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/Mergers/Jurisdiction

European Union

Authored By Sheppard Mullin Richter & Hampton LLP | Numl

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Overview

Overview

The EU treaties' competition law provisions do not contain rules specific to merger control. From September 1990, merger control was governed by the Council Regulation (EEC) No. 4064/89, until 1 May 2004 when the current EU Merger Regulation (EUMR), Council Regulation (EC) No. 139/2004, came into force.

Which mergers are reviewed by the European Commission?

The EUMR applies to any "concentration" that has an "EU dimension".

The concept of concentration is broadly defined and covers mergers, acquisitions and the creation of full-function joint ventures (JVs) – JVs having sufficient personnel and resources to perform the functions normally carried out by other companies in the same market. At the heart of this analysis lies the notion of “control”, which is also broadly defined and comprises rights, contracts or any other means that confer the possibility of exercising decisive influence over a company. Decisive influence arises where a party is able to determine a company’s commercial strategy. Even a minority shareholding can confer such a possibility, in particular when the minority shareholder can block strategic commercial decisions such as the adoption of budget or business plans. A change in the nature of control can also result in a notifiable concentration; for example, a change from joint to sole control or the entry of a new jointly controlling shareholder.

A transaction has an EU dimension if it satisfies these revenue thresholds:

1. the combined worldwide revenue of all the merging companies is over €5 billion; and
2. the EU-wide revenue of each of at least two of the companies is over €250 million.

Alternatively:

1. the combined worldwide revenue of all the merging companies is over €2.5 billion;
2. the combined revenue of all the merging companies is over €100 million in each of at least three member states;
3. the revenue of over €25 million for each of at least two of the companies in each of the three member states is included under (2); and
4. the EU-wide revenue of each of at least two companies is more than €100 million.

In both alternatives, there is no EU dimension if each of the companies achieves more than two-thirds of its EU-wide revenue within one and the same member state.

On the buyer side, the revenues of all companies belonging to the group must be taken into account, while on the target side only the company being acquired is relevant. Revenues are those achieved from the sale of products or the provision of services in the normal course of business. This excludes intra-group revenues, VAT and other taxes directly related to turnover. On the geographic allocation of revenues, it is usually the location of the customer that is relevant, but this can sometimes be a complex exercise.

What happens when the EUMR applies?

Notification procedure

Under the one-stop shop principle, transactions with an EU dimension fall within the exclusive competence of the European Commission (the Commission) and its Directorate-General for Competition (DG COMP). Other transactions are investigated by one or more member state national competition authorities (NCAs), in accordance with their national merger control rules. As an exception to this rule, the EUMR provides for jurisdictional reallocation procedures between the Commission and the NCAs, prior to and post-notification.

A transaction that must be notified under the EUMR cannot in principle be implemented unless and until the Commission declares it compatible with the internal market. Failing to submit the required notification and closing a transaction before the Commission's approval can result in fines of up to 10% of the company's revenues. If the transaction has closed, the Commission can fine the responsible company for infringing both the notification obligation and the standstill obligation, even if it ultimately approves the transaction in question – judgment of 4 March 2020 in Case *C-10/18 P*, confirming the two-times €10 million fine on Marine Harvest; and judgment of 22 September 2021 in Case *T-425/18*, marginally reducing the two-times €62.5 million fine on Altice. The Commission also has the power to unwind a transaction if it raises significant substantive issues.
The parties may notify their contemplated transaction as soon as they have a good faith intention to conclude an agreement, such as with a memorandum of understanding or a letter of intent. In public bids, the earliest point is after the announcement of the intention to launch the bid. The Commission strongly encourages companies to engage in pre-notification contacts that facilitate the process following a formal notification.

There are specific notification forms that must be used that are included in the relevant legislation (see below) and available on DG COMP's website. Simplified forms apply when the parties do not operate in the same or related markets, or only have limited market shares below certain thresholds (over 70% of notified transactions).

Following the receipt of a complete notification, the Commission opens a Phase 1 investigation, which has a standard duration of 25 working days. The process involves requests for information sent to the parties, competitors and customers. Over 90% of notified transactions are approved after a Phase 1 investigation. If the Commission has serious doubts as to the compatibility of the transaction, it must open a Phase 2 investigation. The latter has a standard duration of 90 working days and typically involves more extensive information gathering, including the companies' internal documents, extensive economic data, more detailed questionnaires to market participants or site visits. In Phase 2, the Commission also analyses claimed efficiencies that the companies could achieve. If the positive effects of such efficiencies for consumers outweigh the mergers' negative effects, the merger can be cleared.

Since 1990, the Commission has received 8581 notifications (up to July 2022), 7643 (89%) of which resulted in a Phase 1 clearance and 56 (less than 1%) in which the Commission found the EUMR inapplicable. In 342 decisions (4%), the Commission approved transactions subject to commitments in Phase 1, while in 63 cases (less than 1%) it approved transactions unconditionally in Phase 2. In 141 decisions (less than 2%), the Commission approved concentrations subject to commitments in Phase 2. Prohibition decisions are even more rare, as there have only ever been 31, that is less than 0.4% of the total notified cases. This evidences that the Commission is not as interventionist as some may present it to be.

The Commission has extensive powers of investigation under the EUMR. In particular, it can seek information from the parties and third parties through simple requests or by formal decision. It can also conduct inspections at premises and examine books and records. Providing incorrect, incomplete or misleading information can result in fines of up to 1% of the companies' aggregate revenues. For example, Facebook was fined €110 million in 2017 for providing misleading information during the Commission's investigation of its acquisition of WhatsApp, despite the fact the information in question did not have an impact on the Commission's approval decision of 2014. Non-confidential versions of all final decisions – in both Phases 1 and 2 – are published on DG COMP's website. The Commission's procedural conduct and all decisions are subject to review by the General Court of the EU and ultimately by the Court of Justice of the EU. The companies or other parties demonstrating an interest can challenge the decision within two months of its notification or publication. This guarantees an independent judicial oversight and ensures that all rights of defence available to the companies are fully respected.

Compatibility assessment

When assessing the compatibility of a transaction under the EUMR, the Commission makes a prospective analysis of whether it would significantly impede effective competition in all or a substantial part of the internal market, in particular because of the creation or strengthening of a dominant position. The detailed test depends on whether the concentration is horizontal or vertical (see below). A specific additional test applies in assessing the potential "spill-over" effects of a JV. In substance, this is an assessment of the JV's potential to give rise to anticompetitive coordination between the parent companies. This can happen if the latter retain activities in the same or related, or vertically linked, markets as the JV.

The parties can offer remedies (commitments) to address the Commission's concerns both in Phases 1 and 2. Remedies must be viable and sufficient to eliminate competition concerns. The Commission will market test the remedies and, if accepted, they will become binding upon the parties. An independent trustee will oversee compliance with such commitments. Offering remedies extends the deadlines both at Phases 1 and 2, which can also result from the Commission "stopping the clock", such as to request for information.

Noteworthy developments

Jurisdictional issues

First, since 1 January 2021, at the end of the agreed transition period, the EUMR is no longer applicable in the UK. Transactions must therefore be notified both in the EU and in the UK if they satisfy the applicable conditions in both jurisdictions. In 2021, 12 transactions were notified to both authorities – ie, the Commission and the CMA. While most of them were cleared unconditionally, one case demonstrates the risk of such parallel investigations. The *Cargotec/ Konecranes* transaction resulted in an in-depth investigation by both authorities. The result was however the opposite in each jurisdiction. The Commission approved the transaction in February 2022 after the merging parties offered to carve out packages of assets from within each of their existing businesses, which could then be sold as a new combined business. The Commission noted that the "divested assets constitute viable businesses that would enable suitable buyers to effectively compete with the merged entity". On the contrary, the CMA rejected the same remedy package in March 2022, noting that the offered "asset packages lacked important capabilities, so would not enable whoever bought them to compete as strongly as the merging businesses do at present. The process of carving out these assets from the merging businesses' existing operations, and knitting them together into a new combined business, would be complex and risky, so could significantly impair how effectively the purchaser of that business would be able to compete". Faced with similar issues in the US, the parties abandoned the deal. The *Meta/ Kustomer* deal also evidences a divergence of analysis between the two authorities, although in this case both authorities approved the deal. The divergence was that the Commission only approved the deal subject to a complex behavioural remedy, while the CMA found the deal would not give rise to competition concerns and cleared the transaction unconditionally.
Second, EU merger control has been repeatedly criticised for the insufficiency of its jurisdictional scope in capturing all anticompetitive transactions, in particular "killer acquisitions" – ie, acquisitions by dominant companies of

nascent competitors whose turnovers are too low to meet existing merger control thresholds. In light of this criticism, the Commission considered, but ultimately decided against, expanding the jurisdictional scope of the EUMR to capture high-value transactions that do not meet the revenue-based thresholds. Instead, on 26 March 2021, the Commission issued a guidance paper on article 22 of the EUMR encouraging NCAs to refer transactions to the Commission that may have a significant cross-border impact but do not meet national merger control thresholds. This initiative, which did not require formal amendments to the EUMR, was specifically designed to allow the Commission to investigate killer acquisitions, particularly those affecting the digital and pharmaceutical sectors. This move reversed the Commission's practice that had previously been to discourage such referrals when the national thresholds were not met. Such referrals are possible even after closing, although the Commission will generally not consider a referral more than six months after closing.

Third, the French NCA initiated in March 2021 a referral request and was joined by other NCAs concerning the *Illumina/ GRAIL* transaction. The Commission accepted the referral and opened a Phase 2 investigation in July 2021. Shortly after, in August 2021, Illumina announced it had completed the acquisition of GRAIL.

On 29 October 2021, the Commission adopted interim measures to restore and maintain the conditions of effective competition. Illumina challenged the Commission's acceptance of the referral in Case *T-227/21*. In a judgment delivered in July 2022, the General Court dismissed Illumina's action and validated the new approach to article 22, based on a literal interpretation of the text, taking into account its historical context and its purpose. The practical consequences of this approach are numerous and restrictive for companies. In order to determine whether or not a merger falls within the jurisdiction of a competition authority, it will be necessary to proceed not only with the traditional analysis of thresholds, which remain applicable, but also with the qualification of the nature of the merger and of the parties involved in order to see to what extent it could fall within the scope of article 22. The General Court has just given the Commission greater freedom, subject of course to the review of the Court of Justice, since both Illumina and GRAIL decided to appeal the General Court's judgment in Case C-611/22 P and Case C-625/22 P.

The Commission continued its Phase 2 investigation and ultimately prohibited the acquisition of GRAIL by Illumina on 6 September 2022. The Commission concluded that the deal would have stifled innovation and reduced choice in the emerging market for blood-based early cancer detection tests. Illumina did not offer remedies sufficient to address these concerns. As the merger has already been implemented, the Commission will decide in due course whether it is appropriate to dissolve it or to take other measures, pursuant to article 8(4) of the EUMR. Illumina has already stated its intention to challenge the Commission's decision before the General Court of the EU.

As explained above, the parties also face possible fines for breaching the standstill obligation under the EUMR. In July 2022, the Commission sent a statement of objections alleging that Illumina and GRAIL breached the EUMR by implementing the acquisition while the Commission's in-depth investigation into the proposed transaction was still ongoing.

It should be noted that the covid-19 pandemic has also left its mark on merger control in Europe as it has affected several sectors, markets and companies. As a result, it is expected that in the coming years the Commission will probably be confronted with many transactions related to the difficulties arising from the crisis. Therefore, the Commission's decision-making practice will have to distinguish between markets that have undergone permanent structural changes and those where the effects are temporary.

Fourth, the one-stop shop principle contained in article 21 of the EUMR has been under some pressure. The Commission has an exclusive competence over mergers with a European dimension. However, the same article opens the possibility for member states to investigate mergers that normally fall within the Commission's competence when they consider it necessary to protect their legitimate (non-competition law) interests. This mechanism has come back into the debate because in the *Vienna Insurance Group/ Aegon* deal, the Hungarian government decided to veto the deal on the basis of its emergency foreign direct investment (FDI) legislation introduced in the context of the covid-19 pandemic, arguing that it threatened its legitimate interests under article 21(4) of the EUMR. The Commission, nevertheless, asked Hungary to withdraw its veto in March 2022.
The Commission's policy is clearly against unjustified national protectionist measures and is determined to apply the derogation under article 21(4) of the EUMR in a narrow way. This evidences the Commission's willingness to use article 21 to assess the soundness of a member state's administration of its FDI review process and its compatibility with EU law. The application of article 21 in the context of FDI can also be seen as an attempt by the Commission to further harmonise national legislation on FDI. The Commission's decision implies that, in certain circumstances and in particular if vetoes cannot be justified on grounds of national security or public order, parties to a settlement can appeal to the courts at EU level, before accepting remedies or adjusting their agreements under pressure from the host member state and its administration.

The case demonstrates very clearly the increasing level of scrutiny that companies may face when they decide to proceed with a merger. EU rules are experiencing the most significant changes in decades. The new and strengthened FDI screening regimes exist in parallel to the EU and national pre-closing merger control systems, recently reinforced by the Commission's new referral policy. This means that investors are generally confronted with a parallel review of their transaction for merger control and FDI purposes that, in addition to increasing costs, could lead to different outcomes and increased legal uncertainty.

The one-stop shop principle was also put under pressure by the *Meta/Kustomer* case, where the Commission accepted a referral request by several member states, but the German FCO did not join this referral request and asserted its jurisdiction. It remains to be seen if the approaches of the two authorities analysing the deal will be consistent or not.

Procedural issues

On 26 March 2021, the Commission published a staff working document that sets out the findings of its evaluation of the procedural and jurisdictional aspects of EU merger control. On this basis, the Commission launched a public consultation on its intention to, among other things, expand and clarify the categories of cases eligible for the simplified procedure, ensure effective, efficient and proportionate information gathering and promote electronic notifications. The Commission published a revised draft implementing regulation and notice on the simplified procedure on 6 May 2022 and invited stakeholders to comment on the proposed revisions by 3 June 2022. The new rules are expected to come into force in 2023. The text proposes a broadening of the range of cases eligible for simplified treatment and introduces a flexibility clause that would allow the Commission to deal with non-simplified cases under the simplified procedure in the event that competition restrictions are not identified. Measures to further streamline the merger control review process include the introduction of a new notification form for simplified cases, in the form of a "check box". This consists mainly of multiple-choice questions and tables to be filled in rather than open questions. For non-simplified cases, the Commission has revised its information requirements and proposes to delete some sections of the Form CO. In addition, the Commission wants to establish a permanent system of fully electronic merger notifications. In particular, the Commission has formally introduced a so-called "super-simplified" procedure for offshore JVs whose activities take place entirely outside the EEA (the EU plus Iceland, Liechtenstein and Norway). Although companies complain that this procedure is unnecessary, costly and time consuming, the Commission has not yet ruled it out.

Substantive issues

The *Illumina/ GRAIL* prohibition decision discussed above is a rare example of a prohibition of a vertical merger on the basis of the innovation competition theory of harm. In stark contrast to the Commission's decision, the US Federal Trade Commission's administrative law judge allowed the transaction to go ahead, only a few days before the Commission's decision.

In the wake of the 2019 EU Green Deal (a roadmap for the EU economic sustainability and climate neutrality by 2050), the Commission carried out a public consultation on how competition rules and sustainability policies can work together, including merger control. The key merger control issue is the need to avoid killer acquisitions of green innovation. That said, the general consensus was that the EUMR remains broadly fit for purpose in this respect. The Commission is also working on developing tools to take into account green efficiencies in the assessment of mergers, although no radical change is expected in this regard.

The digital sector has become one of the main focuses of the Commission over the past years. Digital mergers present specific features, including the facts that they occur in fast-moving markets, might involve zero-price markets or platforms that play a dual role – namely, when a company controls the terms of access to the platform but may also market services competing with rival services offered on the platform – and relate to companies that generate and rely on data to develop their products or services.

The Commission also adopted the Digital Markets Act on 5 July 2022, under which digital gatekeepers have to inform the Commission of all intended concentrations of businesses providing services in the digital sector, regardless of whether they meet the EUMR thresholds. These will further strengthen the Commission's tools to detect and review potentially killer acquisitions in this sector, via article 22 if necessary.

On 19 January 2022, the Commission invited stakeholders' comments on the evaluation of the Market Definition Notice that closed in February 2022. The new notice is expected to be adopted in 2023.

Relevant legislation

Relevant legislation

The EUMR is the main legislative text concerning EU merger control. It contains the rules for notification and assessment of concentrations, including the jurisdictional thresholds, the standstill obligation, the substantive assessment, the procedures and administrative sanctions.

The implementing regulation (Commission Regulation (EC) No. 802/2004) deals with procedural matters, including the notification forms that must be submitted, time limits, file access, etc.

Several soft law instruments have been adopted to interpret various matters concerning the EUMR. Such soft law instruments are only binding upon the Commission and not the EU courts.

The most important procedural aspect is the Consolidated Jurisdictional Notice of 2008. Other procedural notices cover: case referral between the Commission and NCAs (2005); access to file (2005); the simplified procedure (2013); and article 22 of the EUMR referrals (2021).
On substance, the various notices that have been issued cover: the relevant market (1997 – a consultation was launched and this text may be reviewed); horizontal mergers (2004); remedies (2008); ancillary restraints (2005); and non-horizontal mergers (2008).
The Commission has also published various "best practice guidelines", which concern the relationship between case teams and parties or third parties during the procedure. These cover: the conduct of merger control proceedings (2004); the submission of economic evidence (2011); divestiture commitments (2013); and the preparation of public versions of decisions (2015).

Enforcement agencies

Enforcement agencies

Within the EEA, transactions that have an EU dimension must only be notified to DG COMP at the Commission, pursuant to the one-stop shop principle.

Final decisions are in principle adopted by the College of Commissioners, but for Phase 1 decisions (the vast majority of cases) the power to adopt the approval decision is delegated to the competition commissioner, a position currently held by Executive Vice President Margrethe Vestager.

Transactions that do not have an EU dimension can be reviewed by NCAs, when the applicable national jurisdictional tests are satisfied. There are mechanisms in place allowing for referrals of transactions between the Commission and NCAs.

Horizontal mergers

Horizontal mergers

The substantive rules on the assessment of horizontal mergers are described in the guidelines on the assessment of horizontal mergers. The Commission has a dynamic approach, in which it compares the likely structure of the market after the merger with that of the "counterfactual scenario", that is, the market structure that would have likely existed in the absence of the merger. Two types of anticompetitive effects are outlined: non-coordinated effects and coordinated effects.

Non-coordinated effects

Also known as unilateral effects, non-coordinated effects, by definition, result from the elimination of competition between the merging parties who are no longer competitors and enjoy increased market power.

Such effects are possible in a situation of single-firm dominance, that is, a company in a position of market power that allows it to behave to a large extent independently of other competitors, customers and ultimately consumers. Market shares are of particular importance in this assessment. Market shares of 40% or more are usually an indication of single-firm dominance, and there is a tendency for the Commission to define product markets narrowly for these purposes.

Unilateral effects are also possible in oligopolistic markets even in the absence of single-firm dominance, when a transaction eliminates an important competitive constraint that the parties previously exerted on each other. In its assessment, the Commission takes into account several factors, such as: closeness of competition (the closer substitutes the parties' products are, the higher the risk of, for example, price raises after the merger); entry and expansion conditions (the lower they are the less likely are the anticompetitive effects); actual or potential competition (for example, spare capacity could counter any intention of raising prices by the merging parties); buyer power (the countervailing power of customers can in some instances constrain the merger entity); and whether the merger eliminates an important competitive force (a "maverick") that has more influence than its market share suggests.

Coordinated effects

Concerning coordinated effects, the Commission examines whether the market structure is oligopolistic, and whether the transaction will facilitate tacit collusion between the members of that oligopoly. This could result in prices being raised, output being reduced or other harmful effects. Collective dominance can occur without active collusion, where mere adaptation of market conditions by the oligopolists causes anticompetitive parallel behaviour.

An oligopolistic market structure can allow deviations from the "tacit coordination" to be monitored and sanctioned through some form of deterrence mechanism or retaliation. The Commission considers that it can prohibit a transaction if it results in a market structure where it would be economically rational to adapt to market conditions in a way that would substantially reduce competition. The Commission's analysis takes into account the following factors: product homogeneity (differentiation makes collusion less likely); market transparency (the higher it is, the easier for oligopolists to adopt parallel behaviour); stagnant and inelastic demand growth; low levels of technological change (when innovation is important, tacit collusion is less interesting); entry barriers; similarities between the major suppliers' activities in terms of costs structures, market shares and capacity; and buyer power.

As explained in the overview section, merger-specific efficiencies that would outweigh the anticompetitive effects of a transaction can allow the latter to be approved. It is necessary in this regard to demonstrate that there are no other less anticompetitive but realistic alternatives to achieve such efficiencies. In general, non-horizontal mergers are considered to offer greater scope for efficiencies.

Vertical mergers

Vertical mergers

The assessment of vertical mergers has been facilitated by the publication by the Commission of guidelines on the assessment of non-horizontal mergers. These Guidelines define the main lines of analysis taken by the Commission. Vertical mergers only give rise to a competitive threat when they are combined with significant market power in at least one of the markets concerned, either upstream or downstream. As mentioned above, except in the case of significant market power, vertical mergers are more likely to create substantial efficiencies because the activities of the notifying parties are complementary and therefore generate synergies.

A non-horizontal merger does not normally raise competition concerns, either for coordinated or non-coordinated effects, when the market share of the merged firm does not reach 30% in each of the markets concerned and the HHI after the merger is below 2,000.

The assessment of vertical mergers looks for two types of anticompetitive risks that could reflect the Commission's concern: first, foreclosure by depriving a competitor of access to an essential input or access to a consumer; and second, the acquisition of market power through leverage.

The guidelines analyse the different coordinated and non-coordinated effects that a vertical merger may cause and distinguish between "input foreclosure", which prevents competitors from entering the market or, on the contrary, encourages them to exit, and "customer foreclosure". The latter concerns mergers that result in integration between a supplier and a major customer. Foreclosure may be against downstream competitors as well as against upstream competitors. In either case, the Commission assesses the likelihood of anticompetitive foreclosure by looking at the parties' ability to achieve it, the incentive for the new entity to foreclose and the negative impact on competition to the detriment of consumers.

Conglomerate mergers involve companies that operate in different product markets. In general, they are considered not to raise material competition issues. However, in cases where the products of the merging parties are complementary, a transaction can result in concerns about "portfolio power". This may occur when the market power deriving form a portfolio of brands exceeds the sum of its parts, thereby enabling the merged entity to exercise market power in individual markets more easily. In this regard, the Commission assesses the risk of market foreclosure through practices such as bundling or tying. That said, the evidentiary burden for the Commission is very high, and such theories of harms based on conglomerate effects remain rare.

Other

Other

Not applicable.