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Competition (Private Company Acquisitions): Global Toolkit

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A toolkit providing an overview of the key competition issues to consider on a cross-border acquisition. Main focus on EU and US anti-trust laws. It also links out to further jurisdiction-specific resources on key competition issues in the context of private acquisitions.

An acquisition often has an effect on competition in the relevant markets in which the target business or buyer operates. Where the effect on competition is significant, the acquisition may be prohibited by national or supra-national (EU) merger regulation, or at least made subject to structural or behavioural undertakings.

International acquisitions can be subject to concurrent regulation under any number of different jurisdictions in which the transaction will have an impact. Within the EU, the situation may be simplified by the exclusive jurisdiction which, subject to limited exceptions, Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (EUMR) gives to the European Commission (the Commission) over certain large acquisitions.

In some circumstances where merger control laws do not apply, acquisitions may potentially be subject to other competition rules against anti-competitive agreements or the abuse of market dominance.

This Note considers:

- EU merger control.
- US merger control.
- Key aspects of national merger control and how to handle multiple notifications.
- This note does not consider filing requirements that may be required under rules relating to screening of transactions on national security or foreign investment grounds, which have proliferated in recent years. It also does not cover filing requirements that will become applicable in 2023 and 2024 under the EU Foreign Subsidies Regulation and the EU Digital Markets Act (Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector, OJ 2022 L265/1).

EU Merger Control

Parties to an acquisition that is potentially subject to EU merger control need to address the following questions:

- In what circumstances will the Commission have jurisdiction to regulate the merger?
- What are the substantive tests applied by the Commission?
- What steps are involved in the notification and investigation procedure?
- What are the Commission's powers to impose penalties and what are the parties' rights to appeal?

The Commission's Jurisdiction

The Treaty on the Functioning of the European Union (TFEU) makes no express provision for the regulation of mergers, although some residual authority lies in Articles 101 and 102 of the TFEU. The EUMR fills that gap and provides a one-stop shop, subject to certain limited exceptions, for the regulation of concentrations within the European Economic Area (EEA) (the EU, Norway, Iceland and Liechtenstein).

An acquisition will be caught by the EUMR if it amounts to a concentration with an EU dimension. An EU dimension is determined by reference to turnover thresholds (see below, EU Dimension). If the EUMR applies, the acquisition must be notified by way of a Form CO to the Directorate-General for Competition (DG Comp).

Implementation of the acquisition cannot occur until the Commission has, or is deemed to have, given its approval. As discussed below, the Commission may also grant a derogation from this suspension in certain limited circumstances. There is also a restricted exception in the case of public bids and creeping takeovers.

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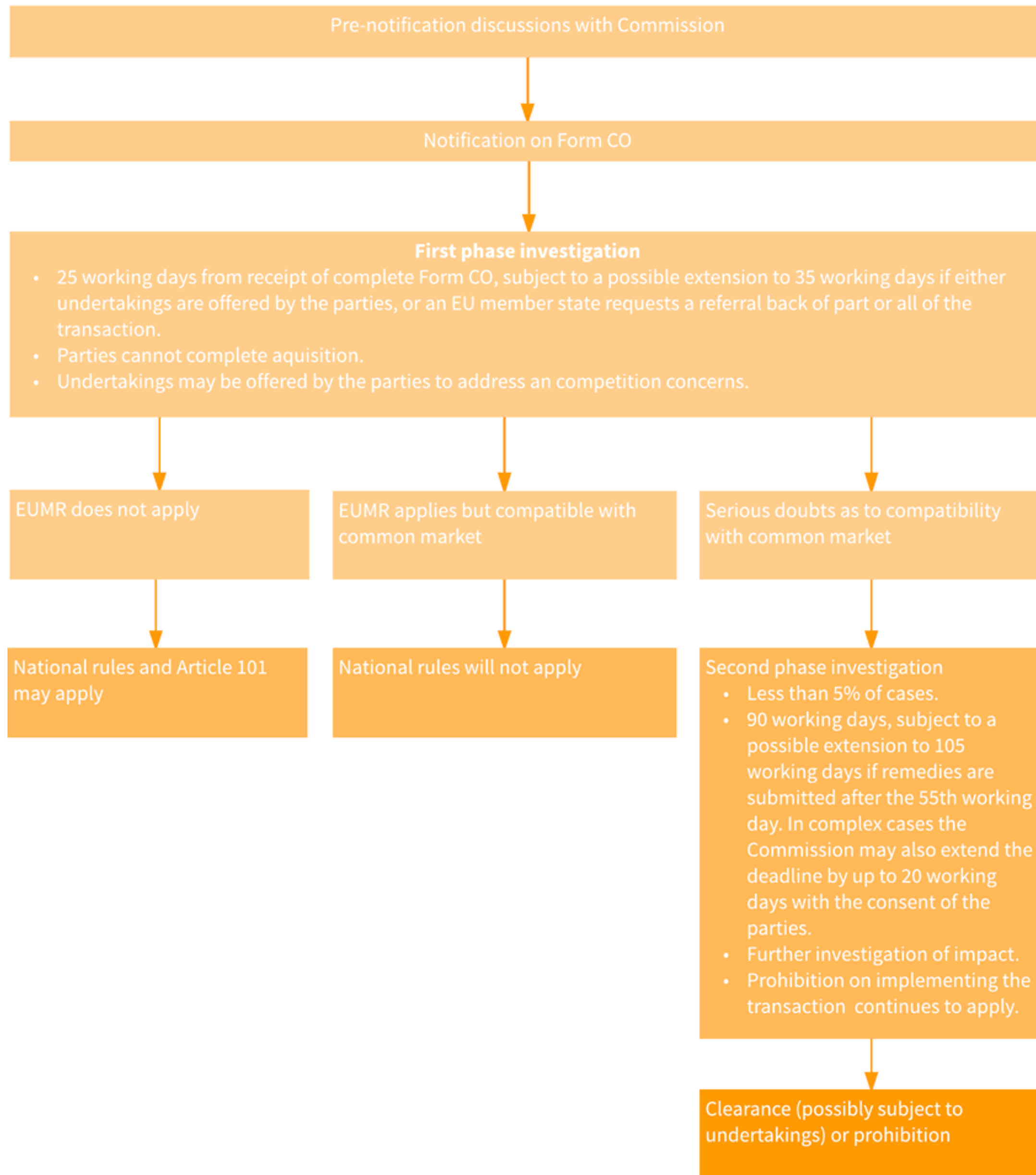
The Commission will investigate whether the acquisition will significantly impede effective competition within the common market (or a substantial part of it), in particular as a result of the creation or strengthening of dominance. If the Commission finds that there is the possibility of anti-competitive effects of that nature, it has the power to block the acquisition, impose conditions on the transaction or order divestiture. (See box, EUMR: procedure.)

EUMR: procedure



One-Stop Shop

Subject to a few exceptions, jurisdiction over mergers that fall within the EUMR belongs exclusively (and compulsorily) within the EU to the Commission and falls outside the scope of national regulators in the affected member states.

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The limited exceptions to this include the following situations:

- Pre-notification referrals. There are two types of pre-notification referrals:
  - before notification, the notifying undertaking(s) may make a reasoned request for a referral, in whole or part, from the Commission to a member state where it can show that the merger would significantly affect competition in a distinct market (Article 4(4), EUMR). The relevant member state has 15 working days in which to respond to this request (failing which it is deemed to have agreed). Unless the member state disagrees, the Commission must decide, within 25 days of receiving the request, whether a distinct market exists and, if so, whether to refer the merger. If the merger is referred, national competition laws of the relevant member state will apply. As at December 2022, a total of 209 cases have been referred in full or in part back to a member state under this procedure. One referral request has been refused (Case Comp/M.10438 - MOL/OMV Slovenija), because the national competition authority opposed the referral;
  - if a merger does not meet the EUMR thresholds but is notifiable under applicable national competition laws in three or more member states, the notifying undertaking(s) may, before making such notifications, make a reasoned request for it to be examined by the Commission (Article 4(5), EUMR). If none of the competent member states have disagreed with the referral request within 15 working days of its receipt, the Commission will exercise jurisdiction over the merger and the EUMR will apply exclusively. As at December 2022, a total of 410 referral requests under this procedure have been accepted and seven such requests have been refused.
- Post-notification referrals. Within 15 working days of receiving a copy of any notification, a member state may request that the matter be referred back in whole or part for consideration under national merger law if it can demonstrate that a market affected by the merger is a distinct market within that member state (Article 9, EUMR). In those cases:
  - provided that the member state(s) can demonstrate that the merger threatens to affect significantly competition in a distinct market, the Commission has a discretion to refer the merger in whole or in part to some or all of the applicants (as occurred in the proposed acquisition by Thomas Cook plc of control of the travel business of Co-operative Group Limited and Midlands Co-operative Society Limited (Case Comp/M.5996));
  - if, however, the member state(s) can demonstrate that the distinct market does not represent a substantial part of the common market, the Commission must accede to the member state's request (this happened, for example, with the proposed acquisition by Carrefour of Ahold Polska, a Polish consumer goods retailer (Case Comp/M.4522)).

  As at December 2022, a total of 99 cases have been referred in full or in part back to a member state under this procedure and 15 such requests have been refused.

Further exceptions to the Commission's exclusive jurisdiction include situations where:

- A member state can show a legitimate interest (which does not relate to competition) in exercising jurisdiction over the merger (for example, reasons of public security, or plurality of the media or prudential rules (Article 21(4), EUMR)).
- Matters of national security are at issue (Article 346, TFEU).

There is also scope for member state(s) to request, within 15 working days of receiving a notification, that the Commission examines a merger where the EUMR thresholds are not met (Article 22, EUMR). In essence, this allows for the Commission to investigate transactions which the member state(s) consider that the Commission is better placed to assess. This request may either be made by the member state(s) on their own initiative or in response to an invitation by the Commission. As at December 2022, a total of 41 referrals up to the Commission under this procedure have been made successfully and four have been refused. In March 2021, the Commission published new guidance reversing its previous policy of only accepting Article 22 referrals if the member state that initiated the referral had jurisdiction to review the transaction under its national merger control regime. Consequently, the Commission will, in certain circumstances, accept a referral even if the transaction is not notifiable under the national merger control regimes of any member state. In April 2021 it applied that new policy to accept a referral of Illumina's acquisition of GRAIL (Case Comp/M.10188), which it subsequently prohibited in September 2022.

For further guidance on case referrals please see the Commission Notice on case referral in respect of concentrations (OJ 2005, C56/2) and its guidance on the application of the referral mechanism set out in Article 22 (OJ 2021 C113/6).

What Is a Concentration?

Concentration is widely defined. As well as the obvious situation of a full merger between two or more undertakings, it extends to any situation where

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an undertaking, either alone or in conjunction with others, acquires direct or indirect control of the whole or part of another.

Control is loosely defined and goes beyond legal control to cover any situation where an undertaking has ownership or other rights (contractual or otherwise) which either separately or jointly confer the possibility of exercising decisive influence over another undertaking. Decisive influence will arise for example where there are contractual veto rights over strategic commercial decisions of the target and, in particular, approval of the budget, business plan and appointment of senior management. The acquisition of an equity stake of as little as 20% has been found to confer control in certain situations where, for example, the remainder of the shares are widely held.

The vast majority of concentrations that have been assessed by the Commission under the EUMR have involved equity transactions. However, parties may need to determine whether an acquisition of assets will result in a concentration. Guidance on this question is provided in the Commission's Consolidated Jurisdictional Notice (OJ 2008 C95/01). In relation to the notion of a concentration, the Commission's Consolidated Jurisdictional Notice refers to the acquisition of control of assets and states that:

> "The object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute a whole or part of an undertaking, in other words a business with a market presence, to which a market turnover can be clearly attributed" (paragraph 24).

From this statement, it appears that where a buyer is able, as a consequence of the transaction, to carry on at least part of the business carried on previously by the seller (to which a market turnover can clearly be attributed), the acquisition will be treated as a concentration.

EU Dimension

A concentration will be subject to the EUMR if it fulfils both of the following thresholds:

- The aggregate worldwide turnover of all undertakings concerned is more than EUR5 billion.
- The aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR250 million.

These are known as the primary thresholds.

The EUMR also applies to concentrations of a smaller size where the parties carry on, jointly and individually, a minimum level of activities in three or more member states (known as the secondary thresholds). This will be the case where all of the following thresholds are met:

- The aggregate worldwide turnover of all undertakings concerned is more than EUR2.5 billion.
- The aggregate EU-wide turnover of at least two undertakings concerned is more than EUR100 million.
- The combined aggregate turnover of all undertakings concerned in each of at least three EU member states is more than EUR100 million.
- In the same three EU member states, turnover of at least two undertakings concerned is more than EUR25 million.

Both tests are subject to an exception. The EUMR does not apply if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover in one and the same member state. Effectively, therefore, if the merger has its main impact within just one member state, the transaction will not be a concentration with an EU dimension but may be subject to that, and potentially other, member states' national regulation (see below, National Merger Controls).

The exchange rates to be used for the purposes of calculating turnover in the context of the above thresholds are those of the European Central Bank, where available.

Calculating Turnover

Turnover is defined in the EUMR as the amounts (after sales rebates, VAT and any other taxes directly related to turnover) derived from the ordinary activities of the undertaking concerned in the previous financial year. Separate rules govern the calculation of turnover of credit or financial institutions and insurance companies.

The first step in applying the thresholds is to identify the undertakings concerned for the purposes of the calculation. In general, the undertakings concerned will be the target and each of the entities acquiring control of the target (either solely or jointly with other undertakings concerned), but different rules apply to the creation of a new, greenfield joint venture and to acquisitions of joint control over a target in which the seller is retaining a controlling interest. In calculating the turnover of an undertaking concerned, it is necessary to aggregate together all of the turnover achieved by the group of companies to which it belongs.

The EUMR cannot be avoided by staging consecutive sales of part of an undertaking, as transactions between the same parties within a rolling two-year period will be aggregated.

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Substantive Tests

If the EUMR applies to an acquisition, the acquisition cannot be implemented until the Commission has investigated whether or not it is "compatible with the internal market" (Article 7, EUMR).

On request, the Commission may grant an express derogation to the suspension provision under Article 7(3). Derogations are rarely granted and, in practice, a successful applicant requires a strong case showing:

- Detrimental harm to one of the parties (or potentially a third party) as a result of the suspension (as was the case in the Barings rescue package (ING/Barings Case No. IV/M.573)).
- That the deal poses little or no threat to competition, for example because the transaction would qualify for the simplified procedure (see the Commission Notice on simplified procedure for treatment of certain concentrations (OJ 2013, C366/04).

The suspensory effect does not apply in the case of a public bid or creeping bid provided that the merger is notified to the Commission without delay and the acquirer does not exercise voting rights attached to the securities or does so only to maintain the full value of the investment based on a derogation granted by the Commission.

A concentration will not be "compatible with the internal market" where it "significantly impedes effective competition in particular as a result of the creation or strengthening of dominance". The Commission has published a notice on the appraisal of horizontal mergers as an aid to the application of the substantive standard (Horizontal Mergers Notice, OJ 2004, C31/03).

The starting point for the Commission's analysis is usually the market share of the merged entity. A market share of less than 30%, although constituting an "affected" market if in excess of 20% on a horizontal basis (see below, Notifications and Procedural Issues), is unlikely to be considered as impeding competition, unless it will result in a market that is significantly concentrated (for example, a reduction in the number of major players from five to four, from four to three, or from three to two). As a rule of thumb, if the combined market share of the parties is in excess of 50% this will, in itself, be seen as evidence of single-firm dominance (paragraph 20, Horizontal Mergers Notice).

The Commission will also look at other factors such as:

- The specific market structure for the relevant products or services and the likelihood of new entrants into that market.
- The market position of the undertakings concerned and their economic and financial strength.
- Whether or not there are alternative products or services available.

The Commission will first identify the relevant product and geographic markets affected by the concentration, and will then consider the degree of market power within those markets created or enhanced by the concentration. Guidance on the Commission's approach is contained in the Commission's notice on market definition (OJ 1997 C372/03).

The European Commission also has guidelines on the assessment of non-horizontal (in other words, vertical or conglomerate) mergers under the EU Merger Regulation (OJ 2008/C265/07). They provide an overview of the type of general issues that arise as well as guidance on the relevant market share and concentration levels below which concerns are unlikely to arise. The guidelines also review the Commission's analysis of the possible foreclosure effects or co-ordinated effects arising from non-horizontal mergers.

The guidelines make a number of general points about the nature of non-horizontal mergers, explaining in general terms how they might in certain circumstances significantly impede effective competition (although they are less likely to do so than horizontal mergers between directly competing undertakings). Non-horizontal mergers can significantly impede effective competition by changing the ability and incentive to compete on the part of the merging companies and their competitors in ways that cause harm to consumers (both intermediate and ultimate consumers). This can arise through either or both of:

- Non-coordinated effects (mainly foreclosure). That is words hampering or restricting a rival's access to markets or supplies and so reducing the ability and incentive to compete.
- Co-ordinated effects. These arise where the merger changes the nature of competition in such a way that it either makes existing co-ordination easier or makes new co-ordination more likely.

Relevant product market. The starting point in defining the relevant product market is determining the actual goods or services that are the subject of the agreement. To this should be added those goods or services that significant numbers of consumers would accept as interchangeable or substitutable if the price of the original products was increased (demand side substitution). These substitutes will be included if the substitution would constrain prices from rising above competitive levels.

The following factors may be relevant in making this assessment:

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- Physical similarity.
- Differences in end use.
- Differences in price.
- Cost of switching between the products.
- Established or entrenched consumer preferences.
- Industry-wide product classifications.

For the purposes of its analysis, the Commission will consider the hypothetical effect of a permanent 5% to 10% price increase by applying what is known as the Small but Significant Non-Transitory Increase in Price test (SSNIP test), which is also used by the UK and US authorities. For example, in the context of a merger of soft drink bottlers, the SSNIP test could be applied to consider whether different flavours of soft drink belong to the same market. If a sufficient number of consumers would switch from flavour A to flavour B when confronted with a permanent price increase of 5-10% for flavour A, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would then have to be extended to other available flavours until a set of products is identified for which a price increase would not induce a sufficient substitution in demand.

In addition, prices and competition can also be influenced by the potential behaviour of suppliers switching production to supply the relevant goods or services in response to a small and permanent change in price. If they are able to do so at relatively short notice without incurring significant additional costs or risks, the suppliers' existing line of products should also be included in the market definition (supply side substitution).

Relevant geographic market. The geographic market is the area over which substitution can effectively take place because the trading conditions are very similar if not identical. Again, the starting point is the geographical area in which the products or services supplied by the target compete closely with others. But if substitute goods or services are likely to be obtained from outside that area in the event of a price increase, this will increase the potential size of the geographic market. Regard is also had to a range of demand characteristics such as the importance of national or local preferences and current patterns of customer purchases and product differentiation. The market for some products will be EU-wide (for example, car components) while other products or services have a national or even local market (such as a ferry port).

Collective dominance/oligopoly. In addition to the assessment of the possible creation or strengthening of single firm dominance, parties should be aware that the Commission will also consider the extent to which the concentration may create or strengthen an oligopolistic market structure (referred to by the Commission as "collective" or "oligopolistic" dominance). Initially, the Commission only identified collective dominance in instances of symmetric duopolies but collective dominance has also been identified in markets involving three or more significant participants where there is an increased risk of co-ordinated anti-competitive effects.

In setting out the grounds for assessing oligopolies, the Horizontal Mergers Notice draws a distinction between mergers involving homogeneous and heterogeneous (that is, differentiated) products. Where a merger involves homogeneous products (being products which customers consider are highly substitutable irrespective of the producer) the Commission has indicated that it may consider that a merger gives rise to "serious doubts" where it results in the reduction of six to five major market participants. In the context of heterogeneous products the Commission is unlikely to intervene where the parties combined market share is less than 25%.

The Horizontal Mergers Notice states that in addition to the ability to establish the terms of co-ordination with reasonable ease, three additional basic conditions must be fulfilled for there to be an increased risk of collusive or co-ordinated behaviour as a result of a merger:

- The affected markets must be sufficiently transparent to allow co-ordinating firms to monitor to a sufficient degree whether the terms of co-ordination are being observed.
- There must be credible deterrent mechanisms that can be activated in case deviation is detected.
- The actions of outsiders such as current and future competitors, as well as customers, should not be able to jeopardise the results expected from the co-ordination.

The Commission has also increased its focus on the ability of a merger to harm consumers. It has stated that mergers will be challenged only if they enhance the market power of companies in a manner which is likely to have adverse consequences for consumers.

The Horizontal Mergers Notice provides guidance on four areas that may constitute a countervailing force or defence to an increase in economic power resulting from a merger, namely:

- Buyer power.
- The likelihood of entry by new firms.
- The likelihood that efficiencies will result from the merger.
- The conditions for a failing firm defence.

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The issue of efficiencies may be particularly significant. To qualify as a countervailing force, efficiencies must be:

- Of direct benefit to consumers.
- Substantial.
- Merger-specific.
- Timely.
- Verifiable.
- Likely.
- Quantifiable.

Although efficiency arguments are encouraged, efficiencies have not been determinative in clearing any mergers under the EUMR to date.

Notifications and Procedural Issues

Unlike investigations under Articles 101 and 102 of the TFEU Treaty, the Commission is restricted to a maximum period of 25-35 working days in straightforward cases (up to 115-160 working days in more difficult mergers) to conduct its investigation under the EUMR. If the Commission fails to act within these time limits the concentration will be deemed to be compatible.

The steps in the EUMR procedure are:

- Pre-notification discussions with the Commission.
- Notification.
- The first phase investigation.
- The second phase investigation (difficult cases only).

Pre-notification discussions. Before the formal notification of a concentration, the parties are encouraged and expected to enter into informal discussions with the Commission in order to discuss, among other things, the likely impact of the transaction and possible consequences. Throughout the formal investigation of the concentration after notification, the parties will usually continue to discuss the case with the Commission. Indeed, in complex cases there is usually an extensive period of pre-notification preparation and discussion with the Commission before the formal review period commences.

The Commission's simplified procedure also identifies cases that can be notified without pre-notification discussions altogether: those that do not give rise to horizontal overlaps and vertical links between the merging companies in the EEA. The Commission estimates that this concerns around 25% of cases that qualify for a simplified review.

Notification. The parties must notify a merger agreement before implementation either once a definitive agreement has been concluded or a public bid has been announced, or before this if they can demonstrate a good faith intention to conclude a binding agreement or have publicly announced an intention to make a bid.

In a concentration involving the acquisition of joint control, all of the controlling parties are responsible for the notification. In an acquisition of sole control, notification is the prime responsibility of the buyer (and it is clearly in the buyer's interest that notification is made). In a public bid, it is the bidder's responsibility to notify the Commission. A notification is made on Form CO which can be found in Annex 1 of Council Regulation (EC) No. 802/2004 implementing the EUMR, as amended (Implementation Regulation).

Time begins to run for the purposes of the Commission's investigation on the working day following the receipt by the Commission of a complete Form CO. All information on the Form CO must be correct, complete and not misleading, otherwise the notification will be considered incomplete and (in the case of incorrect or misleading information) the notifying parties may be subject to fines of up to 1% of their group worldwide turnover (Article 14(1), EUMR). If, at some point in the investigation, the Commission discovers that the Form CO is incomplete, it will reject the notification and the investigation will re-start altogether on the subsequent submission of the complete Form CO. It is therefore crucial that, in order to avoid delay, the party lodging the form makes sure that it is complete. Again, informal discussions and the submission of a draft Form CO to the Commission are important to agree waivers of any specific section of the Form CO and to secure some level of advance comfort as to the "completeness" of any proposed notification.

One original, three paper copies and two copies in CD- or DVD-ROM format of the Form CO, including all supporting documents, need to be submitted to the Commission (see the Commission communication on the format and number of copies of notifications and other submissions, email address for electronic submission). The supporting documents required include the concentration agreements (or the latest drafts), the offer document (in a public bid), and the most recent report and accounts for each party. Where at least one affected market (as defined below) is identified, the parties must also provide copies of, for example, relevant market analysis or reports prepared for, or received by, any director or member of the supervisory board and minutes of board or shareholder meetings (Section 5(4), Form CO).

The form itself is extensive and requires a great deal of detailed information, including, among other things:

- Background information about the parties.
- Details of the concentration, comprising its timing,

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method, the market sectors in which it will operate and the turnover figures for each of the undertakings concerned (worldwide, Community-wide and in each member state).

- Details of the ownership and control of the undertakings concerned.
- Information about the personal and financial links and previous acquisitions of the parties.
- The definitions of the product and geographic markets which the parties consider to be the relevant ones for the purposes of the Commission's investigation.
- Details of the market structure in the particular goods or services and information about each party's main competitors, customers and suppliers in order that the Commission can seek their views.
- Copies of documents prepared by or for, or received by, managers or directors of the parties (including board minutes) that discuss matters including deal rationale and expected effects, and the competitive landscape.

Much less market specific information is required where there is no overlap between the activities of the undertakings concerned giving rise to an "affected market" (a market where the parties have a combined market share of 20% or more or, in the vertical context, an individual or combined market share of 30% or more), or where the transaction involves a joint venture that has limited activities in the EEA (turnover and assets in the EEA each with a value of less than EUR 100 million). Such cases may qualify for the simplified notification procedure (see the Commission Notice on simplified procedure for treatment of certain concentrations, OJ 2013, C366/04). This may also be the case, if the combined market shares of the parties are between 20% and 50% but the incremental increase in market concentration due to the merger is small. In June 2022, the Commission consulted on proposals for expanding the categories of transactions that can benefit from the simplified procedure and for streamlining the information requirements of its notification forms.

Copies of the form are sent by the Commission to each member state. To protect confidentiality, any business secrets or other sensitive information which the parties supply should be clearly marked and this will be blocked out of the copies. In addition, certain basic details are published in the Official Journal to invite comment from interested third parties such as customers and competitors.

First phase investigation. The first phase investigation begins on receipt of the complete Form CO. The Commission has 25 working days to complete the first phase. This period will be extended to 35 working days if there is a referral request under Article 9 of the EUMR, or if divestiture or other undertakings are offered by the parties (within 20 working days of the start of the first phase investigation) in order to address any concerns identified by the Commission. For simplified procedure cases, the Commission will often (but not always) issue a clearance within around 20 working days, but is under no obligation to do so.

The investigation involves an intensive analysis of the information in the Form CO and contact with third parties (competitors, customers, suppliers and, where relevant, trade associations) in order to determine whether the concentration is caught by the EUMR and raises serious doubts as to its compatibility with the common market.

During the investigation the parties cannot implement the acquisition (although, as described above, in some very limited circumstances the Commission may waive this on application). In the case of a public bid, the bid can continue but the bidder cannot exercise its voting rights in the course of the investigation except to "maintain the full value of its investments" and on the basis of an express derogation by the Commission.

At the end of the first phase, the Commission will usually make one of the following declarations:

- That the concentration is not caught by the EUMR (for example, in its view, the merger does not give rise to a concentration or the thresholds are not met) (an Article 6(1)(a) Decision). In this case the parties may still need to deal with national regulators in each affected member state or consider the preferential application of Article 101 of the TFEU Treaty (or both).
- That the concentration is caught by the EUMR but does not raise serious doubts as to its compatibility with the common market (possibly subject to undertakings from the parties) (an Article 6(1)(b) Decision). In this case member state national merger control regulations will not apply. Clearance can be withdrawn later if it is found that it was given in reliance on incorrect information or where any undertakings given are breached.
- That there are serious doubts as to the concentration's compatibility with the common market and a Phase II investigation is required (an Article 6(1)(c) Decision).

At any time in the process, third parties can make submissions on the concentration (although any such submission made after the third week following notification is unlikely to be as effective). Substantial criticism from third parties may persuade the Commission to hold a second phase investigation.

Historically, less than 5% of cases have gone to a Phase II investigation.

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Second phase investigation. Typically, the parties and third parties will maintain a dialogue with the Commission during its first phase investigation. As a result of these discussions, parties may sometimes decide to withdraw the notification altogether and reconsider the deal in order to avoid a Phase II investigation, which can last up to 125 working days (withdrawing the notification is possible at any stage).

During the Phase II investigation, the Commission continues its analysis but in greater depth in order to determine whether the "serious doubts" identified in the first phase investigation are made out. The process involves a more detailed fact finding exercise, the publication of a formal Statement of Objections and often an oral hearing, at the request of the notifying parties or other sufficiently interested parties, to address issues raised in the Statement of Objections.

At the end of the investigation the concentration may be cleared (usually subject to undertakings) or prohibited. Where the concentration has already been implemented, remedial steps, such as divestiture, may be ordered.

The Phase II period is 90 working days and may be extended by up to 20 working days in complex cases (at the request, or with the agreement of the parties to be made, at the latest, 15 working days after the initiation of Phase II proceedings). Separately, if remedies are proposed or revised after the 55th working day during Phase II proceedings, there will be an automatic extension of 15 working days.

(See also box, EU Merger Regulation timetable.)

Ancillary restraints. Commonly, in the negotiation of an acquisition, the parties will accept certain restraints, such as a non-compete provision. On the face of it, this is restrictive of competition and potentially subject to scrutiny under Article 101 of the TFEU. In essence, Article 101 prohibits agreements or concerted practices which may affect trade between member states and have the object or effect of preventing, restricting or distorting competition to an appreciable extent.

However, in the context of concentrations that fall within the EUMR, restraints may be allowed provided that they are ancillary to the creation of the concentration. The restraints must be directly related and subordinate to the main object of the transaction, but essential to it in a commercial sense, so that without the restraints the transaction would not take place.

Guidance is given in the Commission's Notice on Ancillary Restrictions (OJ 2005 C56/03) which deals specifically with non-compete provisions, intellectual property licences and purchase and supply agreements between the parties:

- Non-compete clauses imposing obligations on the seller will be considered ancillary restrictions to the extent that they are essential to enable the buyer to receive the full benefit of any goodwill or know-how (or both) that is acquired. However, a non complete clause must be reasonable in terms of its duration, geographic coverage and the products affected. A three-year period will generally be acceptable where both goodwill and know-how have been acquired, and a two-year period where only goodwill is involved.
- A seller will often retain ownership of intellectual property and know-how rights in order to exploit them in the retained business, while granting the buyer access to the rights under licensing arrangements. In this context, restrictions in licences of patents, trade marks, know-how and similar rights may be accepted as ancillary restrictions to the extent that they are necessary for the implementation of the merger. The licences must be limited in terms of their field of use (to the activities of the business acquired) but need not be limited in time.
- Purchase and supply agreements may be acceptable where the acquired business was formerly part of an integrated group of companies and still needs to rely on another company within its former group for raw materials. In these circumstances, purchase and supply agreements between the new and the former owners may be considered ancillary for a transitional period so that the businesses concerned can adapt to their new circumstances. However, exclusivity will not be acceptable except in exceptional circumstances (for example, where there is scarcity of the raw material).

Penalties and Appeals

The Commission has wide powers under the EUMR, for example:

- Any concentration implemented in breach of the EUMR can be separated back into its individual parts (and a fine imposed).
- Fines of up to 1% of the aggregate turnover of "undertakings concerned" can be imposed for giving misleading or false information, or failing to comply with Commission requests for information. The Commission has imposed a number of fines on companies providing incorrect information, including a EUR110 million fine imposed on Facebook in May 2017 in respect of information provided during the Commission's 2014 review of Facebook's acquisition of WhatsApp (Case M.8288).
- Fines of up to 10% of the worldwide turnover of offending parties can be imposed where a concentration is implemented in breach of the EUMR or for a failure to comply with undertakings given. In April 2018, the Commission imposed a

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fine of EUR124.5 million on the French telecoms company Altice for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before notification or approval by the Commission. A EUR28 million fine was also imposed on Canon in June 2019 for implementing its acquisition of Toshiba Medical Systems Corporation before notification to and approval by the Commission.

- Daily fines of up to 5% of the aggregate daily turnover of the undertakings concerned can be imposed for each working day of delay in failing to supply information requested by the Commission or failing to comply with a condition of clearance. The Commission has, for example, imposed a fine of EUR50,000, together with periodic penalties totalling EUR900,000, on Mitsubishi for failing to respond to information requested in connection with a merger to which Mitsubishi was not a party.

The parties to a concentration (and affected third parties) can appeal against the Commission's ruling under the EUMR to the General Court but only on the limited basis provided under the TFEU (that the Commission lacked authority, infringed procedures or the Treaty, or misused its powers). (See box, EU Merger Regulation timetable.)

Merger Control in the US

The primary US merger control law is section 7 of the Clayton Act. It prohibits acquisitions of assets, shares, or non-corporate interests where the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly. Transactions may also be subject to sections 1 and 2 of the Sherman Act, which prohibit unreasonable restraints of trade or attempts at monopolisation, and section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act) requires parties to pre-notify transactions to the federal agencies responsible for applying US anti-trust laws (the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (collectively, the Agencies)). Notifications are filed with both of the Agencies. For transactions that undergo more than a cursory review, only one of the Agencies will handle the matter. Often it is possible to anticipate the relevant Agency that could take a more in-depth substantive review based on each Agency's history of examining similar transactions in the same or tangential markets.

Unlike in other jurisdictions, under the HSR Act both the acquiring person and the acquired person are each required to make separate filings to the Agencies.

Jurisdiction

The HSR Act may potentially apply to the acquisition of any assets, voting securities, or non-corporate interests. Although "assets" is not defined in the HSR Act and the rules promulgated thereunder, the Agencies have taken a broad interpretation so as to cover the acquisition of both tangible and intangible assets. That can include, for example, exclusive licenses to patents and trademarks. "Voting securities" are defined in the FTC's rules governing the notification procedure (HSR Rules) as including any security either that currently entitles the holder to vote for the election of directors or that is convertible into such a security. However, the acquisition of a convertible voting security is exempt from notification until the point of its conversion into a voting security with the present right to vote for directors. "Non-corporate interests" are defined in the HSR Rules as including interests in an unincorporated entity which gives the holder the right to any profits of the entity or in the event of dissolution of that entity the right to any of its assets after payment of its debts.

Unlike the EUMR, the HSR Act is not restricted in application to transactions that involve an acquisition or change of "control". Instead, the initial assessment of whether a filing is required turns on the following issues:

- Whether either the acquiring or acquired persons are engaged in US commerce or in any activity affecting US commerce (the commerce test).
- The value of voting securities, assets, or non-corporate interests held as a result of the acquisition (the "size of the transaction test"). Under this test, an HSR filing is required if the acquiring person will hold assets or voting securities with an aggregate total value of more than USD101 million and the acquired and acquiring person have sufficient assets or sales; or, if the value exceeds USD403.9 million, irrespective of the size of the persons involved in the transaction (otherwise assuming no exemptions apply).
- The total worldwide sales and assets of the acquiring and acquired persons (the "size of the persons test"). Generally, if the transaction is valued between USD101 million and USD403.9 million and one party (including all members of the group to which it belongs) has worldwide sales or assets in excess of USD20.2 million and the other party (again including its entire group) has worldwide sales or assets of USD202 million or more, then this test is satisfied. The "size of the persons test" need not be met if the value of the transaction is in excess of USD403.9 million.
- Whether any exemptions apply (see below).

As a result of the 2000 Amendments to the HSR Act, certain thresholds are adjusted annually and are published each calendar year in the Federal Register.

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Exemptions

If the above jurisdictional tests are satisfied, it is then necessary to consider the potential application of certain exemptions contained in the HSR Act or rules promulgated thereunder. Of particular importance are the following exemptions applicable to transactions involving non-US assets or non-US companies where the US sales and/or US assets are below certain levels.

The acquisition of non-US assets is exempt if such assets generated less than or equal to USD101 million in sales in or into the US. There are particular rules and interpretations regarding intangible assets and movable assets, so care should be taken when considering whether an asset qualifies as "non-US" for the purpose of this exemption.

If the sales generated from the acquired assets exceed USD101 million, the acquisition is exempt if:

- Both the acquiring and the acquired persons are foreign.
- The aggregate sales in or into the US of both the acquiring and the acquired person in the most recent fiscal year are less than USD222.2 million.
- The aggregate total assets in the US of both the acquiring and the acquired persons are less than USD222.2 million; and,
- The assets that will be held as a result of the transaction are valued at USD403.9 million or less.

The acquisition of voting securities of a foreign corporation is exempt if made by:

- A US person, and the foreign corporation (including all entities it controls):
  - holds US assets valued below USD101 million; and
  - made aggregate sales in or into the US below USD101 million.
- A foreign person, and the transaction: (i) does not confer on the acquiring persion 50% or more of the issuer's outstanding voting securities, or (ii) the foreign corporation:
  - holds US assets valued below USD101 million; and
  - made aggregate sales in or into the US below USD101 million.
- If either of the USD101 million thresholds above are exceeded, the transaction may still be exempt if:
  - both the acquiring and acquired persons are foreign;
  - the aggregate sales in or into the US of both the acquiring and the acquired person in the most recent fiscal year are less than USD222.2 million;
  - the aggregate total assets in the US of both the acquiring and the acquired persons are less than USD222.2 million; and
  - the value of the voting securities that will be held as a result of the transaction is USD403.9 million or less.

Numerous other exemptions may also apply depending on the type of investment, the underlying assets being acquired or held by the acquired person, and the type of acquiring or acquired person. Therefore, even if the above tests do not appear to allow for the application of those exemptions, other exemptions may be relevant.

Procedure

Filing under the HSR Act is mandatory. Filings may be submitted at any time following the execution of a written agreement or letter of intent, which can be non-binding. Although there is no deadline for making the filing, the transaction cannot be consummated until the filings have been made and the applicable waiting period under the HSR Act has elapsed or has otherwise been terminated by the Agencies. Failure to observe these requirements may result in a fine of up to USD43,792 per day and, potentially, action to unwind the transaction and disgorgement of profits.

Both parties to the transaction must each make a separate HSR filing and (unless agreed otherwise) the buyer must pay a filing fee as follows:

- USD45,000 (deals valued between USD101 million and USD202 million).
- USD125,000 (deals valued between USD202 million and USD1.0098 billion).
- USD280,000 (deals valued in excess of USD1.0098 billion).

The fee must be paid on submission of the notification.

The notification and report form (the HSR Filing) requires the filing party to provide certain background information about the business and revenues of the filing party and the structure of the transaction. In contrast to the Form CO filed under the EUMR, the HSR Filing does not require detailed information on affected markets. Instead, the Agencies' analysis may rely significantly on the "item 4(c) and 4(d) documents" submitted by the parties as part of the filing. Item 4(c) documents comprise "all studies, surveys, analyses and reports prepared by or for any officer or director for the purpose of evaluating or analysing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets". Item 4(d) documents comprise confidential information memoranda or documents serving that function, third party analyses

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by bankers including "pitch books," and documents discussing synergies and efficiencies. Acquiring parties must also report on certain minority and majority holdings in companies operating in the same line of business as the target company.

Timing

As soon as both parties have made their filings to both Agencies, the initial 30-day waiting period begins (the day of receipt being day 0). For transactions falling within 16 Code of Federal Regulations 801.30 (including tender offers and acquisitions of voting securities from a third party - in other words, not the issuer - on the open market, conversion or exercise of options and so on) the filing by the acquiring person starts the waiting period. In these circumstances, the acquired person has 10 or 15 additional days in which to file. In the case of a cash tender offer or the acquisition of assets in bankruptcy, the waiting period is restricted to a 15-day period, which begins once the buyer has made its filing.

Unless an Agency decides to take action, the transaction may be consummated on the expiration or termination of the relevant waiting period. It is possible to request early termination of the applicable waiting period, which can be granted by the Agencies. If early termination is granted, this fact will be published in the Federal Register and on the FTC's website together with the filing parties' names and the entity being acquired. No other facts regarding the transaction or the HSR Filing are made public. It is worth noting, however, that as of February 2021 the Agencies have suspended granting early termination of the waiting period. Although the Agencies indicated the suspension was "temporary," it is currently unclear when or if the Agencies will once again begin granting early termination.

Substantive Review

Under merger guidelines issued periodically by the Agencies and modified most recently in 2010, a merger should not be permitted to proceed if it will create or enhance market power or facilitate its exercise. Market power is defined as the ability of a seller profitably to maintain prices above competitive levels for a significant period of time.

For transactions that require a more detailed review, it is common for the reviewing Agency to contact the parties as well as their competitors and customers to seek additional information and documents. During the initial waiting period, the relevant Agency may request additional information or documents on a voluntary basis. This often includes, but is not limited to, lists of top customers and competitors and internal documents, such as marketing and strategy materials. Appropriate and timely handling of such enquiries is essential in order to minimise the risk of a more in-depth review.

Second Request

The HSR waiting period may be extended if the reviewing Agency issues, before the waiting period expires, a Request for Additional Information and Documentary Material (Second Request) seeking additional information from the parties. The issuance of a Second Request will automatically extend the waiting period to the 30th day or, in the case of a cash tender offer, the tenth day after the date of substantial compliance with the request for additional information. In practice, parties often enter into a "timing agreement" with the relevant Agency extending the waiting period.

The Second Request takes the form of a request for information (questions), documents, and copies of databases. The Agencies may also require depositions from senior executives of the parties and other market participants on issues relating to the transaction. The effort, time and expense involved in responding appropriately to a Second Request can be, and often is, substantial.

On substantial compliance with the Second Request (often taking 4 to 6 months) the reviewing Agency must decide whether to approve the transaction or to seek a court order enjoining it. It is also worth noting that while the Agencies are the principal enforcers of merger control in the US, mergers can, in certain circumstances, also be challenged through the courts by private parties.

During the course of the Second Request process, the parties may negotiate and enter into a consent agreement with the reviewing Agency to address any anti-competitive effects that have been identified. This often takes the form of an agreement to divest part of the merged entities' operations. The Agencies sometimes require that the parties identify a buyer acceptable to the Agency to whom the business is to be sold and enter into an agreement with that buyer before the consent order will be agreed. In certain circumstances, the Agencies may be prepared to accept conduct commitments in lieu of divestiture.

(For a comparison of EU and US merger regimes see box, EU and US merger regimes compared.)

National Merger Controls

Most major jurisdictions have a form of statutory merger control. The common triggers for these controls are turnover thresholds or combined assets or market share tests. The substantive tests that are applied are usually related to creating or increasing market power or otherwise reducing competition in the relevant market.

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The national regimes of EU member states will not apply where the EUMR applies to a merger, except in limited circumstances (see above, One-Stop Shop). But where the EUMR does not apply, a merger may be subject to regulation under a number of different member states' national regimes. Other merger laws in non-EU jurisdictions may also apply irrespective of the application or non-application of the EUMR.

In a number of jurisdictions, there are particular rules governing the merger activity of regulated industries (such as utilities, newspapers and banking services). Merger activity is often more tightly controlled in these areas. Generally, the involvement of the particular industry regulator as well as the normal competition authority is required in the investigation and clearance procedures.

There are co-operation agreements in place, for example, between the Commission and the US and other national authorities, which provide for the sharing of non-confidential information relating to transactions of common interest and detailed consultation and co-operation in respect of cases which may have an effect in the other jurisdiction.

Multi-jurisdictional filings are likely to be required on most large acquisitions. These can impose a huge burden on management time and are difficult to manage.

Checklist: Tips on Managing Multi-Jurisdictional Filings

The Team

- Establish a central team to co-ordinate the notification process. This may be done in-house or through the appointment of an experienced external law firm. Ensure that business people are identified to take ownership of the exercise and to hold responsibility for managing information flows.
- Appoint local lawyers, economic experts and/or public relations consultants in the key jurisdictions. Check the individuals' track records.
- In a complex deal, be prepared to devote a vast amount of management time to the process.
- Keep the business team and main deal lawyers informed of delays or developments as they occur.

The Background

- Carry out a thorough economic analysis taking into account the likely arguments of complainants (such as competitors and customers). Assume that they will present their case formally and informally. Consider in advance what divestments you may be prepared to make without destroying the commercial rationale of the deal.
- Review any earlier filings that you have made with the relevant competition authorities. It is important when preparing filings to maintain consistency and also to keep an eye on the possibility of future deals.

Jurisdiction

- Identify which countries technically have jurisdiction (mandatory or voluntary) and which will require you to suspend the transaction. Is there a serious competition issue in any country that is commercially important to the deal?
- Do any "foreign transaction" or other exemptions apply, removing the need to notify?
- Evaluate the extent to which non-competition authorities will be involved or influence the anti-trust regulators in a given jurisdiction. This will be particularly important in certain sectors, such as banking and telecommunications.
- If time is of the essence, consider what can be done after the event in a mandatory regime which requires filing and/or clearance before completion. What are the penalties for failing to file or for completing before clearance? Is it possible to organise a staged completion so as to delay completion in an affected country until clearance is obtained from the relevant regulator?
- Ensure that your agreement contains relevant pre-closing conditions requiring clearance in affected jurisdictions.
- Address the issue of the other parties' involvement in the filing process, and their obligation to co-operate.

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- Consider the consequences of a second stage investigation, especially in relation to completion and the transfer of assets.
- Check any precedents set in previous cases considered by the authorities and evaluate the risks of adverse reaction.
- Do you have a particular policy on filing particularly as regards voluntary regimes such as the UK? Some companies may prefer to avoid filings unless mandatory whereas others may wish to eliminate any potential risk.
- Decide whether to make an informal pre-notification approach, and to which authorities. Is it possible to get guidance to avoid the need to file?
- Address the issue of any conditions being imposed or undertakings required by the competition authority. Are there any offers you can make in the early stages to address any particular concerns and avoid a second stage investigation?
- Present the same story in all jurisdictions. There is a marked increase in communication between authorities, which can raise important tactical issues particularly where, for example, you are filing in the US and under the EUMR. You may not wish all information given to one regulator to be made available to others, but on the other hand you will want to be seen to be co-operative.
- Create a basic pro forma package of information and a draft notification document and send it to the local lawyers to be adapted to their requirements. Consider basing the document on the Form CO (the Form used for filing under the EUMR). This is more stringent and demanding than many national requirements but will ensure that most of the relevant issues are addressed.
- Set a clear timetable and review it as the filings progress.
- Try to avoid filing in holiday periods (usually August in Europe).
- Do not underestimate the amount of time needed to put notifications together and to obtain clearance.

Communications

- Vet all external communications and press releases to ensure the message is consistent.
- Send briefing papers to the authorities before meetings. These should be produced or approved by the central team to ensure a consistent message is given by all lawyers involved.
- Notes should be kept of all meetings and copied back to the central team.
- Ensure that you deal with any confidentiality issues in relation to business information pre-filing. Consider putting all confidential information in a separate file.

EU and US Merger Regimes Compared

EU and US merger review procedures are fundamentally different. The EU procedure is administrative, with the Commission acting as investigator and judge. The US procedure, by contrast, is litigation-based. The US agencies (the Federal Trade Commission and Department of Justice) must sue the merging parties before an independent judge to prevent the closing of a merger they oppose.

A large amount of information is required up front in the Form CO for EU filings. Only limited information is initially required in the Form submitted under a US Hart-Scott-Rodino filing, but the parties are also required to supply certain internal documents which may have assisted the parties in their analysis of the deal (4(c) and 4(d) documents). This sets the tone for dealings between the parties and the competition authorities. Under the US system, the burden of proof is on the authorities to accumulate evidence to block a merger in the courts. There is limited communication or information exchange in the early stages between the parties and the authorities. This is in marked contrast to the EU approach where parties are encouraged to give information freely and discuss the case with the Commission openly.

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The initial phase of an investigation lasts for approximately the same time under both systems. The EU first phase lasts for 25 (or, if commitments are given to avoid an in-depth (Phase II) investigation, 35) working days. Similarly, there is an initial waiting period of 30 days (or 15 days for cash tender offers and acquisitions of assets in bankruptcy) in the US. However, it is possible under the US system to request early termination of the 30-day period.

The timetables diverge significantly when in-depth investigations are opened. An EU Phase II investigation lasts a maximum of 90 working days, with the possibility of limited extensions of 15 and 20 working days respectively in the event of remedy proposals or in complex cases with the consent of the parties. By contrast, once the US authorities issue a Second Requestfor further information the timetable becomes much more open-ended.

The EU and US agreed to a bilateral co-operation agreement between anti-trust regulators in 1991 and have issued a joint set of best practice guidelines on co-operation in reviewing mergers. Parties to a transaction can assume that regulators will co-operate, so it is crucial that they co-ordinate their own approach. One difficult decision can be whether or not to waive confidentiality rules to permit the exchange of information between the reviewing agencies. The granting of waivers may smooth the process, but the release of information in Form CO or remedy papers may prejudice the conduct of a case in the US.

EU Merger Regulation Timetable

Pre-notification	Do as much as possible during this period: • Prepare detailed market information (with the help of economists in difficult cases). • Decide a strategy (including remedies in difficult cases) that you can offer at an early stage. • Send the Commission a short briefing paper and arrange a pre-notification meeting. • Consider whether there are any referral issues. • Provide the Commission with a draft Form CO for its review and agree any waivers of information requirements with the Commission. • If appropriate, discuss remedies at the pre-notification meeting with the Commission. • Assess what third parties are likely to say and how you will respond.
Notify (Form CO)	File before implementation, either once a definitive agreement or public bid has been announced, or earlier if a good faith intent to make a binding agreement or a bid can be shown. Provide as much relevant information as possible as clearly as possible. Consider attaching a briefing paper to Form CO. The clock starts ticking.
Phase I (25-35 working days)	The first phase investigation begins on the day after receipt of the complete Form CO. The Commission has 25 working days to complete the first phase (this can be extended to 35 working days if undertakings are offered or a member state requests to review the case). The investigation involves an intensive analysis of the information in the Form CO and contact with third parties (competitors, customers, suppliers and, where relevant, trade associations). Parties have the opportunity of state of play meetings with the Commission as well as "triangular meetings" with complainants.

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End Phase I	At the end of the first phase the Commission will declare one of the following: • The concentration is not caught by the EUMR. • The concentration is caught by the EUMR but is compatible with the common market (possibly subject to undertakings from the parties). • There are serious doubts as to the compatibility of the concentration and a Phase II investigation is required. Historically, less than 5% of cases have gone on to a Phase II investigation.
Phase II	The parties and third parties will typically be asked for further detailed information and will be given an opportunity to respond to the Commission's findings in the first phase. Some may withdraw the notification and reconsider the deal in order to avoid the further delay of the Phase II investigation (90 working days subject to extension). Withdrawing the notification is possible at any stage (a formal withdrawal document is required). In recent years, around a third of the deals that have been investigated in Phase II have been cleared unconditionally.
Phase II: Statement of objections	If the Commission is still not satisfied six to seven weeks into Phase II it will issue a Statement of Objections. It may be difficult to change the Commission's view from this point on.
Phase II: Hearing	This is held two months and one week into Phase II, usually at the request of the parties or third parties with sufficient interest. It is attended by the Commission, the parties, third parties and representatives from competition authorities of member states.
Phase II: Decision	Undertakings can technically be given up to three months into Phase II. But this will often be too late as the Commission will have insufficient time to test them with interested third parties. The transaction may be cleared (perhaps subject to undertakings) or prohibited. Phase II may be extended by up to 20 working days in complex cases. If remedies are proposed after the 55th working day there will be an automatic extension of 15 working days.
Advisory Committee Opinion	The advisory committee (comprising representatives of member states' competition authorities) issues an opinion on the Commission's decision.

Jurisdictional Resources on Competition (Private Acquisitions)

We have published the following resources on competition issues in the context of the private acquisitions in the following jurisdictions:

- France: Practice Note, Competition: Private Acquisitions (France)
- Germany: Practice Note, Competition: Private Acquisitions (Germany)
- Italy: Practice Note, Competition: Private Acquisitions and Joint Ventures (Italy)
- The Netherlands: Practice Note, Competition: Private Acquisitions (The Netherlands)
- Spain: Practice Note, Competition: Private Acquisitions and Joint Ventures (Spain)

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