The EC's increasing reliance on internal documents under the EU Merger Regulation: issues and implications

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The EU has an administrative system of merger control in which the European Commission (EC) conducts wide-ranging investigations and renders detailed decisions following the expiry of the strict deadlines mandated in the EU Merger Regulation (EUMR).[1] Those deadlines are triggered by the submission of a lengthy notification document (Form CO) that describes the markets on which the merging parties operate, assesses actual and potential horizontal, vertical, and conglomerate effects, and is supported by market share and other data. In recent years, the EC has increasingly supplemented these features of EU merger control with extensive and burdensome documentary requests of the kind that have for many years characterised merger control in the US. In contrast to the EU, in the US merging parties need complete only a fairly basic notification form to start the process and, should they wish to challenge a transaction, the US agencies must file suit in court, triggering a judicial review system with important procedural safeguards.

The evolution in the EC's reliance on pre-existing documentary evidence, including ordinary course-of-business documents generated by merging parties and third parties (together, "internal documents"), has been gradual, rather than the result of a sudden or announced change in policy. The cumulative effects of this evolution have nevertheless been profound. This article considers the practical and legal implications of the EC's increasing reliance on internal documents and explains why, in the view of the authors, it would be appropriate and timely for the EC to formalise its practice in an effort to render it more transparent, systematic, and consistent. Specifically, we recommend that the EC adopt guidelines that enable merging companies and their advisers to understand and anticipate the circumstances in which internal documents will be requested and the types of documents that will be required. We also recommend that the EC take account of the implications of extensive document requests for both the scope and detail of Form CO and the EUMR's mandated review deadlines. Finally, we recommend that the EC establish mechanisms to protect merging parties' rights and ensure that the reliance placed on internal documents is fair, balanced, and objective.

I. Antitrust agencies' use of internal documents

Antitrust agencies are interested in, and attach importance to, internal documents because they view them as providing valuable evidence of the way in which merging companies view a range of issues, including market definition, the competitive landscape, the identities of their closest competitors, the scope for and likelihood of market entry, and a transaction's likely effects. As the International Competition Network (ICN) has put it, in the eyes of antitrust agencies, "[p]re-existing documents containing data are the most compelling" because "[t]he data contained in ordinary course of business documents reflect the observations of the company or the author irrespective of whether the agency is able to test the data for reliability."[2]

The ICN's view is consistent with statements by EC officials. As the EC's then-Acting Deputy Director-General for Mergers explained in 2014, "[as] investigations of difficult mergers have become more complex…economic submissions and detailed analysis of internal documents play a more important role than ten years ago."[3] More recently, another EC official noted that "[i]nternal documents, for us, are a very important source of qualitative evidence, of how the companies think, what they're doing."[4] The EC considers that internal documents "play an important part in the Commission's competitive assessment, for both unilateral and coordinated effects" because they "can shed light on the rationale of a deal, the state of the market, its competitive dynamics, the behaviour of the market players, their positioning, and metrics used to benchmark such positioning. They can give also useful insights for the use

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

[2] ICN, Merger Working Group, Investigative Techniques Subgroup, Developing Reliable Evidence in Merger Cases, Second Annual ICN Conference, Mérida, Mexico 23–25 June 2003.

[3] Carles Esteva Mosso, then-Acting Deputy Director-General for Mergers, EU Merger Control: The Big Picture, Sixth Annual GCR Conference, Brussels, 12 November 2014.

[4] Hanna Anttilainen, Head of Mergers Unit, Directorate B, DG COMP. See Khushita Vasant, "EC, BkartA officials defend complex merger review processes", Brussels WomenAT conference, PaRR, 16 February 2017.

of the economic evidence, by, for example, illustrating what type of costs firms actually consider in their pricing decisions."[5]

The EC's increasing reliance on internal documents aligns the EU with the long-standing practice of the US, where the antitrust agencies have for many years made extensive use of internal documents on the ground that they "often reveal important aspects of the competitive environment in which the transaction takes place, and are key to the agencies' initial review of a transaction."[6] Senior members of the US Federal Trade Commission (FTC)[7] and the Antitrust Division of the US Department of Justice (DOJ)[8] have underlined the importance of internal documents and the US agencies routinely rely on internal documents to corroborate and test arguments made by merging parties. For example, in 2014, David Gelfand, then-Deputy Assistant Attorney General for Litigation at the Antitrust Division of DOJ, explained that the US agencies endeavour to obtain a "complete picture" of a transaction's likely competitive effects based on an objective review of available documents:

> "Company documents are…extremely important to our analysis and they offer merging parties an excellent opportunity to convince us why their view of the world is correct…We are often persuaded by a party's argument when the party is able to point to credible, contemporaneous supporting documents. But recognize that we need a complete picture and will want to understand statements in your documents that contradict what you are telling us…That does not mean that any particular statement is necessarily dispositive on an issue — after all, company executives often have imperfect information themselves and have been known on occasion to exaggerate their own competitive strength — but you should take unhelpful documents seriously, because we do."[9]

At the judicial level, EU and US courts largely have endorsed these views. In the EU, the General Court has found that internal documents may be "particularly important in that they corroborate the findings made at the stage of the analysis of the market shares and the degree of concentration and precede the analysis of the econometric information."[10] In the US, internal documents have played a decisive role in many leading cases. By way of example, in *Bazaarvoice*,[11] "much of [DOJ's] story was told through Bazaarvoice documents" and "the centrepiece of [DOJ's] proof was the companies' own documents, which showed that the merger was planned to '[e]liminate [Bazaarvoice's] primary competitor' and 'reduc[e] comparative pricing pressure.'"[12] More recently, in *Anthem/Cigna*, faced with conflicting expert views on the closeness of competition between the merging parties, the trial court examined the parties' business planning documents, holding that "Anthem's ordinary course documents tell a consistent story that contravenes the firm's litigation position."[13]

II. Evidentiary principles under the EUMR

The EUMR is silent on the evidentiary principles that apply in EU merger control proceedings. Unlike in the case of proceedings concerning violations of arts 101 or 102 of the Treaty on the Functioning of the European Union (TFEU), which relate to past conduct and therefore demand clear evidence that EU competition rules have in fact been infringed, the EC engages in a prospective assessment under the EUMR that necessarily seeks to predict, on the basis of the best available evidence, whether a concentration is likely to significantly impede effective competition using evidence relating to the current and probable future state of competition on the market. The burden of proof is borne by the EC[14] and must be discharged in accordance with a "balance of probabilities" standard.[15]

[5] Luca Manigrassi, Eleonora Ocello and Violeta Staykova, "Recent developments in telecoms mergers" (2016) 3 *Competition Merger Brief* 1.
[6] FTC Competition Matters Blog, *Resetting our views on HSR Items 4(c) and 4(d)*, 28 November 2016, *https://www.ftc.gov/news-events/blogs/competition-matters/2016/11/resetting-our-views-hsr-items-4c-4d* [Accessed 1 November 2017].
[7] Terrell McSweeny, FTC Commissioner, "A Carpenter Is Only As Good As Her Tools: The Importance of Using Our Full Toolbox As Antitrust Enforcers", Global Antitrust Enforcement Symposium, Washington DC, 28 September 2015 ("We should be careful not to toss out the kind of evidence that common law has used for centuries on the grounds that it may seem anecdotal because, on the contrary, it can be the most probative…A two-page party document explaining the strategic rationale for a transaction might well be the best available evidence of the transaction's likely competitive effect. Moreover, the probative value of contemporaneous documents far surpasses self-serving oral statements made after an investigation is underway").
[8] Leslie C. Overton, then-Deputy Assistant Attorney General for Civil Enforcement at the Antitrust Division of the DOJ, Non-reportable Transactions and Antitrust Enforcement, 14th Annual Loyola Antitrust Colloquium, Institute for Consumer Antitrust Studies, Chicago, 25 April 2014 ("There are sound reasons to give substantial weight to…internal documents. Executives of the merging parties are often knowledgeable about the markets in question. Where they are contemplating a major financial investment — such as a merger or acquisition — they may be motivated to accurately evaluate the likely impact of the transaction on pricing, profitability or output").
[9] David Gelfand, then-Deputy Assistant Attorney General for Litigation of the Antitrust Division of the DOJ, Reflections on the Past Year at the Antitrust Division, Global Competition Review Live Conference, New York, 16 September 2014.
[10] *Ryanair Holdings Plc v European Commission* (T-342/07) EU:T:2010:280; [2011] 4 C.M.L.R. 4 at [138]. The EC explicitly referred to this statement in *Deutsche Börse/NYSE Euronext* to rebut the merging parties' contention that its findings on market definition were not based on quantitative evidence (Commission Decision of 1 February 2012 (COMP/M.6166 — *Deutsche Börse/NYSE Euronext*, fn.128).
[11] *United States v Bazaarvoice Inc* No.13-CV-00133-WHO, 2014 WL 203966, at *16 (N.D. Cal. 8 January 2014).
[12] Bill Baer, then-Acting Associate Attorney General of the DOJ, Delivers Remarks at American Antitrust Institute's 17th Annual Conference, Washington, DC, 16 June 2016; and Renata Hesse, then-Acting Assistant Attorney General of the Antitrust Division, Delivers Opening Remarks at 2016 Global Antitrust Enforcement Symposium, Washington DC, 20 September 2016.
[13] *United States of America v Anthem Inc*, Memorandum Opinion of Judge Amy Berman Jackson, 8 February 2017. On appeal, the court also attached importance to ordinary course documents in affirming the trial court's decision to enjoin the merger. *United States v Anthem Inc* No.17-5024 (D.C. Cir. 28 April 2017) at 29–30.
[14] See *Energias de Portugal SA v Commission of the European Communities* (T-87/05) EU:T:2005:333; [2005] 5 C.M.L.R. 23 at [61] ("It is for the Commission to demonstrate that a concentration cannot be declared compatible with the common market"). See too *Bertelsmann AG v IMPALA* (C-413/06 P) EU:C:2008:392; [2008] 5 C.M.L.R. 17 (Court of Justice confirmed the existence of a symmetrical burden of proof, requiring the EC to discharge its burden when it approves concentrations, as well as when it prohibits them).
[15] *Bertelsmann* [2008] 5 C.M.L.R. 17 at [52] (Court of Justice confirmed that the EC is required to predict the outcome that is "most likely to ensue").

The EU merger review is necessarily fact-specific and requires the EC to conduct an objective assessment of different types of evidence. The EC has not set out in a systematic way the principles it applies to the evaluation of different types of evidence, although the Horizontal and Non-Horizontal Mergers Guidelines contain useful guidance.[16] As a practical matter, the EC reviews many types of evidence from various sources, including: (i) party evidence; (ii) market share data; (iii) internal documents; (iv) business person statements and testimony; (v) independent industry reports; (vi) customer testimony; (vii) competitor testimony; (viii) consumer surveys; and (ix) empirical analyses. The EU Courts have confirmed that "there is no hierarchy between the types of evidence used by the Commission in merger cases as the Commission has the duty to make an overall assessment of the case"[17] and the EC endeavours to collect as much evidence as possible,[18] so as to evaluate the "totality of the available evidence."[19]

The EUMR empowers the EC to obtain "all necessary information" needed to complete its assessment, including by issuing requests to merging parties and third parties. Evidence may be obtained through simple requests or formal decisions.[20] Requests for internal documents are typically sent only after notification.[21] The EC may impose penalties when a merging party provides incorrect or misleading information.[22] For example, in May 2017, the EC fined Facebook €110 million for providing incorrect or misleading information during the EC's 2014 investigation into Facebook's acquisition of WhatsApp.[23] The magnitude of this fine dwarfed penalties imposed in the past for similar infractions[24] and, as Commissioner Vestager explained at the time, "sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information."[25]

As to the scope of its information requests, the EC is subject to a general requirement to ensure that such requests are proportionate.[26] Consistent, however, with the wide discretion extended to the EC in respect of antitrust investigations,[27] the EU Courts have given the EC broad latitude under the EUMR to request as much information as is considers necessary.[28] The only meaningful limitation is that the EC may not engage in "fishing expeditions." In *HeidelbergCement*, the Court of Justice criticised a request issued by the EC during an art.101 investigation on the ground that it sought "extremely extensive and detailed information…in relation to twelve Member States over a period of ten years" based on "an excessively succinct, vague and generic — and in some respects, ambiguous — statement of reasons."[29] Accordingly, EC information requests should be necessary, proportionate, and appropriately framed.

[16] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/05, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF*; and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF* [Accessed 1 November 2017]. By contrast, the 2010 US Horizontal Merger Guidelines include a section on "Evidence of Adverse Competitive Effects," which did not feature in the 1992 Guidelines. This section (paras 2.1 and 2.2) identifies several categories of evidence, including historical events, market shares, and concentration levels, as well as various sources of evidence, including information obtained from the merging parties, customers, and other industry participants and observers, which the DOJ and the FTC have found "most informative in predicting the likely competitive effects of mergers." The section is not, however, intended to be exhaustive and, as noted in the overview, "should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time."

[17] *Deutsche Börse/NYSE Euronext* Decision, para.246, referring to *Ryanair* [2011] 4 C.M.L.R. 4 at [136] ("the applicant's assertion that the 'non-technical evidence' cannot be taken into account unless it is supported by 'technical evidence' cannot be upheld. There is no need to establish such a hierarchy. It is the Commission's task to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation. It is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted").

[18] See, e.g. Commission Decision of 27 June 2007 (Case COMP/M.4439 — *Ryanair/Aer Lingus* (I), para.38) ("The fact that single pieces of evidence (answers to questions, result of econometric studies) may not support a certain conclusion, cannot as such put into question the Commission's assessment, since the Commission cannot base its decision on one single piece of evidence, but must collect as many pieces of evidence as possible, analyse all available facts and opinions and weigh all the available evidence when deciding on the compatibility of a transaction with the common market").

[19] See, e.g. Commission Decision of 4 September 2012 (Case COMP/M.6314 — *Telefónica UK/Vodafone UK/Everything Everywhere/JV*, para.22); and Commission Decision of 27 February 2013 (Case COMP/M.6663 — *Ryanair/Aer Lingus (III)*), para.27 et seq. ("it is important to stress that the assessment of the competitive impact of the Transaction involves a complex legal and economic analysis, the results of which are based on the totality of the available evidence").

[20] Failure to respond to an information request made by decision can lead to penalties. Requests issued by decision specify the information requested and fix a deadline for its submission (art.11(1) EUMR). Failure to meet that deadline will lead to the suspension of the EUMR's deadlines (art.10(4) EUMR).

[21] DG Competition Best Practice Guidelines on the conduct of EC merger control proceedings, para.26, *http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf* [Accessed 1 November 2017].

[22] EUMR art.14.

[23] When Facebook notified the acquisition of WhatsApp in 2014, it informed the EC that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. It stated this in both Form CO and in a reply to a request for information from the EC. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities. The EC found that, contrary to Facebook's statements in the 2014 merger review process, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014, and that Facebook staff were aware of such a possibility. See Commission Decision of 17 May 2017 (Case COMP/M.8228 — *Facebook/WhatsApp*).

[24] Prior to the *Facebook* decision, the largest fine imposed by the EC for providing incorrect and misleading information amounted to €50,000 (see Commission Decision of 28 July 1999 (Case COMP/M.1543 — *Sanofi/Synthélabo*) and Commission Decision of 14 December 1999 (Case COMP/M.1610 — *Deutsche Post/trans-o-flex*). In 2004, the EUMR was revised to, inter alia, increase the level of fines that could be imposed from a maximum of €50,000 to 1% of a company's global revenues.

[25] Commission Press Release IP/17/1369 of 18 May 2017. In July 2017, the EC issued two further statements of objections concerning the provision of incorrect or misleading information in connection with the Commission Press Release IP/17/1924 of 6 July 2017 (Case COMP/M.7435 — *Merck/Sigma-Aldrich*,) and Commission Press Release IP/17/1924 of 6 July 2017 (Case COMP/M.8283 — *General Electric/LM Wind*) transactions.

[26] See Treaty on the European Union art.5(4) ("Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties"). See too *Omya AG v Commission of the European Communities* (T-145/06) EU:T:2009:27; [2009] 4 C.M.L.R. 19 at [34].

[27] See, e.g. *Australian Mining & Smelting Europe Ltd v Commission of the European Communities* (C-155/79) EU:C:1982:157; [2009] 4 C.M.L.R. 19 at [17]; and *Orkem SA v Commission of the European Communities* (C-374/87) EU:C:1989:387; [1991] 4 C.M.L.R. 50 at [15].

[28] See, e.g. *Omya* [2009] 4 C.M.L.R. 19 at [30]; and *Schneider Electric v Commission of the European Communities* (T-310/01) EU:T:2002:254; [2003] 4 C.M.L.R. 17 at [79] and [94].

[29] See *HeidelbergCement AG v European Commission* (C-247/14 P) EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [27] and [39]. See too Opinion of Advocate General Wahl, *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at paras 46, 84, and 90–94.

As a practical matter, there are few checks on the scope of EC document requests, as the Hearing Officer and EC hierarchy are generally reluctant to get involved. Moreover, judicial review of document requests issued under the EUMR is effectively excluded, as the requirement that an appellant demonstrate "a distinct change in his legal position"[30] typically cannot be met in respect of a decision ordering a company to provide documents in an on-going merger investigation. Additionally, merging parties may be reluctant to seek judicial review of EC decisions while merger investigations are on-going given the associated delay and distraction at a time when they are seeking to persuade the investigating officials to approve their concentration.

III. The EC's evolving reliance on internal documents under the EUMR

The EC's use of internal documents in merger review has evolved significantly, from the early days following the EUMR's entry into force in 1990, when the EC typically reviewed only a handful of basic transaction-related documents, to the modern era, where requests for tens of thousands of internal documents have become more common.

The first version of Form CO imposed narrow documentary requirements on notifying parties, covering only transaction documents, annual reports and accounts, and reports or analyses prepared for the purposes of the transaction and from which information had been taken to draft the market definition and competitive assessment sections of Form CO. Notifying parties were also required to list and briefly describe (but not submit) other analyses, reports, studies, and surveys prepared for the purposes of analysing the proposed transaction "with respect to competitive conditions, competitors (actual and potential), and market conditions."[31] In 1994, Form CO was amended to require notifying parties to provide copies of such documents where at least one affected market was identified and the document in question had been submitted to or prepared for any member of a company's board or shareholders' meeting.[32]

In the decade after the EUMR came into force, the EC generally confined its review of internal documents to board papers and only occasionally requested other documents.[33] The EC typically refrained from issuing broad requests for internal documents, although references to internal documents in EC decisions became somewhat more common in the early 2000s. By way of example:

- In *Volvo/Scania*, the EC cited internal documents to support its findings that the affected markets were national in scope, that Volvo price discriminated between different customer groups, and that Volvo and Scania were close competitors.[34]
- In *Schneider/Legrand*, the EC cited internal documents to support its identification of national markets for electrical equipment.[35]
- In *Bombardier/ADtranz*, the EC found support for its identification of national geographic markets for regional trains, trams, and underground trains in the merging parties' internal documents.[36]
- In *General Electric/Instrumentarium*, the EC cited internal documents to assess the nature of General Electric's alliance with a third party, Draeger.[37]

The seminal event in the evolution of EU merger control occurred in the early 2000s when the EU Courts rendered a trilogy of judgments in the *Airtours*,[38] *Schneider*,[39] and Tetra Laval[40] cases that were highly critical of the EC's use of the available evidence. The judgment in *Airtours* was particularly scathing of the EC's treatment of documentary evidence.[41] Reacting to the EU Court's judgments, then-Commissioner Monti conceded that "our record in the merger area is less glorious after these Court rulings"[42] and, in 2002, the EC approved a "comprehensive merger control reform

[30] *IBM Corp v Commission of the European Communities* (60/81) EU:C:1981:264; [1981] 3 C.M.L.R. 635 at [9]. See also *Air France v Commission of the European Communities* (T-3/93) EU:T:1994:36 at [43]; and *Assicurazioni Generali SpA v Commission of the European Communities* (T-87/96) EU:T:1999:37; [2000] 4 C.M.L.R. 312.

[31] Commission Regulation 2367/90 on the notifications, time limits and hearings provided for in Council Regulation 4064/89 on the control of concentrations between undertakings [1990] OJ L219/5.

[32] Commission Regulation 3384/94 on the notifications, time limits and hearings provided for in Council Regulation 4064/89 on the control of concentrations between undertakings [1994] OJ L377/1.

[33] See, e.g. Commission Decision of December 4, 1996 (IV/M.774 — *Saint-Gobain/Wacker-Chemie/NOM*, para.72) (EC cited an internal document to support its finding that conventional abrasive grains did not exercise a competitive restraint on synthetic diamonds); and Commission Decision of 22 January 1997 (Case IV/M.794 — *Coca-Cola Enterprises/Amalgamated Beverages GB*, paras 41–63) (EC relied, inter alia, on internal planning documents to define a product market limited to colas).

[34] Commission Decision of 15 March 2000 (Case COMP/M.1672 — *Volvo/Scania*), paras 46, 92, 282, 297 and 306.

[35] Commission Decision of 10 October 2001 (Case COMP/M.2283 — *Schneider/Legrand*), paras 26, 202–204, 217–219 and 227. On appeal, the Court criticised the EC's reliance on certain of the merging parties' internal documents to conclude that Spanish wholesalers would be unable to significantly restrain the merged entity's competitive conduct. *Schneider Electric SA v Commission of the European Communities* (T-310/01) EU:T:2002:254; [2003] 4 C.M.L.R. 17 at [204]–[208].

[36] Commission Decision of 3 April 2001 (Case COMP/M.2139 — *Bombardier/ADtranz*, para.22).

[37] Commission Decision of 2 September 2003 (Case COMP/M.3083 — *General Electric/Instrumentarium*, paras 151–165).

[38] *Airtours Plc v Commission of the European Communities* (T-342/99) EU:T:2002:146; [2002] 5 C.M.L.R. 7.

[39] *Schneider Electric v Commission v Commission of the European Communities* (T-310/01) EU:T:2002:254; [2003] 4 C.M.L.R. 17. This case was decided concurrently with *Schneider Electric v Commission* (T-77/02) EU:T:2002:255. The two cases are collectively referred to as "Schneider."

[40] *Tetra Laval BV v Commission of the European Communities* (T-5/02) EU:T:2002:264; [2002] 5 C.M.L.R. 28. This case was decided concurrently with *Tetra Laval BV v Commission of the European Communities* (T-80/02) EU:T:2002:265; [2002] 5 C.M.L.R. 29. The two cases are collectively referred to as "*Tetra Laval*."

[41] *Airtours* [2002] 5 C.M.L.R. 7 at [130] ("It is apparent from a cursory examination of that document that the Commission's reading of it was inaccurate…the Commission ignored the emphasis placed by the author of the extract on the massive increase in foreign holiday sales that has taken place over the last 20 years. It follows that the Commission construed that document without having regard to its actual wording and overall purpose, even though it decided to include it as a document crucial to its finding that the rate of market growth was moderate in the 1990s and would continue to be so").

[42] Quoted in Saneed Shah, "European Court Deals Crushing Blow to Monti's Merger Policy", *The Independent*, 25 October 2002.

package, which is intended to deliver a world class regulatory system for firms seeking approval for their mergers and acquisitions in the Community."[43] Following extensive discussion with Member State antitrust agencies, the EC's proposals were, with only relatively minor changes, agreed in November 2003[44] and adopted in January 2004.[45]

Among other things, the EC recognised that "the level of proof required by the [General Court] is high, which implies that the Commission's enquiries should be more extensive and detailed than at present."[46] Accordingly, with a view to "strengthen[ing] further the economic underpinnings of [its] competition analysis" and permitting "more rigorous testing of the economic models we apply in our investigations," the EC undertook an "across-the-board increase in the economic expertise in our case teams."[47] In July 2003, the EC appointed its first Chief Economist to provide methodological guidance on economic policy, general guidance in individual cases, and detailed support in complex cases, in particular those requiring sophisticated quantitative analysis.[48] In addition, in an effort to improve internal decision making, the EC gave additional resources to and expanded the mandate of the Hearing Officer,[49] the official charged with ensuring that companies' rights of defence are respected, established a unit devoted to scrutiny and policy,[50] and formed a peer-review "panel" system to provide "a real and effective internal check on the soundness of the investigators' preliminary conclusions."[51]

As to Form CO, the EC expanded the types of documents that merging companies should provide to include copies of analyses, reports, studies, surveys, and any comparable documents prepared by or for any member of a company's board or shareholder's meeting "for the purpose of assessing or analysing a concentration with respect to *market shares*, competitive conditions, competitors (actual and potential), *the rationale of the concentration*, *potential for sales growth or expansion into other product or geographic markets*, and/or general market conditions" (additions to the 1994 version of Form CO are italicised).[52] Following the implementation of the recast EUMR, the EC steadily increased the number of internal documents requested from merging parties in complex cases,[53] although the principal evolution in evidentiary practice involved the more systematic development of quantitative and other empirical evidence by the Chief Economist's Team.[54]

Form CO's requirements were again revised in late 2013 to expand still further the types of internal documents that should be provided to include analyses, reports, studies, surveys, and any comparable documents generated during the preceding two years that, in respect of any affected market, assess market shares, competitive

[43] Commission Press Release IP/02/1856 of 11 December 2002.
[44] Commission Press Release IP/03/1621 of 27 November 2003.
[45] Commission Press Release IP/04/70 of 20 January 2004.
[46] Mario Monti, "EU Competition Policy" (2002) Fordham Corp. L. Inst. 87 (Barry E. Hawk, ed. 1993).
[47] Philip Lowe, Future Directions for EU Competition Policy, International Bar Association, Fiesole, Italy, 20 September 2002 ("[T]his economic function needs in our view to be closely associated with the day-to-day work of our case teams, giving guidance on analytical methodology, giving upstream advice on the direction of investigations and direct assistance in the most complex cases. An independent opinion on the economic aspects of a case should also be available to the Commissioner and the Commission and should be in the file"). Available at *http://ec.europa.eu/competition/speeches/text/sp2002_034_en.pdf* [Accessed 1 November 2017].
[48] Mario Monti, "EU Competition Policy" (2002) Fordham Corp. L. Inst. 87 (Barry E. Hawk, ed. 1993) ("Obviously this new role will have to be defined carefully. I believe it needs to be closely associated with the day-to-day work of our case teams, giving guidance on analytical methodology, advice on the direction of investigations and direct assistance in the most complex cases. At the same time, it will provide to the Competition Commissioner … an independent opinion on the economic aspects of a case before he proposes a final decision to the Commission").
[49] Decision of the President of the European Commission of 13 October 2011, on the function and terms of reference of the hearing officer in certain competition proceedings (2011/695/EU) [2011] OJ L275/29. Three main changes were effected: (i) the EC accepted that the Hearing Officer need no longer be an EC official and would in future report directly to the Competition Commissioner; (ii) the Hearing Officer was empowered to intervene before the submission of a draft decision to the Competition Commissioner; and (iii) the Hearing Officer's report would in future be made available to each national competition authority.
[50] See, e.g. Philip Lowe, "Review of the EC Merger Regulation—Forging a Way Ahead, speech at the European Commission/IBA Conference on EU Merger Control", Brussels, 8 November 2002 ("[t]his 'Scrutiny Office' [will] follow cases throughout their development and organise panels at key moments, for example before statements of objection are issued and on final decisions in the second phase of a merger investigation").
[51] Mario Monti, "Europe's Merger Monitor", *The Economist*, 9 November 2002. See too Joaquín Almunia, "Due Process and Competition Enforcement", IBA 14th Annual Competition Conference 2010, Florence, 17 September 2010 (Commission Press Release SPEECH/10/449) ("scrutiny is very close and very careful … contentious cases can be analysed by a 'peer review' panel which reports its findings directly to me"); and Henry C. Su, Interview with Dr Alexander Italianer, then-Director General, DG COMP, The Antitrust Source, American Bar Association, 4 March 2011 ("[O]ne of the elements in [the Commission's] internal process of scrutiny is the use of peer review panels. These panels are organized for major antitrust or merger cases, especially the complex ones, and where a statement of objections is either envisaged, or has already been adopted. The peer review panel may cover either all the aspects of the case, or a specific aspect, which is controversial or complex, where we want to have a fresh pair of eyes to look at all the relevant aspects").
[52] Commission Regulation 802/2004 implementing Council Regulation 139/2004 [2004] OJ L133/1.
[53] See, e.g. Commission Decision of 29 March 2006 (Case COMP/M.3975 — *Cargill/Degussa Food Ingredients*), paras 27, 45, 52, and 65 (EC cited parties' internal documents to, inter alia, support its conclusions on product market definition and, in particular, that synthetic emulsifiers and lecithin were separate product markets and that within lecithin, separate product markets could be defined for GM and non-GM lecithin and fluid and deoiled lecithin); Commission Decision of 10 May 2007 (Case COMP/M.4381 — *JCI/Fiamm*), paras 200–203 (EC cited internal documents suggesting that the merging parties developed competitive strategy on a country-by-country basis to support the identification of national geographic markets for starter batteries sold for independent aftermarket applications); and Commission Decision of 9 January 2009 (Case COMP/M.5153 —*Arsenal/DSP*), paras 40–63, 75, 115–118, 137, 158, 189, 215–220, and 222–232 (EC used the parties' internal documents to inter alia: (i) discredit the notifying party's argument that the relevant geographic market was worldwide; (ii) support a separate product market for di-benzoate plasticisers; (iii) confirm the supply-demand dynamics on the market for sodium benzoate; and (iv) determine that the merging parties were close competitors).
[54] See, e.g. Commission Decision of 27 June 2007 (Case COMP/M.4439 — *Ryanair/Aer Lingus*) (Chief Economist's Team conducted a series of economic studies, including a price correlation study and two regression analyses that replicated studies conducted by each party, to evaluate the competitive constraint that each party exercised on the other); Commission Decision of 11 March 2008 (Case COMP/M.4731 — *Google/DoubleClick*) (Chief Economist's Team engaged in a detailed empirical analysis of the key assumptions underlying various horizontal and non-horizontal theories of harm advanced by complainants); Commission Decision of 21 October 2008 (Case COMP/M.4919 — *StatoilHydro/ConocoPhillips*) (Chief Economist's Team performed an econometric analysis to measure the extent to which ConocoPhillips' service stations had constrained the pump prices at closely neighbouring stations operated by Statoil); Commission Decision of 17 December 2008 (Case COMP/M.5046 — *Friesland Foods/Campina* (Chief Economist's Team made extensive use of retail scanner data to conduct a series of econometric analyses designed to determine whether the parties' branded dairy products were close substitutes); Commission Decision of 6 January 2010 (Case COMP/M.5644 — *Kraft Foods/Cadbury*) (Chief Economist's Team analysed pricing and sales data to determine the extent to which the merging companies' chocolate tablet brands exerted competitive constraints on each other in the UK); and Commission Decision of 13 July 2011 (Case COMP/M.6101 — *UPM/Myllykoski and Rhein Paper*) (Chief Economist's Team carried out stationarity analyses to determine whether apple juice exerted a strong competitive constraint on orange juice).

conditions, competitors (actual and potential), and/or potential for sales growth or expansion into other product or geographic markets.[55] (During the preceding consultation,[56] these amendments were criticised by some commentators as being disproportionate and inconsistent with the EC's stated objective of making EU merger control "business friendly.")[57] Perhaps even more significantly, in addition to expanding the types of documents that need be produced as part of the initial filing, the EC started to issue broad supplemental requests for internal documents on which it subsequently relied to substantiate important findings of fact. The following examples are illustrative:

- In *Olympic/Aegean Airlines*, the EC's document request covered more than 90,000 internal documents, which were cited in the EC's assessment of market definition, the closeness of competition between the merging parties, and barriers to entry.[58]
- In *Western Digital Ireland/Viviti Technologies*, the EC's document request covered hundreds of thousands of internal documents, which the EC cited in support of findings reached on market definition, closeness of competition between the merging parties, and barriers to entry.[59]
- In *Deutsche Börse/NYSE Euronext*, the EC's document request covered several thousand internal documents and its conclusions on market definition and the competitive relationship between the merging parties were based in large part on extensive citations from those documents.[60]
- In *Ball/Rexam*, the EC cited large numbers of internal documents in its assessment of market definition, closeness of competition between the merging parties, the nature and extent of buyer power, and the projected impact of the transaction.[61]
- In *Hutchison 3G UK/Telefonica UK*, the EC's document request covered more than 300,000 internal documents, which the EC relied on to substantiate findings concerning the closeness of competition between the merging parties.[62]
- In *Hutchison 3G Italy/Wind/JV*, the EC's document request covered more than one million internal documents that were cited extensively to substantiate findings that the merging parties were close competitors and that the merger would harm competition in Italy.[63]
- In *Dow/DuPont*, the EC's document request covered more than 400,000 internal documents, several of which were cited to support the EC's findings that the merging parties were important innovators and that the merger would slow the development of new agro-chemicals.[64]

Although economic evidence remains important to the EC's assessment of reportable transactions, merging parties' internal documents (and, on occasion, documents provided by third parties)[65] are increasingly relied upon to substantiate findings reached on product[66] and

[55] Commission Regulation 1269/2013 amending Regulation 802/2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings [2013] OJ L336/1. This version of Form CO also requires the production of "minutes of the meetings of the board of management, board of directors, supervisory board and shareholders' meeting at which the transaction was discussed, or excerpts of those minutes relating to the discussion of the transaction" and documents analysing the transaction rationale in which "the transaction is discussed in relation to potential alternative acquisitions."

[56] See EU merger control — Draft revision of simplified procedure and merger implementing regulation, *http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html* [Accessed 1 November 2017].

[57] Commission Press Release IP/13/288 of 27 March 2013.

[58] Commission Decision of 26 January 2011 (Case COMP/M.5830 — *Olympic/Aegean Airlines*).

[59] Commission Decision of 23 November 2011 (Case COMP/M.6203 — *Western Digital Ireland/Viviti Technologies*).

[60] Commission Decision of 1 February 2012 (Case COMP/M.6166 — *Deutsche Börse/NYSE Euronext*).

[61] Commission Decision of 15 January 2016 (Case COMP/M.7567 — *Ball/Rexam*).

[62] Commission Decision of 11 May 2016 (Case COMP/M.7612 — *Hutchison 3G UK/Telefonica UK*).

[63] Commission Decision of 1 September 2016 (Case COMP/M.7758 — *Hutchison 3G Italy/Wind/JV*).

[64] Commission Decision of 27 March 2017 (Case COMP/M.7932 — *Dow/DuPont*).

[65] For cases where the EC has relied on documents provided by third parties, see Commission Decision of 22 June 2009 (COMP/M.5335 — *Lufthansa/SN Holding*) (EC requested and received from Air Berlin a large number of internal documents regarding its potential entry on certain routes); *Western Digital Ireland/Viviti Technologies* Decision (EC referred to internal documents received from Toshiba in assessing the extent of supply-side substitution from 3.5" desktop to 3.5" business critical hard disk drives, and the likelihood of Toshiba's entry into the 3.5" consumer electronics sector); Commission Decision of 28 May 2014 (Case COMP/M.6992 — *Hutchison 3G UK/Telefonica Ireland*), para.280 (EC's assessment of Hutchison 3G's market position cited competitors' internal documents); and *Hutchison 3G UK/Telefonica UK* Decision, para.1110 (EC's evaluation of Sky's competitive position cited competitors' internal documents).

[66] See, e.g. *Deutsche Börse/NYSE Euronext* Decision paras 360–366 (EC cited internal documents to support its conclusion that exchange-traded derivatives did not compete on the same antitrust product market as derivatives traded on over-the-counter platforms); Commission Decision of 24 May 2013 (Case COMP/M.6576 — *Munksjö/Ahlstrom*), paras 99, 109, 123, 131, 141, 182, 197, 283–288 and 317 (EC cited internal documents in assessing demand- and supply-side substitutability in relation to all product markets relevant to the transaction); *Hutchison 3G UK/Telefonica UK* Decision paras 257 and 275 (EC cited internal documents in assessing the competitive significance of a segmentation between SIM-only and handset contracts); and Commission Decision of March 29 2017 (Case COMP/M.7995 — *Deutsche Börse/London Stock Exchange Group*), paras 161 and 165 (EC cited internal documents to support a separate product market for central counterparty clearing of bonds).

geographic market definition,[67] barriers to entry,[68] closeness of competition between the merging parties,[69] and the likelihood of co-ordinated effects.[70]

IV. The role of internal documents in US merger control

Internal documents have historically played a central role in US merger control. In the US, merger review by the federal agencies begins with the completion of a simple notification form. The form provides revenues for each party broken down by "NAICS" codes, which allows the agency to determine if the parties' products or services overlap. It also requests a set of documents similar to those required in Form CO,[71] but does not request market data or any narrative other than a brief description of the structure of the transaction. The content provided by the filing party fills only a few pages.[72] Early in the initial 30-day waiting period, the agencies often issue a narrow, voluntary request for information on overlapping businesses, limited to strategic plans, contact information for the largest customers, market share information as may be kept in the ordinary course, and (where readily available) bidding data.[73] Parties to transactions that may involve some overlap, but that do not ultimately require an extensive investigation, will thus typically produce a few dozen documents at most.

To the extent the US federal agencies are unable to conclude that a transaction does not raise serious competition law issues, they extend their investigation beyond the initial 30-day waiting period through the issuance of a request for additional information and documentary materials, which is known as a Second Request. In such circumstances, merging parties are not permitted to close their transaction until 30 days (or 15 in certain cases) after they certify "substantial compliance" with the Second Request, shifting the burden to the investigating case team to prove shortcomings or deficiencies. The US agencies' practice of issuing a broad request that is subsequently narrowed by negotiation has been criticised as burdensome and inefficient.[74] Such criticism is tempered by two considerations. First, the agencies take the qualifier "substantial" in "substantial compliance" seriously, and though they frequently issue deficiency notices after the parties certify substantial compliance, major disputes are rare. Secondly, even if the agencies believe that a party has not substantially complied with the Second Request, the time for review begins running as soon as the parties certify, and the burden is on the agency to seek judicial intervention to toll that time. Neither agency has done so in recent times, and in practice most deficiency notices are negotiated rapidly and relatively amicably.

The principal focus of negotiation for the Second Request is around whose files will be searched, as the number of individuals is the primary driver of burden. The DOJ and FTC publish "Model Second Requests" that give merging companies a reasonable indication of the types of documents that will be requested.[75] The US agencies' practice of requesting that a large number of individuals be searched generates significant burden, typically costing millions, and sometimes many millions,

[67] See, e.g. Commission Decision of 8 May 2014 (Case COMP/M.6905 — *Ineos/Solvay/JV*), para.365 (EC cited parties' internal documents indicating that the competitive dynamics of the market for commodity S-PVC were often analysed on a regional level); Commission Decision of 10 September 2014 (Case COMP/M.7061 — *Huntsman Corporation/Equity Interests Held By Rockwood Holdings*), para.175 (EC cited internal documents to support its conclusion that the TiO2 market was divided into three main regions); Commission Decision of 8 September 2015 (Case COMP/M.7278 — *General Electronic/Alstom (Thermal Power — Renewable Power & Grid Business*), paras 167, 171, 174, 177 and 180 (EC cited internal documents to support its conclusion that China constituted a separate market and should be excluded from the worldwide market for 50Hz heavy duty gas turbines); and Commission Decision of 10 February 2016 (Case COMP/M.7555 — *Staples/Office Depot*), para.188 (EC cited internal documents to determine the manner in which the merging parties assessed the relevant geographic market).

[68] See, e.g. *Ball/Rexam* Decision, paras 540, 568, and 591 (EC cited internal documents to support its conclusion that barriers to entry and expansion were high); and *Deutsche Börse/London Stock Exchange Group* Decision, para.656 (EC cited Deutsche Börse's internal documents assessing recent failed entry attempts to support its conclusion that barriers to entry into the international central securities depositories market were high).

[69] See, e.g. *Ineos/Solvay/JV* Decision, para.788 (EC cited Solvay internal documents that recognised INEOS as its main competitor); *Hutchison 3G UK/Telefonica UK* Decision, paras 430, 431, and 888 (EC cited internal documents to corroborate its finding that H3G and Telefonica were close competitors, and that the combined entity would have a reduced incentive to compete aggressively, including because of H3G's "maverick" position in the UK mobile market); *Hutchison 3G Italy/Wind/JV* Decision, paras 529 and 813 (EC cited the parties' internal documents to conclude on H3G's position as the cheapest and most aggressive MNO on the retail mobile market prior to the transaction, and to confirm that the parties were close competitors); *Deutsche Börse/London Stock Exchange Group* Decision, paras 429–445 (EC cited internal documents to support its conclusion that the merging parties' products were close competitors); and Commission Decision of 5 April 2017 (Case COMP/M.7962 — *Chemchina/Syngenta*), para.572 (EC cited internal documents to support its conclusion that merging parties' main products were each other's closest competitors).

[70] See, e.g. Commission Decision of 5 June 2014 (Case COMP/M.7009 — *Holcim/Cemex West*), para.208 (EC noted that parties' internal documents militated against possible coordinated behaviour); Commission Decision of 24 May 2016 (Case COMP/M.7881, *AB InBev/SABMiller*), para.69 (EC found "ample evidence that brewers analyse in their internal documents how to establish and sustain price coordination"); and *Hutchison 3G Italy/Wind/JV* Decision, para.1124 (EC cited parties' internal documents to conclude that reaching terms of coordination would be possible post transaction).

[71] See Items 4(c) and 4(d) of the Hart-Scott-Rodino form, *https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions* [Accessed 1 November 2017].

[72] The form itself is about 12pp., but includes space for instructions and form fields such as checkboxes and lists.

[73] See FTC, Guidance for Voluntary Submission of Documents During the Initial Waiting Period, *https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents* [Accessed 1 November 2017].

[74] See, e.g. Maureen Ohlhausen, then-Acting Chair, FTC, Antitrust Policy for a New Administration, The Heritage Foundation, Washington, DC, 24 January 2017, *https://www.ftc.gov/system/files/documents/public_statements/1051993/antitrust_policy_for_a_new_administration.pdf* [Accessed 1 November 2017]. ("I worry about the cost of compulsory process and second requests that firms experience in merger review … Thus, I would like to convene a meeting of the FTC's Bureaus of Competition and Consumer Protection leadership to address possible overbreadth of discovery. The goal would be to narrow the scope and expense of compulsory process (especially as to third parties), without depriving the FTC's staff of the information they need to evaluate mergers and other matters").

[75] The DOJ's Model Second Request is available at *https://www.justice.gov/atr/request-additional-information-and-documentary-material-issued-weebyewe-corporation*; the FTC equivalent is available at *https://www.ftc.gov/system/files/attachments/merger-review/guide3.pdf*. See too DOJ, Antitrust Division Revises, Streamlines Model Second Request, 28 November 2016, *https://www.justice.gov/opa/blog/antitrust-division-revises-streamlines-model-second-request* [Accessed 1 November 2017]. ("Publishing the revised Model will permit parties and their counsel to anticipate what information the division may seek, even before being issued a Second Request. This will allow parties to better focus their collection and review of documents and information, and allow counsel to better advise their clients what to expect from the division").

of dollars.[76] Given that documents introduced at trial to block a transaction almost always come from a few of the most senior executives, one might question whether the US agencies could limit their requests to those few individuals.

If the US agencies want to block a transaction, they must persuade the courts to do so. It typically takes several months to prepare for a trial, and during this time the merging parties receive copies of all documents collected by the agencies during their investigation—including from third parties—and they have an opportunity to review those documents, take depositions of document authors and business people to test the veracity and credibility of what is written in those documents, and request discovery of additional documents to obtain context that may be lacking from the universe of documents collected by the agency. There are also rules of evidence governing the documents that can be introduced at trial and how such materials can be used. As a result, the agencies cannot simply read what they want into a selective set of documents. Rather, they must be prepared to demonstrate to a judge that their interpretation is correct, even after the defence has been able to cross-examine relevant witnesses and submit its own documents.

V. Implications and issues

The EC's increased readiness to request and rely on large numbers of internal documents as part of the EU merger review process has important legal and practical implications, five of which are discussed below.

First, an important implication of the EC's requesting and examining large numbers of internal documents as part of its review process is that merging companies and their counsel will increasingly need to make themselves aware of the contents of those documents when they notify transactions in order to ensure that submissions made in Form CO are consistent with them.[77] Merging companies will in turn need to take account of the time and expense associated with conducting large-scale document review prior to notification, as both may be non-trivial, given the number of internal documents that may potentially bear on the wide array of matters addressed in Form CO (including, but not limited to, market definition, closeness of competition, market dynamics, ease of entry, transaction rationale, and merger-related efficiencies).

This new reality makes it all the more important that the EC codify its practice. As described above, the EC's focus on internal documents has evolved over time and, unlike changes to the EUMR's jurisdictional scope and the substantive test, has occurred without public consultation or any announcement as to a change in policy. To ensure greater consistency, and to enable companies to plan in advance, we recommend that the EC explain and codify its practice regarding internal document requests in a notice or set of guidelines that provides clear advice as to: (i) the circumstances in which large-scale document requests will be made; (ii) the types of documents that will routinely be requested (board decks, business presentations, etc.), including in particular the circumstances in which email searches may be required; (iii) the individuals whose documents are likely to be requested; and (iv) the time period over which document searches will typically be required.

Secondly, the EC's increased readiness to request and examine large numbers of internal documents has implications for the architecture of the EU merger review process. When the EUMR was adopted, the EU made a deliberate decision to use a front-loaded, data-heavy notification form that required merging companies to define relevant markets, substantiate the basis on which those markets had been defined, and provide detailed data and information about the competitive conditions on those markets. The EU also chose to introduce a system with strict deadlines—concentrations were required to be notified within one week of announcement and the EC was mandated to issue a decision in every case no later than five months after notification. That choice effectively precluded lengthy pre-notification discussions, limited the extent of information that could reasonably be provided in Form COs, and excluded extensive information requests.

Over time, the EU merger review process has evolved: the handling of straightforward cases has been simplified, enabling the review periods to be reduced,[78] while more complex cases have become subject to longer and more intense review. In complex cases, protracted pre-notification processes, often extending over six months or more, have become the norm, during which the EC augments already-lengthy versions of Form CO, issues multiple information requests, and examines economic evidence. Following notification, the EC routinely surveys numerous market participants and engages in extensive fact-finding to allow it to draft

[76] See Antitrust Modernization Commission, Report and Recommendations, April 2007 ("on average, second request investigations took seven months and resulted in median compliance costs of $3.3 million"); and Jason Doly, "Antitrust Pioneer Joe Sims Retires From Jones Day Partnership", *The American Lawyer*, 6 January 2016 ("When you're doing a merger that has some issues, you're talking about $10 million to $20 million in costs just to gather the information, before the cost of the lawyers").

[77] Legal counsel are under a legal obligation to ensure that information and explanations provided in Form CO are "true, correct, and complete." Form CO must conclude with the following declaration which is to be signed by or on behalf of the notifying parties: "The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere." Section 11 Annex I Commission Regulation 802/2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1. Article 14(1)(a) EUMR empowers the EC to impose fines of up to 1% of a company's aggregate global turnover where, inter alia, that company is found to have intentionally or negligently provided incorrect or misleading information to the EC.

[78] Over the past decade, the EC has streamlined its review of straightforward transactions, including through a simplified procedure, which allows companies to use a shorter notification form in respect of non-problematic transactions. See Mergers: Commission Adopts Package Simplifying Procedures Under the EU Merger Regulation — Frequently Asked Questions, 5 December 2013, Commission Press Release MEMO/13/1098. The EC has acknowledged that "there is room to improve and streamline some further provisions of the Merger Regulation, particularly with a view towards simplifying procedures." See Commission White Paper, *Towards more effective EU merger control*, 9 July 2014, SWD(2014) 217, paras 76–77.

detailed, reasoned decisions that often span hundreds of pages. The cumulative effect of this evolution has been to lengthen considerably the EUMR review process to a point where EC review is often among the longest and most burdensome in the world.

Adding to this already burdensome process a requirement that merging companies provide thousands of internal documents represents a significant change to the architecture of EU merger review that calls into question the appropriate balance between Form CO, the EC's market investigation, economic and other evidence, and the examination of internal documents. The EC's response to date has been to extend pre-notification and/or suspend its formal review periods following notification by "stopping the clock" in order to give companies time to gather internal documents.[79] Procedural devices of this kind were only exceptionally employed in the past, but have become more frequent and of longer duration in recent years as the EUMR's deadlines cannot reasonably accommodate the time required to respond to wide-ranging requests for internal documents. Of the 36 Phase II reviews undertaken between 2007 and 2011, "clock stoppage" occurred in 22% of cases; by contrast, of the 41 Phase II reviews undertaken between 2012 and July 2017, "clock stoppage" occurred in 32% of cases (and an increasing number of Phase I cases). By way of example:

- In *Google/Motorola Mobility*, the EC suspended its Phase I review for 23 working days to give the merging parties time to gather internal documents.[80]
- In *Huntsman Corp/Equity Interests Held By Rockwood Holdings*, the EC suspended its Phase II review for 21 working days to enable the parties, inter alia, to gather internal documents.[81]
- In *Dow/DuPont*, the EC suspended its Phase II review on two occasions for a total of 34 working days, primarily to gather internal documents.[82]

The practical implications of the EC's increasing requests for internal document are inconsistent with the original design of the EUMR process and, in the view of the authors, require a recalibration of that process. In particular, if, as appears to be the case, the EC intends to systematically test merging companies' submissions by reference to internal documents, then the need to delay formal notification by many months while the EC perfects Form CO notifications may no longer be reasonable or necessary. Accordingly, in cases where the EC envisages requesting large numbers of internal documents, we recommend that the EC reduces the extent of information and explanations that need be provided in Form CO, disciplines itself to require fewer successive drafts of Form CO, and issues requests for documents earlier in the process to give merging companies and their counsel sufficient time to gather those documents within the EUMR's mandated deadlines, obviating the need to "stop the clock."

Thirdly, requests for large numbers of internal documents can have important implications for legal professional privilege, which shields from disclosure communications between a company and its lawyers and documents prepared for the purpose of seeking, obtaining, or providing legal advice. Consistent with the principles enshrined in the European Convention on Human Rights[83] and the Charter of Fundamental Rights of the European Union,[84] the EU Courts have recognised the existence of legal professional privilege,[85] although many have criticised the narrow scope of that privilege, which does not extend to legal advice from in-house counsel.[86]

[79] The average time between notification and EC decisions following phase II investigations has increased from 109 working days in 2002 (with proceedings ranging from 74 days (Commission Decision of 17 December 2002 (Case COMP/M.2822 — *ENBW/ENI/GVS*) to 167 days (Commission Decision of 30 January 2002 (Case COMP/M.2416 — *Tetra Laval/Sidel*)) to 127 days in 2009/2010 (with proceedings ranging from 77 days (Commission Decision of 28 August 2009 (Case COMP/M.5440 — *Lufthansa/Austrian Airlines*) to 145 days (Commission Decision of 17 November 2010 (Case COMP/M.5658 — *Unilever/Sara Lee Body Care)*) to 134 days in 2016 (with proceedings ranging from 116 days (Staples/Office Depot Decision) to 160 days (*Hutchison 3G UK/Telefonica UK* Decision)).

[80] Commission Decision of 13 February 2012 (Case COMP/M.6381 — *Google/Motorola Mobility*), para.2.

[81] *Huntsman Corporation/Equity Interests Held By Rockwood Holdings* Decision, para.16.

[82] *Dow/DuPont* Decision, para.28.

[83] See too Opinion of Advocate General Kokott, *Akzo Nobel Chemicals v European Commission* (C-550/07 P) EU:C:2010:229; [2010] 5 C.M.L.R. 19 at para.47 ("[legal professional privilege is] a general legal principle in the nature of a fundamental right").

[84] Article 47 guarantees the right to a fair trial ("Everyone shall have the possibility of being advised, defended and represented") and art.48 guarantees the right of defence ("Respect for the rights of the defence of anyone who has been charged shall be guaranteed").

[85] See *AM&S Europe* [2009] 4 C.M.L.R. 19 at [2] ("in all the Member States written communications between lawyer and client are protected by virtue of a principle common to all those States"); *Hilti AG v Commission of the European Communities* (T-30/89) EU:T:1991:70; [1992] 4 C.M.L.R. 16 at [18] ("it must be held that the principle of the protection of written communications between lawyer and client may not be frustrated on the sole ground that the content of those communications and of that legal advice was reported in documents internal to the undertaking. Thus the principle of the protection of written communications between lawyer and client must, in view of its purpose, be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications"); and *Akzo Nobel Chemicals Ltd v Commission of the European Communities* (T-125/03) EU:T:2007:287; [2008] 4 C.M.L.R. 3 and EU:T:2007:58, at [77] ("It thus stated that Community law, which derives from not only the economic but also the legal interconnection between the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular as regards certain communications between lawyer and client. That confidentiality serves the requirement, the importance of which is recognised in all of the Member States, that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it. Similarly, the Court considered that the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence").

[86] See, e.g. Maurits Dolmans and Damien Gerard, "Recognizing the Legal Privilege of In-House Counsel", April 2013, MLex; Maurits Dolmans, Jay Modrall, and Dirk Vandermeersch, "The European Court of Justice Denies Professional Legal Privilege to Employed Lawyers" (2011) 36(4) *Employee Relations Law Journal* 1; and Julia Holtz, "Legal Professional Privilege in Europe: A Missed Policy Opportunity" (2013) 4(5) *Journal of European Competition Law & Practice* 1.

The EC has recognised that certain internal documents requested under the EUMR may be protected by legal professional privilege.[87] It has not, however, codified or articulated its approach to identifying such documents, and its practice is not always consistent.[88] Further, as a practical matter, it is often difficult for merging parties to identify legally privileged documents within the short deadlines prescribed by the EC for the submission of large sets of internal documents.[89] Unlike in the US, where companies may submit documents on a rolling basis as they complete privilege reviews, the EC is less willing to give companies time to review documents for legal privilege and to accept the existence of legal privilege other than in clear-cut cases involving legal advice given by outside counsel.[90] Also, unlike in the US, the EC does not have rules that allow companies to "claw back" inadvertently disclosed privileged material produced in the context of EU merger review.[91] Instead, disputes are considered by the investigating officials and may be escalated to the Hearing Officer, which inevitably leads to delay and may in some cases cause friction between the merging parties and the EC.

Accordingly, to ensure that merging parties may appropriately exercise their right to shield legally privileged documents from disclosure, we recommend that the EC develop clear guidance as to the circumstances in which legal privilege will be respected in EU merger proceedings. Such guidance should, we believe, respect at a minimum all communications involving outside counsel, as well as communications involving in-house counsel if such communications are privileged under the laws of the jurisdiction in which the relevant in-house counsel is admitted to practice.[92] Indeed, the authors believe that, as a matter of policy, the EC should extend the protections of legal privilege to all in-house counsel.

Among the reasons for respecting in-house counsel legal privilege is that a consistency of approach as between the EC and US agencies would facilitate the negotiation of waivers allowing the EC and its US counterparts to share information; correspondingly, divergence may impede the negotiation of waivers, and the collaboration facilitated by those waivers By declining to recognise privilege over advice from in-house counsel, and compelling production of such documents, the EC may be violating the public international law principle of comity, by interfering with fundamental rights, such as legal privilege, afforded to a company by the laws of another state (e.g. in the case where the EC compels production of advice covered by legal privilege in the US, on the basis that the advice is not privileged under EU law).

We further recommend that the EC give merging companies sufficient time to conduct privilege reviews, that it establish a timely and effective system for the adjudication by the Hearing Officer of disputes concerning the privileged character of documents, and that it develop procedures to enable companies to "claw back" inadvertently disclosed privileged material. It is particularly important that the EC take steps to resolve privilege disputes in a timely fashion in the context of merger review, where timelines are invariably tight. At present, the incentives to challenge the EC's decisions on privilege claims in a merger context and an antitrust context can be very different, as merging parties invariably want to avoid delaying the review, while parties to antitrust proceedings can usually afford to spend time exhausting all available avenues (including appeals) to have a privilege claim determined.

Fourthly, the EC's increasing readiness to issue extensive document requests has important implications for merging parties' rights to review those documents in cases in which the EC issues a statement of objections. Access to the EC's file in such cases is "one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defense."[93] In situations where the EC has obtained documents from the merging parties alone, providing access to those documents may be relatively straightforward, assuming each merging company is ready to grant access to the other company or its counsel. Even then, though, the

[87] See, e.g. Decision of the President of the European Commission of 13 October 2011, on the function and terms of reference of the hearing officer in certain competition proceedings (2011/695/EU) [2011] OJ L275/29, recital 11 ("The hearing officer should be able to facilitate the resolution of claims that a document is covered by legal professional privilege. To this end, if the undertaking or association of undertakings making the claim agrees, the hearing officer will be allowed to examine the document concerned and make an appropriate recommendation, referring to the applicable case-law of the Court of Justice").

[88] See, e.g. Thomas Wilson, "Document Requests in Complex EU Merger Cases" (2017) 15(2) *Zeitschrift für Wettbewerbsrecht* 146.

[89] In some cases where notifying parties have submitted documents in response to a Second Request during a US merger review, it may be possible to reduce the burden on the parties in the EU by reproducing the US production, as redacted for US privilege. In other cases, however, EC requests may cover documents that were not submitted in the US and a fresh privilege review may be required. The EC may also require notifying parties to revise redactions to US privileged documents that do not fall within the narrower scope of legal professional privilege under EU law.

[90] The EC has on occasion gone further and challenged privilege claims over EU outside counsel advice where that advice does not "have a relationship to the subject-matter of [the administrative] procedure." See *AM&S Europe* [2009] 4 C.M.L.R. 19 at [23]. This can lead to the EC challenging privilege claims over advice relating to non-competition matters, such as IP and employment.

[91] See Federal Rules of Civil Procedure r.26(b)(5)(B), which provides that "if information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved." It is the FTC's stated policy not to treat inadvertent production of privileged materials as a waiver of privilege, and its standard procedure is to return the original and all copies of any inadvertently produced privileged material as soon as its privileged nature has become apparent. See FTC, Statement of the Federal Trade Commission's Bureau of Competition on Guidelines for Merger Investigations, *https://www.ftc.gov/system/files/documents/public_events/114015/ftc_statement_on_guidelines_for_merger_investigations_12-22-02_2.pdf*. The DOJ also has "an internal policy addressing inadvertently produced privileged documents that roughly mirrors the rules of civil procedure. The [DOJ] will sequester documents it identifies as privileged and will do the same with potentially privileged documents identified by a producing party": see Tracey Greer, Senior Counsel, "Electronic Discovery, Antitrust Division, DOJ, Avoiding E-Discovery Accidents & Responding to Inevitable Emergencies: A Perspective from the Antitrust Division", ABA Spring Meeting, March 2017, *https://www.justice.gov/atr/page/file/953381/download* [Accessed 1 November 2017].

[92] See, e.g. F. Enrique González-Díaz and Paul Stuart, "Legal professional privilege under EU law: current issues" (2017) 3(3) *Competition Law & Policy Debate* 56.

[93] Commission Notice on the Rules for Access to the Commission File in Cases pursuant to Articles [101] and [102] of the [TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C325/7 (File Access Notice), art.1.

two-week period typically given to companies to review the EC's case file and prepare their response to a statement of objections will often be insufficient when the case file is extensive and the EC's statement of objections cites numerous documents that require review and verification in order to determine their context, authorship, and relevance. Accordingly, to ensure that merging companies' rights of defence are respected, the EC should either extend the two-week response period or, better still, discipline itself to question merging parties about the provenance and reliability of particular documents before a statement of objections is issued.

In situations where the EC's case file contains documents provided by third parties, including customers and competitors of the merging parties, it may be more difficult to provide full access to those documents, although it is no less important, in particular in cases in which the EC has relied on such documents. To give merging parties sufficient time to review third party documents, full access should be provided to such documents immediately following the issuance of a statement of objections. This may in turn necessitate a more disciplined and systematic approach on the EC's part to creating non-confidential versions of documents that may be shared with merging parties. Where third party documents cannot be shared with the merging parties because they contain confidential information, we recommend that the EC refine and formalise the procedural mechanisms it has developed to allow merging parties' advisers to review confidential information in data rooms or through confidentiality rings.[94] These procedures were designed for, and have been developed primarily in respect of, the review of economic evidence by economic consultants, but could readily be adapted to allow third party documents to be reviewed by outside counsel.

Fifthly, in cases in which the EC requests, reviews, and relies on large numbers of internal documents, it is essential that its assessment of those documents be fair and objective. This requires (at least) three qualities—an open mind, an appreciation of a given document's author, intended use, and audience, and a readiness to view all available documents "in the round." Only a complete and balanced assessment of all the available evidence is capable of determining whether extracts from one or more documents fairly reflect the views of the companies in question and can safely be relied upon. To minimise the risk of confirmation or prosecutorial bias, it is essential that EC officials resist the temptation to "cherry pick"[95] and search only for "smoking guns" that support a particular theory of harm, remain open to considering inculpatory documents as well as exculpatory documents,[96] and discipline themselves to understand the background to and context of any given document.

To the extent the EC has endeavoured to explain its practice, it has fallen short of providing sufficient reassurance that it recognises the need to conduct a complete review of all available documents. In *Ineos/Solvay JV*, the merging parties were required to provide the EC with over 14,000 internal documents. They subsequently complained about the EC's selective use of those documents, contending that the EC had: (i) focused on a small number of inculpatory documents and ignored many exculpatory documents; (ii) overemphasised inculpatory statements in documents that were authored by junior employees or sales staff, contaminated by opinions expressed by third party consultants, or drafted to influence board decisions; and (iii) failed to draw a proper distinction between strategic aspirations and actual behaviour in the market. In response, the EC explained that,

> "as a general rule…it is not very appropriate to employ the concepts of 'inculpatory' and 'exculpatory' documents in the context of merger proceedings, which are consensual in nature, contrary to the meaning attributed to those terms in the context of antitrust proceedings."

The EC went on to state that

> "[it] is under no obligation to provide a detailed assessment of all the documents in its file. That would be incompatible with the need for speed and the short timescales which the EC is bound to observe when exercising its power to examine concentrations."[97]

The EC may be correct in stating that there is no legal obligation for its decisions "to provide a detailed assessment of all the documents in its file." The EC is, however, required as a matter of law (and sound policy) to perform a balanced assessment of all the available evidence, including all internal documents. This obligation requires the EC to assess internal documents "in the round," taking full account of their context, authorship, and representativeness. Meeting this standard can often be challenging, in particular given the EUMR's strict deadlines. It is nevertheless essential that investigating officials appreciate the need to solicit and

[94] See DG COMP Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and the EU Merger Regulation, 2 June 2015, *http://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf* [Accessed 1 November 2017].

[95] See, e.g. *Società Italiana Vetro SpA v Commission of the European Communities (Italian Flat Glass)* (T-68/89) EU:T:1992:38; [1992] 5 C.M.L.R. 302 at [91], where the Court criticised the EC for selectively quoting evidence by omitting exculpatory statements from a document relied on to support an adverse finding under art.81 ("It emerges from the inquiry carried out by the Court that when the EC prepared the documentary evidence with a view to communication to the undertakings, certain relevant passages were deliberately deleted or omitted, even though they did not relate to business secrets. In particular, nine words were deleted without trace in a handwritten note from SIV of 30 January 1985").

[96] See, e.g. Emil Paulis, then-Acting Deputy Director General for Antitrust, "The Burden of Proof in Article 82 Cases" [2006] Fordham Corp. L. Inst. 469 (Barry E. Hawk, ed. 2007) ("The burden of proof on the dominant firm for objective justifications and efficiencies should not be confused with the obligation of the authority to investigate "*à charge*" and "*à décharge*" i.e. to observe neutrality in investigating the facts and circumstances of an alleged infringement of art.82, whether they are inculpatory or exculpatory. This obligation of neutrality during the investigation cannot however impose an obligation on the public authority to investigate out of its own initiative all thinkable exculpatory evidence to prove the absence of evidence relating to objective justifications or efficiencies").

[97] *Ineos/Solvay/JV* Decision, para.56 and fn.22, citing *Cisco Systems Inc v European Commission* (T-79/12) EU:T:2013:635; [2014] 4 C.M.L.R. 20 at [108]–[109].

take account of merging parties' views on whether a given document is probative, representative, and has been properly understood and characterised, and discipline themselves to give merging parties sufficient time in the review process to address the relevance, representativeness, and probative value of a given document before importance is attached to that document.

In the absence of robust and timely judicial review, the EC's administrative approach necessarily requires the adoption of checks and safeguards that replicate those inherent in a judicial system.[98] The safeguards developed by the EC as part of the reforms adopted in response to the *Airtours*, *Schneider*, and *Tetra Laval* judgments reflected the EC's practice at the time and were, in particular, designed to ensure that EC decisions would in future be more firmly grounded in economics.[99] They were not intended to, and do not in fact, address the implications of large-scale documentary review. If, as appears increasingly to be the case, EC decisions are to be framed around internal documents provided in response to information requests, additional safeguards are needed to protect merging parties. Two sets of measures may be considered in this respect.

First, we recommend that the EC adopt a set of best practices guidelines that, among other things: (i) acknowledge the need to ensure that document requests are proportionate; (ii) provide advice on reasonable steps that merging parties can take to identify internal documents that are likely to be requested; (iii) explain the technology, including predictive coding and computer algorithms, that will generally be accepted by the EC to sift large sets of internal documents; (iv) describe the steps that the EC will customarily take to understand the provenance and context of internal documents, to ascertain their relevance and probative value, and to assess their representativeness in light of other documents on the EC's case file; and (v) detail the protocols that the EC will follow to ensure that investigating case teams' review of large sets of internal documents is fair and objective.

Secondly, we recommend that the EC establish internal safeguards designed to ensure that investigating officials' assessments of internal documents are objective and fairly conducted. As the Court's judgment in *Airtours* makes clear,[100] even the most diligent officials can make mistakes, overlook important documents, or misconstrue statements. While the EC has established peer review panels to provide an effective internal check on investigating case teams' preliminary conclusions, the efficacy of this safeguard has been eroded somewhat by the evolution in EC practice as the collection and use of internal documents has expanded. This evolution has inevitably made effective peer review more challenging, increasing the risk that evidence will be missed or misconstrued. We therefore recommend that the remit of scrutiny panels be extended to checking the completeness, objectivity, and fairness of documentary review undertaken by investigating case teams.

VI. Conclusion

The EC's increasing reliance on large numbers of internal documents in EU merger review has important legal and procedural implications. Among other things, it has implications for the architecture of EU merger control, calling into question the continued value of Form CO in its current form. Extensive reliance on internal documents also requires internal procedures that are fit for purpose, clear guidelines that are capable of consistent application, and effective checks on investigating officials' review of documentary evidence to ensure that the EU's administrative system of merger control remains effective, efficient, and fair.

[98] See, e.g. Wouter P.J. Wils, *Principles of European Antitrust Enforcement* (Oxford and Portland, Oregon: Hart Publishing, 2005), Ch.6 ("If it is clear that any (real or perceived) risk of prosecutorial bias in EC antitrust enforcement could be removed by separating the investigative and prosecutorial function from the adjudicative function, and transferring the latter to the EU courts, one may wonder whether an equivalent solution could not be reached through internal checks and balances inside the European Commission's administrative proceedings, or indeed has not already been achieved in the current system").

[99] See Mario Monti, Europe's Merger Monitor, *The Economist*, 9 November 2002, who summarised the objectives of the Commission's proposals as follows: "[T]o improve the Commission's decision-making process, making sure that our investigations of proposed mergers are more thorough, more focused, and—most importantly—more firmly grounded in sound economic reasoning, with due regard for the rights of the merging partners and of third parties."

[100] *Airtours* Decision, para.130.