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European Union

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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.

• Mergers 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 can 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:

- the combined worldwide revenue of all the merging companies is over €5 billion; and
- 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. Fines are significantly higher if the deal is substantively problematic or the breach is intentional. In the *Illumina/ GRAIL* case, Illumina was fined on 12 July 2023 approximately €432 million for intentionally breaching the standstill obligation during the Commission's in-depth investigation.

The Commission also has the power to unwind a transaction if it raises significant substantive issues, and it intends to use this power in the *Illumina/ GRAIL* decision.

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 52% 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 8920 notifications (up to July 2023), 7952 (89%) of which resulted in a Phase 1 clearance and 56 (less than 1%) in which the Commission found the EUMR inapplicable. In 350 decisions (4%), the Commission approved transactions subject to commitments in Phase 1, while in 65 cases (less than 1%) it approved transactions unconditionally in Phase 2. In 148 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 32, 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 (now Meta) 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 European Union and ultimately by the Court of Justice of the European Union. 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. A specific additional test applies in assessing the potential spillover 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 United Kingdom. Transactions must therefore be notified both in the European Union and in the United Kingdom if they satisfy the applicable conditions in both jurisdictions. In 2021, 12 transactions were notified to both authorities – ie, the Commission and the United Kingdom's Competition and Markets Authority (CMA). While most 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 United States, 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. The *Microsoft/ Activision Blizzard* deal is the most recent with opposite results. The Commission approved the transaction in **May 2023**, subject to comprehensive 10-year licensing commitments:

- a free licence to consumers in the EEA that would allow them to stream, via any cloud game streaming services of their choice, all current and future Activision Blizzard PC and console games for which they have a licence; and
- a corresponding free licence to cloud game streaming service providers to allow EEA-based gamers to stream any Activision Blizzard PC and console games.

On **26 April 2023**, the CMA prohibited the transaction. On 5 May 2023, the CMA made an interim order to prevent the acquisition. On 19 May 2023, the CMA gave notice of the proposed final order to remedy the substantial lessening of competition it had identified. In response to the notice, Microsoft made a series of submissions to the CMA about developments since the publication of its final report, including the acceptance by the Commission of commitments offered by Microsoft and the agreement recently entered into between Microsoft and Sony (which was strongly opposing the merger before). These submissions stated that there has been a material change of circumstances since the final report or that there are otherwise special reasons for reaching a different decision on the remedies question. The CMA requested feedback on these submissions by 4 August 2023. In a turn of events, on 22 August 2023, Microsoft and Activision submitted a new, restructured deal to the CMA to review in a new investigation. The CMA thus finalised its initial procedure and prohibition decision, and opened at the same time a **new Phase 1 investigation** concerning the new deal. Under the restructured deal, Microsoft will not acquire cloud rights for existing Activision

PC and console games, or for new games released by Activision during the next 15 years (this excludes the European Economic Area). Instead, these rights will be divested to Ubisoft Entertainment SA prior to Microsoft's acquisition of Activision. The CMA has invited third parties to comment by 1 September 2023, and the current deadline for a Phase 1 decision is 18 October 2023.

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, but connected to the previous point, the French NCA initiated in March 2021 a referral request concerning the *Illumina/ GRAIL* transaction, even though it did not meet the national notification thresholds, and was joined by other NCAs. The Commission accepted the referral and opened a Phase 2 investigation in July 2021. 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 purpose. The practical consequences of this approach are numerous and restrictive for companies. To determine whether 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 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 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 issued a statement of objections, pursuant to article 8(4) of the EUMR, on 5 December 2022, outlining the measures to unwind the blocked acquisition. These measures include:

- the divestment measures that the Commission considers Illumina must implement to unwind the transaction with GRAIL; and
- the transitional measures that Illumina and GRAIL need to comply with until Illumina has dissolved the transaction.

Illumina has already stated its intention to challenge the Commission's decision before the General Court of the European Union.

As explained above, the parties also faced 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. On 12 July 2023, Illumina and GRAIL were fined for intentionally breaching the standstill obligation. Illumina strategically weighed up the risk of a gun-jumping fine against the risk of having to pay a high break-up fee if it failed to takeover GRAIL. It also considered the potential profits it could obtain by jumping the gun, even if it was ultimately forced to divest GRAIL. It then intentionally decided to proceed and to close the deal while the Commission was still investigating the transaction that was ultimately prohibited. This resulted in the Commission imposing the maximum fine of 10% of Illumina's turnover, amounting to €432 million. GRAIL also played an active role in the infringement, but was only imposed a symbolic fine of €1000 as this was the first time that a gun-jumping fine was imposed on a target company.

There have been three more article 22 referrals since March 2021, concerning the *Cochlear/ Oticon Medical*, *Adobe/ Figma* and *Viasat/ Inmarsat* transactions, but in all these transactions the national merger control thresholds of at least one member state were exceeded, contrary to the *Illumina/ GRAIL* case.

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 of the *Vienna Insurance Group/ Aegon* deal, which was unconditionally approved by the Commission in August 2021. Before this approval, the Hungarian government decided to veto the deal based on an amendment its permanent foreign direct investment (FDI) legislation, introduced the day before the signing of the deal. This amendment expanded the scope of the rules to describe EU and EFTA investors as "foreign". Without this amendment the deal would not be caught by Hungary's FDI rules. On substance, Hungary argued that the deal threatened its legitimate interests under article 21(4) of the EUMR. The Commission, nevertheless, ordered Hungary to withdraw its veto in February 2022, considering that the latter infringed EU law as:

- it had not been communicated to the Commission prior to its implementation; and

- it was not justified, suitable and proportionate and thus infringed freedom of establishment rules.

The deal successfully closed in June 2023. While the Commission's decision was a positive development, it is unclear what would have been its effect if, at the same time, an agreement had not been concluded between Vienna Insurance Group (the buyer) and a Hungarian state-owned fund to acquire 45% of all Hungarian Aegon subsidiaries. In other words, the veto would have been withdrawn even without the Commission's decision.

On the same issue, in its judgment in **Case *C-106/22***, the Court ruled that Hungary was wrong to block Xella from taking over Janes és Társa, a strategic mining firm, as the objective of ensuring the supply of gravel, sand and clay to the construction sector at the regional level cannot justify a restriction on the freedom of establishment rules. In this case, Xella challenged before a Hungarian court the decision of the Minister for Innovation and Technology prohibiting it from acquiring the Hungarian company Janes és Társa, which operates a gravel, sand and clay quarry. Xella is owned by a German company, which is owned by a Luxembourg company, which is, in turn, owned indirectly by a parent company established in Bermuda, which ultimately belongs to an Irish national. The Court first found that the case did not fall within the scope of the FDI Regulation (EU) 2019/452, as the latter only catches investments by companies from third countries. The simple existence of a third-country entity in the ownership structure was insufficient to change this conclusion. Second, the Court ruled that the Hungarian veto was a serious restriction of the freedom of establishment. Such a serious restriction could not be justified by the objective of ensuring the security of supply to the construction sector for basic raw materials, namely gravel, sand and clay. That restriction of the freedom of establishment cannot be justified because it does not concern a "fundamental interest of society", as is the case with the security of supply to the petroleum, telecom and energy sectors. Finally, the Court found that the acquisition in question did not seem able to give rise to a "genuine and sufficiently serious threat" within the meaning of the applicable case law.

The Commission's policy is clearly against unjustified national protectionist measures and it 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 and the Court's ruling imply that, in certain circumstances and in particular if a veto cannot be justified on grounds of national security or public order, parties to a transaction can appeal to the courts (and or the Commission) arguing an infringement of EU law, before accepting remedies or adjusting their agreements under pressure from the host member state and its administration.

These cases demonstrate 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 Federal Cartel Office (FCO) did not join this referral request and asserted its jurisdiction. The Commission approved the deal subject to conditions, and the German FCO, taking into account the Commission's findings, also approved it on 11 February 2022. It is worth noting that Andreas Mundt, President of the FCO, declared concerning this case that: "it is with unease that we ultimately had to acknowledge that the effects of the acquisition would not have warranted a prohibition under existing competition law." We were therefore not far from having conflicting decisions.

To further add to the increasing legal uncertainty and complexity of the assessment of transactions, the Court of Justice, in its Towercast judgment of 16 March 2023 in **Case *C-449/21***, ruled that NCAs and courts can review acquisitions by dominant entities under abuse of dominance rules (article 102 of the Treaty on the Functioning of the European Union), if those acquisitions are not notifiable under EU or national merger control laws. Less than one week later, the Belgian Competition Authority opened an ex officio investigation into the non-notifiable acquisition of edpnet's activities by Proximus, a competitor and the incumbent operator. In an interim measures decision of June 2023, the Belgian Competition Authority ordered Proximus to provisionally separate its activities from those of edpnet.

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. Subsequently, 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 were adopted on 20 April 2023, and will come into force in September 2023.

The new rules, among other things, address the following.

Expanding and clarifying the transactions that qualify for simplified review

The new rules broaden the range of cases eligible for simplified treatment, adding the following categories:

- horizontal transactions where the combined market share of the parties is greater than than 20% but less than than 50%, and the Herfindahl–Hirschman Index (HHI) delta is below 150;
- vertical transactions where the individual and combined upstream market shares of the parties are less than 30%, and their combined purchasing share is less than 30%; and
- vertical transactions where the individual and combined upstream and downstream market shares of the parties are less than 50%, the HHI delta is less than 150 and the company with the smaller market share is the same in the upstream and downstream market.

The existing JV categories are slightly amended as follows:

- the JV's EEA turnover must not only be less than €100 million in the last financial year, but also must be expected to remain less than €100 million in the three years following notification; and
- where the parties transfer assets to the JV, all assets that the parties intend to transfer, even if the transfer occurs in the future, are counted at the time of the transaction.

The new rules introduce flexibility clauses that allow the Commission to deal with non-simplified cases under the simplified procedure:

- extraterritorial JVs, if the annual current turnover of the JV and the turnover of the contributed activities is less than €150 million in the EEA and the total value of asset transfers to the JV in the EEA planned at the time of notification is less than €150 million; and
- minor horizontal or vertical relationships between the parties, if:
  - in horizontal overlap cases, the parties' combined market share is greater than 20% but less than 25%; and
  - in vertical relationships, the parties' individual and combined market shares is greater than 30% on the upstream or downstream markets, but the market shares are either less than 35% on the upstream and downstream markets or less than 50% on one vertically related market while being less than 10% on all the other vertically related market.

Streamlining the information requirements in simplified cases

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. In addition, some sections of the notification form will not have to be completed in the case of:

- JVs with no turnover or assets in the EEA; and
- deals not leading to any horizontal or vertical relationship.

In these "super-simplified" cases, the parties are also encouraged to notify directly, without the otherwise recommended pre-notification contacts.

Amending the information requirements in simplified cases

For non-simplified cases, the Commission has revised its information requirements and proposes to delete some questions of Form CO. Clearer explanations have been provided regarding the possibility of requesting a waiver from the obligation to provide certain information. Some new questions have also been introduced, such as on pipeline products, data collected and stored that could be useful for quantitative economic analysis, and whether a competitor holds a significant non-controlling shareholding (greater than 10%) in any of the parties.

Introducing an electronic merger filing system

In addition, the Commission has introduced a permanent system of fully electronic merger notifications (eTrustEx), requiring prior registration. Notifications will need to be signed electronically, using at least one qualified electronic signature (QES) complying with the requirements set out in **Regulation (EU) No. 910/2014** (the eIDAS Regulation). These certificates can be purchased from named qualified trust service providers (QTSPs) listed on the **eIDAS website**.

Substantive issues

The *Illumina/ GRAIL* prohibition decision discussed above is a rare example of a prohibition of a vertical merger based on 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. The 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, in force since 2 May 2023, 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. On 4 July 2023, seven potential gatekeepers – Alphabet, Amazon, Apple, ByteDance (TikTok's owner), Meta, Microsoft and Samsung – notified the Commission that they meet the requirements for gatekeeper designation. The Commission now has until 6 September 2023 to decide on their formal designation. Booking has announced that it expects to exceed the thresholds for designation soon. These rules (with which gatekeepers will need to comply by 6 March 2024 at the latest) 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.

Finally, 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.

• 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, standstill obligation, substantive assessment, procedures and administrative sanctions.

The implementing regulation (**Commission Implementing Regulation (EU) 2023/914**) deals with procedural matters, including the notification forms that must be submitted, time limits, file access and so on. This implementing regulation enters into force on 1 September 2023 and will repeal the old implementing regulation (**Commission Regulation (EC) No 802/2004**).

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 soft law instrument is the **Consolidated Jurisdictional Notice** of 2008. Other procedural notices cover:

- **case referral** between the Commission and national competition authorities (2005);
- **access to file** (2005);
- **article 22 of the EUMR referrals** (2021); and
- the **simplified procedure** (2023).

On substance, the various notices that have been issued cover:

- the **relevant market** (1997 – a consultation was launched and this text will be replaced by a new one in 2023);
- **horizontal mergers** (2004);
- **ancillary restraints** (2005);
- **remedies** (2008); 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 the Directorate-General for Competition 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. Non-notifiable transactions can be reviewed ex-post under abuse of dominance rules, following the **Towercast judgment**.

• 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.

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.

While vertical and conglomerate mergers have been traditionally perceived as less likely to be problematic, they have been in the spotlight the past few years, and it is expected that this trend will continue in 2023 and beyond, especially in the life sciences and digital sectors.

• Other

Other

Not applicable.