The Legal 500 & The In-House Lawyer
Comparative Legal Guide
EU: Merger Control (4th edition)

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in EU.

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control-4th-edition

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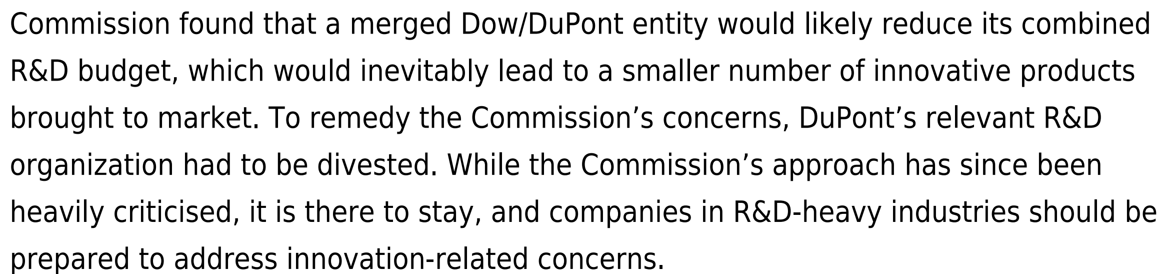
1. Overview

Commissioner Margrethe Vestager has left her mark on European merger control enforcement. Her guiding principle of "fairness" is also reflected in how the European Commission has applied merger control rules over the last five years.

On substance, a novel theory of harm in relation to effects of horizontal mergers on innovation has emerged and will be remembered as one of the important policy changes championed by Commissioner Vestager. In Dow/DuPont and Bayer/Monsanto, the Commission did not focus on specific product overlaps (even if only pipeline-to-pipeline), but instead considered the impact on innovation "more broadly": the



Commission found that a merged Dow/DuPont entity would likely reduce its combined R&D budget, which would inevitably lead to a smaller number of innovative products brought to market. To remedy the Commission’s concerns, DuPont’s relevant R&D organization had to be divested. While the Commission’s approach has since been heavily criticised, it is there to stay, and companies in R&D-heavy industries should be prepared to address innovation-related concerns.

Another novelty is the enforcement of procedural rules in relation to gun jumping and the provision of misleading information during the notification process. In 2014, the Commission fined Marine Harvest EUR 20 million for acquiring a 48% shareholding without notifying the Commission; the Commission found that the large minority shareholding already conferred de facto control at the shareholders’ meeting of the target. In April 2018, the Commission fined Altice EUR 125 million for taking charge of the target company before receiving merger control clearance. Additionally, in June 2019, the Commission fined Canon EUR 28 million for partially implementing its acquisition of Toshiba Medical before notification and merger control approval by exercising decisive influence over Toshiba Medical while the latter was legally controlled by an independent business. Canon appealed the Commission’s decision at the General Court of the European Union on 9 September 2019. The forthcoming judgement should provide much-awaited clarification on this topic. While gun jumping may have played a subordinated role in mergers in the past, these cases certainly bring the topic into the limelight.

In May 2017, the Commission fined Facebook EUR 110 million for providing incorrect information during the merger control process of its acquisition of WhatsApp; at the time, Facebook stated that it would be unable to establish reliable automated matching between Facebook users’ accounts and WhatsApp users’ accounts, although it did exactly that two years later. The Commission argued that the technical possibility of matching accounts already existed at the time of the notification, which Facebook acknowledged. Furthermore, in April 2019, the Commission fined General Electric EUR 52 million for providing incorrect information in its acquisition of LM Wind. Merck KGaA’s acquisition of Sigma-Aldrich is still under investigation by the Commission. These cases show that the provision of accurate information during the notification process will be watched carefully by the Commission. While this is not objectionable as such, the Commission should bear in mind that the sheer amount of information requested is becoming increasingly unmanageable for notifying parties: on top of the

notification form (which can be several hundred pages long, with thousands of annexed documents and market data), the Commission has copied the US-style 2nd request approach in Phase II cases, resulting in the production of millions of internal documents.

Looking into the future, the topic of "common ownership" – whereby investors hold minority stakes in multiple companies active within the same industry – has attracted the Commission's interest. Under the current European merger control rules, only the acquisition of (joint or sole) control may trigger a notification requirement. In February 2018, Commissioner Vestager said that the Commission is carefully looking into the matter and has begun investigating whether common ownership causes problems or not. In addition, the European Parliament, in its Annual Report on Competition Policy of March 2018, called upon the Commission to draw up a report on the effects of common ownership on the European markets. We will see if this will lead to a change of the European merger control regulation.

In July 2019, after the European elections in May 2019, the European Parliament elected Ursula von der Leyen as the new President of the European Commission. Von der Leyen will assume office in November 2019, which will also see the arrival of a new College of Commissioners. The European Commission's focus on digital giants is set to sharpen further after Margrethe Vestager's nomination for a second term as Competition Commissioner (assuming she is confirmed by the European Parliament and the Council). Vestager's portfolio in the new Commission will expand considerably, as she is expected to take on one of the most visible and senior roles in the new Commission, being responsible for coordinating the Commission's wider digital policy and making Europe fit for the digital age. Digital businesses (and online platforms in particular) can expect regulatory pressure to intensify over the next five years, as the EU is eager to claim global leadership in this sector.

2. Is notification compulsory or voluntary?

A notification is mandatory if two conditions are met: (1) the transaction leads to a change of control (e.g. by acquisition of sole or joint control) or a change in the quality of control (e.g. from joint to sole control), and (2) the turnover thresholds set out in the

European merger control regulation (“EUMR”) are met.

3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

Yes, the EUMR imposes a “stand-still obligation” which prohibits the parties from closing a transaction prior to receiving clearance from the Commission. As described above, the Commission is increasingly vigilant that companies do not breach this obligation.

In a public bid, the purchaser is allowed to acquire the outstanding shares, provided the Commission is informed without delay and the shares are not voted for until clearance has been granted.
The Commission can also grant a derogation from the stand-still obligation. Such derogations are granted very rarely, when it can be proved that the harm to the companies (or to a third party) of waiting until clearance is greater than any potential negative effects on competition.

4. **What are the conditions of the test for control?**

The EUMR applies to transactions which lead to a change of control (or change in the quality of control) over a company on a lasting basis. Control is exercised “positively” when a parent company enjoys the power to determine the strategic commercial decisions of the target by, for example, having sufficient votes in the decision-making bodies to pass all crucial decisions without the need to be supported by potential other parent companies. Control can also be exercise “negatively”, which happens when one shareholder is able to veto strategic decisions in the target, but does not have the power, on its own, to impose such decisions. Two or more parent companies can “jointly control” a target when they both have the power to exercise decisive influence over the target (either positively or negatively).

Control is also possible on a “de facto” basis when a minority shareholder is likely to represent a majority of registered votes at the shareholders' meetings, mainly because shareholder presence at past meetings was low enough for the minority shareholding to actually amount to a majority of the registered votes.

5. What are the conditions on minority interest in your jurisdiction?

Minority shareholdings are not currently caught at the EU level, unless they confer (joint) control. The Commission has in the past examined this issue and considered proposing a change to the EUMR to be able to review acquisitions of minority shareholdings. The Commission has not formulated concrete proposals, as Commissioner Vestager recognized the excessive burden such an expansion of jurisdiction would represent for companies.
However, the Commission is currently investigating whether “common ownership” may cause competition concerns which merit intervention.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?

A concentration is notifiable to the Commission if it has “a Community dimension”, which exists where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion; and
(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,
(c) unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

OR
(a) the combined aggregate worldwide turnover of all the undertakings concerned is

more than EUR 2.5 billion;
(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,
(e) unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

The EUMR’s jurisdictional thresholds are based on turnover. Typically, the turnover for the last financial year for which audited accounts are available is taken into account.

Turnover is generally allocated to the place where the customer is located, which is normally the location where competition with alternative suppliers takes place and where the contractual obligations are performed, i.e. where the service is actually provided and the product is actually delivered. There are a number of exceptions for certain industries, e.g. transport of passengers, mining and commodity trading, credit and financial institutions.

8. Is there a particular exchange rate required to be used for turnover thresholds and asset values?

Typically, the average yearly European Central Bank exchange rate for the financial year to which the provided turnover information refers should be used.

9. **Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business?**

Acquisitions of joint control over an existing business or the setting up of a newly established joint venture are notifiable if the general criteria mentioned above are met. There are no specific thresholds for JVs; each of the jointly-controlling parent companies is viewed individually as the "undertakings concerned" and, if joint control is acquired over an existing company, then the joint venture itself is also viewed as an "undertaking concerned". As a result, JVs with no actual or foreseeable effects within the EEA might be subject to mandatory EU notification, as the thresholds can be met solely on the basis of two parents' turnover – irrespective of the geographic location of the JV or the size of its activities and assets.

In addition, under the EUMR, only so-called "full-function" JVs are notifiable to the European Commission. These are the joint ventures that are performing, on a lasting basis, all the functions of an autonomous economic entity on the market. A "full-function" JV needs to have sufficient resources to operate independently on the market and not just as an annex to its parent companies by, for example, manufacturing solely for its parent companies.

If the EUMR does not apply because a JV is not full-function, the creation of the JV may still be notifiable under national merger control rules, as not all national rules apply the concept of full-functionality.

10. **In relation to "foreign-to-foreign" mergers, do the jurisdictional thresholds vary?**

Companies meeting the EU thresholds for aggregate worldwide turnover must notify their merger transactions to the Commission whether or not the parties have direct connections to the EU.

11. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

N/A

12. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**

The EUMR requires that the Commission examine whether a transaction would cause a "significant impediment to effective competition" (SIEC test). The adoption of this test in 2004 has led to a more effects-based approach to merger control review by the Commission.

13. **Are non-competitive factors relevant?**

The EUMR does not stipulate that factors unrelated to competition be considered. During its 2017/2018 investigation into Bayer's acquisition of Monsanto, the Commission had received numerous third-party communications expressing concerns relating to non-competition issues, such as European and national rules on food safety, consumer protection, the environment, and the climate. In its March 2018 press release, the Commission stressed that such concerns cannot form the basis of a merger assessment.

The Commission's prohibition of Siemens' proposed acquisition of Alstom in February 2019 demonstrates as well that factors unrelated to competition are not considered relevant. Siemens and Alstom's plan to merge with the view of establishing a European rail champion that would be able to take on the Chinese competition was not taken into consideration by the Commission, which decided to stick to the established merger rules despite political pressure from some EU Member States.

14. Are ancillary restraints covered by the authority's clearance decision?

Yes. The EUMR provides that a decision declaring a concentration compatible with the common market shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration. The most common ancillary restraints that are covered by this provision include non-compete clauses, licence agreements, and purchase and supply obligations. The Commission notice on restrictions directly related and necessary to concentrations (2005/C 56/03) covers the details of this issue.

15. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

There is no deadline to file, but the transaction must be notified and clearance must be obtained prior to the implementation of the transaction.

16. What is the earliest time or stage in the transaction at which a notification can be made?

Concentrations should typically be notified to the Commission following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

However, notifications may also be made earlier where the companies demonstrate a good faith intention to conclude an agreement. Typically, the Commission would accept notifications on the basis of an agreed term sheet or similar document showing advanced negotiations. A public bid can be notified once an intention to make a bid has been publicly announced.

17. What is the basic timetable for the authority’s review?

Phase I: 25 working days from receipt of complete notification, which can be extended to 35 working days if remedies are offered or a referral request is received from national competition authorities.

Phase II: 90 working days from the day that follows the decision to carry out an in-depth inquiry (6(1)(c) decision). This period is extended by 15 working days if the companies offered remedies after the 54th working day following the initiation of the in-depth inquiry.
The Phase II review period can be extended by a further 20 working days if requested by the notifying parties within 15 days of the opening of the in-depth investigation. Likewise, the Commission may extend the review period with the agreement of the notifying parties at any time following the initiation of proceedings, but the total combined duration of all extensions should not exceed 20 working days.

18. Under what circumstances the basic timetable may be extended, reset or frozen?

In addition to the extensions described above, the Commission can also “stop the clock” and effectively freeze the timetable for the review of the transaction. The Commission can do so if it requested the provision of information from the parties with a formal decision and the parties failed to provide it. The Commission can also stop the clock “owing to circumstances for which one of the undertakings involved in the concentration is responsible” or to order an inspection pursuant to Article 13 EUMR.

The parties can informally suggest “stop the clock” provisions if they would like to give the Commission more time to review a particular aspect of the transaction (e.g.

proposed remedies package) without any time pressure. The parties would do that if they believed that granting the Commission more time in the short term would result in a shorter review (or less burdensome remedies) in the long term.

19. Are there any circumstances in which the review timetable can be shortened?

Due to internal decision-making procedures, it is not possible to shorten the 25-working-day review period significantly. If merger-specific reasons for a swift clearance exist and the case is simple, the Commission may be able to shorten the process by a few working days.

20. Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?

In the case of acquisition of sole control, the acquirer alone must notify the transaction. In the case of acquisition of joint control, the notification must be jointly submitted by the undertakings acquiring joint control.

21. What information is required in the filing form?

Transactions must be notified using the standard Form CO or, in the case of transactions with less potential for any competition concerns, the Short Form CO. Their content is set out in Implementing Regulation 802/2004. Both forms require the provision of information on the transaction and the parties' activities, definitions of the relevant markets, and a detailed description of the parties' presence in any overlapping or vertically-related markets.

If the overlaps between the parties have a combined market share of 20% or above, a standard Form CO will have to be submitted. The additional information that needs to be submitted with this form relates to the competitive situation in relation to each of the affected markets, including information on the structure of demand, product differentiations, closeness of competition, market entry and exits, R&D, cooperative

agreements, etc.

22. Which supporting documents, if any, must be filed with the authority?

This depends largely on the complexity of the transaction. The EUMR requires submitting all documents which relate to the transaction and which have been prepared for or by senior management--typically, the deal documentation and various reports supporting the market estimates. A full Form CO needs to provide the contact details of competitors, customers and trade associations so that the Commission may reach out to them and ask for their views.

In the last few years, it has become standard practice in Phase II cases to require the production of all internal documents (including emails) for a large number of businesspeople. In larger and more complicated transactions, this can result in the production of millions of documents.

23. Is there a filing fee? If so, please specify the amount in local currency.

No.

24. Is there a public announcement that a notification has been filed?

High-level information about new notifications is published both on the Commission's website and the EU Official Journal (which is also available online). In the Form CO, the Parties have to propose the language to be used for this purpose.

Pre-notification discussions are not made public and the Commission protects

confidentiality of such discussions. We know of no instances where this confidentiality has been breached.

25. Does the authority seek or invite the views of third parties?

The Commission will proactively contact the Parties' competitors, customers and trade associations. In Phase II proceedings, the Commission will publicly invite third parties to submit their comments on the transaction.

26. What information may be published by the authority or made available to third parties?

The Commission will only share with the public a summary of the notification form drafted by the notifying party itself. The public will eventually have access to the non-confidential final Commission decision. The parties have the possibility to claim confidentiality over some of the information provided to the Commission and the Commission will not share such information with the public at any stage of the proceedings without the parties' prior permission. This information will be redacted from the final decision.

Third parties demonstrating a "sufficient interest" can apply in writing with the Commission to be granted the status of "interested third party". Such parties will get access to additional information with the view of informing them of the "nature and subject matter of the procedure". However, the information shared with interested third parties will also be redacted to reflect any confidentiality claims.

27. Does the authority cooperate with antitrust authorities in other jurisdictions?

The Commission works closely with European NCAs through the ECN (European

Competition Network), which aims to ensure the effective and consistent application of European competition rules. The Commission also works with the ICN (International Competition Network) to address practical antitrust/merger enforcement and policy issues globally.

The Commission has also entered into collaboration agreements with non-EU authorities, such as Brazil, Canada, China, India, Japan, South Korea, Mexico, Russia, South Africa, Switzerland and the US. The purpose of these agreements is to facilitate cooperation between the authorities on general issues, but also to exchange information on specific transactions, though the Commission can only share information with non-EU authorities if the parties give the Commission a special waiver to do so.

28. What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?

The remedies have to make the transaction compatible with the market (i.e., remove any significant impediments to effective competition), either in the form of behavioural, structural, or quasi-structural remedies (e.g., offering access to a network or other infrastructure) or changes to existing contractual arrangements. For policy reasons, the Commission typically prefers structural or quasi-structural remedies rather than behavioural remedies, which are more difficult to monitor.

29. What procedure applies in the event that remedies are required in order to secure clearance?

Remedies can be proposed during the Phase I investigation to avoid a Phase II, or during the Phase II investigation to avoid a prohibition of the transaction.

Parties must submit their proposed remedies within 20 working days from the notification date in a Phase I proceeding, and within 65 working days after the opening

of Phase II. The timeline for the review gets extended if the Parties offer remedies (after the 54th day in Phase II).

If the European Commission has concerns that a proposed transaction threatens to significantly impede effective competition, clearance will most likely be given only if the Parties divest a part of their business. The divested activities must consist of a viable business that can compete effectively with the merged entity on a lasting basis. Furthermore, the divested activities must be transferred to a suitable independent purchaser possessing the financial resources, proven relevant expertise, and the incentive and ability to maintain and develop the divested business.

30. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

The Commission has powers to impose fines up to 10% of aggregate worldwide turnover on the parties if they intentionally or negligently fail to notify a merger with an EU dimension, irrespective of whether clearance is ultimately obtained. The EC and national competition authorities have recently increased the prosecution of such breaches. As mentioned above, the Commission fined Canon EUR 28 million in June 2019 for partially implementing its acquisition of Toshiba Medical before notification and merger control approval.

31. What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?

The Commission may impose a fine of up to 1% of the aggregated turnover of companies for intentionally or negligently providing incorrect or misleading information to the Commission. This was most recently put into practice in April 2019, when the Commission fined General Electric EUR 52 million for providing incorrect information during the Commission’s investigation of GE’s planned acquisition of LM Wind. In May 2017, the Commission had also fined Facebook €110 million for providing misleading information during the review of its acquisition of WhatsApp.

32. **Can the authority’s decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?**

Yes. The Parties can appeal the final clearance or blocking decision to the General Court of the European Union within two months after the decision. Third parties can also lodge an appeal if they can show that the decision has a direct and individual impact on them.

33. **What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?**

See the overview.

34. **Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

There are currently no planned reforms of the EUMR. As mentioned above, the Commission is reviewing the issues raised by common ownership of minority shareholdings in companies active in the same industry.