



In brief: the key features of merger control legislation in European Union

Freshfields

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Legislation and jurisdiction

Relevant legislation and regulators

What is the relevant legislation and who enforces it?

The EU merger control rules, which apply to large-scale merger and acquisition transactions, are set out in the EU Merger Regulation (EUMR). The regime applies to the European Economic Area (EEA) and the three members of the European Free Trade Association.

The EUMR is enforced by the Directorate-General for Competition (DG Comp) of the European Commission (the Commission) in Brussels. EUMR notifications are reviewed by sector-specific units within DG Comp, which have integrated merger control competence.

In addition to the sector-specific merger units, the Commission's internal decision-making process involves a number of other stakeholders: the chief economist team and the case support and policy unit (within DG Comp), and the legal service and the sectoral directorates-general (eg, transport and energy) (outside DG Comp).

The Commission also uses peer review panels in Phase II cases to test the validity of the case team's arguments. The panels comprise a team of lawyers and economists from DG Comp, who are independent of the original case team. In addition, two hearing officers, who are independent of DG Comp and report directly to the Commissioner for Competition, organise and conduct oral hearings in Phase II cases. They also act as independent arbitrators if a dispute arises on the effective exercise of procedural rights between parties and DG Comp.

The Commission has published a series of notices and guidelines to assist in the interpretation of several key issues under the EUMR. These include:

- notices on jurisdictional and procedural issues, including:
 - the Consolidated Jurisdictional Notice (2008);
 - the Notice on the Simplified Procedure (2013; a revised version entered into force on 1 September 2023);
 - the Commission Implementing Regulation 2023/914 (2023); and
 - the Notice on Case Referrals (2005);
- guidelines on issues of substance, including:
 - the Guidelines on the Assessment of Horizontal Mergers (2004); and



- the Guidelines on the Assessment of Non-Horizontal Mergers (2008);
- the Remedies Notice (2008);
- the Notice on Restrictions Directly Related and Necessary to Concentrations (2005); and
- the Notice on the Definition of Relevant Market for the Purposes of Union Competition Law (2024)

In addition, the Commission has published a number of best practices and communications, including the Communication on the Transmission of Documents (2023), the Best Practices on the Conduct of Merger Proceedings (2004) and the Best Practices for the Submission of Economic Evidence (2011). These and other notices are available on the Commission's website.

The EUMR is based on the one-stop shop principle, whereby once a transaction triggers notification to the Commission, the national authorities of the member states are precluded from applying their own competition laws to the transaction (except in circumstances in which the Commission refers transactions to the national authorities of the member states).

On 16 March 2023, in *Towercast*, the EU Court of Justice (ECJ) ruled that it is possible for a national competition authority (NCA) or a national court to find that a concentration, which has no EU dimension, falls below the notification threshold under national law and has not been referred to the Commission under article 22 EUMR, constitutes an abuse of dominance pursuant to article 102 TFEU. NCAs have already started investigations on this basis (eg, *Proximus/EDP Net* in Belgium, 2023 and *Vodafone/4iG* in Hungary, 2023 under article 102 TFEU and a case in the meat-cutting sector in France, 2024; and most recently *Dossche Mills/Ceres* in Belgium, 2025 under article 101 TFEU by analogy).

The ability of national authorities to apply non-competition laws to transactions subject to the EUMR is circumscribed; however, member states have tested the ambit of those principles (eg, Hungary in *VIG/Aegon*, 2022; Spain in *E.ON/Endesa*, 2006; Italy in *Abertis/Autostrade*, 2006; and Poland in *Unicredito/HVB*, 2005).

Scope of legislation

What kinds of mergers are caught?

A 'concentration' is defined in the EUMR as a merger of two or more previously independent undertakings (or parts of undertakings), or the acquisition of direct or indirect control of the whole or parts of another undertaking, which brings about a durable change in the structure of the undertakings concerned. The EUMR applies to concentrations that have an EU dimension (ie, meet certain turnover thresholds), or are referred to the Commission pursuant to articles 4(5) or 22 EUMR.

What types of joint ventures are caught?

Provided that the applicable turnover thresholds are met, the creation and change of control over full-function joint ventures are caught by the EUMR. A full-function joint venture is an autonomous economic entity resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parents.

Non-full-function joint ventures, such as strategic alliances and cooperative joint ventures (eg, production joint ventures), are not governed by the EUMR but by the rules of the TFEU on restrictive practices, notably article 101, which prohibits agreements between undertakings that may affect trade between member states and that have as their object or effect the prevention, restriction or distortion of competition.

According to Council Regulation (EC) No. 1/2003, article 101 of the TFEU can be enforced by the Commission or by NCAs; however, non-full-function joint ventures can trigger merger control in a number of member states (eg, Germany and, in some circumstances, Austria) even in the case of an acquisition of a minority interest.

Is there a definition of ‘control’ and are minority and other interests less than control caught?

‘Control’ means the possibility of exercising decisive influence over an undertaking on the basis of rights, contracts or other means. When outright legal control is not acquired (eg, through the acquisition of shares with the majority of the voting rights), the Commission will consider whether the acquirer can still exercise legal or de facto control over the undertaking through special rights attaching to shares or contained in shareholder agreements, board representation, ownership and use of assets, and related commercial issues.

There is no precise shareholding or other test for decisive influence and each case is decided on its own merits. For example, in *News Corp/Premiere* (2008), the Commission found that the acquisition by News Corp of a 24.2 per cent shareholding was sufficient to confer on it a de facto majority of the voting rights given the specifics of the case, resulting in a notifiable concentration. Also, in *Vivendi/Telecom Italia* (2017), a holding of 29.94 per cent of the voting rights was deemed to amount to de facto control, because Vivendi could appoint the majority of the board of directors.

The EU General Court has also considered the extent to which minority shareholdings come within the scope of the EUMR and confirmed that the EUMR does not empower the Commission to assess minority shareholdings where these do not lead to an acquisition of control under article 3(2) of the EUMR (see *Aer Lingus Group plc v Commission*, T-411/07, 2010).

Thresholds, triggers and approvals

What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The purpose of the EUMR is to review concentrations that have an EU dimension and specific thresholds are designed to ensure that, only large-scale acquisitions, mergers and joint ventures are caught.

A concentration will be caught by the EUMR where:

- the aggregate worldwide turnover of all the parties exceeds €5 billion; and
- the aggregate EU-wide turnover of each of at least two parties exceeds €250 million, unless each of the parties achieves more than two-thirds of its aggregate EU-wide turnover in one and the same member state.

In an attempt to reduce the need for businesses to make multiple applications for clearance at the national level within the EU, the EUMR also applies to smaller concentrations that have an impact in at least three member states if:

- the aggregate worldwide turnover of all the parties exceeds €2.5 billion;
- the aggregate EU-wide turnover of each of at least two parties exceeds €100 million;
- in each of those member states, the aggregate turnover of all the parties exceeds €100 million; and
- in each of those member states, the turnover of each of at least two parties exceeds €25 million, unless each of the parties achieves more than two-thirds of its aggregate EU-wide turnover in the same member state.

Turnover is deemed to be the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year.

In an acquisition, on the buyer side, the turnover of the whole group to which the relevant undertaking belongs is taken into account in accordance with detailed tests set out in the EUMR. The calculation can be complex and may involve certain adjustments to the turnover figure in the most recent audited accounts, for example to account for certain recent disposals or acquisitions. On the other hand, the turnover of the vendor is irrelevant except for that of the target business being acquired. In the case of joint ventures, the whole turnover of the parents and their groups that intend to jointly control the venture is taken into account.

In addition, there are rules for the calculation of turnover in specific sectors – in particular for banks and other financial institutions and insurance undertakings – as well as principles based on case experience for the geographic allocation of turnover in particular sectors, such as airlines, telecommunications and financial services.

The EUMR establishes a system of referrals to ensure that a concentration is examined by the authority best placed to conduct the assessment (in line with the principle of subsidiarity). Under articles 4(4) and 9 of the EUMR, in certain cases, the merging parties or the NCA, respectively, can request that a transaction that meets the EUMR thresholds be reviewed – in whole or in part – by the NCAs. For example, in *Phoenix/McKesson* (2022), the Commission partially referred a proposed acquisition to the French competition authority under article 9 of the EUMR while unconditionally approving the transaction outside France. In *Triton/Caverion* (2023), the Commission partially referred Triton's acquisition of Finnish tech solutions company Caverion, clearing the transaction outside Finland, whereas the Finnish competition authority conditionally approved the transaction in relation to Finland.

By the same token, under articles 4(5) and 22 of the EUMR, merging parties or one or more member states may request the Commission to review a transaction that does not meet the EUMR thresholds, provided certain conditions are met. This applies both when member states are competent based on their national law (eg, *Kingspan/Trimo*, 2022; and *Meta (formerly Facebook)/Kustomer*, 2021) and when a country lacks a national merger control regime; an application of article 22's historical purpose, known as the 'Dutch clause' (eg, *Brasserie Nationale/Boissons Heintz*, 2024). Luxembourg is currently the only EU country without a merger control system, though a bill to introduce one is under review by the Luxembourgish parliament.

The Commission also sought to use article 22 to capture so-called 'killer acquisitions', such as for example in the *Illumina/GRAIL* case, where the Commission had invoked article 22 of the EUMR to assess the transaction despite GRAIL's lack of revenue in Europe (and therefore no filings being triggered in any EU member state).

Nevertheless, the ECJ, overturning a 2022 General Court ruling, determined that this interpretation of article 22 was overly expansive and undermined legal certainty for companies. This landmark decision puts an end to the Commission's policy to, in certain instances, encourage and accept referral requests from member states under article 22 of the EUMR, even where transactions do not meet the national merger control thresholds of the referring member states. The Commission is expected to explore how to fill the perceived 'enforcement gap' and might seek to introduce alternative thresholds to allow it to capture additional transactions. The Commission shares this information with member states which may use it to refer such transactions to the Commission under article 22 of the EUMR, if possible.

Other article 22 referrals included the acquisition of the chipmaker company Autotalks by Qualcomm (*Qualcomm/Autotalks*), potentially merging two suppliers of V2X semiconductors in the EEA, but abandoned in March 2024, and Nasdaq's European power trading and clearing business by EEX (*EEX/Nasdaq*), which was

abandoned in June 2024. The referral request by seven member states to review the *Microsoft/Inflection* case was withdrawn by each of these member states after the *Illumina/GRAIL* decision.

Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for concentrations with an EU dimension. There are no exceptions, and the EUMR empowers the Commission to fine undertakings that fail to notify.

In certain circumstances, parties may request that a transaction that meets the EUMR thresholds be referred wholly or partly to a member state.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The EUMR applies to all concentrations that have an EU dimension. Because the turnover thresholds are based on geographic turnover and not on the location or registered office of the parties, even foreign-to-foreign transactions essentially involving non-EU groups are caught if the financial thresholds are met.

Certain extra-EEA joint ventures have to be notified to the Commission as a result of the parents' turnover in the EEA, but have no effect in the EEA. As of September 2023, parties are able to notify these concentrations without any pre-notification contacts under the super-simplified procedure. This happened 90 times in 2024.

Are there also rules on foreign investment, special sectors or other relevant approvals?

The EUMR applies to all transactions that meet the relevant turnover thresholds. There are no sector-specific rules.

Foreign direct investment (FDI) is governed at the member state level; however, pursuant to the EU framework regulation for the screening of FDIs that became fully applicable on 11 October 2020, the Commission has the power to issue an opinion when an investment poses a threat to the security or public policy of more than one member state. This framework enhances the cooperation between the Commission and the member states in their actions on foreign investments. In January 2024, the Commission presented a proposal for a new regulation on the screening of foreign investments, citing as the reason for the new proposal the lack of screening mechanisms across all member states, which might leave potentially critical FDIs undetected.

Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (the Foreign Subsidies Regulation) is aimed at addressing distortions caused by foreign subsidies and introduces a mandatory notification system for relevant transactions and public procurement procedures involving parties that have received foreign subsidies, as well as an ex officio review of foreign subsidies and awarded public procurement contracts. This represents an independent new ex ante notification procedure for transactions with dedicated thresholds, timelines and redressive measures.

The transaction-related regime introduced by the Foreign Subsidies Regulation requires an ex ante notification if:

- the transaction constitutes a concentration in the form of a change of control on a lasting basis, including full-function joint ventures;
- at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the European Union and generates an aggregate turnover of at least €500 million in the European Union; and
- the undertakings concerned were granted combined aggregate financial contributions from third countries exceeding €50 million in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

The Foreign Subsidies Regulation provides that even if those thresholds are not met, the Commission can call in any concentration if it suspects that the undertakings concerned may have benefitted from foreign subsidies in the previous three years. The procedural rules – including the review periods, penalties and rules on gun jumping – broadly mirror EU merger control rules.

Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (DMA) requires designated gatekeepers to inform the Commission of any intended concentration that involves core platform services or any other services in the digital sector, or enable the collection of data, irrespective of whether they are notifiable to the Commission under the EUMR or to a competent NCA under national merger rules (article 14 DMA). The Commission shares this information with member states which may use it to refer such transactions to the Commission under article 22 of the EUMR.

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