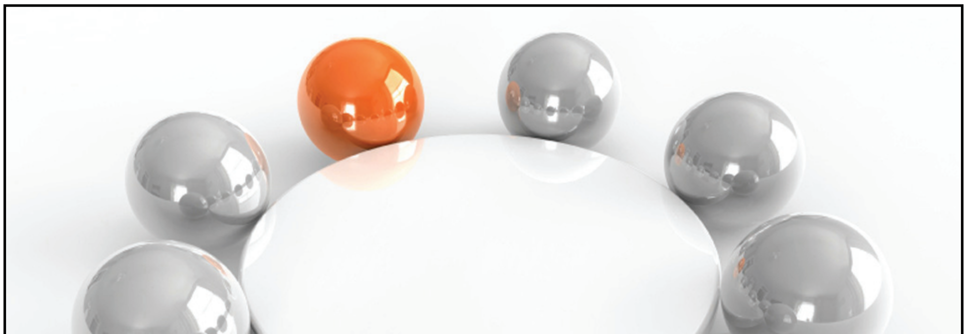

Staying Competitive and Compliant in the EU

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Staying Competitive and Compliant in the EU

Three-Part Webinar Series on EU Competition Laws

Howard W. Fogt, Jr., Washington, D.C.
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Series Topics and Schedule

- European Community and EU member state merger control policies, procedures, and remedies – **September 18, 2008**
- European competition law and procedures, including vertical restraints, technology licensing, and cartel enforcement – **November 5, 2008**
- Trends and developments in European competition law, including privilege, private remedies, class actions, and best practices for compliance – **January 21, 2009**

- **Time**

  12:30 p.m. Eastern
  11:30 a.m. Central
  10:30 a.m. Mountain
  9:30 a.m. Pacific

  Duration: 1 hour

I. Introduction: A Bit of Historical Perspective

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A. The Political, Social, Cultural and Economic Context

Louis Cartou, Professor Emeritus at the University of Paris V, Rene Descartes, wrote in his book, *The European Union*:

> The construction of Europe or its reconstruction has been shaped by its history and by its philosophy. The veritable foundation of European unity rests on what one could call the "European tradition." In one of his most colorful passages, Victor Hugo wrote, "the past is a part of ourselves; perhaps, the most essential part. All of the waves of history that carry us forward, all of the energy that nourishes us comes from the past. What is a tree without its roots? What is a people without its history?"

Thus, it is essential to understand European history, its traditions, its principles, its goals of liberty and security in order to comprehend the evolution of European law.

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European law has evolved directly from the ashes of two great wars in this century in which millions of combatants were killed and literally tens of millions of people were liquidated. Its roots span countless centuries of war, conflict, suspicion, prejudice and isolation (political, economic and cultural).

Today, one can take a high speed train from Brussels to Paris in 1 hour and 25 minutes (if there are no strikes). About half way, the train passes through the valley of the River Somme, where there were more than 1.5 million casualties between July – November, 1916 during the first World War. A generation was lost. We always pass too quickly to give sufficient thought and consideration to these events and sacrifices.

In rapid chronology, the European law has taken shape through the European Coal and Steel Treaty in 1951, the European Atomic Energy Treaty in 1957, the European Economic Treaty in the same year, the Single European Act in 1986, the Treaty on European Union in 1992 and, subsequently, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon.

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It is important to understand not only the substantive provisions of these treaties but, as well, to remember the assumptions on which they were adopted. Thus, the preamble to the European Coal and Steel Treaty makes clear that the six signatory member states were resolved:

- to substitute for age old rivalries the merging of essential interests;
- to create, by establishing an economic community, the basis for a broader and deeper community among people long divided by bloody conflict; and
- to lay the foundation for institutions which will give direction to a destiny henceforth shared.

Based on these shared interests and common destiny, six European nations (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) determined to form an economic union. For that purpose, the European Economic Community (now the European Community) was formed by the Treaty of Rome in 1957.

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It is instructive to understand the *tasks* that they assigned to this community. Article 2 of the Rome Treaty states that, by establishing a common market and progressively approximating the economic policies of the members states, the Community will promote throughout the Community:

- harmonious development of economic activities;
- a continuous and balanced expansion;
- an increase in stability;
- an accelerated raising of the standard of living; and
- closer relations between member states.

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To achieve these goals, Article 3 of the Treaty directs that the activities of the Community shall include:

- the elimination as between member states of custom duties and quantitative restrictions on the import and export of goods and all measures having equivalent effect;
- the establishment of a common customs tariff and a common commercial policy toward third countries *towards third countries*;
- institution of a system ensuring that competition in the common market is not distorted; and
- the approximation of laws of the member states to the extent required for the proper functioning of the common market.

Over the ensuing 60 years, the European Union has grown to include 27 member states.

B. Growth in Size of European Union

- 1951 – Belgium, France, Germany, Italy, Luxembourg and Netherlands form European Coal and Steel Community
- 1957 – Treaty of Rome creates European Economic Community or Common Market
- 1973 – Denmark, Ireland and United Kingdom join the EU
- 1981 – Greece becomes member of the EU
- 1986 – Spain and Portugal join the EU
- 1995 – Austria, Finland and Sweden become members of the EU
- 2004 – Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia join the EU
- 2007 – Bulgaria and Romania join the EU

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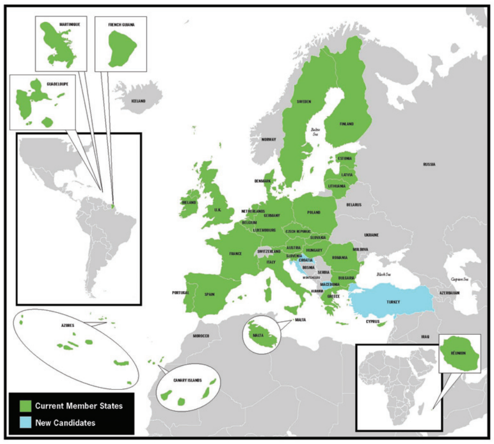

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II. Basic Concepts of Competition Policy

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A. Basic EU Legislation on Competition

- Treaty Provisions Relating to Competition
  - Article 81 – prohibition of restrictive trade practices and concerted practices (agreements between undertakings) that may affect trade between Member States having the object or effect of preventing or distorting or restricting competition within the Common Market
  - Article 82 – abuse by an undertaking with a dominant position that may affect trade between Member States
  - Article 83 – authority to adopt regulations to insure compliance with prohibitions in Article 81 and Article 82, to establish procedures for the application of these Articles and to determine the relationship between national law and Article 83
  - Article 85 – authority, in cooperation with Member States, to investigate suspected infringements and take action to restrain them
  - Articles 87-89 – state aids, state enterprises and subsidies

A. Basic EU Legislation on Competition

- Treaty Provisions Relating to Freedom of Movement of Goods, People Services and Capital
  - Articles 29 and 30 – Quantitative restrictions on imports and exports and all and measures of equivalent effect shall be prohibited between member states – Free customs union
  - Article 30 – Prohibitions or restrictions on imports, exports between member states may be justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, protection of national treasurers, protection of industrial and commercial property so long as not constituting a means of arbitrary discrimination or a disguised restriction on trade between member states (environmental protection now included) – Derogation of free customs union

A. Basic EU Legislation on Competition

- Provisions Relating to Mergers
  - Articles 83 and 308 and Council Regulation 4064/89 (as amended) – Provides authority to European Commission to investigate and prohibit mergers “concentrations” of a “Community Dimension” that impede effective competition in the European Community

B. Basic Underlying Principles for Competition Policy

- Competition
  - Competition is a basic driver of a free market economy. Competition demands that companies provide consumers quality, innovative products that consumers want at the lowest possible price. To be effective, competition requires suppliers to be independent of each other, each subject to the competitive pressure exerted by the others.
  - Thus, EU competition policy is aimed at preventing concerted multi-firm conduct and abusive market distortive conduct of firms with dominant positions.

B. Basic Underlying Principles for Competition Policy

- Single Economic Common Market
  - The benefits of competition can only work on an EU-wide basis if the barriers to economic trade between Member States are eliminated. The single market is all about **bringing down barriers** and **simplifying existing rules** to enable everyone in the EU – individuals, consumers and businesses – to be able to chose its products and services from the supplier offering the best price, wherever located. The cornerstones of the single market are often said to be the '**four freedoms**' – the free movement of **people, goods, services and capital**. The single economic market fostered by EU legislation known as **additional laws** ('Directives') that require barriers between Member States to be eliminated in in specific areas and are implemented at national level by Member States themselves.
  - Member States may restrict the free movement of goods only in exceptional cases, for example when there is a risk resulting from issues such as public health, environment, or consumer protection.

B. Basic Underlying Principles for Competition Policy

- Merger Enforcement
  - Mergers and acquisitions can, depending on market circumstances, facilitate achievement of consumer benefits – new products, lower prices, better quality – through efficiency-enhancing integration. On the other hand, some mergers may reduce competition in a market, usually by creating or strengthening a dominant player. This is likely to harm consumers through higher prices, reduced choice or less innovation. To prevent anti-competitive mergers, the European Commission acts as a gate-keeper. It requires mergers (concentrations) of a certain size to be notified in advance and to wait until a review is completed before they are consummated. Thus, All proposed mergers notified to the Commission are examined to see if they would significantly impede effective competition in the EU. If they do not, they are approved unconditionally. If they do, and no commitments aimed at removing the impediment are proposed by the merging firms, they must be prohibited to protect businesses and consumers from higher prices or a more limited choice of goods or services.

C. Basic Economic Concepts

- Perfect Competition (Transparent and Complete)
  - Large number of buyers and sellers
  - Essential market information available to everyone
  - Sellers compete among themselves for business and would be induced to provide what the customers want
  - Sellers would seek to be innovative, progressive and to reduce costs
  - Competition would keep prices near costs
  - Producers would make as much product as buyers want

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C. Basic Economic Concepts

- Concentrated Markets
  - Few sellers or few buyers
  - Perfect competition could exist if there were no barriers to entry and effective entry was quick and easy
  - Potential competition would provide the same pressures as actual competition
  - Same is true for power buyers

C. Basic Economic Concepts

- Effective Competition
  - Efficient allocation of resources in response to demand
  - Keeps market open providing opportunities for small- and medium-sized enterprises
- Market Definition

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D. Merger Specific Economic Concepts

- Market Definition
  - Market definition is the tool to identify and define the boundaries between firms
    - Idea is to identify the actual competitors of the parties involved in deals that are capable of constraining the parties behavior and prevent them from behaving independent of effective competitive pressure
    - Market shares are used as a proxy to convey meaningful information regarding market power
    - Market definition is often decisive

D. Merger Specific Economic Concepts

- Market definition requires a definition of a "relevant product" market
  - All the relevant products and/or services regarded as interchangeable by reason of their characteristics, prices and their intended use
- Market definition requires definition of a "relevant geographic" market
  - Area in which undertakings concerned are involved in the supply and demand of products in conditions of homogenous competition that can be distinguished from other areas because conditions of competition are appreciably different there

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D. Merger Specific Economic Concepts

- Objective of competition policy
  - The objective in controlling structural changes in supply of a product is to prevent the creation or reinforcement of a <u>dominant position</u> as a result of which effecting competition would be significantly reduced and a firm would be able to behave to an appreciable extent independent of its competitors, customers and consumers

D. Merger Specific Economic Concepts

- Competitive restraints
- Demand substitutability
  - Firm can't have significant impact on sale if customers can switch easily to available substitute products or supplies located elsewhere SNIP
- Supply substitutability
  - Suppliers able to switch production to relevant product and markets without great cost
- Potential competition

D. Merger Specific Economic Concepts

- Evidence to define markets
  - Product dimension
    - substitution in recent past
    - views of customers and competitors
    - customer preferences – market studies
    - barriers and costs associated with switching demand to potential substitutes
  - Geographic dimension
    - diversion or orders in past to other areas
    - demand characteristics: national preference, language, lifestyle, need for local presence
    - views of customers and competitors
    - current geographic pattern of purchases
    - trade flows/pattern of shipments
    - barriers and switching costs

D. Merger Specific Economic Concepts

- Calculation of Market Share
- Barriers to Entry
- Technology Evolution
- Failing Enterprises

III. EC Merger Control Legislation

A. Merger Control Regulation

- Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance)
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF

B. Horizontal Guidelines

- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 05.02.2004, pp. 5-18
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF

C. Non-Horizontal Guidelines

- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.
- http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf

D. Relevant Market

- Commission Notice on the definition of the Relevant Market for the purposes of Community competition law, Official Journal C 372 , 09.12.1997, p. 5
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML

E. Remedies

- Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98,Official Journal C 68, 02.03.2001, p. 3
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:068:0003:0011:EN:PDF
- On 24 April 2007, the Commission launched a public consultation on a draft revised Commission Notice on Remedies acceptable under the Merger Regulation (24.04.2007). The draft Notice is available at http://ec.europa.eu/comm/competition/mergers/legislation/draft_remedies_notice.pdf

F. Ancillary Restraints Guidelines

- Commission Notice on restrictions directly related and necessary to concentrations, Official Journal C 56, 05.03.2005, pp. 24-31
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:056:0024:0031:EN:PDF

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IV. European Commission Enforcement

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- Legislative Structure
- Concentration
- Community Dimension

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- Deadlines and Time Limits
- Referral Between Commission and Member State
  - Role of three
  - One-stop shopping
  - Member State vetos
- Substantive Test
- Guidelines
  - Standard of illegality
  - Efficiencies
  - Failing firm defense
- Triggering Event
  - Letter of Intent
- Procedures and Transparency
- Role in European Economic Area (EEA)

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- Test for Assessment of Mergers
  - Creation of or strengthening dominant position no longer sole criterion for assessment of concentration
  - Now
    - Disjunctive test
      - Creation/strengthening of a dominant position or significantly impede effective competition in the Common Market
  - Controversial compromise
    - U.S. vs. EC assessment criteria
  - Recital to Council Regulation suggests "significant impediment" criteria will only apply in case below the level of dominance in cases of non-collusive oligopoly ("joint dominance"?)
- Create Transparency and Coordination

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Merger Control Thresholds

INITIAL TURNOVER THRESHOLDS

Combined worldwide turnover of EUR5 billion — No

Yes

EC-wide turnover of each of at least two of the companies involved exceeds EUR250 million — No

Yes

More than two-thirds of EC-wide turnover of each company is generated in one member state — Yes

No

Merger Regulation applies

ALTERNATIVE TURNOVER THRESHOLDS

Combined worldwide turnover of EUR2.5 billion — No

Yes

Combined turnover of all participants exceeds EUR100 million in at least three member states — No

Yes

In each of those three member states at least two of the companies each generate exceeding EUR 25 million — No

Yes

EC-wide turnover of each of at least two of the companies involved exceeds EUR100 million — No

Yes

National competition rules may apply

Merger Control Timetable

Conclusion of an agreement; or
Announcement of public bid; or
Letter of intent indicating **a good faith intention to conclude an agreement**

Period of suspension during which notified transaction cannot be implemented until conclusion of Phase I investigation

NOTIFICATION
(opening of PHASE I INVESTIGATION)

25 working days

(subject to extension to **35 working days** if (1) a "fix" is proposed or (2) if a member state requests a referral under Article 9)

CLEARANCE
On the basis that transaction notified does not raise serious doubts as to its "compatibility with the common market" (threaten the creation of or strengthen a dominant position <u>or</u> significantly impede effective competition in common market) or opening of PHASE II INVESTIGATION

(if no decision taken within **25 working days**, transaction is automatically deemed cleared)

90 working days

(subject to extension 105 working days if undertakings offered ***unless remedies are offered before 55th working day*** **)**

(subject to optional extension by up to 20 working days at the request or, with agreement of, the parties made within first 15 working days)

(subject to **additional** extension where for example, parties do not cooperate with the Commission's investigation or requests for information)

FINAL DECISION
Either clearing or prohibiting the deal or clearing the deal after modification

(if no Commission decision within **90 working days**, transaction is automatically deemed cleared)

Transaction Subject to Control: Concentrations

- Mergers and Acquisitions
- De jure or Defacto Control
- Full-functioning Joint Ventures

- For a transaction to fall within the European Commission Merger Regulation (ECMR) thresholds, it must be a ***concentration***. That is to say, an acquisition or change of control must occur as a result of the transaction. The concept of a concentration under the ECMR applies to "operations" or transactions that bring about a "lasting change" in the structure of the undertakings (companies) involved. This concept is interpreted broadly. Control can be legal or de facto and it can be exercised individually or jointly.
- A change of control will occur whenever a party acquires the right to exercise decisive influence over an undertaking (despite the fact that it has no intention of actually doing so). This will arise when, for example, a party acquires the majority of the shares in an undertaking, but may also arise on a de facto basis. Accordingly, a minority shareholder that is highly likely to achieve a majority at a general meeting, due to the fact that the remaining shares are dispersed, may be deemed to acquire de facto control.

- A change from sole to joint control (and vice versa) of an undertaking will also be deemed a concentration, as the EC has concluded that decisive influence exercised by one undertaking is substantially different from decisive influence exercised jointly. Again, joint control can be acquired on a legal or de facto basis. This will cover situations where a minority shareholder acquires rights which allow it to veto decisions that are essential for the strategic commercial behavior of the undertaking (de facto joint control).
- The ECMR also applies to full function JV, i.e. a JV which performs on a lasting basis all the functions of an autonomous economic entity e.g., production or marketing JVs.

Community Dimension

- If an investment constitutes a concentration for ECMR purposes, the next step (to determine whether the transaction requires notification to the EC) is to consider whether it has a "Community dimension". This assessment is determined solely by reference to turnover of the relevant undertakings (those acquiring control and the undertaking over which control is acquired such as purchaser and target and partners to a new full function JV). Assets in the EU are irrelevant in determining whether the ECMR applies.

Turnover Threshold

- A concentration will have a Community dimension where the :
  - Combined aggregate worldwide turnover exceeds EUR 5 billion; and
    - the aggregate Community (EU) wide turnover of each of at least two of the merging parties exceeds EUR 250 million, unless each of the merging parties obtains more than 2/3 of its EU turnover within one and the same EU Member State.
- If the above thresholds are not met, the concentration may still have a Community dimension if the alternative lower multi-jurisdictional thresholds are met:
  - Combined aggregate worldwide turnover exceeds Euro 2.5 billion; and
    - in each of at least three EU Member States, the combined aggregate turnover of the merging parties exceeds Euro 100 million; and
    - in each of those three Member States, the aggregate turnover of each of at least two of the merging parties exceeds Euro 25 million; and
    - the aggregate Community-wide turnover of each of at least two of the merging parties exceeds Euro 100 million;
    - unless each of the merging parties obtains more than 2/3 of its EU turnover within one and the same EU Member State.

Calculation of Turnover, Including Geographic Allocation of Turnover

- The relevant turnover of a merging party is calculated as the revenues achieved in the financial year preceding the transaction from the sale of products and provision of services falling within the company's ordinary activities (excluding intra-group transactions), after deduction of sales rebates and any taxes directly related to (and included in) turnover, such as value added tax.
- The aggregate turnover of the entire corporate group of the merging parties must be considered, which comprises the relevant turnover of : (1) the merging parties ; (2) any undertaking controlled, directly or indirectly by the merging parties ; (3) any undertaking which controls the merging parties, directly or indirectly ; (4) any undertakings controlled by undertakings that control the merging parties, directly or indirectly ; and (5) any undertaking jointly controlled by two or more companies belonging to the same group of the merging parties. However, if the seller is disposing of only a subsidiary or a portion of its assets, it is the turnover of the subsidiary or the assets being sold that are counted.
- Turnover is calculated in geographical terms, independent of the main office location of the parties. Thus, foreign-to-foreign mergers may be subject to control where revenues are generated in the European Union. The location of the registered offices of the parties is irrelevant.

Mandatory Reporting Requirements

- All concentrations with a Community dimension must be notified to the European Commission, addressed to the Director General for Competition at the Commission's Merger Registry.
- EU Member States may not apply their national competition provisions to any concentration, which is subject to the ECMR unless the European Commission has referred the concentration in whole or in part to a Member State. See Article 4 (5) ECMR for referrals down requested by the parties and Article 9 ECMR for referrals down requested by a Member State.
- It is also possible in certain circumstances for concentrations, which do not have a Community dimension to be examined by the Commission (referral up). See Article 4(5) ECMR for referrals up requested by the parties and Article 22(3) for referrals up requested by one or more Member States.
- In addition, Member States may take appropriate measures to protect legitimate interests other than those taken into account under the ECMR, principally public security, plurality of the media and prudential rules.

Merger Control Procedures

- Procedures before the Commission
  - Following recent reforms, a concentration can be notified to the European Commission whenever the parties are able to demonstrate a « good faith intention to conclude an agreement » and demonstrate that their plans are sufficiently concrete (for example through a signed agreement in principle, a memorandum of understanding , a letter of intent signed by all the parties) or in the case of a public bid, as early as such undertakings have publicly announced an intention to make such a bid.
  - The parties can decide to notify their merger plans prior or after the trigger event, although notification must take place before completion as implementation of the concentration must be suspended until clearance.
  - Any implementation prior clearance or without prior notification, may lead to fines of up to 10% of the aggregate group-wide turnover of the merging parties.
  - The obligation to notify is on the party acquiring control, although this may be done in consultation with the vendor and/or target company.

Merger Control Procedures

- The Merger Regulation does not provide for the payment of any filing fee.
  - What to report
    - Notification of a concentration to the European Commission must be submitted on the so-called Form Co or, in the case of transactions qualifying for the simplified procedure, on a separate Short Form which dispenses the merging parties with certain information requirements in the notification. Pre-notification referral requests must be submitted on Form RS.
    - All these forms are annexed to the Implementing Regulation. They are also available at: http://europa.eu.int/comm/competition/mergers/legislation/impl_regulation.htm

Merger Control Procedures

- Pre-notification talks
  - Pre-notification is not compulsory. However, the European Commission in its Best Practice Guidelines encourages pre-notification contact with the DG Competition case team generally at least two weeks before the expected date of notification. The parties are encouraged to submit a briefing memorandum outlining the concentration, its likely impact and the sector and market involved. The submission of a draft notification is also encouraged.
  - These consultations can take some time, but are useful and reduce the risk of notification being rejected for incompleteness. Further information can be found under Section 3 of the Best Practice guidelines concerning the purposes and timing of pre-notification consultations, as well as information to be provided in that process.

Merger Control Procedures

- Phase I review
  - The initial first-phase review lasts up to 25 working days from the day following receipt by the Commission of a complete notification – i.e., submission of the Form CO.
  - This period is automatically increased by 10 working days where the Commission receives a request for a referral from a Member State or where the parties submit remedies. In case of commitments proposed by the parties, the relevant commitments must be submitted to the European Commission within 20 working days from the date of receipt of the notification.
  - Unless undertakings are offered or a request for referral has been received, within 25 working days after notification, the European Commission must issue its Phase I decision. If the proposed concentration does not raise serious doubts, the EC must clear it. The EC issues a written decision in all but the most non-problematic cases.
  - Where the European Commission at the end of its first-phase review considers that the transaction raises serious substantive issues and the parties have not offered satisfactory undertakings to cure this problem, the Commission is required to initiate an in-depth second phase investigation.

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Merger Control Procedures

- Phase II Review
  - Where a full investigation is required, the European Commission must complete it within a further 90 working days although this period may be extended in various circumstances.
  - The European Commission initiates the proceedings by issuing to the parties a formal written decision describing the Commission' serious doubts as the compatibility of the transaction with the common market. The decision is confidential and the EC does not prepare any public version. However, the Commission routinely issues a press release summarizing the substantive concerns raised by the transaction at the time it initiates an in-depth investigation.
  - If deemed appropriate after the Phase II investigation is well along, the EC team may conclude its investigation with the issuance of a Statement of Objection (SO) that describes all the EC's competitive concerns about the proposed concentration. Anything on which the European Commission wishes to rely in its final decision must be included in the SO. There is no deadline on timing of the SO issuance. Then, the parties may decide to reply to the SO and request the conduct of a formal hearing at which testimony is taken from the parties and other interested parties including customers and competitors.

Merger Control Procedures

- Where the Commission cannot give outright approval to the concentration, it can either prohibit it or permit it subject to remedies, in the form of conditions or obligations on the parties. Such obligations could include modification of the concentration or divestment of other assets or businesses held by any of the parties.
- Accordingly, if commitments are proposed in Phase II, the relevant commitments must be submitted within 65 working days of the date on which Phase II proceedings were initiated. Where the parties submit commitments outside of these time limits, the relevant Phase of the Commission's investigation may be extended by a number of working days.
- It is also possible in Phase II for the parties and/or the Commission to request an extension of the Phase II period. However, the latter can never extend beyond 125 days from the date of initiation of the Phase II review.
- All decisions on concentrations following second stage proceedings must be taken by the full college of Commissioners.
- Where the Commission fails to take any decision within the Phase I or Phase II period, the concentration is deemed to be declared compatible with the common market and therefore permitted.

Merger Control Procedures

- Appellate Review
  - Commission merger decisions are subject to judicial review by the European Court of Justice (ECJ), initiated in its Court of First Instance (CFI). The courts' standard of review accords the Commission some deference in appraising issues that involve economic assessments. This standard is often referred to as the "manifest error" rule. A number of recent cases, however, suggest that the court's review of Commission decisions has become more rigorous.
  - The normal timing of an appeal process before the CFI is often too long to be capable of salvaging a prohibited transaction. For this reason, the CFI has introduced a so-called "fast-track" procedure that can be applied, upon request, at the CFI's discretion. It may reduce the appeal process to approximately ten months/one year from the lodging of the application.

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Substantive Standards

- Relevant Market Definition
  - Product Market Definition: Demand and Supply substitution
  - Geographic Market Definition
- Criteria for Assessment: Unilateral and Coordinated Effects (Collective Dominance)
  - Market Shares and Market Concentration
  - Other Problematic Factors
  - Efficiencies and other Countervailing Factors
- Non-horizontal Mergers: Vertical/Conglomerate/Portfolio and Network Effects

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Substantive Standards

- The basic test for the examination of a concentration under the ECMR is whether it will "*significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position*".
- The substantive analysis of an EC merger case begins with definition of "affected" markets, that is the relevant product and geographic markets. It proceeds to an assessment of the possible competitive effects in the affected markets as well as countervailing factors, and with the co-operation of the parties, determines whether agreement can be reached on undertakings that would remedy anti-competitive effects.

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Substantive Standards

- The European Commission has adopted a *Notice on remedies* in early 2001 setting out the main types of remedies which may be acceptable, such as divestment, termination of exclusive agreements and licensing of technology or provision of access to infrastructure, and the main implementation requirements in respect of divestment commitments. The Notice confirms a preference for structural remedies, usually divestment of assets, rather than behavioral commitments. Activities to be divested must consist of "*a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity. Normally a viable business is an existing one that can operate on a stand-alone basi*s".
- More recently, in 2003, the EC provided further guidance to merging parties in the form of Best Practice guidelines for Settlement Commitments, consisting of standard model for divestiture commitments and a standard model for trustee mandates, as well as explanatory notes.

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V. Member State Merger Control Regimes

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- Most Member States have brought their merger control laws and regulation in line with EC law.
- The substantive concepts referred to under the EC jurisdictional notice are applied through the whole EU.
- Member states have distinct local procedures and practices that require particular attention and local expertise.

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EU Countries	Minimum Combined Turnover Thresholds	Minimum Individual Thresholds
Austria	€ 30 million	
Belgium	€100 million	And at least two parties each have a Belgian turnover : € 40 million
Bulgaria	BGN 15 million (approx. € 7,6 million)	
Cyprus		At least two parties each have a Cyprus turnover: 2 million Cyprus pounds (around € 3,4 million)
Czech Republic	CZK 1.5 billion (around € 53,6 million)	And at least two parties each have a Czech turnover: CZK 250 million (around € 8,9 million)
Denmark	DKK 3.8 billion (around € 510 million)	And at least two parties each have a Danish turnover: DKK 300 million (around € 40 million)
Estonia	100 million kroons (around € 6,4 million)	And at least two parties each have an Estonian turnover: 30 million kroons (around € 2 million)
Finland		At least two parties each have a Finnish turnover: € 20 million
France		At least two parties each have a local turnover: € 50 million
Germany		At least one party with turnover: € 2 5 million
Greece		Turnover of each of at least two parties: € 15 million

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EU Countries	Minimum Combined Turnover Thresholds	Minimum Individual Thresholds
Hungary	HUF 15 billion (about € 60 million)	And each of at least two parties have local turnover: HUF 500 million (about € 2 million)
Ireland		Local turnover of any one of the undertakings involved: € 40 million
Italy	€ 432 million	Turnover of target : € 43 million
Latvia	LVL 25m (approx. € 36 million)	
Lithuania	LTL 30 million (around € 8,7 million)	And each of at least two parties have local turnover: LTL 5 million (€ 1,5 million)
Luxembourg	---	---
Malta	---	---
Netherlands		Turnover of at least two parties: € 30 million
Poland		Turnover of target in any of the two last financial years shall be at least: € 10 million
Portugal	€ 150 million	And each of at least two parties with turnover of € 2 million

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EU Countries	Minimum Combined Turnover Thresholds	Minimum Individual Thresholds
Romania	Equivalent in RON of € 10 million	At least two parties each have a Romanian turnover: equivalent in RON of € 4 million
Slovakia		Each of at least two parties have local turnover: SKK 360 million (around € 9,5 million) **or** One party has local turnover : SKK 500 million (around € 13,2 million)
Slovenia	SIT 8 billion (approx. € 33 million) in each of last two years	
Spain	€ 240 million	And turnover of each of at least two parties: € 60 million
Sweden		At least two undertakings each have a local turnover: SEK 100 million (€ 10,7million)
UK		UK turnover of Target: £ 70 million (€ 101 million)

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List of EU Jurisdictions Having a Market Share or Share of Supply Test

Greece	Notification Thresholds
Mandatory prior or post notification	A filling is required when: ▪ combined worldwide turnover of the new entity is at least € 150 million and at least two parties each have a turnover in Greece exceeding € 15 million. A post merger filing shall take place when the combined market share of the parties in the relevant market in Greece is at least 10% or when the combined turnover of at least two parties in Greece amounts to Euro 15 million.
Latvia	Notification Thresholds
Mandatory prior notification	A notification is required when: • the total annual turnover of merger participants in Latvia has in the last financial year exceeded LVL 25 million (approximately € 35.7 million or USD 45.3 million); or • the total market share in the relevant market of the market participants involved in the merger exceeds 40 percent. Merger control will apply only when the Latvian market will be affected by the merger – that is when the business activities of at least one of the merger participants take place in Latvia.
Portugal	Notification Thresholds
Mandatory prior notification	Concentrations are subject to prior notification if either: • their implementation creates or reinforces a share greater than 30 percent of the national market for a particular good or service or for a substantial part of it; or • in the preceding financial year, the group of undertakings taking part in the concentration have recorded in Portugal a turnover exceeding Euro 150 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of these undertakings exceeds Euro 2 million.

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Slovenia	Notification Thresholds
Mandatory prior notification	A concentration must be notified if: • the combined aggregate annual turnover of all the companies concerned, including affiliated companies, exceeds SIT 8 billion (approx. Euro 33.3 million) before tax in the Slovenian market in each of the last two years; or • all the companies concerned, including affiliated companies, jointly achieve more than a 40 percent market share in Slovenia, or a substantial part of it.
Spain	Notification Thresholds
Mandatory prior notification	There are two alternative thresholds based on market share and turnover. A notification shall be made where: • a share of 30 percent or more of the national market or of a 'defined' geographic market within it, of a given product or service, is acquired or increased; or • the aggregate turnover in Spain of the companies involved exceeded € 240 million during the last financial year provided that the turnover in Spain of each of at least two parties exceeded € 60 million.
UK	Notification Thresholds
Voluntary system	A merger will qualify for investigation where: • the undertaking to be acquired has a UK turnover exceeding £ 70 million (€ 101 million or USD 122m); or • as a result of the merger a share of at least 25 percent of the supply or purchase of goods or services of any description in the UK or a substantial part of it will be created or enhanced ('share of supply test').

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Conclusion

- Historical Context
- Legislation
- Procedures
- Results – Conflict with United States

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Forthcoming Schedule

- European competition law and procedures, including vertical restraints, technology licensing, and cartel enforcement – **November 5, 2008**
- Trends and developments in European competition law, including privilege, private remedies, class actions, and best practices for compliance – **January 21, 2009**

- **Time**

  12:30 p.m. Eastern
  11:30 a.m. Central
  10:30 a.m. Mountain
  9:30 a.m. Pacific

  Duration: 1 hour

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