

# Merger Control

## Trends and climate

### Trends

**How would you describe the current merger control climate, including any trends in particular industry sectors?**

#### European Union

##### Cadwalader Wickersham & Taft LLP

In November 2014 a new European Commission under President Jean-Claude Juncker took office for a five-year term. The new Competition Commissioner Margrethe Vestager (formerly a Danish politician) has been tasked with using competition policy to contribute to policy areas such as the digital single market, energy, financial services, industrial policy and the fight against tax evasion.

The EU Merger Regulation (139/2004) is one of several legal instruments used to fulfil the European Commission's policy objectives. Other relevant legal instruments include Articles 101 and 102 of the Treaty on the Functioning of the European Union, which can be used to tackle cartels/restrictive agreements and abuse of dominance, respectively, and state aid rules.

On a number of occasions since taking office Vestager has made clear that all EU competition cases are decided according to the law and the facts, with political factors having no place. Further – no doubt in response to criticisms of her predecessor, Commissioner Almunia – she has been careful not to comment to the media on the likely outcome of ongoing cases and it is understood that a code of conduct is being established to set out clear rules on the issue for staff of the Directorate-General for Competition (DG COMP), the service which deals with competition matters within the European Commission.

Following several years with fewer notifications under the EU Merger Regulation due to the global financial crisis, in 2014 merger control review increased and the European Commission dealt with more than 300 transactions. The second half of 2014 saw a significant global upswing in deal activity which has continued into 2015. Indeed, the first half of 2015 saw the greatest number of Phase II cases running simultaneously in the 25-year history of the EU Merger Regulation, although so far the new commissioner has not blocked any mergers – the most recent prohibitions were in early 2013 (UPS/TNT Express and Ryanair/Aer Lingus).

In the past two years the industry subject to the most EU Merger Regulation scrutiny has probably been telecommunications, primarily in relation to mobile network and cable operators. These markets have traditionally been dominated by local incumbents at the national level. They are still national in geographic scope and generally quite concentrated, with only a few players. The European Commission has tended to review these mergers in an in-depth Phase II investigation before then granting conditional clearance. Examples include:

- Orange/Jazztel – cleared on the condition that Orange divest its fibre network in five major Spanish cities and provide wholesale access to its asymmetric digital subscriber line and mobile networks.
- Liberty Global/De Vivjer – cleared on the condition that Liberty Global license certain channels at fair and reasonable market prices in the Netherlands.
- Liberty Global/Ziggo – cleared on the condition that Liberty Global divest one of its premium pay-television channels in the Netherlands and abandon certain contractual restrictions on over-the-top content.
- Telefonica/E-Plus – cleared on the condition that Telefonica sell up to 30% of its mobile network capacity in Germany and other radio spectrums to a new market entrant.
- Hutchinson/Telefonica Ireland – cleared on the condition that Hutchinson sell up to 30% of its mobile network capacity in Ireland and other radio spectrums to a new market entrant.

This trend may well continue, as industry consolidation is a logical response to dwindling profit margins. For example, the European Commission is presently examining a proposed joint venture between Danish telecommunications operators Teliasonera and Telenor, having opened a Phase II investigation in April 2015 due to concerns that the merged entity would face insufficient competitive constraints from the two remaining players on the Danish mobile telecommunications markets, which could lead to higher prices and reduced innovation.

Another industry in which a number of transactions have had to be examined under the EU Merger Regulation is healthcare. The European Commission reviewed and conditionally cleared two medical device mergers – one after the parties offered commitments in Phase I (Medtronic/Covidien) and the other following an in-depth Phase II investigation (Zimmer/Biomet). In pharmaceuticals, the European Commission's established approach to market definition has generally

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allowed parties to identify competition concerns early and to secure prompt Phase I approval by submitting appropriate commitments early (eg, GlaxoSmithKline/Novartis). The pharmaceutical industry continues to be fertile for transactional activity requiring EU Merger Regulation review, with a number of large players looking to take advantage of tax inversion opportunities (eg, Pfizer, Valeant, Shire, AbbVie and Mylan).

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## Reform

### Are there any proposals to reform or amend the existing merger control regime?

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Under the previous competition commissioner, the European Commission proposed a number of substantive and procedural changes to the merger regime in the white paper “Towards More Effective EU Merger Control” (July 2014). The proposed changes include the following:

- extending jurisdiction under the EU Merger Regulation to cover the acquisition of minority shareholdings presenting, *prima facie*, a “competitively significant link”. Parties would have to file a simplified information notice containing *de minimis* information to enable the European Commission to decide whether it wishes to investigate the acquisition fully;
- excluding from merger review the creation of full-function joint ventures located and operating outside the European Economic Area;
- simplifying the procedures for upward referrals (by which the parties or a national authority asks the European Commission to take jurisdiction over a merger) and downward referrals (by which the parties request that the European Commission transfer jurisdiction to a specific national authority); and
- increasing the number of voluntary extension days which can be used to resolve competition concerns and/or to negotiate remedies.

The white paper was followed by a public consultation period. The European Commission is currently reviewing the responses, with Competition Commissioner Margrethe Vestager reportedly undecided on the approach to be taken towards minority shareholdings. The adoption of a legislative reform proposal, if eventually brought forward by the European Commission, would require unanimity in the European Council and the consent of the European Parliament.

Another area which appears to be under consideration by the Directorate-General for Competition since the arrival of the new commissioner is whether it would be appropriate to put in place some sort of EU legal framework for national review of mergers in order to better align national systems.

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## Legislation, triggers and thresholds

### Legislation and authority

#### What legislation applies to the control of mergers?

European Union

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EU merger control is governed by the EU Merger Regulation. This is accompanied by the Implementing Regulation 802/2004, which provides detailed rules.

The European Commission has also published a number of non-binding notices and guidelines, as well as its best practices on substantive issues (eg, horizontal and non-horizontal merger guidelines) and procedural matters (eg, the Consolidated Jurisdictional Notice). These, along with consolidated versions of the legislation, are available on the Directorate-General for Competition’s website (<http://ec.europa.eu/competition/mergers/legislation/legislation.html>).

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#### What is the relevant authority?

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At the EU level, all competition enforcement is carried out by the European Commission, the administrative arm of the European Union. Day-to-day case work happens within the Directorate-General for Competition (DG COMP), under the leadership of Competition Commissioner Margrethe Vestager.

In the field of merger control, simplified case decisions are taken by the director general of DG COMP and Phase I decisions are taken by the competition commissioner acting alone under delegated authority. Phase II decisions require

the approval of the entire college of commissioners, which will for the most part be guided by the competition commissioner's recommendations.

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## Transactions caught and thresholds

### Under what circumstances is a transaction caught by the legislation?

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The European Commission has jurisdiction over transactions that amount to a 'concentration' and have an 'EU dimension' (ie, that meet the jurisdictional thresholds set out in the EU Merger Regulation).

A 'concentration' means a transaction which gives rise to a change of control, and encompasses full mergers between two previously independent companies ('undertakings'), as well as acquisitions of control over an independent company by either one company (sole control) or two or more companies (joint control).

The EU Merger Regulation defines 'control' as the ability to exercise a decisive influence. The possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. Therefore, a concentration can occur on a legal or a *de facto* basis, may take the form of sole or joint control and may extend to the whole or parts of one or more undertakings. Control may be acquired by one company acting alone or by several acting jointly.

If the transaction constitutes a concentration, in order for the European Commission to have jurisdiction it must also meet the turnover thresholds set out in Article 1(2) or (3) of the EU Merger Regulation.

All European Economic Area member states (except Luxembourg and Liechtenstein) have their own national merger control regimes administered by national competition authorities, which apply to cases falling outside the European Commission's jurisdiction under the EU Merger Regulation. However, the EU Merger Regulation contains various provisions allowing for transfer or jurisdiction between EU and national levels, intended to ensure that jurisdiction is ultimately exercised by the authority or authorities best placed to review the deal.

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### Do thresholds apply to determine when a transaction is caught by the legislation?

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Whether a transaction is notifiable to the European Commission depends on whether it meets the turnover (ie, revenue) thresholds for EU dimension set out in Articles 1(2) and (3) of the EU Merger Regulation. There are two types of threshold:

- Primary thresholds – a merger will require notification to the European Commission where:
  - the parties have a combined global turnover of more than €5 billion; and
  - the parties have individual EU-wide turnovers of more than €250 million.
- Secondary thresholds – a merger that does not meet the primary thresholds may still require notification to the European Commission if:
  - the parties have a combined global turnover of more than €2.5 billion;
  - the combined aggregate turnover of all undertakings in each of at least three EU member states is more than €100 million;
  - the aggregate turnover of each of at least two of the undertakings in each of at least three EU member states is more than €25 million; and
  - the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million.

Only about 5% of all notifications to the European Commission result from the secondary thresholds being met.

Even if the primary or secondary turnover thresholds are met, the transaction will not be notifiable to the European Commission if two-thirds of each party's EU-wide turnover stems from the same member state. The two-thirds rule has the effect of allowing the competition authority of that country to review the case (reflecting an underlying assumption that it will have the most direct interest).

While the above rules are mathematical rather than discretionary, discretionary mechanisms also exist, allowing a national agency to review cases which trigger the EU Merger Regulation thresholds, but which may significantly affect competition in a market within a member state which presents all characteristics of a distinct market. In these rare cases, the notifying party can use the mechanism in Article 4(4) of the EU Merger Regulation to ask the European Commission to refer the case *ab initio* to one or more national authorities.

Where a case has national characteristics, a national competition authority may alternatively request that the case be

transferred to it after a notification to the European Commission.

Where a transaction falls short of the EU Merger Regulation primary or secondary thresholds, but triggers a notification obligation in three or more European Economic Area countries under national merger control laws, the notifying party may choose to use the mechanism in Article 4(5) of the EU Merger Regulation to seek approval for 'one-stop-shop' review by a single authority – the European Commission – by means of a reasoned submission (Form RS), which, if successful, is then followed by a notification to the European Commission.

In addition, where a deal is first notified to one or more national competition authorities, the European Commission may accept referral of the case from one or more national agencies if the transaction "affects trade between Member States" and "threatens to significantly affect competition" within a specific member state (the 2014 white paper reform proposal would eliminate the 'significantly affect' requirement).

Turnover ('revenue' in US parlance) is calculated on the basis of the entire group of companies, not just the entity that is party to the transaction. Special rules for the calculation of turnover apply to private equity firms, financial institutions and insurers. The European Commission's Consolidated Jurisdictional Notice contains extensive guidance on how to calculate turnover and allocate it geographically to member states, as well as information on when a change of control occurs for jurisdictional purposes. The notice is available on the Directorate-General for Competition's website ([http://ec.europa.eu/competition/mergers/legislation/draft\\_jn.html](http://ec.europa.eu/competition/mergers/legislation/draft_jn.html)).

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## Informed guidance

### Is it possible to seek informal guidance from the authority on a possible merger from either a jurisdictional or a substantive perspective?

European Union

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Yes. If there are doubts as to whether the European Commission will have jurisdiction under the EU Merger Regulation after a thorough review of the legislation, guidance notices and precedent by the parties' lawyers, informal contact can be made with the Directorate-General for Competition (DG COMP), which will generally encourage the notifying party to complete and submit a case allocation request form (available on DG COMP's website), on which it is specified that this is a consultation request only.

Notifying parties use the same form to apply to DG COMP for the allocation of a case team and case number as the first step in the notification process. This marks the beginning of the (*de facto* obligatory) pre-notification stage, during which the case team will review and comment on at least one draft of the notification document, and may (in more complicated transactions) have one or more meetings with the parties, before it gives the informal green light to proceed with formal notification.

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## Foreign-to-foreign

### Are foreign-to-foreign mergers caught by the regime? Is a 'local impact' test applicable under the legislation?

European Union

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Yes. EU merger control applies to transactions that have 'EU dimension'. Thresholds are based on geographic turnover. Thus, a transaction that meets the EU-wide thresholds because the parties have the requisite sales in the European Union must be notified, no matter whether the parties are European based.

One situation which has been caught since EU merger control was introduced – and where it is difficult to see how the transaction could feasibly affect competition in the European Union – is the so-called 'canteen in Tanzania' joint venture scenario. For example, if two large multinationals set up a joint venture in Tanzania (or any other non-European Economic Area (EEA) country) to run a lunch canteen for their local employees, the EU Merger Regulation would be triggered (assuming that the joint venture is 'full function' – that is, one which performs all functions of an autonomous economic entity on an ongoing basis) due to the size of the parent entities, even though the new joint venture has no nexus with Europe. At present, such joint ventures benefit from the use of the simplified procedure and short-form notification, but notification is still required. The European Commission's 2014 white paper suggests that review be excluded altogether for joint ventures that operate and are located outside the EEA, but as yet the European Commission has presented no concrete proposals to amend the EU Merger Regulation to this effect.

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## Joint ventures

## What types of joint venture are caught by the legislation?

European Union

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EU merger control applies to full-function joint ventures, provided that the turnover thresholds are met.

A 'full-function' joint venture is one which performs all the functions of an autonomous economic entity on an ongoing basis. To be considered a full-function joint venture, the joint venture's activity and market presence must be distinct from those of the parent companies.

Other non-full-function joint ventures (eg, research and development joint ventures) are not caught by EU merger control, but are subject to self-assessment under the general antitrust regime of Article 101 of the Treaty on the Functioning of the European Union.

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## Notification

### Process and timing

#### Is the notification process voluntary or mandatory?

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Notification is mandatory where the transaction meets the thresholds in the EU Merger Regulation and the transaction constitutes a concentration.

In acquisitions of sole control, the duty to notify is on the buyer. All parties must jointly notify in cases of joint control.

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#### What timing requirements apply when filing a notification?

European Union

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There is no deadline for beginning pre-notification talks or filing a definitive notification with the European Commission. However, the transaction cannot be closed or implemented until a clearance decision has been obtained.

The European Commission will accept a notification even before an agreement has been signed if the parties can demonstrate a good-faith intention to conclude an agreement or, in the case of a public bid, where the offeror has publicly announced an intention to make such a bid.

Where more than one merger may be occurring in the same relatively concentrated markets simultaneously, it is advisable to notify as promptly as possible. This is because the European Commission applies a 'first come, first served' policy regarding its substantive assessment of markets and market shares: where two transactions affecting the same market are filed contemporaneously, the first filing will be assessed under the market conditions as they exist at the time of the filing, whereas the market impact of the second deal will be assessed under the assumption that the first deal has taken place. In 2011 the European Commission cleared Seagate/Samsung unconditionally, but was prepared to clear Western Digital/Hitachi only with remedies. Both mergers affected the hard disk drives market, but Seagate/Samsung was notified just one day earlier.

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#### What form should the notification take? What content is required?

European Union

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Standard notifications must be made using the European Commission's Form CO template. This requires an extensive amount of information, particularly on the parties' activities, their views on market definition, horizontal overlaps and vertical considerations. Considerable supporting documentation is also required, such as copies of the transaction agreements and documents prepared for the board about the transaction. The parties are required to provide detailed market data for affected markets. The structure of supply and demand in affected markets must also be discussed, as well as:

- product differentiation;
- closeness of competition;
- market entry and exit;
- research and development activities; and
- trends and cooperative agreements.

If the parties want the European Commission to consider whether efficiency gains generated by the transaction are likely to enhance competition, they must supply such information in the notification.

Less complicated transactions may qualify for notification under the simplified procedure using the Short Form notification template.

The current versions of both Form CO and Short Form templates can be found as annexes to the consolidated version of the Implementing Regulation at [http://ec.europa.eu/competition/mergers/legislation/regulations.html#impl\\_reg](http://ec.europa.eu/competition/mergers/legislation/regulations.html#impl_reg).

Notification can be made in any official EU language, although these days most notifications are made in English. The Directorate-General for Competition has guidance on its website as to the number of copies of the notification which must be provided, in electronic and hard copy, as well as the opening hours of the Merger Registry to which the notification must be delivered.

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## Is there a pre-notification process before formal notification, and if so, what does this involve?

European Union

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Yes. The European Commission expects parties to enter into pre-notification talks before a formal filing is made, even where transactions qualify for treatment under the simplified procedure.

Pre-notification can begin at an early stage, even while deal negotiations are still in progress. The European Commission will keep such contacts entirely confidential if so requested.

Pre-notification generally starts when the notifying party sends in a completed case allocation request form. Within a week of receipt, the Directorate-General for Competition (DG COMP) will allocate a case team and give the transaction a case number.

The duration of pre-notification is difficult to predict and companies should allow plenty of time for this stage before the start of the formal review timetable. This is not 'pre-notification' in the US sense, where the term is used to reflect the obligation to notify before completion. In the European Union, 'pre-notification' is a process of informal dialogue preceding the actual notification. It would be highly unusual for pre-notification in even the simplest of cases to take less than three weeks; in more complex cases it can run to a number of months or even up to a year. The length of pre-notification is determined by the responsiveness of the DG COMP case team to the submission of successive drafts and the speediness with which the companies concerned can collect all the relevant data.

There are no hard and fast rules as to precisely how pre-notification is conducted. The parties may choose to send in a background briefing memorandum at the outset or engage in a face-to-face meeting with the case team in the case of more complicated transactions. In any event, the case team will expect to receive at least one draft – and often several – of the notification document. Under the best practices guidance, the case team may take up to five working days to review each draft and provide feedback, usually in the form of further questions, which will then need to be answered, with the answers being incorporated into the next draft of the notification.

Formal notification should not be made until the case team provides a heads-up that it is completely satisfied with the latest draft of the notification. Parties which notify before consent is given by the case team risk having their notification declared incomplete, and the statutory deadlines under the EU Merger Regulation will not start to run until it is deemed complete.

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## Pre-clearance implementation

### Can a merger be implemented before clearance is obtained?

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Article 7(1) of the EU Merger Regulation prohibits parties from implementing a notifiable merger before receiving a clearance decision from the European Commission (the 'standstill obligation').

There are limited exceptions to this rule, most notably in a public bid situation or in 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, provided that the notification is made without delay and the acquirer does not exercise the voting rights attached to the securities.

It is possible to apply to the European Commission for a derogation from the standstill obligation, but such cases are rare and permission to implement a transaction early will be granted only in exceptional circumstances.

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## What guidance is available from the authorities?

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The European Commission has published extensive guidance in the form of notices and guidelines, available at: <http://ec.europa.eu/competition/mergers/legislation/legislation.html>.

On substance, guidance is available regarding:

- horizontal and non-horizontal mergers;
- market definition;
- remedies; and
- ancillary restraints (ie, those restraints necessary and closely linked to a deal which therefore avoid ordinary antitrust scrutiny).

On procedure, guidance covers:

- jurisdiction (consolidated jurisdictional notice);
- simplified procedure; and
- upward and downward referrals.

Further, the Directorate-General for Competition has also published best practices for:

- the conduct of EU merger control proceedings;
- economic evidence; and
- remedies.

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## Fees

### What fees are payable to the authority for filing a notification?

European Union

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No fees are payable.

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## Publicity and confidentiality

### What provisions apply regarding publicity and confidentiality?

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Approaches to the Directorate-General for Competition (DG COMP) seeking guidance on jurisdictional issues early in the process remain entirely confidential. Further, the fact that pre-notification has started, with the allocation of a case team and a case number, is not made public by the European Commission, although sometimes where a transaction has been announced and is in the public domain the parties to the transaction may put out statements that they are in pre-notification or that a draft notification has been submitted.

Where a transaction has not been publicly announced and strict confidentiality must be maintained until the time of an announcement (eg, due to stock exchange rules), DG COMP will maintain confidentiality and will even limit access to documentation about the deal to specific officials on its own internal systems.

Once formal notification is made, this is generally picked up within a short time (sometimes in less than an hour) by specialist competition newswires. Once the Merger Registry has received a formal notification, it will reveal the case number and name of the parties to anyone who cares to call it and ask. Within a day or two, the case will also be listed on the European Commission's website, with the case number, names of the parties and provisional deadline for clearance.

The European Commission does not publish the full text of the notification, but will publish a short summary of the transaction on its website. Further, within seven to 10 days of notification, a notice will appear in the *Official Journal of the European Union* in all EU languages, briefly summarising the transaction and the activities of the parties involved and inviting interested third parties to make their views known within 10 days of the date of publication. The summary text used is provided by the parties as part of the notification.

If a remedy is submitted in Phase I or a national competition authority requests that the case be referred to national level, an extra 10 working days will be added to the procedure. Similarly, the submission of a remedy in Phase II after a certain date will result in the addition of 15 working days. The DG COMP website summary of the case always states the current

decision deadline and the date will be updated in such circumstances. A change of the published decision deadline will allow the detection of those events immediately by the specialist media and public.

All decisions taken by the European Commission under the EU Merger Regulation are addressed to the notifying party, are sent only to the notifying party and are confidential.

For simplified cases, the European Commission simply sends its clearance decision directly to the notifying party and does not issue any media release. For other Phase I and Phase II cases, a media release will be issued with an outline of the facts on the same day as the clearance or prohibition decision. Where a case proceeds into an in-depth Phase II investigation, the European Commission sends a 'serious doubts' decision to the notifying party and issues a media release announcing that Phase II has been opened.

Following receipt of the clearance or prohibition decision, the notifying party must redact business secrets so that a public version can be published in the European Commission's online case file. For commercial data (eg, turnover, volumes and market shares) the European Commission will ask the parties to provide ranges to be used in the public version of the decision. In more complex cases the redaction process can be very time consuming, and often non-confidential versions of decisions are only published months or sometimes a year or more after the decision date.

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## Penalties

### Are there any penalties for failing to notify a merger?

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Yes. The European Commission is empowered under the EU Merger Regulation to impose fines of up to 10% of global group turnover on parties which fail to notify.

Where a company becomes aware of the fact that it should have made a notification for a transaction that has already completed, it may choose to approach the Directorate-General for Competition (DG COMP) to discuss the matter. The European Commission will then generally require a notification to be made, even if the transaction has long since been implemented.

DG COMP does not always pursue infringement proceedings in such cases. Nevertheless, in 2014 it fined salmon farmer Marine Harvest €20 million for acquiring a 48.5% stake, and through it *de facto* sole control over its rival Morpol, before notifying the transaction. A fine of the same magnitude was levied on Electrabel in 2009 in similar circumstances. These two most recent infringement cases are good examples of how a change of control within the meaning of the EU Merger Regulation can occur in stock-building situations, even when the entire holding is a still a minority stake, by way of a creeping acquisition.

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## Procedure and test

### Procedure and timetable

#### What procedures are followed by the authority? What is the timetable for the merger investigation?

European Union

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The European Commission follows the procedures set out in the EU Merger Regulation, the accompanying Implementing Regulation and its non-binding notices and guidance.

Once the formal notification has been filed and deemed complete, the statutory deadlines under the legislation start to run. The vast majority of cases are handled in a Phase I procedure, and it is only the most complex of cases that will be put into an in-depth Phase II procedure:

- Phase I – the European Commission's standard review lasts 25 working days (ie, excluding weekends and European Commission holidays). This timetable is extended to 35 working days if either the parties submit commitments or a member state competition authority makes a request for downward referral. In some cases, the parties will meet with the case team to hear its initial concerns during a state of play meeting at around working day 15. At the conclusion of the initial review, the European Commission must either clear the transaction or open an in-depth procedure. Although it rarely happens, at this stage the European Commission can also conclude that it had no jurisdiction in the first place.
- Phase II – in cases where the European Commission has serious doubts at the end of Phase I, it will open an in-depth review. In principle, this fact-intensive review lasts 90 working days. This is extended to 105 working days should the parties submit remedies late in the procedure (after working day 55), giving the European Commission

time to market test the remedies. The parties can also add up to 20 voluntary working days to the Phase II procedure (doing so after working day 15 of Phase II requires the European Commission's consent). Further, the European Commission can 'stop the clock', suspending its review, should the parties fail to respond to an information request by a given deadline. The European Commission can sometimes clear a Phase II case early where its concerns prove unsubstantiated or where the parties submit adequate remedies.

Where its competitive concerns remain after two months of intensive fact finding in Phase II, usually in the window of working days 42 to 50, the European Commission will send the parties a charge sheet (a statement of objections) setting out its theory of harm and the evidence supporting its case for prohibition. The parties will then be given access to the fuller evidence on the European Commission's file, and can reply to the statement of objections in writing. They may also elect to present their arguments during an oral hearing. The deadline for submitting commitments is working day 65.

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### What obligations are imposed on the parties during the process?

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The parties cannot implement their merger before receiving clearance from the European Commission and must hold separate the merging entities unless the European Commission grants a derogation, which is extremely rare.

During the review, the parties are also obliged to cooperate with the European Commission: where the parties purposefully or negligently submit incorrect or misleading information, or fail to answer an information request, the European Commission can fine the notifying party up to 1% of global group turnover.

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### What role can third parties play in the process?

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Third parties are vital to the European Commission's review because they help the case team to fully understand the markets concerned and provide independent views which may differ from those of the notifying parties.

As a matter of course, the notifying party must provide the case team with the names and contact details of its main competitors and customers as part of the notification (except in cases under the simplified procedure). The case team will send all these companies a questionnaire within a day or two of receiving the notification, which must be completed online within one week of receipt.

Third parties which do not receive a questionnaire in Phase I as part of this process are nonetheless at liberty to contact the case team and make their views known. They may even wish to do so before the date of formal notification.

Parties that establish a sufficient interest in the outcome of the review can intervene by providing written comments and participating in the oral hearing, should the case go proceed to Phase II. Such third parties can also receive a redacted version of the statement of objections, although this will occur some days or weeks after the notifying party receives it. Directly and individually concerned third parties may even appeal the European Commission's final decision to the European courts.

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## Substantive test

### What is the substantive test applied by the authority?

European Union

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The European Commission will prohibit transactions which will "significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position".

In various guidelines, the European Commission has outlined its approach to different types of merger:

- In horizontal mergers, the European Commission will look mainly for evidence of:
  - unilateral effects (ie, increased market power of the parties due to reduction of competitive pressure on the market); and
  - coordinated effects (ie, changes in the post-merger market structure which facilitate or stabilise anti-competitive coordination between competitors).

The European Commission also relies on so-called 'gap theories' – for instance, where the merging parties were close competitors previously or where the target's competitive weight is not reflected in its market share.

- In vertical mergers, the European Commission's main concern is foreclosure (ie, that as a result of the merger,

upstream or downstream competitors of the merged entity will have insufficient access to either supplies or markets). However, non-horizontal mergers generally pose less concern than horizontal mergers, as they do not entail the elimination of any direct competition and often create efficiencies.

- In conglomerate mergers (ie, transactions in which the parties are not active on the same horizontal or vertically linked markets, but on closely related markets), the European Commission will probe whether the merger entity will have the ability and incentive to foreclose competitors by bundling related products or supplies.

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## Carve-outs

### Does the legislation allow carve-out agreements in order to avoid delaying the global closing?

European Union

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No. Companies that implement parts of a notifiable transaction outside the European Union before it has been notified and clearance has been obtained from the European Commission are subject to the same stringent sanctions as parties that violate the standstill obligation under the EU Merger Regulation.

The EU Merger Regulation allows for derogations from the standstill requirement, but cases in which such derogations have been granted are extremely rare.

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## Test for joint ventures

### Is a special substantive test applied for joint ventures?

European Union

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The same substantive test (ie, whether the transaction significantly impedes effective competition in the common market or a substantial part thereof) is applied to full-function joint ventures, mergers and acquisitions alike.

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# Remedies

## Potential outcomes

### What are the potential outcomes of the merger investigation? Please include reference to potential remedies, conditions and undertakings.

European Union

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At the conclusion of its review, the European Commission must:

- clear the deal unconditionally;
- clear it subject to remedies; or
- prohibit the transaction.

Parties can submit remedies as early as the start of Phase I (but will generally wait until a state of play meeting with the case team has taken place at around working day 15 in Phase I to hear the European Commission's views). Any submission of Phase I remedies will extend the initial review deadline from 25 to 35 working days. In Phase II, the parties can submit remedies until working day 65. The submission of remedies after working day 55 will automatically extend the review deadline by 15 working days.

The commitments must be set out at length based on a standard form and must be described in the Form RM template, explaining the content and their suitability to ease the European Commission's competition concerns. Parties must provide a non-confidential version of the commitments for market testing. In certain cases, officials may ask the parties to present or suggest qualified buyer(s) for any divestment.

The remedy should be proportionate to the competition concerns it addresses while entirely removing the concerns.

The European Commission generally prefers structural remedies (ie, divestments), but will also consider behavioural remedies (eg, to continue providing certain services or supplying certain goods) on a case-by-case basis. Generally, remedies are market tested with relevant third parties unless the European Commission finds the commitments to be *prima facie* inadequate. Depending on when remedies are first offered, the parties may have one or more opportunities to upgrade their proposal in response to comments from the case team and the market.

## Appeals

### Right of appeal

#### Is there a right of appeal?

European Union

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European Commission prohibition decisions can be appealed to the General Court (and then to the European Court of Justice) by the companies involved in the transaction. Properly speaking, this is an application for annulment and is a review of rationality and legality, but not a fresh review of the evidence or a substitution of its views by the court. If the appeal succeeds, the effect is not to clear the concentration, but rather to require the European Commission to reconsider the deal (assuming that the parties still wish to pursue it).

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#### Do third parties have a right of appeal?

European Union

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Third parties (eg, competitors, customers and suppliers) can appeal European Commission merger decisions which are of direct and individual concern to them – that is, those affecting them “by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually”. Participation by the third party in the initial European Commission merger review procedure (as a complainant or otherwise) can constitute evidence of direct and individual interest.

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### Time limit

#### What is the time limit for any appeal?

European Union

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The limitations period for bringing an appeal to annul an EC merger decision is two months and 10 days. However, when this limitations period starts to run varies depending on who is filing the appeal. For addressees of the decision (eg, the notifying parties), the limitations period starts to run from the time that the European Commission notifies them of the decision.

For non-addressees (eg, competitors, customers or suppliers) the situation is more nuanced, and whether an appeal is timely will depend on the extent of the publicity given to the decision:

- If the decision has been published in the *Official Journal* (as is the case for Phase II decisions), the limitations period runs from the moment of publication.
- Similarly, when the European Commission publishes a summary notice in the *Official Journal* and publishes the full decision online, the start of the limitation period is triggered.
- If the decision has not been published, the time limit can nevertheless start to run. Once the third party learns of the decision, it has been held that it is up to it to request the text of the decision within a reasonable time, and failure to do so can leave it out of time. However, time can begin to run only from the date on which the non-addressee acquires actual knowledge of the decision and its content, such as to enable it to exercise its right of action.

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## Law stated date

### Correct as of

#### Please state the date as of which the law stated here is accurate.

European Union

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August 12 2015.

