The EC Merger Regulation

An overview of the EU merger control rules

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1. INTRODUCTION

The EC Merger Regulation provides a mechanism for the control of mergers and acquisitions at the European level. The current version of the Merger Regulation came into force on 1st May 2004.¹

When does the Merger Regulation apply?

The Merger Regulation applies to any “concentration” which has, or is deemed to have, a “Community dimension”:

> “Concentration”: This is a concept which is widely defined to cover mergers, acquisitions of control and the creation of full-function joint ventures. The concept is considered further at Part 2 below;

> “Community dimension”: A transaction has a Community dimension where certain turnover thresholds are met, as described at Part 3 below.

What happens if the Merger Regulation applies?

Jurisdiction: The Merger Regulation lays down the conditions under which the Commission or the National Competition Authorities (NCAs) have jurisdiction over concentrations. Generally, concentrations with a Community dimension fall to be investigated by the Commission, whereas those without a Community dimension fall to be investigated by the NCAs in accordance with their domestic merger control rules; summaries of those national rules in the 25 EU Member States (plus the three EFTA states party to the EEA Agreement) are included at Annex 2. As an exception to this general rule, procedures were introduced with effect from 1st May 2004 under which parties can engage in pre-notification contacts with the authorities with a view to reallocating jurisdiction between the Commission and the NCAs, as considered at Part 4 below. Procedures also exist for the post-notification reallocation of cases between the Commission and the NCAs, and in certain limited circumstances Member States may still apply their national laws to concentrations with a Community dimension (as considered at Part 6 below).

Mandatory notification and waiting period: Transactions falling under the Merger Regulation must in principle be notified to the Commission and generally cannot be implemented unless and until the Commission declares them compatible with the common market. The European Commission adopted a new Implementing Regulation in 2004, which include the Forms to be completed when notifying deals under the Merger Regulation.² It has also issued a number of Notices (the current versions of which are referred to in this publication) explaining how it applies various aspects of the Merger Regulation regime.

**Commission investigations.** Deals notified under the Merger Regulation are investigated by the Commission under formal procedures to determine whether or not they are compatible with the common market (see Part 5 below). Once a deal is formally notified to the Commission under the Merger Regulation, in most cases the investigation is completed within a "Phase I" period of 25 working days. If the Commission opens a further in-depth "Phase II investigation", under the new Merger Regulation this will typically take a further 6 - 7 months. Charts illustrating the various timetables for the handling of cases under the Merger Regulation are included in Parts 4 and 5.

**Statistics**

Since the implementation of the first Merger Regulation\(^3\) in 1990, the Commission has received notifications of close to 3,000. In recent years it has been handling some 200 to 300 formal notifications a year (down from a peak of 345 notifications in 2000). For statistics on cases notified under the Merger Regulation, see Annex 1. All significant Merger Regulation decisions are published (subject to removal of business secrets), providing useful insights into how the Commission has defined markets in previous cases.

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2. CONCENTRATIONS

The concept of “concentration” includes:

> the merger of two or more previously independent undertakings;

> the acquisition of direct or indirect control (whether by purchase of securities or assets, by contract or otherwise) of the whole or parts of one or more other undertakings; or

> the establishment of a joint venture where this involves the acquisition of joint control of a full-function joint venture undertaking.

When is there control?

Control is widely defined and is constituted by rights, contracts or any other means which, either separately or in combination, confer the possibility of exercising decisive influence over an undertaking. Decisive influence arises where a party acquires the ability to determine an undertaking’s commercial strategy.

There is no defined shareholding level at which decisive influence arises. Depending on the circumstances (including the size of other shareholdings and the existence of veto rights and other powers granted to shareholders), the acquisition of a minority shareholding in another undertaking may confer the possibility of exercising decisive influence, in particular if the minority shareholder acquires the ability to block strategic commercial decisions (e.g. the adoption of annual budgets or business plans) or the appointment of key management.

A transaction gives rise to sole control where it results in a single undertaking having the possibility of exercising decisive influence over the whole or part of another undertaking. Where two or more undertakings together acquire the ability to exercise decisive influence over another undertaking, there is said to be joint control.

Full-function joint ventures

The establishment of a JV undertaking will give rise to a concentration where the following conditions are met:

> Joint control: Two or more parents must each exercise decisive influence over the JV undertaking, e.g. through rights of veto over strategic matters such as the adoption of annual budgets or the appointment of senior management;

> Autonomy: The JV must have sufficient personnel, facilities and resources to enable it to perform the functions normally carried out by other undertakings operating on the same
market. Important considerations will be whether the JV is required to take most of its raw material requirements from its parents or to sell its production mainly to its parents; and

> **Durability**: The JV must be established on a "lasting basis".

Joint ventures which do not fall within the Merger Regulation - because they are not "full-function" in this sense (or because they lack a "Community dimension") - may be subject to review by the NCAs under national merger control rules. In some cases they may also be subject to investigation (by the Commission or the NCAs) under Article 81 and/or 82 of the EC Treaty.

**Changes in the nature of control**

A concentration will also arise where there is a durable change in the quality or nature of control of an undertaking. Thus, there will be a concentration where a party with joint control of an undertaking moves to a position of sole control.

Similarly, there may be a concentration as a result of changes in the number of shareholders which jointly control a JV undertaking following the withdrawal or entry of one or more controlling shareholders.
3. COMMUNITY DIMENSION

The Merger Regulation applies to concentrations with a "Community dimension". Whether a transaction has a Community dimension depends on whether it satisfies certain turnover thresholds. These turnover tests are purely **jurisdictional** in nature. The thresholds are applied without regard to substantive competition issues, to the nationality of the parties, to the country where the transaction is to take place or to the law applicable to the transaction. As a result, the Merger Regulation can apply to transactions with little or no EU connection. By virtue of the EEA Agreement, the Commission's jurisdiction is also extended to cover the three EFTA contracting states where such a "Community dimension" is established.6

**Turnover thresholds**

There are two **alternative** sets of thresholds (as illustrated by the flowchart on page 7):

(a) **Original thresholds**: The Merger Regulation's original thresholds (which date back to 1989) remain in force. They apply the concept of "one-stop shopping" at the European level to any deal which meets the following tests:

> **Worldwide turnover test**: The combined worldwide turnover of all the undertakings concerned must be more than **€5,000 million**;

> **Community-wide turnover test**: Each of at least two of the undertakings concerned must have EU-wide turnover of more than **€250 million**; and

> **Two-thirds rule**: A concentration does not have a "Community dimension" if each of the undertakings concerned achieved more than **two-thirds** of its EU-wide turnover in one and the same Member State.

(b) **Alternative thresholds**: When the operation of the original Merger Regulation was reviewed in the mid-1990s, there had been broad support for the one-stop shopping principle to be extended to deals which would otherwise be subject to merger control by three or more NCAs in the EU. There was considerable debate about how this might be achieved. Eventually some fairly complex changes were introduced in 1998 and these remain in place under the current Merger Regulation. Deals which do not meet the original thresholds nevertheless have a "Community dimension" if they meet all the following alternative tests:

> **Lower worldwide turnover test**: The combined worldwide turnover of all the undertakings concerned must be more than **€2,500 million**;

> **Lower Community-wide turnover test**: Each of at least two of the undertakings concerned must have EU-wide turnover of more than **€100 million**;

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6 See Article 57 of the EEA Agreement: the turnover thresholds applied relate to the undertakings concerned's activities in the EU only. However, the parties’ turnover in the EFTA States (Iceland, Liechtenstein and Norway) will be relevant to establishing the degree of involvement of the EFTA Surveillance Authority and EFTA NCAs under Protocol 24 EEA.
> **Additional three Member States test:** In each of at least three EU Member States:
  - the combined national turnover of all the undertakings concerned must be more than €100 million; and
  - each of at least two of the undertakings concerned must have national turnover of more than €25 million; and

> **Two-thirds rule:** A concentration does not have a “Community dimension” if each of the undertakings concerned achieved more than two-thirds of its EU-wide turnover in one and the same Member State.

**Undertakings concerned**

In general, the “undertakings concerned” for these purposes are the undertaking(s) acquiring sole (or joint) control and the undertaking over which control is being acquired.\(^7\)

On a sale of part of a business, only the turnover attributable to the parts which are the subject of the transaction is to be taken into account for the purpose of calculating the vendor’s turnover.

Where an acquisition is made by a joint venture, the Commission looks at the economic reality of the operation in determining whether or not to lift the corporate veil. If the JV is simply an acquisition vehicle for its parents, the Commission looks through it and treats each parent as an undertaking concerned. On the other hand, where the acquisition is carried out by a pre-existing full-function JV undertaking, the Commission usually treats the JV as a single acquiring undertaking.

**Calculation of turnover**

The amounts to be included in the calculation of turnover must correspond to the ordinary activities of each undertaking concerned in its previous financial year.\(^8\) When calculating the turnover of an undertaking concerned, one must include the turnover of any entities belonging to the same group. The definitions for these purposes are wider than legal control and may result in the inclusion of companies which might not in other contexts be considered as part of the group.

The whole turnover of all companies under the sole control of an undertaking concerned must be aggregated. In relation to JV undertakings jointly controlled by an undertaking concerned and third parties, the turnover of the JV is attributed equally between its controlling parents, irrespective of the size of their financial or voting interests.

**Special rules**

There are special rules for calculating the turnover of banks and other financial institutions and of insurance companies.

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\(^7\) For further guidance, see Commission Notice on the concept of undertakings concerned (OJ 1998 C66/14, 2.3.1998). The Commission is aiming to publish a revised version of the Notice for consultation in 2006.

\(^8\) For further guidance, see Commission Notice on calculation of turnover (OJ 1998 C66/25, 2.3.1998). The Commission is aiming to publish a revised version of the Notice for consultation in 2006.
EC MERGER REGULATION THRESHOLDS

Original Test

Is the combined worldwide turnover of all undertakings concerned more than €5,000 million (c. £3,500 million)?

Yes

Is the EU turnover of each of at least two undertakings concerned more than €250 million (c. £175 million)?

Yes

Does each of the undertakings concerned achieve more than two-thirds of its EU turnover within one and the same Member State?

ECMR applies

No

Yes

Alternative Test

Is the combined worldwide turnover of all undertakings concerned more than €2,500 million (c. £1,700 million)?

No

Yes

Is the EU turnover of each of at least two undertakings concerned more than €100 million (c. £70 million)?

No

Yes

In each of at least three Member States is the combined national turnover of all undertakings concerned more than €100 million ( £70 million)?

No

Yes

In each of at least three of these Member States is the turnover of each of at least two undertakings more than €25 million (c. £17 million)?

ECMR does not apply

Yes

No

Yes
4. **PRE-NOTIFICATION ALLOCATION OF CASES BETWEEN THE COMMISSION AND MEMBER STATES**

Where a transaction gives rise to a concentration with a Community dimension, in principle it must be notified to the Commission which has exclusive jurisdiction to investigate, without the NCAs being able to apply their national merger control rules. Conversely, the NCAs are in principle competent to investigate mergers which do not have a Community dimension (subject to their national rules, summarised at Annex 2, being applicable), without the Commission having any jurisdiction to investigate.

This simple allocation of jurisdiction is, however, subject to a number of exceptions (as illustrated on page 10). For these purposes, it is convenient to distinguish:

> **Pre-notification reallocation of jurisdiction:** In 2004 new procedures were introduced which allow for the possibility of cases to be reallocated at the initiative of the parties. These Article 4(4) and 4(5) referral procedures are considered below;

> **Post-notification reallocation of jurisdiction:** The Merger Regulation also maintains procedures (which already existed prior to 2004) allowing for cases to be referred from the Commission to the NCAs or vice versa. These Article 9 and 22 referral procedures are considered at Part 5 of this publication.

**Article 4(4) pre-notification referrals from the Commission to a NCA**

There may be some circumstances in which parties to a proposed concentration with a Community dimension conclude that it would be simpler or more advantageous if their transaction could be reviewed (either in whole or part) at the Member State level rather than by the Commission under the Merger Regulation. This might be the case, for example, if the only competition issues of any significance are limited to one Member State (particularly if they are issues over which the relevant NCA would likely seek to assert jurisdiction under Article 9 discussed at Part 5 of this publication).

For such cases a voluntary procedure has been introduced under which the parties may opt to have the case referred - in whole or part - to the NCA in question instead of notifying it to the Commission. To use these procedures, the parties must prepare and submit a reasoned submission (using Form RS) to the Commission which will then forward copies to all the NCAs. The identified NCA then has 15 working days in which to agree or object to the proposed referral. Assuming the NCA agrees, the Commission must then decide (within a maximum of 25 working days from the submission of the Form RS) whether or not to make the requested referral.

If the Commission agrees to refer the case in whole, it will then only be necessary for the parties to notify the case to the NCA in question (which will review the case under its applicable national merger control rules). If the Commission agrees to a partial referral request, the aspects concerned will be reviewed by the NCA in question and the parties will need to make a notification to the Commission under the Merger Regulation in respect of the remaining

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9 For further guidance, see Commission Notice on case referral in respect of concentrations (OJ 2005 C56/2, 5.3.2005).

10 Form RS is annexed to the Commission’s 2004 Implementing Regulation. For applications also involving the EFTA contracting states, see the Form RS and explanatory notes published by the Commission’s DG Competition (available on its website) which includes information pertaining to the extension of the procedure to the EFTA contracting states by reference to the EEA Agreement.
aspects of the concentration. In either case, the concentration continues to have a “Community dimension” such that the other NCAs will not be able to apply their national merger control rules (unless the Commission were to agree to a subsequent Article 9 request).

**Article 4(5) pre-notification referrals to the Commission**

Many cross-border mergers which fall below the Merger Regulation's thresholds will instead be subject to notification and review by a number of NCAs within the EEA. Recognising that there could be advantages to business if some of these transactions could benefit from the one-stop shop principle, a voluntary procedure has been introduced under which parties may seek to have cases handled by the Commission if they would otherwise have been subject to investigation by the NCAs in at least three Member States (and possibly also in at least one EFTA contracting state).

To take advantage of these pre-notification procedures, before notifying to any of the NCAs the parties must prepare and submit a reasoned submission to the Commission (using Form RS) which will then be forwarded to all the NCAs. Each of the NCAs which would in principle have jurisdiction to investigate under its national merger control rules then has 15 working days from receipt of the Form RS in which to object. If no NCA objects, the transaction is deemed to have a Community dimension and must be notified to the Commission. But if any of the Member States objects (even if only one of them) then jurisdiction is not transferred and the deal remains subject to notification and review at the Member State level.
PRE-NOTIFICATION AND POST-NOTIFICATION REFERRAL PROCEDURES
(AND PHASE I PROCEDURE)

**Does concentration satisfy the ECMR thresholds such that it has a “Community dimension”? (see Part 3)**

- **Yes**
  - **Is impact of concentration mainly in one Member State?**
    - **No**
    - **Is concentration notifiable to 3 or more NCAs?**
      - **Yes** Options: Do parties instead want to try to notify at national level? or benefit from one-stop shop principle?
      - **No**
        - **Option**: Do parties instead want to try to notify at national level?
          - **Yes**
            - **Art. 4(4) pre-notification referral procedure to NCAs**
              - Informal contacts with Commission and NCA
              - Formally submit Form RS to Commission (identifying NCA(s) to which whole or partial referral requested) following which:
                - identified NCA has 15 WDs (from receipt) in which to object
                - Commission then has up to 25 WDs (from submission of Form RS) in which to make referral
              - Even if referral made (in whole or in part) concentration continues to have Community dimension, such that not notifiable to other NCAs
            - **Identified NCA or Commission objects**
              - (or if only partial referral made)
            - **Commission agrees to referral**
              - (in whole or in part)
          - **No**
            - **No NCAs object**
              - (concentration deemed to have a Community dimension)
            - **One (or more) of NCAs with jurisdiction objects**
              - possible Art. 9 post-notification referral(s) to NCAs
              - possible Art. 22 post-notification referral(s) to Commission

- **No**
  - **Art. 4(5) pre-notification referral procedure to European Commission**
    - Informal contacts with Commission and NCAs
    - Formally submit Form RS to Commission (identifying NCAs with jurisdiction) following which:
      - NCAs with jurisdiction have 15 WDs (from receipt) in which to object
      - absence of objections (from any NCA with jurisdiction) is treated as approval ("positive silence")
    - **No national notifications should be made before referral decision**

**ECMR PHASE I PROCEDURE**
- Informal pre-notification contacts with Commission
- Formally submit Form CO notification (or Short Form notification)
- NCAs have 15 WDs (from receipt of notification) to make Art. 9 request
- Notifying parties have 20 WDs (from notification) to submit Phase I commitments
- Final Phase I decision within 25 WDs of formal notification (35 WDs if Art. 9 request made or Phase I commitments offered):
  - Phase I clearance (unconditional or subject to commitments), or
  - Phase II proceedings (see box on page 16)

**NOTIFY IDENTIFIED NCAs**
- Deal should be notified to, and investigated by, identified NCAs in accordance with national merger control rules (jurisdictional, procedural and substantive rules)
- If Art. 9 referral made, NCA must inform parties of preliminary results within 45 WDs
- NCA has 15 WDs from national notification (or knowledge of transaction) to make Art. 22 referral to Commission
- If full referral made under Art. 4(4), then no need for ECMR notification

Note: “WD” indicates working days, excluding official Commission holidays
5. **PROCEDURE FOR THE NOTIFICATION OF CASES TO THE COMMISSION**

Where a transaction will give rise to a concentration with a Community dimension, it should be formally notified to the Commission prior to its implementation (unless it has been referred in whole to a NCA pursuant to the Article 4(4) procedures considered at Part 4). The notification should be made following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The notification can also be made at an earlier stage:

- if the undertakings concerned demonstrate to the Commission a **good faith intention** to conclude an agreement, for example on the basis of a Memorandum of Understanding (MoU) or a Letter of Intent (LoI); or

- in the case of a **public bid**, if they have publicly announced an intention to make such a bid.

The Commission has extensive powers of investigation under the Merger Regulation. In particular, it can seek information from the parties and third parties, either by simple requests or by formal decision. It is also able to conduct inspections at premises and examine books and records (but is not able to conduct searches at private homes). Furthermore, the Commission is entitled to interview any natural or legal person who consents, in order to collect information in relation to an investigation.

**Pre-notification discussions**

Within the Directorate-General for Competition, each operational Directorate has a mergers unit with officials who focus on handling Merger Regulation cases (including a number of officials seconded from the NCAs). In addition there are some staff operating under the Deputy Director-General for Mergers with responsibility for allocating new cases and ensuring that they are adequately resourced.\(^{11}\)

The Commission strongly encourages parties and their advisers to have pre-notification contacts with the Commission, even in seemingly non-problematic cases.\(^{12}\) These discussions are confidential and often take place before the transaction is announced (in general at least two weeks prior to notification and in some cases many months in advance). These discussions can be helpful to the parties for a number of reasons, including:

- They enable the parties to obtain informal advice on jurisdictional issues such as the calculation of turnover or whether a JV undertaking is “full-function”;

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\(^{11}\) Currently, the operational Directorates' prime areas of responsibility are as follows: Directorate B - energy, basic industries, chemicals and pharmaceuticals; Directorate C - information, communication and media (including telecommunications and postal services, information industries, internet and consumer electronics); Directorate D - services (including financial services, banking and insurance; transport and distributive trades); Directorate E - industry, consumer goods and manufacturing (including consumers goods and foodstuffs, mechanical and other manufacturing industries including transportation equipment). The Deputy Director-General with special responsibility for mergers is responsible for the work undertaken by those Directorates as regards Merger Regulation cases and reports to the Director-General, Philip Lowe. New cases are generally allocated to case teams at DG Competition's Merger Management Meetings, usually held on Monday afternoons.

\(^{12}\) For further guidance, see the Commission’s “Best practices on the conduct of EC merger control proceedings” (available on DG Competition's website). For cases with a strong transatlantic element, see also the EU-US Best Practices on cooperation in merger investigations (also available on DG Competition’s website).
In some cases, they can be used to discuss whether it may be appropriate to use the pre-notification referral procedures of Article 4(4) or 4(5) (see Part 4 above);

They allow the parties to discuss waivers from the strict requirements of the Form CO questionnaire, thereby minimising the risk of a formal notification being subsequently declared incomplete;

They assist in identifying any special concerns officials may have, thereby enabling the parties to address these in the notification and, if appropriate, to consider changes to the transaction;

Where the parties consent, they may enable the Commission to start the process of third party consultation before formal notification.

The notification forms

The Commission’s 2004 Implementing Regulation includes (as annexes) the forms to be used when notifying deals to the Commission. Form RS is to be used by parties making reasoned submissions requesting use of the pre-notification referral procedures (see Part 4 above). For formal notifications to the Commission, the forms to be used are as follows:

- **Form CO** specifies the information that notifying parties must generally provide when submitting a full-form notification. It requires extensive information on the parties, the transaction and the relevant markets, as well as contact details for customers, competitors, suppliers and trade associations whom the Commission will consult as part of its investigations;

- The **Short Form** may be used when notifying concentrations that are unlikely to raise competition concerns, i.e. those which are likely to qualify for the Commission’s simplified procedure (for which only a short-form clearance decision will be issued).\(^\text{13}\)

With the notification, the parties are also required to supply supporting documentation, including copies of the agreements bringing about the concentration, reports and accounts and also copies of analyses, reports, studies and surveys submitted to or prepared by or for the management board or shareholders meeting where these assess or analyse the concentration with respect to market shares, competitive conditions, rationale for the deal, etc.

\(^\text{13}\) For cases which do not raise any real competition issues, the Commission may make use of simplified procedures under which it only issues a short-form decision at the end of Phase I; for further guidance, see Commission Notice on a simplified procedure for treatment of certain concentrations under the Merger Regulation (OJ 2005 C556/32, 5.3.2005). Essentially, this procedure is available for: (a) joint ventures with EEA turnover and assets below €100 million; (b) concentrations where there is no horizontal market overlap between the parties, nor any vertical relationships; (c) concentrations where there is a horizontal overlap but with combined market shares below 15% or where there is a vertical relationship but market shares are below 25%; or (d) concentrations involving a move from joint to sole control of a pre-existing joint venture. About half of notifications are now dealt with under this simplified procedure.
The complete notification and supporting documents must be submitted to the Commission in hard copy together with 35 copies (for transmission *inter alia* to the NCAs).

**Suspension of the transaction**

A merger falling under the Merger Regulation cannot be implemented unless and until the Commission declares it compatible with the common market except:

> in the case of a **public bid** (or a series of transactions in securities listed on a stock exchange) - provided the concentration is notified to the Commission without delay and the acquirer only exercises voting rights attached to the securities in order to maintain the full value of its investment; or

> where the Commission has granted a **derogation** following a reasoned request from the parties (which may be made before the formal notification of the deal).

The validity of a transaction completed in breach will depend on the Commission's decision as to its compatibility with the common market. The Merger Regulation enables the Commission to dissolve a concentration which has already been implemented and has been found to be incompatible.

**Formal Phase I investigations**

Following receipt of the formal notification, including all information which the Commission considers necessary for the notification to be complete, the Commission has an initial period of 25 working days (which can be extended in certain circumstances) in which to conduct a formal investigation. This can often involve sending detailed requests for information (so-called Article 11 letters) to the parties and to third parties, including competitors and customers; it may also hold meetings as part of this process. At the end of the Phase I process the Commission will reach one or more of the following decisions:

> **Clearance**: The deal may proceed because it does not give rise to serious doubts about its compatibility with the common market;

> **Clearance subject to commitments**: Even where a deal raises serious competition concerns, it may nevertheless be the subject of a Phase I clearance decision subject to conditions, e.g. that the parties must divest certain businesses within a certain period following completion or must give commitments regarding their future behaviour. If parties wish to secure a Phase I clearance subject to such conditions, they must offer appropriate commitments no later than 20 working days following notification - in which event the usual 25 working days Phase I period is extended to 35 working days;

> **No jurisdiction**: The deal does not fall within the Merger Regulation because it is not a "concentration" or because it lacks a "Community dimension";

> **Article 9 referral**: The deal "threatens to affect significantly competition" in a distinct market within a Member State and can more appropriately be investigated at national level.
A referral will be made only if a NCA has made a formal request to that effect, whether on its own initiative or because it was invited by the Commission to do so. Deals may be referred to NCAs in whole or in part: in the case of a partial referral, the Commission will assess the non-referred part of the deal) (see Part 6 below); or

> **Launch of Phase II investigation.** The deal raises “serious doubts” as to its compatibility with the common market such that a more detailed Commission investigation is necessary.

**Formal Phase II investigations**

Phase II proceedings involve detailed in-depth investigations and impose significant burdens not only on the parties but also on the Commission and interested third parties who may be involved in the process. In addition to ongoing information gathering (including site visits in many cases), Phase II proceedings involve a number of formal steps by the Commission:

> Following further investigations, in most cases the Commission issues a written **Statement of Objections** to which the parties will generally respond with a written **Reply**;

> On issuing the Statement of Objections, the Commission will also grant the parties **access to the file**, whereby the parties are given access to copies of information obtained from third parties (subject to the removal of business secrets) during the course of the Commission’s investigations, so as to assist the parties in preparing their Reply to the Statement of Objections. Although the formal right of access to the file only arises once the Statement of Objections is issued, in accordance with its Best Practices guidelines the Commission will generally aim to give the parties access to non-confidential versions of **key documents** received from third parties (notably substantiated submissions running counter to the parties’ own contentions) at an earlier stage in the Phase II proceedings (and in some cases even at Phase I);

> There will be a formal **Oral Hearing** in Brussels should the parties request one;

> Prior to adoption of the final Phase II decision, the Commission will consult the **Advisory Committee** (made up of representatives of the NCAs) which issues an opinion on the draft decision;

> There is also the possibility of **State of Play meetings** (in addition to less formal meetings between the parties and Commission staff) at certain points in the process. Thus, it would be normal for the parties to have the opportunity of such a meeting during the course of Phase I if the case looks likely to raise “serious doubts” (so that the parties have the opportunity to table Phase I commitments before the expiry of the 20 working days deadline). State of Play meetings may also take place during Phase II investigations. The Best Practices guidelines provide for these at the following stages: (a) within a couple of weeks of the opening of Phase II proceedings (to facilitate the parties’ understanding of the Commission’s concerns, and the Commission’s understanding of the parties’ reactions, as well as to discuss the likely timeframe for the Phase II proceedings), (b) shortly in advance of the Statement of Objections (to help clarify certain issues and facts), (c) following the Reply to the Statement of Objections and the Hearing (which may serve as a basis for discussing the scope and timing of any remedial
commitments), and (d) in advance of the Advisory Committee meeting (which should enable a discussion of the market-testing of any commitments tabled by the parties and possible final improvements). In addition to these bilateral meetings between the parties and the DG Competition staff, the Commission’s Best Practices guidelines also envisage the possibility of triangular meetings where the views of the notifying parties and opposing third parties can be heard in a single forum (generally in advance of the Statement of Objections); and

> In most Phase II cases, DG Competition now establishes a Peer Review Panel comprising three or so Commission officials with no prior involvement in the case under review. These officials are given access to the file and will scrutinise the draft Statement of Objections prepared by their colleagues, acting as a “fresh pair of eyes” or “devil’s advocates”, with a view to improving the quality of the Statement of Objections and the prospect of the final Phase II decision standing up to challenge before the Court (e.g. in the event of a subsequent appeal by the parties or by third parties). These are internal checks within the Commission, so the parties do not have formal meetings with the Panel.

The Merger Regulation provides for a standard Phase II investigation period of 90 working days. If the parties offer commitments, this Phase II time period is automatically extended to 105 working days, unless the parties offer commitments less than 55 working days from the start of Phase II. The general deadline for offering commitments is 65 working days from the start of Phase II. The Phase II timetable may also be extended by up to 20 working days in complex cases at the request of the parties (if requested within 15 working days of the start of Phase II) or, at any time, by the Commission with the consent of the parties. There are also procedures for the Commission to stop the clock if the parties have not supplied information required by the Commission for its investigations. These procedures are summarised in the box overleaf.

Following a Phase II investigation, the Commission will either clear the deal (often subject to conditions) or prohibit it (unless the deal has already been abandoned by the parties14). Phase II decisions are adopted by the full College of Commissioners.

Compliance with commitments

In cases where the Commission’s final clearance decision (at Phase I or Phase II) is made subject to conditions, compliance with those commitments is vigorously enforced by the Commission. This almost invariably involves the parties appointing a trustee (or trustees) to monitor compliance with the commitments. Typically the trustee must be given the power to divest the identified divestment package (at no minimum price) if the parties themselves are unable to identify an acceptable purchaser within the specified period.15 Failure to comply with remedial commitments

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14 DG Competition has made available an Information Note on the abandonment of Concentrations (2005) on its website setting out the steps required for a deal to be viewed as abandoned by the Commission.

15 For further guidance on remedies acceptable to solve competition problems, see Commission Notice on commitments submitted to the Commission under the Merger Regulation (OJ 2001 C68/3, 2.3.2001) and the Commission’s Best Practice Guidelines for Divestiture Commitments (available on DG Competition’s website). The commission is aiming to publish a revised version of the Notice for Consultation in 2006.
can be punishable by a fine of up to 10% of turnover. In the case of concentrations that have been implemented in contravention of a condition attached to the clearance decision the Commission has the power to take measures necessary to ensure that the concentration is dissolved and that the pre-concentration market position and effective competition are restored.

Statistics

The tables at Annex 1 give an overview of Merger Regulation cases over the years. The vast majority of cases are cleared at Phase I (many using the simplified procedure). In recent years a significant number have been cleared at Phase I only after the parties agreed changes to the deal (including major divestments in several cases).

Of Phase II cases, about half have been cleared by the Commission only after the parties agreed to certain conditions. These commitments are usually of a “structural” nature (i.e. involving divestments of overlapping businesses), although several involve “behavioural” commitments (which require ongoing monitoring by the Commission). Of the remaining Phase II cases, either the parties have withdrawn their notifications (abandoning the deal) or the Commission has concluded the proceedings with an unconditional clearance or an outright prohibition.
### PHASE II PROCEDURE

<table>
<thead>
<tr>
<th>Basic Phase II deadline: 90 WDs</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; calculated from WD following initiation of Phase II proceedings</td>
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</table>

<table>
<thead>
<tr>
<th>Extra time in event of Phase II commitments: +15 days = 105 WDs</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; objective: to allow extra time to consult third parties and NCAs</td>
</tr>
<tr>
<td>&gt; exception: if remedies submitted less than 55 WDs into Phase II</td>
</tr>
<tr>
<td>&gt; deadline for offering Phase II commitments: 65 WDs into Phase II (automatically extended by agreed “stop the clock”, referred to below)</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Extra time in event of agreed “stop the clock”: + max 20 WDs</th>
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</thead>
<tbody>
<tr>
<td>&gt; objective: for complex Phase II cases to allow for investigation/verification of facts</td>
</tr>
<tr>
<td>&gt; only possible:</td>
</tr>
<tr>
<td>- at request of parties (one request only, to be made within 15 WDs of initiation of proceedings), or</td>
</tr>
<tr>
<td>- with the consent of the parties (if proposed by the Commission at any stage in the process)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Extra time in event of “stop the clock” where party responsible: potentially indefinite</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; the equivalent provision under old ECMR was used in a number of cases to extend timetable; it remains to be seen whether this provision will be used extensively under the new ECMR</td>
</tr>
</tbody>
</table>

*NB: These “stop the clock” provisions may also be used at Phase I*

Thus it would not be unusual for the Phase II timetable to extend to 125 WDs plus Commission holidays (which can equate in total to 6-7 months), and potentially longer if the Commission “stops the clock” e.g. on the grounds that the parties did not supply information requested by the Commission.
6. EXCLUSIVE JURISDICTION AND EXCEPTIONS (INCLUDING POST-NOTIFICATION REALLOCATION OF CASES)

Concentrations with a Community dimension generally fall under the exclusive jurisdiction of the European Commission, to the exclusion of the NCAs throughout the EEA. Member States may, however, intervene in the following exceptional cases:

> Under the Article 9 procedure a Member State can request that a concentration notified to the Commission under the Merger Regulation be referred to it (in whole or part) if the deal (a) threatens to affect significantly competition in a market within that Member State which presents all the characteristics of a distinct market or (b) affects competition in a market within that Member State which presents all the characteristics of a distinct market and does not constitute a substantial part of the common market. The Member States have 15 working days (from receipt of their copy of the notification) in which to make such a request. If such a request is made, the Phase I timetable is extended from 25 to 35 working days. The Commission must then accept or reject the request. If the Commission accepts the request and the case is referred to the Member State, the NCA has no fixed timeframe within which to reach its final decision; however, it must inform the Commission of its preliminary assessment and proposed future actions within 45 working days (and must reach a final decision without undue delay);

> Member States can also intervene to take appropriate measures to protect legitimate interests other than competition, e.g. public security, plurality of the media and prudential rules for financial services such as in the banking and insurance sectors (Article 21(4) of the Merger Regulation); and

> In the defence sector the Member States may prevent parties from notifying military aspects of merger deals to the Commission (Article 296 of the EC Treaty).

Article 22 of the Merger Regulation provides that one or more NCAs may request the Commission to review a concentration without a Community dimension provided the concentration affects trade between Member States and threatens to affect significantly competition within the territory of the Member State or States making the request. The Article 22 procedure includes time limits for the consideration of cases: a request must be made to the Commission within 15 working days of the concentration being notified to the Member State.

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16 Transactions falling within the Merger Regulation may also raise issues in jurisdictions outside the EEA, whether elsewhere in Europe (e.g. Switzerland, Bulgaria, Romania) or further afield (e.g. USA, Canada, Brazil, South Africa, Australia). In international merger cases, the Commission increasingly seeks to cooperate with the competition authorities in relevant third country jurisdictions. See also Part 4 above which describes the possibility for a concentration with a Community dimension to be referred to a NCA under Article 4(4).

17 In 2002 the NCAs agreed a number of principles on the application of Article 22 (these are available on several of the NCAs’ websites). See also Part 4 above which describes the possibility for a concentration without a Community dimension to be referred to the Commission under Article 4(5) in which case it will be deemed to have a Community dimension.
7. SUBSTANTIVE APPRAISAL OF CONCENTRATIONS

In appraising the compatibility of a concentration with the common market under the new Merger Regulation, the Commission must make a prospective analysis of whether the concentration would "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" (Article 2(2) and (3)). This substantive test is sometimes referred to as the "SIEC" test to distinguish it from the earlier "dominance" test which existed under the previous Merger Regulation. The SIEC test is generally viewed as similar to the "SLC" (substantial lessening of competition) test which exists in a number of other jurisdictions, including the UK and USA. The Courts have interpreted the notion of "dominance" to include collective dominance, including mergers in oligopolistic markets giving rise to "coordinated effects" (or "tacit collusion"). Recital 25 to the Merger Regulation explains the rationale behind the new SIEC test in terms of a desire to ensure that the non-coordinated effects of a merger in an oligopolistic market can be caught. It states that the notion of a significant impediment to effective competition should be extended beyond the existing concept of dominance "only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the markets concerned."

If the concentration involves the establishment of a cooperative joint venture undertaking, the Commission must also determine whether it is compatible with the provisions of Article 81 of the EC Treaty (Article 2(4) and (5)) (see page 24 below).

The SIEC test

There has been much discussion and debate over whether the new SIEC test will have a significant effect on the standards applied by the Commission in deciding whether to open Phase II proceedings or whether to seek commitments from the parties or even to prohibit deals. Much of this debate focused on whether there was a "gap" under the old dominance test, in particular if a merger raised serious competition concerns but resulted neither in a firm enjoying a strong No. 1 position of say 40-50% or more in a market (indicative of single-firm dominance) nor in the creation or strengthening of an oligopolistic market structure conducive to tacit collusion between a small group of players (indicative of collective dominance). Some of these concerns were driven by the fact that in 2002 the Court of First Instance annulled three Commission Phase II prohibition decisions on the basis that the Commission had failed to prove that the deals were caught by the old Merger Regulation’s dominance test.18

To the extent that certain cases fall within such a "gap", it will continue to be a matter of debate - on a case-by-case basis - whether the new SIEC test should be applied to prohibit or impose conditions on the deal. The Commission has indicated that it will continue to apply an economics-focused approach to the assessment of mergers and that it does not expect its policy towards mergers to change as a result of the new test; however, it is generally perceived that the SIEC test gives a wider degree of discretion to the Commission. Nevertheless, it can be

18 Judgments of the Court of First Instance in 2002 regarding the Commission’s Phase II prohibitions of Airtours/First Choice, Schneider/Legrand and Tetra Laval/Sidel.
expected that the Court will require the Commission to put forward convincing evidence that the merger would be incompatible with the maintenance and development of effective competition - and that the standards will be particularly high if the case does not involve the creation or strengthening of single-firm dominance or the likelihood of tacit coordination between the members of an oligopoly. This ultimate check imposed by the possibility of an appeal to the Court may provide some comfort to notifying parties; however, the Commission does not need to go to Court to prohibit a deal. The Commission has sought to allay concerns by introducing a number of procedural checks and balances to its administrative process and also by publishing guidelines providing a sound economic framework for the application of its merger control policy. The Commission’s 2004 Horizontal Merger Guidelines are expected to be supplemented by draft guidelines on non-horizontal mergers (i.e. mergers raising vertical or conglomerate concerns) later in 2006.

The Horizontal Guidelines set out the factors that the Commission will consider when appraising whether a merger is likely to have anti-competitive effects. Adopting an economics-based approach, the Guidelines identify two main ways in which horizontal mergers may significantly impede effective competition:

> In the case of so-called “unilateral” effects (sometimes called “non-coordinated” effects) the Commission will examine whether the merger eliminates important competitive constraints on one or more firms, which consequently would enjoy increased market power. These concerns can arise in situations of single-firm dominance or potentially in some mergers in oligopolistic markets; and/or

> In the case of coordinated effects the Commission will examine whether the pre- and/or post-merger market structure is oligopolistic (e.g. limited to say only three or four major players) and whether the merger will facilitate “tacit collusion” between the members of that oligopoly with the consequence of prices being raised, output being reduced or other harmful effects on competition. In making this assessment, the Commission will examine the structure of the market and the past behaviour of firms on the market, (notably whether there is a stable economic environment conducive to tacit collusion, whether it is possible to monitor compliance with the terms of tacit coordination and whether there is a form of deterrent mechanism to prevent deviation).

**Dominance and non-coordinated effects**

**Dominance** equates to a position of market power which allows a party (or parties) to behave to a considerable extent independently of other competitors, customers and ultimately consumers. In the context of a merger or acquisition, the critical factor tends to be the extent to which the merged entity may, as a result of the merger, be able to raise prices (or reduce choice or levels of innovation) without losing customers.

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19 These include the creation of a Chief Economist position in 2003, with a staff of qualified economists who can be called upon to assist the DG Competition case teams. They also involve the introduction of Peer Review Panels for more challenging Phase II cases and various other procedural improvements outlined in its 2004 Best Practices guidelines (see Part 5 above).

In making this assessment, the Commission places considerable reliance on the parties’ market shares on markets affected by the merger. Traditionally, market share figures of more than 40% may be regarded as indicative of **single-firm dominance**. There is a tendency for the Commission to define product markets narrowly for these purposes. However, depending on the products or services concerned, the Commission may be prepared to define the relevant geographic market as EU-wide or even global. In other cases the Commission will look at markets at the Member State level or even locally.

In defining relevant markets and appraising the parties’ market positions, the Commission also takes account of factors, such as:

- **Whether the merging firms are close competitors**: If the parties’ products are particularly close substitutes (compared with those of other competitors), this will generally increase the risk of significant price rises following the merger as rivals’ products are less likely to act as a constraint on pricing;

- **Entry and expansion conditions**: If barriers to market entry or expansion by other players are low (and such entry or expansion is realistic) a substantial increase in market share and concentration may nevertheless not raise competition concerns;

- **Actual or potential competition**: The ability of the merged group to raise prices may be constrained by actual or potential competition from other undertakings (within or outside the EU), including their ability to increase output (e.g. if they have spare capacity) and increase sales if the merged group were to seek to increase prices;

- **Buyer power**: The merged group may also be constrained by countervailing power of customers (including their ability to switch to other suppliers);

- **Other relevant supply and demand considerations**: These may include whether the merging parties are vertically integrated or otherwise control or exercise influence over the supply of inputs or demand for outputs, e.g. through ownership of intellectual property rights;

- **Whether the merger eliminates an important competitive force**: Some firms may have more of an influence on the competitive process than their market shares may suggest, e.g. a recent new entrant which may have innovative new products or be expected to play the role of a maverick in a concentrated market.

### Collective dominance and coordinated effects

An oligopolistic market is one which is dominated by a relatively small number of major players, even if none enjoys a position of **single-firm dominance**. The term “duopoly” may be used to describe a two-firm oligopoly; “oligopolies” may be found to exist even where three or more firms are involved.
more substantial players are active in the relevant market. In 1999 the Court of First Instance upheld the Commission’s view that a position of collective dominance can occur “where a mere adaptation by members of the oligopoly to market conditions causes anti-competitive parallel behaviour whereby the oligopoly becomes dominant. Active collusion would therefore not be required for members of the oligopoly to become dominant and to behave to an appreciable extent independently of their remaining competitors, their customers and, ultimately, the consumers” (Gencor/Lonrho). An oligopolistic market may provide opportunities for “tacit collusion” by the members of the oligopoly where “cheating” (i.e. deviations from the tacitly coordinated pricing or output levels) can be monitored (because of market transparency) and punished (through some form of deterrent mechanism or retaliation measures). Thus the Commission takes the line that it can prohibit a concentration in an oligopolistic market if it would result in or reinforce a market structure where it would be economically rational (or more rational) for members of the oligopoly, in adapting themselves to market conditions, to act in ways which will substantially reduce competition between them.

Accordingly, where a concentration may raise oligopoly concerns, the parties will need to demonstrate that it will not result in a market structure which would create incentives for the remaining major players on the relevant markets to constrain capacity, discourage market entry or otherwise distort competition - to the detriment of customers (e.g. higher prices) or of smaller competitors or “mavericks” outside the oligopoly (e.g. reducing their competitiveness or even driving them out of the market in the longer term). For these purposes, historical analyses of the past level of competition in the relevant market (including variations in market shares and prices) may assist. While cautioning against adopting a mechanical “checklist” approach, the Commission typically expects to find some of the following characteristics in an oligopolistic market:

> **product homogeneity** (e.g. “commodity” markets) with limited differentiation in the nature and pricing of the products. Oligopoly concerns are less likely to arise where suppliers offer differentiated product ranges and/or different distribution methods and associated services with different customers having different requirements (e.g. in terms of product quality, reliability of supply, contract terms);

> **high market transparency** regarding key competitive parameters (e.g. production capacities, output or prices);

> **stagnant and inelastic demand growth**, given that volatile demand will generally make coordination less likely;

> **low levels of technological change**, recognising that in markets where innovation is important it will be possible for one firm to gain a major advantage over its rivals, so it will not be attractive to seek a tacitly coordinated outcome;

> **substantial entry barriers**;

> interdependence and extensive commercial links, giving rise to multi-market contacts between the major suppliers;
>  **Symmetries or similarities** between the major suppliers’ business activities in terms of:

- cost structures,
- market shares,
- capacity levels,
- levels of vertical integration;

>  **Insignificant buyer power.**

**Other considerations addressed by the Horizontal Guidelines**

In appraising concentrations under the Merger Regulation, the Commission will also consider any **efficiencies** that the parties expect to flow from the merger. Thus, if the parties can put forward substantiated and verifiable evidence of cost-savings or other merger-specific efficiencies, the Commission may rely on these to find the merged entity will be better placed to act pro-competitively for the benefit of consumers (thereby counteracting the adverse effects on competition which the merger might otherwise have). With regard to the merger-specific aspect, it is necessary to demonstrate that there are no less anti-competitive, realistic and attainable alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) than the notified merger which preserve the claimed efficiencies.

In very exceptional circumstances the Commission may conclude that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a **failing firm**. For these purposes, however, it is necessary to demonstrate that:

>  the failing firm would in the near future be forced out of the relevant market because of financial difficulties;

>  there is no less anti-competitive alternative deal (as may be verifiable by the fact that various other scenarios have been explored without success); and

>  in the absence of the deal, the assets of the failing firm would inevitably exit the market (which may, in the case of a merger between the only two players in a market, justify such a merger-to-monopoly on the basis that the market share of the failing firm would in any event have accrued to the other merging party).

**Vertical mergers and conglomerate mergers**

**Vertical mergers.** Vertical mergers are mergers between firms that operate at different, but complementary, levels in the chain of production and/or distribution. They may give rise to competition concerns, in particular if the merger is expected to foreclose market access anti-competitively. Competition concerns will only arise when the merging firms involved have
a substantial level of market power in one or more markets along the supply chain. In such circumstances, a vertically integrated firm may be able to foreclose rivals from either an upstream market for the supply of inputs or a downstream market for distribution or sales.

**Conglomerate mergers:** Conglomerate mergers involve firms that operate in different product markets and, in general, do not raise competition issues. However, in circumstances where the products acquired are complementary to the acquirer’s own products, such a merger may give rise to competition concerns, in particular, those relating to so-called “portfolio power”. A company may acquire portfolio power when the market power deriving from a portfolio of brands exceeds the sum of its parts, thereby enabling it to exercise market power in individual markets more effectively.

**Cooperative joint ventures**

A joint venture is “cooperative” where it has as its object or effect the coordination of the competitive behaviour of its parents. In making this appraisal, the Commission has regard to the risks of any spillover effects arising from the presence (to a material extent) of two or more of its parents:

- in the **same** markets as the JV;
- in markets **downstream** or **upstream** from that of the JV; or
- in **neighbouring** markets closely related to the JV’s market.

Where a joint venture is “cooperative” in this sense, it may be caught by the Article 81(1) prohibition; in such cases, the Commission must also examine (in accordance with Article 2(4) of the Merger Regulation) whether any coordinative aspects satisfy the exemption criteria of Article 81(3). In effect, the Commission conducts an economic balance sheet analysis. It appraises whether any potential for elimination of competition (through coordination between the parents) is outweighed by likely benefits which may result (e.g. through improvements in production, technology or distribution); a fair share of those benefits should flow to consumers.

Where a joint venture raises significant spillover effects, there will be a high possibility of a Phase II investigation to appraise these Article 81 issues. If a JV involves two or more parents retaining significant activities on the same market as the JV, then there will be a real risk of a prohibition decision. It may prove necessary for the parties to offer commitments in order to ensure either that the risk of spillover effects is removed or that the Article 81(3) criteria are satisfied.

**Ancillary restraints**

The Merger Regulation also provides that a decision approving a merger (whether at Phase I or Phase II) shall be deemed to cover any restrictions that are “ancillary” to the concentration, i.e. “directly related and necessary to the implementation of the concentration” such that they will not be caught by Article 81(1). This may cover, for example, typical vendor non-compete clauses, interim purchase and supply agreements or technology licences between the parties, etc. The
Commission is not required to rule on such issues as part of its Merger Regulation appraisal; only in exceptional circumstances, where a case raises novel and unresolved questions giving rise to genuine uncertainty, will the Commission consider such issues if requested by the notifying parties.\(^{22}\)

Where restrictions are not ancillary to a concentration, they may be caught by Article 81(1) if they have an appreciable effect on competition in the EU and on trade between Member States. Any such agreements will be subject to scrutiny under the general competition rules (including whether they may satisfy the exemption criteria of Article 81(3)).

**Review**

The Court of First Instance (CFI) has the power to review the legality of all Commission decisions, including decisions under the ECMR. An appeal can be brought not only by the merging parties, but also by third parties “directly and individually concerned” by the decision. Until June 2002, no Commission prohibition decision under the ECMR had been successfully challenged. However, the *Airtours/First Choice* decision was the first of a series of prohibition decisions overturned by the CFI (see Annex 1D). These judgments, by scrutinising the Commission’s fact finding and economic analysis, increased the intensity of regulatory review of Commission decisions. As a result of the CFI judgments overturning the Commission decisions, in combination with the introduction of a new ‘fast track’ procedure which significantly shortens the length of judicial review proceedings to seek review of Commission decisions, recourse to the CFI is expected to become more common.

The filing of an appeal against an act of the Commission does not suspend the application of that act, but the CFI may on application, if it considers that circumstances so require, order that the application of the contested act be suspended and prescribe any necessary “interim measures”.

The CFI also has jurisdiction to review decisions imposing penalty payments or fines and, where appropriate, it may increase, reduce or cancel any such sanction.

Appeals from the CFI to the European Court of Justice (ECJ) may only be made on a point of law. The only possible grounds for appeal are: lack of competence of the CFI; breach of the CFI’s procedure, adversely affecting the appellant; or breach of EC law.

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March 2006

*This memorandum is for general information only. It is not intended to contain definitive legal advice which should be sought, as appropriate, in relation to any particular transaction. If legal advice is required please contact your usual adviser at Slaughter and May or any member of the Firm’s Competition Group.*

\(^{22}\) For further guidance, see the Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C56/24, 5.3.2005).
ANNEX 1: MERGER REGULATION STATISTICS (1990-2005)

A. Total number of notifications and referrals by year

<table>
<thead>
<tr>
<th>Year</th>
<th>Notifications to Commission</th>
<th>Referrals from Member States to Commission</th>
<th>Referrals from Commission to Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>pre-notification (Art 4(5))</td>
<td>post-notification (Art 22)</td>
</tr>
<tr>
<td>1990</td>
<td>12</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1991</td>
<td>63</td>
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<td>-</td>
</tr>
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<td>-</td>
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<td>313</td>
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<tr>
<td>Total</td>
<td>2,961</td>
<td>39</td>
<td>12</td>
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### B. Different Phase I outcomes by year

<table>
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<tr>
<th>Year</th>
<th>Clearance decisions</th>
<th></th>
<th>No jurisdiction decisions</th>
<th>Referred to Phase II</th>
<th>Notifications withdrawn during Phase I</th>
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<tbody>
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<td></td>
<td>Unconditional</td>
<td>Conditional</td>
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<tr>
<td>1990</td>
<td>5 (71%)</td>
<td>- (71%)</td>
<td>2 (29%)</td>
<td>- (29%)</td>
<td>- (29%)</td>
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<td>1991</td>
<td>47 (77%)</td>
<td>3 (6%)</td>
<td>5 (8%)</td>
<td>6 (8%)</td>
<td>3 (8%)</td>
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<td>1992</td>
<td>43 (68%)</td>
<td>4 (6%)</td>
<td>9 (14%)</td>
<td>4 (6%)</td>
<td>3 (6%)</td>
</tr>
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<td>1993</td>
<td>49 (84%)</td>
<td>6 (7%)</td>
<td>4 (7%)</td>
<td>4 (7%)</td>
<td>1 (7%)</td>
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<td>1994</td>
<td>78 (80%)</td>
<td>2 (3%)</td>
<td>5 (7%)</td>
<td>6 (7%)</td>
<td>6 (7%)</td>
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<tr>
<td>1995</td>
<td>90 (80%)</td>
<td>3 (3%)</td>
<td>9 (8%)</td>
<td>7 (8%)</td>
<td>4 (8%)</td>
</tr>
<tr>
<td>1996</td>
<td>109 (87%)</td>
<td>- (7%)</td>
<td>6 (5%)</td>
<td>6 (5%)</td>
<td>5 (5%)</td>
</tr>
<tr>
<td>1997</td>
<td>118 (82%)</td>
<td>2 (1%)</td>
<td>4 (3%)</td>
<td>11 (3%)</td>
<td>9 (3%)</td>
</tr>
<tr>
<td>1998</td>
<td>207 (86%)</td>
<td>12 (5%)</td>
<td>6 (2%)</td>
<td>12 (2%)</td>
<td>5 (2%)</td>
</tr>
<tr>
<td>1999</td>
<td>236 (83%)</td>
<td>19 (7%)</td>
<td>1 (0%)</td>
<td>20 (1%)</td>
<td>7 (1%)</td>
</tr>
<tr>
<td>2000</td>
<td>293 (84%)</td>
<td>28 (8%)</td>
<td>1 (0%)</td>
<td>19 (1%)</td>
<td>8 (1%)</td>
</tr>
<tr>
<td>2001</td>
<td>299 (87%)</td>
<td>13 (4%)</td>
<td>1 (0%)</td>
<td>22 (4%)</td>
<td>8 (4%)</td>
</tr>
<tr>
<td>2002</td>
<td>240 (92%)</td>
<td>10 (4%)</td>
<td>1 (0%)</td>
<td>7 (3%)</td>
<td>3 (3%)</td>
</tr>
<tr>
<td>2003</td>
<td>203 (91%)</td>
<td>11 (5%)</td>
<td>- (5%)</td>
<td>9 (5%)</td>
<td>- (5%)</td>
</tr>
<tr>
<td>2004</td>
<td>220 (91%)</td>
<td>12 (5%)</td>
<td>- (5%)</td>
<td>8 (5%)</td>
<td>3 (5%)</td>
</tr>
<tr>
<td>2005</td>
<td>276 (90%)</td>
<td>15 (5%)</td>
<td>- (5%)</td>
<td>10 (3%)</td>
<td>6 (3%)</td>
</tr>
<tr>
<td>Total</td>
<td>2,513 (86%)</td>
<td>134 (5%)</td>
<td>54 (2%)</td>
<td>151 (5%)</td>
<td>68 (5%)</td>
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</tbody>
</table>
C. Different Phase II outcomes by year

<table>
<thead>
<tr>
<th>Year</th>
<th>Clearance decisions</th>
<th>Prohibition decisions</th>
<th>Notifications withdrawn during Phase II</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unconditional</td>
<td>Conditional</td>
<td></td>
</tr>
<tr>
<td>1991</td>
<td>1 (20%)</td>
<td>3 (60%)</td>
<td>1* (20%)</td>
</tr>
<tr>
<td>1992</td>
<td>1 (25%)</td>
<td>3 (75%)</td>
<td>-</td>
</tr>
<tr>
<td>1993</td>
<td>1 (25%)</td>
<td>2 (50%)</td>
<td>-</td>
</tr>
<tr>
<td>1994</td>
<td>2 (40%)</td>
<td>2 (40%)</td>
<td>1b (20%)</td>
</tr>
<tr>
<td>1995</td>
<td>2 (29%)</td>
<td>3 (42%)</td>
<td>2c (29%)</td>
</tr>
<tr>
<td>1996</td>
<td>1 (12%)</td>
<td>3 (38%)</td>
<td>3d (38%)</td>
</tr>
<tr>
<td>1997</td>
<td>1 (11%)</td>
<td>7 (78%)</td>
<td>1e (11%)</td>
</tr>
<tr>
<td>1998</td>
<td>3 (25%)</td>
<td>4 (30%)</td>
<td>2f (15%)</td>
</tr>
<tr>
<td>1999</td>
<td>-</td>
<td>8 (57%)</td>
<td>1g (7%)</td>
</tr>
<tr>
<td>2000</td>
<td>3 (13%)</td>
<td>12 (52%)</td>
<td>2h (9%)</td>
</tr>
<tr>
<td>2001</td>
<td>5 (21%)</td>
<td>10 (42%)</td>
<td>5i (21%)</td>
</tr>
<tr>
<td>2002</td>
<td>2 (25%)</td>
<td>5 (62%)</td>
<td>-</td>
</tr>
<tr>
<td>2003</td>
<td>2 (25%)</td>
<td>6 (75%)</td>
<td>-</td>
</tr>
<tr>
<td>2004</td>
<td>2 (22%)</td>
<td>4 (44%)</td>
<td>1j (11%)</td>
</tr>
<tr>
<td>2005</td>
<td>2 (25%)</td>
<td>3 (38%)</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>28 (19%)</td>
<td>75 (50%)</td>
<td>19 (13%)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>27 (18%)</td>
<td></td>
</tr>
</tbody>
</table>

For ease of reference, the 19 Art 8(3) prohibition decisions (adopted by the Commission under the ECMR in the period through to the end of 2005) are separately listed in the notes beneath the table.

---

5 Case M.800 Blokker/Toys “R” Us (26 June 1997), OJ 1998 L316/1 (completed merger for which the Commission also adopted an Art 8(4) decision requiring divestments).
7 Case M.1524 Airtours/First Choice (22 September 1999), OJ 2000 L93/1; annulled on appeal to CFI in Case T-342/99, but merger abandoned; MyTravel (the successor company of Airtours) subsequently brought an action against the Commission seeking compensation for damages pursuant to Article 288 of the EC Treaty; Case T-212/03 MyTravel v Commission (still pending).
8 Case M.1672 Volvo/Scania (14 March 2000), OJ 2001 L143/74; Case M.1741 MCI Worldcom/Sprint (28 June 2000), OJ 2003 L300/1; annulled on appeal to CFI in Case T-310/00, but merger abandoned.
9 Case M.2097 SCA/Metallic Structure (31 January 2001), OJ 2002 L57/1; Case M.2220 General Electric/Honeywell (3 July 2001), OJ 2004 L48/1; upheld by the CFI in Cases T-209/01 Honeywell v Commission and T-210/01 General Electric v Commission, judgments of 14 December 2005 (not yet reported), but merger abandoned; Case M.2283 Schneider/Legrand (10 October 2001), OJ 2004 L101/1 and L101/134; completed merger for which the Commission also adopted an Art 8(4) decision requiring divestments; annulled on appeal to CFI in Cases T-310/01 and T-77/02, but renewed Phase II proceedings subsequently opened and merger abandoned by way of divestment; subject of action for damages under Article 288 of the EC Treaty in Case T-351/03 Schneider Electric SA v Commission (still pending); Case M.2187 CVC/Interstaging (17 October 2001), OJ 2004 L82/0/20; Case M.2416 Gota-Laval/Soder (30 October 2001), OJ 2004 L381/1 and L431/13; completed merger for which the Commission also adopted an Art 8(4) decision requiring divestments; annulled on appeal to CFI in Case T-5/02, and subsequently approved subject to conditions in renewed Phase I proceedings.
10 Case M.3440 ENI/EDP/GDP (9 December 2004); upheld on appeal to CFI in Case T-87/05.

---

28 Slaughter and May
ANNEX 2: OUTLINE OF NATIONAL MERGER CONTROL REGIMES IN THE EEA

*NB:* Special rules may apply for certain sectors, e.g. banks, insurance, media, regulated utilities.

A. The 25 EU Member States

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Jurisdictional criteria</th>
<th>Notification requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>(a) combined worldwide turnover of €300m; and (b) combined turnover in Austria of €30m;</td>
<td>Mandatory prior notification to Bundeswettbewerbsbehörde (Federal Competition Authority)</td>
</tr>
<tr>
<td></td>
<td>(c) at least two parties each have worldwide turnover of €5m</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Exceptionally, no jurisdiction of:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(i) only one party has turnover in Austria for €5m; and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(ii) combined turnover of all other parties is less than €30m</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>(a) combined turnover in Belgium of €100m; and</td>
<td>Mandatory prior notification to Conseil de la Concurrence/Raad voor de Mededinging (Competition Council)</td>
</tr>
<tr>
<td></td>
<td>(b) at least two parties each have turnover in Belgium of €40m</td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td>(a) at least two parties each have turnover in Cyprus of CYP 2m (c. €3.5m); and</td>
<td>Mandatory prior notification to Commission for the Protection of Competition</td>
</tr>
<tr>
<td></td>
<td>(b) at least one party carries on business in Cyprus; and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(c) combined turnover in Cyprus of CYP 2m (c. €3.5m)</td>
<td></td>
</tr>
<tr>
<td>Czech Republic</td>
<td>(a) combined turnover in Czech Republic of CZK 1,500m (c. €50m); and</td>
<td>Mandatory prior notification to Úřad pro Ochrannou Hospodářské Soutěže (Office for the Protection of Economic Competition)</td>
</tr>
<tr>
<td></td>
<td>(b) each of at least two parties has turnover in Czech Republic of CZK 250m (c. €9m);</td>
<td></td>
</tr>
<tr>
<td></td>
<td>or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(a) at least one party (which must be the target in the case of a share or asset acquisition) has turnover in Czech Republic of CZK 1,500m (c. €50m); and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) at least one other party has worldwide turnover of CZK 1,500m (c. €50m)</td>
<td></td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Jurisdictional criteria</td>
<td>Notification requirements</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>Denmark</td>
<td>(a) combined turnover in Denmark of DKK 3,800m (c. €510m); and (b) at least two parties each have turnover in Denmark of DKK 300m (c. €40m); or (a) at least one party has turnover in Denmark of DKK 3,800m (c. €510m); and (b) at least one other party has worldwide turnover of DKK 3,800m (c. €510m)</td>
<td>Mandatory prior notification to Koncurrencestyrelsen (Competition Authority)</td>
</tr>
<tr>
<td>Estonia</td>
<td>(a) combined worldwide turnover of EEK 500m (c. €30 million); (b) combined worldwide turnover of each of at least two parties of EEK 100m (c. €6m); and (c) at least one party carries on business in Estonia</td>
<td>Mandatory prior notification to Konkurentsiamet (Competition Board)</td>
</tr>
<tr>
<td>Finland</td>
<td>(a) combined worldwide turnover of €350m; and (b) at least two parties each have turnover in Finland of €20m</td>
<td>Mandatory prior notification to Kilpailuvirasto (Competition Authority)</td>
</tr>
<tr>
<td>France</td>
<td>(a) combined worldwide turnover of €150m; and (b) at least two parties each have turnover in France of €50m</td>
<td>Mandatory prior notification to DGCCRF (Direction Générale de la Concurrence de la Consommation et de la Répression des Fraudes) at Ministry of Economy, Finance and Industry (MINEFI)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Jurisdictional criteria</td>
<td>Notification requirements</td>
</tr>
<tr>
<td>--------------</td>
<td>------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>Germany</td>
<td>(a) combined worldwide turnover of €500m; and (b) at least one party has turnover of €25m in Germany</td>
<td>Mandatory prior notification to Bundeskartellamt (Federal Cartel Office)</td>
</tr>
<tr>
<td></td>
<td>Exceptionally, no jurisdiction if: (i) there is an independent (non-affiliated) undertaking, merging with another undertaking, which has worldwide turnover of less than €10m; or (ii) the only relevant market is a minor market where goods/services have been offered for at least five years with total annual sales of less than €15m</td>
<td></td>
</tr>
<tr>
<td>Greece</td>
<td>Pre-merger notification if: (a) combined turnover of €150m; and (b) each of at least two parties has turnover in Greece of €15m</td>
<td>Mandatory prior or post merger notification to Hellenic Competition Commission (depending on jurisdictional criteria)</td>
</tr>
<tr>
<td></td>
<td>Post-merger notification if: (a) combined market share of at least 10 per cent; or (b) at least two undertakings have turnover in Greece of €15m</td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>(a) combined turnover in Hungary of HUF 15,000m (c. €60m); and (b) at least two parties each have turnover of HUF 500m (c. €2m)</td>
<td>Mandatory prior notification to Gazdasági Versenyhivatal (Office of Economic Competition)</td>
</tr>
<tr>
<td>Ireland</td>
<td>(a) at least two parties each have worldwide turnover of €40m; and (b) at least two parties carry on business in any part of the island of Ireland (ie including Northern Ireland); and (c) at least one party has turnover in the Irish Republic of €40m</td>
<td>Mandatory prior notification to Competition Authority</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Jurisdictional criteria</td>
<td>Notification requirements</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------------------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>Italy</td>
<td>(a) combined turnover in Italy of €421m; or (b) target has turnover in Italy of €42m <em>(Thresholds are revised annually to take account of inflation; above figures were revised in June 2005)</em></td>
<td>Mandatory prior notification to the Autorità Garante della Concorrenza e del Mercato (Competition Authority)</td>
</tr>
<tr>
<td>Latvia</td>
<td>(a) combined turnover of LVL 25m (c. €37m); and (b) combined market share of 40 per cent</td>
<td>Mandatory prior notification to Konkurences Padome (Competition Council)</td>
</tr>
<tr>
<td>Lithuania</td>
<td>(a) combined turnover in Lithuania exceeds LTL 30m (c. €9m); and (b) at least two parties each have turnover in Lithuania of LTL 5m (c. €1.5m)</td>
<td>Mandatory notification to Konkurencijos Taryba (Competition Council)</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>no specific merger control regime</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Malta</td>
<td>combined turnover in Malta of MTL 750,000 (c. €1.8m)</td>
<td>Mandatory prior notification to Office for Fair Competition</td>
</tr>
<tr>
<td>Netherlands</td>
<td>(a) combined worldwide turnover of €113.45m; and (b) at least two parties each have turnover in the Netherlands of €30m</td>
<td>Mandatory prior notification to Nederlandse Mededingingsautoriteit (Dutch Competition Authority)</td>
</tr>
<tr>
<td>Poland</td>
<td>(a) combined worldwide turnover of €50m; and (b) turnover of target (or of vendor in case of sale of shares) in Poland of €10m in either of previous two years or merger not result in dominant position being created or strengthened</td>
<td>Mandatory prior notification to Urząd Ochrony Konkurencji i Konsumentów (Office for Competition and Consumer Protection)</td>
</tr>
<tr>
<td>Portugal</td>
<td>(a) combined turnover in Portugal of €150m; and (b) each of at least two parties has turnover in Portugal of €2m; or combined market share in Portugal of 30 per cent</td>
<td>Mandatory prior notification to Autoridade de Concorrência (Competition Authority)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Jurisdictional criteria</td>
<td>Notification requirements</td>
</tr>
<tr>
<td>-------------------</td>
<td>-----------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>(a) combined worldwide turnover of SKK 1,200m (c. €30m); and</td>
<td>Mandatory notification to Protimonalný Úrad (Antimonopoly Office)</td>
</tr>
<tr>
<td></td>
<td>(b) each of at least two parties has turnover in the Slovak Republic of SKK 360m (c. €10m);</td>
<td></td>
</tr>
<tr>
<td></td>
<td>or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(a) at least one party has turnover in Slovak Republic of SKK 500m (c. €13m); and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) at least one party has worldwide turnover of SKK 1,200m (c. €30m)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>(a) combined turnover in Slovenia exceeds SIT 8,000m (c. €34m) in each of last two years;</td>
<td>Mandatory prior notification to Urad RS za Varstvo Konkurence (Competition Protection Office)</td>
</tr>
<tr>
<td></td>
<td>or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) combined market share in Slovenia of 40 per cent</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>(a) combined turnover in Spain of €240m; and</td>
<td>Mandatory prior notification to Servicio de Defensa de la Competencia (part of Ministry of Economy)</td>
</tr>
<tr>
<td></td>
<td>(b) each of at least two parties has turnover in Spain of €60m;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>combined market share in Spain of 25 per cent or more</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>(a) combined worldwide turnover in preceding financial year of SEK 4,000m (c. €430m); and</td>
<td>Mandatory prior notification to Konkurrensverket (Competition Authority)</td>
</tr>
<tr>
<td></td>
<td>(b) each of at least two parties has turnover in Sweden of SEK 100m (c. €11m)</td>
<td>Voluntary notification possible (and authority could require notification) if first threshold met but second threshold not met</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>(a) target has turnover in the UK of £70m (c. €100m); or</td>
<td>Voluntary notification to Office of Fair Trading</td>
</tr>
<tr>
<td></td>
<td>(b) transaction results in or increases share of supply of goods or services of any description of 25 per cent or more in UK (or a substantial part of the UK)</td>
<td></td>
</tr>
</tbody>
</table>
### B. The 3 Contracting EFTA States

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Jurisdictional criteria</th>
<th>Notification requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iceland</td>
<td>(a) combined turnover of ISK 1,000 million (c. €14m); and (b) at least two parties each have turnover of ISK 50m (c. €0.7m)</td>
<td>Mandatory prior notification to Samkeppnisstofnun (Competition Authority)</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td>No specific merger control regime</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Norway</td>
<td>(a) combined turnover in Norway of NOK 20m (c. €2.5m); and (b) each of at least two parties has turnover in Norway of NOK 5m (c. €0.6m)</td>
<td>Mandatory prior notification to Konkurransetilsynet (Competition Authority)</td>
</tr>
</tbody>
</table>
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