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Merger Control 2025

21st Edition

Contributing Editors:

Nigel Parr & Steven Vaz

Ashurst LLP

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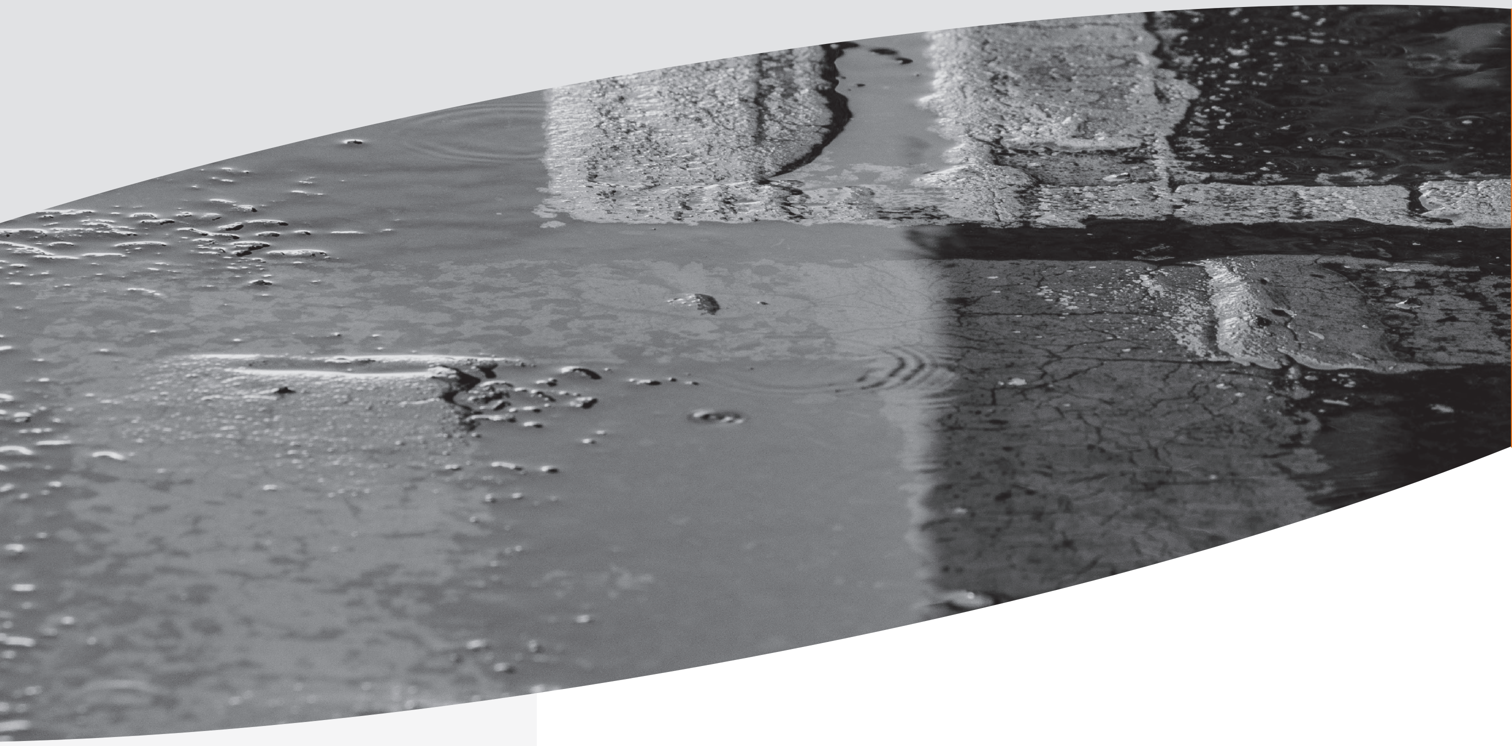

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Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

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From the Publisher

Welcome to the 21st edition of *ICLG – Merger Control*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to merger control laws and regulations around the world, and is also available at www.iclg.com.

The publication begins with three expert analysis chapters written by Ashurst LLP, AlixPartners, and CMS that provide further insight into merger control developments.

The question and answer chapters, which in this edition cover 33 jurisdictions, provide detailed answers to common questions raised by professionals dealing with merger control laws and regulations.

As always, this publication has been written by leading merger control lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Nigel Parr & Steven Vaz of Ashurst LLP for their leadership, support and expertise in bringing this project to fruition.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)? If relevant, please include details of: (i) independence from government; (ii) who the senior decision-makers are (e.g. Chair, Chief Executive, Chief Economists), how long they have been in position, and their professional background (lawyer, economist, academia, industry, professional services, politics, etc.); and (iii) any relevant key terms of appointment (e.g. duration of appointment) of those in leadership positions (such as Chair, Chief Executive, and Chief Economist).

In the European Union ("**EU**") and the slightly broader European Economic Area ("**EEA**") (which comprises the Member States of the EU plus Iceland, Liechtenstein and Norway), a one-stop-shop principle applies for concentrations (see question 2.1) that meet certain jurisdictional thresholds (see question 2.4), subject to certain exceptions (see question 2.7).

The European Commission ("**EC**") in Brussels is the "one-stop-shop" to which such concentrations must be notified. The Directorate-General for Competition ("**DG COMP**") is the EC department responsible for vetting the concentrations. Olivier Guersent is the Director-General of DG COMP (since 1 January 2020). Guillaume Loriot (a lawyer by background) is the Deputy Director-General of DG COMP responsible for mergers (since 16 May 2021). Lluis Sauri Romero is the Acting Chief Economist of DG COMP (since August 2023), pending the EC's search for a new Chief Economist to replace Pierre Régibeau, whose term recently expired.

The European Commissioners decide, as a body, to clear or prohibit notified concentrations based on the outcome of DG COMP's review under the "significant impediment to effective competition" test (see question 4.1). For concentrations cleared at the end of a phase I review (see question 3.7), however, the body of Commissioners have delegated the power to adopt the clearance decision to the Commissioner responsible for competition policy.

Margrethe Vestager (Denmark) has served as Competition Commissioner since 2014. A new Competition Commissioner will be selected for the next EC 2024–2029.

Concentrations not caught by the EU jurisdictional thresholds may be reviewable by the national competition authorities ("**NCAs**") of EU/EEA countries under their respective national merger control rules. Mechanisms are in place allowing for referrals of concentrations between the EC and the NCAs (see question 2.7).

Under the agreement on the United Kingdom's ("**UK**") withdrawal from the EU ("**Brexit**"), the one-stop-shop principle applied as regards the UK during a transition period that ended on 31 December 2020 to all concentrations notified to the EC before the end of that period. The UK now falls outside the scope of the one-stop-shop principle and can apply its own merger control rules to concentrations notified to the EC.

1.2 What is the merger legislation?

The Merger Regulation, Council Regulation (EC) No. 139/2004 of 20 January 2004 ("**MR**"), contains the rules for notification and assessment of concentrations, including the transactions covered, the jurisdictional thresholds, the notification requirement, the obligation to suspend implementation pending clearance, the substantive assessment standard and the fundamental procedures and administrative sanctions.

Commission Regulation (EC) No. 802/2004 of 21 April 2004 (as last amended by Regulation (EU) No. 1269/2013) addressed procedural matters relating to notifications (including forms), time limits, the right to be heard, file access, treatment of confidential information and submission of commitments. In April 2023, the EC repealed Regulation (EC) No. 802/2004 and adopted replacement Regulation (EU) No. 2023/914 ("**Implementing Regulation**"), which entered into force on 1 September 2023. The new regulation is part of a "merger simplification package" aimed at streamlining, simplifying and expanding the scope of the process the EC uses to review concentrations that clearly do not raise competition concerns (see question 3.11).

Five sets of EC guidelines address substantive assessment issues on: the Relevant Market (2024); Horizontal Mergers (2004); Acceptable Remedies (2004); Restrictions Directly Related and Necessary to Concentrations (2005); and Non-Horizontal Mergers (2008).

The most recent of these (the 2024 revised Notice on the Relevant Market) provides guidance on defining markets in competition analysis, especially considering digitalisation, globalisation, and the EU's increased focus on innovation and sustainability. It broadens the scope of analysis beyond traditional price-based factors to include, for example, innovation, quality, and sustainability. In addition, it introduces forward-looking market definitions and a broader range of evidence in assessing product markets. It also addresses specific challenges posed by digital markets, highly innovative industries characterised by substantial R&D activities, multisided platforms, aftermarkets, bundles, and (digital) ecosystems.

The EC has also issued procedural guidelines, including the important Consolidated Jurisdictional Notice (2008) ("**CJN**") addressing issues relating to the concept of concentration and the jurisdictional thresholds. Other EC procedural notices cover: Case Referral between the EC and NCAs (2005); Access to the File (2005); the Hearing Officer (2011); and a Simplified Procedure for concentrations not raising competition concerns (2013). In March 2021, the EC issued guidance on the referral mechanism in MR Art. 22, which was subsequently rejected by the EU Court of Justice in September 2024 (see question 3.3). In May 2023, the EC adopted new measures aimed at increasing the number of mergers benefitting from the simplified notification and review procedure and further simplifying that procedure, including changes to the Implementing Regulation (see above), a new notice on a Simplified Procedure (see question 3.11) and a communication on the method of transmitting documents to the EC, electronically signing such documents and technical specifications for documents submitted electronically.

To accompany the foregoing, the EC has also published "best practice" guidelines on: the Conduct of Merger Control Proceedings (2004); Submission of Economic Evidence (2011); Divestment Commitments (2013); Disclosure of Information in Data Rooms (2015); and Preparation of Public Versions of Decisions (2015).

See the DG COMP website for the texts of all of the foregoing documents: http://ec.europa.eu/competition-policy/mergers/legislation/legislation_en

Under EU Court of Justice case-law pre-dating the MR, Art. 102 of the Treaty on the Functioning of the European Union ("**TFEU**") prohibiting the abuse of a dominant market position can apply to certain concentrations. Under the MR (Art. 21), however, the MR alone can apply to concentrations as defined in its Art. 3 (see question 2.1 below), and the EC lacks procedural powers to assess such concentrations under Art. 102 TFEU outside the MR.

In contrast, in March 2023, the Court of Justice ruled (Case C-449/21) that an NCA may apply Art. 102 to a concentration that is not subject to *ex ante* review by the NCA under national merger control law and that has not been referred to the EC under Art. 22 TFEU (see question 3.3). Referring to the pre-MR case-law, the Court observed that, to prohibit such a concentration under Art. 102, the NCA must establish that the degree of dominance reached by the purchaser through the acquisition will substantially impede competition, because the only other undertakings remaining on the market will depend on its market behaviour.

The EU's far-reaching Digital Markets Act (Regulation (EU) 2022/1925) also has provisions that apply to concentrations involving very large online platforms serving as market "gatekeepers" (see question 7.2).

Finally, two other EU regulations also apply to concentrations. First, the Regulation on Foreign Direct Investment Screening (Regulation (EU) 2019/452), which entered into force in 2020, established a cooperation mechanism for screening inward foreign direct investments (FDIs). Under this cooperation mechanism, Member States must exchange information on FDIs taking place in their territory with the EC and other Member States. They also need to take into account concerns raised by the EC and other Member States on FDIs threatening security or public order in the EU, or threatening projects or programmes of EU interest. The regulation further sets out certain guiding principles for Member States wishing to maintain or adopt FDI screening rules at a national level.

Second, the new Foreign Subsidies Regulation (Regulation (EU) 2022/2560), which is applicable since 12 July 2023, grants the EC a broad mandate to investigate alleged distortive foreign subsidies. In addition to allowing the EC to investigate foreign subsidies on its own initiative, this regulation imposes mandatory notification and approval requirements for operators engaging in certain M&A transactions and public procurement procedures in the EU where they involve financial contributions above certain levels granted by non-EU governments.

1.3 Is there any other relevant legislation for foreign mergers?

Yes, the EEA Agreement between the EU, its Member States and three of the countries belonging to the European Free Trade Association – Iceland, Liechtenstein and Norway ("**EFTA States**") extends the one-stop-shop principle. Under that agreement, the EFTA States may not review transactions caught by the EU jurisdictional thresholds, even if all the parties to the transaction are from the EFTA States (see question 6.1). (See also the discussion of the cooperation agreements with the United States ("**U.S.**") and Canada in question 6.1.)

1.4 Is there any other relevant legislation for mergers in particular sectors?

No; however, please see questions 3.2 and 7.2 below.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

Please see the discussion in question 2.7 of Member State measures to protect legitimate interests under MR Art. 21(4).

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

The MR applies to transactions when they constitute a "concentration" (MR Art. 3(1)). A transaction constitutes a concentration when it results in a change in the control of an undertaking on a lasting basis.

In the context of competition law, the concept of an "undertaking" encompasses, according to case law, every entity under common control engaged in an economic activity, irrespective of its legal status and the way in which it is financed (Case C-41/90 *Höfner and Elser* (1991) ECR I 2010, para. 21).

The "change" of control on a lasting basis may result from the merger of two or more independent undertakings; it may also result from the acquisition of direct or indirect control of an undertaking by one or more persons already controlling another undertaking or by one or more other undertakings. The MR catches both share and asset acquisitions. The creation of a new joint venture ("**JV**") that will be jointly controlled by two or more undertakings and will perform on a lasting basis all the functions of an autonomous economic entity is also deemed to constitute a concentration (see question 2.3).

The MR defines "control" as the possibility of exercising decisive influence (MR Art. 3(2)). The CJN (11–90) explains the EC's interpretation of the concept of control in detail. Control results from ownership or the right to use all or part of an undertaking's assets. It also results from rights, contracts or any other means conferring decisive influence on the composition, voting or decisions of the organs of an undertaking. An undertaking can exercise control on a *de jure* or *de facto* basis. Veto rights over the appointment of senior management or the determination of the budget typically confer the power to exercise decisive influence on the undertaking concerned. Veto rights over a business plan will normally also do so if the business plan sets out details on the company's aims and measures for achieving those aims. Veto rights over the company's investment policy confer control if investments constitute an essential feature of the market in which the company is active. In contrast, veto rights relating to decisions on the essence of the company (changes in the statutes or the capital, liquidation, etc.) are considered normal protection of minority shareholders' rights and do not confer decisive influence.

For conceptual purposes, the CJN distinguishes between "sole" control, in which one undertaking exercises decisive influence over another undertaking, and "joint" control, in which two or more undertakings exercise such influence jointly. Many different types of control situations are possible. Two shareholders each owning 50% of the shares and voting rights of a company is a classic example of "joint" control. The owner of the majority of a company's shares and voting rights will normally have the power to exercise decisive influence over that company. If none of the minority shareholders have veto rights relating to the company's business plan or investment policy (see above), the majority shareholder will normally exercise "sole" control. In contrast, if one or more minority shareholders have such veto rights, those minority shareholders and the majority shareholder will exercise "joint" control over the company. Similarly, if there is no majority shareholder but a minority shareholder has such veto rights, that minority shareholder will normally exercise *negative* "sole" control over the company. If there is no majority shareholder and two or more minority shareholders have such veto rights, they will exercise "joint" control. A minority shareholder may also exercise *de facto* sole control if it is the largest shareholder and is highly likely to achieve a majority at the shareholders' meeting. The failure of an acquirer of a leading and substantial minority shareholding to realise that it had acquired *de facto* sole control has led to EC fines (see question 3.3).

2.2 Can the acquisition of a minority shareholding or other form of influence amount to a "merger"?

The acquisition of a minority shareholding in a company can amount to a "concentration" if the minority shareholder thereby acquires control of the company (see question 2.1).

In contrast, the acquisition of a minority shareholding not conferring control on the acquirer is not a concentration caught by the MR.

2.3 Are joint ventures subject to merger control?

The MR deems creation of a new jointly controlled JV to constitute a concentration, but only if the JV will perform, on a lasting basis, all the functions of an autonomous economic entity (MR Art. 3.4). That is the case whether the new JV is a so-called "greenfield operation" or whether the parties contribute existing assets to it.

Moreover, the EU Court of Justice held in 2017 that a change in the control of an existing undertaking from sole to joint results in the creation of a JV and will constitute a concentration under the MR only if the JV will perform, on a lasting basis, all the functions of an autonomous economic entity (Case C-248/16). Prior to that ruling, the EC had considered that such a change resulted in a concentration even if the existing undertaking did not have a full-function character after the transaction (CJN 91).

A JV has a full-function character when it will operate on a market on a lasting basis and perform functions normally performed by other undertakings operating on that market. It is not full function if it will only take over from its parents one or more specific functions without having its own market presence or market access. Sales to the parents accounting for more than half of the JV's turnover may undermine the JV's full-function character, unless the parties can demonstrate that the JV will be free to sell its goods or services to third-party customers and will deal with its parents at arm's length.

The CJN (91–109) explains these requirements in detail.

2.4 What are the jurisdictional thresholds for application of merger control?

Parties must notify a concentration to the EC for clearance prior to implementation if it has a so-called "**Community dimension**" (MR Art. 1(2)).

A concentration has a Community dimension where (i) the combined aggregate worldwide turnover of all the undertakings concerned exceeds €5,000 million, and (ii) the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds €250 million.

A concentration that does not meet the foregoing primary thresholds will nevertheless have a Community dimension where all the following conditions are met: (i) the combined aggregate worldwide turnover of all the undertakings concerned exceeds €2,500 million; (ii) in each of at least three EU Member States, the combined aggregate turnover of all the undertakings concerned exceeds €100 million; (iii) in each of at least three of those same EU Member States, the aggregate turnover of each of at least two of the undertakings concerned exceeds €25 million; and (iv) the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds €100 million.

Even if the above primary or secondary thresholds are met, however, the concentration will not have a Community dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within the same EU Member State (the "**two-thirds rule**").

In applying the thresholds, the "**undertakings concerned**" are the merging parties in the case of a merger, the acquirer(s) of control and the target in the case of a share or asset acquisition, and the jointly controlling companies in the case of the creation of a new full-function JV. In the case of such a new JV, if a parent undertaking will transfer a business to the JV, the business in question is part of that parent undertaking for the purposes of the thresholds.

If a JV acquires another undertaking, the question arises whether the JV is the acquiring undertaking concerned (in which case, the turnovers of the jointly controlling parent undertakings are attributed to the JV) or whether each of the JV's jointly controlling parent companies is a distinct undertaking concerned for the application of the filing thresholds. Under the CJN (146–147), if the JV has a "full-function" character (see question 2.3), the EC will normally consider that the JV itself is the undertaking concerned on the acquirer side; however, if the JV is a "mere vehicle" for an acquisition by the parent companies, the EC will consider each of the parent companies to be distinct undertakings concerned. In October 2020, the General Court (Case T-380/17) interpreted the CJN as meaning that, even in the case of a full-function JV, the EC can consider the economic reality in order to establish whether the parent companies are the real players behind a concentration, in which case they will each be separate undertakings concerned for the application of the filing thresholds.

In all cases, the "undertaking" includes not just the entity that is a direct party to or subject of the agreement or bid, but also all other entities in a relationship of common control with that entity (e.g., the target entity and all its controlled subsidiaries).

The CJN (124–194) explains the concept of undertaking concerned, the notion of turnover (net sales revenue), what the relevant turnover is (external sales net of rebates and taxes directly related to turnover) and how to determine it (most recent audited financial accounts with adjustments for subsequent acquisitions and divestitures). The CJN (195–220) also describes the methods for allocating turnover geographically (normally, to the country where the customer is located) and explains the special rules for determining the turnover of financial and insurance undertakings.

Finally, two MR mechanisms can result in the EC obtaining jurisdiction over concentrations that fall below the Community dimension thresholds, and two additional MR mechanisms permit the EC to transfer jurisdiction over all or parts of a concentration with a Community dimension (see question 2.7).

2.5 Does merger control apply in the absence of a substantive overlap?

Yes, all concentrations (see question 2.1) with a Community dimension (see question 2.4) must be notified, regardless of whether there is a substantive overlap between two or more of the undertakings concerned. However, a simplified procedure may apply in the absence of a substantive overlap (see question 3.11).

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

A foreign-to-foreign transaction is caught by the MR's notification and clearance requirements if it is a concentration (see question 2.1) and has a Community dimension (see question 2.4). The MR's notification and clearance requirements may also apply to a foreign-to-foreign transaction if one of the two MR mechanisms discussed in question 3.3 applies.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Under the two-thirds rule (see question 2.4), a concentration meeting the primary or secondary turnover thresholds is deemed not to have a Community dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU Member State.

Where a concentration does not have a Community dimension, it may be reviewable in one or more EU/EEA Member States. All the EU/EEA Member States, except Liechtenstein and Luxembourg, have their own national merger control laws that may apply. Each such national law has its own distinct set of jurisdictional thresholds.

Referrals by the parties or Member States to the EC: Two MR mechanisms can result in the EC obtaining jurisdiction over transactions that fall below the Community dimension thresholds. See question 3.3.

Referrals by the EC to Member States: Two further MR mechanisms permit the EC to transfer jurisdiction over all or parts of a concentration that has a Community dimension. First, before a concentration with a Community dimension is notified, the parties may submit a reasoned submission to the EC and EU Member States, requesting that the NCA of the affected Member State vet the transaction instead (MR Art. 4(4)). Second, regardless of whether the parties make such a request, the NCA of that country may do so (MR Art. 9). Both mechanisms apply where the concentration threatens to affect competition in a distinct market located within an EU Member State.

EC Guidance: The EC Notice on Case Referral reviews the legal criteria that each of the above four referral mechanisms must satisfy and sets out the factors that must be taken into account when referral decisions are made.

Protection of Legitimate Interests: In addition, as an exception to the one-stop-shop principle, EU Member States may take appropriate measures in order to protect legitimate interests other than those the MR takes into consideration, provided those interests are compatible with EU law (MR Art. 21(4)). These provisions permit EU Member States to impose restrictions on and possibly prohibit a notified concentration cleared by the EC. The MR expressly recognises public security, plurality of the media and prudential rules as constituting legitimate interests compatible with EU law. A Member State wishing to consider any other public interest in reviewing a concentration must first notify that interest to the EC for assessment of compatibility with EU law.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Where the same buyer and seller undertakings engage in two or more transactions with each other within a two-year period, the MR treats all those transactions as a single concentration arising on the date of the last transaction.

Two or more transactions also constitute a single concentration if (i) they are interdependent because the parties would not complete one without the other, and (ii) the same undertaking ultimately acquires control.

A single concentration also arises where the same undertaking acquires control of another undertaking through a series of transactions in securities that take place within a reasonably short period.

The CJN (36–50) explains in detail the circumstances in which these rules can come into play.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Notification is compulsory. Subject to very limited exceptions (see question 3.8), a concentration meeting the thresholds must be notified before implementation (MR Art 4(1)) and may not be implemented prior to clearance (MR Art 7(1)).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Application of the MR is without prejudice to Art. 346 of the TFEU, which permits EU Member States to take measures they consider necessary in order to protect essential security interests connected with the production of or trade in arms, munitions and war material. A similar provision applies with respect to the EFTA States under the EEA Agreement (see question 1.3). In a number of cases, EU Member States have instructed parties with concentrations meeting the jurisdictional thresholds not to notify the parts of those transactions relating to the defence sector.

3.3 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

Two MR mechanisms can result in the EC obtaining jurisdiction over transactions that fall below the Community dimension thresholds, regardless of whether they are reviewable under national merger control laws.

Three Member State Rule: First, the parties to a concentration that does not have a Community dimension under the primary or secondary turnover thresholds (see question 2.4) may request the EC to examine their transaction if it is capable of being reviewed under the national competition laws of at least three EU Member States (MR Art. 4(5)). The parties are more likely to take advantage of this possibility when they consider that a one-stop review by the EC will be more efficient, more rapid and less costly than multiple reviews at Member State level or when they consider that a positive outcome is more likely before the EC than before the competent NCAs. The parties must make the request using the Form RS attached as Annex III to the Implementing Regulation (see question 1.2). If none of the EU Member States that are competent to examine the concentration express disagreement, the MR deems the concentration to have a Community dimension. The parties must then notify the concentration to the EC, and no EU Member State may apply its national competition law to the transaction. In contrast, an expression of disagreement by any of the competent Member States renders the mechanism inapplicable.

Art. 22 Referrals to the EC: Second, one or more EU Member States may ask the EC to examine a concentration that does not meet the Community dimension thresholds if the transaction affects trade between EU Member States and threatens competition within the requesting country (MR Art. 22). Other EU/EEA countries may join such a request. If the EC agrees to intervene, the scope of its jurisdiction is limited to the requesting country (or countries). This has led, in some cases, to parallel investigations of the same transaction, i.e., by the EC for the requesting country and by NCAs in other EU Member States.

Until 2021, the EC's practice was to discourage Art. 22 referral requests from Member States not having jurisdiction over the transaction under their national merger control laws, because experience had shown that these transactions were unlikely to significantly impact the internal market. In March 2021, however, the EC changed this practice and issued practical guidance on the Art. 22 referral mechanism, complementing the existing general guidance in the EC Notice on Case Referral (2005). Under the 2021 guidance (para. 19), referral of a transaction that is not notifiable in the referring Member State(s) will normally be appropriate where a party's turnover does not reflect its actual or potential competitive potential; for example, where it is a start-up that has not yet developed a business model generating significant revenues.

The EC accepted the first Art. 22 referral request under this new policy in April 2021 (Case M.10188). The notifying party appealed to the General Court, which upheld the EC's acceptance of the referral (Case T-227/21); however, the EU Court Justice overturned the General Court's judgment, rejecting the EC's Article 22 new referral policy. Therefore, the NCAs may refer transactions to the EC only if the requesting country has jurisdiction (Cases C-611/22 and C-625/22 P).

In July 2021, the EC opened an in-depth phase II investigation of Case M.10188. While the investigation was ongoing, however, the parties implemented the transaction in August 2021, resulting in the EC opening an investigation for violation of the standstill requirement (Case M.10483) and adopting interim measures to restore and maintain conditions of effective competition pending the outcome of the EC's phase II review (Case M.10493). In September 2022, the EC prohibited the transaction (see question 6.2) and in July 2023 the EC imposed a record fine of €432 million on the purchaser and a symbolic fine of €1,000 on the target for intentionally completing the transaction before the EC finished its investigation (see question 3.8). The notifying party has appealed these latter EC decisions to the General Court (Cases T-709/22 and T-5/23 respectively). In June 2024, the notifying party completed the divestiture of the target. Following the judgment in Cases C-611/22 and C-625/22 P, the EC withdrew the decisions related to the case as they no longer have a legal basis, given that the EC did not have jurisdiction to review Case M.10188 in the first place.

In the second half of August 2023, the EC accepted two new Art. 22 referrals that were not notifiable in any Member State (Cases M.11212 and M.11241). Even though concerns about mergers in the digital and pharmaceutical sectors were the main drivers behind the 2021 Guidance, the two new referrals, involving vehicle communication technology and power trading, confirm that the guidance is not limited to any specific economic sector. Both deals were abandoned in March and June 2024, respectively.

3.4 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The EC is empowered to impose fines not exceeding 10% of the aggregate worldwide turnover of each of the undertakings concerned where they intentionally or negligently fail to notify a concentration (MR Art. 14(2)).

The risk of the EC imposing a fine if it establishes failure to notify is high; however, so far, the EC has needed to do so only rarely. The most recent instances date from 2009 and 2014, when acquirers of substantial minority shareholdings conferring *de facto* sole control (see question 2.1) failed to notify and implemented their respective acquisitions without obtaining clearance (Cases M.4994, 2009 and M.7184, 2014). Although the EC cleared the two transactions after their belated notifications, it imposed fines of €20 million, respectively, on the acquirers. See also the discussion in question 3.8 of two later cases involving fines for partial implementation before notification (Cases M.7993, 2018, and M.8179, 2019).

The EU Court of Justice (Cases C-10/18 P and C-746/21 P) confirmed that failure to notify is a separate and distinct offence from the offence of failing to respect the standstill obligation (see question 3.8).

3.5 Is it possible to carve out local completion of a merger to avoid delaying global completion?

In principle, no. See below (question 3.8) regarding the legal obligation not to implement a concentration with a

Community dimension prior to clearance. This "standstill" obligation applies to the whole of the concentration, including parts outside the EEA. In principle, completion of any part of a concentration with a Community dimension anywhere in the world prior to obtaining EC clearance is a violation of this "standstill" requirement. Exceptionally in an appropriate case, however, the EC may grant a derogation from this requirement (see question 3.8). It has permitted completion of non-EEA parts pending MR clearance in at least one case (Case M.4151, 2006) but has refused in at least one other (e.g., Case M.5969, 2011).

3.6 At what stage in the transaction timetable can the notification be filed?

The notifying parties may file a notification before the parties conclude an agreement if the parties can demonstrate to the EC both their intention to enter into an agreement and a concrete plan to do so; for example, based on an agreement in principle, a memorandum of understanding or a letter of intent. In the case of a public bid, the earliest point would normally be immediately after the announcement of the intention to launch the bid.

3.7 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The timeframe for scrutiny essentially depends on whether the notified concentration can be cleared during the initial – "**phase I**" – investigation (25 working days) or needs to go through the detailed – "**phase II**" – investigation (additional 90 working days). At both stages, extension and/or suspension of the review period is possible depending on the circumstances (see below). In addition to the review periods, the timeframe must take account of the pre-notification phase. The EC's Best Practices on the Conduct of Merger Control Proceedings (2004) provides guidance for interested parties on the main stages and the day-to-day conduct of the regulatory process.

Pre-notification period: Especially for transactions not qualifying for the simplified procedure (see below and question 3.11), the period before formal filing of the notification is an important part of the overall timeframe for scrutiny. The notifying parties start the pre-notification period by filing a request for the allocation of a DG COMP case team. Following DG COMP's identification of the case team and assignment of a case number, the next step is generally an informal contact with the case team to discuss timing. Pre-notification discussions with the case team are generally started with the submission of a detailed draft of the Form CO (see question 3.7) for their review. The case team's review normally requires five working days, after which representatives of the notifying parties generally meet with the case team either in person or by telephone in order to obtain the case team's comments and discuss timing. After that meeting, the case team may send requests for additional information to the notifying parties, and they will need to incorporate their responses into a new draft of the Form CO. The responses to the initial requests for information ("**RFIs**") may lead to further case team requests for additional information. In some cases, it may be necessary to submit multiple Form CO drafts for the case team's review. DG COMP recommends that the notifying parties (see question 3.12) submit, as early as possible within the pre-notification period: internal documents – such as board presentations, surveys, analyses, reports and studies – discussing the planned transaction; its economic rationale; its competitive significance; and its market context. In cases of sufficient potential complexity, it is also a growing practice for case teams to request and carry out a site visit of relevant facilities in the pre-notification period, in order to facilitate the team's understanding of the production processes and businesses involved.

Before the notifying parties formally file the final Form CO, it is important to ensure that the form reflects all the information the DG COMP case team considers necessary for its investigation. If the notifying parties do not do so, the case team may – and it has done in practice – reject the formal filing as being incomplete. For example, in July 2019, the EC declared the notification in Case M.9406 incomplete approximately two weeks into the phase I review, pushing the transaction back into the pre-notification phase. This was the first time the EC had declared a notification incomplete since 2015.

The pre-notification period can take many months in complex cases. The *Halliburton/Baker Hughes* transaction (Case M.7477), in which the pre-notification period lasted around 13 months, provides an extreme example. For concentrations qualifying for the simplified procedure (see question 3.11), the pre-notification period can require only a couple of weeks; however, for transactions not qualifying for that procedure, the pre-notification period often takes more than a month, even in non-complex cases.

Phase I investigation: The formal filing of the final Form CO, if accepted as complete, starts the clock running on the case team's "phase I" investigation. The EC has 25 working days, which start to run on the first working day after the formal filing. By the end of that period, the EC must clear the transaction or open a detailed 90-working-day "phase II" investigation. After accepting the filing as complete, DG COMP publishes an information page on its website with the names of the parties, the case number, the date of the notification and the provisional phase I end date, and updates this information page with other key dates as the review progresses. Several days after the filing, the EC publishes a notice in the EU Official Journal, inviting third parties to submit their observations within a specified period following the date of the publication. The case team can also send market test questionnaires to customers, competitors and suppliers.

If the case team's review does not raise serious doubts as to the compatibility of the concentration with the internal market (i.e., risk that the transaction would significantly impede effective competition in the EU's internal market, see question 4.1), the EC will adopt a clearance decision on or before the review period's 25th working day. Since the 1990 inception of EU merger control, the EC has cleared approximately 90% of all notified concentrations unconditionally in phase I. Since the introduction of the simplified procedure (see question 3.11) in 2000, clearances by that procedure account for approximately 60% of all unconditional phase I clearances.

In contrast, if the review raises serious doubts, the case team will hold a "state of play" meeting with the notifying parties on or around the 15th working day of phase I. The notifying parties then have the option of submitting remedies removing those serious doubts (see question 5.2). In order to avoid the opening of a phase II investigation, they must submit the remedies before the expiry of the 20th working day. If they do not submit timely remedies and if the case team's further investigation does not remove the serious doubts, the EC will open a phase II investigation.

The notifying parties' submission of timely remedies automatically extends the phase I period by 10 working days. During that period, the case team will assess the remedies and market test them with customers and competitors. On or before the 35th working day, the EC will adopt a conditional clearance decision if it finds that the remedies remove the serious concerns, or it will open a phase II investigation if it concludes that they do not. Concentrations cleared conditionally at the end of phase I and concentrations moving to phase II account, respectively, for around 3–4% of all notified concentrations.

Phase II investigation: If the EC opens a phase II investigation, the clock on the 90-working-day investigation period starts to run from the end of the phase I period. Voluntary extensions of the 90-working-day period are possible. The notifying parties can ask the EC to extend if they make the request before expiry of the 15th working day of the period. The EC can take the initiative to extend the phase II period at any time but can extend only with the notifying parties' agreement. The aggregate duration of these extensions may not exceed 20 working days in total. The EC can also suspend the period's running if circumstances for which one of the undertakings involved in the concentration is responsible impede the investigation.

The EC opens phase II by adopting a confidential decision describing in detail the reasons for its serious concerns. The case team normally then holds a "state of play" meeting with the notifying parties within two weeks of the decision. Before that meeting, the notifying parties normally submit written comments on the decision for discussion with the case team. The case team conducts its detailed investigation through further RFIs to the notifying parties and contacts with interested third parties.

If the further investigation reveals that the transaction will not significantly impede effective competition (see question 4.1), the EC will adopt a decision clearing the transaction. In contrast, if the investigation confirms that the transaction will significantly impede effective competition, the EC will start work on a so-called "statement of objections" ("**SO**"), setting out its findings and conclusions in detail. Before it issues the SO, however, DG COMP will hold another "state of play" meeting with the notifying parties. At, or shortly after, that meeting, the notifying parties may be able to avoid issuance of the SO if they signal a willingness to submit remedies and proceed forthwith to do so. If the notifying parties do not do so, the EC will issue the SO, which is confidential, to its addressees. It issues an SO in about 40% of phase II cases, and usually does so no later than seven or eight weeks into phase II. The notifying parties then have an opportunity to reply in writing to the SO and can request an oral hearing.

The notifying parties can submit remedies to remove competitive concerns at any time before expiry of the 65th working day of the phase II review period. Submission of remedies on or after the 55th working day automatically extends the period by 15 additional working days. By or before the end of the period, the EC will adopt a conditional clearance decision, if it finds that the offered remedies remove the competitive concerns, or a prohibition decision if it finds that they do not (or if the notifying parties do not submit remedies). Around 27% of phase II cases end in unconditional clearance, 60% in conditional clearance and the rest (so far, 32 cases) in prohibition.

3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?

Yes, completion before clearance is prohibited (MR Art. 7(1)). In May 2018, the EU Court of Justice held that actions taken that are necessary to achieve the change of control (even if those actions do not themselves complete the change of control) can "jump the gun" and violate the "standstill" obligation (Case C-633/16).

An exception to the "standstill" requirement applies to the implementation of a public bid or of a series of transactions in securities, provided the acquirer notifies the concentration immediately and does not exercise the voting rights attached to the securities. In 2020, the EU Court of Justice upheld the EC's position that the exception for a series of acquisitions in securities does not apply where an undertaking first acquires a substantial minority shareholding conferring *de facto* sole control (see question 2.1) over a company with the intention of later acquiring a majority stake through a public bid (Case C-10/18 P).

The EC may also grant a derogation from the standstill requirement upon a reasoned request demonstrating exceptional circumstances (MR Art. 7(3)). Although the bar is set relatively high, the EC has granted derogations in approximately 138 cases since the MR's inception.

The risks in completing without authorisation before obtaining clearance are the possible invalidity of the transaction and the likely imposition of significant fines. The validity of the transaction depends on whether the transaction complies with the MR's substantive test (see question 4.1). In contrast, the risk of a significant fine is not contingent on that factor. The EC is empowered to impose fines not exceeding 10% of the aggregate worldwide turnover of each of the undertakings concerned where they intentionally or negligently implement a concentration without authorisation before the EC clears the concentration (MR Art. 14(2)).

The EC imposed its first fine ever for unlawful "gun-jumping" in April 2018 (Case M.7993) – a fine of €124.5 million on a buyer for including in the share purchase agreement with the seller certain provisions aimed at preserving the value of the target in the period before completion of the transaction. The EC imposed fines for two separate infringements: €62.25 million for partial implementation prior to notification; and €62.25 million for partial implementation after notification but prior to obtaining EC approval. The EC recognised in its decision that it is both common and appropriate to include clauses aimed at protecting the value of the target prior to completion, provided the clauses are strictly limited to that which is necessary to ensure the maintenance of the target's value. It found, however, that the clauses in question exceeded that threshold and violated the standstill requirement as they permitted the buyer to exercise decisive influence through the power to approve the target's appointment of senior management, its pricing policy and commercial terms and conditions with customers, along with its ability to enter, terminate or modify a wide range of contracts. On appeal, the General Court upheld the EC's decision but reduced the €62.25 million fine for partial implementation prior to notification by 10%, because the buyer had informed the EC about the transaction before the share purchase agreement was signed and sent the EC a case allocation request immediately after signing (Case T-425/18). On 9 November 2023, the EU Court of Justice confirmed that the EC was justified in imposing two separate fines on the buyer for gun-jumping, involving both breaching the standstill obligation and failing to notify, but reduced the fine for the failure to notify by €3.1 million (Case C-746/21 P).

The EC imposed its second fine for unlawful gun-jumping in June 2019 in a case involving a two-step "warehousing" transaction structure aimed at permitting the seller to obtain early payment of the purchase price (Case M.8179). In the first step, which took place before notification to the EC, certain persons unaffiliated with the buyer or the seller set up a special purpose vehicle to which the seller sold 95% of the target's shares for the modest sum of €800. At the same time, the buyer paid the seller €5.28 billion for the remaining 5% of the target's shares plus options to acquire the stake held by the special purpose vehicle. The parties then notified the transaction to the EC. After the EC cleared the transaction as not significantly impeding effective competition (see question 4.1 below), the buyer exercised its options, thereby acquiring 100% of the target's shares.

The EC subsequently opened a gun-jumping investigation and concluded that the two steps of the warehousing structure together formed a single notifiable transaction. It found that the buyer had partially implemented that transaction in the first step, in violation of the standstill requirement, because the first step was necessary in order to achieve the ultimate change of control over the target and thus presented a direct functional link with the implementation of that change of control. The EC fined the buyer €14 million for partial implementation before notification and an additional €14 million for partial implementation before obtaining EC approval. The General Court upheld this decision on appeal (Case T-609/19), and the buyer did not appeal to the EU Court of Justice.

See also the discussion of the Art. 22 referral Case M.10188 in question 3.3. In July 2023, the EC imposed a record fine of €432 million on the purchaser and a symbolic fine of €1,000 on the target for completing the transaction before the EC finished its investigation (Case M.10483). The purchaser has appealed the EC's decision to the General Court (Case T-5/23). However, the EC withdrew its gun-jumping decision following the judgment in Cases C-611/22 and C-625/22 P.

3.9 Is a transaction which is completed before clearance is received deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?

The validity of a transaction completed before clearance is received depends on the outcome of the EC's investigation (MR Art. 7(4)). If the transaction is subsequently cleared (with or without conditions), the transaction is deemed valid. In contrast, if the transaction is subsequently prohibited, it is deemed invalid. However, there is an exception for securities transactions, which are deemed invalid when the transaction is prohibited only if the buyer and seller knew or ought to have known that the transaction was carried out in violation of the standstill requirement.

If the EC prohibits an already implemented transaction, it may require the parties to dissolve the concentration, so as to restore, insofar as possible, the situation prevailing prior to completion (MR Art. 8(4)). The EC may also order or take any other appropriate measures to ensure that the parties dissolve the transaction and restore the prior situation.

3.10 Where notification is required, is there a prescribed format?

Yes, the notifying parties must submit notifications in the manner prescribed by Form CO, attached as Annex I to the Implementing Regulation. They may use a Short Form CO, attached as Annex II to the Implementing Regulation, for certain transactions (see question 3.11).

An EC communication published in the EU Official Journal (most recently in OJ 2023 C-160/11) specifies the method of transmitting documents to the EC and the technical specifications for signing and submitting documents electronically. The EC requires that documents be transmitted to and from the EC using digital means, unless the EC exceptionally agrees that other means may be used.

3.11 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

Simplified procedure: In May 2023, the EC replaced its 2013 Notice on a Simplified Procedure with a new 2023 notice expanding the categories of cases that can benefit from the procedure. Under the new notice, the following cases can benefit:

- two or more undertakings acquire joint control of an undertaking and either:
  - the JV has no current or expected turnover in the EEA and at the time of the notification the parent undertakings have no plan to transfer to the JV any assets located within the EEA; or
  - the JV has negligible activities in the EEA, which is the case where the JV, plus any assets contributed to it by the acquirers, has turnover and total asset values, respectively, of less than €100 million in the EEA;
- two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and the following conditions are fulfilled under all plausible market definitions:
  - none of the parties to the concentration horizontally overlap or have a vertical market relationship with any other party;
  - two or more of the parties horizontally overlap but their combined market share is either: (i) lower than 20%; or (ii) lower than 50% and the HHI delta resulting from the concentration on that market is below 150; or
  - two or more of the parties are in a vertical market relationship on any market and their individual and combined market shares are: (i) lower than 30% on the upstream and downstream markets; (ii) lower than 30% on the upstream market and the purchasing share of the parties active in the downstream market is less than 30% of upstream inputs; or (iii) lower than 50% on both the upstream and downstream markets, and the HHI delta resulting from the concentration is below 150 on both the upstream and downstream markets, plus the market share of the smaller undertaking is the same in both the upstream and the downstream markets; and
- a party acquires sole control of an undertaking over which it already has joint control.

The 2023 notice also introduces several "flexibility clauses" giving the EC discretion to apply the simplified procedure to certain types of cases that do not fall under any of the above categories. The types of cases that can benefit are for:

- horizontal overlaps where the combined market share is 20% to 25%;
- vertical market relationships where the individual or combined market shares are either:
  - 30% to 35%; or
  - do not exceed 50% in one market and 10% in the other vertically related market; and
- JVs with turnover and assets between €100 and €150 million in the EEA.

For the purposes of determining the qualification for the simplified procedure in the case of a concentration involving the acquisition of joint control, the EC does not treat relationships between the acquirers of joint control outside the field of the JV as horizontal or vertical relationships.

The new Implementing Regulation (see question 1.2) introduces a "**tick-the-box**" short notification form with multiple choice questions and tables for cases qualifying for the simplified procedure. It also reduces and clarifies the information requirements for such cases.

According to the Notice on a Simplified Procedure (28), and in contrast with the normal procedure (see question 3.7), pre-notification contacts should be initiated at least two weeks before the expected date of notification, and it may be possible to dispense with the submission of a draft notification. Moreover, the new 2023 notice introduces a "super-simplified" procedure for cases involving JVs with no turnover or assets in the EEA, and transactions with no horizontal or vertical relationships. The parties are invited to notify directly without engaging in exchanges with the EC beforehand. The notice published in the EU Official Journal (see question 3.15) will indicate that the concentration may qualify for a simplified procedure. After verifying that the criteria for a simplified procedure are satisfied, the EC will then normally issue a short-form unconditional clearance decision within 25 working days from the notification date and will endeavour to do so as soon as practicable after expiry of the 15th working day. However, the EC has the option to revert to a normal procedure in the period leading up to the 25th working day.

Informal ways to speed up: For transactions not qualifying for the simplified procedure, preparing a thorough draft of the Form CO and engaging in robust cooperative discussions with the EC case team during the pre-notification period (see question 3.7) may help avoid surprises during phase I.

3.12 Who is responsible for making the notification?

Who is responsible for making the notification depends on the concentration's nature:

- for a merger, it is the merging parties;
- for an acquisition of sole control, it is the acquirer of control;
- for an acquisition of joint control, it is the acquirers of joint control; and/or
- for the creation of a full-function JV, it is the undertakings that will have joint control.

3.13 Are there any fees in relation to merger control?

There are no filing fees for notifications to the EC under the MR.

3.14 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

An exception to the "standstill" requirement applies to the implementation of a public bid, provided the concentration is notified without delay and the acquirer does not exercise the voting rights attached to the securities (see question 3.8). The requirement not to exercise the voting rights also applies to the acquisition of a non-controlling minority shareholding as part of the bid. The undertaking launching the bid may request the EC to grant a derogation from the "standstill" requirement permitting it to exercise the voting rights solely for the purpose of maintaining the full value of its investment.

3.15 Are notifications published?

The EC will publish the fact of the notification, but not the notification itself. Several days after the formal filing of the final Form CO, the EC publishes a brief notice in the EU Official Journal. The notice indicates the parties and the nature of the transaction and invites third parties to submit their observations within a specified period following the date of the publication. The notifying party or parties draft the text of the notice (as part of the Form CO). The EC also indicates the date of the notification and the provisional end of the phase I period on an information page for the case on the DG COMP website.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The EC must prohibit – as incompatible with the internal market – concentrations that would significantly impede effective competition in all or a substantial part of the internal market, in particular, due to the creation or strengthening of a dominant position (MR Art. 2(3)). In an important July 2023 judgment (Case C-376/20 P), the EU Court of Justice held (87) that "it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it". The Court thereby rejected the May 2020 ruling of the General Court (Case T-399/16) that the EC had to demonstrate a "strong probability" that the merger would significantly impede effective competition. The detailed assessment criteria used to determine whether a significant impediment is more likely than not depends on whether the concentration is horizontal or vertical. An additional test specifically applies alongside the significant impediment test to assess the potential "spill-over" effects of a JV.

Horizontal concentrations: The EC's Guidelines on Horizontal Mergers (2004) explain in detail the various circumstances in which concentrations involving a horizontal relationship between the undertakings concerned may significantly impede effective competition. The theories of harm fall under the broad headings of "non-coordinated" and "coordinated" effects.

Under the guidelines, a horizontal concentration may produce "non-coordinated" anticompetitive effects if the loss of competition between the parties is likely to permit the post-closing undertaking to reduce output and increase prices. That can be the case, for example, if the concentration is likely to create or strengthen a dominant position for the post-closing undertaking in the relevant market. It can also be the case, for example, under certain circumstances if a significant number of customers consider the merging parties to be the closest competitors in a market for differentiated products.

A horizontal concentration that does not create or strengthen a dominant position can also significantly impede effective competition through other non-coordinated effects in an oligopolistic market if those effects are likely to result in significant price increases or degradations in quality or other competitive parameters. The EU Court of Justice ruled in July 2023 (Case C-376/20 P) that such non-coordinated effects can arise in an oligopolistic market if (a) the concentration eliminates important competitive constraints that the parties had exerted upon each other before the concentration, or (b) it reduces competitive pressure on the remaining competitors. In so ruling, the Court rejected the General Court's May 2020 position (Case T-399/16) that (a) and (b) were cumulative rather than alternative requirements.

In certain concentrated markets, it may make rational business sense for suppliers to engage in coordination by responding to each other's price increases or output decreases by following the leader instead of competing aggressively. In such a market, a horizontal concentration may significantly impede effective competition by producing "coordinated" anticompetitive effects. It may do so by increasing the likelihood that the main players will coordinate to increase prices or by making existing coordination among the main players easier, more stable or more effective.

Non-Horizontal Concentrations: The EC's Guidelines on Non-Horizontal Mergers (2008) recognise, and the EC's decisional practice generally confirms, that concentrations that do not involve a horizontal relationship are generally less likely to impede effective competition than horizontal concentrations. The principal focus of the guidelines is on the limited sets of circumstances in which a concentration involving a vertical relationship will significantly harm competition by foreclosing competitors. However, the guidelines also discuss other possible ways in which vertical concentrations, as well as concentrations between undertakings active in closely related markets (e.g., suppliers of complementary products), may impede effective competition.

JV "spill-over" effects: In addition to the significant impediment to competition test, the creation of a full-function JV (see question 2.3) is also subject to an additional substantive test to determine the JV's compatibility with the EU's internal market. The JV's creation will be incompatible with that market if it will give rise to "spill-over" effects on competition between the jointly controlling parent undertakings, resulting in appreciable anticompetitive effects that pro-competitive efficiencies would not offset. In principle, spill-over effects could occur if the jointly controlling parent undertakings are active on the same market as the JV or on a market that is closely related to the JV's market. To date, however, the EC has never prohibited a concentration due to such spill-over effects.

Role of consumer welfare: According to the EC (Case M.9409), the MR's legal test includes the protection of the competitive process, even if it cannot be demonstrated that a reduction of competition affects consumer welfare.

4.2 To what extent are efficiency considerations taken into account?

The MR (recital 29) recognises that it is appropriate for the EC to take account of any substantiated and likely efficiencies put forward by the undertakings concerned and notes the possibility that efficiencies resulting from a concentration may counteract its anticompetitive effects. According to the EC's Guidelines on Horizontal Mergers (77), the EC:

> *"[...] considers any substantiated efficiency claim in the overall assessment of the merger. It may decide that, because of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the [internal] market [...]. This will be the case when the [EC] is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have."*

The EC has considered efficiency arguments in assessing many notified concentrations. Moreover, the EC is understood to be considering ways it could take into account so-called "green efficiencies" that help companies meet the EU's Green Deal climate goals. To date, however, efficiencies do not appear to have been a decisive factor in the EC's clearance of a concentration. In a May 2020 judgment (Case T-399/16), the General Court distinguished two types of efficiencies in merger cases. According to the General Court, any concentration will lead to efficiencies stemming from the merged entity's rationalisation and integration of production and distribution processes. The General Court considered these types of efficiencies, aimed at eliminating duplicate structures in the production and distribution chains and redeploying or dismissing redundant staff, inherent in all mergers and as possibly leading the merged entity to lower its prices. The General Court held that the EC must consider these "inherent" efficiencies in assessing its theory of harm, without it being incumbent on the parties to prove them. In contrast, it is for the parties to prove any efficiencies going beyond the inherent ones. In an important July 2023 judgment (Case C-376/20), however, the EU Court of Justice rejected (242–247) the General Court's distinction, ruling that the parties have to prove all efficiencies, including "inherent" ones.

4.3 Are non-competition issues taken into account in assessing the merger?

No, the criteria that the EC is required to take into account in assessing concentrations under the significant impediment to effective competition substantive test focus on competition issues (MR Art. 2(1)).

As the full college of European Commissioners adopts phase II decisions *in camera*, it is at least possible that non-competition political considerations could play a role in their deliberations; however, allegations of such considerations influencing decisions have arisen only rarely. Since taking office in November 2014, moreover, Competition Commissioner Vestager has stated publicly on several occasions that political factors do not play a role in EC merger control decisions.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The scope for the involvement of third parties in the EC's procedure is large (see question 3.7).

The EC is entitled to hear third parties showing "sufficient interest" in the EC's procedure (MR Art. 18(4)). As summarised in its Best Practices on the Conduct of Merger Control Proceedings (34), parties considered to have a "sufficient interest" include customers, suppliers, competitors, members of the management organs of the undertakings concerned and recognised workers' representatives of those undertakings.

In practice, third parties – especially customers and competitors – play a crucial role in the EC's assessment of concentrations, particularly in those that appear likely to raise competition concerns. Shortly after receiving the formal notification, the EC publishes an invitation for third-party comments (see question 3.15). Almost immediately after it receives the notification (and sometimes already in the pre-notification period if the notifying parties' consent), the case team seeks the views of the transaction parties' principal customers, competitors and suppliers. It asks them to complete sometimes very detailed (but usually tick-the-box and/or short answer) questionnaires about the relevant markets, the principal players, the market impact of the transaction, and so forth. The case team follows up with some third-party market players by telephone or in-person meetings. Such contacts with market players intensify substantially in a phase II investigation.

Customers or competitors with concerns about a concentration may also bring their concerns proactively to the case team's attention. The case team pays particularly close attention to the views of customers but also listens to competitors, while factoring in their possible interests in complicating a rival's transaction (including the possible aim of picking up part of the target business that the parties may have to divest as part of a remedy package). If the notifying parties submit remedies to overcome competitive concerns (see question 5.2), moreover, the EC market tests the proposal with a wide range of market players.

If the EC issues an SO to the notifying parties (see question 3.7), it is open to the case team in appropriate cases to provide a non-confidential version of the SO (with business secrets removed) to third parties that have demonstrated a sufficient interest, so they can make their views on the EC's assessment known. However, the EC requires the third parties to accept strict confidentiality obligations and use restrictions.

Third parties may also appeal against an EC clearance or prohibition decision if they can demonstrate that the decision directly and individually concerns them (see question 5.10).

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

See the discussion of the main stages of the regulatory process in question 3.7. During the pre-notification period, the EC often requests substantial information and documents and is prepared to accept a notification as complete, only if the Form CO incorporates all the information the EC deems necessary in order to conduct its phase I investigation. The EC may impose fines not exceeding 1% of the aggregate turnover of the undertaking concerned for supplying incorrect or misleading information in the notification (MR Art. 14(1)). It has so far imposed fines on this ground in only a limited number of cases (Cases M.1543, 1999; M.1608, 1999; M.1610, 1999; M.2624, 2002; M.3255, 2004; M.8228, 2017; and M.8436, 2019). The highest fine imposed to date was €55 million (Case M.8228, 2017).

In the pre-notification period, as well as in phases I and II, the EC may, by simple request or by decision, require the parties to the concentration and third parties to provide all necessary information (MR Art. 11(1)). RFIs in EC merger control procedures are usually by simple request, with the EC normally using a request ordered by decision only rarely where a simple request for important information proves ineffective in eliciting information the EC considers especially important.

Both kinds of RFIs must: state the legal basis and purpose of the request; specify what information is required; fix the time limit within which the recipient must provide the information; and specify the penalties for supplying incorrect or misleading information intentionally or negligently (a fine of up to 1% of the aggregate turnover of the undertaking concerned). The EC has imposed fines for incorrect or misleading information in RFIs in several cases (Cases M.1610, 1999 – €50,000; M.3255, 2004 – €45,000; M.8228, 2017 – €55 million; and M.8181, 2021 – €7.5 million).

An RFI ordered by decision must also state the penalties for supplying incomplete information intentionally or negligently or for not supplying information within the required time limit (a fine of up to 1% of aggregate turnover). It must also indicate the EC's power to impose periodic penalty payments to compel the supply of missing information (up to 5% of the average daily aggregate turnover of the undertaking concerned). In addition, it must specify the recipient's right to have the decision reviewed by the EU Court of Justice. To date, the EC has never imposed a fine on a party to a concentration for failure to respond to an RFI ordered by decision. In 2000, however, the EC fined a third party €50,000 (Case M.1634, 2000) for failing to respond to repeated RFIs, including a final RFI ordered by decision, requesting information the EC deemed important for its assessment of the notified concentration. In that case, the EC also imposed periodic penalty payments on the third party totalling €900,000 to compel compliance with the final RFI.

The EC may also revoke a clearance decision where the decision was based on incorrect information for which one of the undertakings is responsible, or which was obtained by deceit (MR Art. 6(3)(a)).

The EC also has the power to conduct all necessary inspections of undertakings. It has the power to enter any premises, land and means of transport. It also has the power to: examine the undertaking's books and other records; take or obtain any form of copies or extracts of such books and records; seal premises, books and records for the duration of the inspection; and request explanations of facts or documents relating to the subject matter and purpose of the inspection. It may announce the inspection in advance or conduct it without notice (i.e., a so-called "dawn raid", which is a misnomer as the inspection takes place in normal business hours). The EC has conducted inspections in a merger control context only rarely.

The inspectors may carry out the inspection under a simple authorisation or pursuant to a formal decision. Refusal to submit to an inspection ordered by decision can lead to the imposition of a fine of up to 1% of aggregate turnover. Whether the inspectors act based on a written authorisation or a decision, the undertaking also risks fines of up to that same maximum if it intentionally or negligently impedes the inspection in other ways. That is the case if it produces its required books or other records in incomplete form or if a representative or member of staff gives an incorrect or misleading answer to a question, fails or refuses to provide a complete answer or breaks a seal attached to evidence to protect its integrity for later inspection. The EC has so far not imposed any fines relating to merger control inspections.

The EC may request officials of the NCA in the country concerned to assist in the inspection. Alternatively, it may request the NCA itself to undertake the inspection, in which case the NCA will exercise its powers in accordance with its national law. Where the NCA takes the lead, the EC may also request that its own personnel assist the NCA.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The EC may use information obtained in application of the MR only for the purposes of the relevant request, investigation or hearing (MR Art. 17(1)). Moreover, EC and NCA personnel are legally required not to disclose information covered by professional secrecy except as expressly permitted under the MR (Art. 17(2)).

If the EC addresses an SO to the notifying party or parties, the addressee of the SO is entitled to gain access to the EC's file on the case. The right of access does not extend to internal EC documents, nor does it extend to correspondence between the

EC and NCAs or other public authorities with which the EC has concluded an agreement governing confidentiality of information they exchange with the EC. The right of access extends to all other information in the file, except business secrets of other undertakings or other confidential information, unless the EC considers disclosure of that information to the addressee of the SO to be necessary for the purposes of the procedure.

The EC's Notice on Access to the File (2005) provides guidance on what constitutes business secrets or other confidential information for the foregoing purposes. If the EC considers that disclosure of such information is necessary, its practice is to disclose the information only to external economic and/or legal advisors with appropriate safeguards. It has set out the rules and procedures it applies for this purpose in its Best Practices on the Disclosure of Information in Data Rooms (June 2015).

The EC is required to publish every decision adopted after a phase II investigation in the EU Official Journal, provided it does not disclose business secrets. In addition, it publishes a notice of its adoption of every phase I and phase II decision in the Official Journal. Its established practice since the 1990s has also been to publish on the DG COMP website a non-confidential text (public version) of each phase I and phase II decision. The EC's Guidance on the Preparation of Public Versions of Decisions (May 2015) sets out ground rules for the information that undertakings can claim for redaction as business secrets and confidential information in public versions and describes the procedure for settling confidentiality claims.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

See the discussion of the main stages in the regulatory process in question 3.7. The regulatory process ends with the EC's adoption of a decision either:

- finding that the concentration falls outside the scope of the MR (phase I);
- clearing the concentration unconditionally (phase I or phase II);
- clearing the concentration conditionally, subject to compliance with commitments relating to remedies (phase I or phase II); or
- prohibiting the concentration (phase II).

In the case of a decision prohibiting an already implemented concentration, the EC may also take interim measures to maintain conditions of effective competition and order the parties to undo the concentration.

The regulatory process may also end without a decision if the parties demonstrate to the EC's satisfaction that they have abandoned the concentration. A DG COMP information note on abandonment of concentrations (2004, available on the DG COMP's website) sets out the requirements for achieving this satisfaction. In theory, the process can also end if the time period expires, and the EC has taken no decision. In those cases, the concentration is deemed cleared (MR Art. 10(6)); however, in practice, the EC takes decisions rather than allowing the time to expire.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

It is possible, and indeed not an uncommon occurrence (see question 3.7), for the notifying parties to propose "remedies" that involve modifying the transaction in order to gain the EC's clearance if it accepts that the modifications entirely eliminate the competition concern.

The EC does not formally "negotiate" the remedies with the notifying parties. It is up to the notifying parties (see question 3.12) to propose remedies and to convince the EC that they can be implemented effectively within a short period and will be sufficiently workable and lasting to ensure that the competition concern will not materialise. If the EC is convinced, the notifying parties formally submit the remedies in the form of a "commitment", and the clearance decision is subject to conditions and obligations intended to ensure compliance with the commitment.

5.3 Are there any (formal or informal) policies on the types of remedies which the authority will accept, including in relation to vertical mergers?

The EC's Notice on Acceptable Remedies (2008) provides guidance on the basic conditions for acceptable commitments, the appropriateness of different types of remedies, as well as the procedures for the notifying parties' submission and for the EC's acceptance of the remedies. Generally, structural remedies involving divestiture of a viable and competitive business are preferred over other types of remedies (e.g., access to infrastructure, networks or key technologies; and change of long-term exclusive contracts). Structural remedies are particularly preferred over so-called "behavioural" remedies involving promises by the parties to abstain from certain commercial conduct. According to the Notice on Acceptable Remedies (69), the EC will consider behavioural promises only exceptionally in specific circumstances, such as where competition concerns result from conglomerate structures (as opposed to horizontal or vertical relationships). In December 2020, the EC controversially accepted long-running behavioural commitments in a high-profile case involving the acquisition by a major global technology company of a fitness tracker smartwatch maker (Case M.9660). The buyer agreed, among other things, not to use the target's data for advertising purposes. The very limited overlap in the businesses of the buyer and the target was one of the factors leading the EC to find that behavioural commitments were appropriate in this case.

As regards structural remedies involving a divestiture, the EC's Notice on Acceptable Remedies distinguishes three situations. The first, and by far the most common in practice, involves a commitment to sell the divestiture assets or business within a fixed period after the clearance decision. The second, which is used in cases where there may be substantial obstacles to identify a suitable purchaser, is an "up-front buyer" remedy, in which the notifying parties commit not to complete the conditionally cleared concentration before a binding agreement is entered into with a purchaser of the divestiture assets or business approved by the EC. The third, which is the least common in practice, is a so-called "fix-it-first" remedy, where the notifying parties must enter into a legally binding agreement with a purchaser of the divestiture business before the EC clears the concentration.

The EC's Notice on Acceptable Remedies also describes the requirements for the implementation of commitments, including the divestiture process, the procedures for the EC to accept the suitability of the purchaser of the divestiture assets or business and of the sale and purchase agreement, as well as the obligations on the notifying parties in the interim period pending the completion of the divestiture. The notifying parties must complete the divestiture within a fixed period agreed with the EC. Pending such completion, the notifying parties will need to hold the divestiture assets or business separate and have them operated by a hold-separate manager under the supervision of a monitoring trustee. In its practice, the EC divides the divestiture process into two periods: the period for entering into a binding agreement with the divestiture purchaser; and a subsequent period for closing the divestiture transaction. It normally divides the period for entering into a binding agreement into a period for seeking a suitable purchaser and, if the notifying parties are unsuccessful in finding such a purchaser, a shorter period thereafter for a divestiture trustee to divest the assets or business at no minimum price.

5.4 To what extent have remedies been imposed in foreign-to-foreign mergers? Are national carve-outs possible and have these been applied in previous deals?

The EC accepts remedies that remove competition concerns without regard to whether the transaction involves EU companies or is foreign-to-foreign.

In general, the EC has a clear preference for divestitures of stand-alone businesses. However, it is willing to consider carve-out remedies, in particular where the received feedback from the market test conducted with respect to the remedy is positive. In 2022, the EC accepted carve-out remedies in Case M.10078, involving EU companies (see also e.g., M.4611, also involving EU companies, for carve-outs in relation to a specific country).

5.5 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

See question 3.7 above. The deadline for submitting phase I remedies is before expiry of the 20th working day of the review period. Submission of timely phase I remedies results in the automatic extension of the review period from 25 to 35 working days.

The deadline for submitting phase II remedies is before the expiry of the 65th working day of the review period. However, the EC has accepted commitments submitted for the first time after the 65th working day in exceptional circumstances. A submission of remedies after the 54th working day results in automatic extension of the review period by an additional 15 working days. (If the EC and the notifying parties agree to extend the phase II review period by up to 20 working days (see question 3.7) before the 54th and 65th working days, those deadlines are also extended.)

The notifying parties may submit remedies at any point before the deadlines (see also the discussion of "fix-it-first" remedies in question 5.2 above).

The notifying parties (see question 3.12) must submit a formal commitment, accompanied by a completed Form RM (attached as Annex IV to the Implementing Regulation, see question 1.2), describing the commitment, explaining its suitability to remove the competition concern, identifying any deviations from the EC's model texts (see question 5.6) and providing detailed information on the divestiture business. The normal practice is to submit a draft of the commitment and completed Form RM to the EC's case team for review and comment. The case team may then come back with questions that the parties will need to answer before the case team gives the "green light" for the submission of the final formal commitment and final Form RM. After receiving the formal commitment, the EC market tests it with other market players before accepting it.

5.6 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Yes, the EC has a model text for divestment commitments as well as a model text for the mandates of the monitoring trustee and the divestiture trustee. The EC has issued best practice guidelines on these model texts (available on the DG COMP website). If the submitting parties deviate from the models, they must explain and justify the deviations in the Form RM (see question 5.5). The EC's Notice on Acceptable Remedies (see question 5.2) provides further guidance on the EC's normal approach to the terms and conditions applicable to the divestment.

5.7 Can the parties complete the merger before the remedies have been complied with?

The answer depends on the nature of the remedy. See question 5.2 above. The most common form of divestment remedy involves a commitment to sell the divestiture business within a fixed period after the clearance decision. If the remedy takes this form, the parties can complete the concentration after clearance but before complying with the commitment. In contrast, when the EC requires an "up-front buyer" remedy, the notifying parties commit not to complete the concentration before entering into a binding agreement with a purchaser of the divestiture business approved by the EC.

5.8 How are any negotiated remedies enforced?

Clearance of the concentration is subject to compliance with the remedy commitment. In its Notice on Acceptable Remedies (19–20), the EC distinguishes between conditions and obligations. The requirement to achieve the divestment of the divestiture business within the timeframe in the commitment is a condition, while the implementing steps necessary to achieve that result (e.g., appointment of the divestiture trustee) are generally obligations.

Breach of a "condition" automatically results in the clearance decision no longer standing and may lead the EC to take interim measures to maintain conditions of effective competition. The EC may then proceed to open a phase II investigation, without, however, being bound by the time limits of the MR (MR Art. 8(7)(a)). Where appropriate, the EC may also order the parties to undo the concentration. The EC may also sanction the breach of condition with a fine of up to 10% of the aggregate turnover of the undertaking concerned.

If the parties breach an "obligation", revocation of clearance is not automatic; however, the EC may exercise its discretion to do so. It may also impose a fine (up to 1% of the aggregate turnover) for the breach, as well as periodic penalty payments (up to 5% of the average daily aggregate turnover) to compel compliance with the obligation.

Until now, the EC has never taken any of these measures.

5.9 Will a clearance decision cover ancillary restrictions?

Yes, an EC decision clearing a concentration is deemed to cover ancillary restrictions, i.e., restrictions directly related and necessary to the implementation of the concentration (MR Arts 6(1)(b), 8(1) and 8(2)). The EC's Notice on Restrictions

Directly Related and Necessary to Concentrations (2005) provides guidance on the interpretation of the notion of ancillary restraints. A classic example is a seller's obligation not to compete with the transferred business. Under the EC's Notice on Restrictions Directly Related and Necessary to Concentrations (2005), a seller's non-compete obligation with a proportionate subject matter and geographic scope can generally qualify as an ancillary restraint for a period of up to two years when the transferred undertaking includes goodwill, and up to three years when it includes both goodwill and know-how.

5.10 Can a decision on merger clearance be appealed?

Yes, EC decisions are appealable in the first instance to the EU's General Court (under TFEU Art. 263). The addressee(s) of the EC decision can lodge an appeal. Third parties (potentially, e.g., the target in a hostile public offer, competitors, customers, employee representatives) may also lodge an appeal, provided they are directly and individually concerned by the decision.

The General Court may not substitute its assessment of the concentration for that of the EC. Instead, it must confine its review to whether the EC was competent to adopt the decision, complied with the rules of procedure, adequately stated the reasons for its decision, accurately stated the facts, manifestly erred in its appraisal or misused its powers. Judgments of the General Court are appealable to the EU Court of Justice, but only on issues of law.

If the General Court (or the EU Court of Justice on appeal) annuls the decision, the EC must re-examine the concentration in a fresh phase I procedure, in light of the then current market conditions, and where necessary pursuant to a new notification (MR Art. 10(5)).

5.11 What is the time limit for any appeal?

The time limit is two months and 10 days from (i) notification of the decision in the case of the addressees of the decision, or (ii) the day the decision came to their knowledge in the case of third parties.

5.12 Is there a time limit for enforcement of merger control legislation?

Yes, the EC's power to impose fines or penalties (see questions 3.3, 3.7, 4.5 and 5.7 above) is subject to a limitation period of three years in the case of infringements of provisions concerning notifications, RFIs and inspections (Council Regulation (European Economic Community ("**EEC**")) No. 2988/74). Time begins to run on the day on which the infringement was committed or in the case of continuing or repeated infringements on the day on which the infringement ceases. Any action by the EC or an NCA acting at the EC's request for the purpose of a preliminary investigation or proceedings relating to the infringement (an RFI, a written authorisation or decision ordering an inspection, the commencement of proceedings, or issuance of an SO) interrupts the period and starts it running afresh.

The EC's power to enforce decisions imposing fines or penalties is subject to a limitation period of five years that starts to run on the day on which the EC adopts the decision.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

Cooperation with the EU NCAs: The EC transmits to the EU NCAs copies of all Form CO notifications as well as copies of the most important documents lodged with or issued by the EC, including remedy commitments. The EC also carries out its merger control procedures in close liaison with the NCAs, which may express their views on those procedures. Mechanisms for transferring jurisdiction between the EC and EU NCAs are discussed in question 2.7 above. Representatives of the EU NCAs also sit on an advisory committee that the EC must consult before adopting a phase II decision or a decision imposing a fine or penalty.

In 2010, the EC and the EU NCAs established the EU Merger Working Group with the objective of fostering increased consistency, convergence and cooperation among EU merger jurisdictions. In November 2011, the group issued a set of best practices relating to cooperation in transactions reviewable in more than one EU Member State.

Cooperation with the EFTA Surveillance Authority: Under the EEA Agreement between the EU, the EU Member States and the EFTA States (see question 1.3), concentrations that have a Community dimension are not reviewable by the EFTA States. Protocol 24 of the EEA Agreement provides for the EC to cooperate in its investigation, under certain circumstances, with the EFTA Surveillance Authority, the EC's counterpart in relation to the EFTA States.

Cooperation with the U.S. authorities: The EC cooperates with the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice pursuant to an agreement dating from the 1990s. The U.S.-EU Merger Working Group set up by the three agencies has issued Best Practices on Cooperation in Merger Investigations (2011) providing an advisory framework for their cooperation. Representatives of the three agencies contact one another on learning of a merger that may require review in both the U.S. and the EU. Where appropriate, the authorities coordinate on timing and exchange evidence, subject to the parties to the concentration providing waivers of confidentiality. The agencies also cooperate on remedies.

Cooperation with the Canadian authorities: The EU also has an agreement with Canada that provides for merger control cooperation similar to that with the U.S. authorities summarised above.

Multilateral cooperation: The EC also cooperates with third-country competition authorities on policy issues, in particular through the International Competition Network.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

Statistics: DG COMP publishes monthly, in the mergers section of its website, updated statistics indicating the annual numbers of notifications, referrals, phase I decisions, phase II proceedings initiated, phase II decisions and other decisions. In 2023 and 2024 through July, the EC received around 581 notifications of concentrations. 554 were decided (the remainder being referred to other authorities or abandoned). 543 (98%) of those decided were cleared after a phase I review (63 under the normal procedure, 474 under the simplified procedure and six after the acceptance of remedies).

EC Phase II decisions: Of the notified transactions that underwent an in-depth phase II review resulting in a decision in the above period, the EC prohibited one and cleared two unconditionally, and cleared eight conditionally based on remedies.

The prohibited transaction (Case M.10615) involved a conglomerate merger where the parties were a hotel online travel agency ("**OTA**") provider and an OTA primarily focused on flight services. The EC argued that the transaction would strengthen the notifying party's alleged dominant position in the hotel OTA market, which would make it harder for other OTAs to compete.

Procedural violations: Finally, for the EC's recent enforcement record concerning procedural violations, see questions 3.3, 3.8 and 4.5.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

No, as already noted (questions 1.2 and 3.11), the EC adopted several important measures to further simplify MR merger control procedures in 2023.

6.4 Please identify the date as at which your answers are up to date.

The answers are up to date as at 15 August 2024.

7 Is Merger Control Fit for Digital Services & Products?

7.1 In your view, are the current merger control tools suitable for dealing with digital mergers?

There is an ongoing debate regarding the suitability of the current MR framework for addressing digital mergers.

Commission EC track record: In a March 2021 written question to Commissioner Vestager (E-001423/2021), a European Parliament member noted a statement by an eminent university professor, who was formerly DG COMP's chief economist, that DG COMP "is ineffective in the digital economy". The written question noted that the EC has approved numerous mergers in the sector without having prohibited even one, in spite of the fact that some of the largest digital players have held market shares of 95% in their respective markets for the last decade. In her July 2021 response, Commissioner Vestager defended the EC's track record in reviewing digital mergers, pointing out that the EC "does not shy away from requiring wide-ranging remedies" in reviewing digital mergers. According to the Commissioner in her response, the current rules "work well overall and are flexible enough to tackle digital markets".

Experts' report: In 2017, Commissioner Vestager set up a panel of outside experts (Professors Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer) to, in the words of the experts' final report "**Competition Policy for the digital era**" published in April 2019, "explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age". The report, which has generated substantial commentary by antitrust lawyers, covers the full spectrum of competition policy. Chapter 6 of the report focuses on merger control, particularly acquisitions by incumbent digital platforms of innovative newcomers that might escape the MR framework because the newcomers do not yet generate sufficient turnover to reach the Community dimension thresholds (see question 2.4). Chapter 6 also considers whether traditional theories of harm are suitable for assessing such acquisitions.

Community dimension thresholds: Following the introduction by Germany and Austria of filing thresholds using transaction values as a means of catching such acquisitions, the EC considered whether to propose any changes to the Community dimension thresholds for the same purpose. In their report, the experts argued against changing the Community dimension thresholds and instead recommended closely monitoring the practicability of the German and Austrian thresholds and the workability of the MR's existing referral system (see question 2.7). Following the publication of the report, Commissioner Vestager publicly expressed doubts about the need for changes to the thresholds (*MLex Global Advisory,* 18 June 2019) and has instead opted to change the EC's practice regarding referrals by Member States (see question 3.3). See also the comments on the Digital Markets Act in question 7.2.

Theories of harm: The experts' report noted that many acquisitions by large incumbents of innovative newcomers are likely to be pro-competitive. Moreover, the experts emphasised that such acquisitions are generally likely to raise competitive concerns only in a limited set of circumstances. According to the experts, the theories of harm the EC has so far used in examining such acquisitions are "generally sound". However, they proposed some modifications to the theories of harm for cases in which an acquirer operating a multisided digital platform or "ecosystem" benefitting from strong positive network effects holds a highly entrenched dominant position in a market with high entry barriers. In particular, they suggested examining the position of the incumbent operator in a "market for the digital ecosystem".

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

The EC's review of its existing Notice on the Relevant Market (see question 1.2) revealed that, while the basic principles are still sound, the guidelines do not address some of the changes in recent practice, particularly as regards the digital economy. The EC adopted the revised Notice on the Relevant market on 8 February 2024 (see question 1.2).

In 2021, the EC changed its practice and policy regarding Member State referrals of mergers to the EC for vetting under the MR, to take account of concerns that so-called "killer acquisitions" of young and innovative companies with limited current revenues, particularly in the digital sector, might fall outside the Community dimension thresholds and escape EC jurisdiction. However, the EU Court of Justice overturned the EC's changed policy in September 2024 (see question 3.3). It remains to be seen whether the EC will introduce new powers to review below-threshold transactions.

Finally, in September 2022, the EU adopted the far-reaching Digital Markets Act ("**DMA**") that, among other things, requires (since 2 May 2023) very large online platforms serving as market "gatekeepers" to inform the EC of any intended concentrations involving providers of digital services. Under the DMA, such gatekeepers must inform the EC of such intended acquisitions whether the concentration is notifiable to the EC under the MR or to NCAs under national merger control laws.

On 6 September 2022, the EC designated, for the first time, six gatekeepers subject to the DMA. The gatekeepers were obliged to ensure full compliance with the DMA's requirements six months after they were designated. On 29 April 2024, the EC designated one of the six gatekeepers as having an additional core platform service. On 13 May 2024, the EC designated another gatekeeper.

7.3 In your view, have any cases highlighted the difficulties of dealing with digital mergers? How has the merger authority dealt with such difficulties?

In recent years, the EC has examined several digital mergers involving leading platforms acquiring young innovative companies with low turnover, e.g., Cases M.7217, M.8124, M.8788 and M.10262, all four of which fell below the Community dimension thresholds and reached the EC through NCA referrals under MR Art. 22 (see question 2.7). The EC appears to have dealt with these and other digital mergers without facing substantial conceptual or other difficulties and using existing theories of harm that appear to have been fit for purpose.

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