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Quickguides

EU merger control

EU merger control

Quickguide overview

This Quickguide provides an overview of EU merger control. Topics covered include:

- The jurisdictional thresholds
- The principles for calculating the relevant turnover of the parties
- The European Commission's procedure
- Merger remedies

For further information on any of these areas, please speak to one of the contacts listed on the final page of this Quickguide, or your usual Ashurst contact.

Brexit

The UK left the EU on 31 January 2020 and the Brexit Transition Period ended on 31 December 2020. On 1 January 2021, the UK and EU became two fully distinct regulatory, legal and customs territories, whose relationship is governed by the Trade and Cooperation Agreement (TCA).

This means that the UK is no longer part of the EU for jurisdictional, procedural and substantive assessment purposes under the EU Merger Regulation. In particular, the "one-stop shop" principle established under the EU Merger Regulation no longer applies to the UK, meaning that the UK Competition and Markets Authority (CMA) is now permitted to investigate transactions in parallel with the European Commission.

For further information on UK merger control from 1 January 2021, see our Quickguide, "*UK merger control*".

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at London Fruit & Wool Exchange, 1 Duval Square, London E1 6PW T: +44 (0)20 7638 1111 F: +44 (0)20 7638 1112 www.ashurst.com.

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EU merger control

1. Merger control in the EU

There are two levels of merger control in the EU:

- EU merger control for certain transactions with a "Community dimension", which fall within the jurisdiction of the European Commission under Council Regulation (EC) No. 139/2004 (EU Merger Regulation); and
- national merger control for those transactions which do not meet the EU Merger Regulation criteria, but qualify for investigation under the national laws of individual Member States.

All EU Member States[1] have national merger control laws, with the exception of Luxembourg.[2] Of these national merger control regimes, all require mandatory notification of qualifying transactions to the relevant authorities, and most require suspension of completion pending a clearance decision, with provisions for harsh sanctions (including substantial fines) in case of default. Moreover, each merger authority works to its own timetable. Accordingly, establishing which authorities have jurisdiction over a concentration, and the resulting effects on the proposed transaction timetable, is crucial.

Within the European Union, the European Commission has exclusive jurisdiction over "concentrations" with a "Community dimension". Generally, therefore, transactions which are subject to notification to, and clearance by, the European Commission under the EU Merger Regulation are not subject to parallel merger inquiries under the national merger control provisions of Member States. However, there are provisions which allow for parallel inquiries of concentrations with a "Community dimension" in certain limited circumstances.[3] In addition, the European Commission may be asked by the parties or by the relevant national competition authorities to examine transactions which do not have a Community dimension.[4]

Under the arrangements which govern the European Economic Area (EEA),[5] where a merger has a Community dimension, the jurisdiction of the European Commission will extend to the whole of the EEA. Where a merger does not have a Community dimension but has an "EFTA-wide dimension", then it will be reviewed on a "one-stop shop" basis by the EFTA Surveillance Authority (ESA). The EEA arrangements are not considered in detail in this note.

The assessment of transactions under the EU Merger Regulation does not take account of non-competition factors, such as public interest and national security. There is no process for obtaining foreign investment clearance at EU level. However, the EU has adopted a Regulation establishing a

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1 The European Union comprises Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

2 Luxembourg has the ability to examine mergers under laws aimed at controlling activity which is capable of preventing, restricting or distorting competition or that leads to an abuse of a dominant position. However, there is no compulsory or voluntary filing of mergers.

3 In particular, parallel inquiries may occur where:
- the European Commission, at the request of the parties or a Member State, exercises its discretion to refer a case in whole or in part to the competent authorities of a Member State (Article 4(4) and Article 9). This will permit the Member State involved to consider the effects of the transaction on competition in its territory;
- a Member State takes measures to protect its "legitimate interests", such as public security, media diversity and prudential supervision (Article 21(4)), with the European Commission assessing the effects on competition under the EU Merger Regulation; or
- a Member State invokes the provisions of Article 346 of the Treaty on the Functioning of the European Union in matters relating to its essential security interests, which can result in the aspects of a concentration relating to national defence being examined at the national level, while the non-defence or dual-use aspects of the concentration are assessed at the EU level under the EU Merger Regulation.

4 One or more Member States may ask the European Commission to accept jurisdiction in respect of a transaction which does not have a "Community dimension" (Article 22). The parties may also ask the European Commission to assume jurisdiction (Article 4(5)) where a merger falls within the merger control jurisdiction of at least three Member States.

5 The EEA is a grouping of the EU Member States and most of the EFTA Member States. The EFTA Member States comprise Iceland, Liechtenstein, Norway and Switzerland. However, Switzerland did not join the EEA so the EFTA States for the purposes of the EU Merger Regulation are Iceland, Liechtenstein and Norway.

framework which assists Member States in screening investments on security and public order grounds[6] and allowing the European Commission to evaluate and issue an opinion on each investment. Ultimately, it is for Member States to issue a decision as to whether or not to allow foreign direct investment. Further details on the EU Screening Regulation can be found here.

2. Application of the EU Merger Regulation

As noted above, the EU Merger Regulation applies to "concentrations" with a "Community dimension". Jurisdiction is determined by reference to the turnover from sales of the "undertakings concerned".

Concentration

A concentration is defined by the EU Merger Regulation as arising where:

- two or more previously independent undertakings merge; or
- one or more undertakings acquire, whether by the purchase of securities or assets, by contract or otherwise, direct or indirect control of the whole or parts of at least one other undertaking; or
- a joint venture is created which performs, on a lasting basis, all the functions of an autonomous economic entity (i.e. a "full function" joint venture).

"Control" is defined for EU Merger Regulation purposes as the ability to exercise "decisive influence" over an undertaking, in particular, through:

- the existence of rights or contracts conferring decisive influence on the composition, voting or other commercial decisions of the undertaking; or
- the ownership or right to use all or part of its assets.

For example, an undertaking can acquire control over another undertaking when it holds 50 per cent or less of the other's voting shares, but nevertheless acquires the *de facto* ability to affect strategic decisions of that undertaking, e.g. where a minority shareholder would be likely to have a stable majority of the voting rights at shareholder meetings. Minority shareholders may also acquire control through the exercise of veto rights in relation to key strategic matters such as the business plan, approval of the budget, or the appointment of senior management. Control via veto rights of this nature is often referred to as "negative control".

Where a minority stake confers decisive influence, the acquisition of such an interest may result in the creation of joint control whereby two or more undertakings are able to exercise decisive influence jointly and thereby share control.

As noted above, the creation of a "full function" joint venture constitutes a concentration for the purposes of the EU Merger Regulation. A joint venture will generally be full function where:

- it has sufficient resources to operate independently[7] on a market, performing all the functions normally carried out by undertakings operating in the same market, with its own management and access to resources such as staff, assets and finance; and
- there is a lasting change in the structure of the undertakings concerned.

Joint ventures which are not full function are subject to Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)[8] and relevant national competition laws and possibly also to national merger control laws where the relevant jurisdictional tests and thresholds are met. Joint ventures which are full function but which do not satisfy the EU Merger Regulation turnover thresholds

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[6] Regulation (EU) 2019/452.

[7] The fact that (as would be expected) the parents may be involved in the strategic decisions of the joint venture does not prevent it from being full function, provided that it is autonomous on an operational level.

[8] Article 101 of the TFEU prohibits agreements, decisions between associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Article 102 prohibits abuse of a dominant position by one or more undertakings in so far as it may affect trade between Member States.

and which have as their object or effect the co-ordination of the competitive behaviour of undertakings which remain independent will also be subject to Articles 101 and 102 and possibly also to national merger and competition laws.

Undertakings concerned

For the purposes of calculating turnover, the "undertakings concerned" are generally the undertakings acquiring sole or joint control, and the undertaking over which control is acquired. The vendor is excluded (unless it is a partial sale and it is retaining joint control). In calculating turnover, it is necessary to assess total "group" turnover across all product/business sectors by including the turnover of all the undertakings that "control" the undertakings concerned, as well as the undertakings controlled by such undertakings. Accordingly, the definition of a "group" for EU Merger Regulation purposes can be wider than the concept of a "group" for accounting purposes, as it may be necessary to include the turnover attributable to minority interests. However, on the acquisition of part of a company or business, only the turnover of the part being acquired is taken into account.

Community dimension

A concentration will have a Community or EFTA[9] dimension if:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €5,000m; and
- the aggregate Community/EFTA-wide turnover of each of at least two of the undertakings concerned is more than €250m,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide or EFTA-wide turnover within one and the same Member State.

A concentration also has a Community dimension or EFTA dimension if:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €2,500m; and
- in each of at least three EU Member States or EFTA Member States the combined aggregate turnover of all of the undertakings concerned is more than €100m; and
- in each of at least three of these Member States the aggregate turnover of each of at least two of the undertakings concerned is more than €25m; and
- the aggregate Community-wide or EFTA-wide turnover of each of at least two of the undertakings concerned is more than €100m,

unless each of the undertakings concerned achieves more than two-thirds of its Community-wide or EFTA-wide turnover within one and the same Member State.

"Aggregate turnover" is the revenue derived by the undertakings concerned in the preceding financial year (in practice, the last financial year for which audited accounts are available) from the sale of products and/or the provision of services after the deduction of sales rebates, value added tax and other taxes directly related to turnover. It is necessary to make adjustments to include the turnover of any undertakings acquired, and deduct the turnover of any disposals made, since the last audited accounts.

The concepts of Community-wide/EFTA-wide turnover and turnover within a single Member State may raise complex issues in relation to the allocation of turnover to different territories. Turnover for these purposes is typically assessed by reference to destination of sales, i.e. allocated according to the location of the customer at the time of the transaction, or the place where a service was provided.

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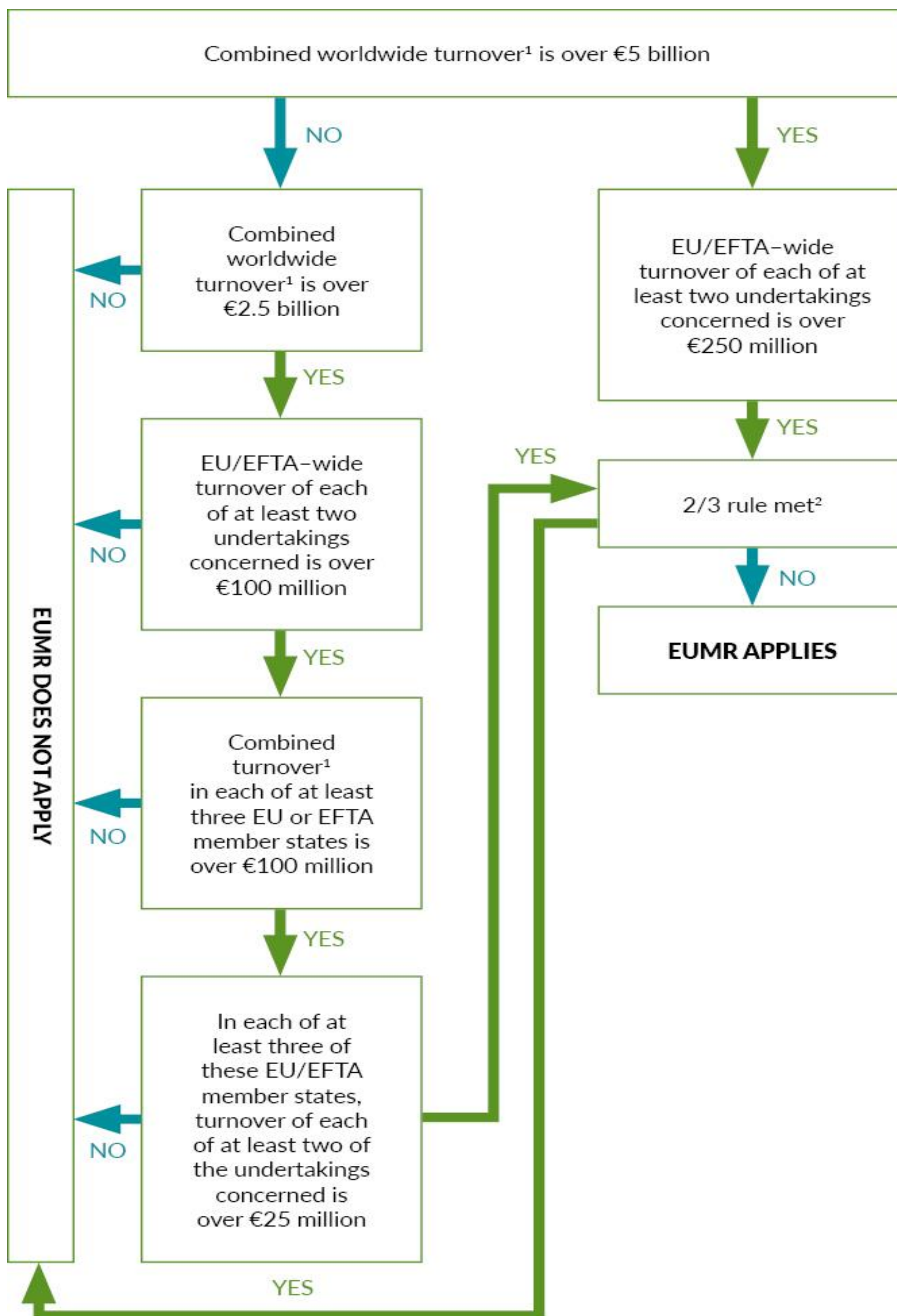
[9] For these purposes the EFTA Member States are Iceland, Norway and Liechtenstein.

Where an undertaking's accounts are prepared in a foreign currency, these figures must be converted to euros using the European Central Bank's official exchange rate for the relevant 12-month period. There are special rules for the calculation of the turnover of banks, insurance companies and other financial institutions. Essentially, the turnover of credit and other financial institutions for EU Merger Regulation purposes comprises income, commissions receivable and net profit, while for insurance undertakings, the value of the gross premiums written is used.



1 All "undertakings concerned" (e.g. entities within each of the purchaser(s)' and target's groups).

2 Each of the undertakings concerned achieves more than two thirds of its aggregate EU-wide or EFTA-wide turnover within one and the same member state.

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3. Procedure

Notification

There is no deadline for submission of a notification, although completion must generally (subject to very limited exceptions) be suspended pending a clearance decision, with the effect that parties usually wish to notify promptly.

It is possible to notify a transaction to the European Commission from the point in time at which the undertakings concerned can demonstrate a "*good faith intention to conclude an agreement*" (e.g. on the basis of a signed memorandum of understanding or heads of terms document), or in the case of a public bid, "*where they have publicly announced an intention to make such a bid*". Notification is normally undertaken by the acquirer, or in the case of an acquisition resulting in joint control, by the parties acquiring joint control. Business secrets (as between the parties and/or third parties) can be identified as confidential and will not be divulged by the European Commission to third parties.

Notification is made by submitting the official filing document, known as a "Form CO", to the European Commission. The preparation of a Form CO requires a considerable amount of information, and can be very time-consuming. This is especially so when there are material competition issues, and when there are "affected markets" requiring detailed market analysis. There are two types of "affected markets" defined in the Form CO template:

- First, there will be an affected market where the parties are active in the same product market and their combined market share is 20 per cent or more (i.e. a horizontal relationship);
- Secondly, there will be an affected market where a party is active in a market which is upstream or downstream of a market in which another party is active (i.e. a vertical relationship) and the individual or combined market share of any of the parties is 30 per cent or more at either market level, regardless of whether there is any existing supply relationship between the parties.

The European Commission also requires extensive information in relation to certain other markets potentially relevant to the competition assessment, including neighbouring markets where the parties, individually or together, have a market share of 30 per cent or more.

Since the precise relevant market definition may only be determined in the course of the European Commission's inquiry (i.e. following notification), the European Commission frequently requires additional information to be provided "up front" on the basis of wider or narrower market definitions than those initially proposed by the parties, and in relation to product markets which may not appear to be affected markets.

A reduced length "Short Form CO" and simplified notification procedure is available for concentrations which meet the turnover thresholds but meet certain criteria, for example, they do not give rise to any affected markets.

The time required for drafting a Form CO varies according to the complexity of a case, and can take from one or two weeks for straightforward cases falling within the simplified procedure, to several months for very complex cases with multiple affected markets. In addition, the European Commission generally wishes to agree the content of a Form CO with the parties prior to submission (even where there are no substantive competition issues), and accordingly the normal accepted practice is to file a draft document (or successive drafts, in more complex cases) in advance of the final notification. In the most straightforward cases, a draft will normally be agreed with the European Commission within a week or two, but in complex cases where there are likely to be significant concerns, this process of "pre-notification discussions" may last several weeks or potentially months and involve face-to-face meetings with the European Commission's case-team in Brussels. During the pre-notification discussions, the European Commission will give guidance on the application of the EU Merger Regulation, and will indicate what additional information is needed to complete the notification. The European Commission may indicate at this stage the areas of concern arising out of the merger (although it will not give guidance on the likelihood of clearance). Since the European Commission can

reject a Form CO as incomplete at its discretion, it is advisable to co-operate with the European Commission to ensure that it is satisfied that the notification is complete before it is formally submitted.

Suspension

There is a strict prohibition under the EU Merger Regulation on putting a notifiable merger into effect before notification, and (subject to limited exceptions) completion cannot take place until the European Commission has issued a clearance decision. Fines of up to 10 per cent of aggregate worldwide group turnover may be imposed for early completion or for taking steps to start integrating the merging businesses before clearance has been granted (known as "*jumping the gun*").

The European Commission may, in exceptional circumstances, waive the requirement to suspend completion (for example, in case of the risk of imminent financial failure of the target company where the acquisition does not raise any material competition concerns) but such derogations from the suspensory period are rare and will not be given for reasons of "commercial convenience" (such as a desire to complete by a certain date for accounting reasons). For a derogation to be granted, it must in practice be shown firstly that the merger is not likely to have an adverse effect on competition and secondly that there is a threat of serious damage to the parties or third parties if no derogation is granted.

In public bids, it is also possible to acquire the relevant shares prior to the grant of a clearance decision, provided that the transaction is notified to the European Commission without delay and the acquirer does not exercise the voting rights attaching to those shares until clearance has been obtained. These provisions are used primarily in jurisdictions (such as France) where a public bid cannot be made on a conditional basis.

Timetable and outcome

In the course of its inquiry, the European Commission will consider the arguments set out in the parties' Form CO submission, and (in non-simplified procedure cases) "market test" these with third parties. This involves the European Commission contacting the market participants (such as customers, competitors and suppliers) whose names and contact details the parties are required to provide in the Form CO. In addition, the European Commission invites third party comments on the transaction through a notice published in the EU Official Journal (and on the European Commission's web-site).

The European Commission has an initial period of 25 working days from formal notification (referred to as "Phase I") within which to make one of the following decisions:

- the transaction does not fall within the scope of the EU Merger Regulation;
- unconditional Phase I clearance;
- Phase I clearance subject to commitments offered by the parties to remove possible competition concerns, usually a structural remedy, such as the divestment of a business. These commitments must be offered by the parties not more than 20 working days after notification, and if they are offered the initial one-month period is extended to 35 working days, to give the European Commission sufficient time to "market test" the proposed remedies;
- an in-depth Phase II investigation is required on the basis that the European Commission has serious doubts that the transaction is compatible with the internal market (i.e. it has concerns that it would significantly impede effective competition); or
- as discussed in more detail below, the European Commission may decide to refer a merger to the competition authority of a Member State (or Member States) which has requested jurisdiction and has a sufficient interest in the case. A Member State must make a request for a referral within 15 working days of receiving a copy of the Form CO from the European Commission, and the request

will automatically extend the Phase I investigation period to 35 working days (which is the maximum length for a Phase I investigation).

In the event that the European Commission commences an in-depth Phase II investigation, the inquiry timetable is extended by a further 90 working days. The Phase II investigation will usually involve the issue of a statement of objections by the European Commission, a written reply by the parties, an oral hearing (if requested, which interested third parties as well as the parties to the transaction are invited to attend), and consultation with the Advisory Committee.[10] In addition, if the decision is to be made subject to commitments given by the parties, these commitments need to be negotiated and agreed. Whenever remedies are offered 55 working days or more after the beginning of Phase II, the timetable is extended by a further 15 working days. Independently of the offer of remedies, Phase II proceedings can also be extended at any time by up to a total of 20 working days.[11] The maximum length for a Phase II investigation is therefore 125 working days.

Commitments which are structural in nature (e.g. divestments or access to key infrastructure) are preferred by the European Commission, and behavioural commitments constraining the future conduct of the relevant businesses (e.g. in relation to future prices or product ranges) are rarely acceptable. Remedies must be offered not more than 65 working days after the initiation of the Phase II investigation but if the European Commission is not satisfied that the commitments offered address the concerns raised, it may prohibit the transaction, or if it has already been implemented (which would be unusual given the suspensory obligation), order it to be undone to restore effective competition. Phase II inquiries typically last for the full period, although the European Commission may terminate them early. In particular, the European Commission must take a clearance decision as soon as the serious doubts have been removed. The final decision will either be a decision of compatibility approving the concentration (possibly subject to conditions) or a decision of incompatibility prohibiting the concentration.

The European Commission may impose substantial fines on undertakings or individuals infringing the provisions of the EU Merger Regulation. The provision of incorrect or misleading information can result in fines of up to one per cent of the aggregate worldwide group turnover of the undertakings concerned. Failure to comply with an obligation arising from an investigation, or implementation of a transaction prior to a clearance decision or in breach of a prohibition decision, can result in fines of up to 10 per cent of the aggregate worldwide group turnover of each of the undertakings concerned.[12] Failure to notify is also subject to a potential fine of up to 10 per cent of the aggregate worldwide group turnover of each of the undertakings concerned.

4. Referral of cases to and from the European Commission

Notwithstanding the European Commission's exclusive jurisdiction over transactions with a Community dimension, the EU Merger Regulation includes provisions enabling the referral of cases from the European Commission to the national competition authorities and vice versa. These provisions are designed to operate as "corrective mechanisms" to ensure that a merger is reviewed by the most appropriate authority. Overall, the mechanisms are intended to ensure that mergers with a significant

[10] The Advisory Committee is made up of representatives from the Member States and is required to issue a written opinion on all draft Phase II decisions. This opinion is not binding on the European Commission but it is required to take utmost account of it.

[11] The parties may make only one request for an extension during Phase II and such a request must be made within 15 working days of the start of the Phase II proceedings. Thereafter, extensions can only be made by the European Commission (but only with the consent of the parties to the transaction).

[12] For example: in April 2018 a €125m fine was imposed on a Dutch telecom company, Altice, for gun-jumping (Case No. M.7993); in July 2014, the European Court of Justice upheld a €20m fine on Electrabel for failing to notify to the European Commission its acquisition of a minority shareholding and completing the deal without prior clearance from the European Commission (C-84/13 P Electrabel v the European Commission); in May 2017, the European Commission imposed a fine of €110m on Facebook for submitting misleading information during the merger control clearance process for its 2014 acquisition of WhatsApp (Case No. M.8228); in 2000 in Mitsubishi Heavy Industries (Case No. M.1634), the European Commission imposed a fine of €50,000 on a third party for failing to supply information on a joint venture, and periodic penalties of €25,000 per day, amounting to €900,000, were also imposed.

cross-border impact are reviewed by the European Commission, and that cases whose impact is primarily national or local are reviewed by the relevant national authorities.

All of the procedures for transferring jurisdiction described below are used relatively frequently.

Reference back for scrutiny at national level

Under Article 9, a merger which has been notified to the European Commission under the EU Merger Regulation can be referred back to a national competition authority, at its request, where either:

- the merger threatens to affect competition significantly within a market in the Member State and the market concerned presents all the characteristics of a distinct market; or
- the merger affects competition in a market within the Member State and the market presents all the characteristics of a distinct market which does not form a substantial part of the EU (in practice this means a sub-national market, or series of sub-national markets, within a Member State).

The European Commission has discretion whether to accept or reject such a request under the first heading but must refer a case to the Member State in respect of a request made under the second heading, i.e. where the merger affects competition in a distinct market within the Member State's territory that does not form a substantial part of the EU internal market if the European Commission considers that such a distinct market is affected.

Similarly, Article 4(4) allows the parties themselves to request a reference back to a national competition authority, before notification is made to the European Commission. Such a request is made via the submission of a duly completed "Form RS". The European Commission has full discretion whether to accept or reject such a request (provided that the Member State concerned is content for the merger to be referred back to it).

Reference up for scrutiny by the European Commission

Under Article 22, by contrast, the national competition authorities of one or more Member States can request that the European Commission review a merger which does not meet the jurisdictional thresholds under the EU Merger Regulation. Such a request can be made where the merger affects trade between Member States and threatens to affect competition significantly within the territory of the requesting Member States. In March 2021, the European Commission issued guidance setting out that it will accept referrals under Article 22 where the national competition authority does not have jurisdiction under its own merger control legislation. The European Commission has full discretion whether to accept an Article 22 request.

There is a parallel provision in Article 4(5) which permits the parties themselves to request that the European Commission takes jurisdiction in relation to a merger that does not meet the EU Merger Regulation thresholds. Such a request can only be made where the transaction is notifiable under national rules in at least three Member States. Again, a request is made using Form RS. If one or more national competition authorities with jurisdiction over the merger objects to the proposed reference to the European Commission, the merger will be reviewed at national level.

5. Appraisal of concentrations

In assessing a concentration, the European Commission must consider whether the merger can be expected significantly to impede effective competition, in particular through the creation or enhancement of a dominant position. If the merger is expected to be anti-competitive applying this test, the concentration must be prohibited (unless acceptable remedies are offered). Unlike EU law on dominant positions (Article 102 of the TFEU), there is no requirement for abusive conduct; the creation of a dominant position which results in a significant impediment to competition is sufficient justification in itself to prohibit a transaction (or require remedies).

Joint ventures which are "full function" and fall under the thresholds for review under the EU Merger Regulation, but those which have as their object or effect the co-ordination of the competitive

behaviour of undertakings which remain independent are subject to an Article 101-type analysis. The co-ordination aspects of the concentration will be appraised in accordance with the criteria of Articles 101(1) and 101(3) of the TFEU with a view to establishing whether the operation is compatible with the internal market, but within the time frame of the EU Merger Regulation inquiry. Where such an operation does not fulfil the criteria for exemption laid down in Article 101(3) of the TFEU, it must be declared incompatible with the common market.

The considerations which are applied in assessing the competitive effects of a merger are considered in more detail in Ashurst's Quickguide, Substantive economic analysis in merger control.

6. Remedies

The European Commission has the power to make merger clearance conditional on the fulfilment of commitments from the parties to implement remedies to remove any associated competition concerns. Remedies may be structural, such as divestments to remove competitive overlaps between the parties, or behavioural, such as commitments on the future conduct or commercial policy of the merged entity. That said, the European Commission has a clear stated preference for structural remedies which eliminate the competition concerns outright, and behavioural remedies are only accepted in exceptional circumstances.

Remedies are agreed and "market tested" in the final phases of the competition assessment and must be finalised in all respects (not just agreed in outline) before the European Commission is able to grant clearance to a merger.

Appendix 1

Group Turnover

The EU Merger Regulation requires that turnover of all companies related to the undertakings concerned, i.e. "group" companies, is included in the calculation of aggregate turnover and thus the assessment of its Community/EFTA dimension.

Related undertakings cover the following:

- the undertaking concerned;
- any undertakings over which it exercises management control;
- undertakings which have management control over the undertaking concerned (i.e. direct and indirect parent companies of the undertaking concerned);
- other undertakings which are subject to management control by undertakings falling within the immediately preceding point (i.e. co-subsidiaries of the undertaking concerned); and
- any undertakings which are subject to joint management control by two or more of the undertakings referred to in the points above.

Management control over another undertaking comprises the direct or indirect:

- ownership of more than half the capital or business assets; or
- power to exercise more than half the voting rights; or
- power to appoint more than half the supervisory board, the administrative board or bodies legally representing the undertaking; or
- right to manage the other undertaking's affairs.

It should also be noted that turnover generated between any of the undertakings considered to be related according to the criteria above (that is "internal" group turnover) is not taken into account when calculating the turnover of the undertakings concerned.

Appendix 2

Joint venture turnover

Joint ventures between undertakings concerned

The turnover of a joint venture undertaking of an undertaking concerned in a concentration is taken into account according to the provisions contained in the EU Merger Regulation, where the undertaking is under the joint management control of the undertaking concerned in one of the four ways set out in Appendix 1.

The provisions relating to the allocation of the turnover of such a jointly-owned or controlled entity are as follows:

- no account is taken of the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned in the concentration or any other undertaking connected with any one of them (related in any of the ways set out at Appendix 1) (i.e. broadly, internal sales between the joint venture and its parents are excluded, in order to avoid double counting); and
- turnover resulting from the sale of products and the provision of services between the joint venture and any third parties is aggregated with the turnover of the undertakings concerned by apportioning that turnover equally between the joint venture principals, irrespective of the actual ratio of their interests in the joint venture (e.g. where two parents exercise joint control, half of the turnover of the joint venture will be allocated to each parent exercising joint control (regardless of actual shareholdings) where there are three, a third, etc.).

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