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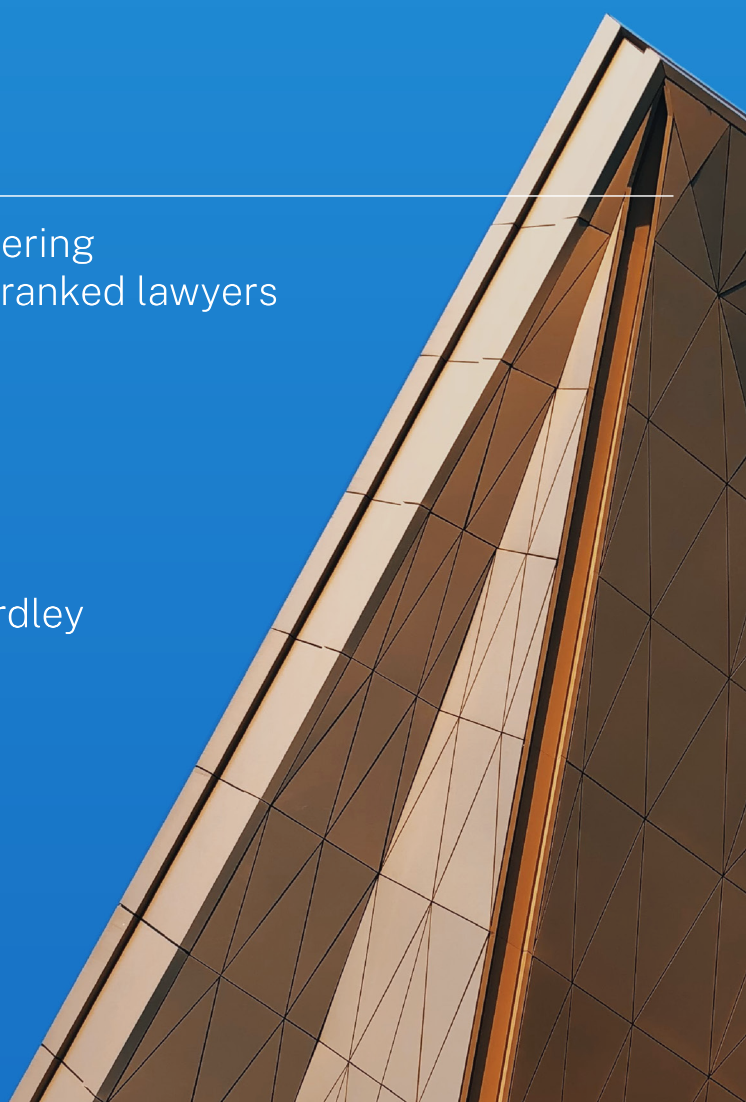
EU: Law & Practice

Porter Elliott and Catherine Gordley
Van Bael & Bellis



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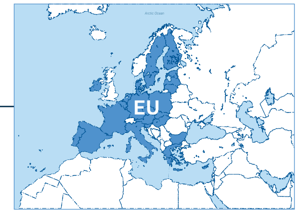

Law and Practice

Contributed by:
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Contents

Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, the competition team at Van Bael & Bellis has assisted clients at both the EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA) and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a dedicated team of EU and UK specialists who regularly represent merging parties as well as complainants in cases involving key issues of jurisdiction, procedure and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. The team also routinely helps clients to obtain merger clearance from member state authorities for transactions that do not meet EU thresholds. The firm is frequently called on to co-ordinate merger control filing efforts across the world.

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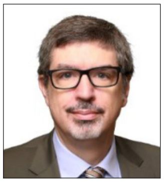

Porter Elliott is the co-head of competition law at Van Bael & Bellis and a leading expert on EU merger control law. For over 25 years, he has successfully guided dozens of complex and high-profile transactions through the regulatory process, both in Europe and elsewhere. He has also represented third parties in successfully challenging and preventing the approval of proposed mergers. Porter regularly teaches, writes and speaks on issues of competition and merger control law and has conducted training for merger control authorities.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Council Regulation 139/2004 on the control of concentrations between undertakings (the "EU Merger Regulation" or EUMR) provides the regulatory framework for the assessment of all "concentrations" (including mergers, acquisitions and certain joint ventures) that have an "EU dimension" (ie, that meet the turnover-based thresholds of the EUMR – see **2.5 Jurisdictional Thresholds**).

Commission Regulation 802/2004, as amended by Commission Regulation 1269/2013 (the "Implementing Regulation"), lays out the deadlines and other procedural aspects of the review process and provides the notification forms. Effective from 1 September 2023, the current Implementing Regulation will be replaced by a new Commission Regulation adopted in April 2023 (see **10.1 Recent Changes or Impending Legislation**).

The European Commission (the "Commission") has published additional notices, guidelines and best practices documents, available on its website, examples of which are listed below.

Additional jurisdictional and procedural guidance includes:

- the Consolidated Jurisdictional Notice;
- the Notice on Simplified Procedure (to be replaced by a revised Notice effective from 1 September 2023);
- the Notice on Case Referrals and Guidance on the Application of Article 22 EUMR (see **2.1 Notification**); and
- the Notice on Access to File.

Additional substantive guidance includes:

- the Notice on Relevant Market;
- the Horizontal Merger Guidelines;
- the Non-Horizontal Merger Guidelines; and
- the Remedies Notice.

1.2 Legislation Relating to Particular Sectors

There is no separate legislation for foreign transactions, nor sector-specific legislation.

1.3 Enforcement Authorities

The Commission has exclusive jurisdiction within the European Economic Area (EEA) to review concentrations with an EU dimension (ie, those satisfying the EU thresholds). The EEA consists of the 27 EU member states plus three European Free Trade Association (EFTA) countries: Iceland, Liechtenstein and Norway.

The Directorate General for Competition ("DG Comp"), under the leadership of the current Competition Commissioner Margrethe Vestager, administers the merger control process.

The Commission operates according to a "one-stop shop" principle. Concentrations with an EU dimension must be notified to the Commission and need not be notified to any of the EEA national competition authorities (NCAs), even if national notification thresholds are met. NCAs cannot review or apply their competition rules to a concentration that has been notified to the Commission.

Under certain circumstances, the Commission will accept exclusive jurisdiction over cases that do not meet the EU thresholds upon referral by one or more EU member state or the parties, or it will agree to transfer its jurisdiction back to one or more member states (see **2.1 Notification**).

Exceptions

The Commission's exclusive jurisdiction over concentrations with an EU dimension is subject to several limited exceptions regarding:

- the "legitimate interests" of member states in public security, media plurality, prudential rules or other exceptional interests under Article 21(4) EUMR;
- the national security interests of member states relating to the production and/or trade in certain goods intended for exclusively military purposes under Article 346 of the Treaty on the Functioning of the European Union (TFEU); and
- certain products for which jurisdiction does not extend over the EFTA states per Protocol 2 of the EEA Agreement.

Brexit

As of 1 January 2021, the UK merger control regime has operated entirely independently of the EU regime. The "one-stop shop" rule no longer applies to the UK, and parties will need to assess whether to notify a transaction in both jurisdictions.

2. Jurisdiction

2.1 Notification

Parties must notify any concentration with an EU dimension (see **2.5 Jurisdictional Thresholds**) to the Commission and receive clearance before it can be implemented.

The EUMR contains several referral mechanisms that allow transactions that do not meet the EU thresholds to be referred to the Commission for review and that allow deals meeting the EU thresholds to be referred to the member state NCAs.

Referral to the Commission

By the parties (Article 4(5) EUMR)

Where a transaction does not meet the EUMR thresholds but requires notification in at least three member states, the notifying parties may make a "reasoned submission" to the Commission, requesting that it review the transaction, rather than the member state NCAs. If the NCAs do not object, this reduces the notification burden by allowing the transaction to benefit from the EU's one-stop shop. Historically, fewer than 4% of such referral requests have been rejected.

By the member states (Article 22 EUMR)
One or more member state NCAs may request that the Commission take jurisdiction over a transaction that does not meet the EUMR thresholds if it:

- affects trade between member states; and
- threatens to significantly affect competition within the territory of the requesting member state(s).

In practice, fewer than 10% of such referral requests have been rejected. In early 2021, the Commission clarified that a member state NCA need not have jurisdiction over the transaction in order to refer it to the Commission (see **10.1 Recent Changes or Impending Legislation**). This opens the door for deals that do not meet the notification thresholds in any member state to be referred to the Commission for review.

Referral to the Member States

By the parties (Article 4(4) EUMR)
Before notifying a transaction with an EU dimension to the Commission, the parties may make a "reasoned submission" to the Commission requesting a full or partial referral of the transaction to a member state NCA. The parties' submission must demonstrate that the concentration may significantly affect competition in a market within a member state that presents all the characteristics of a distinct market and should therefore be examined by that member state's NCA. No Article 4(4) request has ever been rejected.

By the member states (Article 9 EUMR)
A member state may request a full or partial referral from the Commission. To do so, the member state must inform the Commission within 15 days of receipt of a copy of the EU notification that the transaction threatens to significantly affect competition in a market within that member state that has all the characteristics of a distinct market (in which case the Commission will decide whether to refer the case) or that the transaction affects competition in a market within that member state which moreover does not constitute a substantial part of the internal market (in which case, the Commission must refer the case). Historically, the Commission has rejected around 12% of Article 9 requests.

2.2 Failure to Notify

The EUMR imposes both a notification and a standstill obligation:

- notification obligation – Article 4(1) EUMR requires that parties notify any concentration with an EU dimension before implementation; and
- standstill obligation – Article 7 EUMR requires parties to wait to implement any concentration with an EU dimension until the transaction is notified to and cleared by the Commission (see **2.12 Requirement for Clearance Before Implementation**).

Fines for a Failure to Notify or Suspend

Under Article 14(2) EUMR, the Commission may fine parties up to 10% of aggregate worldwide turnover for "gun-jumping" if they fail to notify a transaction or implement a transaction before receiving clearance.

The Commission has become increasingly willing to impose large fines for gun-jumping and other procedural violations:

- in July 2023, it imposed the largest fine to date (EUR432) on Illumina for an especially blatant violation of the standstill obligation in relation to its acquisition of Grail;

- previously, the largest gun-jumping fine was EUR125 million, imposed on Altice for implementing its acquisition of PT Portugal before notifying the transaction (confirmed by the General Court but currently under further appeal to the Court of Justice); and
- other recent gun-jumping fines range between EUR20million and EUR30 million and include: EUR28 million on Canon/Toshiba Medical Systems Corporation in 2019; EUR20 million on Marine Harvest/Marpol in 2014; and EUR20 million on Electrabel/Compagnie Nationale du Rhône in 2009.

2.3 Types of Transactions

The EUMR only applies to "concentrations", ie, mergers, acquisitions of control and certain "full-function" joint ventures. As a rule of thumb, in order for a transaction to be considered a concentration, there should be a change in the nature of control of an undertaking (see **2.4 Definition of "Control"**). How this change in control is brought about (whether through a purchase of assets or shares, or by other means) is immaterial. Purely internal restructurings or reorganisations that do not lead to a change of control will not qualify as concentrations within the meaning of the EUMR.

2.4 Definition of "Control"

The EUMR defines "control" as rights, contracts or other means which, together or separately, confer the possibility of exercising decisive influence over an undertaking. Such control may be held solely (ie, by one undertaking) or jointly (by two or more undertakings). The acquisition of control, including through changes in the nature of control (eg, from sole to joint, or vice versa), will generally constitute a concentration under the EUMR.

Sole Control

The classic example of an acquisition of sole control is where Company A acquires 100% of Company C. However, sole control can also arise where Company A acquires less than 100% of Company C, provided that A's stake in C allows A to determine, on its own, the key strategic commercial decisions of C. This might be the case, for example, where all such decisions are to be taken by a simple majority vote of C's board of directors and A is entitled to appoint the majority of the directors of C's board.

The above are examples of "positive" sole control (where A is able to take strategic commercial decisions relating to C on its own). Sole control can also be "negative". This is where A does not have the power to take strategic commercial decisions relating to C on its own but is the only shareholder of C with the power to veto such decisions.

Joint Control

Joint control exists where two or more undertakings have the possibility of exercising decisive influence over another undertaking. In this context, decisive influence normally means the power to block decisions.

A typical example of joint control would be a 50:50 joint venture ("C"), with both shareholders ("A" and "B") having veto rights over key strategic decisions of C, such as the approval of C's business plan or budget, or the appointment of C's senior management. In such a situation, as A and B must reach a consensus in determining the commercial policy of C, they are considered to jointly control C. Veto rights that are of the kind typically granted to minority shareholders for the preservation of their basic shareholder interests, such as a veto over changes to C's corporate statute or the liquidation of C, would not normally confer control in the absence of other factors.

Both sole control and joint control may be de jure (eg, based on contractual rights set out in a shareholders' agreement) or de facto (eg, as the result of strong economic links or other factors that confer the possibility to exercise decisive influence over an undertaking). An assessment of control must therefore consider the full factual circumstances of a transaction, including the contractual and non-contractual rights of the parties involved.

Minority Shareholdings

The acquisition of a minority shareholding that does not grant sole or joint control over an undertaking is not a concentration under the EUMR. However, such transactions may be notifiable in certain EU member states.

2.5 Jurisdictional Thresholds

Concentrations that meet either of the turnover thresholds below have an "EU dimension" and must be notified to the Commission, provided that they do not fulfil the "two thirds" exception. These thresholds, which are based on the parties' turnover in the last financial year for which audited figures are available, apply to all concentrations. There are no additional sector-specific thresholds.

Primary Thresholds

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR5 billion; and
- the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR250 million.

Alternative Thresholds

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR2.5 billion; and
- in each of at least three EU member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million; and
- in each of at least three member states included above, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR25 million; and
- the aggregate EU-wide turnover of at least two of the undertakings concerned exceeds EUR100 million.

Two-Thirds Exception

The primary or alternative thresholds will not be met if each of the undertakings concerned achieves more than two thirds of its aggregate EU-wide turnover in one and the same member state.

2.6 Calculations of Jurisdictional Thresholds

Article 5 EUMR outlines how turnover should be calculated for the purposes of the EU jurisdictional thresholds.

Calculation of Turnover

The term "aggregate turnover" refers to revenue derived from the sale of products and/or services by the undertakings concerned in the most recent financial year for which audited accounts are available.

Turnover for each undertaking concerned normally includes all group-wide turnover, excluding intra-group turnover. If only part of an undertaking is being acquired (eg, a subsidiary or a division), only the turnover relating to that part counts as the target's turnover, and the seller's turnover is ignored.

Revenues are calculated only on the basis of net turnover (ie, after the deduction of sales rebates, value added tax and any other taxes directly related to turnover). The calculation of aggregate turnover generally excludes any extraordinary revenues that do not correspond to the ordinary activities of the undertakings concerned, such as income from the sale of businesses or assets.

Geographical Allocation of Turnover

Turnover is generally allocated based on where the customer is located, as this is normally where competition with alternative suppliers takes place. The Commission's Jurisdictional Notice provides additional detail on where turnover should be allocated for specific types of sales, including internet sales.

Revenues registered in a foreign currency must be converted to euros using the average exchange rate for the 12-month period in question, as published by the European Central Bank.

Financial Institutions

The EUMR and the Consolidated Jurisdictional Notice provide specific rules that apply to the calculation and allocation of turnover in the case of credit and other financial institutions.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Undertakings Concerned

The EUMR jurisdictional thresholds refer to the aggregate turnover of "undertakings concerned". In the case of mergers, the merging parties are both undertakings concerned. In the case of acquisitions, the undertakings concerned are the acquirer(s) and the target(s) but not the seller.

If the transaction involves the acquisition of joint control over a pre-existing undertaking, then that undertaking is also an undertaking concerned.

Control Group of the Undertakings Concerned

EU turnover thresholds concern the aggregate turnover of all entities belonging to the control group of the undertaking concerned. For turnover purposes, the concept of control group includes:

- the undertaking concerned;
- any undertakings directly or indirectly controlled by the undertaking concerned;
- any undertakings that directly or indirectly control the undertaking concerned (ie, its parent companies); and
- any undertakings other than the undertaking concerned that these controlling undertakings also control.

The turnover of a target undertaking is limited to that of the target itself and its subsidiaries, but not the turnover of the target's parent companies (the sellers) or any other subsidiaries of those parent companies.

2.8 Foreign-to-Foreign Transactions

The EUMR applies to all concentrations with an EU dimension, regardless of the nationality of the parties involved. There are no special rules for foreign-to-foreign transactions or a local effects test beyond the turnover thresholds.

2.9 Market Share Jurisdictional Threshold

The EU notification thresholds are based solely on turnover. There are no market share-based thresholds.

2.10 Joint Ventures

The EUMR applies only to “full-function” joint ventures (JVs). Non “full-function” JVs are not caught by the EUMR, but are subject to the EU antitrust rules, specifically Article 101 TFEU. They may also require notification in certain member states that take a different approach to what constitutes a notifiable transaction.

A JV is considered “full-function” if it performs, on a lasting basis, all the functions of an autonomous economic entity. It must therefore have sufficient staff, assets and capital to function on the market independently of its parent companies. It must also have its own market presence, and not merely perform a single function on behalf of its parent companies (such as customer service or R&D) or be overly reliant on its parent companies as either suppliers or customers.

Concentrations involving full-function JVs may arise from the creation of a new greenfield operation or through a change in control over an existing business (eg, a change from sole to joint control or the addition of a parent company to an existing full-function JV).

2.11 Power of Authorities to Investigate a Transaction

The Commission has no power to investigate or review on its own initiative transactions that do not meet the EU jurisdictional thresholds.

However, the Commission can acquire jurisdiction to review such transactions as a result of a referral request lodged by either the parties or a member state (see **2.1 Notification**).

2.12 Requirement for Clearance Before Implementation

Article 7 EUMR imposes a standstill obligation, requiring parties to a concentration with an EU dimension to suspend implementation until they have received clearance.

Definition of Implementation

The Court of Justice clarified the meaning of implementation in Ernst & Young/KPMG Denmark (2018). Actions taken in anticipation of a merger (eg, the target severing legal ties with its parent company) do not constitute implementation of the transaction, even if they would not have occurred had it not been for the merger, and they are irreversible and have an effect on the market. Rather, implementation in the sense of Article 7 EUMR concerns steps that contribute to a lasting change in control of an undertaking.

Multi-step Transactions

Transactions achieved through multiple steps can constitute part of the same notifiable concentration, where these steps are interdependent (ie, legally or de facto linked by condition) and control is ultimately acquired by the same undertaking(s). Under Article 5(2) EUMR, two or more transactions between the same two parties within a two-year period will be considered part of the same concentration for turnover calculation purposes (preventing parties from evading merger control by splitting transactions into smaller deals). Any multi-step concentrations must receive clearance before the first step is implemented.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Commission may impose fines of up to 10% of aggregate worldwide turnover for implementing a concentration with an EU dimension before receiving clearance (see **2.2 Failure to Notify**).

If the Commission determines that a concentration with an EU dimension was implemented without receiving clearance, it can order interim measures under Article 8(5) EUMR to restore or maintain conditions of effective competition pending a review of the transaction. If the Commission then issues a decision prohibiting the transaction (see **4.1 Substantive Test**), the Commission may order the parties to dissolve the concentration or take other restorative measures to remedy the competitive situation.

2.14 Exceptions to Suspensive Effect

Parties may only implement a transaction with an EU dimension before it has received clearance if one of two limited exceptions is met.

Exception for Public Bids

Under Article 7(2) EUMR, transactions involving a public bid or a series of transactions in publicly traded securities, in which control is acquired from various sellers, are exempted from the standstill requirement provided that:

- the concentration is notified to the Commission without delay; and
- the acquirer does not exercise the voting rights attached to the securities in question (or does so only to preserve the full value of its investments pursuant to a derogation granted by the Commission).

Exception by Reasoned Request

Under Article 7(3) EUMR, parties may obtain a derogation from the standstill requirement by submitting a reasoned request to the Commission. In practice, the Commission grants such derogations only exceptionally, where the transaction clearly does not threaten competition and where one of the parties (typically the target) would suffer serious economic harm (eg, bankruptcy) if the transaction were not allowed to proceed.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Other than the exceptions noted in **2.14 Exceptions to Suspensive Effect**, there are no circumstances in which implementation is permitted before clearance has been received.

In particular, the Commission does not permit a transaction to close in other jurisdictions pending EU clearance, regardless of whether the EU business could be ring-fenced or held separately.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no deadline to notify a transaction to the Commission. However, notification must be made (and clearance granted) before a transaction with an EU dimension can be implemented (see **2.12 Requirement for Clearance Before Implementation**).

3.2 Type of Agreement Required Prior to Notification

A notification may be made following the conclusion of a binding agreement. However, the EUMR also allows parties to notify a transaction if they can demonstrate a good faith intention to conclude a binding agreement, for example, through a letter of intent or memorandum of understanding. Public bids may be notified once the parties have publicly announced an intention to make a bid.

3.3 Filing Fees

There are no filing fees to notify a concentration to the Commission.

3.4 Parties Responsible for Filing

In the case of an acquisition, the acquirer is solely responsible for notifying the transaction.

Where the transaction involves the acquisition of joint control, all parties acquiring control are responsible for making the notification.

In the case of a merger, both merging parties are responsible for filing the notification.

3.5 Information Included in a Filing

Information Required

The notification must be made by completing the official notification form, "Form CO", which is annexed to the Implementing Regulation (a new version of which comes into effect on 1 September 2023).

It is generally recognised that the amount of time and detail required to complete Form CO is unparalleled by any other merger control regime worldwide. Completed Form COs are frequently longer than 100 pages and can easily eclipse 1,000 pages – excluding annexes – in complex cases involving numerous markets. The process is front-loaded, requiring parties to submit detailed information regarding, for example:

- the transaction and its rationale (including extensive internal documentation of the deal);
- the corporate structure, turnover and activities of the parties;
- the definition of the relevant markets;
- competitive overlaps and vertical relationships, including details of any affected markets (see **4.2 Markets Affected by a Transaction**);
- contact details for market participants;
- any merger-specific efficiencies; and
- any co-operative effects resulting from a JV (where applicable).

Increasingly, even in Phase I cases (see **3.8 Review Process**), the Commission requires parties to turn over huge volumes of internal documents – from board presentations and minutes to emails of key individuals – concerning either the transaction or the markets at issue.

Certain transactions may be notified under a simplified procedure using the "Short Form CO" (see **3.11 Accelerated Procedure**), which is less burdensome to complete than the standard Form CO, although still hefty compared to the standard forms in many other jurisdictions.

Submission

While Commission notifications previously needed to be made in hard copy form, during the COVID-19 pandemic, the Commission started to accept electronic notifications. As of 1 September 2023, the Commission's default mechanism to accept notifications will be electronically, through its "EU Send Web" platform (also called "eTrustEx"). The Commission's website provides further guidance on the required specifications for submissions. In the interim, parties should verify what format to use with the Commission Registrar in advance of filing.

Notifications may be submitted in any of the EU official languages, although the overwhelming majority of notifications are in English. Any supporting documents not in an official language must be translated.

3.6 Penalties/Consequences of Incomplete Notification

The Commission has the discretion to reject a Form CO as incomplete. In this case, Phase I of the Commission's review will begin only once the parties have submitted a notification that the Commission considers complete.

For this reason, it is standard practice for parties to submit a draft of Form CO during pre-notification and to wait until the Commission has indicated that the notification appears complete (see **3.9 Pre-notification Discussions With Authorities**), before formally filing.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Fines and Penalties

The Commission can impose fines of up to 1% of aggregate annual turnover on a party that intentionally or negligently supplies incorrect or misleading information, whether in the notification form or in response to a request for information.

The Commission can also impose periodic penalty payments of up to 5% of a party's average daily aggregate turnover for non-compliance with certain Commission decisions, including failing to provide complete and correct information in response to a formal request for information.

The Commission has recently become more active in imposing fines on merging parties that supply incorrect or misleading information. In 2017, the Commission imposed a EUR110 million fine on Facebook relating to its acquisition of WhatsApp. The Commission also imposed a fine of EUR52 million on General Electric in 2018 and a fine of EUR7.5 million on Sigma-Aldrich in 2021. Each of these fines related to failure to fully disclose products or capabilities still in development.

Revoking Clearance

The Commission has the power to revoke a previously granted clearance decision if it discovers that its decision was based on incorrect information for which one of the parties was responsible, or where the clearance was obtained by deceit. In practice, the Commission has only revoked one clearance decision on this basis (Sanofi/Synthelabo in 1999, although this merger was ultimately conditionally cleared following a new notification and review process).

3.8 Review Process

The Commission's review process consists of two phases: a standard Phase I review and, if necessary, an in-depth Phase II investigation.

Phase I

The Phase I review process begins once a complete notification is formally submitted to the Commission. As the length of the statutory period is fixed regardless of the complexity of the case, the Commission tends to front-load the review process in pre-notification (see **3.9 Pre-notification Discussions With Authorities**) to avoid running out of time in Phase I.

Phase I lasts 25 working days, running from the working day following notification. This timeline may be extended by an additional ten working days if either:

- the Commission receives a referral request from a member state; or
- the parties offer remedies to address a competition concern.

During Phase I, the Commission will normally solicit views from the market (see **7.2 Contacting Third Parties**) and may also receive spontaneous feedback in response to its public announcement of the notification.

At the end of Phase I, the Commission must issue one of the following decisions:

- finding that the transaction does not fall within the scope of the EUMR;
- clearing the transaction (with or without conditions); or
- opening a Phase II investigation.

The majority of cases are cleared – conditionally or unconditionally – after Phase I. Fewer than 4% of all notified transactions go to Phase II, and another 2% are withdrawn before the initiation of Phase II.

Phase II

Phase II is an exceedingly burdensome process, requiring the notifying parties to reply to detailed requests for information and to produce large volumes of internal documents and data.

Phase II runs 90 working days from the Commission's decision to open the in-depth investigation. This timeline can be extended in multiple ways:

- to 105 working days if the parties offer remedies (provided these are submitted between working days 55 and 65);
- by 20 working days at the request of the parties (made by working day 15) or at the initiative of the Commission with the parties' agreement; and
- for a variable period of time, as a result of the "stop the clock" mechanism following a formal Commission decision to request information (see **3.10 Requests for Information During the Review Process**).

Engagement with the case team in Phase II follows several major milestones:

- a 6(1)(c) Decision – at the end of Phase I, the Commission issues a detailed decision outlining its reasons to open a Phase II investigation, to which the parties respond in writing;
- a Statement of Objections (SO) – if the Commission's initial doubts are not resolved in the course of its review, it will issue an SO outlining its concerns, typically around working day 40 of Phase II, to which the parties respond in writing (the Commission must issue an SO if it intends to prohibit a transaction);
- access to file – if an SO is issued, the Commission must provide the parties with access to the evidence on which the SO relies; and
- an oral hearing – once an SO is issued, the parties may request an oral hearing (however, as complainants are also invited to participate, in practice, notifying parties often choose not to have a hearing).

Throughout Phase II, the parties also interact regularly with the case team and usually the Commission's Chief Economist's team.

At the end of Phase II, the Commission must issue a decision either:

- clearing the transaction (with or without conditions); or
- prohibiting the transaction.

3.9 Pre-notification Discussions With Authorities

While parties are not legally obliged to engage in pre-notification discussions with the Commission, doing so has become standard practice in nearly all cases. This reduces the risk of a notification being declared incomplete after submission (see **3.6 Penalties/Consequences of Incomplete Notification**). An extended pre-notification may also reduce the risk of a Phase II investigation (see **3.8 Review Process**).

The notifying parties begin by requesting the allocation of a case team using a standard request form available on the Commission's website. Once a case team is assigned, the parties will often submit a briefing paper on the transaction and may have one or more calls and meetings with the case team. This would typically be followed by the submission of one or more drafts of Form CO and responses to any comments or requests for information from the case team.

As pre-notification is not part of the formal process, it has no fixed timeline. The case team will often wish to ensure that they have a thorough understanding of the markets and competitive issues involved in a transaction before the clock officially starts. Once the case team deems the draft to be complete, it will signal to the parties that they may file the formal notification.

In "simplified procedure" cases (see **3.11 Accelerated Procedure**), the pre-notification period may be brief, perhaps a week or two. In more complex cases, the pre-notification process can last many months.

3.10 Requests for Information During the Review Process

The Commission normally first issues requests for information to parties involved in the transaction and to third parties by "simple request".

Where necessary, the Commission can also issue information requests "by decision". In such cases, if the addressee is a party and it fails to provide the information requested within the time limit specified in the request, the review clock is stopped until that information is provided. The Commission may also issue a decision imposing periodic penalty payments on the addressee until the information is provided.

The Commission may impose fines if incorrect or misleading information is supplied in response to either type of request (see **3.7 Penalties/Consequences of Inaccurate or Misleading Information**).

3.11 Accelerated Procedure

A "simplified procedure" may apply for transactions that are unlikely to give rise to any competitive concerns. The criteria are outlined in the Commission's Notice on the Simplified Procedure (a new version of which comes into effect on 1 September 2023) and currently include:

- JVs with no, or negligible, actual or foreseen activities in the EEA (ie, the JV generates turnover or has assets in the EEA of under EUR100 million);
- transactions in which the parties are not active on the same product and geographic market or in markets upstream or downstream from one another, or if they are, their market shares are too low for these to be considered "affected" markets (see **4.2 Markets Affected by a Transaction**);
- acquisitions of sole control of an undertaking by a party already having joint control over that same undertaking; or
- at the Commission's discretion, transactions where the parties' combined market shares do not exceed 50% on any markets where both are active and the delta resulting from the transaction is below 150 on the Herfindahl-Hirschman Index (HHI).

Concentrations that qualify for the simplified procedure may be notified using the Short Form CO, which requires less detailed information than the standard Form CO. The new Implementing Regulation (effective from 1 September 2023) provides a revised template to be used in completing the Short Form CO, which is intended to further reduce the amount of information required to be provided in qualifying cases.

The length of the review period is the same for both a standard case and a simplified procedure case. In practice, however, transactions notified under the simplified procedure are sometimes cleared in advance of the 25-working day deadline.

4. Substance of the Review

4.1 Substantive Test

The Commission will assess whether a transaction would "significantly impede effective competition in the internal market, or a substantial part of it, in particular as the result of the creation or strengthening of a dominant position". This is known as the "significant impediment to effective competition" or "SIEC" test. The Commission must:

- clear any transaction that does not give rise to SIEC;
- open a Phase II investigation if it has "serious doubts" that the concentration is compatible with the internal market at the end of Phase I; or
- prohibit any transaction that gives rise to SIEC (after a Phase II investigation).

The Commission provides guidance on how this test is applied in its Horizontal and Non-Horizontal Merger Guidelines (see **4.4 Competition Concerns**).

4.2 Markets Affected by a Transaction

Markets can be:

- horizontally affected – if the parties are both active in the same market and hold a combined market share of 20% or more; or
- vertically affected – if one party is active in a market that is upstream or downstream from a market in which the other is active and in which the parties' individual or combined market share of either market is 30% or more.

In determining whether a concentration gives rise to any affected markets, the Commission considers the market definitions proposed by the notifying parties, as well as any plausible alternative markets based on the Commission's or the EU Courts' prior decisional practice, market reports, feedback from competitors and customers, or the parties' own internal documents. The Commission enjoys considerable discretion in determining the scope of the relevant markets and will often define markets more narrowly than the parties may do internally.

The Horizontal Merger Guidelines indicate that competitive concerns are unlikely where the parties hold a combined market share of 25% or less, or have a post-merger HHI below 1,000 (or in certain other situations, have a higher HHI but a low delta).

4.3 Reliance on Case Law

The Commission consistently relies on a substantial body of case law built up from its own decisional practice and the judgments of the EU Courts. The notifying parties are expected to refer to this record as a point of departure when defining the relevant markets or submitting other arguments.

The Commission or the notifying parties may occasionally rely on case law from other jurisdictions, particularly if a transaction relates to markets that the Commission has not previously examined in detail. Analysis provided by member state NCAs may be particularly persuasive. However, the Commission's body of decisions is so extensive (more than 8,000 cases decided over the past 30-plus years) that reliance on the decisions of other jurisdictions is very rare.

4.4 Competition Concerns

The Commission will investigate whether the concentration gives rise to a SIEC (see **4.1 Substantive Test**). In making this determination, the Commission will assess the impact of the transaction on various parameters of competition, including prices, output, quality and innovation. The Commission's Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines outline specific theories of harm that the Commission is likely to consider.

Horizontal Concerns

Where the parties to a concentration are active in the same markets, the Commission will typically consider whether a SIEC may arise from:

- non-coordinated (unilateral) effects, notably if the transaction creates or strengthens a dominant position, or if the transaction both eliminates an important competitive constraint that the parties previously exerted on each other and leads to an overall reduction of the competitive pressure on the remaining competitors; or
- co-ordinated effects, if the remaining market players are better able to tacitly co-ordinate their market activities as a result of the transaction, including due to the creation or strengthening of a position of collective dominance.

In practice, the vast majority of the Commission's concerns relate to unilateral effects arising from the parties having high market shares in markets where they compete.

Non-horizontal Concerns

If parties are active on vertically or closely related markets, the Commission will normally consider whether a SIEC may be created through:

- incentives for the merged entity to foreclose competitors' access to inputs or customers; or
- anti-competitive conglomerate effects due to the merged entity being able to engage in bundling of products or services.

It is rare for the Commission to object to a transaction based on vertical or conglomerate effects alone (in the absence of any horizontal effects), although the Commission did so recently in Illumina/Grail.

Innovation Concerns

The Commission is increasingly scrutinising transactions' potential impact on innovation and future competition. In particular, the Commission has considered that a merger may problematically hinder competition at the general level of the "innovation space", by decreasing incentives for the merged entity to compete actively in the development of new products and services.

4.5 Economic Efficiencies

The Commission will take efficiencies generated by a concentration into account under certain circumstances. Form CO contains a dedicated section in which notifying parties may present any evidence of efficiencies.

Any efficiencies claimed must:

- be merger-specific, in that they are directly created by the transaction and are not achievable through any other, less anti-competitive means;
- be quantifiable and verifiable to a reasonable degree of certainty; and
- benefit consumers.

In practice, this is a difficult standard to meet. The Commission rarely accepts efficiencies put forward by parties to a concentration as sufficiently persuasive and has not yet cleared an otherwise problematic transaction based purely on efficiencies.

4.6 Non-competition Issues

The Commission is generally lauded for adhering to competition law principles in its assessments of transactions and eschewing non-competition related considerations. The Commission has repeatedly emphasised the independence of its review process from political considerations and has resisted calls from certain member states to adopt a more protectionist view in order to allow for the creation of "European champions" (see **10.3 Current Competition Concerns**).

Nonetheless, in particularly sensitive or high-profile cases, the Commission will often receive lobbying pressure from national governments and third parties, which may have an impact on the overall context in which the Commission views a particular transaction. In a Phase II investigation, the Commission's decision to clear or prohibit the concentration will be taken by the full College of European Commissioners. As a result, other broad considerations (eg, employment, environment, energy and growth) may have a limited influence in some merger reviews.

The EUMR provides the limited possibility for member states to take action to protect their national security or other legitimate interests, but such exceptional actions do not form part of the merger control process (see **1.3 Enforcement Authorities**). The Commission has also implemented legislation to establish separate mechanisms to monitor and control foreign investment and subsidies in concentrations (see **9. Foreign Direct Investment/Subsidies Review**).

4.7 Special Consideration for Joint Ventures

Full-function JVs are assessed using the same substantive test as all other concentrations – the "SIEC" test (see **4.1 Substantive Test**).

In addition, the Commission may also assess whether the JV gives rise to so-called "spill-over effects" – namely a risk of co-ordination between the parents in markets where they are both active outside the JV or operate upstream or downstream from one another. The Commission will assess any risk of co-ordination between the parent companies under Article 101 TFEU, which prohibits anti-competitive agreements between undertakings.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

If the Commission determines that a notified concentration will lead to a SIEC, it must prohibit the transaction (see **4.1 Substantive Test**), unless remedies are offered that eliminate the Commission's concerns. The Commission can prohibit transactions without prior approval from the EU Courts or any other EU or member state body. Prohibition decisions may be appealed to the General Court (see **8.1 Access to Appeal and Judicial Review**).

In practice, prohibition decisions are rare. To date, the Commission has prohibited only 32 transactions since 1990, out of over 8,000 notified (although over 240 notifications have been withdrawn, often as a result of the Commission's objections). Most problematic transactions are cleared, subject to remedies designed to eliminate the competition concerns.

5.2 Parties' Ability to Negotiate Remedies

The parties may propose remedies to address competition concerns raised by the Commission (see **5.5 Negotiating Remedies With Authorities**).

The Commission's 2008 Remedies Notice contains extensive guidance on the legal requirements that remedies must meet (see **5.3 Legal Standard**).

5.3 Legal Standard

The Remedies Notice notes that any remedy must:

- entirely eliminate the SIEC; the remedies offered by the parties must be sufficient to restore the conditions of competition that would have existed in the absence of the transaction; and
- be capable of being implemented effectively within a short period of time.

In particular, the remedies must offer the Commission a sufficient degree of certainty that the commercial structures or relationships resulting from the remedy can be maintained.

In assessing the likely effectiveness of a remedy, the Commission will consider the nature of the market, any risks inherent in implementing the remedy and the likelihood of the remedies being maintained over time. The Commission is sceptical of remedies that are too complex or require significant ongoing monitoring to ensure compliance.

In addition to these basic principles, the Commission's Notice on Remedies lays out more specific requirements for both structural remedies and behavioural remedies (see **5.4 Typical Remedies**).

5.4 Typical Remedies

Structural Remedies

The Commission has expressed a clear preference for structural remedies, especially divestments, as these bring about a lasting change on the market and do not require ongoing oversight.

To be acceptable, a divestment must consist of a viable business that is operated by a suitable purchaser and can compete effectively with the merged entity going forward. While the Commission prefers the divestment of an existing, standalone business, it will accept the carve-out of a particular business activity where the parties can demonstrate, to the Commission's satisfaction, that the divestiture has sufficient resources, assets, personnel, R&D capacity and any other capabilities needed to compete.

The Notice on Remedies requires that purchasers of divestment businesses must:

- be independent of, and unconnected to, the parties;
- have the financial resources, relevant expertise, incentives and ability to maintain the business as a competitive force; and

- not give rise to new competition concerns by acquiring the divestment business.

Behavioural Remedies

The Commission is generally more sceptical of behavioural remedies (ie, commitments by the parties to act in a certain way on the market) as these tend to be more complex to implement and monitor. As such, they will only be accepted "exceptionally in specific circumstances". In particular, the Notice on Remedies states that commitments not to raise prices, reduce quality or output are generally not workable. The Commission has been more open to accepting behavioural remedies to resolve concerns relating to access to key infrastructure, networks and interoperability, or concerns relating to exclusive long-term contracts or product bundling.

5.5 Negotiating Remedies With Authorities

The parties are responsible for offering remedies – the Commission will neither impose nor propose remedies on its own initiative. In practice, the case team will work with the parties to further refine the parameters of remedies offered by the parties so that they sufficiently address the case team's concerns.

Process

Remedies are offered by submitting commitments, which become the operative terms of the remedy, accompanied by "Form RM". The Commission's "Best Practice Guidelines for Divestiture Commitments" provide a model text for divestment commitments. Form RM is an annex to the Implementing Regulation. Both the commitments and Form RM require considerable time and effort to complete.

Remedies may be offered:

- during pre-notification (in draft form);
- in Phase I – before working day 20 (as Phase I is very short, the Notice on Remedies specifies that in order to be accepted, remedies offered in Phase I must provide "a clear-cut answer to a readily identifiable competition concern", and most Phase I remedies therefore take the form of divestitures); and
- in Phase II – before working day 65 (the Commission will only accept remedies submitted later in exceptional circumstances).

Market Testing and Consultation

The Commission will "market-test" proposed remedies with market participants to ensure that they will resolve the competitive concerns at issue (see **7.2 Contacting Third Parties**).

The Commission will also consult with member state NCAs and (where relevant) the EFTA Surveillance Authority. If the competitive concern at issue affects markets broader than the EEA or requires a global remedy (such as the divestment of a worldwide business), the Commission will typically also co-ordinate with other competition authorities. The Commission may be reluctant to accept global remedies that may not be accepted by other authorities.

5.6 Conditions and Timing for Divestitures

According to the Notice on Remedies, the parties may be allowed to close their transaction immediately after receiving the Commission's conditional clearance decision. In such cases, the parties would typically have a set deadline (eg, six months from the Commission's approval decision) to conclude a binding agreement to sell the divestment business to a suitable purchaser. (If no such purchaser is found, a divestiture trustee will have a mandate to sell the business to a suitable purchaser at no minimum cost.) The parties would then have a further period (eg, three months) after the Commission approves the purchaser to complete the sale of the divestment business.

In cases where it may be more difficult to identify a suitable purchaser, the Commission may require the parties not to close the main transaction until they have entered into an agreement with a suitable purchaser approved by the Commission (an "upfront buyer" remedy). Less commonly, the parties may name a specific purchaser, with whom they have already entered into an agreement, in their original commitment proposal (a "fix-it-first" remedy). In that case, the buyer is approved in the Commission's decision clearing the main transaction (without the need for a separate approval process) and the Commission will take its assets/capabilities into account when evaluating the sufficiency of the remedy.

In any case, between the time that the Commission accepts a divestment commitment and the close of the sale to the approved purchaser, the divestment must be held separate and ring-fenced from the parties' other operations. The parties must appoint a monitoring trustee, who monitors the parties' compliance with the commitments, evaluates the suitability of any potential purchasers and advises the Commission accordingly.

Failure to Comply With Commitments

If the parties fail to comply with a condition of clearance (eg, by failing to divest or by re-acquiring the divestment business), the Commission's clearance decision automatically becomes void. If the parties breach an obligation (ie, a step implementing the remedy, such as appointing a trustee), the Commission has the discretion to revoke its clearance decision.

The Commission may also fine the parties up to 10% of annual turnover and/or issue periodic penalty payments for failing to comply with commitments.

5.7 Issuance of Decisions

The Commission will notify its decision to the parties and to the member states and may also issue a press release providing a basic summary of its conclusions.

The Commission will publish a non-confidential version of any Phase II decision in the EU's Official Journal and on its website, often after a delay of several months. The Commission provides non-confidential copies of all its merger decisions on its website.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Commission adopts the same review process, including with regard to prohibitions and remedies, regardless of the nationality of the parties to a transaction. The Commission has required remedies in numerous transactions involving non-European parties and has also blocked such transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The Commission's clearance decision covers restrictions that are "directly related and necessary to the implementation of the concentration" (otherwise known as "ancillary restraints"). The Commission's Notice on Ancillary Restraints provides guidance on the types of restrictions that commonly arise (eg, licensing arrangements, non-compete clauses, and purchase or supply obligations). Any restrictions that do not qualify as ancillary restraints are reviewable under Article 101 TFEU.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties play an important role in the Commission's review process, and the Commission will actively solicit their feedback (see **7.2 Contacting Third Parties**).

Third parties able to show "sufficient interest" in the proceedings (eg, competitors, customers, suppliers, or recognised workers' representatives of the undertakings concerned) may be granted specific participation rights, including:

- the right to be heard – interested third parties may give oral or written evidence, including in an oral hearing, if one is held in Phase II;
- access to documents – interested third parties may be given access to a non-confidential copy of the SO (under the Best Practices Merger Guidelines, such access is only granted at the Commission's discretion in "appropriate cases"); and
- the right to appeal – interested third parties can appeal Commission clearance decisions to the General Court.

In order to have standing, third parties must normally have actively participated in the Commission's investigation.

7.2 Contacting Third Parties

The Commission actively seeks input from third parties, which can decisively affect the outcome of its review.

Investigation

Form CO requires parties to supply contact details for their top customers, competitors and suppliers, and any relevant trade associations. The Commission will begin its market investigation early in Phase I (or even during pre-notification with the agreement of the notifying parties) by sending detailed electronic questionnaires to these third parties (especially customers and competitors). Answering these questionnaires can be extremely burdensome, especially for smaller companies or those with little or no interest in the transaction. The Commission will also publish the announcement of the notification on its website, inviting any interested parties to provide their views on the concentration.

The Commission will continue to solicit views from third parties throughout its investigation, including through the use of additional questionnaires. Third parties may engage with the Commission in writing, through meetings, or at the oral hearing (see **7.1 Third-Party Rights**).

In practice, it will be very difficult for a transaction to be approved if it faces strong opposition from the market (particularly from customers). Likewise, the Commission is unlikely to challenge a transaction if third parties have not voiced significant opposition.

Remedies

The Commission will market-test proposed remedies in order to ensure that they will resolve the competition concerns at issue and can be implemented effectively. The Commission will send third parties a questionnaire and a non-confidential version of the proposed commitments. If the market response is strongly negative, the Commission may not accept the remedies offered (see **5.5 Negotiating Remedies With Authorities**).

7.3 Confidentiality

Form CO requires the parties to supply a non-confidential summary of the transaction, which the Commission will publish in the Official Journal and on its website when the notification is filed.

The Commission has a legal obligation not to disclose any confidential information obtained during the course of the merger review process, including during pre-notification. The Commission takes this duty very seriously.

7.4 Co-operation With Other Jurisdictions

The Commission routinely co-operates with member state NCAs and other national competition authorities worldwide.

Within the EU/EEA

The Commission co-operates with member states through the European Competition Network (ECN). It provides the NCAs with copies of notifications, proposed remedies and any other major documents submitted by the parties. The Commission must consult an Advisory Committee made up of NCA representatives before it takes a decision following a Phase II review, or any decision imposing fines, but is not bound by the Committee's opinion. The Commission and NCAs also participate in an EU Merger Working Group with the aim of increasing consistency and co-operation in the merger control process.

The Commission will also consult the EFTA Surveillance Authority where a transaction is likely to have significant effects in the EFTA states.

Other Authorities

The Commission routinely co-operates with other competition authorities. The Commission must obtain a confidentiality waiver from the parties in order to share information with a non-EEA competition authority.

Bilateral co-operation

The Commission has entered into a number of co-operation agreements and memoranda of understanding with various competition authorities including those of the USA, Canada, Japan, China, South Korea and Brazil. The EU and UK were expected to conclude a co-operation agreement following Brexit, but this bilateral instrument is not yet in place. The degree of co-operation these arrangements envisage varies. The Commission has a very close relationship with the US competition authorities (the Federal Trade Commission and the Department of Justice's Antitrust Division), and in practice the authorities try to align their positions to the extent possible.

Multilateral co-operation

The Commission also plays an active role in the International Competition Network's (ICN) Merger Working Group.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Commission merger decisions can be appealed to the General Court for annulment on procedural or substantive grounds under Article 263 TFEU. The General Court's rulings may be further appealed to the Court of Justice on points of law.

The General Court is willing to engage in a rigorous review of Commission decisions, although the Commission enjoys a margin of deference, particularly in matters involving complex economic analyses. Ultimately, only a dozen Commission merger decisions have ever been annulled. As the appeals process is lengthy (see **8.2 Typical Timeline for Appeals**), costly, and rarely successful, few merger decisions are appealed. Nevertheless, the Commission carefully considers the likelihood of an appeal when issuing its decisions.

If a Commission decision is annulled, the case reverts to the Commission, which is obliged to reassess the concentration. An annulment of a prohibition decision does not automatically result in the clearance of the transaction, nor does the Commission have the discretion to avoid undertaking a second review.

8.2 Typical Timeline for Appeals

An application for annulment may be lodged by the notifying parties or any other sufficiently interested third party (see **7.1 Third-Party Rights**). Such actions must be filed within two months and ten days of:

- the date of notification of the decision (if filed by an addressee of the decision); or
- the date the party is made aware of the decision (if filed by a third party).

It normally takes two to three years for the General Court to issue a judgment. An expedited procedure is available, which can shorten the timeline to less than a year. The court has discretion about whether to use the expedited process and will tend to do so where the parties can show urgency and where the case revolves around a small number of clear legal issues.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Sufficiently interested third parties may appeal a clearance decision (see **7.1 Third-Party Rights** and **8.1 Access to Appeal and Judicial Review**).

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Foreign Subsidies

On 12 January 2023, Regulation 2022/2560 on Foreign Subsidies ("FSR") came into effect. The FSR includes notification requirements in certain concentrations and public procurement processes and also allows the Commission to investigate ex officio potentially distortive foreign subsidies.

As of 12 October 2023, the FSR will require mandatory, ex ante notification to the Commission of any concentration in which:

- the target, JV or at least one of the merging parties is established in the EU and generates an aggregate turnover in the EU of at least EUR500 million; and
- all undertakings involved (ie, the merging parties, acquirer and target, or the JV and its parents) received from third countries combined aggregate financial contributions of more than EUR50 million in the three financial years prior to notification.

Financial "contributions" is a term that is very broadly defined under the FSR to include a wide range of interactions with state-controlled entities that extend far beyond the traditional notion of subsidies (contributions include, among other things, the transfer of funds or liabilities, the foregoing of revenue that is otherwise due, and even the provision/purchase of goods or services). It is therefore advisable that any party engaging in a transaction that meets the EU turnover threshold above conduct a thorough assessment to determine whether an FSR filing is required.

As under the EUMR, merging parties are required to wait to receive Commission clearance under the FSR before implementing the concentration. Penalties for failing to observe the FSR notification and standstill obligations are the same as under the EUMR (see **2.2. Failure to Notify**). The Commission published the Foreign Subsidies Implementing Regulation in July 2023, which provides further detail on the required format and contents of the FSR notification.

As a result of the above thresholds, there may be cases in which a concentration requires an FSR notification and no EUMR notification (or vice versa). The EUMR and FSR notifications are made to the Commission separately. The FSR notification timeline is statutorily similar to the EUMR (involving a first phase review and a second phase in-depth investigation in complex cases). However, as different Commission case teams will review FSR and EUMR notifications under different standards, the two clearance processes can proceed at different speeds and reach different substantive outcomes.

Foreign Direct Investment

Unlike foreign subsidies, foreign direct investment (FDI) is a competence of the individual EU member states. There is no notification or assessment of FDI at EU level. In 2020, the EU established a mechanism to harmonise member state approaches to FDI screening through Regulation 2019/452, which enables the Commission to provide its opinions on particular investments. However, decisions on FDI are ultimately at the discretion of the member states affected.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The current EUMR has remained in force and unamended since 2004.

The Commission has adopted a new Implementing Regulation, Notice on Simplified Procedure, and Communication on the Transmission of Documents, which will all become effective as of 1 September 2023. The new Implementing Regulation provides updated versions of the notification forms. The most significant changes have been made to the Short Form CO, which places a greater emphasis on market data and eliminates the need to provide as much narrative explanation. This is consistent with the revised Notice on Simplified Procedure, which identifies a few new instances in which the shorter process may be used and gives the Commission greater flexibility to allow parties to use the Short Form, particularly where their horizontal or vertical market shares are slightly above the prescribed limits.

Referral of Small but Competitively Significant Transactions

In 2021, the Commission announced that it would be encouraging the use of the Article 22 referral process to ensure that transactions that did not meet relevant EU or member state notification thresholds but that presented significant threats to competition could nonetheless be reviewed at EU level (see **2.1 Notification**). While such referrals were technically allowed in the past, it has not been Commission policy to accept referrals from member states where the transaction did not meet the notification thresholds. This change in policy will likely open many smaller transactions to possible review that would have previously escaped scrutiny (notably in the pharmaceutical and digital sectors where targets may lack the turnover needed to meet any jurisdictional thresholds). The Commission's first decision to accept a referral under this new policy, in the Illumina/Grail transaction (which the Commission prohibited on 6 September 2022), was upheld on appeal to the General Court on 13 July 2022, although it remains under further appeal to the Court of Justice.

Assessment of Foreign Funds in EU Transactions

On 12 January 2023, the Regulation 2022/2560 on Foreign Subsidies (FSR) came into effect. Through the FSR the Commission aims to address the potentially distortive role of foreign subsidies on EU competition, particularly in the areas of deal-making and public procurement. The FSR will require prior notification and clearance of concentrations that meet certain turnover and foreign contribution thresholds (see **9. Foreign Direct Investment/Subsidies Review**). The FSR does not alter the standard EU merger control process as laid down in the EUMR. However, it will likely considerably increase the time and effort needed to notify, clear and close a transaction in the EU.

10.2 Recent Enforcement Record

In 2022 and the first four months of 2023, 549 cases were notified to the European Commission. During that period, 436 cases were cleared unconditionally in Phase I, either through the normal or simplified procedure. Ten cases were withdrawn in Phase I (although some of these may have subsequently been re-filed) and 11 cases were referred to Phase II. During the period, three Phase II cases were cleared with remedies, two were prohibited (Illumina/Grail in healthcare and Hyundai/Daewoo in shipbuilding), none were cleared unconditionally and four were withdrawn. The Commission does not keep separate statistics for, nor does it draw any distinction with regard to, foreign-to-foreign transactions.

10.3 Current Competition Concerns

Protectionism and the Creation of European Champions

The Commission has been engaged in a debate – especially since it prohibited the Siemens/Alstom merger in 2019 – over what role merger control should play in allowing the emergence of "European champions" to combat competition from non-EU state-subsidised (notably Chinese) companies. Commissioner Vestager has remained firm that DG Comp's role should remain solely focused on reviewing potential harm to competition, without regard to European industrial policy concerns. This debate is certain to reignite in future transactions.

Protecting Innovation

The Commission has expressed increased interest in assessing the competitive effects of mergers on innovation (see **4.4 Competition Concerns**).

Reliance on Internal Documents

The EU process increasingly relies on the production and review of large volumes of internal documents requested from the parties (see **3.5 Information Included in a Filing**). Notifying parties should take care that information contained in Form CO and other submissions to the Commission is consistent with and supported by any internal records or communications.

Enforcing Procedural Compliance

In recent years, the Commission has increased its enforcement efforts against parties that commit procedural violations under the EUMR, in particular by gun-jumping (see **2.2 Failure to Notify**) or by supplying incorrect or misleading information (see **3.7 Penalties/Consequences of Inaccurate or Misleading Information**).

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