

## EU MERGER CONTROL

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NOËLLE LENOIR  
PRESIDENTE DE L'INSTITUT DE L'EUROPE

DAN ROSKIS

# **EU MERGER CONTROL**

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## **Preliminary remarks : Background and Purposes**

**1 - EU Jurisdiction - Caught Transactions**

**2 - EU Merger Control Proceedings**

**3 - Substantive Analysis for EU Merger Review**

# 1 - EU Jurisdiction Caught Transactions

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## 1.1. What is a concentration with a community dimension?

### 1.1.1. Concept of Concentration

### 1.1.2. EU Jurisdictional Thresholds

## 1.2. What if the transaction has no community dimension?

# 1 - EU Jurisdiction Caught Transactions

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## 1.1. What is a concentration with a community dimension?

### 1.1.1. Concept of Concentration

(i) Merger of two (or more) previously independent undertakings; or

(ii) Acquisition

- by one or more persons already controlling at least one undertaking or by one or more undertakings;
- of **control or joint control** of the whole or part of another previous independent undertakings;
- Which brings the possibility of **exercising decisive influence** over strategic business decision undertaking (e.g. veto rights);
- whether by purchase of securities or assets, by contract or by any other means.

(iii) Creation of full-function joint-venture under the joint-control of two (or more) previously independent undertakings

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## 1.1. What is a concentration with a community dimension?

### 1.1.2. EU Jurisdictional Thresholds

- **Exclusive jurisdiction of the Commission** over concentrations between undertakings meeting the Community dimension jurisdictional thresholds;
- **Two sets of turnover thresholds** defined on the basis of both EC and worldwide turnover of the undertakings concerned;
- **Undertakings concerned:** buyer company(ies) and target company, or companies which are members of the JV.

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## 1.1. What is a concentration with a community dimension?

### 1.1.2. EU Jurisdictional Thresholds

- First set of turnover thresholds

(i) the **aggregate world-wide turnover** of the undertakings concerned exceeding **€5 billion**;

AND

(ii) the **EU-wide individual turnover** of each (or at least two) of the undertakings concerned exceeds **€250 million**;

UNLESS

each of the parties achieves **more than two-third of its EU turnover in one and the same Member State.**

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## 1.1. What is a concentration with a community dimension?

### 1.1.2. EU Jurisdictional Thresholds

- Second set of TO thresholds

(i) the **aggregate world-wide turnover** of all the undertakings concerned exceeds **€2.5 billion**;

AND

(ii) the **individual Community-wide turnover** of each of at least two the undertakings concerned exceeds **€100 million**;

AND

(iii) **in each of at least three Member States**, the **aggregate turnover** of all the undertakings concerned exceeds **€100 million**;

AND

(iv) **in each of at least three Member States** mentioned immediately above, the **individual turnover** of each of at least two undertakings concerned exceeds **€25 million**;

UNLESS

each of the parties achieves more than two-thirds of its **aggregate Community-wide turnover in one and the same Member State**.

# 1 - EU Jurisdiction Caught Transactions

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## 1.2. What if the transaction constitutes a concentration, but not of a community dimension?

- **Member States local merger control** regimes can apply, respectively.
- **But Member State(s) may refer to the Commission a concentration with no Community dimension** but affecting trade between the Member States and threatening to significantly affect competition within the Member State(s) concerned.
- Where a concentration falls within the **merger control jurisdiction of at least three Member States**, notifying party(ies) can apply for a referral to the Commission by filing a reasoned submission.

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## 2.1. Merger Notification

## 2.2. Timetable for Merger Review

### 2.2.1. Pre-notification Contacts

### 2.2.2. Phase I

### 2.2.3. Phase II

## 2.3. Investigation and Sanction

### 2.3.1. Commission Investigation Powers

### 2.3.2. Applicable Fines

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## 2.1 Merger Notification

- **Who?**
  - ✓ either the merging undertakings
  - ✓ or the members of a full function JV
  - ✓ or the party(ies) acquiring control on one or more undertakings
- **When?**
  - ✓ When a project of concentration is well advanced (e.g. a Letter of Intent or Memorandum of Understanding has been signed); or
  - ✓ When a binding agreement has been signed (Share Purchase Agreement)

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## 2.1 Merger Notification

- **What?**
  - ✓ A « Form CO » filing document
  - ✓ Significant amount of legal and economical information to be provided
- **Effect?**
  - ✓ Suspensive effect: in principle, the transaction cannot be implemented until a final decision by the Commission
  - ✓ The notification must be complete to start the clearance process

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## 2.2. Timetable for Merger Review

### 2.2.1. Pre-notification Consultations

- Informal and confidential consultations between the parties to a proposed concentration and the DG COMP.
- Purposes of the pre-notification include:
  - ✓ confirming the jurisdiction of the Commission over the proposed concentration;
  - ✓ application by the parties for a referral to Member State(s) or to the Commission;
  - ✓ identifying key issues and possible competition concerns;
  - ✓ ascertaining deadlines.

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## 2.2. Timetable for Merger Review

### 2.2.2. Phase I

#### (i) Time Limits

- **25 commission working days starting** from the complete notification of the merger (if complete);
- **Extended to 35 working days:**
  - ✓ when remedies are submitted by the notifying party to solve competition concerns (to be submitted within 20 working days);
  - ✓ if referral is requested by and to Member States.

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## 2.2. Timetable for Merger Review

### 2.2.2. Phase I

#### (ii) Main Steps

- **Within 3 working days from notification:** Transmission of a copy of Form Co Notification to Member States;
- **Within 15 working days from notification:** “*State of Play*” meeting the Commission where the concentration raises “*serious doubts as to its compatibility with the Common Market*”.
- **Within 25 working days from notification:** DG COMP will:
  - ✓ confirm that the merger meets the jurisdictional thresholds;
  - ✓ confer with other interested Commission Directorates (for example, the Telecommunications Directorate in cases involving the telecoms industry) and the Legal Service;
  - ✓ make inquiries (“*market test*”) and consider submissions by interested third parties;
  - ✓ decide whether the proposed concentration “*raises serious doubts as to its compatibility with the Common Market*”.

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## 2.2. Timetable for Merger Review

### 2.2.2. Phase I

#### (iii) Decision of the Commission

- Formal clearance decision is issued if the merger does not raise “*serious doubts as to its compatibility*” with the Common Market

Most merger operations are cleared by a Phase I decision with remedies, if any.

- Conversely, if the concentration raises “*serious doubts*”, the Commission issues a decision to “*initiate proceedings*” i.e. to proceed an in-depth Phase II investigation

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## 2.2. Timetable for Merger Review

### 2.2.3. Phase II

#### (i) Time Limits

- **90 working days starting from the issuance of a formal decision** raising “*serious doubts as the compatibility of the transaction with the Common Market*”;
- **Extended to 105 working days** if remedies are proposed by the parties more than 55 days after the start of Phase II;
- Possibility for the notifying party(ies) and the Commission to “*stop the clock*” for not more than 20 days, subject to certain conditions.

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## 2.2. Timetable for Merger Review

### 2.2.3. Phase II

#### (ii) Main Steps

- Within 10 working days approximately, “*State of Play*” **meeting** is held with the Commission “to facilitate the notifying parties’ understanding of the Commission’s concerns at an early state of the Phase II proceedings”.
- The Commission issues **information request letters** to the notifying party(ies), to customers, competitors and/or suppliers and it treats such information to ascertain its analysis (market test).

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## 2.2. Timetable for Merger Review

### 2.2.3. Phase II

#### (ii) Main Steps

- Issuance of the **Statement of Objections** summarizing the factual and analytical grounds for opposing the transaction (within approximately six weeks after starting of Phase II);  
  
Statement of Objections triggers the parties' right of access to the DG COMP's investigative file, including third-party complaints;
- **Parties' reply to the Statement** within 2 weeks of Statement of Objections;
- **Oral Hearing** (if requested by the notifying party) one week after the filing of the parties' reply;
- Another "*State of Play*" **meeting** may take place, as an opportunity to discuss the scope and timing of possible remedy proposals.

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## 2.2. Timetable for Merger Review

### 2.2.3. Phase II

#### (iii) Remedies

- Within 65 working days after the opening of Phase II, the parties can submit **remedies in order to get clearance subject to conditions**;
- Remedies must eliminate the factors which impede competition, as identified by the Commission in the Statement of Objections;
- Remedies are generally “*structural*” (e.g. divestiture of an existing business but can also be “*behavioural*” (e.g. pricing practices).

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## 2.2. Timetable for Merger Review

### 2.2.3. Phase II

#### (iv) Final Decision

- The **Advisory Committee** (representatives of the EU Member State competition authorities) reviews the DG COMP's proposed decision and issues non-binding opinion;
- All decisions on concentrations following Phase II proceedings have to be adopted by the **full college of Commissioners**;
- The Phase II decision **clears the transaction (subject to remedies) or blocks the transaction.**

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## 2.3. Investigation and Sanction

### 2.3.1. Commission Investigation Powers

- The Commission is vested with **wide investigative powers**;
- Such powers include compulsory process to obtain answers to **written questions and on-site inspection** of books and records;
- The Commission's powers include the ability to **seal business premises and books and records at the undertakings' premises**.

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## 2.3. Investigation and Sanction

### 2.3.2. Main Applicable Fines

- **Up to 10% of the aggregate worldwide turnover of the undertakings** concerned for (i) failure to notify and/or completion prior to approval or (ii) failure to comply with a remedy.
- **Up to 1% of the aggregate worldwide turnover of the undertakings** for (i) inaccurate information in Form CO or (ii) inaccurate information in a response to an Art. 11 information request letter (ii) refusal to submit to an on-site investigation.
- **Up to 5% of the average daily** turnover of the undertaking(s) concerned per day for delays in providing complete and correct information in response to an Art. 11 request or for non-compliance with an order to cooperate to an on-site investigation.

# **3 - Substantive Analysis for EU Merger Review**

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## **3.1. Substantive standard in the merger regulation**

### **3.1.1. The Applicable Substantive Test**

### **3.1.2. Statutory Factors**

## **3.2. Market Definition**

## **3.3. Dominance**

### **3.3.1. Single Dominance**

### **3.3.2. Collective Dominance**

## **3.4. Other Competitive Harms**

## **3.5 Countervailing Factors**

# 3 - Substantive Analysis for EU Merger Review

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## 3.1. Substantive Standard Test

### 3.1.1. The Applicable Substantive Test

- A new applicable substantive test has been introduced by ECMR dated 20 January 2004 :  
*“A concentration which would **significantly impede effective competition** in the Common Market or in a substantial part of it **in particular** as result of the **creation or strengthening of a dominant position** shall be declared incompatible with the Common Market”* (referred to as “SIEC” test)
- The **dominant position test** remains however the applicable test in most cases;
- But the **SIEC test may also apply to anti-competitive effects** of a merger on **already concentrated markets** where dominance cannot be evidenced.

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## 3.1.2. Statutory Factors

For the purposes of its review, the Commission takes into account *inter alia* :

- the structure of all the markets concerned;
- **the actual or potential competition** from undertakings located either within or outside the Community;
- **the market position of the undertakings concerned** and their economic and financial power;
- **the alternatives available to suppliers and users and** their access to supplies or markets;
- any legal or other **barriers to entry**;
- **supply and demand trends** for the relevant goods and services, and
- and the **development of technical and economic progress** provided that it is to consumers' advantage and does not form an obstacle to competition.

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## 3.2. Market Definition

The Commission defines product and geographic markets as follows.

- A relevant **product market** comprises all those products and/or services which are regarded as **interchangeable or substitutable by the consumer**, by reason of the products' characteristics, their prices and their intended use.
- The **relevant geographic market** comprises the area in which the undertakings concerned are active, in which **the conditions of competition are significantly homogeneous** and different from those in neighbouring areas.

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## 3.3. Dominance

### 3.3.1. Single Dominance

- Single dominance is defined as « *the power to **behave** to an appreciable extent **independently of its competitors, customers and ultimately of consumers** »;*
- Dominance relies on the **assessment of post-transaction market power of the undertakings concerned** with regards to their availability to increase price or reduce production or innovation;
- **Market shares of the undertakings concerned** provide for useful guidance but it is not the sole factor to take into account;
- The Commission provide for **indicative safe harbors** (e.g. market share under 25%).

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## 3.3. Dominance

### 3.3.2. Collective Dominance

- Technical concept based on the **co-ordinated effects** on a market where competitors are incentivised to **act in (tacit) concert**;
- Collective dominance is based in particular on **the following factors**:
  - ✓ Highly concentrated market;
  - ✓ Transparency of prices;
  - ✓ Market conditions allowing an accurate understanding of competitors' behaviour (products homogeneity, similar production costs...);
  - ✓ Existence of credible retaliation mechanism to punish another member to deviate from co-ordinated practices.

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## 3.4. Other Competitive Harms

- **Unilateral or non-coordinated effects:** In substance, the SIEC test will catch situations where the **merged firms are able to individually raise their prices regardless of the competitor's reaction**, even though a single or dominant position is not created or strengthened;
- **Vertical foreclosure:** vertical mergers can restrict the access of competitors to supplies, thereby raising their costs;
- **Co-ordinated (« spill-over ») effects between the partners of a joint-venture.**

# 3 - Substantive Analysis for EU Merger Review

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## 3.5. Countervailing Factors

- **Lack of Barriers to Entry**

Entry of competitors into the market must be likely, timely, and sufficient to prevent the potential anticompetitive effects of a merger.

- **Buyer Power**

The ability of customers to counterbalance the increase of the market power of the undertakings concerned is a determining factor.

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## 3.5. Countervailing Factors

- **Failing Firm**

Similar to the failing firm defense as recognized by U.S., the EC has been willing to clear “rescue mergers”.

- **Efficiencies**

The new 2004 EC Merger Control Regulation introduced expressly the possibility to take into account the efficiencies resulting from the merger when they are verifiable and benefit the consumers .