'Unscrambling the eggs': dissolution orders under Article 8(4) of the Merger Regulation

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On 20 January 2004, the Council adopted a recast Merger Regulation (2) (the ‘recast Merger Regulation’) to replace Regulation 4064/89 (3) (the ‘original Merger Regulation’) following a proposal made by the Commission on 11 December 2002 (4). The reform is comprehensive making changes in almost every provision of the original Merger Regulation. Amidst other, more high-profile changes such as amendments to the substantive test or changes to the referral mechanism, the recast Merger Regulation will also introduce changes to Article 8(4) of Reg. 4064/89, a rarely used provision which empowers the Commission to order the dissolution of an implemented concentration which is found to be incompatible with the common market. Article 8(4) in the recast Merger Regulation will clarify the powers of the Commission with respect to implemented concentrations that are found to be incompatible with the common market. The provision will make clear that the Commission has the power to order the full dissolution of an implemented concentration which is found to be incompatible with the common market. It will be accompanied by a new provision in Article 8(5) of the recast Merger Regulation enabling the Commission to impose interim measures to restore or maintain conditions of effective competition in situations of unauthorised implementation.

This paper looks at the history of Article 8(4) and its application under Regulation 4064/89 and discusses the amendments made by the Council with respect to this provision in the recast Merger Regulation.

The need for a dissolution provision in a system of ex ante merger control

Article 8(4) or any similar provision empowering the competition authority concerned to order the dissolution of a merger is an essential complementary mechanism in a merger control system which is based on the principle of ex ante control.

The system put in place under the original Merger Regulation is a system of ex ante control based on two basic, intertwined principles: mandatory notification of all concentrations with Community dimension (Article 4(1) of the original Merger Regulation); and a stand-still obligation (also known as ‘suspensive effect’ or ‘bar on closing’ obligation) prohibiting the implementation of concentrations prior to an authorisation decision (Article 7(1) of the original Merger Regulation). In other words, the merging parties cannot proceed with the implementation of their concentration without a prior authorisation decision by the Commission. Those basic features will be retained in the recast Merger Regulation.

If this system were applied without exceptions and were always strictly adhered to by the undertakings concerned, there would evidently not be any need for a provision empowering the Commission to order dissolution of implemented transactions.

However, both the original Merger Regulation and the recast Merger Regulation contain certain exceptions to the overarching stand-still obligation which, where applicable, allow merging parties to

(1) The author would like to thank his colleagues in the Merger Review team, Dan Sjoblom, Stephen Ryan, Gudrun Schmidt, Daniel Dittert and Mario Todino, for interesting discussions on many of the issues addressed in this paper. Special thanks are also owed to Jaime Rodriguez Ordonez who assisted with the research of a number of points raised in the paper and to Thalia Lingos for kindly helping with certain points of United States law. Any opinions, errors or omissions in the paper are, however, the sole responsibility of the author.


implement a concentration prior to having received an authorisation decision by the Commission. This possibility is envisaged in Articles 7(3) and 7(4) of the original Merger Regulation (Articles 7(2) and 7(3) of the recast Merger Regulation) which allow respectively the prior implementation of public bids (1) or the possibility for ad hoc derogations from the stand-still obligation allowing the prior implementation of a concentration, before an authorisation decision or even before it is notified to the Commission. (2)

In addition, despite the severe consequences specified in the Merger Regulation for breach of the stand-still obligation (3), merging parties may have de facto implemented a concentration in breach of this obligation resulting in an anomalous situation which may require subsequent corrective measures. This may arise either because of disregard by the merging parties of the stand-still obligation or because the concentration was already implemented before the Commission acquired jurisdiction over it, for example in cases of a concentration without Community dimension which is subsequently referred to the Commission under Article 22. (4)

Despite the establishment of an ex ante control system, with its principle of prior mandatory notifications and stand-still obligations, therefore, there may still be exceptional situations where a concentration is implemented and is subsequently found to be incompatible with the common market. In such situations, it is of the utmost importance that the legislation enables the competition authority in charge to take all the necessary corrective measures to protect conditions of effective competition by restoring the competitive situation prevailing prior to the implementation of the anti-competitive concentration.

**Article 8(4) in the original Merger Regulation**

In enacting the original Merger Regulation in 1989, the Council had foreseen these situations of problematic implementation and had afforded the Commission the necessary powers to take corrective measures in Article 8(4) of the original Merger Regulation. (5)

Article 8(4) in the original Merger Regulation provides that:

*Where a concentration has been implemented, the Commission may, in a decision pursuant to paragraph 3 or by separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition*.

The provision was drafted in a flexible manner giving the Commission a very wide margin of discretion in imposing suitable corrective measures.

It is an understatement to say that the adoption of a decision under Article 8(4) is a difficult state of affairs for the companies concerned. Indeed, the provision principally aims at correcting situations of implementation of prohibited concentrations by

(1) Article 7(2) of the recast Merger Regulation retains this exception and expands it to cover not only public bids but also that of ‘a series of transactions in securities ...admitted to trading on a market such as a stock exchange, by which control ...is acquired from various sellers’.

(2) It is to be noted that the Commission’s proposal for a provision (Article 7(4) in the Commission’s proposal) empowering the Commission to issue Block Derogations by disapplying the suspensive effect laid down in Article 7(1) for categories of cases which, in general, do not lead to a combination of market positions giving rise to competition concerns, was not retained by the Council and therefore will not form part of the recast Merger Regulation.

(3) Article 7(5) of the original Merger Regulation (Article 7(4) of the recast Merger Regulation) provides that the validity of transactions implemented in contravention of the stand-still obligation is dependent on a final authorisation decision being granted by the Commission either expressly or on the basis of an Article 10(6) presumption (clearance due to inaction by the Commission within the requisite time periods set out in Article 10 of the Merger Regulation). In addition, the Commission may impose fines for such violations pursuant to Article 14(2) of the original and the recast Merger Regulation.

(4) This situation occurred in the cases of Kesko/Tuko and Blokker/Toys ‘R’ Us (which are described further below) which concerned concentrations referred to the Commission by Finland and the Netherlands respectively pursuant to Article 22.

(5) Apart from the EC merger control system, other prior notification merger control systems such as notably that of the United States also contain provisions enabling the competition authorities concerned to ‘undo’ an implemented concentration which is found to be anti-competitive. Despite the introduction of a pre-merger notification requirement coupled with a stand-still obligation (during the so-called waiting period) enacted as part of the Hart-Scott-Rodino Anti-trust Improvements Act 1976 (HSR), US law (s. 11 of the Clayton Act, 15 U.S.C. s. 21) enables the US competition agencies to undo a completed transaction which is in violation of s. 7 of the Clayton Act by seeking an order requiring the acquiring company to ‘cease and desist from such violations and divest itself of the stock, or other share capital or assets held … in the manner and within the time fixed by the said order’. See a recent dissolution order imposed in the case of Chicago Bridge & Iron Company (interestingly, a merger which had been legally notified and not challenged during the waiting period but later found to be anti-competitive) (http://www.ftc.gov/os/2003/06/cbiid.pdf) where the court (at page 120) reiterates established jurisprudence showing that the primary aim of relief in such cases is to ‘restore competition to the state in which it existed prior to … the illegal merger’.
forcing the merged parties to separate, i.e. to undo their deal, usually within short deadlines. Given the severe consequences that such forced divestitures may have on the merging parties, it is not surprising that merging parties have generally adhered, whenever possible, to the stand-still obligation of Article 7(1) and, as a result, the Commission has needed to use this provision extremely rarely in the last 13 years of enforcement under the original Merger Regulation.

The Commission has adopted only four decisions pursuant to Article 8(4) in the following cases (1): Blokker/Toys ‘R’ Us (2), Kesko/Tuko (3), Tetra Laval/Sidel (4) and Schneider/Legrand (5).

Both Blokker and Kesko concerned implemented concentrations without a Community dimension which were referred to the Commission pursuant to Article 22 by the Netherlands and Finland respectively. In both cases, the Commission found that the concentrations were incompatible with the common market and, in both instances, it required the acquiring party to proceed to divestitures pursuant to Article 8(4). In Kesko, the Commission considered it necessary to order Kesko to divest itself of the daily consumer goods business of Tuko Oy and, in Blokker, it ordered Blokker to divest itself of at least 80% of the total share capital of the target company and to take other restorative measures as specified in the Decision (6).

The two recent cases of Tetra/Sidel and Schneider/Legrand concerned implementation of public bids which had been completed (unconditionally, in accordance with the then applicable French stock-exchange rules) pursuant to the exception of Article 7(3) of the original Merger Regulation, before the Commission had completed its review of the concentrations. In both cases, the Commission declared the concentrations incompatible with the common market pursuant to Article 8(3) and then ordered the separation of the undertakings in decisions adopted pursuant to Article 8(4).

Scope of application of Article 8(4) of the original Merger Regulation

Through its experience in using Article 8(4), the Commission had identified certain potential shortcomings with regard to this provision. In its Green Paper (7) launching the merger reform which culminated in the adoption of the recast Merger Regulation, the Commission invited comments inter alia on the functioning of and possible need for amendments to Article 8(4) of the original Merger Regulation.

Applicability of Article 8(4) to un-notified concentrations

The Commission was concerned with certain suggestions by legal commentators that Article 8(4) could only be applicable to ‘notified’ concentrations, i.e. that the Commission could not act in cases of implemented but un-notified concentrations. Proponents of this interpretation argued that Article 8(1) of the original Merger Regulation, by stating that all proceedings initiated pursuant to Article 6(1)(c) shall be closed by means of a decision as provided in Article 8(2) to (5), would limit the applicability of these provisions to cases where the concentration has been notified and a second phase proceeding has been initiated. Whilst the Commission, in the Green Paper, made clear that it did not share this interpretation, (8) it thought that it would be expedient to clarify the powers conferred to it by the Regulation with regard to mergers that have already been implemented.

The overwhelming majority of commentators shared the Commission's interpretation as to the applicability of Article 8(4) to un-notified concentrations. Nevertheless, a large number of respondents felt that the wording of Article 8(4) could be improved in order to clarify the scope of its applicability and the scope of the Commission’s powers under this provision.

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(1) Apart from these four cases where Article 8(4) was used expressly by the Commission in a decision, use of Article 8(4) in a combined 8(3)/8(4) decision was threatened in the case of Anglo American Corporation/Lohnro (Case M.754, Commission decision of 23.4.1997, OJ L 149, 20.5.1998, p. 21) in which, following remedies negotiations, a strict divestiture remedy with effectively the same terms as those in the Commission’s draft Article 8(4) order was agreed and imposed as a condition in an Article 8(2) decision.


(5) Schneider/Legrand, Case M.2283, Article 8(4) Commission decision of 30.1.2002.

(6) See Article 2 of the Commission decision in Blokker, op. cit. footnote 11.


(8) See Green Paper, point 224. According to the Commission, such an interpretation would run counter to the very purpose and wording of Article 8, in particular of Article 8(4), which refers to ‘a concentration’, without limiting the powers of the Commission to cases of “notified” concentrations (language used elsewhere in the Merger Regulation; for instance Articles 6, 8(2), 9(1), etc).
**Scope of the Commission's powers under Article 8(4) — type of corrective measures**

The Commission's experience in using Article 8(4), in particular in the recent Tetra/Sidel and Schneider/Legrand cases, had also revealed a number of potential shortcomings with Article 8(4) of the original Merger Regulation.

In particular, in past Article 8(4) cases, the Commission had encountered arguments that the provision did not enable the Commission, as an automatic consequence of a prohibition decision, to order the full dissolution of a prohibited, implemented concentration but that, instead, the Article required the Commission to proceed to a re-assessment of the competitive merits of the case in order to find an appropriate remedy-type solution requiring the necessary minimum amount of divestitures.

In both the Tetra/Sidel and Schneider/Legrand decisions which the Commission adopted pursuant to Article 8(4) of the original Merger Regulation, the Commission explained that the principal aim of Article 8(4) was to enable the complete separation of the merged parties in order to restore conditions of effective competition. In Tetra/Sidel, for example, the Commission stated that 'restoration of conditions of effective competition is the primary concern in proceedings pursuant to Article 8(4) of the Merger Regulation... Article 8(4) envisages that, in situations where concentrations prohibited by the Commission have already been implemented, the restoration of effective competition must, in principle, be effected by means of a separation of the undertakings or assets brought together through the prohibited transaction.' (1) In both cases, the undertakings concerned disputed the Commission's competence to order a complete separation of the two undertakings by requiring them to divest all the shares or assets acquired. (2)

Both the Tetra/Sidel and Schneider/Legrand decisions under Article 8(3) (prohibition decisions) and 8(4) (divestiture decisions) were the subject of actions for annulment before the Court of First Instance which resulted in the annulment of both the Commission's prohibition decisions and divestiture decisions. (3) The annulment of the prohibition decisions is outside the scope of this paper; however, the CFI's findings in its judgments annulling the Commission's divestiture decisions are of interest for the interpretation of Article 8(4) of the original Merger Regulation.

The CFI annulled the divestiture decisions without the need for it to address in detail the pleas put forward by the applicants and the Commission on the interpretation of Article 8(4). The CFI disposed of the cases by relying on a simple legal premise: that the prior annulment by the CFI of the prohibition decisions necessarily deprived the divestiture decisions of any legal basis and resulted inevitably in their automatic annulment (4). However, certain obiter dicta in the CFI's judgment in Tetra Laval v. Commission suggest that the CFI agreed, in principle, with the Commission's interpretation of Article 8(4) of the original Merger Regulation that, once an implemented concentration is declared incompatible with the common market, the full separation of the merged

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(1) See case Tetra/Sidel, M.2416, Article 8(4) Commission Decision of 30.1.2002, point 11, emphasis added. See also case Schneider/ Legrand, M. 2283, Article 8(4) Commission Decision of 30.1.2002, points 10 and 11, where the Commission states that ‘il convient que l’opération en tant que telle soit dénouée au moyen d’une séparation complète de Schneider et Legrand’.

(2) See Schneider/Legrand (M. 2283, Article 8(4) Commission Decision of 30.1.2002), point 25, where it is stated that Schneider thought that an imposition of divestiture going far beyond the level of control would be disproportionate. Likewise, in Tetra/Sidel (M.2416, Article 8(4) Commission Decision of 30.1.2002, point 31 et seq., where it is stated that Tetra argued that an order for a complete divestiture would be disproportionate. Similar arguments were advanced by Kesko in the Kesko/Tuko case (M.784, Commission decision of 19.2.1997, OJ L 110, 29.4.1997, p. 55). In its decision, the Commission specifically stated that it had taken the ‘flexibility’ arguments put forward by Kesko into account and that it had ordered only what was strictly necessary to restore conditions of effective competition on the Finnish markets for retail and cash-and-carry sales of daily consumer goods (see point 14 of the decision).

(3) See judgments in cases T-310/01 Schneider Electric SA v Commission (annulment of Article 8(3) decision ); T-77/02 Schneider Electric SA v Commission (annulment of Article 8(4) decision ); T-05/02 Tetra Laval BV v Commission (annulment of Article 8(3) decision ); T-80/02 Tetra Laval BV v Commission (annulment of Article 8(4) decision ).

(4) See Schneider v Commission, case T-77/02, points 43-45, and Tetra Laval v Commission, T-80/02, para 42.
parties is the logical consequence (1). The revisions made in the recast Merger Regulation aim at emphasising this underlying principle (2).

The amended Article 8(4) and new Article 8(5) in the recast Merger Regulation

The recast Merger Regulation will include a revised Article 8(4) and will introduce a new Article 8(5) in order to deal comprehensively with issues of problematic implementation of concentrations where dissolution of a concentration or temporary hold-separate orders may be required.

Article 8(4) in the recast Merger Regulation — Dissolution orders

Article 8(4) of the recast Merger Regulation will provide as follows:

4. Where the Commission finds that a concentration
   (a) has already been implemented and that concentration has been declared incompatible with the common market, or
   (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

— require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible;

— order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

The revision of Article 8(4) in the recast Merger Regulation addresses the concerns identified with the scope of application and scope of the Commission's powers under Article 8(4) of the original Merger Regulation.

Applicability of the revised Article 8(4)

Regarding the applicability of Article 8(4) to un-notified concentrations, the deletion of paragraph (1) of the original Article 8 (which has been added to the end of Article 6(1)(c) of the recast Merger Regulation), removes any possible doubts as to the scope of application of Article 8(4). By disassociating Article 8(4) from Article 6(1)(c), and by continuing to refer to "concentrations" and not to 'notified concentrations' in both Articles 8(3) and 8(4), it will be clear that the Commission can prohibit and order the dissolution of any concentration that is found to be incompatible with the common market and not only notified concentrations.

Article 8(4) will apply to two categories of concentrations: (a) implemented concentrations (notified and un-notified) which the Commission scrutinises and declares incompatible with the common market; and (b) concentrations which are implemented in contravention of a condition attached to an Article 8(2) clearance decision in which the Commission found that the merger, in the absence of the condition, 'would fulfil the criteria laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty', i.e. that the merger would be incompatible with the common market. These two categories, therefore, concern situations where the Commission has found that the concentration, as notified (for category (a)) or in the absence of the condition (in category (b)) would be

(1) In its judgment, (in case T-80/02, Tetra Laval v. Commission), the CFI held (at para. 36) 'first of all, that the scheme of the Regulation, and particularly the 16th recital, show that the objective of Article 8(4) is to allow the Commission to adopt all the decisions necessary for the restoration of conditions of effective competition. When, as in the present case, the concentration has been implemented pursuant to Article 7(3) of the Regulation, the separation of the undertakings involved in the concentration is the logical consequence of the decision declaring the concentration incompatible with the common market.'

(2) See point 92 of the Explanatory Memorandum accompanying the Commission’s proposal for a recast Merger Regulation, adopted on 11 December 2002, op. cit. footnote 4 above.
incompatible with the common market. In both those situations, the Commission could proceed immediately with an Article 8(4) procedure and could adopt a decision ordering the full dissolution of the implemented concentration.

The above-mentioned categories are the only situations covered by Article 8(4); The Commission will, therefore, not be able, without further examination, to use its Article 8(4) powers to order automatically the dissolution of a concentration where the implementation has been carried out in contravention of a condition attached to a decision, in which the Commission only expressed ‘serious doubts’ as to the compatibility of the concentration with the common market [i.e. either an Article 6(1)(b) decision or an Article 8(2) decision taken, in accordance with Article 10(2), on the basis of ‘serious doubts’ (1)]. In such cases, instead of proceeding automatically with an Article 8(4) dissolution order, the Commission would have the power to adopt interim measures pursuant to Article 8(5) of the recast Merger Regulation (see below) and to examine the case further without being bound by time limits (pursuant to Article 8(7) of the recast Merger Regulation) with a view of adopting a final Article 8 decision. Only if the Commission found, following an in-depth examination, that the concentration would indeed be incompatible with the common market, could the Commission proceed with a final Article 8(4) dissolution order. Article 8(4) will thus be reserved solely for concentrations that are found to fulfil the incompatibility criteria of Article 2 and whose continued implementation would, therefore, result to significant competitive harm.

Scope of Commission's powers under the revised Article 8(4)

As regards the powers conferred to the Commission with respect to the measures it can order under Article 8(4), the wording has been amended to emphasise the overriding principle underlying this provision, that the situation prevailing prior to the implementation of the concentration (‘status quo ante’) ought to be restored (2).

Thus, the Commission will be able to order the parties to dissolve the concentration in its entirety, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired. Where such restoration is not fully possible through dissolution of the concentration, Article 8(4) provides the necessary powers for the Commission to restore the ‘status quo ante’ as far as possible. Finally, the Commission can order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision, for example by imposing modalities for the divestiture such as the appointment of an independent trustee.

It should be noted that procedurally, the Commission will be able to impose such measures either in a single Article 8(3)/8(4) decision or in a separate Article 8(4) decision. All the procedural guarantees set out in Articles 18, 19(3) and 20(1) of the recast Merger Regulation are fully applicable in an Article 8(4) procedure, i.e. the Commission must communicate its objections to the parties, allow them the opportunity to make their views known (in a written reply and/or oral hearing), consult the Advisory Committee and publish its decision in the Official Journal.

Article 8(5) of the recast Merger Regulation - Imposition of interim measures

Article 8(5) of the recast Merger Regulation will complement the revised Article 8(4) by enabling the Commission to take interim measures. Article 8(5) of the recast Merger Regulation will provide as follows:

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration (a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

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(1) This category of decision (Phase II conditional clearance decision pursuant to Article 8(2) but based on a ‘serious doubts’ finding) is now specifically referred to in Article 8(7)(a)(ii) of the recast Merger Regulation. Such a situation may arise where the parties offer commitments, early in Phase II, in order to remove the Commission’s serious doubts as to the compatibility of the transaction with the common market. According to Article 10(2), in such cases, if the Commission finds that the serious doubts are removed, it ought to clear the concentration without delay. For an Article 8(2) decision based on a finding of serious doubts see, for example, case M.2861, Siemens/Draegerwerk, Commission decision of 30.4.2003.

(2) This was the objective underlying the Commission’s proposal for the revisions in Article 8(4). See point 92 of the Explanatory Memorandum accompanying the Commission’s proposal for a recast Merger Regulation, adopted on 11 December 2002, op. cit. footnote 4 above.
(b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;

(c) has already been implemented and is declared incompatible with the common market.

This provision applies to all situations of unauthorised implementation including, implementation without having notified the concentration or without having obtained an authorisation decision or situations where the parties implement their concentration in breach of conditions attached to conditional clearance decisions pursuant to Article 6(1)(b) or 8(2).

The provision is flexible in order to allow the Commission to take any type of interim measure which is appropriate to ensure that conditions of effective competition are not jeopardised in the interim period pending a final decision as to the compatibility of the concentration with the common market and a possible final dissolution order under Article 8(4). Thus, the Commission will be able to impose hold-separate obligations preventing the undertakings from scrambling the eggs in an irreversible manner and monitoring the situation by the appointment of an independent trustee.

The procedure for adopting such decisions derogates from the standard procedure. Article 18(2) and 19(3) of the recast Merger Regulation will permit the Commission to act swiftly and take provisional interim measure decisions without hearing the parties or consulting the Advisory Committee (1). However, a hearing and consultation of the Advisory Committee must take place prior to the provisional interim measures decision becoming a final interim measures decision.

Conclusion

Despite the ex ante control system enshrined in the original and recast Merger Regulation which is designed to avoid situations of implementation of concentrations prior to authorisation, provisions enabling the Commission to order dissolution of concentrations that are found to be incompatible with the common market constitute essential complementary powers in the Commission's armoury.

In the recitals of the recast Merger Regulation, the legislator explains that it has entrusted the Commission with the duty of ensuring that the process of reorganisation does not result in lasting damage to competition and has, therefore, afforded the Commission the power of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.

If past use is any guidance for the future, it should not be expected that the Commission will need to use the powers afforded to it in the amended Article 8(4) and new Article 8(5) of the recast Merger Regulation except in exceptional situations. The fact that these provisions are there, however, ensures that, in those rare situations where an anti-competitive concentration is already implemented, the Commission will have all the necessary powers to protect competition by being able to intervene effectively and to order the restoration of the status quo ante.

(1) The same procedure is also established in Article 18(2) of the original and recast Merger Regulation with respect to Article 7(4) derogation decisions.