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Merger Control

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Contributing Editors: **Nigel Parr & Steven Vaz**

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Introduction

Merger control rules governing the entire European Union ("**EU**") were introduced in late 1989, and entered into force on 21 September 1990. The merger control regime is currently governed by Regulation 139/2004 ("**EUMR**"),[1] which became applicable on 1 May 2004.[2] Many detailed procedural rules, as well as the notification forms that must be used when filing a concentration can be found in Implementing Regulation 802/2004, which will be replaced by Implementing Regulation 914/2023 as of 1 September 2023.

The EU merger control rules require notification to the European Commission ("**EC**") of "concentrations" where parties meet certain turnover thresholds, which can be found in Article 1(2) and 1(3) EUMR. Concentrations are caught by the EUMR when a lasting change in the quality of control results from the merger of (parts of) two previously independent undertakings or the acquisition, by an individual already controlling an undertaking or by one or more undertakings of direct or indirect control of the whole or parts of another undertaking. This can be established by purchase of securities or assets, by contract or by other means.

A major advantage of the EUMR is that it introduces a "one-stop-shop" system, which in principle allows companies to avoid multiple notifications with EU Member States' national competition authorities for the same transaction. When the EU merger filing thresholds are met, one merger regulator has jurisdiction: the EC.[3]

From the outset, exceptions to the one-stop-shop principle were part of the regulatory landscape. They allow concentrations to be referred by one or more Member States to the EC, even when the EUMR notification thresholds are not met. Similarly, even when the EUMR notification thresholds are met, a concentration can be referred back to an EU Member State when certain conditions are met.

One particular referral mechanism has again grabbed the spotlights in the last two years, and will be discussed in more detail later in the chapter (see below "*New developments in jurisdictional assessment or procedure*").

In deciding whether to allow a particular transaction, the EC will verify whether a concentration would significantly impede effective competition in the common market or in a significant part of it, in particular as a result of the creation or strengthening of a dominant position. Parties can offer commitments in order to have the concentration approved by the EC.

The EUMR provides for two phases in the proceedings. If the concentration does not raise any particular concerns, or the parties offer commitments that remedy any concerns, the EC can take a first phase unconditional or conditional clearance decision. Such a decision must be taken within 25 working days following the working day of receipt of a complete notification. This period is increased to 35 working days in case of a conditional clearance decision. When at the end of the first phase investigation the EC finds that the concentration raises serious doubts as to its compatibility with the common market, it will initiate proceedings. This starts the second phase in the merger proceedings. In principle, this second phase lasts 65 working days at most, but will be increased by 15 working days when commitments are offered on the 55th working day or later. In addition, parties may also request for an additional extension of 20 working days at most. In exceptional circumstances, these timelines can be suspended.

In addition, the EC has also introduced a simplified merger procedure, allowing for the parties to provide less information and obtain a short-form decision faster, although the EC is not under a legal obligation to issue a decision sooner when the simplified procedure is applicable. In the last decade, the vast majority of transactions are dealt with under the simplified procedure, ensuring an effective and efficient merger control system at the EU level.

Overview of merger control activity during the last 12 months

In 2022, the EC received and reviewed 371 merger notifications. By comparison, in 2021, 405 merger notifications were received by the EC.

The EC's merger decisions between 2020 and 2022[4]

	2020	2021	2022
Notifications	361	405	371
Decisions under simplified procedure	278	309	291
Phase I clearance	334	384	354
Phase II openings	8	7	8
Conditional clearances after Phase I	13	7	10
Conditional clearances after Phase II	3	4	2
Cases withdrawn after Phase I	7	9	8
Cases withdrawn after Phase II	2	3	4
Prohibitions decisions	0	0	2

As the table above shows, the vast majority of merger notifications were investigated under the simplified procedure. Indeed, 291 decisions were simplified merger cases in 2022 (*i.e.*, 78% of the total decisions rendered by the EC – a similar level has applied since 2018). Furthermore, the number of simplified decisions is likely to increase in view of the simplification of merger control procedures adopted by the EC on 20 April 2023 and into force as of 1 September 2023 (see below "*New developments in jurisdictional assessment or procedure*").

In 2022, the EC issued 10 conditional Phase I decisions (*i.e.*, *Prince/Ferro*, *Parket/Meggitt*, *Ali Group/Welbilt*, *D'Ieteren/PHE*, *Bouygues/Equans*, *Celanese/Dupont Mobility*, *KPS/Real Alloy Europe*, *Philip Morris/Swedish Match*, *SalMar/NTS*, and *ALD/Leaseplan*) and two conditional Phase II decisions (*i.e.*, *Cargotec/Konecranes* and *Meta/Kustomer*).

Compared to 2020 and 2021, where no prohibition decision was issued by the EC, two concentrations were prohibited in 2022.

In *Hyundai Heavy Industries/Daewoo Shipbuilding & Marine Engineering* decision (case M.9343), the EC found that the transaction would have resulted in the creation of a dominant position between the two leading shipbuilders in the worldwide market for the construction of large liquified gas carriers.

In the well-known *Illumina/Grail* decision (case M.10188), the EC found that the transaction raised vertical concerns as it would lead to vertical input foreclosure strategies by Illumina in the market for the development and commercialisation of cancer detection tests based on sequencing technologies. In line with this prohibition decision, the EC has adopted a statement of objections setting out measures to divest Grail and initiated proceedings for a gun-jumping infringement following closing during the Commission's review.

Aside from the two prohibition decisions in 2022, eight transactions were withdrawn in the course of the Phase I investigation and four were withdrawal during the Phase II investigation (*i.e.*, *Greiner/Recticel*, *Kingspan/Trimo*, *Kronospan/Pleiderer Polska*, and *NVIDIA/Arm*).

Among these decisions, it is noteworthy that most merger notifications raised horizontal effects, involving overlaps in sectors such as basic industry, construction, or equipment, and raising concerns about the creation/strengthening of a dominant position (*e.g.*, *Ali Group/Welbilt*, *D'Ieteren/PHE*, *Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering*, *Parket/Meggitt*, *Prince/Ferro*). Even if most merger notifications are still of a horizontal nature, the EC investigated vertical concerns in 2022, raised by complex concentrations in the technology and biotech sectors (e.*g.*, *Illumina/Grail*, *Meta/Kustomer*, *NVIDIA/Arm*) as well as in other sectors (e.g., *KPS/Real Alloy Europe*, *Philip Morris/Swedish Match*).

As for 2023, the EC continues investigating the following Phase II investigations: *Booking/eTraveli* (online travel); *Broadcom/VMWare* (hardware/software); *MOL/OMV* (motor vehicles); *Microsoft Activision* (video game software); and *Vivendi/Lagardère* (media). Also, the EC will continue investigating the *Illumina/Grail* case saga (e.g., gun-jumping charges, divestiture of Grail).

New developments in jurisdictional assessment or procedure

From a procedural and jurisdictional perspective, the following developments are worth highlighting:

<u>a. Adoption of the merger simplification package</u>

As mentioned above, the EC adopted and published a package to simplify the procedures for reviewing concentrations under EUMR on 20 April 2023. This merger simplification package is composed of: (i) a revised Merger Implementing Regulation;[5] (ii) a Notice on Simplified Procedure;[6] and (iii) a Communication on the Transmission of Documents.[7]

To bring significant benefits for businesses and advisers regarding preparatory work and related costs, these new rules aim to streamline and simplify merger review procedures, with a targeted 25% reduction in reporting requirements. The new package will be applicable as of 1 September 2023.

The merger simplification package introduces the following major changes:

- <u>Expansion of the scope for the simplified procedure</u>: As the package keeps the existing categories of transaction that already benefit from the simplified procedure, it introduces two new types of eligible concentration. The EC can review certain concentrations under the simplified procedure even if they do not satisfy the related conditions for such treatment ("flexibility clauses"). Certain cases could qualify for a "super-simplified" procedure which parties can notify directly without pre-notification contacts with the EC. With the aim of clarity, the package also precises the circumstances through which the EC may investigate a case under the normal procedure, with a non-exhaustive list of examples of types of concentration that may be excluded from the simplified procedure.

- Optimisation of the transmission of documents to the Commission: The package streamlines the application and review of both simplified and non-simplified cases. As for the simplified cases, it introduces a new notification form for simplified cases ("tick-the-box" "**Short Form CO**"). As for the non-simplified cases, information requirements are reduced and clarified with a new notification form ("**Form CO**"). Beside these forms, the EC also revised and streamlined the other filings, including the referral request of mergers to or from the EC ("**Form RS**") and the remedy proposal ("**Form RM**"). Finally, the EC now requires notifications to be sent electronically, and companies can use the Qualified Electronic Signatures ("**QES**"). However, the EC will continue to accept notification on paper, if it is agreed that signing documents with QES is not feasible.

b. Enforcement activities regarding merger control

i) Canon/Toshiba Medical Systems Corporation and gun-jumping

One significant jurisdictional development over the last months relates to the *Canon/Toshiba Medical Systems Corporation* and the breach of prior notification requirements and standstill obligations.

In early 2016, Toshiba decided to sell its medical systems business, Toshiba Medical Systems Corporation ("**TMSC**"), in an attempt to quickly raise capital by the end of its 2015 financial year. Following an accelerated bidding process, Canon acquired TMSC, in a bid which included a warehousing scheme involving an interim purchaser buying the business first. Indeed, the transaction involved two stages that allowed Toshiba to record the divestiture of TMSC as a capital contribution in its accounts by 31 March 2016 without transferring control over TMSC to Canon and before merger control clearances were issued in the relevant jurisdictions.

In July 2017, the EC issued a statement of objections alleging an infringement of the EUMR through premature transaction implementation. On 27 June 2019 (Case M.8179), the EC concluded that, through this two-step transaction (*i.e.*, warehousing scheme), Canon failed to comply with the prior notification requirements and the standstill obligations under EUMR.

As a result, Canon was fined EUR 32 million. However, Canon challenged the EC's decision.

By a judgment of 18 May 2022, the General Court of the European Union ("**GCEU**") upheld the EC's decision to fine Canon for partially implementing its acquisition of TMSC prior to receiving clearance under the EUMR. Notably, this judgment is in line with the EC's position on toughening its enforcement of the EUMR's standstill obligation, and no arrangements can be used to circumvent this obligation.

ii) Illumina/Grail and Article 22 EUMR

Another significant jurisdictional development over the last months concerns the *Illumina/Grail* and the application of Article 22 EUMR.

On 21 September 2020, Illumina acquired Grail without notifying the transaction to the EC nor any national competition authorities of Member States, as the thresholds were not met.

Following the announcement by the EC of its new approach to Article 22 EUMR and a letter sent by the EC to Member States informing them of the transaction and inviting them to submit a referral request under this article, the French Competition Authority and other Member States' competition authorities submitted referral requests in March 2021, which were accepted by the EC in April 2021.

As a reminder, Article 22 EUMR provides a referral mechanism whereby one or more Member States may request the EC to examine any transaction insofar as it does not have an EU dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Following these requests, the EC invited Illumina to notify the transaction. Illumina challenged the EC's invitation letter and acceptation decision before the GCEU.

On 13 July 2022 (T-227/21), the GCEU upheld the EC's decision. Indeed, it confirmed the authority of the EC under Article 22 EUMR to examine a transaction that does not have an EU dimension, but which is the subject of a referral request made by a Member State, and even if the transaction is not notifiable in that Member State.

In the end, the judgment introduces a degree of uncertainty given that a transaction that has already been completed does not preclude a Member State from submitting a referral request under Article 22 EUMR.

iii) The Towercast ruling and review of non-notifiable acquisitions

A last case deserving mention is the Towercast ruling that was issued in recent months.

In 2016, the French Competition Authority rejected an abuse of dominant position complaint from Towercast (a French broadcasting services operator) against TDF's (a competitor) acquisition of Itas. Towercast challenged the decision before the French courts, which asked the European Court of Justice ("**ECJ**") for a preliminary ruling.

By a judgment of 16 March 2023 (C-449/21), the ECJ ruled that the acquisition of a target that does not trigger a notification obligation under merger control rules may be subject to a proceeding by national competition authorities and national courts on the basis that the acquisition constitutes an abuse of dominant position according to Article 102 TFEU. Indeed, the ECJ considered that "*although that [EUMR] regulation introduces an ex ante control for concentration operations with a Community dimension, it does not preclude an ex post control of concentration operations that do not meet that threshold*".

As a result, the judgment equips the EC and national competition authorities with another instrument to review below threshold mergers, in addition to the revised application practice of referrals under Article 22 EUMR.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

<u>a. Assessment of likely entry</u>

The horizontal merger guidelines were drafted in 2003 and published in 2004, whereas the vertical merger guidelines were released in 2008. To adhere to the current approach of the EC, one must closely monitor the decision practice. For instance, when looking at "entry", the horizontal merger guidelines define "timely entry" as occurring within a two-year window.[8] The Lear Report on Ex-post Assessment of Merger Control Decisions in Digital Markets, published in June of 2019, argued that this window is too restrictive and "could be extended when dealing with mergers in digital markets".[9] The EC even contemplated five years as a suitable window in its decision in Case M.8677 – *Siemens/Alstom*. In June 2022, in Case M.10431 – *Ali Group / Welbilt*, the EC excluded concerns in one of the markets concerned by the transaction, despite a combined share of 60–70% of the parties and an increment between 5–10%, in view of the prospects of market expansions and the likely role of smaller player on those markets going forward.[10] Therefore, market dynamics can sometimes work in the parties' favour and are not always utilised against them.

<u>b. Impact of sanctions considered in 2022 because of the Ukraine war</u>

The EC considered the impact of the war in Ukraine in several of its merger decisions in 2022, including in case M.10619 – *SNAM/ENI/JV*, where it considered that the international sanctions against Russia, in particular the reduction of imports of natural gas "creates a new dynamic environment in the market".[11]

c. Role of sustainability in merger control

Another relevant trend in merger assessment at the EC level is that sustainability and protecting green innovation competition are becoming important factors. In case M.9938 – *Kingspan Group/Trimo*, the parties abandoned the contemplated transaction in the course of the EC's in-depth investigation. The press statement that the European agency released when it closed its investigation is essentially the only publicly available material regarding the EC's assessment. The press release underscores that both parties are key suppliers of mineral fibre sandwich panels. The EC also explained that the use of these panels in the building sector is to insulate and ultimately create more energy-efficient industrial and commercial structures, being part of the European Green Deal goals. Therefore, the EC concluded that these products must continue to be accessible to clients at reasonable costs.

Key economic appraisal techniques applied, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

In the EU, economic appraisal techniques are applied to assess the potential impacts of mergers on competition and consumer welfare. These techniques consider various factors, including unilateral effects, coordinated effects, and the assessment of vertical and conglomerate mergers.

Additionally, there has been a shift in the evaluation criteria from the traditional Chicago pure consumer welfare benchmark, which focuses solely on price effects, to a broader consumer welfare or even "societal welfare" perspective.

Traditionally, merger assessments primarily focused on the Chicago School's pure consumer welfare benchmark, which centred on price effects. However, there has been a growing recognition of the need to consider a broader range of factors to capture the overall impact on consumer welfare or even societal welfare. This broader perspective takes into account non-price factors such as innovation, quality, choice, and the impact on small and medium-sized enterprises ("**SMEs**") and the wider economy.

More specifically, in recent years, the EU's approach to merger appraisal has emphasised the importance of assessing the potential effects on innovation, dynamic competition, and overall consumer welfare beyond just price considerations. This is also reflected in today's relevance of the GAP test, where the EC now takes into account pre-merger concentration levels; however, the cases are taken on the merits, and the review is based on facts and evidence.[12]

This shift reflects an understanding that mergers can have complex and multifaceted effects on markets and society as a whole, and the economic appraisal techniques are evolving accordingly to capture these broader impacts. This is certainly the case regarding the sustainability aspects.

The EC's Policy Brief from September 2021 outlined the ways in which competition policy can assist and enhance the Green Deal. The brief also considered input from various stakeholders regarding the collaboration between competition rules and sustainability policies.[13]

Recognising consumer preferences for sustainable products, services, and technologies is crucial, both as a distinguishing factor in general and in defining specific markets.

Regarding merger control, the main insights drawn from these contributions are as follows: (1) Special attention needs to be given to "green killer acquisitions", which involve the acquisition of a company involved in green innovation. These acquisitions often go unnoticed due to falling below the usual notification thresholds; (2) it is worth considering a longer time horizon when evaluating the overall social benefits of an acquisition; and (3) the EC should exercise caution when accepting out-of-market efficiencies, taking into account potential implications for competition and sustainability.

This is also reflected in the revision of the market definition.[14] The revision of market definition also seeks to address the challenges posed by potential "killer acquisitions" in innovative and emerging sectors. These acquisitions, which may fall below traditional notification thresholds, can stifle competition and hinder green innovation.

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

Where a proposed concentration is deemed by the EC to give rise to serious competition concerns, the notifying party(ies) may seek to secure a conditional clearance decision by submitting to the EC remedies that would eliminate those concerns.

Remedies can be offered in either phase by submitting the information and documents prescribed by the EC's standardised remedies form (Form RM). Given the time constraints in Phase I, the EC emphasises the importance of submitting remedies proposals in a timely manner. The EC also notes that only limited modifications (such as clarifications, refinements or improvements designed to ensure that the commitments are workable and effective, presented as an immediate response to the result of consultations) will be accepted (per the guidance of the Remedies Notice,[15] paras 82–83). Parties are usually under pressure to give "more" to meet the "clear-cut" threshold required by the EC to alleviate the "serious doubts" of article 6(1)I EUMR. In phase II, the burden to prove the competition concerns is on the EC and the parties need to resolve the established concerns.

The alignment of timing of remedies negotiations in parallel investigations by multiple competition authorities can be challenging for the parties. In the United Kingdom, the Competition and Markets Authority ("**CMA**") will only start negotiating remedies once it has found a substantial lessening of competition in its provisional findings, which comes relatively late in the Phase II investigation. In contrast, the EC may start discussing remedies as early as the pre-notification.

Since the early implementation of the EUMR, it has always been the preference of the EC to accept structural remedies. Article 2 EUMR requires the EC when appraising concentrations to take into account to maintain effective competition in view of "the structure of all the markets concerned (…)". More precisely, in its Notice on remedies, the EC clearly established that it will examine "behavioural promises, only exceptionally in specific circumstances", in particular in conglomerate transactions. This restrictive approach was clearly reaffirmed in Case M.5984 – *Intel/McAfee* (26 January 2011) where the EC indicated that "remedies other than divestiture remedies appear best suited to directly address the concerns raised" (para. 306).

In 2022, the only non-structural remedy accepted by the EC, out of twelve merger cases with remedies, was in Case M. 10262 – *Facebook/Kustomer*, where the notifying party offered access commitments to application programming interfaces ("**APIs**") with a 10-year duration, combined with a monitoring trustee and a fast track and binding dispute resolution mechanism. The other eleven merger cases with remedies concerned divestiture (*i.e.*, exclusively structural), including one crown jewel, five upfront buyers and two hybrid fix-it-first (in Case M.107–1 – *Celanese/Dupont*, Celanese proposed to divest the business to Taro Plast S.p.a., an Italian producer of engineering plastics). However, the EC formalised its conclusions on the purchaser in a separate buyer approval process, and in Case M.10431 – Ali Group/Welbilt, remedies discussions started with the EC in pre-notification, before Ali Group finally offered to divest the entirety of Welbit's global ice-making machine business to a specific purchaser already identified. However, the EC formalised and confirmed again that for the purchaser in a separate buyer approval process, the last two types of remedies must be distinguished. While it may be preferable for the EC that the commitments are fully implemented in advance of a clearance decision, it is more common that such implementation is *ex post*. Hence, there are procedures allowing the EC to accept the notifying party's commitments to implement the remedies; those commitments are then attached to the EC's Phase I or Phase II clearance decision as conditions or obligations.

Fix-it-first means that the parties identify a buyer for the divestment business and enter into a legally binding agreement with the purchaser during the merger investigation. The EC will take the agreement with that purchaser into account in its clearance decision, and no further approval will be required post clearance. Pure "fix-it-first" solutions are rare, while hybrid "fix-it-first" solutions become more frequent.

It is worth mentioning that in two 2022 cases, structural remedies were accepted by the EC to address non-horizontal concerns (Case M.10702 – *KPS/Real Alloy Europe*, and Case M.10792 – *Philip Morris/Swedish Match*).

The level of cooperation between competition authorities with respect to remedies has proven to be limited, in particular between the CMA and the EC, creating a new challenge for parties. In 2022, the merger of equals between Cargotec and Konecranes was conditionally cleared by the EC, while blocked by the CMA. The proposed remedies to both competition authorities would have involved carving out packages of assets from within each of their existing businesses, which could then be sold as a new combined business. While these proposed commitments were validated by the market test of the EC, the CMA's market enquiry found that such commitment lacked important capabilities, so would not enable whoever bought them to compete as strongly as the merging businesses.

Key policy developments

The key developments in EU merger policy generally focus on enhancing effectiveness, transparency, and addressing emerging challenges in the digital economy. Looking ahead, mergers will face closer scrutiny as various developments unfold. Below, we explore some general trends and key aspects of EU merger policy:

a. Digital Markets Act ("**DMA**")

The EC may expand its referral policy under the DMA, potentially including more transactions for review.

Furthermore, finalisation of the revision of the market definition notice is expected in the third quarter of 2023 (see below).[16]

b. Foreign Subsidies Regulation ("**FSR**")

Starting from autumn 2023, investors should be prepared for the relevance of the FSR in transactions.

The FSR came into effect on 12 January 2023 in the EU. It aims to address distortions caused by foreign subsidies in the EU's internal market and ensure fair competition. The FSR was proposed by the EC and adopted through the ordinary legislative procedure by the Parliament and the Council.[17]

The FSR introduces three main tools. Firstly, a notification-based tool allows the EC to investigate concentrations and public procurements involving financial contributions from non-EU Member States above certain thresholds. Parties must notify such contributions, and the EC can impose measures if distortive subsidies are found. Secondly, a general investigation tool enables the EC to initiate investigations on its own for various market situations, including smaller transactions and greenfield investments. Finally, the FSR provides redressive measures or the acceptance of commitments to address distortive subsidies, such as divestment of assets or granting access to infrastructure.[18]

Overall, the FSR closes a regulatory gap by subjecting non-EU subsidies to scrutiny and ensuring a level playing field for companies operating in the EU internal market. It empowers the EC to investigate and take necessary measures to counter the negative effects of foreign subsidies, thus promoting fair competition and maintaining the integrity of the EU's internal market.[19]

Important dates to take into account:
- On **12 July 2023**, the EC can start *ex officio* investigations.
- On **12 October 2023**, the notification obligation for concentrations and public procurement above certain thresholds starts to apply.

<u>c. Consumer preferences for more sustainable products, services, and technology to be increasingly factored into competitive assessment</u>

In recent years, there has been a growing emphasis on sustainability and environmental considerations in various aspects of society, including consumer preferences. Consumers are increasingly seeking products and services that align with their values and contribute to sustainable practices. This shift in consumer behaviour has significant implications for merger control and competition assessments.

To meet societal demands, competition authorities and regulatory bodies are recognising the importance of considering sustainability factors in merger reviews, e.g. revision of the market definition, and green deal and mergers. This involves assessing the potential impact of mergers on environmental sustainability, such as evaluating whether a merger could lead to a reduction in sustainable options for consumers or hinder the development of environmentally friendly technologies. Factors like carbon footprint, resource efficiency, and sustainable production practices are being considered to ensure that mergers do not result in negative outcomes for sustainability.

<u>d. Continued need to assess non-price effects of mergers – e.g., loss of innovation</u>

While traditional merger assessments primarily focused on price effects, there is an increasing recognition of the importance of considering non-price effects as well. Non-price effects refer to the impact of mergers on factors other than price, such as innovation, product quality, variety, and consumer choice.

Innovation is a critical driver of economic growth and competition. Mergers have the potential to impact innovation by reducing incentives for research and development or by eliminating competitive pressures that drive companies to innovate. Therefore, merger control authorities must carefully evaluate the potential loss of innovation resulting from mergers, particularly in industries and sectors where innovation is a key competitive factor.

Assessing non-price effects requires a broader perspective and a deeper understanding of the competitive dynamics within industries. Competition authorities are increasingly considering factors such as the merging parties' research and development activities, their historical record of innovation, the competitive landscape, and the potential for future innovation when evaluating merger cases.[20]

This is also reflected in the adoption of the new guidance paper last year in March regarding Article 22 EUMR. The Guidance Paper identifies transactions that are suitable for referral under Article 22 EUMR. These include cases where the turnover of one party does not accurately reflect its competitive potential. The EC may consider factors such as the high value of consideration received by the seller compared to the target's current turnover. In summary, the Guidance Paper outlines criteria for Article 22 EUMR referral, taking into account the discrepancy between turnover and competitive potential. It provides examples of transactions involving start-ups, innovators, competitive forces, and entities with valuable assets or key inputs.

e. Continued attention to nascent/potential competition issues arising from transactions in the digital economy and beyond

The digital economy presents unique challenges and considerations for merger control. The rapid pace of technological advancements and the increasing importance of digital platforms and ecosystems have led to the emergence of new competitive dynamics and potential competition concerns.

In the digital sector, nascent or potential competition refers to situations where a merging party may not be a current competitor but has the potential to become one in the future. This can arise from the presence of innovative startups or companies with disruptive business models that could challenge incumbent firms. In such cases, mergers could eliminate potential competition and harm long-term innovation and consumer welfare.

Competition authorities are paying close attention to these potential competition issues in the digital sphere and beyond. They assess whether a merger could foreclose future competition or harm the development of innovative technologies or business models. The analysis includes factors such as the merging parties' market positions, the competitive landscape, barriers to entry and expansion, and the potential impact on innovation and consumer choice.[21]

Addressing these nascent competition concerns requires a forward-looking approach and an understanding of the dynamic nature of digital markets. Competition authorities are adapting their methodologies and frameworks to effectively evaluate the potential impact of mergers on competition in the digital economy and ensure that market structures remain conducive to innovation and consumer welfare.

Reform proposals

Of particular importance are the expected reforms to the approach on market definition. The final version of a revised market definition notice is expected in the third quarter of 2023.[22]

The review process, initiated in April 2020, involved gathering feedback from stakeholders, evaluating the current Notice's relevance, and considering updates based on the Commission's practice, EU courts' case law, and evolving market realities. Over 100 stakeholders contributed their views, which have been taken into account in the draft text presented for consultation.

The proposed changes in the revised Market Definition Notice aim to provide clearer guidance, transparency, and legal certainty for businesses, thereby facilitating compliance and improving enforcement by the Commission and National Competition Authorities. The changes include:

1. Explaining the principles and application of market definition in the context of competition rules.
2. Placing greater emphasis on non-price elements like innovation and product/service quality.

3. Offering clarifications on forward-looking market definition, particularly in markets undergoing structural transitions.
4. Introducing new guidance on market definition in digital markets, such as multi-sided markets and digital ecosystems.
5. Establishing principles for innovation-intensive markets where competition revolves around innovation.
6. Providing more guidance on geographic market definition, including global markets, imports, and local markets defined by catchment areas.
7. Clarifying quantitative techniques used for market definition, such as the small but significant and non-transitory increase in price ("**SSNIP**") test.
8. Expanding guidance on sources of evidence and their probative value.

* * *

Endnotes

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2. Article 26(1) Reg 139/2004.
3. Article 21(3) EUMR.
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Hendrik Viaene
Tel: +32 473 43 25 48 / Email: hviaene@mwe.com
Hendrik Viaene is the managing partner of McDermott Will & Emery's Brussels office. His predominant focuses are European and Belgian competition law (merger control, cartels and abuse of dominant position), state aid and EU internal market provisions. He regularly assists clients before the Court of Justice, the General Court, the European Commission, national courts and administrative authorities. Mr. Viaene has published various contributions relating to the application of European and Belgian competition law. He is an editor of the EU Competition Law Handbook. He also teaches competition law in the framework of the Brussels Bar Association.

Stéphane Dionnet
Tel: +32 2 230 50 59 / Email: sdionnet@mwe.com
Stéphane Dionnet has over 20 years of experience practicing international competition law, and has experience liaising with competition authorities in the European Union, United States and Asia. Stéphane has advised global corporations on how to navigate complex multijurisdictional merger control matters. He has represented clients in numerous cartel investigations and has also successfully assisted companies in obtaining conditional immunity from the European Commission and other competition law agencies in and outside the European Union.
Stéphane has experience across a wide range of sectors including consumer products, energy, entertainment, financial services, technology, pharmaceuticals, retail, e-commerce and telecommunications.
Earlier in his career, Stéphane worked for three years within the "Merger Network" of the European Commission's Directorate-General for Competition. He was case-handler in high-profile transactions, including phases 1 and 2 with remedies.

Mélissa Hui
Tel: +32 2 282 35 61 / Email: mhui@mwe.com
Mélissa Hui focuses her practice on EU competition and antitrust matters.

McDermott Will & Emery

Avenue des Nerviens 9-31, 1040 Brussels, Belgium
Tel: +32 2 230 50 59 / URL: www.mwe.com