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Merger control in the European Union: an overview

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All in-house counsel will be aware of the merger control rules that grant competition authorities the power to monitor, assess and even modify or prohibit M&A activity. There are very few jurisdictions around the world that do not enforce some form of merger control and, with the notable exception of Luxembourg, all 28 EU Member States can require the notification of mergers. This requirement can be triggered by sales into a Member State, irrespective of where a business is registered or based. As such, being familiar with the merger control rules is important not only for companies that are located in the EU, but for all companies that conduct business in the region.

Although there have been efforts towards convergence between Member States, there remain significant differences between the various national merger control regimes in the EU. Moreover, while the European Commission can serve as a 'one-stop-shop' under certain circumstances, it is by no means unusual for transactions to be notified to multiple competition authorities.

Navigating the various sets of rules in the EU can be challenging but, if approached methodically and in good time, there is no reason why these obligations should obstruct or significantly delay a deal. In this note, we will set out an essential overview of merger control in the European Union and the practical steps that in-house counsel should take to avoid pitfalls. We will focus on four key questions, namely:

- What types of transaction trigger a filing?
- How do you know where to file?
- How will filing impact on timing?
- What does the process involve?

What types of transaction trigger a filing?

The first question is whether the type of deal that the business is planning is one that can possibly trigger a merger control filing. Unfortunately, even on this fundamental point, there is some divergence across the EU: certain transactions are treated as notifiable in some Member States but not others, in particular with regard to minority acquisitions.

Almost all national merger control authorities, and the European Commission, require notification of the following types of deal:

- Acquiring full or joint control over a business;
- Acquiring or disposing of assets that comprise all of part of a business; and
- Creating or dissolving a "full-function" joint venture (see below).

In most situations it will be clear whether an acquisition will lead to a change of control over the target business. Acquiring a majority shareholding will almost always satisfy this condition. By contrast, acquiring a minority shareholding will only be notifiable – in most jurisdictions – if the buyer will be able to exercise control over the target after completion, for instance by holding a golden share/casting vote, or through a right of veto over strategic commercial decisions, such as agreeing the budget or appointing the CEO.

Some Member States, however, require notification of any acquisition of 25% or more of a company's shares, even if it does not result in a change of control. This is the case in the UK, where notification is voluntary (see below), as well as in Germany and Austria, where it is mandatory. The European Commission is currently considering measures that would allow it to review minority acquisitions that do not cause a change in control, but it will be some time until a decision is taken.

Establishing, dissolving, or changing the membership of joint ventures can give rise to particularly complex merger control issues. In general, only joint ventures that will be able to act independently on the market (so-called "full-function" joint ventures) require notification. This excludes, for example, production joint ventures that will only supply their parents. By contrast, in Germany, merger control also applies to non-full-function joint ventures.

The "German" exceptions are relevant to a great number of transactions since the turnover thresholds that trigger a filing obligation in Germany are among the EU's lowest, relative to the size of the national economy.

How do you know where to file?

Once it is clear that a deal may require notification, the next step is to identify those countries in which a filing must be made. This is done by applying the thresholds set by each competition authority.

If a transaction meets the EU-wide thresholds set by the European Commission, the parties avoid having to make separate filings to any of the Member State authorities. This one-stop-shop principle is a central element of merger control law in the EU. However, the applicable turnover thresholds are relatively high:

European Commission notification thresholds

First Threshold:	**Second Threshold:**
· The parties' combined worldwide turnover exceeds €5 billion; *and*	· The parties' combined worldwide turnover exceeds €2.5 billion; *and*
· The EU turnover of at least two parties exceeds €250 million.	· The parties' combined turnover exceeds €100 million in each of at least three Member States; *and*
	· In each of the same three Member States, the turnover of each of at least two parties exceeds €25 million; *and*
	· The EU turnover of each of at least two parties exceeds €100 million.

If the Commission thresholds are not met, but the deal meets the thresholds of three Member States or more, the parties can still choose to notify the Commission (and, again, avoid making any national filings). It will usually be in the parties' favour to do so when possible, in order to reduce the burden of filing multiple notifications.

The national thresholds are also typically based on the parties' turnover. Most are relatively simple to apply: for example, a filing will be required in France if the parties had a combined worldwide turnover of €150 million in the previous year, and at least two of the parties each had turnover in France exceeding €50 million. Not all countries' thresholds are based on turnover, however. In Spain, Portugal and the UK, thresholds based on the parties' national market shares (or, in the UK terminology, "share of supply") operate as alternatives to a turnover test.

In order to apply these thresholds, some basic data will have to be gathered. Typically, counsel advising on the merger control process will need the parties' revenues from the previous year allocated on a country-by-country basis, according to the location of the customer. If the parties are active in Spain, Portugal or the UK, it might also be necessary to estimate their market shares; this is less straightforward than gathering turnover data, since it requires the scope of the relevant market(s) to be defined.

In most Member States, and before the European Commission, filing is mandatory if the relevant thresholds are met. By contrast, the UK operates a voluntary system. The UK jurisdictional thresholds indicate which deals the national competition authority may request parties to notify; however, if the thresholds are met, the parties are still not obliged to make a filing unless/until they are ordered to do so. It will be for the parties and their advisors to decide on a case-by-case basis whether it is in their interests to make a voluntary notification, having regard to the strategic importance of the UK to the transaction, the likelihood of the deal being "called in" for review, and the risk of the investigation raising concerns.

How will filing impact on timing?

It is important that the assessment of where a deal triggers filings is carried out as early as possible, since it will almost certainly have some impact on timing. With the exception of the UK, all EU competition authorities including the European Commission require transactions to be notified before completion, and impose a standstill period during their review. Until the authority has granted its approval (or the time limit for it to do has expired), the parties are obliged not to take any steps to implement the deal. Companies face significant financial penalties for breaching the standstill obligation – also known as "gun-jumping" – while, in countries such as Greece and Ireland, individuals deemed responsible for the breach can face criminal prosecution.

It is therefore standard for parties to make completion of their deal conditional upon receipt of all necessary merger control approvals. This is another reason why the jurisdictional assessment should be carried out in good time, so that appropriate wording can be included in the share purchase or other agreement on which the transaction is based. Moreover, the parties should consider the likelihood of the deal being opposed by any competition authorities before they agree this wording, so that – for example – the buyer does not commit to taking all steps necessary to receive approval if it is likely that the deal will be blocked. If the buyer has given a "hell or high water" commitment to getting approval, it may be forced to give substantial remedies to the competition authority (*e.g.*, divesting a large part of its business).

The length of time needed to receive approval will vary substantially from case to case, depending on both where a deal is notified and, even more importantly, the extent to which it triggers competition concerns. The European Commission and most authorities take a two-stage approach to assessing mergers, with the aim of approving the bulk of transactions (generally more than 90%) in a short 'Phase One' review, but having the option of opening a lengthier 'Phase Two' investigation to examine problematic deals more thoroughly. Phase One typically lasts around one month, with some variation from jurisdiction to jurisdiction; for example, the European Commission's deadline is 25 working days, the UK authority's deadline is 40 working days, while the Belgian authority's deadline (in the most straightforward cases) is just 15 working days. There is a greater variation in the length of Phase Two investigations, which generally last at least three to five months.

It is important to note that these statutory deadlines are, to some extent, only indicative of the actual time it will take to receive approval. For instance, although the European Commission's formal Phase One time limit is 25 working days, in practice the Commission will insist upon pre-notification discussions before this period begins. These discussions can take longer than the actual Phase One review itself. Similarly, in Poland (for example), submitting a notification does not automatically start the clock on the authority's one-month first phase; rather, the clock will start when the authority considers that it has received all necessary information – often, after the parties have responded to several rounds of questions.

Finally, with regard to timing, parties should be aware that most competition authorities have the power to stop the clock once it has started in order to request supplementary information. Although this should not happen in non-problematic cases, it can never be excluded; hence, it is advisable to allow some leeway when agreeing a closing date based on the receipt of merger control approvals.

What does the process involve?

The substantive analysis of mergers is relatively consistent throughout the EU: the relevant competition authority will examine whether the proposed transaction risks harming the market, and in particular disadvantaging consumers, by reducing competition. The form that this review takes, and the information that the parties are required to provide, however, vary widely from Member State to Member State.

In some countries – most notably, Germany – parties notify by way of a letter to the competition authority that does not have to follow a prescribed form. The formal requirements as to the information that they must provide are very limited, and the parties exercise their own judgment as to the level of detail necessary to satisfy the authority that the transaction raises no concerns. As a result, if a deal is clearly unproblematic (for example, if the buyer and target are not competitors), the letter will be short and provide only essential descriptions of the parties and the transaction.

By contrast, other countries – and the European Commission – require parties to notify in a standard format (or even a standard form) and specify in detail the questions that must be answered and the data that must be provided. It is common, for example, for the parties to have to provide sales data, including market share estimates for themselves and their competitors, going back three years. Clearly, the level of detail that is demanded in a merger filing will affect the length of time that it takes to prepare, and this too must be taken into account when planning the deal timetable.

Moreover, some authorities require the parties to submit annexes such as financial statements, market studies and even internal documents related to the transaction. It is particularly important that in-house counsel are aware of this possibility, and monitor all documents that are produced from the earliest time that their company starts working towards a transaction. An internal memo predicting that the deal will help to increase prices or foreclose competitors, for instance, could prove highly damaging if seen by the authorities – and disclosure may be mandatory.

Consistent across all EU competition authorities is the possibility of offering remedies to address concerns that a transaction will harm the market. The parties can propose remedies in either Phase One or Phase Two, and the timeline for the authority's review will be extended to allow for the proposal to be considered and market tested. There is a general preference throughout the EU for structural remedies, such as divestment; however, certain authorities (including the European Commission) are increasingly open to the possibility of behavioural remedies, such as a supply or pricing commitment, or a combination of structural and behavioural remedies.

One final aspect of the merger control process that varies throughout the EU is the existence of a filing fee. Some competition authorities, although not all of them, require the parties to pay a fee either at the start of the filing process or at its end. This can vary from €1,100 in Greece up to a maximum of €109,860 in Spain. It is important to pay the fee promptly if it is required to formally start the authority's review, as is the case in Austria; equally, if the fee must be paid before clearance is granted, this should not be unnecessarily delayed.

Conclusion

Complying with merger control requirements in the EU should not be complex, even for businesses that are active in several countries and are thus exposed to the rules of multiple jurisdictions. The focus for in-house counsel should be on taking stock of potential filings at an early stage, and considering whether any competition authorities might raise concerns about the deal. In this way, the merger filing process can be factored into the deal timeline and appropriate steps can be taken to tackle the concerns, whether by planning remedies or simply building arguments to allay the authorities' fears. Timely preparation and organisation will reap dividends and ensure as smooth a process as possible, wherever in the EU (or elsewhere) you are filing.