# EUROPEAN COMPETITION LAW REVIEW

Volume 35: Issue 4 2014

## ARTICLES



SWEET & MAXWELL

# The GE/Honeywell Saga? Ehh, What's Up, Doc? A comparative approach between US and EU merger control proceedings almost 15 years after

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Comparative law; EU law; European Commission; International co-operation; Merger control; United States

## Introduction

Almost 15 years ago, on the eve of Independence Day, on July 3, 2001, the EU Commission decided to prohibit the acquisition of Honeywell by General Electric.[1] The EU Commission's decision to block this transaction was subject to a firestorm of criticism as the US Department of Justice previously decided not to challenge the transaction. As noted at that time by Ms Deborah Platt Majoras,[2] then Deputy Assistant Attorney General, Antitrust Division, US Department of Justice:

> "The US/EU divergence on the GE-Honeywell decision underscores the need to continue working cooperatively and constructively (…). The Antitrust Division has been open, both in private discussions with our counterparts at the European Commission and in appropriate public fora, in our disagreement with the EU's decision and the bases for it. Indeed, we have been criticized by some as being overly critical. We respectfully disagree. In our view, for co-operation to be meaningful, i.e., for it to contribute significantly to effective global antitrust enforcement, it must include honest discussion of areas of agreement and disagreement, and careful dissection of divergent decisions".[3]

In a recent speech delivered in Washington DC, Joaquin Almunia, Vice-President of the European Commission responsible for Competition Policy stated:

> "I believe that, almost 15 years after the GE/Honeywell saga, a lot has been made to ensure that our respective authorities understand each other's concerns when they arise".[4]

In this regard, 2013 was a distinct year for the EU and US agencies. Several cases provoked strong co-operation between them, notably in the aviation industry (*General Electric/Avio*[5] and *American Airlines/US Airways*)[6] and in advertising activities (*Publicis/Omnicom*).[7] Mr Almunia also pointed out that co-operation does not mean identical decisions "because of the different features of our respective markets" (e.g. see the EU Commission's prohibition decision in *NYSE Euronext/Deutsche Börse* in February 2012, a transaction which was previously cleared by the US DoJ).

Almost 15 years after the "*GE/Honeywell Saga*", the purpose of this article is to analyse the similarities and differences between EU and US merger control proceedings. Several aspects are dealt with including the legal framework (I.), the preliminary analysis (II.), the notification process (III.) and the procedural aspects (IV.). The funding principles of the co-operation between the EU and US agencies are also detailed (V.).

* The views expressed by the authors in this article are their own and not those of the FTC or any individual Commissioner and/or of Paul Hastings LLP or any of its clients. The authors would like to thank Michael Stevens for his advice and assistance with this article.
[1] European Commission, *GE/Honeywell* COMP/M.2220, Decision July 3, 2001.
[2] Ms Platt Majoras was appointed to serve as Chairwoman of the Federal Trade Commission in 2004 until she stepped down in 2008.
[3] Deborah Platt Majoras, "GE-Honeywell: The US Decision, Remarks of Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, Before the Antitrust Law Section, State Bar of Georgia", November 29, 2001.
[4] Joaquin Almunia, "EU competition policy, relations with the US, and global business", Georgetown University Law Center, 7th Annual Global Antitrust Enforcement Symposium, Washington DC (US), September 25, 2013, speech No.13/749.
[5] European Commission, *GE/Avio* COMP/M.6844, July 1, 2013.
[6] European Commission, *US Airways/American Airlines* COMP/M.6607, August 5, 2013.
[7] European Commission, *Publicis/Omnicom* COMP/M.7023, January 9, 2014, not yet published. Press release No.IP/14/10. In his speech dated September 25, 2013 delivered in Washington DC, Mr Almunia noted: "As to the near future, I expect our dialogue to continue — among other cases — on the transactions between the US advertising group Omnicom and its French competitor Publicis; a deal that would create the world's biggest advertising group".

## I. Legal framework

### *Applicable rules*

The first EU Merger Control Regulation was adopted in December 1989 and entered into force in September 1990.[8] The current EU Merger Control Regulation 139/2004 became effective on May 1, 2004.[9] In the United States, two primary statutes govern the merger control review process, namely: (i) §.7A of the Clayton Act of 1914; and (ii) the Hart-Scott-Rodino Improvements Act of 1976.

### *Enforcement agencies*

Merger control review is divided in Europe between two types of agencies depending upon whether applicable thresholds are met. At the EU level, the Directorate General for Competition of the EU Commission (DG Comp) has jurisdiction over EU-dimension cases. At the national level (i.e. where EU thresholds are not met but local thresholds are met), National Competition Authorities have jurisdiction to review the transactions.

In the United States, merger review is divided between two agencies: (i) Department of Justice (DoJ); and (ii) Federal Trade Commission (FTC). Parties proposing a deal submit pre-merger notification filings to both agencies.[10] Pursuant to a pre-merger notification and clearance process, the deal is assigned to the agency with the greatest historical experience in the relevant commercial sector. Allocating mergers between the agencies by industry ensures that any given merger is reviewed by the enforcers with the greatest resources and depth of expertise concerning the relevant industry. Moreover, this process is efficient in that it allows the agencies to avoid duplication of expertise and promotes consistency of outcomes.

### *Judicial review*

The EU Commission has powers of decision.[11] In practical terms, it can block any transaction which would seriously restrict competition within the European Union (e.g. *UPS/TNT Express* in January 2013,[12] *NYSE Euronext/Deutsche Börse* in February 2012,[13] *General Electric/Honeywell* in July 2001).[14] When the EU Commission issues a decision prohibiting a transaction which has already been implemented, the EU Commission may require the Parties in question to take steps to restore conditions for effective competition, including divestiture. Parties can file an application for annulment against the EU Commission's administrative decision to the General Court of the European Union.

In the United States, only Federal Courts have ultimate authority regarding whether to block a transaction. But before a merger reaches such ultimate disposition, the agencies' processes for pursuing a remedy meaningfully diverge according to the agencies' differing statuses and authorising statutes. For instance, the FTC is an independent agency led by five politically-appointed commissioners who must authorise enforcement action. In contrast, the DoJ is an executive branch agency lead by an Assistant Attorney General. The agencies face slightly different standards when seeking preliminary relief from a federal district court.[15] Further, Congress vested the FTC with authority to conduct a full agency merits trial in the first instance, only after which the merging parties can appeal to the commission and then to a federal court. Based on the diverging processes, parties pursuing a merger against agency efforts to block the transaction face different time and resource requirements depending on which agency is reviewing the deal.

### *Is the requirement to comply with local merger control rules limited to "change of control"?*

As for EU merger control and at this stage, the answer is clearly positive. Basically, the EU Merger Control Regulation applies to "concentrations", a concept which is widely defined to cover various operations which bring about a "*change of control on a lasting basis*".[16] Two kinds of change of control either on a de jure or on a de facto basis may be subject to merger control proceedings: sole control[17] or joint control.[18] Sole control is usually acquired as a result of the acquisition of the majority of the voting rights in a company (de jure control). A substantial minority shareholder may be regarded as having de facto control, if for example, it is highly likely that the shareholder will achieve a majority of the votes cast at shareholders' meetings (de facto sole control). Joint control exists where several entities have the ability to exercise decisive influence over another entity.

From a European perspective, the answer to this question has always been crystal clear. In this regard, minority shareholdings which do not lead to a change of control are currently not subject to EU Merger Control Regulation. However, the EU Commission would want to extend the scope of the EU Merger Control Regulation

[8] Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings.
[9] Council Regulation (EC) 139/2004 of January 20, 2004 on the control of concentrations between undertakings.
[10] Premerger Notification Program, FTC, available at: *http://www.ftc.gov/enforcement/premerger-notification-program* [Accessed February 4, 2014].
[11] Article 8 of Council Regulation (EC) 139/2004 of January 20, 2004.
[12] European Commission *UPS/TNT Express* COMP/M.6570, Decision January 30, 2013, not yet published. Press release No.IP/13/68.
[13] European Commission, *Deutsche Börse/NYSE Euronext* COMP/M.6166, Decision February 1, 2012.
[14] European Commission, *General Electric/Honeywell* COMP/M.2220, Decision July 3, 2001.
[15] 15 U.S.C. § 53(b) (for the FTC a preliminary injunction is warranted with "a proper showing that… [issuances of a preliminary injunction] would be in the public interest."). The DoJ must meet the federal courts' traditional, and perhaps more stringent, standard for a preliminary injunction.
[16] Article 3.1 of Council Regulation (EC) No 139/2004 of January 20, 2004.
[17] *European Commission Consolidated Jurisdictional Notice under Regulation 139/2004*, § 54–61.
[18] *European Commission Consolidated Jurisdictional Notice under Regulation 139/2004*, § 62–82.

and have jurisdiction over those non-controlling minority shareholdings[19] which would imply a significant modification of the above founding principles. Mr Almunia recently stated that Europe is "looking at the experience of some EU countries and of other jurisdictions such as the US, where merger-control rules already cover this type of acquisition".[20]

In the United States, the requirement to comply with the HSR Act is not limited to transactions that involve a "change of control". Any acquisition that results in the acquiring person holding more than US $75.9 million worth of voting securities of another company may require a filing, even if the amount represents a very small percentage of the total outstanding stock of the target company. However, acquisitions of less than 50 per cent of a non-corporate entity are not reportable. The agencies have authority to, and indeed sometimes do, challenge non-reportable transactions that raise competitive concerns.[21]

## II. Preliminary analysis

### *Notification thresholds*

In both the European Union and the United States, transactions are reviewed by the local agencies if local thresholds are met.

At the EU level, only turnover/revenues thresholds exist and have not been modified since May 1, 2004. More precisely, there are two series of alternative thresholds: primary thresholds or secondary thresholds. Primary thresholds[22] are met where: (i) the combined aggregate worldwide turnover/revenues of all the undertakings concerned exceeds €5 billion; (ii) the aggregate EU-wide turnover of all the undertakings concerned exceeds €250 million. Alternatively, secondary thresholds[23] are met where: (i) worldwide turnover/revenues of the undertakings concerned exceeds €2.5 billion; (ii) the aggregate EU-wide turnover/revenues of each of at least two of the undertakings concerned exceeds €100 million; and (iii) in each of at least three Member States of the European Union: (a) the combined aggregate turnover/revenues of all the undertakings concerned is more than €100 million; and (b) each of at least two of the undertakings concerned achieves a turnover of more than €25 million (in each of the same three Member States identified). However, even if the above alternative primary or secondary thresholds are met, a concentration does not have an EU dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State of the European Union.

In the United States, three different types of thresholds, which are updated annually in order to take inflation into account, exist. These thresholds are not only based on local revenues. In order to be subject to US Merger Control Rules, a transaction has to meet the commerce test (i.e. either the acquiring or acquired person is engaged in US commerce or in any activity affecting US commerce) and the size-of-the-transaction test (i.e. transactions over US $75.9 million and the size-of-the-parties test. One party must have worldwide assets or sales over US $151.7 million and the other party must have worldwide assets or sales over US $15.2 million. Where the size-of-the-party test is not satisfied, the size-of-the-transaction threshold is US $303.4 million.

### *Specificities as for Foreign-to-Foreign transactions*

In the European Union, there are no specific thresholds for Foreign-to-Foreign Transactions. On the contrary, in the United States, the basic test is whether the acquired person or assets generated at least US $75.9 million in sales in the United States in the last year. A limited additional exemption for certain transactions with values under US $303.4 million also exists.

### *Exemptions*

In the European Union, if there is a change of control (or a change in the quality of control) and applicable thresholds are met by the undertakings concerned, a notification is required. There is no exemption.

In the United States, an important step at the very beginning of the process is to determine whether the contemplated transaction qualifies for any of the exemptions set forth in the HSR Act or the Rules. There are lots of exemptions (e.g. the acquisition of goods or realty in the ordinary course of business; certain acquisition of voting securities "solely for the purpose of investment").

## III. Notification process

### *Deadline to file*

In both jurisdictions, notification is mandatory for transactions meeting applicable thresholds and there is no specific deadline to file. However, transactions cannot be closed until approval is obtained.

[19] European Commission Staff Working Document, "Towards more effective EU merger control", June 25, 2013, see especially Pt II on merger control for the acquisition of non-controlling minority shareholdings ("structural links").
[20] Joaquin Almunia, "EU competition policy, relations with the US, and global business", Georgetown University Law Center, 7th Annual Global Antitrust Enforcement Symposium, Washington DC (US), September 25, 2013.
[21] See, e.g. *FTC v St Luke's Health Sys Ltd* 1:13-CV-00116-BLW, (D. Id. Mar. 26, 13); *United States v Twin America LLC et. al* 12-cv-8989 (S.D.N.Y. Dec. 11, 2012).
[22] Article 1.1 of Council Regulation 139/2004.
[23] Article 1.2 of Council Regulation 139/2004.

### Who must notify

In any cases, the EU Commission only receives one filing for each transaction. However, two scenarios can be distinguished. In case of acquisition of sole control, only the Acquirer has to fill out a Form. In case of acquisition of joint control, the joint controllers have to fill out one and the same Form.

In the United States, in most cases, two filings are received by the US agencies, one from the Acquiring Person and one from the Acquired Person. In 2012, a total of 1,429 transactions were reported to the US agencies representing 2,829 filings received.[24]

### Language of the notification

The EU Commission must receive a notification in one of the 24 official languages of the European Union which becomes the language of the proceedings or all notifying Parties.[25] Other parties, including the Target Company, as well as third parties involved in the proceedings may use another official language of the European Union if they wish. In the United States, the notification is in English only.

### Filing fee

At the EU level, there is no filing fee. In some Member States of the European Union, National Competition Authorities may receive a fee (e.g. Austria, Germany, Italy).

In the United States, the filing fee depends upon the size of the transactions. The filing amounts to US $45,000 for transactions valued in excess of US $75.9 million but less that US $151.7 million. For transactions up to US $758.6 million, the filing fee is US $125,000. For transactions over US $758.6 million, the filing fee is US $280,000.

### Voluntary notification

In both jurisdictions, there is no procedure for "voluntary" filing for transactions that do not meet thresholds are exempt. In the European Union, if a transaction meet local thresholds in three Member States of the European Union, Parties can ask the EU Commission to review the case instead ("the one-stop-shop principle"). Likewise, in both jurisdictions, transactions that are not notified can be investigated even after they are closed.

As for transactions for which a notification is not required, the US Agencies can and do investigate. It is also possible in the European Union but not on the basis of EU Merger Control Rules and would probably be conducted on the basis of antitrust regulations.

### Penalties for failure to file

The EU Commission may impose fines of up to 10 per cent of the worldwide revenues of the Parties. Electrabel was fined in June 2009 by the EU Commission €20 million for failure to file and observe the waiting period for the period from December 23, 2003 to August 9, 2007.[26] Electrabel brought an action for annulment before the General Court of the European Union which confirmed the fine in December 2012.[27]

The HSR Act aims to preserve the pre-merger competitive status quo until the agencies investigate the potential effects of a merger. In the United States, only Federal Courts may impose fines up to US $16,000 a day for violation of the HRS Act, either for complete failure to file, or for premature integration known informally as "gun jumping". In short, the HRS Act prohibits merging parties from transferring beneficial ownership of assets, or otherwise effectively consolidating operations pending termination of the HSR waiting period. In May 2013, Biglari Holdings was ordered by the US District Court for the District of Columbia to pay an US $850,000 civil penalty to settle the charge (the complaint alleged that Biglari failed to file and observe the waiting period prior to closing as for certain acquisitions of shares of Cracker Barrel in June 2011).[28]

### What goes in the notification

In both jurisdictions, information to be furnished in the Notification Form is similar: description of the contemplated transaction, corporate information on the Ultimate Parent Entity, owners, affiliates and subsidiaries, prior acquisitions, production and sales data by product or service category.

Likewise, the documents to be submitted at the same time as the Notification Form are also of the same nature. It includes: transaction documents (e.g. copy of the merger or acquisition agreement), government/financial documents (last annual reports and annual audit reports), analytic documents (i.e. documents prepared for management to analyse the transaction, including documents discussing synergies or efficiencies, including those prepared by third-party advisors like investment bankers, consultants, etc.).

## IV. Procedural aspects

### Timeline for most investigations

Most merger control investigations handled by the EU Commission are closed within "Phase I" (i.e. within 25 working days which could be extended to 35 working days). In the United States, most investigations are closed

[24] *Hart-Scott-Rodino Annual Report*, Fiscal Year 2012, Appendix B.
[25] Article 3.4 of Commission Regulation (EC) 802/2004 of 7 April 2004 implementing Regulation 139/2004 on the control of concentrations between undertakings.
[26] European Commission, *Decision of 10 June 2009 imposing a fine for putting into effect a concentration in breach of Article 7(1) of Council Regulation (EEC) 4064/89* (Case COMP/M.4994 *Electrabel/Compagnie Nationale du Rhône*).
[27] General Court of the European Union, judgment of 12 December 2012, *Electrabel v European Commission* (T-332/09). An appeal is pending before the European Court of Justice (C-84/13 P).
[28] *US v Biglari Holdings*, final judgment, May 30, 2013, US District Court for the District of Columbia, Civil Action No.1:12-cv-01586.

within the first 30 day period. In both jurisdictions, when the waiting period has expired and the agencies have taken no action (US) or no formal decision (European Union), the transaction may be consummated.

### *Procedural aspects during the initial waiting period/Phase I*

After filing, the antitrust agencies have to review the transaction. In both jurisdictions, the Parties may request that the agencies terminate the waiting period before it has run its full course. The agencies may, at their discretion, grant such requests.

### *Outcomes of initial waiting period/Phase I*

In the European Union and the United States, there are basically three possible outcomes. The investigation may expire, in which case the Parties are free to close. It may be early-terminated by the US/EU agencies in which case the Parties are free to close. It may alternatively be extended by a request for additional information (commonly referred to as a "Second Request" in the United States and "Article 6.1(c)" decision in the European Union opening an in-depth investigation "Phase II").

### *In-depth investigation*

If they think that the contemplated transaction presents serious antitrust concerns, the US and EU agencies can issue a Second Request and an art.6(1)(c) decision, respectively.

In 2012, 10 transactions were subject to Phase II investigation by the European Commission out of a total of 283 transactions which were notified to the EU Commission.[29] Meanwhile, 49 transactions were subject to a Second Request by the US Agencies out of a total of 1,429 reported transactions were reported to the US Agencies (representing 2,829 filings received).

### *Timetable of in-depth investigation*

The EU timetable of the in-depth investigation is extremely different from the US timetable.

As for European Merger Control Rules,[30] the EU Commission has 90 working days (after the date on which the in-depth investigation was initiated), which can be extended to 105 working days where commitments are offered by parties within 55 working days of the commencement of Phase II. An extension of the Phase II time limit is also possible at the request of the parties, for a period of up to 20 further working days. Several detailed questionnaires are usually sent by the EU Commission. Economic analysis is required very early in the process. The volume of requested documents is usually much smaller than in the United States.

In the United States, the waiting period clock is stopped until both parties certify compliance with the Second Request. After certification of compliance, the agency has another 30 days of review, unless the agency negotiates a timing agreement which alters this timeline. Second Requests typically demand ordinary-course-of-business documents, data and interrogatory answers. Second Requests may require extensive production of party materials, sometimes requiring that the parties produce hundreds of thousands or even millions of documents from numerous company employees and from their operations all over the world. If the requested documents are not in English, the parties must prepare and submit translations. The parties and the agencies negotiate regarding the necessary number of document custodians, investigational hearings, or investigatory depositions. In many cases, compliance takes months to achieve.

### *Fundamental differences in the in-depth investigation approach*

The EU Commission *can* block any transactions (e.g. *UPS/TNT Express* in January 2013; *NYSE Euronext/Deutsche Bôrse* in February 2012; *Olympic Airways/Aegean Airlines* in 2011; *Ryanair/Aer Lingus* in 2007). The EU Commission will not have to sue in EU courts and demand an injunction to block the transaction. For procedural infringements, the EU Commission can itself impose periodic penalty payments or fines (up to 1 per cent of the aggregate worldwide revenues of the Parties) where Parties, intentionally or negligently[31]: (i) supply incorrect or misleading information in a submission, certification or notification or in response to a RFI, or product incomplete books or records during an inspection or refuses to submit to an inspection; or (ii) do not supply information within the required time limit; or (iii) fail to rectify within a time limit set by the EU Commission an incorrect, incomplete or misleading answer; or (iv) break seals affixed by the EU Commission or other authorised persons in the course of inspections. Where the Parties have subsequently satisfied the obligation which the periodic penalty payment intended to enforce, the EU Commission may fix itself the definite amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

## V. Co-operation between EU Commission and US agencies

The list of cases in which the EU Commission and US agencies have closely co-operated in the past 10 years is long and includes: *Oracle/PeopleSoft* (2004); *Sony/BMG* (2004); *Johnson & Johnson/Guidant* (2005); *Panasonic/Sanyo* (2009), *Cisco/Tandberg* (2010), *Intel/McAfee* (2011), *Western Digital/Hitachi* (2011),

[29] EU Commission statistics, available at: *http://ec.europa.eu/competition/mergers/statistics.pdf* [Accessed February 4, 2014].
[30] Article 10 of Council Regulation 139/2004.
[31] Article 14 of Council Regulation 139/2004.

*NYSE Euronext/Deutsche Börse* (2012), *UTC/Goodrich* (2012).[32] In 2013 specifically, several cases were subject to significant discussions between the EU and US agencies, e.g. *General Electric/Avio*, *American Airlines/US Airways* and *Omnicom/Publicis*. The US/EU Merger Working Group's ongoing policy dialogue, together with regular informal contacts, allows the EU and US agencies to advance inter-agency co-operation and consistency.

Two documents provide directives and parameters for co-operation between the EU and US regimes.

First, the US–EU Competition Laws Cooperation Agreement (adopted in 1991 and subject to periodic amendment)

> "promote[s] cooperation and coordination and lessen[s] the possibility or impact of differences between the [US/EU] in the application of their competition laws".

The Agreement requires each jurisdiction to notify the other when its enforcement activities may affect "important interests" of the other jurisdiction.

As for merger control proceedings, the EU Commission shall give such notifications to the US Agencies once notice of the Phase I investigation is published in the EU *Official Journal* and if it decides to initiate Phase II proceedings. This enables the views of the US agencies to be taken into account before a decision is adopted. Conversely, the US agencies shall notify the Commission if a Second Request is issued and if they decide to file a complaint challenging the transaction. This enables the views of the EU Commission to be taken into account before the entry of a consent decree.

Secondly, the *US-EU Best Practices On Cooperation In Merger Investigations* (published in October 2011)[33] aims to enhance co-ordination on the timing of reviews (e.g. joint conferences, joint interviews with party executives), collection and evaluation of evidence (e.g. discussions about their respective analyses regarding tentative market definitions, assessment of competitive effects, efficiencies, theories of competitive harm, economic theories and empirical evidence) and communication between the reviewing agencies (especially regarding remedy offers). The Best Practices are a useful framework for co-operation, particularly by indicating critical points in the process where contacts between the respective Agencies could be productive.

Basically, consultations between the US/EU Agencies occur: (a) before the United States closes its investigation without taking action; (b) before the United States issues a Second Request; (c) no later than three weeks following the initiation of a Phase I investigation in the European Union; (d) before the European Union opens a Phase II investigation or clears the merger without going to Phase II; (e) before the European Union closes a Phase II investigation without issuing a Statement of Objections or approximately two weeks before the European Union anticipates issuing its SO; (f) before the relevant US DoJ/FTC section/division investigating the merger makes its case recommendation to the relevant director; and (g) at the commencement of remedies negotiations with the merging parties. Consultations between senior competition officials can also be set up.

US and EU officials may attend certain key events in the other's investigative process (e.g. the European Union's Oral Hearing and the merging parties' presentations to the Assistant Attorney General/Director of the Competition Bureau at which the parties present their arguments prior to the agency's decision whether to take enforcement action). In practical terms, waivers of confidentiality executed by merging parties are necessary. In this regard, the Best Practices are also of great importance in order to clarify the application of the attorney privilege which is significantly different in the European Union and the United States. It is accepted that the parties can exclude from the scope of their waiver given to the EU Commission evidence that is properly identified by them as and qualifies for the in-house counsel privilege under US law.[34]

## VI. Conclusion

The US agencies' role has shifted in the last 10 years. Prior to the "*GE/Honeywell Saga*", the US agencies tended to be the world's primary antitrust regulator. After *GE/Honeywell*, the EU Commission became much more active. In practical terms, massive analysis required for EU Form CO at a very early stage now tends to drive initial process.

The landscape is still in flux. Future merger practice will have an even greater global focus and multinational merging parties will need to be proactive in multiple jurisdictions outside the United States and the European Union.

The Chinese MOFCOM is taking an increasingly active role. In *Baxter Inc/Gambro AB*, the transaction was cleared by the EU Commission on July 22, 2013[35] and on August 8, 2013 by the MOFCOM.[36] As for the contemplated transaction, EU and Chinese agencies required similar structural remedies. However, the US and EU analysis is not always accepted by the MOFCOM. In *Seagate/Samsung* in 2011, the MOFCOM imposed

[32] European Commission, *UTC/Goodrich* COMP/M.6410, Decision July 26, 2012.
[33] US-EU Merger Working Group, *Best practices on cooperation in merger investigations*, October 14, 2011, and *FAQs on the US-EU Merger Working Group's Best practices on cooperation in merger investigations*, available on the EU Commission' website at: *http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf* [Accessed February 4, 2014].
[34] US-EU Merger Working Group, *Best practices on cooperation in merger investigations*, October 14, 2011, fn.10 and *FAQs on the US-EU Merger Working Group's Best practices on cooperation in merger investigations*, §11.
[35] European Commission, *Baxter International/Gambro* COMP/M.6851, Decision of July 22, 2013.
[36] *MOFCOM Announcement No.58 of 2013 on Approval of Decisions on Anti-monopoly Review Against Concentration of Undertakings in the Acquisition of Gambro AB by Baxter International Inc with Additional Restrictive Conditions*.

significant remedies which contrasted with the unconditional approvals granted by the EU[37] and US Agencies.

The co-operation between the Chinese MOFCOM and the US agencies, on the one hand, and the EU Commission, on the other hand, is being strengthened. Although fairly modest in terms of content, two Memoranda of Understanding were signed by the MOFCOM with the US agencies and the EU Commission, respectively in July 2011[38] and September 2012.[39] Other major jurisdictions are ramping up their merger review regimes, including Brazil[40] and India.[41] Through COMESA, a regional organisation, African countries have made a foray into merger control, too.[42] As the world's competition regimes continue to proliferate, cross-border understanding and co-operation will become increasingly essential to a coherent global merger control scheme.

[37] European Commission, *Seagate/HDD Business of Samsung* COMP/M.6214, Decision October 19, 2011.
[38] *Memorandum of Understanding on Antitrust and Antimonopoly Cooperation Between the US Department of Justice and Federal Trade Commission and the People's Republic of China National Development and Reform Commission, Ministry of Commerce and State Administration for Industry and Commerce*, July 27, 2011.
[39] *Memorandum of Understanding on Cooperation in the area of anti-monopoly law between the EU Commission (Directorate General for Competition) and the National Development and Reform Commission and the State Administration for Industry and Commerce of The People's Republic of China*, September 20, 2012.
[40] A memorandum of understanding was signed on October 8, 2009 between the Directorate General for Competition of the EU Commission and the Brazilian Authorities. An agreement between the US and Brazilian Governments regarding co-operation between their competition authorities in the enforcement of their competition laws were signed on October 26, 1999.
[41] *Memoranda of understanding were signed by the Competition Commission of India with the US agencies* on September 27, 2012 and, separately, with the Directorate General for Competition of the EU Commission on November 21, 2013. See Joaquin Almunia, "Competition, innovation and growth: an EU perspective on the challenges ahead", Third BRICS International Competition Conference, New Delhi, November 21, 2013, speech No.13/958: "Only a few years ago, our dialogue was limited to some authorities, such as the FTC and the DoJ from the US".
[42] The Common Market for Eastern and Southern Africa (COMESA) Competition Commission, see: *http://www.comesacompetition.org* [Accessed February 4, 2014].