

# EC focus on internal documents: Time to rethink the architecture of the EU merger control process?

The European Commission's increasing reliance on internal documents in EU merger control proceedings places an excessive burden on the notifying parties, but it seems debatable if the practice results in higher-quality decisions. **Tilman Kuhn**, partner at global law firm White & Case, explains the process and suggests some practical steps forward.

**T**he merger control landscape became more complex in 2018, as tensions between the US and China led to an increasing number of cross-border mergers being blocked on national security grounds. But it's not just geopolitics that is clogging up the merger approval process: The European Commission's intervention rate has increased to roughly 30 percent in the past three years. And the Commission's pursuit of novel theories of harm (such as the "industry-level innovation theory of harm" in the agrochemical mergers, its recent public focus on "killer acquisitions" in the pharmaceutical and digital industries, or its assessment of the impact of common ownership in the industry in which the transaction at issue takes place) has led to additional complexity and uncertainties for companies wishing to merge.

Moreover, the Commission's approach to evidence in merger cases has evolved significantly in recent years to a point where it is having an adverse impact on the timing of transactions, especially those that do not necessarily pose a serious antitrust threat.

The source of this latter problem is that the Commission increasingly requests the merging parties and their advisers to provide large volumes of internal documents at short notice, which the Commission then uses as important evidence for its findings.

The extent of the Commission's new approach has become evident in a number of recent complex merger cases. As part of its antitrust probe into the US\$130 billion merger between Dow Chemical and DuPont announced at the end of 2015, it requested more than 400,000 documents. Meanwhile, the CEO of Bayer described EU merger proceedings in Bayer/Monsanto last year as going to "unimaginable depths" after having to provide 2.7 million documents to the Commission.

Starting in the early 2000s, the Commission's decisions have included an increasing number of references to internal documents. The Commission's approach has been shaped by merger control practices in the US, where a heavy reliance on internal documents has been standard practice for many decades. But rather than switching entirely to the US system, the Commission has—without any specific legal basis or trigger—added some elements of the US practice to its own system. The result is a hybrid of the two



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that is becoming unmanageable.

When appraising the compatibility of a concentration with the internal market under the merger regulation, the Commission must make a prospective analysis of whether the concentration would "significantly impede effective competition" (SIEC) within the internal market. To do this, it can ask for all information it considers necessary, as it has sweeping investigative powers. There is no guidance on the collection or treatment of internal documents in the EU Merger Regulation (EUMR) or any Commission guidelines (the Commission is apparently working on guidelines but has not issued them or published them for consultation). Currently, the Form CO, which specifies the information that notifying parties must provide following the announcement of a merger, only sets out the minimal set of documents to be submitted.

The Commission can request internal documents at different points in time (without any advance warning) in all



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phases of the merger proceedings—be it in the pre-notification phase or during the more substantive phase I or, especially, phase II review.

The Commission typically sets very short deadlines to respond and the parties may be able to obtain only a short extension. It also requires the companies to respond in a specific format, including with a “production log” and a “privilege log,” in which the produced documents need to be listed, privilege claims need to be explained, etc., all of which take extra time.

The scope of the requests differs depending on the phase of the investigation. In pre-notification, the Commission typically asks for specific types of documents, such as those discussing overall strategy, sales and budget, or the parties’ relevant business divisions.

After formal notification, and especially in phase II, the Commission frequently asks for all types of documents from specific custodians (including emails, Word and PDF documents, spreadsheets and presentations).

Usually, after formal notification, the Commission first issues a simple request pursuant to Article 11(2) EUMR, which specifies the type of information required and then sets a deadline to respond. If the parties fail to meet that deadline, the Commission will request the information by decision pursuant to Article 11(3) EUMR, which will suspend the EUMR’s timetable as of the expiration of the simple request’s deadline.

The Commission’s increased appetite for internal documents raises several issues.

#### **Expanded duration of merger reviews**

First, these requests can be extensive and burdensome and can create several procedural issues, including substantial delays in the merger review process as well as legal procedural uncertainties. The absence of effective administrative or judicial redress exacerbates these problems.



## **It is critical that the competition authority does not cherry-pick documents supporting its initial theories of harm, and instead weigh these fairly against evidence to the contrary**

The increased information requests have certainly had an impact on the increased duration of pre-notification phases. By way of illustration, in the case of Bayer and Monsanto, pre-notification alone took eight months, and there are several other examples of pre-notification (and the case later still going into phase II) exceeding six months.

The Commission has also issued an increasing number of “stop-the-clock” decisions after making requests for internal documents that require the merging parties and their advisors to identify, review and submit thousands of documents under strict deadlines. Indeed, in phase II cases, one or more stop-the-clocks have become the norm, rather than the exception.

The combination of longer pre-notification, longer phase II reviews and “upfront buyer” remedies (meaning that the transaction can only be closed once an SPA with a divestiture buyer has been signed and the Commission has approved the buyer) becoming standard, leads to much longer proceedings, in some cases exceeding 18 months between the first substantive engagement with the Commission and clearance to close. For the merging parties, it is an enormous challenge to “hold a deal together” for so long.

#### **Lack of legal redress and inadequate protection of LPP**

The current EU merger control system lacks an administrative or judicial framework that can provide effective legal protection against excessive

document requests. There is no formal process to challenge simple requests, and challenging an Article 11(3) decision does not provide for timely redress either (in addition, the Courts have granted the Commission wide discretion regarding the appropriateness and scope of information requests).

Another key problem is the very limited protection of legal professional privilege (LPP), which is akin to a fundamental right, when companies respond to document requests.

While it is clear that documents that are protected by LPP must be excluded from the scope of the Commission’s document requests, there is no formal guidance on the protection of LPP with respect to documents requested in EUMR proceedings. Based on its antitrust proceedings best practice guidelines, the Commission takes the view that LPP is limited to the following three categories of documents:

1. Written communication with an independent EU-qualified lawyer made for the purposes and in the interests of the client’s right of defense in competition proceedings
2. Internal notes circulated within an undertaking that are confined to reporting the content of communications with an independent, EU-qualified lawyer containing legal advice or
3. Working documents and summaries prepared by the client, provided that they were drawn up exclusively for



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the purpose of seeking legal advice from an independent, EU-qualified lawyer in exercise of the rights of defense

Also in merger cases, the Commission has taken a strict stance and interpreted these rules narrowly. For example, the Commission does not accept LPP where advice or correspondence is from non-EU-qualified lawyers, in-house counsel or economists and other consultants. It also does not accept the common interest privilege.

Merging parties often have to submit hundreds of thousands of documents to the Commission without being able to conduct a proper LPP review in advance. If they want to be certain that no documents that qualify for LPP are produced, they may wish to exclude those that hit on certain “privilege” search terms. The Commission reviews claims strictly, based on privilege logs that the parties must produce and that provide a detailed breakdown of each document that they consider to be covered by LPP. It typically rejects claims based solely on search term hits, and requires a manual review and explanation, which take additional time. Contrary to the US process, there is no concept of “substantial compliance” with a document request that would allow restarting the clock while the parties are finalizing their LPP review.

#### Substantive reviews

Internal documents have also become key evidence to support

the Commission’s views on whether the transaction at issue leads to an SIEC, and especially where the Commission pursues novel theories of harm. For example, the Dow/DuPont decision contains more than 1,300 references to internal documents. Internal documents will be key evidence especially in suspected “killer acquisitions”, where the Commission believes the acquirer primarily acquires the target in order to prevent the target from bringing a new (pipeline) product to market that would cannibalize the acquirer’s own products’ sales.

In principle, it is sound to rely, *inter alia*, on internal documents, because they “allow the Commission to gain a [...] better insight into the relevant markets as viewed by the market participants themselves.” They can have a particular probative value for the notifying parties’ factual claims and key competitive effects of a transaction, such as the merger’s strategic rationale, post-merger plans and incentives, closeness of competition and other aspects relevant to reach a well-founded decision. For example, in GE/Alstom, the Commission had ample evidence that GE was planning to abandon Alstom’s pipeline product line.

However, internal documents also have shortcomings. They may represent snapshots that have been superseded by more recent events or insights; the authors may not express a considered company leadership-endorsed view; they may be presenting their achievements in a biased manner; they may



**1,300**

Some decisions contain more than 1,300 references to internal documents

have a hidden agenda with certain statements; the prospects given may be overly optimistic (e.g., to obtain funding for certain projects), etc. For example, when considering the merits of the Dow/DuPont merger, the Commission said it had discovered direct evidence that the parties were looking to cut back their innovation and research and development, a judgment that was based on documents created on the basis of speculation by a relatively low-ranked scientist.

When deciding on a merger case, the Commission has a duty to make an overall assessment based on the totality of the evidence. It also needs to “sanity-check” its interpretation against other economic and factual evidence.

Information overload can make it difficult to reach a balanced assessment of the full body of evidence. As a practical matter, it is virtually impossible to review hundreds of thousands of documents within the EUMR’s prescribed tight deadlines. This will cause the quality of the assessment to decline—so-called information overload bias. In practice, this means that when the Commission uses its keyword-based search, the words it looks for will typically be those that can help the Commission find support for its initial theory of harm. In cases where the Commission applies a selective interpretation, it is partially a result of its self-imposed information overload.

#### Going forward

Most importantly, in an administrative system like the EU’s, it is critical that the competition authority does not cherry-pick documents supporting its initial theories of harm, and instead weigh these fairly against evidence to the contrary. It is time for all stakeholders to start an open discussion about institutional, legislative or—at the very least—practical changes that will relieve some of the pressure on the notifying parties and will allow the EC to focus on practical and legal issues that will lead to higher-quality decisions.



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## Seven steps towards a more efficient and balanced practice

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At a somewhat “higher level,” with the current information request practice becoming more similar to the US system, while the remainder of the EU system (extensive pre-notification and Form CO filing, etc.) is kept in place, reform is needed.

### 1 Decide on a single system: the EU or US review system?

The Commission must decide what kind of investigative system it wants to use, whether this is a document-focused system with a flexible timetable based on the US model, or one that follows the traditional EU system based on the rigid structure of pre-notification, an extensive Form CO and strict timetables.

The timeframes under the EUMR have been designed for merger proceedings based on the Commission’s traditional process (starting with an extensive Form CO notification) and investigation methods. Extensive information requests do not fit into this system and undermine one of the EUMR’s main principals—“legal certainty through timely decision-making”—as more protracted pre-notification phases and more stop-the-clock decisions become the rule, rather than the exception.

If the Commission is not willing to reduce the scope of its document collection to a manageable level, it should shorten the pre-notification phase, reduce the scope of Form CO and the amount of information requested in the “descriptive” requests for information.

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### 2 Address the ineffective judicial protection against disproportionate document requests

There is also an urgent need to address the ineffective judicial protection against disproportionate document requests. The Commission should implement an “effective dispute resolution mechanism” against overly burdensome document requests (and very tight response deadlines) that guarantee the principle of proportionality. Ideally, this would be overseen by a specialized court. It could be overseen by the Commission’s legal service, a special merger policy unit or by the Hearing Officer, but an external review would be preferable.

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### 3 Allow formal witness evidence

Under the current system, there is an inherent risk that the Commission will interpret internal documents literally and out of context. Without the possibility of asking the document’s author to testify formally about its meaning, intention or context, the Commission can easily reach flawed and preconceived conclusions.

Allowing for proper depositions would be a solution but would also raise several issues when it comes to implementation. First, carrying out document-related depositions would likely result in further delays and would thus likely require modifications of the EUMR’s timetable or the way the Commission applies it. Second, such a move may require legislative changes because the EU regulations do not provide for a clear power to take statements in merger cases. On the other hand, the Commission does have the power to fine companies for providing false or misleading information, whether provided in the Form CO, in response to RFIs or in a formal witness deposition. At a minimum, the Commission should treat formal deposition from a parallel review by the US antitrust agencies as formal evidence.

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### 4 Introduce clear rules on substantive appraisal

The volume of documents collected in complex cases is typically too large to digest, so the case team must limit itself to looking for “smoking guns” based on keyword searches. This might be an appropriate approach in a cartel investigation, but it is not the way to come to an understanding of how an industry functions, which is the focus of merger reviews.

Instead, the Commission should whittle down its request to focus on a set of the most important documents, such as management-approved strategy and business plans, and, for example, genuine leadership-endorsed strategy documents that should weigh more heavily than emails by lower-ranked employees.

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### 5 More sensible timing for document requests

Document requests often occur at the worst possible time in the review process, namely at the beginning of phase II, when the merger parties must respond to the Commission’s Article 6 (1)(c) decision, prepare a State of Play meeting in which they need to put all issues on the table, and respond to several RFIs. Extensive document requests at this point of the procedure are bound to result in stop-the-clock decisions and should be avoided.

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### 6 Introduce the concept of substantial compliance

In order to allow parties to collect documents and conduct a proper LPP review without facing stop-the-clock decisions, the merging parties should, like in the US, be allowed to produce documents on a rolling basis, with the clock running as of substantial compliance.

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### 7 Offer broader LPP protection

The limited LPP protection that the Commission accepts is not just impractical given the time constraints, but it does not appropriately fit the situation that the Commission and parties face under the EUMR. Mergers have no criminal connotation that would justify a narrow interpretation of LPP.

An independent legal standard for merger proceedings should be established that properly reflects the different setup of an EUMR investigation, the typically global nature of transactions reviewed, and the often pro-competitive nature of mergers. In particular, US and EU in-house counsel correspondence and correspondence with economists on subjects related to the reviewed transaction, other potential transactions in the industry and legal proceedings in general should be protected. The common interest privilege should also be respected.

LPP rules should be standardized to the greatest extent possible between several jurisdictions. It is remarkable that in a global transaction, the very same document may be protected from disclosure to the US agencies, but not from the European Commission because the document emanated, for example, from a party’s in-house lawyer.