



# EU Merger Control

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# Agenda

1. **Introduction**
2. The concept of concentrations
3. Substantive assessment
4. Procedure
5. Jurisdiction - referrals
6. Practical implications

# General

- Purpose of merger control: Control with structural changes in the market
  - In contrast with antitrust rules: Anti-competitive behaviour prohibited
    - Anti-competitive agreements/concerted practices prohibited (Art. 101 TFEU/Art. 53 EEA)
    - Abuse of dominant position prohibited (Art. 102 TFEU/Art. 54 EEA)
  - Decisive: Change of control
- Compulsory pre-merger control/ex ante control
  - Analysis of potential effects on competition/Ex ante analysis
    - Comparison of the competitive conditions that would result from the merger with the conditions that would have prevailed without the merger
    - In contrast with the ex post control of Art. 101/102 TFEU (Art. 53/54 EEA)
  - Once and for all clearance
- Procedural characteristics
  - Compulsory notification
  - Stand-still obligation
  - Strict time limits for enforcement agency

# Terminology: Concentrations between undertakings

- EU Merger Regulation: “Concentrations between undertakings”
- Types of concentrations
  - Mergers
  - Acquisitions
  - Joint ventures

# Types of mergers

- Horizontal
- Vertical
- Conglomerate

# Effects of mergers on competition

## - Possible positive effects

- Achieving economies of scale and cost reductions
- Developing new products/markets
- Promoting innovation and transfer of technology

## - Possible negative effects

- Strengthening of market power
- Reinforcement of oligopolistic market structures
- Raising/increasing of barriers to entry

# EU merger control

- Supra national (EU) v. national rules
  - 2 sets of rules
    - The EU Merger Regulation
    - National merger control legislation
  - No overlap
- Scope of EU merger control
  - Concentrations with EU Dimension
  - The EU Merger Regulation (Reg. 139/2004), art. 1
  - Original and alternative turnover thresholds

# The one-stop shop EU merger control

- Concentrations with EU dimension: National merger/competition law not applicable, art. 21(3)
  - Referral provisions: Re-attribution of cases between the Commission and the Member States
    - If EU dimension: From the Commission to Member States  
Cf. principle of subsidiarity
    - If no EU dimension: From Member States to the Commission
- Exception: Protection of Member States' legitimate interests, art. 21(4)
  - Public security, plurality of the media and prudential rules shall be regarded as legitimate interests



# EU Merger Control Authorities

- European Commission
  - DG Comp
- The General Court (previously the Court of First Instance)
  - Judicial review of European Commission's decisions
- European Court of Justice
  - Appeals from the General Court
- No decentralised enforcement of EC Merger Regulation by National Competition Authorities
  - A case having a EU dimension may however be referred to the competent authorities of the Member States, cf. Article 4(4) and Article 9
  - If referral to Member States, national merger control legislation to be applied

## Sources of law - overview

- The Merger Regulation (Reg. 139/2004)
- The Implementing Regulation 802/2004 (procedural rules; how to calculate time limits etc.)
  - Annex I: Form CO
  - Annex II: Short Form CO
  - Annex III: Form RS Reasoned Submission
- Judgments from the European Court of Justice and the General Court
- Decisions from the Commission
- Guidelines/notices from the Commission

# Sources of law - European Commission's Guidelines

## - Substantive issues

- Assessment of horizontal mergers (OJ 2004 C 31/5)
- Assessment of non-horizontal mergers (OJ 2008 C 265/6)
- Definition of the relevant market (OJ 1997 C 372/5)
- Remedies acceptable (OJ 2008 C 267/1)
  - (See also Best Practices Guidelines)
- Restrictions ancillary to concentrations (OJ 2005 C 56/24)

## - Procedural issues

- Consolidated Jurisdictional Notice (16 April 2008): Replaces former Notices
  - The concept of concentration (OJ 1998 C 66/5)
  - The concept of full-function joint ventures (OJ 1998 C 66/1)
  - The concept of undertakings concerned (OJ 1998 C 66/14)
  - Calculation of turnover (OJ 1998 C 66/25)
- Simplified procedures (OJ 2005 C 56/32)
- Case referral (OJ 2005 C 56/02)

## - Best practices on merger control proceedings

- DG Comp Best Practices on the conduct of merger control proceedings (20 January 2004)
- The Commission's model texts for divestiture commitments and the trustee mandate (2 May 2003)

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# Scope of EU merger control: Concentrations

- The concept of concentration: Change of control decisive element
  - Operations bringing about a lasting change in the control of the undertakings concerned, and therefore in the structure of the market
    - Internal restructuring within a group of companies are not included
- Types of concentrations, Article 3
  - Mergers
  - Acquisitions
  - Full-function joint ventures
- If no concentration, Article 101 TFEU may be applicable
- See also Consolidated Jurisdictional Notice, Part B

# Acquisition of control - an overview

## - Control

- The possibility of exercising decisive influence on an undertaking
- To determine its strategic commercial behaviour

## - Types of control

- Sole or joint control
- De jure or de facto control
- Direct or indirect control

## - Ways of acquiring control

- Acquisition of shares or assets
- Acquisition of whole or part(s) of target undertaking
  - Legal entity, branches, assets
  - Must constitute a business to which a market turnover can be clearly attributed

# Acquisitions of qualified minority interests

## - De facto control

- Likely to achieve a majority at shareholders' meetings
  - Other shares widely dispersed
  - Evidence from the presence of shareholders in previous years

## - De jure control

- Specific rights attached to minority shareholding
  - E.g. preferential shares leading to a majority of the votes
- Other rights/Shareholder agreements enabling the shareholder to determine the strategic behaviour of the target company
  - E.g. the power to appoint more than half the members of the Board

## - Options

- Will not in itself confer sole control; unless
  - Will be exercised in near future, and
  - Follows from legally binding agreement

## Joint control

- Two or more undertakings/persons having the possibility of together exercising decisive influence over another undertaking
  - Decisive influence: Power to block actions which determine the strategic commercial behaviour of the undertaking
    - I.e. beyond veto rights normally conferred to minority shareholder
- Two parent companies each with 50 %
- Veto rights related to strategic decisions
  - In Statutes or shareholder agreements
- Elements in overall assessment
  - Appointment of management
  - Determination of budget
  - Business plan
  - Investments
- Strong common interests vs. shifting alliances



# Creation of full-function joint ventures

- Three cumulative conditions for being subject to merger control
  - Joint control
    - Cf. previous slide
  - Full-function
    - Commission Consolidated Jurisdictional Notice
    - Performing all the functions of an autonomous economic entity
      - Stability
      - Dependence on parents
  - Lasting change in market structure
    - Entity created on a lasting basis
    - Financial resources
    - Personal resources
- If not subject to merger control; Article 101 TFEU may apply

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# The SIEC-test

- Significantly impede effective competition, Article 2(2)
  - "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market"
  - Causal link required between the concentration and effects
  - Market analysis
  - The SIEC-test replaced the Dominance-test
- Elements in the analysis
  - Definition of the relevant market
    - Commission Notice on the Relevant Market (1997 OJ C 372/5)
      - Product market
      - Geographic market
  - Competitive assessment:
    - General
      - Commission Guidelines on the assessment of horizontal mergers (2004 OJ C 31/03)
      - Commission Guidelines on the assessment of non-horizontal mergers (2008 OJ C 265/6)
    - Theories of harm
    - Market power - Unilateral effects
    - Coordinated effects
    - Vertical effects

# Definition of the relevant market

- Precondition for assessing possible restrictions on competition
- Purpose: To identify and define the boundaries of competition between companies
  - Identifying the products/services capable of constraining the behaviour of the parties to the concentration and preventing them from behaving independently of an effective competitive pressure
- Both a product and a geographic dimension
- Commission Notice on the Relevant Market

# Significantly impede effective competition

- Horizontal effects: Unilateral effects
  - Creation or increase of market power
  - Ability to act independently of its competitors and customers
    - To profitably increase prices or reduce output, choice or quality
  - Merger with a potential competitor
- Horizontal effects: Coordinated effects
  - Collective dominance
  - Competitors more likely to coordinate their competitive behaviour?
- Vertical effects
  - Non-coordinated affects: Foreclosure
  - Coordinated effects
- Conglomerate mergers

# Market shares and concentration levels

## - Concentration levels

- HHI (Herfindahl-Hirschman Index)
- Adding the squares of the individual companies in the market
- $\Delta\text{HHI}$  = Change in concentration as a result of the concentration
- Normally no horizontal competitive concerns if;
  - Post-merger HHI between 1000 -2000 and  $\Delta\text{HHI} < 250$
  - Post-merger HHI  $> 2000$  and  $\Delta\text{HHI} < 150$

## - Market shares as indication of unilateral effects

- $< 25\%$ : Presumed compatible
- $< 40\%$ : Normally no unilateral effects

## - Market shares and concentration levels only elements in individual market analysis: Importance of countervailing factors

# Sources of competitive constraints

## - Demand-side substitution

- Consumers' response to a small but significant increase in prices
- Depends on the reactions of the marginal consumers, not the average consumer
  - The issue is not whether all consumers react to an increase in prices by changing to another product but whether a sufficient number of consumers changes to other products or reduces their demand in an amount that makes the price increase unprofitable
- The most immediate and effective disciplinary force, taken into account when defining the relevant market

## - Supply-side substitution

- Other suppliers' ability to switch production to the relevant products
- Shift must be possible in the short term and without incurring significant additional risks or costs
- Taken into account when defining the relevant market

## - Potential competition

- Not taken into account when defining relevant market, but may be an effective competitive constraint

# Possible countervailing factors

- Possibility of market entry - Potential competition
  - Entry must be likely, timely (2-3 years) and sufficient to deter any anti-competitive effects
  - Examples of entry barriers
    - Regulatory barriers
    - Technical advantages (e.g. preferential access to essential facilities or IPR)
    - Commercial and strategic barriers; Importance of brands, over-capacity, exclusive distribution networks and proprietary solutions
    - Importance of track records
    - Importance of economies of scale
    - Important sunk costs
- Buying power
  - Bargaining strength of the buyer vis-à-vis the seller in commercial negotiations
    - Depends on customer's size, commercial significance and ability to resort to credible alternatives
- Dynamics of the market
- Nature and structure of products and competition
  - Differentiated or homogeneous products
  - Bidding markets



# Efficiency defence

- Many mergers have both negative (anti-competitive) and positive effects
  - Positive effects e.g. efficiencies (economies of scale, economies of scope)
  - How should positive effects/efficiencies be balanced against negative effects in individual cases?
- Consumer welfare standard
  - Horizontal Guidelines, paras 76-88
  - A merger should not be prohibited if the efficiency gains are sufficiently substantial as to ensure that the price will not increase
  - Consumers should not be worse off as a result of the merger
  - Compare Article 101 TFEU

# Failing firm defence

- Horizontal Guidelines, paras 89-91
- Failing firm
  - The allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking
- No alternative purchaser
  - There is no less anti-competitive alternative purchase than the notified merger
- Assets of failing firm will exit market
  - In absence of merger, the assets of the failing firm would inevitably exit the market
- “Burden of proof”
  - Notifying parties must demonstrate that the deterioration of competitive structure not caused by the merger

## Ancillary restraints

- Ancillary restraints, cf. Article 6(1)(b) second subparagraph
  - Restrictions directly related to and necessary to the concentration
  - Automatically covered by a merger clearance
  - Principle of proportionality; restrictions on duration, geographical scope and products/services to be covered must be limited
- Commission Notice on ancillary restraints (OJ 2005 C 56/24)
- Example #1: Non-compete clauses on the seller
  - Purpose: To protect the value of the business(es) being transferred
  - Acceptable for 3 years when transfer of both goodwill and know-how
  - Acceptable for 2 years when only transfer of goodwill
- Example #2: Supply and purchase obligations
  - In order to maintain the continuity of supply in a transitional period

# Remedies

- Possible outcomes of investigation
  - Clearance
  - Prohibition
- Alternative outcome: Commitments by parties to overcome identified problems
- Types of remedies
  - Structural
  - Behavioural
- Notices
  - Notice on remedies, OJ 2008 C 267/1
  - Model text for Divestiture Commitments and Trustee Mandate, cf. Best Practice Guidelines
- DG Comp in-house Merger Remedy Study

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# Concentrations with a EU dimension must be notified

- EU dimension defined by turnover thresholds only (regardless of effects on competition)
- Original thresholds, Article 1(2)
  - Combined global turnover: > EUR 5 billion
  - Individual turnover within EU of each of at least two undertakings concerned: > MEUR 250
  - Exception: 2/3-rule
- Alternative thresholds, Article 1(3)
  - Combined global turnover: > EUR 2,5 billion
  - Combined turnover within at least 3 EU states: > MEUR 100
  - Individual turnover of at least two undertakings concerned within the EU states: > MEUR 25
  - Individual turnover within EU of each of at least two undertakings concerned: > MEUR 100
  - Exception: 2/3-rule

## Calculation of turnover (Art. 5)

- Starting point: Undertakings concerned
  - Undertakings participating in a concentration
  - Acquisition of parts of an undertaking
- The concept of turnover, Article 5(1)
  - Amounts derived from sales of products/services of ordinary activities last financial year
- Identification of undertakings whose turnover is taken into account, Article 5(4)
- Geographical allocation of turnover, Article 5(1)
  - Customer location
- The Commissions Consolidated Jurisdictional Notice, Part C

# Who must notify and when to notify (Art. 4)

## - Who must notify (Art. 4(2))

- Mergers: The merging parties
- Acquisition of control: The person(s) acquiring control
- The seller has no obligation to notify

## - When must notification be submitted (Art. 4(1))

- “[P]rior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest”
- Notification may also be made where the undertakings demonstrate a good faith intention to conclude an agreement



# The stand-still obligation (Art. 7)

## - Purpose

- To ensure the possibilities of effective merger control

## - Automatic suspension

- The concentration may not be put into effect/implemented until it has been cleared by the Commission
- Legal exception: Public bids/series of transactions (art. 7 (2))
  - May be implemented, but no exercise of voting rights
- Individual exemption: Derogation upon request (art. 7 (3))
  - Rarely granted

## - Content

- All implementing measures
  - Closing
  - Exercise of share-holders' rights
  - Integration of the activities of the undertakings concerned
- Preparatory measures may be taken

# Timetable (Art. 10)

## Pre-Notification

### Stage I:

25 working days/  
If commitments + 10  
working days

### Stage II:

90 working days/  
If commitments + 15/20  
working days

Notification CO

Art.6 (1)/(2) decision

Art.8 (1)/(2)/(3) decision

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# One-stop shop principle



## Referral to Member States: Pre-notification by the parties (Art. 4(4))

- Test: Concentration may significantly affect competition in distinct market within a Member State
- Commission must be informed prior to notification by reasoned submission
- The Member State referred to in the RS must express disagreement or agreement within 15 working days of receiving the reasoned submission (silence = agreement)
- Commission may then decide to refer the whole or part of the case to the Member State
  - The case may even be referred to more than one Member State
- Commission's decision must be taken within 25 working days after receiving the RS

# Referral to Member States: Post-notification by Member States (Art. 9)

- A Member State may request referral within 15 working days after the case was notified to the Commission on its own initiative or upon the invitation of the Commission
- Article 9(2)(a) test: Concentration threatens to affect significantly competition on a distinct market within a Member State
  - Commission decides on the basis of the test but also has administrative discretion
- Article 9(2)(b) test: Concentration affects competition on a distinct market within a Member State which is a non-substantial part of EEA
  - Commission decides on the basis of the test, no administrative discretion (i.e. the Commission has an obligation to refer)
- Commission's decision to refer or not shall as a general rule be taken within 25 working days from receiving the notification
- The case may be referred as a whole or partially
- The Member States shall inform undertakings of preliminary assessment within 45 working days after the Commission's referral

## Referral to the European Commission: Pre-notification by the parties (Art. 4(5))

- Test: Concentration which is capable of being reviewed by at least three Member States
- Commission must be informed before any notification by reasoned submission
- Competent Member States must express disagreement within 15 working days of receiving the reasoned submission
- Member States' veto: No referral where at least one Member State disagree
- If no disagreement, the concentration is deemed to have a EU dimension

## Referral to the European Commission: Post-notification by Member States (Art. 22)

- One or more Member States may request referral within 15 working days after the case was notified
- Test: Concentration affects trade between Member States and threatens to significantly affect competition within requesting Member States' territory
- Any other Member State shall have the right to join the initial request
- National time limits suspended until Commission has made decision
- Commission is deemed to have adopted decision to examine the concentration if no explicit decision within 10 working days after receiving the request
- Commission examines the case on behalf of requesting Member State(s)



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# Initial phase

## - Feasibility studies

- Buyer

- Buyer's assessment of regulatory risk: Will the concentration be prohibited/cleared on conditions/unconditionally cleared
- If clearance on conditions - what conditions are likely (impact on price)
- Alternatives to intended transaction structure

- Seller

- Seller's assessment of regulatory risk (impact on price)

## - Jurisdiction / notification

- Notification to EU

- Referrals to/from the Commission

- Cross-border transactions: Screening of jurisdictions where notification may be required

- Transaction structure may influence notification issues

## Negotiation phase

- Handling of commercially sensitive information: Applicability of Article 101 TFEU
  - Information exchange between seller and buyer during negotiations
  - Due diligence
- Completion of due diligence - agreements in violation of Articles 101 and 102 TFEU
  - Article 101 TFEU: Cartel agreements - risk of sanctions
  - Article 101 TFEU : Other agreements - risk of invalidity
  - Article 102 TFEU : Risk of sanctions, invalidity, and profitability
  - Importance of compliance programs

# Drafting of the sale purchase agreement

- Standstill obligation
  - Closing date
  - Long stop date
  - Independent until completion
    - Regulating the operation of the target company between signing and completion
    - Preparatory actions permitted
- Regulating regulatory risk, i.e. risk of intervention
  - Prohibition
  - Remedies
    - Structural
    - Behavioural
- The parties' rights and obligations in a regulatory process
- Ancillary restraints
  - Non-compete clauses
  - Licence agreements
  - Purchase and supply obligations



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