1989), at 228.

126 Commission Decision 91/535/EEC, *Tetra Pak/Alfa-Laval*, 1991 O.J. (L 290) 35.

127 *Tetra Laval*, *supra* note 4, at paras. 148, 155.

128 Monti, EU Competition Policy, *supra* note 79.

129 In Jan. 2003, following re-notification, the transaction was approved by the Commission. See Commission Decision COMP/M.2416, *Tetra Laval/Sidel*, 2003 O.J. (C 137) 14.

lowing its adoption of the Horizontal Mergers Guidelines, it intended publishing notices explaining its approach to vertical and conglomerate mergers.¹³⁰ These statements suggest a continued resolve on the Commission's part to apply conglomerate effects theories. Nevertheless, given the high evidentiary standard established by the court where conglomerate theories of harm are involved, the Commission may, at least in the short to medium term, be expected to pursue conglomerate effects theories only in exceptional circumstances.

Irrespective of the outcome of the appeal in *General Electric/Honeywell*, it seems unlikely that Commissioner Monti's application of the Merger Regulation to conglomerate mergers will be followed by his successors other than in exceptional circumstances. Indeed, a phase I clearance decision rendered during the last year of Commissioner Monti's tenure may come to be regarded as his most enduring legacy with respect to the appraisal of conglomerate mergers. In *General Electric/Amersham*, which involved the merger of two producers of complementary ranges of diagnostic imaging equipment, the Commission developed a systematical framework to assess the post-merger scope for contractual tying, economic tying, and technical tying.¹³¹ With respect to commercial bundling or economic tying, which had been the most controversial aspect of *General Electric/Honeywell*, the Commission established a four-point test: (1) the merged entity should be able to leverage its pre-merger dominance in one product to another complementary product; (2) there must be a reasonable expectation that rivals could not propose a competitive response; (3) the resulting marginalization of those rivals should be expected to force them from the market; and (4) the merged firm should then be in a position to implement price increases.¹³²

G. ECONOMICS AND ECONOMISTS

In its brief life, the Merger Regulation has transformed the use of economics in the European Community. Although other initiatives, such as the shift of emphasis from legal form to economic effect in the area of vertical restraints, have also promoted the use of economics, merger control has been at the vanguard of this development.¹³³ In common with the U.S. federal antitrust agencies,¹³⁴ the Commission recognized at an early stage the need to develop a sound

130 Press Release IP/02/1856, *supra* note 47.

131 Commission Decision 2004/103/EC, *General Electric/Amersham*, 2004 O.J. (C 74) 5, at paras. 33-61.

132 *Id.* at para. 37.

133 See Derek Ridyard, *The Role of Economics in European Merger Control*, in *EUROPEAN MERGER CONTROL LAW: A GUIDE TO THE MERGER REGULATION* (2d ed. 2004).

134 See, e.g., William J. Kolasky, *Sound Economics and Hard Evidence: The Touchstones of Sound Merger Review*, Address before the American Bar Association, Washington D.C. (Jun. 14, 2002), available at <http://www.usdoj.gov/atr/public/speeches/11304.pdf>.

analytical framework that was firmly grounded in economics. Unlike the U.S. agencies, however, DG COMP did not historically have a distinct economics unit, and instead relied on economists drawn from within its ranks, as well as outside economists engaged on an ad hoc basis. During Commissioner Monti's tenure, the Commission employed external economists to assist in several cases, including *Volvo/Scania*, *General Electric/Honeywell*, *UPM-Kymmene/Haindl*,¹³⁵ and *Norske Skog/Parengo/Walsum*,¹³⁶ although the conclusions reached by those economists were not made known at the time, or subsequently.

In 2002, following the EC courts' judgments in *Airtours*, *Schneider*, and *Tetra Laval*, the Commission announced plans to create a new position of Chief Economist in order to provide an independent economic opinion.¹³⁷ In July 2003, the Commission appointed its first Chief Economist, Lars-Hendrik Röller,¹³⁸ to provide methodological guidance on economic policy, general guidance in individual cases, and detailed guidance in complex cases, in particular those requiring sophisticated quantitative analysis.¹³⁹ Röller reports directly to the Director-General and is currently supported by about ten economists. In the U.S., the creation of an effective and independent group of economists is widely-viewed as having strengthened its antitrust enforcement. In the same way, the Commission has appointed a Chief Economist to advance the use of economics in its decision-making.¹⁴⁰ The Chief Economist's team is smaller than the comparable teams at the U.S. agencies and it remains to be seen whether Commissioner Monti's successors will attach the same importance to developing and nurturing DG COMP's economic capabilities.

IN THE U.S., THE CREATION OF AN EFFECTIVE AND INDEPENDENT GROUP OF ECONOMISTS IS WIDELY-VIEWED AS HAVING STRENGTHENED ITS ANTITRUST ENFORCEMENT. IN THE SAME WAY, THE COMMISSION HAS APPOINTED A CHIEF ECONOMIST TO ADVANCE THE USE OF ECONOMICS IN ITS DECISION-MAKING.

135 Commission Decision 2002/737/EC, *UPM-Kymmene/Haindl*, 2002 O.J. (L 233) 38.

136 Commission Decision 2002/737/EC, *Norske Skog/Parengo/Walsum*, 2002 O.J. (L 233) 38.

137 Monti, EU Competition Policy, *supra* note 79.

138 Press Release IP/03/1027, European Commission, Commission Appoints Chief Competition Economist (Jul. 16, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1027&format=HTML&aged=1&language=EN&guiLanguage=en>.

139 Monti, EU Competition Policy, *supra* note 79.

140 See Deborah Platt Majoras, G.E. Honeywell: The U.S. Decision, Remarks before the Antitrust Law Section, State Bar of Georgia (Nov. 29, 2001), available at <http://www.usdoj.gov/atr/public/speeches/9893.pdf>.

Experience to date has been encouraging. In *Sony/BMG*, for example, economics played a central role in the Commission's appraisal of whether the merger of two of the world's five major record companies could be expected to create or strengthen a position of collective dominance. Although the merging parties provided DG COMP with a substantial body of economic evidence showing a complexity in pricing behavior that was inconsistent with tacit collusion, the Chief Economist's team carried out their own assessment of extensive data provided by each of the five major music companies in an effort to determine whether their average transaction prices had evolved in parallel in the principal EU countries. The Chief Economist's team met with the parties' economists on several occasions and attended the oral hearing. Ultimately, the Commission determined that there was insufficient evidence to establish that the transaction would create or strengthen a position of collective dominance, and it was approved without condition.

H. ADMINISTRATION AND PROCEDURE

Commissioner Monti wisely left virtually untouched the principal procedural rules and practices that had evolved since the Merger Regulation came into force. The reform package approved in 2003 did, however, contain two important measures intended to introduce greater flexibility into the investigative timetable. First, the Merger Regulation was amended to permit merging parties to notify transactions before signing definitive agreements or announcing a public bid, provided they can "satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete."¹⁴¹ Second, in an effort to give the Commission more time to carry out its market investigation without squeezing the time available to notifying parties to respond to statements of objections, the Merger Regulation was amended to permit the investigative timetable in phase II cases to be extended by up to 35 working days at the request of the notifying parties.¹⁴² In practice, extensions to the Commission's deadlines may be expected in many cases, thereby leading to a general lengthening of the merger clearance timetable in phase II cases.

Also during Commissioner Monti's tenure, the Commission adopted the Best Practices Guidelines dealing with "the day-to-day handling of merger cases and the Commission's relationship with the merging parties and interested third par-

141 *Merger Regulation*, *supra* note 1, at recital 34; *see also*, art. 4(1). This provision is consistent with the International Competition Network's Recommended Practices for Merger Notification Procedures, point III.A, at http://www.internationalcompetitionnetwork.org/2003_practices.pdf.

142 *Merger Regulation*, *supra* note 1, at art. 10(3).

ties, in particular concerning the timing of meetings, transparency, and due process in merger proceedings.”¹⁴³ Two significant new measures were introduced. First, the Best Practices Guidelines envisage that notifying firms may receive “key documents” (i.e. complaints and substantiated third-party submissions) at an earlier point in the investigative timetable than had previously been the Commission’s practice.¹⁴⁴ Second, the Commission formalized its practice of organizing “state-of-play” meetings at various points in the investigative process,¹⁴⁵ as well as “triangular” meetings involving third parties.¹⁴⁶ It remains to be seen whether these changes will be sufficient to address the DG COMP’s tendency in recent years to share third-party submissions with the notifying parties too late in the process to permit a timely response before the issuance of a statement of objections during phase II.

I. REMEDIES

During Commissioner Monti’s tenure, the Commission became more systematic and exacting with respect to the scope, implementation, and detail of remedies. Among other things, it started to vet potential purchasers of divested businesses more carefully, required “upfront buyer” solutions in a number of cases,¹⁴⁷ and made greater use of independent trustees to monitor compliance with remedies. The Commission also endeavored to provide greater clarity with respect to remedies. In December 2000, the Commission adopted the Remedies Notice to pro-

143 Press Release IP/03/1744, European Commission, Commission Adopts Merger Control Guidelines (Dec. 16, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1744&format=HTML&aged=1&language=EN&guiLanguage=en>.

144 *Best Practices Guidelines*, *supra* note 50, at paras. 45-46.

145 *Id.* at paras. 26-31. “State-of-play” meetings are envisaged at four points in the investigative process: (1) where it becomes clear during phase I that the Commission is likely to have “serious doubts” and that it may be possible to offer remedies capable of addressing those concerns during phase I; (2) within two weeks of phase II having been opened; (3) before the Commission issues a statement of objections; (4) following the parties’ response to the statement of objections and the oral hearing; and (5) before the Advisory Committee, which comprises representatives of Member State agencies.

146 *Id.*, *supra* note 50, at paras. 38-39.

147 The Remedies Notice provides that, “where the viability of the divestiture package depends ... to a large extent on the identity of the purchaser,” the parties may be required to suspend the implementation of the notified transaction until reaching a binding agreement to sell the business to a purchaser approved by the Commission. See Commission Notice on Remedies Acceptable under Council Regulation 4064/89/EEC and under Commission Regulation 447/98/EEC, 2001 O.J. (C 68) 3, at para. 20. See also, *id.* at para. 16. An “up-front buyer” had been required in a number of cases. This remedy was first used in Commission Decision 99/287/EC, *WorldCom/MCI*, 1999 O.J. (L 116) 1; Commission Decision No. IV/M.1137, *Exxon/Shell*, 1998 O.J. (C 252) 9, at paras. 31, 36.

vide “necessary guidance and predictability about the Commission’s merger control policy.”¹⁴⁸ Shortly afterwards, the Commission formed an enforcement unit within DG COMP to ensure consistency and monitor implementation of remedies. In 2003, the Commission published model texts for divestiture commitments and the engagement of trustees (the Model Texts), together with Best Practices Guidelines on the Model Texts.

J. INTERNATIONAL COOPERATION

Like his predecessors, Commissioner Monti recognized that international cooperation in merger control is a natural consequence of increased enforcement by national and supranational regulatory authorities, the internationalization of the world’s economy, and the desirability of avoiding significant divergence in the application of different competition rules by different antitrust agencies. During his tenure, various initiatives were pursued to facilitate convergence and minimize conflict, including the adoption of International Cooperation Best Practices Guidelines by the Commission and the U.S. federal agencies in July 2002,¹⁴⁹ an agreement between the European Community and Japan signed in 2003,¹⁵⁰ and a commitment to multilateral cooperation through the International Competition Network (ICN), a global network of competition authorities launched in October 2001 and focused exclusively on competition.¹⁵¹

Notwithstanding the progress made by EC and U.S. agencies towards institutionalizing cooperation, a significant disagreement occurred in 2001 in connection with the *General Electric/Honeywell* transaction. This transaction involved few horizontal overlaps, and the U.S. Department of Justice (DOJ) concluded that, subject to certain divestitures in those areas where the merging parties did compete, the transaction would not harm competition. The Commission, however, prohibited the transaction, prompting criticism from U.S. politicians and regulators. A former senior U.S. regulator characterized the divergent results as

148 Press Release IP/00/1525, European Commission, Notice on Merger Remedies: How and When to Cure Dominance Problems (Dec. 21, 2000), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/00/1525&format=HTML&aged=1&language=EN&guiLanguage=en>.

149 International Cooperation Best Practices on Cooperation in Merger Investigations (Oct. 30, 2002), at http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf.

150 Council Decision of 16 Jun. 2003 concluding the Agreement Between the European Community and the Government of Japan Concerning Cooperation on Anti-Competitive Activities, 2003 O.J. (L 183) 11.

151 The ICN has two principal goals: (1) to formulate and develop positions through focused dialogue on specific proposals for procedural and substantive convergence in antitrust enforcement; and (2) to provide support for new competition agencies, both in enforcing laws and building a strong competition culture in their countries. See Memorandum on the Establishment and Operation of the International Competition Network, at <http://www.internationalcompetitionnetwork.org/mou.pdf>.

reflecting an “absolutely fundamental disagreement” between the U.S. and EC authorities,¹⁵² while another described the Commission’s decision as “not strongly grounded in economic theory or empirical evidence.”¹⁵³ This disagreement represented the most significant divergence between EC and U.S. regulators since *Boeing/McDonnell Douglas*.

Several factors made the disagreement in *General Electric/Honeywell* striking. First, the Commission and DOJ had cooperated extensively during their respective investigations, even interviewing some witnesses jointly.¹⁵⁴ Second, the case followed a long period in which the EC and U.S. regulators had cooperated well and established considerable mutual respect. Third, the tone of many of the comments was unusually forthright and uncompromising, with U.S. regulators, in particular, making little effort to disguise their disagreement with the Commission. *General Electric/Honeywell* confirmed that convergence might not always be possible, especially in complex cases where agencies employ different analytical frameworks. Nevertheless, with the exception of *General Electric/Honeywell*, Commissioner Monti’s tenure was characterized by growing convergence in the field of merger control. Significant transactions where the EC and U.S. agencies cooperated include *Time Warner/EMI*, *AOL/Time Warner*, *CVC/Lenzing*, *Hewlett-Packard/Compaq*, *Carnival/P&O*, *Sony/BMG*, and *Oracle/PeopleSoft*.

K. CHECKS AND BALANCES

The CFI’s judgments in *Airtours*, *Schneider*, and *Tetra Laval* provoked a wide-ranging debate on whether the European Community should adopt a judicially-based system of merger control similar to that in the United States. Under such a system, the Commission would act as a prosecuting agency (in the same way as the DOJ and Federal Trade Commission in the United States): if the Commission found that a merger raised serious competition concerns, it would have to take the case to a court, where the decision and power to enjoin a merger would lie with the court. In addition to perhaps requiring amendment of the EC Treaty, such a system would “fundamentally alter the current working of the Commission and the Merger Regulation.”¹⁵⁵ An important objective of

152 Charles A. James, International Antitrust in the Bush Administration, Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada (Sep. 21, 2001), available at <http://www.usdoj.gov/atr/public/speeches/9100.pdf>.

153 William J. Kolasky, U.S. and EU Competition Policy: Cartels, Mergers, and Beyond, Council for the United States and Italy, New York (Jan. 25, 2002), available at <http://www.usdoj.gov/atr/public/speeches/9848.pdf>.

154 See, e.g., Kolasky, Conglomerate Mergers and Range Effects, *supra* note 38. See also, James, *supra* note 152.

155 The Review of the EC Merger Regulation, 32nd Report of the House of Lords Select Committee on the European Union, HL Paper 165, Session 2001-02, at para. 239.

Commissioner Monti's response to the court's judgments was his desire to avoid the Commission's ceding power to the EC courts. Three elements of this strategy may be identified.

First, recognizing that "a proper functioning judicial review is essential to ensure that we maintain a high level of quality in our decisions,"¹⁵⁶ Commissioner Monti underlined its willingness to work with the EC courts "to speed up the delivery of judgments, particularly when the merging parties are keen to keep a deal alive pending the outcome of the appellate process."¹⁵⁷ To that end, the Commission expressed the hope that appeals in merger cases might be further accelerated,¹⁵⁸ and started to explore the notion of a specialized chamber for competition matters within the EC courts, as well as other measures intended to ensure a speedier review of Commission decisions.¹⁵⁹

Second, Commissioner Monti implemented a range of measures intended to increase checks on the Commission's decision-making. In addition to deepening the nature and extent of Member State involvement¹⁶⁰ and giving additional resources to and expanding the mandate of the Commission's Hearing Officers¹⁶¹ the independent officials charged with ensuring that companies' rights of defense are respected,¹⁶² Commissioner Monti established and started to use on a systematic basis peer-review panels that operate independently of DG COMP case

156 Monti, *The Main Challenges for a New Decade of EC Merger Control*, *supra* note 85.

157 Monti, *Europe's Merger Monitor*, *supra* note 43. See also, Press Release IP/02/1856, *supra* note 47 ("The Commission will continue to push for speedy review by the Courts of Appeals in merger cases. The use by the Court of First Instance of a fast-track procedure in recent cases already represents considerable progress, but the goal should be to ensure that judicial review takes place in a period of time that makes sense for all commercial transactions").

158 In Feb. 2001, an expedited, or "fast-track," procedure, introduced by the CFI in Dec. 2000 for use in urgent cases where interim measures are inappropriate or inadequate, came into force. See Rules of Procedure of the Court of First Instance of the European Communities of May 2, 1991, 1991 O.J. (L 136) 1, corrigendum 1991 O.J. (L 317) 34, as Amended with a View to Expedited Procedures on Dec. 6, 2000, 2000 O.J. (L 322) 4, at art. 76(a).

159 Press Release IP/02/1856, *supra* note 47 ("The Commission, in parallel with the discussions in the Council of Mi[ni]sters on the revision of the Merger Regulation, will explore with Member States several options aimed at ensuring speedier judicial review in merger cases. The Commission will also pursue contacts with the [Community courts] on this matter").

160 See, e.g., Philip Lowe, *The Interaction between the Commission and Small Member States in Merger Review*, *The Competition Authority Merger Review Day*, Dublin (Oct. 10, 2003), available at http://europa.eu.int/comm/competition/speeches/text/sp2003_037_en.pdf.

161 Commission Decision 2001/462/EC (ECSC), *The Terms of Reference of Hearing Officers in Certain Competition Proceedings*, 2001 O.J. (L 162) 21.

162 See, e.g., Philip Lowe, *Review of the EC Merger Regulation—Forging a Way Ahead*, *European Merger Control Conference*, Brussels (Nov. 8, 2002), available at http://europa.eu.int/comm/competition/speeches/text/sp2002_043_en.pdf.

teams. Panels of experienced officials are now routinely appointed in phase II investigations to scrutinize the case team's conclusions with a fresh pair of eyes at key points of the inquiry. Commissioner Monti's intention is that such panels should become "a real and effective internal check on the soundness of the investigators' preliminary conclusions."¹⁶³ Although these panels operate behind closed doors, and therefore lack transparency, experience to date has suggested they have introduced a degree of internal oversight thought to have diminished in recent years.

Third, following the court's judgments in *Airtours*, *Schneider*, and *Tetra Laval*, the Commission launched a review of its internal organization and, in particular, the future role of the Merger Task Force, the dedicated team of specialist officials established in 1990 to focus exclusively on applying and enforcing the Merger Regulation. The objectives of this review were two-fold: to increase flexibility in the allocation of staff and to strengthen in-house sector-specific expertise.¹⁶⁴ In April 2003, the Commission announced that the Merger Task Force would effectively be disbanded and that a mergers unit would be created within each of the five sector-specific Directorates of DG COMP currently in charge of antitrust enforcement.¹⁶⁵ Officials of the Merger Task Force have progressively been allocated among the four sector-specific Directorates of DG COMP. Although this administrative reform was implemented only recently, initial indications suggest it has had only modest practical implications for DG COMP's application of the Merger Regulation.

The success of these measures in diffusing calls for the European Community to adopt a judicially-based system of merger control will emerge only with time. If future Commission decisions are well-reasoned and firmly based in fact, law, and sound economics, Commissioner Monti's tenure will likely be viewed as having preserved the Commission's power to approve and prohibit mergers. Should, however, complaints continue about the perceived absence of checks and balances on the Commission's decision-making and the lack of effective judicial review, the EC institutions may find it difficult to resist pressure to give greater powers to the EC courts.

163 Monti, *Europe's Merger Monitor*, *supra* note 43.

164 See, e.g., Donna Patterson & Carl Shapiro, *Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons*, 16 *ANTITRUST* 18 (2001).

165 Press Release IP/03/603, European Commission, Commission Reorganises its Competition Department in Advance of Enlargement (Apr. 30, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/603&format=HTML&aged=1&language=EN&guiLanguage=en>.

L. POLITICAL IMPARTIALITY

In the years following implementation of the Merger Regulation, it was relatively common for companies involved in transactions subject to phase II investigations to lobby Commissioners other than the EC Competition Commissioner in an effort to reverse what might otherwise be a prohibition decision. However, instances in which lobbying of this kind changed the outcome of a case were rare. During Commissioner Monti's tenure, the growing authority of DG COMP, the increasing complexity of many cases, and the Commission's broader interest in insulating itself from political pressures reduced the incidence of lobbying activities of this kind, even in high-profile cases.

Commissioner Monti successfully resisted political pressure in several important cases, including *General Electric/Honeywell*,¹⁶⁶ *Volvo/Scania*,¹⁶⁷ and *Schneider/Legrand*.¹⁶⁸ In so doing, he emphasized that the Merger Regulation is "based solely on a competition-based test, unlike some other systems that apply various 'public interest tests,'" with "no possibility for a political authority to intervene in first or second phase."¹⁶⁹ He was also perceived to have been even-handed in his approach to European and non-European companies, with much of the criticism leveled at the Commission during his tenure coming from European companies (*Volvo/Scania*, *Schneider/Legrand*, and *Alcan/Pechiney*). Even when they disagreed with Commissioner Monti's decisions, U.S. commentators did not allege any anti-U.S. bias on the Commission's part.¹⁷⁰

VI. Conclusion

Commissioner Monti's tenure will be remembered as a period of controversy and change. History's verdict will turn, at least in part, on the court's judgment, expected in 2005, in the appeal lodged against the *General Electric/Honeywell*

166 See Press Release IP/01/855, *supra* note 33 ("I deplore attempts to misinform the public and to trigger political intervention. This is entirely out of place in an antitrust case and has no impact on the Commission whatsoever. This is a matter of law and economics, not politics. The nationality of the companies and political considerations have played and will play no role in the examination of mergers, in this case as in all others").

167 A reported attempt made by the Swedish prime minister to intervene in favor of the merging parties reinforced the Commission's resolve to prohibit the transaction.

168 A reported intervention by the French prime minister on behalf of the parties failed to change the Commission's decision to prohibit the transaction.

169 Ky Ewing Jr., *Interview with Mario Monti, European Commissioner for Competition Policy*, 15 ANTITRUST 9 (2001).

170 See Timothy J. Muris, *Merger Enforcement in a World of Multiple Arbiters*, Brookings Institution Roundtable on Trade and Investment Policy, Washington D.C. (Dec. 21, 2001), available at <http://www.ftc.gov/speeches/muris/brookings.pdf>.

prohibition decision. The durability of Commissioner Monti's legacy will be determined by his successors' commitment to implementing the letter and spirit of the reforms instituted at his initiative in response to the court's judgments in *Airtours*, *Schneider*, and *Tetra Laval*. If future Commission decisions are based on the systematic, rigorous, and scientific assessment of economic evidence, Commissioner Monti's tenure will be judged to have had a profound and lasting effect on the practice of EC merger control. ▼