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Competition law  
 **Merger control**

Merger control, how we can understand that term? Is it Economic term or it is only about law?  
Let is begin with the economic point of view, A merger is an agreement that unites two existing companies into one new company. There are several types of mergers and also several reasons why companies complete mergers. Mergers and acquisitions are commonly done to expand a company's reach, expand into new segments, or gain market share. A merger is the voluntary fusion of two companies on broadly equal terms into one new legal entity. The firms that agree to merge are roughly equal in terms of size, customers, scale of operations, etc. For this reason, the term "merger of equals" is sometimes used. Mergers are most commonly done to gain market share, reduce costs of operations, expand to new territories, unite common products, grow revenues and increase profits, all of which should benefit the firms' shareholders. After a merger, shares of the new company are distributed to existing shareholders of both original businesses. Mergers occur when two companies join forces. Such transactions typically happen between two businesses that are about the same size and which recognize advantages the other offers in terms of increasing sales, efficiencies, and capabilities. The terms of the merger are often fairly friendly and mutually agreed to and the two companies become equal partners in the new venture. A merger extinguishes the merged corporation, and the surviving corporation assumes all the rights, privileges, and liabilities of the merged corporation. It is not the same as a consolidation, in which two corporations lose their separate identities and unite to form a completely new corporation. While from legal point of view, merger control refers to the procedure of reviewing mergers, acquisitions under antitrust or competition law. Over 130 nations worldwide have adopted a regime providing for merger control. Merger control regimes are adopted to prevent anti-competitive consequences of concentrations (as mergers and acquisitions are also known). Federal and state laws regulate mergers and acquisitions. Regulation is based on the concern that mergers inevitably eliminate competition between the merging firms. This concern is most acute where the participants are direct rivals, because courts often presume that such arrangements are more prone to restrict output and to increase prices. Antitrust merger law seeks to prohibit transactions whose probable anticompetitive consequences outweigh their likely benefits. The critical time for review usually is when the merger is first proposed. This requires enforcement agencies and courts to forecast market trends and future effects. Merger cases examine past events or periods to understand each merging party's position in its market and to predict the merger's competitive impact. The legal basis for EU Merger Control is Council Regulation (EC) No 139/2004, the EU Merger Regulation. The regulation prohibits mergers and acquisitions which would significantly reduce competition in the Single Market, for example if they would create dominant companies that are likely to raise prices for consumers.   
 The rules for merger control in the EU are set out in the following:  
 1. Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation), which sets out the principal regulatory framework on mergers and acquisitions in the EU.  
 2. Regulation (EC) 802/2004 implementing Regulation 139/2004 (Merger Implementing Regulation).

Several European Commission notices (especially Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, guidelines and model texts.  
 Recently, the following two guidance documents on procedural aspects of EU merger control were published:  
 1. The Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation, published in May 2015.  
 2. The Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 of the Treaty on the Functioning of the European Union and under the Merger Regulation, published in June 2015.

Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation) is concerned only with certain mergers and acquisitions. For a transaction to come within the ambit of EU merger control it must qualify as a concentration (see below) and involve parties that bring sufficient "weight to the table", \*(that is, reach certain turnover thresholds (see below, Thresholds).   
 Concentrations are defined as transactions that involve a lasting change in control because either:  
 1. Two or more previously independent undertakings merge.  
 2. One or more undertaking(s) acquire(s), directly or indirectly, control of one or more other undertaking(s) by one of the following means: purchase of securities or assets; contract; or any other means.  
 3. Two or more undertakings create a full-function joint venture.   
 ''Control'' is defined as the possibility of exercising decisive influence with regard to the considerations of fact and law involved (Article 3(2), Merger Regulation). Therefore, it is not necessary for control to actually occur in practice, however, the ability to influence a company's strategic commercial behaviour (through, for example, the appointment of senior management or other important boards or the approval of business plan and so on) is sufficient to establish control. Control can be applied by one (parent) company (sole control) or two or more stakeholders, which need one another to influence the strategic behaviour (joint control).  
 Almost all systems of competition law provide for control of mergers, to prevent companies from joining together to eliminate competition between them. A merger could be a complete union of two or more companies, a more one-sided takeover or the transfer of parts of one firm to another. Deciding whether a merger will harm competition can require sophisticated economic analysis of markets and the effects of the transaction. Yet this sophisticated analysis must in most jurisdictions be carried out to strict deadlines so as to protect the procedural rights of all affected parties.  
 Why do competition authorities analyse mergers? Most mergers are beneficial to competition, or at least do no harm to it, so competition authorities typically conduct a quick screening exercise to identify the exceptions. In, mergers between competitors can result in very large costs to consumers and to the economy more generally, so it is essential that authorities have the power and skills to investigate effectively and to remedy any potential problems they find (including by blocking the merger). Mergers between companies that do not directly compete (such as a ‘vertical’ merger between a supplier and its customer) rarely raise competition concerns; but when they do, they require very sophisticated economic analysis to assess whether the effects are anti-competitive or efficiency-enhancing.

The purpose of merger control. Compliance with competition law requirements represents a very important aspect of any M&A transaction. This is because before completion can take place, many merger transactions will need to be notified to and approved by competition authorities in a number of different jurisdictions. The purpose of merger control is to enable competition authorities to vet in advance whether mergers will have a detrimental impact on competition. Where a competition authority considers that a merger transaction will result in anti-competitive effects, it can require the merging parties to enter into commitments to remedy those anti-competitive effects, or prohibit the transaction entirely. It should be recalled that merger control will apply equally to certain transactions not traditionally seen as mergers. These include debtfor equity swaps, certain minority stake acquisitions, or acquisitions by private equity funds. There are now more than 90 merger control regimes worldwide, each with differing notification requirements. In the European Union (EU), notification is required if relevant turnover thresholds are met, regardless of whether the parties are physically present in the EU. Coordination of a large number of filings, in particular ensuring the availability and consistency of information provided to competition authorities across the world, presents a logistical aspect for the transacting parties (and their legal representatives), which can not be left unaddressed. While it may be cumbersome, compliance with these diverse requirements is imperative, as failure to comply can have very significant consequences for the parties concerned. It will therefore be necessary to consider, at the outset of the transaction, the jurisdictions where notifications are likely to be necessary. Merger control – suspensory effect. If parties fail to notify a transaction before completion, and that failure comes to the attention of a competition authority, the penalties for non-compliance can be very significant indeed. In the first instance, competition authorities have the power to impose substantial fines on parties who complete a transaction without prior notification (so-called gun-jumping). By way of example, in 2008, the European Commission (EC) fined Electrabel €20 million for acquiring control of Compagnie Nationale du Rhone without obtaining prior EC approval. Such a fine will usually be imposed on the acquiring party. Competition authorities also have significant powers to retrospectively review a transaction for compliance with competition law. In those circumstances, competition authorities may impose onerous conditions on the parties, such as significant divestments or may even order the complete reversal of the transaction. The acquiring party will therefore be obliged to implement the necessary divestments within a limited period of time, with the prospect of significant financial consequences. The US antitrust authorities are quite activist in this regard. Further, even if a non-notified transaction does not come to the attention of the relevant competition authorities, a failure to notify can affect the validity of the transaction as a whole in those jurisdictions where it should have been notified. Where multiple competition authorities are involved, the risks associated with noncompliance are magnified by the fact that competition authorities often liaise with each other in reviewing deals and certain notification forms require the disclosure of all competition authorities to whom the deal will be notified. Other steps falling short of completion of a transaction before obtaining merger clearance may also come under scrutiny from competition authorities. For example, if competitors share competitively sensitive information for the purposes of due diligence activities, this may result in an infringement of competition law. Merging parties must also consider very carefully points such as imposing restrictions on significant business expenditure and any joint approaches to their customers before completion to avoid competition law infringements.

What is the relevant legislation and who enforces it? The EU merger control regime, which applies to large-scale transactions (see question 5), is set out in Council Regulation (EC) No. 139/2004 (EUMR). The regime applies to the European Economic Area (EEA; that is, the 28 EU Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom) together with the three members of EFTA (Iceland, Liechtenstein and Norway). The EUMR is enforced by the Directorate General for Competition of the European Commission (DG Comp or the Commission) in Brussels. EUMR notifications are reviewed by sector-specific units within DG Comp, which have integrated merger control competence. In addition to the sector-specific merger units, the Commission’s internal decision-making process involves a number of other stakeholders: the chief economist team and the case support and policy unit (within DG Comp), and the Legal Service and the sectoral directorates general (eg, Transport and Energy) (outside DG Comp). The Commission also uses ‘peer review panels’ in Phase II cases to test the validity of the case team’s arguments. The panels consist of a team of lawyers and economists from DG Comp, who are independent from the original case team. In addition, two hearing officers, who are independent of DG Comp and report directly to the competition commissioner, organise and conduct oral hearings in Phase II cases and act as an independent arbitrator where a dispute on the effective exercise of procedural rights between parties and DG Comp arises.

What legislation applies to the control of mergers?The main laws governing merger decisions are the EU Merger Regulation (139/2004) and the 2004 Implementing Regulation (802/2004), as amended by the 2013 Implementing Regulation (1269/2013). The EU Merger Regulation sets out the main rules for the assessment of concentrations, whereas the implementing regulations concern procedural issues (eg, notification, deadlines and the right to be heard). The commission has also published a series of notices and guidelines to help parties in transactions that potentially fall within the scope of the EU Merger Regulation. These include the Consolidated Jurisdictional Notice (2008) and the Notice on the Simplified Procedure (2013). The laws and non-binding notices and guidelines are available on the European Commission’s Directorate General for Competition’s website.

What is the relevant authority? The sole authority in charge of enforcing the EU Merger Regulation is the Directorate General for Competition, the European Union's executive body based in Brussels. The commission directly enforces the EU Merger Regulation in the European Economic Area (EEA) and European Free Trade Association (EFTA) member states (ie, Iceland, Liechtenstein and Norway). The EU Merger Regulation operates on a one-stop shop basis, whereby a transaction that comes under the commission’s jurisdiction need not be notified to the national competition authority in EEA and EFTA member states which would otherwise have jurisdiction over the transaction. National competition authorities are precluded from applying their own rules to the transaction in this context, except in specific circumstances.Transactions caught and thresholds.

Under what circumstances is a transaction caught by the legislation? Only so-called 'concentrations' with an EU dimension fall within the scope of the EU Merger Regulation. The concept of a 'concentration' covers transactions that result in a lasting change of control. ‘Control’ is defined as rights, contracts or other means which, separately or in combination, and in all factual and legal circumstances, confer on the acquirer of control the ability to exercise decisive influence over an undertaking. Control may be held by one party (sole control) or by several parties acting jointly (joint control). There is no strict percentage shareholding test, although control has been found to exist on the basis of as little as a 27% shareholding (eg, the Pirelli/Edizione/Olivetti/Telecom Italia merger), based on evidence of attendance rates of less than 27% of voting rights from shareholders' meetings during the three preceding years. A concentration has an EU dimension only where it satisfies the turnover thresholds under the EU Merger Regulation. In the case of concentrations without an EU dimension, the national competition authorities in EU member states may review the merger.

Is it possible to seek informal guidance from the authority on a possible merger from either a jurisdictional or a substantive perspective? The commission may provide informal guidance on questions from parties directly relating to a planned transaction – for example, jurisdictional questions – where the parties provide sufficiently detailed background information to allow the commission to properly assess the question. Simultaneously, pre-notification contacts with the commission are standard, even for simplified procedure notifications. This usually involves email correspondence and conference calls with the case team and the submission of a draft version of the Form CO notification template. Pre-notification may involve discussions on the possibility of referrals to or from national competition authorities within the European Union or parallel proceedings in non-EU jurisdictions.  
Foreign-to-foreign

Are foreign-to-foreign mergers caught by the regime? Is a ‘local impact’ test applicable under the legislation? The EU merger control regime applies regardless of whether the relevant thresholds are met.  
Joint ventures

What types of joint venture are caught by the legislation? Where the joint venture performs on a lasting basis all the functions of an autonomous economic entity and is thus ‘full function’, a filing is required. Non-full function joint ventures are not caught by the legislation, but may trigger filing obligations in EU member states, such as Austria, Germany and Poland.

Oversight by the European Union, the competition laws have been enacted under the Directive 2005/56/EC on Cross-border mergers and the Economic Concentration Regulation 139/2004, known as the "EUMR". The law requires that firms proposing to merge apply for prior approval from the Commission, specifically mergers that transcend national borders and with an annual turnover of the combined business exceeds a worldwide turnover of over EUR 5000 million and Community-wide turnover of over EUR 250 million must notify and be examined by the European Commission. Merger regulation thus involves predicting potential market conditions which would pertain after the merger. The standard set by the law is whether a combination would "significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position.  
 Under EC law, a concentration exists when a:

"change of control on a lasting basis results from (a) the merger of two or more previously independent undertakings... (b) the acquisition... if direct or indirect control of the whole or parts of one or more other undertakings." Art. 3(1), Regulation 139/2004, the European Community Merger Regulation.

This usually means that one firm buys out the shares of another. The reasons for oversight of economic concentrations by the state are the same as the reasons to restrict firms who abuse a position of dominance, only that regulation of mergers and acquisitions attempts to deal with the problem before it arises, ex ante prevention of creating dominant firms. In the case of [T-102/96] Gencor Ltd v. Commission [1999] ECR II-753 the EU Court of First Instance wrote that merger control is there "to avoid the establishment of market structures which may create or strengthen a dominant position and not need to control directly possible abuses of dominant positions."

To conclude, the Commission's application of the EC Merger Regulation is widely considered to have been a success. Although there will inevitably be legal and practical developments, including advances in forensic tools and economic modelling, that shape its future application, the EC Merger Regulation is an increasingly mature legal instrument. At least as importantly, Commission practice has developed to a point where counsel are generally able to predict with reasonable certainty the analytical framework that will be applied in any given case, the economic and other evidence that will likely be considered probative, the duration of the Commission's review, and the probable outcome. The challenge for the Commission will be to maintain the standards that have characterised the EC Merger Regulation's application to date; to continue to identify ways in which the administrative burden placed on notifying parties can be reduced, thereby expediting merger review and avoiding unnecessary (and costly) data-gathering; to explore the scope for approving more transactions without the need for lengthy, motivated decisions, thereby freeing resources for complex cases; to avoid the temptation to extend the EC Merger Regulation's jurisdictional ambit to the acquisition of non-controlling minority shareholdings; to encourage the harmonisation of national rules and procedures; and to continue to render sensible, well-reasoned decisions substantiated by sound data and hard evidence.