

Competition Law: Mergers

Minsk

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Provisions of the TFEU

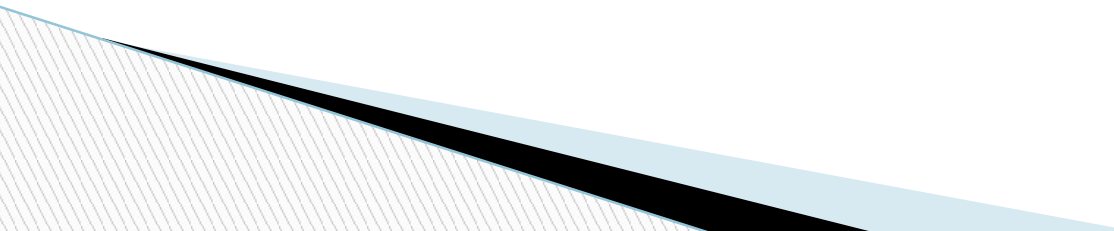
- Core Provisions:
 - Article 101 of the TFEU
 - Article 102 of the TFEU
 - Article 106 of the TFEU

- Other Relevant Provisions
 - Article 3 of the TFEU
 - Article 14 of the TFEU
 - Article 103 of the TFEU
 - Article 104 of the TFEU
 - Article 105 of the TFEU
 - Article 119 of the TFEU
 - Article 346 of the TFEU

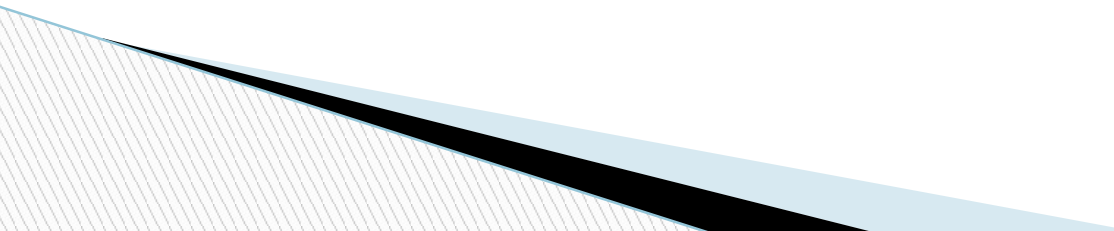
General Rules

- Framework Legislation
 - **Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)**, OJ L 24/1, 29 January 2004
- Implementing Regulation
 - **Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004** (published in OJ L 133, 30.04.2004, p.1) amended by Commission Regulation (EC) No 1033/2008 of 20 October 2008 (published in OJ L 279, 22.10.2008, p. 3) – Consolidated version of 23 October 2008
- Notices & Guidelines
- EEA Agreement
 - Articles 53-65 of the EEA Agreement of 1 August 2007
 - Protocol 24 of the EEA Agreement of 30 January 2010
 - Explanation of case referral under the EEA Agreement

Key Features

- ❑ One firm buys out the shares of another: **concentration of economic power** in the hands of fewer than before;
 - ❑ **Reasons** for oversight of economic concentrations by the state are the same as the reasons to restrict firms who abuse a position of dominance, BUT regulation of M&A attempts to deal with the problem **before it arises**, ex ante prevention of market dominance
 - ❑ Competition law requires that firms proposing to merge gain **authorization** from the relevant government authority.
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Mergers : Benefits


- increase in market power,
 - increased market share and
 - decreased number of competitors
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Merger Control

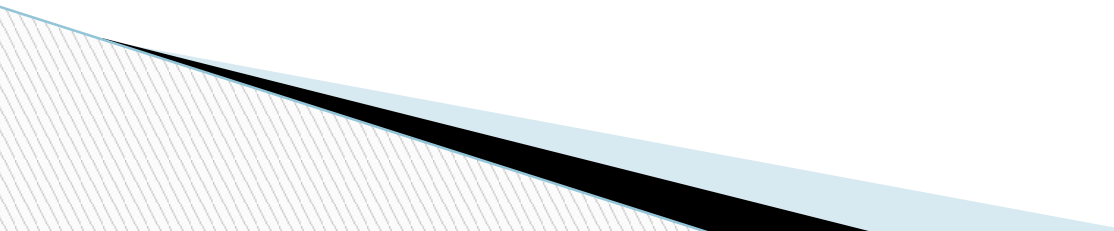
Merger control is about predicting what the market might be like, not knowing and making a judgment.

Hence the central provision under EU law asks whether a concentration would if it went ahead **“significantly impede effective competition... in particular as a result of the creation or strengthening off a dominant position...”**

Issues for Analyses

- Market shares of the merging companies (assessed and added);
 - The Herfindahl-Hirschman Index (to calculate the “density” of the market, or what concentration exists);
 - The product in question;
 - The rate of technical innovation in the market;
 - Collective dominance, or oligopoly through “economic links”;
 - Transparency of the market;
 - The entry of new firms to the market, and any barriers that they might encounter/
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Defences

- Creation of efficiencies enough to outweigh any detriment;
 - Technical and economic progress;
 - A firm which is being taken over is about to fail or go insolvent, and taking it over leaves a no less competitive state than what would happen anyway
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Historical Background

- USA: The Clayton Act
- EU:
 - Art. 81 and 82 of the Treaty on EU
 - 1973 – Commission Proposal for a Reg. of the Council of Ministers on the Control of Concentrations between Undertakings
 - Regulation 4064/89
 - Merger Regulation 139/2004 (known as the “ECMR”)

Merger Control: The Policy Rationale

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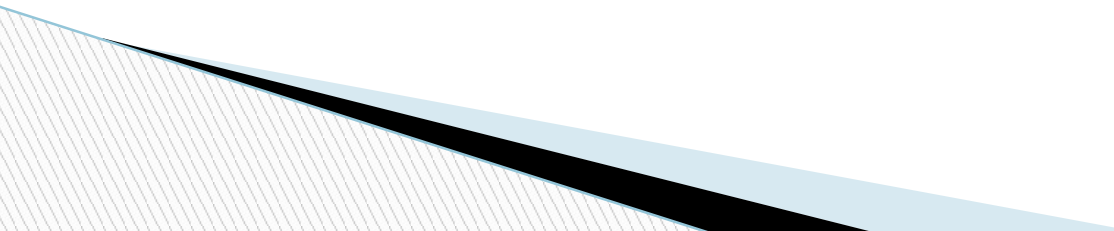
- Mergers can have a marked impact on competition:
 - Reduction of competition;
 - Detriment for consumers;
- Stripping the assets of the acquired firm (which is contrary to long-term public interest)
- Regional policy (control over unemployment and regional vitality, maintaining a balanced distribution of wealth and job opportunities around the country)

Merger Control: The Policy Rationale

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- Enhancing economic efficiency:
 - Easier to reap economies of scale;
 - Enhancing distribution efficiency
- Enhancing managerial efficiency

Substantive Tests

- Does the concentration significantly impede effective competition? (EU)
 - Does the concentration substantially lessen competition? (US, UK)
 - Does the concentration lead to the creation or strengthening of a dominant position? (Germany, Switzerland)
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Horizontal Mergers

A **horizontal merger** is one between parties that are competitors at the same level of production and/or distribution of a good or service, i.e., in the same relevant market.

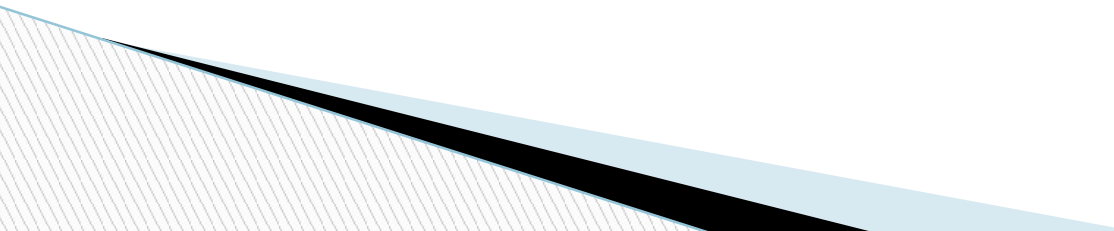
Types of anticompetitive effects associated with horizontal mergers:

- unilateral (non-coordinated) effects arise where, as a result of the merger, competition between the products of the merging firms is eliminated, allowing the merged entity to unilaterally exercise market power, for instance by profitably raising the price of one or both merging parties' products, thus harming consumers
- coordinated effects arise where, under certain market conditions (e.g., market transparency, product homogeneity etc.), the merger increases the probability that, post merger, merging parties and their competitors will successfully be able to coordinate their behaviour in an anti-competitive way, for example, by raising prices.

Coordinated Effects: “Airtours criteria”

Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination.

Conditions for coordination to be sustainable:

- the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to;
 - discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected;
 - the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.
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Non-horizontal Mergers

Basic forms of non-horizontal mergers:

- vertical mergers and
- conglomerate mergers

Vertical Mergers

- Between firms that operate at different but complementary levels in the chain of production (e.g., manufacturing and an upstream market for an input) and/or distribution (e.g., manufacturing and a downstream market for re-sale to retailers) of the same final product
- In purely vertical mergers there is no direct loss in competition because the parties' products did not compete in the same relevant market.

However

AOL/Time Warner

the European Commission required that a joint venture with a competitor Bertelsmann be ceased beforehand

Conglomerate Mergers

Conglomerate Mergers happen when companies acquire a large portfolio of related products, though without necessarily dominant shares in any individual market (firms operate in different product markets, without a vertical relationship)

Recent focus of conglomerate mergers by antimonopoly authorities, very disputable (different outcomes of the merger control reviews by the authorities of the United States and the European Union of the GE/Honeywell merger attempt.)

Merger Control Regimes

- ▣ **Mandatory regime** - filing of a transaction is compulsory (majority of merger jurisdictions worldwide)
 - “suspensory clause” - the parties to a transaction are indefinitely prevented from closing the deal until they have received merger clearance;
 - “local” (the transaction cannot be implemented within the particular jurisdiction) and “global” (the transaction cannot be closed/implemented anywhere in the world prior to merger clearance) bars on closing/implementation
- ▣ **Voluntary regime** - the parties are not prevented from closing the deal and implementing the transaction in advance of having applied for and received merger clearance (UK)

EU Merger Control: Basics

Merger Regulation is the legal base for controlling merger operations between enterprises

Mergers are inevitable and desirable, they are welcomed as one means of increasing the competitiveness of European industry on world markets

Concentration: General

- Merger Regulation will only be applicable if there is a concentration (Art. 3 (1))
- Extra-territorial catch
- Determination of concentration will be based on quantitative criteria, focusing on the notion of control
- Key terminology:
 - Concentration;
 - Merger;
 - Complete merger;
 - Change of control

When to Notify?

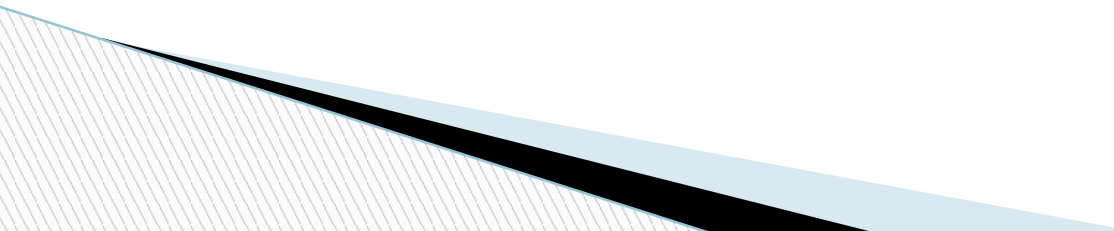
Either following:

- Conclusion of the agreement;
- Announcement of a public bid
- Acquisition of control

Or

- After manifestation of good faith intent to do so

Notification

- Mandatory for all concentrations with a **Community dimension**
 - Such concentrations shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a Commission decision, or on the basis of a presumption (certain exemptions for public bids).
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Community Dimension: Thresholds

- the combined aggregate worldwide turnover (from ordinary activities and after turnover taxes) of all the undertakings concerned (in the case of the acquisition of parts of undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller(s)) is more than EUR 5 000 million (**special rules apply to banks**), and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,
- **unless**
- each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Community Dimension

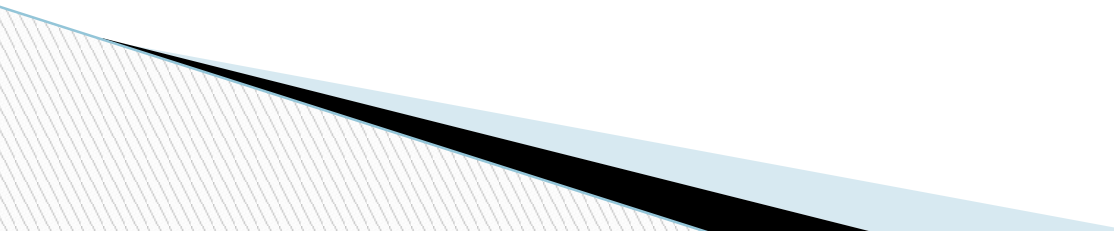
In case the above thresholds are not met a concentration has nevertheless Community dimension, if

- the combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 2 500 million, **and**
- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million, **and**
- in each of at least three Member States included for the purpose of the second point above, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million, **and**
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR100 million,

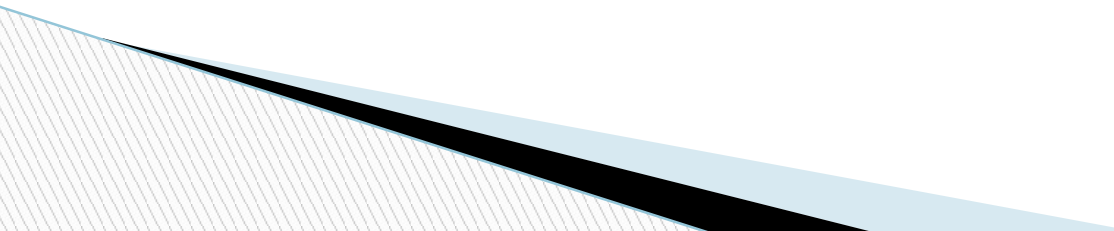
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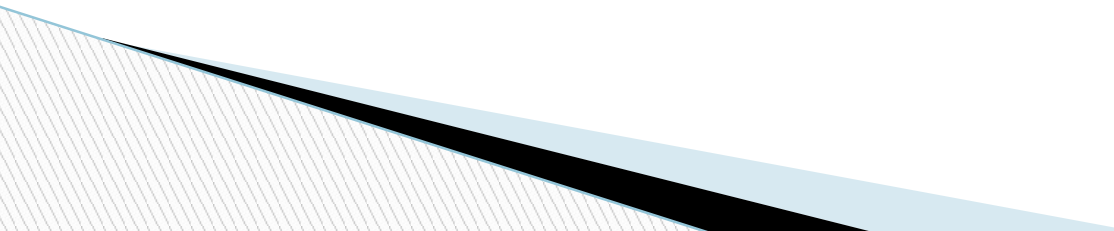
Phases

- ▣ **Phase I: Initial Examination** (Phase I deadline commences on the date when the complete notification is received by the Commission)
 - ▣ **Phase II: Initiation of proceedings** (Phase II deadline commences on the date of the Article 6(1)c decision)
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Phase I: Initial Examination

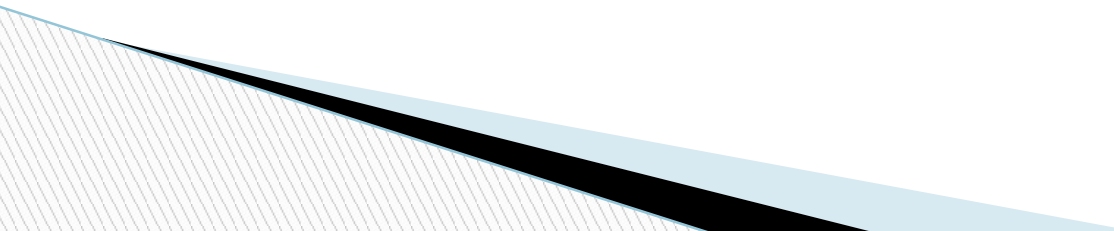
- Detailed appraisal via: request for information, interviews, inspections carried out by the competent Authorities of the Member States and the Commission
 - Member States can request referral within 15 working days of notification.
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Phase I: Decision (Art. 6)

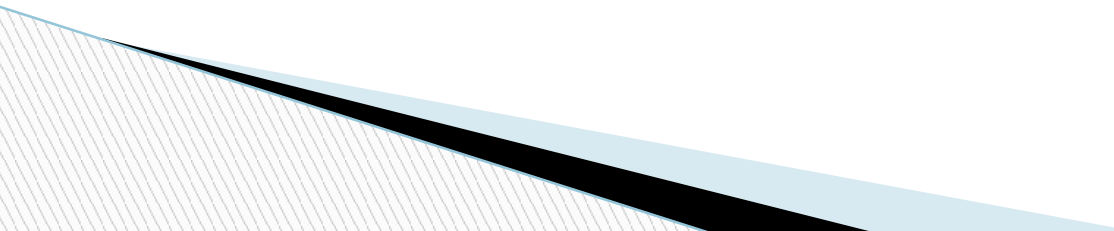
- 6(1)a : the concentration does not fall within the scope of the Merger Regulation
 - 6(1)b : the concentration does not raise serious doubts as to its compatibility with the common market: approval
 - 6(1)c : the concentration raises serious doubts: phase 2 of procedure
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Phase I: Decision (Art. 6)

Article 6 decision to be taken:

- within 25 working days after receipt of the complete notification
 - unless increased to 35 working days if a Member State makes a 9(2) request, or
 - unless increased to 35 working days if the undertakings concerned offer commitments
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Phase II: Initiation of proceedings

- Detailed appraisal via: request for information, interviews, inspections carried out by the competent Authorities of the Member States and the Commission
 - Declaration of incompatibility is preceded by the issuing of a statement of objections, with a right for the parties to access the file and to request a formal oral hearing
 - Advisory Committee of Member States: meeting and delivery of opinion
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Phase II: Decision (Art. 8)

8(1): approval in case of compatibility with the common market

8(2): approval with conditions and obligations rendering the concentration compatible with the common market

8 (3):prohibition in case of incompatibility with the common market

8(4): dissolution of the merger in case of premature implementation or implementation in breach of a condition for clearance

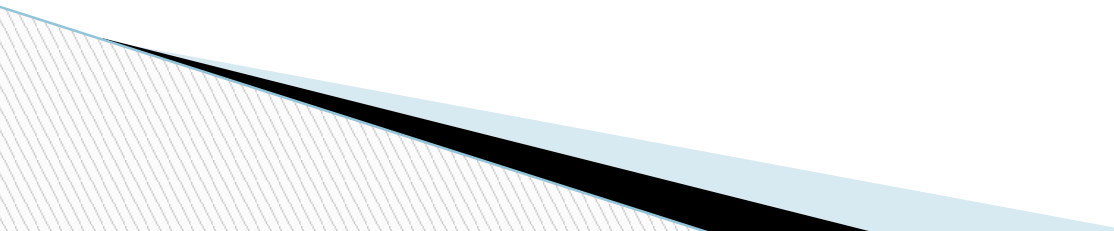
8(5): interim measures

8(6): revocation of a clearance decision in case of incorrect information or breach of obligation.

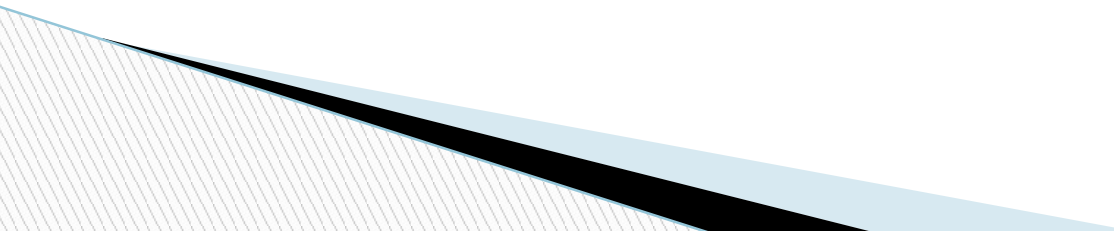
Subsequent Actions upon Decision

- Two months from the date of the decision to lodge an appeal
- Possibility: Review by the European Court of First Instance and ultimately by the European Court of Justice

Differentiation between Community and National Merger Control

- ❑ Mergers with a Community dimension are, in general, investigated only by the Commission (Art. 21 of the Merger Regulation)
 - ❑ Sole jurisdiction of Commission, review by the Community Courts
 - ❑ National legislation is not applicable to Community dimension mergers (exceptions)
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International Cooperation on Merger Issues

- Cooperation between the European Union and the United States: Best practices on cooperation in merger cases
 - International Competition Network: Commission waiver model of confidentiality in merger investigations
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Relevant Case Law

- Continental Can 6-72
- BAT and Reynolds v Commission 156/84 (1987) ECR 4487
- Gencor Ltd. v. Commission T-102/96
- Arjomari-Prioux/Wiggins Teape IV/M25 (1991) 4 CMLR 854
- Northern Telecom/Matra Telecommunications IV/M 249
- Sanofi v. Sterling Drug IV/M72 (1992) 5 CMLR M1
- Digital Equipment International & Mannesman Kienzle GmbH IV/M57 (1992) 4 CMLR M99
- Aerospatiale SNI & Alenia-Aeritalia y Selenia Spa IV/M53 (1992) 4 CMLR M2
- Nestle SA & Source Perrier SA IV/M190 (1993) 4 CMLR M17
- AOL/Time Warner