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Artículos

# ARE COMPETITION AUTHORITIES PLANNING TO RULE THE WORLD? NEW AND EXPANDED APPROACHES TO MERGER CONTROL

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**Are competition authorities planning to rule the world? New and expanded approaches to merger control**

*Competition authorities worldwide are increasingly inclined to review and challenge mergers. They are using an ever-wider range of tools to claim jurisdiction over transactions that traditionally fell outside their authority (such as those that fell below the corresponding thresholds). They base this new approach on a broader analysis of criteria that goes beyond what were considered the boundaries of competition law. In this context, the substantive assessment of mergers is also evolving, with competition authorities taking into account factors such as sustainability, employment, data/digital markets issues and innovation, and weighing them up against predicted efficiencies to determine a merger's benefits and risks. In addition, commitments for clearance are increasingly being used to address non-traditional concerns.*

**KEYWORDS:**
Concentration of undertakings; merger control; merger regulation; EUMR; thresholds; Article 22; substantive assessment; sustainability; employment issues; digital and data; innovation; mandatory notification; theories of harm, efficiencies, remedies and commitments; Digital Markets Act.

**¿Pretenden las autoridades de competencia dominar el mundo? Nuevos planteamientos en control de concentraciones**

*Las autoridades de competencia a nivel mundial se inclinan cada vez más por examinar e impugnar operaciones de concentraciones. Las autoridades están utilizando una gama cada vez más amplia de herramientas para obtener jurisdicción para revisar operaciones tradicionalmente fuera de su competencia, incluso aquellas por debajo* *de los umbrales, basándose en un análisis amplio de criterios que van más allá de los límites tradicionales del derecho de competencia. En este contexto, el panorama de la evaluación sustantiva del control de concentraciones también está evolucionando, y las autoridades de competencia tienen en cuenta en su análisis factores no tradicionales, como cuestiones de sostenibilidad, laborales, aspectos relacionados con datos/mercados digitales e innovación, mientras que la consideración de las eficiencias implica equilibrar los beneficios y los riesgos asociados a factores no tradicionales. Además, se recurre con mayor frecuencia a la propuesta de compromisos para abordar las preocupaciones no tradicionales como condición para la aprobación de las fusiones.*

**PALABRAS CLAVE:**
Concentración de empresas, Control de concentraciones, Reglamento de concentraciones, EUMR, Umbrales, Artículo 22, Evaluación sustantiva, Sostenibilidad, Cuestiones laborales, Digital y datos, Innovación, Notificación obligatoria, Teorías del daño, Eficiencias, Condiciones y compromisos, Digital Markets Act.

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# 1. Introduction

Mergers and acquisitions ("M&A") are used by companies as a means to develop their activities and increase their market shares and financial strength. As such, growth, economies of scale, synergies and diversification are usually the main reasons why companies embark on M&A transactions. Although many of these transactions are beneficial — or at least not harmful — to consumers and the economy, some may raise concerns. To deal with these concerns, countries around the world typically use merger control as a tool to prevent M&A transactions from harming competition and the economy in general.

Assessing M&A transactions from a competition standpoint involves complex analytical exercises such as defining the relevant markets, assessing the effects of the transactions on (future) competition and analysing how the relevant markets function. The complexity lies in the fact that this is the realm of forecasting, predicting and estimating. The aim is to predict the future effects of a current transaction, hence the concept of *ex ante* control.

To help navigate the *ex ante* control of M&A transaction, on 21 December 1989, the Council of the then European Communities adopted a regulation on the control of concentrations, which established that certain transactions must be approved by the European Commission ("EU Commission"). The Merger Regulation ("EUMR")[1] entered into force on 21 September 1990 and introduced into EU competition law a legal framework for the substantive review of concentrations[2].

1 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

2 According to Article 3(1) of the EUMR, "a concentration shall be deemed to arise where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings, or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings." The definition is further explained in the Commission's Consolidated Jurisdictional Notice ("*Jurisdictional Notice*").

In the 1989 version of the EUMR, it was envisaged that a transaction "which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded" should be prohibited[3]. As this test was considered flawed, amendments to the EUMR were adopted in 2003 and became effective on 1 May 2004[4]. In this context, from 2004 onwards, mergers that "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" are considered incompatible with the internal market (the so-called "SIEC test")[5]. In other words, under this assumption, a merger cannot be prohibited unless it creates or strengthens a position likely to significantly impede effective competition. Most national competition authorities ("NCAs") follow the same approach.

The SIEC test broadened the scope of regulatory intervention: it was no longer necessary to prove that an undertaking had a dominant position, and this allowed for a more expansive competition analysis. NCAs started looking at the negative effects that transactions had on the structure of markets and competition, considering criteria such as whether the merging parties could be considered direct competitors, the risk of future price increases and the effects of the merger on innovation.

The EU and NCAs' approach to merger control continues to evolve. These changes bring with them some uncertainty. This article analyses and provides guidance on how, in addition to their traditional approach, the competition authorities appear to be being influenced by social sensibilities and are applying novel legal criteria to catch more and more transactions in their net and to decide on their merits.

## 2. Notification thresholds and much more

Before addressing the substantive assessment of mergers (Section 3), we look at the number and types of transactions subject to mandatory control, both *ex ante* and *ex post*. Together with the more sophisticated scope of substantive merger analysis, the increased number of transactions subject to merger review by NCAs and the EU Commission demonstrates their ever expanding reach.

The essence of merger control systems in the EU, and in most Member States, is *ex ante* mandatory and suspensive control by the competition authorities whenever a transaction meets certain thresholds — which are generally based on turnover, and in some cases market share[6] or transaction value[7]. As such, merger control is (or was) based on objective thresholds. When a transaction

3 Article 3(2) of the EUMR.

4 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

5 Article 3(2) of the EUMR.

6 For example, in Spain and Portugal.

7 For example, in Germany and Austria.

falls below the thresholds it is not subject to notification or suspension; conversely, when it meets the thresholds it must be notified to and approved by the NCA before it can be implemented.

However, this system does not catch transactions that fall below the (objective) thresholds but are still capable of harming competition, in particular so-called "killer acquisitions"[8]. In response, NCAs have looked for a way to review these transactions that do not meet the thresholds and that otherwise would not have been caught. This has brought with it all the challenges, risks and uncertainties inherent to a subjective system.

## Article 22 of the EUMR

Over the years, the EU has produced a relevant number of materials (i.e. Communications, Guidelines, Notices) that address jurisdictional[9], substantive[10] and procedural matters[11]. Although they initially provided guidance on understanding, applying and interpreting the EUMR, the EU has recently used these materials to bring about a *de facto* change in the scope of merger control and to broaden the EU Commission's powers. One example of this is the now (in)famous Article 22 of the EUMR.

The EU Commission has chosen not to revise the EUMR and the existing notification thresholds, and to instead use a new interpretation of Article 22 of the EUMR, established in formal Guidance, which allows it to examine transactions below the EUMR and Member States' notification thresholds if a Member State refers them[12].

For reference, Article 22 of the EUMR states that "one or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request". While this provision does not expressly require that the Member State in question be competent to control the transaction under its national law (i.e. it does not expressly require that national thresholds have been triggered), the EU Commission had historically considered that it would only accept a referral under Article 22 if the transaction reached the national notification thresholds of at least one Member State.

8 For further information, see *New trends in merger control: the baby, the bathwater, uncertain outlooks and eternal returns*, Tânia Luísa Faria, Margot Lopes Martins and Mariana Viana Pedreira, in Revista da Concorrência e Regulação, No. 45, January-March 2021 and *New trends in merger control: capturing the so-called killer acquisitions... and everything else*, Tânia Luísa Faria, Margot Lopes Martins and Raquel Marques Nunes, in Actualidad Jurídica Uría Menéndez, No. 57, September-December 2021, pp. 33-53.

9 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2008 O.J. C95/1.

10 Commission Notice on the definition of the relevant market for the purposes of Community competition law, 1997 O.J. C372/5; Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. C31/05; and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008 O.J. C265/6.

11 DG Competition Best Practice Guidelines on the conduct of EC merger control proceedings.

12 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases ("Article 22 Guidance").

This change obviously raises concerns in terms of legal certainty for companies and M&A activity, as it means that any transaction can be controlled by the EU Commission if the loose conditions set out in Article 22 are met — i.e. if the transaction affects trade between Member States and threatens to significantly affect competition within the Member State making the referral.

The Article 22 Guidance refers to "transactions involving at least one undertaking whose turnover does not reflect its actual or future competitive potential" and presents five, purely indicative, scenarios in which this might be the case for an undertaking: (i) it is a young entity with substantial competitive potential; (ii) it is an important innovator or is carrying out potentially important research; (iii) it exerts significant competitive pressure; (iv) it has access to competitively important assets; or (v) it supplies products or services that constitute important inputs.

This approach is particularly broad and, on top of that, non-exhaustive. It would seem that the possibilities for the EU Commission to claim jurisdiction over a transaction — outside any pre-established jurisdiction at either the national or EU level — are now infinite.

The *Illumina/Grail* merger was the first case handled under the new Article 22 Guidance. For context, Illumina is a US company that specialises in genomic sequencing and sells integrated genetic-analysis systems used in the development and implementation of cancer screening tests. Grail is a biotechnology company that was founded in 2016 and is also headquartered in the United States. Based on genomic sequencing, it develops blood tests for the early detection of cancer and carries out cutting-edge research in this field.

For a variety of reasons, it was both a surprising and a bold choice for the EU Commission to test its new standard against this transaction as (i) it did not trigger any of the EU's thresholds or the Member States' national thresholds; (ii) both companies were based outside the EU and Grail did not have a presence in the EU and was not likely to do so in the near future; (iii) the transaction was already being reviewed by the Federal Trade Commission ("FTC", the US competition authority); (iv) the transaction had been announced to the market in September 2020, while the EU Commission only decided to initiate Article 22 proceedings in March 2021; and (v) the Article 22 Guidance had not been published yet.

Thus, contrary to Commissioner Vestager's public assurances, the EU Commission started testing a new approach — one that in practice enormously expanded its powers — before adapting the relevant rules. Commissioner Vestager had stated on 11 September 2020, when commenting on the possibility of expanding the scope of merger control laws, that the EU would not depart from its established position without first publishing guidance to assist Member States and merging parties. Specifically, she stated that "This will not happen overnight — we need time for everyone to adjust to the change, and time to put guidance in place about how and when we will accept these referrals"[13]. However, no such guidance had been published when the EU Commission first invited Member States to make a referral request under Article 22 in relation to the Illumina/Grail transaction.

13 Commissioner Vestager, "The future of EU Merger Control" at the International Bar Association's 24th Annual Competition Conference, 11 September 2020.

France submitted the first referral request, and was subsequently joined by Belgium, Greece, Iceland, the Netherlands and Norway. Once the EU Commission accepted the referral, Illumina was obliged to notify the transaction to the EU Commission, which it did on 16 June 2021. In other words, NCAs without jurisdiction gave jurisdiction to the EU Commission to review the Illumina/Grail transaction.

The EU Commission decided to prohibit the transaction on 6 September 2022, after a Phase II investigation. On top of that, it initiated a gun jumping procedure, which resulted in it imposing a record fine of EUR 432 million on Illumina and a token fine of EUR 1,000 on Grail on 12 July 2023[14] for going ahead with the transaction prior to receiving merger clearance. The EU Commission concluded that the parties had breached the standstill obligation during the in-depth investigation. Judicial appeals are still ongoing.

This case illustrates the risks for companies under the new interpretation of Article 22. Apart from the uncertainty as to the possibility of the EU Commission or an NCA requiring notification of a transaction that does not meet any of the notification criteria, the EU can — and has — prohibit a transaction and impose interim measures and remedies even though the companies were never under the obligation to notify an NCA (or the EU Commission). The EU Commission can also impose fines and periodic penalty payments on companies for carrying out a transaction that they should, in theory, be entitled to carry out freely and immediately.

In short, the EU's re-interpretation of Article 22 clearly has the merit of being flexible and bridging some of the enforcement gaps in the current regulations, but it is undeniably impractical for companies. Article 22 and the corresponding Guidance are based on abstract theories of harm rather than clear and objective criteria. Furthermore, the Article 22 Guidance only gives examples of scenarios where this new approach can be used, rather than providing an exhaustive list, so in theory the EU Commission could accept any referral at all. In the absence of clearer criteria that allow all those involved to better identify transactions that threaten competition for the purposes of Article 22, there is a veritable lack of legal certainty.

The General Court has already confirmed that the EU Commission's new approach to Article 22 is valid and recognised the NCAs' right to refer a transaction irrespective of whether national thresholds are met[15]. This decision is currently under appeal before the ECJ. The resolution of the pending appeal on Illumina/Grail case before the ECJ will hopefully bring further guidance and set some limits to the EU Commission and ÑCA's powers[16].

14 In the case of Grail, the EU Commission considered that it had been fully aware of the standstill obligation and still played an active role in the infringement by enabling the transaction to be completed when it knew that the EU Commission was carrying out an in-depth review. While the fine was for a symbolic amount, it was the first time that the EU Commission imposed a fine on a target company for gun-jumping.

15 Case T-227/21, Illumina v Commission.

16 Pending decision from the ECJ in joined cases C-611/22 P, Illumina v Commission and C-625/22 P, Grail v Commission and Illumina.

## Digital Markets Act

Recent years in the competition law world have seen a considerable focus on digital activities. The constant — and significant — evolution in this field has made it clear that new rules are needed to ensure that digital markets remain (or become) fairer and contestable. A major milestone was the adoption of the Digital Markets Act ("DMA") in September 2022[17]. The DMA entered into force on 1 November 2022 and became applicable, for the most part, on 2 May 2023.

Although the DMA's main focus is not merger control, since it primarily aims to introduce a set of *ex ante* behavioural prohibitions and obligations for large online platforms[18], the regulator took the opportunity to include merger control provisions in the DMA that broaden the EU's jurisdiction in the digital markets.

The rationale is that the current merger control tools may be falling short, particularly in digital markets. This became apparent in the policy discussions on killer acquisitions, which concluded that, in digital markets, there is a higher risks of problematic M&A transactions escaping the control of the competent authorities. It has been observed that tech giants are acquiring promising incipient companies before they generate significant turnover or have a significant presence on the market. As a result, these transactions escape merger control based on notification thresholds, but can significantly worsen the competitive situation in the markets involved. As a fairly representative figure, between 1987 and 2022 large digital platforms carried out almost 1,200 transactions but only around 20 of them were subject to merger control under the EUMR[19].

To this end, the DMA defines criteria for determining what platforms should be supervised and classified as "gatekeepers"[20]. The companies that can be designated as gatekeepers are basically companies that provide core platform services[21] and meet certain quantitative thresholds[22]. These quantitative thresholds aim to identify the digital platforms that have a significant impact on the internal market, act as a relevant gateway for business users to reach end-users and enjoy a deep-rooted and durable position in their operations, or it is foreseeable that they will enjoy such

17 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

18 Articles 5, 6 and 7 of the DMA.

19 Christophe Carugati, Which Mergers Should the European Commission Review under the Digital Markets Act? (9 December 2022). Available at SSRN: https://ssrn.com/abstract=4366703.

20 At the moment, six gatekeepers have been designated: Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft. This designation covers 22 services that have been classified as "core platform services".

21 The DMA (Recital 14) identifies the main core platform services as "online intermediation services, online search engines, operating systems, online social networking, video sharing platform services, number-independent interpersonal communication services, cloud computing services, virtual assistants, web browsers and online advertising services".

22 If the provider of core platform services:

(i) has achieved an annual EU turnover equal to or above EUR 7.5 billion in each of the last three financial years; or has had an average market capitalisation or equivalent fair market value of at least EUR 75 billion in the last financial year; and it provides the same core platform service in at least three Member States.

(ii) provides a core platform service that in the last financial year has had at least 45 million monthly active end-users established or located in the EU and at least 10,000 yearly active business users established in the EU…

(III) … in each of the last three financial years.

a position in the near future[23]. To ensure that these new mechanisms keep pace with the constant evolution of digital markets, the EU Commission can carry out market investigations and designate new companies as gatekeepers.

The DMA strengthens the EU Commission's control powers over these platforms, establishing that "any intended concentration" carried out by a gatekeeper must be notified[24]. Specifically, Article 14 of the DMA obliges gatekeepers to inform the EU Commission of any proposed transaction whenever the target or merging entities provide core platform services or any other service in the digital sector, or enable the collection of data.

This obligation applies regardless of whether the transaction must be notified to the EU Commission or an NCA under the EU or national merger control rules. Companies that fail to notify a transaction under Article 14 of the DMA face a fine of up to 1% of their total worldwide turnover[25].

The DMA establishes the minimum information that notifying undertakings must provide to the EU Commission[26]. Once notified, the EU Commission will inform the NCAs of the information received. The NCAs may use this information to trigger the referral mechanism under Article 22 EUMR and request the EU Commission to review the transaction under the merger control rules[27]. The goal is for the DMA and Article 22 of the EUMR to work in tandem, in order to fill in the gaps in the traditional merger control framework. Gatekeepers' transactions may then be reviewed by the EU Commission under Article 14 of the DMA (i.e. outside the merger control rules) or through an Article 22 referral under the merger control rules.

As such, the DMA is yet another novel extension of the EU Commission's powers to review transactions that, under the traditional merger control rules, would have escaped scrutiny.

Although this may pose a risk of excessive enforcement insofar as all transactions involving gatekeepers must be notified, in terms of legal certainty the scope of the notification obligation under the DMA is clearer than the obligation under the reinterpreted Article 22 EUMR, as it applies exclusively to designated gatekeepers. We can also expect additional guidance from the EU Commission to clearly identify what transactions must be reviewed under the DMA.

### Towercast

The expansion of the competition authorities' powers to analyse concentrations outside the traditional framework of the notification thresholds has continued, notably in March 2023 with the ECJ's decision in the *Towercast* case.

23 Article 3 of the DMA.

24 Article 14(1) refers to the concept of "concentration" as defined in the EUMR.

25 Article 30(3) of the DMA. In the event of non-compliance with the DMA's general rules, gatekeepers may face fines of up to 10% of their total worldwide annual turnover, and in the event of repeated infringements these can increase up to 20%. Periodic penalty payments of up to 5% of their average daily turnover can also be imposed (Articles 30(1) and (2) and 31 of the DMA).

26 Article 14(2) of the DMA.

27 Article 14(4) and (5) of the DMA.

On 16 March 2023, the ECJ handed down its judgment in the *Towercast* case in which it ended up reintroducing the *ex post* control of mergers that fall below EU and national thresholds but that amount to an abuse of a dominant position[28].

This case originated in a concentration involving the acquisition of Itas by Télédiffusion France in October 2016. Both companies are providers of digital terrestrial television broadcasting services in France. As the transaction did not trigger the national or EU notification thresholds, the concentration was not subject to prior merger control by the French NCA (*Autorité de la Concurrence*) or the EU Commission. On 15 November 2017, Towercast, another operator in the market, filed a complaint with the French NCA arguing that the concentration was an abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). This complaint was rejected on 16 January 2020.

Towercast appealed the French NCA's decision before the French courts, arguing that Article 102 applies to concentrations per the *Continental Can* decision[29]. The French NCA maintained its position that, with the entry into force of the EUMR, even when M&A transactions trigger the notification thresholds, they fall outside the scope of Article 102 of the TFEU and *Continental Can*. Its rationale was that once the EUMR and national merger control regimes were implemented, it was no longer necessary to use the concept of abuse of a dominant position to control mergers that were potentially harmful.

The French court sought a preliminary ruling from the ECJ on whether, based on Article 21(1) of the EUMR, a concentration that (i) does not meet the EU or national notification thresholds and (ii) has not been referred to the EU Commission, can still be reviewed under the assumption that there is an abuse of a dominant position per Article 102 TFEU.

The ECJ took the opportunity to confirm that Article 102 TFEU and *Continental Can* are applicable, and stressed that even if a concentration is not notifiable, it can still be abusive. As such, a merger that is not notifiable because it falls below the EU and national thresholds, may still be challenged *a posteriori* by the EU Commission or an NCA on the grounds that the merger raises competition concerns.

In practice, this means that a transaction can be challenged even after closing if it can be shown that it amounts to an abuse of a dominant position. In theory, this means that it is always possible to challenge and undo a transaction if it could have led to an abuse of a dominant position. In order to apply *Towercast*, the competition authorities must demonstrate that the buyer has a dominant position on the same market or on a market related to that of the target and that the transaction in itself is harmful to competition insofar as it strengthens that position.

As such, a mere finding of a dominant position is not sufficient to prohibit a transaction; it must be proven that the transaction itself is capable of leading to a substantial restriction of competition and that this amounts to an abuse of such dominant position. To do this, the specific market

28 Judgment of 16 March 2023 in Case C-449/21, *Towercast*.

29 Judgment of 21 February 1973 in Case 6/72, *Continental Can*.

conditions (e.g. significant barriers to entry, high levels of concentration) must be considered. The authorities will also have to find a way of supporting their prediction that the degree of dominance achieved as a result of the transaction is sufficient to prevent competition in the specific market conditions that they have identified. This may be particularly complicated in the case of targets that are incipient companies and for which there is little experience or visibility in the market.

In short, through *Towercast* the ECJ has confirmed yet another mechanism to control concentrations that falls outside the traditional scope of the provisions passed for this purpose, although it may prove challenging to put it into practice.

The *Towercast* mechanism has already been used, at a national level, by the Belgian NCA. It initiated an investigation into Proximus on 22 March 2023 (less than one week after the *Towercast* ruling was handed down) in respect of a possible abuse of a dominant position in the context of its takeover of the EDPnet group, which was not subject to mandatory merger control[30]. The proceedings ended in November 2023 after Proximus opted to sell EDPnet to Citymesh.

Although its impact is more limited than that of Article 22 EUMR, this new case law has added another source of unpredictability and legal uncertainty for undertakings involved in concentrations.

### Control under foreign subsidies legislation

The 2022 EU Regulation on foreign subsidies distorting the internal market ("FSR"[31]) has also created a new mechanism for merger control that can be applied even when national or EU thresholds are not met. And when the notification thresholds are met, this creates an additional notification obligation.

Pursuant to the FSR, a concentration must be notified to the EU Commission when (i) the target or one of the other parties to the transaction is established in the EU and has a turnover of at least EUR 500 million in the EU, and (ii) when the parties have received direct or indirect financial contributions from non-EU countries of more than EUR 50 million over the three years preceding the transaction[32].

However, the EU Commission may order a transaction be notified on the basis of the FSR even if these specific thresholds are not met if it suspects that foreign subsidies may have been granted to the undertakings concerned[33].

30 See press release 10/2023, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/20230322_Press_release_10_BCA_0.pdf.

31 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market. *OJ L 330, 23.12.2022, p. 1–45.*

32 Articles 20 and 21 of the FSR.

33 Article 21(5) of the FSR.

As such, any company that has received financial aid from non-EU countries must be alert to the possibility that their mergers may be scrutinised even if they do not exceed the EU notification thresholds.

With a simple change of practice, new regulations and case law, in the space of a year the EU Commission and the NCAs have seen the scope of their merger control powers substantially extended to include the review and control of transactions that fall below both the EU and national thresholds. In theory, NCAs and the EU Commission can now control any and all concentrations... it remains to be seen which ones they are interested in scrutinising. Although justified by some enforcement gaps, the main problem these changes pose is the tremendous level of deal uncertainty caused by the possible retroactive assessment of transactions, lengthier M&A procedures and increased costs. While the objective of catching more transactions in the merger control net through the notification thresholds may be laudable, there is definitely a need for more precisely framed guidelines.

Another area that has broadened the scope of the competition authorities' intervention in merger control is the substantive assessment of transactions. As explained in further detail in section 3, the authorities have adopted a much more sophisticated approach to analysing transactions that encompasses concepts and areas that competition law had previously ignored.

# 3. The substantive assessment

When assessing the effects of a concentration on competition, the authorities traditionally apply two tests to determine if the transaction is likely to (i) create or strengthen a dominant position or (ii) substantially lessen competition.

Since the EUMR was passed in 2004, most Member States have adopted the SIEC test, which determines whether a transaction may have serious anti-competitive effects even in the absence of dominance. The EU Commission and NCAs typically look for evidence related to the harm that the merger may cause to competition, such as price rises or closing the market to smaller or potential rivals. They also consider any efficiencies that would offset the transaction's harmful impact on competition. The evidence typically focuses on conventional competition factors such as prices, output, choice or quality of goods and services.

However, the competition authorities are now taking into consideration other factors when assessing transactions: environmental impact, sustainability, data/digital considerations, employment issues and even fairness to consumers have featured in recent decisions. Until recently, these elements were completely alien to competition law as a whole, let alone merger control.

The following section focuses on the changes that merger control assessment criteria have undergone in recent years from three different dimensions; theories of harm, analysing efficiencies, and defining and submitting remedies. Finally, we will briefly analyse the approach taken on the other side of the Atlantic in this regard.

## 3.1. Theories of harm

Broadly speaking, the theory of harm explains why a particular conduct may harm competition and, ultimately, market structure and consumer welfare. Competition law and economics provide specific tests to identify whether a particular transaction is capable of seriously harming competition by significantly increasing the acquirer's market power.

One of the challenges that the competition authorities and courts have faced recently is understanding whether the existing theories of harm and tests are well suited to the current economy and new markets. They are all too aware of the need to have an explicit theory of harm that achieves a consistent and rigorous assessment process, especially since the EU Commission has lost appeals and merger decisions were overruled for not formulating or proving properly the theory of harm[34].

When assessing a concentration, the competition authority must articulate a proper theory of harm that is appropriate for the specific case. Several theories of harm were developed that identified cases in which a concentration would predictably have anti-competitive effects. We are referring, for instance, to unilateral or non-coordinated[35], coordinated[36], vertical[37] or conglomerate effects[38], or effects on innovation[39]. All of these examples place a strong focus on the ability of and incentives for the undertakings involved in the concentration to increase prices or foreclose rivals, amongst other effects.

Article 2(1) of the EUMR sets out the material criteria to be assessed by the EU Commission. The ultimate goal of merger control is "*the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned*". In order to do this, the EU Commission takes into account a number of economic factors:

34 Case T-342/99 *Airtours plc v Commission*, 2002 E.C.R. II-2585 (Ct. First Instance); Case T-310/01 *Schneider Electric SA v Commission*, 2002 E.C.R. II-4071 (Ct. First Instance); Case T-5/02 *Tetra Laval v Commission*, 2002 E.C.R. II-4381 (Ct. First Instance).

35 This theory of harm focuses on the potential for a merged entity to have the ability and incentive to unilaterally raise prices, reduce output or limit innovation. The EU Commission assesses whether the merger would result in a significant reduction in competition in the relevant market, leading to higher prices, reduced choice for consumers and a negative impact on competition.

36 This theory of harm examines the possibility that a merger could facilitate collusion or coordinated behaviour among market players. The EU Commission looks for evidence that the entity resulting from the transaction could collude with its competitors to reduce competition, allocate markets or coordinate prices, causing harm to consumers and reducing competition.

37 This theory of harm focuses on the potential for a merger to lead to anti-competitive foreclosure or restriction of access to important inputs or distribution channels. The EU Commission assesses whether the merged entity could engage in anti-competitive conduct, such as denying access to competitors, leveraging market power, or engaging in discriminatory practices, resulting in harm to competition and consumers.

38 This theory of harm looks at the potential for a merger to have anti-competitive effects in unrelated markets. The EU Commission assesses whether the merged entity could engage in anti-competitive behaviour by leveraging its market power from one market into another, resulting in harm to competition and consumers in unrelated markets.

39 This theory of harm focuses on the potential impact of a merger on innovation, such as reducing incentives for research and development or hindering technological progress. The EU Commission assesses whether the merger could lead to a reduction in innovation, resulting in negative effects on competition and consumers in the long term.

- the market position of the undertakings concerned and their economic and financial power,
- the alternatives available to suppliers and users,
- access to supplies or markets,
- legal or other barriers to entry,
- supply and demand trends for the goods and services,
- the interests of intermediate and ultimate consumers, and
- technical and economic progress.

When assessing these factors, the EU Commission has to predict the merged entity's capacity to raise prices, exercise market power, reduce output or the quality of its products, foreclose rivals or hinder their access to inputs.

However, other factors (not mentioned in Article 2 or traditional practice) are increasingly paying a part in modern theories of harm and merger assessment; first innovation, then sustainability, employment and even consumer fairness. These factors are now public policy priorities in many jurisdictions, and certainly the EU itself, and regulators want companies to comply with these and other ESG objectives, not least after merging with or acquiring rivals.

This evolution in the market is pushing policymakers and authorities to reconsider their traditional approach in merger cases and think about how to respond to these new public policy goals. We now take a look at some of the non-traditional concerns in the theory of harm that are being considered when analysing concentrations.

### Sustainability / environmental considerations

Sustainability issues have gained increased importance in competition law, in particular in order to support the objectives of the European Green Deal[40]. In September 2023, the EU Commission published some thoughts on the role of merger control in the context of sustainability challenges and environmental risks[41]. It confirmed that competition law in general, and merger control in particular, need to intervene and play their part in reaching the European Green Deal goals.

In line with this position, recent precedents show that the EU Commission is increasingly taking into account non-traditional sustainability parameters (together with economic factors). This reflects the strong social demand for more sustainable products and services, industries and technologies.

40 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions – The European Green Deal, COM/2019/640 final.

41 Competition Merger Brief, Issue 2/2023 – September, available at https://competition-policy.ec.europa.eu/system/files/2023-09/kdal23002enn_mergers_brief_2023_2.pdf.

Although the association between competition law and sustainable development is not necessarily an obvious one, both find a meeting point where competition law protects and promotes not only the welfare of consumers — who are increasingly turning to sustainable products — but also sustainable innovations and technologies. Indeed, mergers can be driven by the aim of investing in green technologies and markets (such as clean energy, renewable fuels, electric vehicles or emission-reduction techniques), boosting innovation or designing better products that lead to environmental and sustainable improvements.

As such, when developing theories of harm, the EU and NCAs are now more likely to consider sustainability, in particular when (i) defining the relevant markets from both product and geographic standpoints, (ii) assessing consumer preferences, (iii) evaluating green innovation and closeness of competition between parties, and (iv) preventing so-called "green killer acquisitions". Sustainability has also gained relevance when considering the positive effects of a transaction on the environment, innovation and product quality (analysed in section 3.2 below) and determining the scope of remedies (analysed in section 3.3 below).

*Market definitions*: Defining the relevant markets is an essential part of determining whether a transaction is capable of harming competition. It identifies the perimeter within which competition takes place between companies and enables an assessment of the respective market powers of the players involved within said perimeter. Authorities are increasingly being called upon to define and examine the new "green" markets when examining transactions.

For instance, in *Novelis/Aleris*[42], and *DEMB/Mondelez/Charger OPCO*[43] environmental considerations formed a crucial part of the EU Commission's relevant product market definition. In the former, the EU Commission concluded that steel car body parts and aluminium car body parts were not part of the same market, due to considerations related to $CO_2$ emissions, and took the view that there was a higher demand for aluminium since aluminium body parts allowed the production of lighter cars and consequently vehicles that allowed greater fuel economy. In the latter case, the EU Commission considered that there was a possible segmentation between non-conventional coffee (which included organic and fair trade coffee) from conventional coffee, since retailers showed that certain consumers perceive non-conventional coffee as fulfilling different needs — including ensuring sustainable development.

Similarly, in *Marine Harvest/Morpol*[44] consumer preferences for sustainably farmed salmon were considered in the market definition exercise, which ultimately indicated separate product markets for sustainably farmed salmon and conventionally farmed salmon.

In addition, in the 2021 case *Schwarz/Suez*, the EU Commission considered environmental costs as an important parameter in the assessment of the geographic market definition for sorting of lightweight packaging in the Netherlands[45]. In this case, customers in the Netherlands were found

42 Case (EC) M. 9076 - *Novelis/Aleris*.

43 Case (EC) M.7292 - *DEMB/Modelez/Charger OPCO*.

44 Case (EC) M.6850 - *Marine Harvest/Morpol*.

45 Case (EC) M.10047 - *Schwarz Group/Suez Waste Management Companies*.

to avoid transporting lightweight packaging for sorting over long distances in order to reduce the associated $CO_2$ emissions. In the end, the relevant geographic market was defined as national in scope (i.e. the Netherlands).

In 2022, in relation to the case *KPS Capital Partners/Real Alloy Europe*, which involved recycled aluminium products and recycling services — both relevant to the circular economy — the EU Commission considered zero-waste technology production to be a differentiating element in the market definition as regards salt slag recycling (a by-product of aluminium production)[46]. Although once again it ultimately defined the relevant market as a general market for salt slag recycling, there were strong arguments for differentiated markets for non-zero waste and zero-waste recycling.

In 2023, in the *Norsk Hydro/Alumetal* case, when looking at the impact of the transaction on the market for solid advanced aluminium foundry alloys in the European Economic Area ("EEA"), the EU Commission considered whether, based on consumer preferences, low carbon solid advanced aluminium foundry alloys could constitute a separate product market from non-low carbon ones[47]. While in the end it left the market definition open, it did consider a differentiation element in its assessment, indicating indirectly that sustainability may play an important role in market definition.

In line with the above cases, the new Market Definition Notice, adopted on 8 February 2024, reflects the urge to take sustainability into account when defining the market. The Notice lists sustainability as one of the non-price parameters that the EU Commission considers when defining relevant product and geographic markets.

*Consumer preferences and purchasing behaviour*: Sustainability issues are capable of affecting the competitive behaviour of companies and, consequently, are relevant when assessing the conditions of competition to determine the potential impact of a transaction. As such, given the growing interest in eco-responsible consumption, with consumers modifying their purchasing preferences based on social-responsibility and environmental-impact considerations, it is undeniable that this is a criterion that must be taken into account by the competition authorities when analysing the impact of mergers. Consumers are more environmentally conscious than ever and keen to minimise their footprint.

*Green innovation considerations*: The EU Commission and NCAs are increasingly assessing whether mergers do or do not significantly prevent innovation efforts related to environmental technologies. The EU Commission in particular has shown that it may have a role in protecting environmentally friendly technologies when a transaction seems to raise the risk of reduced incentives to innovate and overlapping research and development efforts. In this context, the EU Commission has also resorted to considerations related to companies' sustainability capabilities to identify whether parties are close competitors, based on their research and development initiatives.

46 Case (EC) M.10702 - *KPS Capital Partners/Real Alloy Europe*.

47 Case (EC) M.10658 - *Norsk Hydro/Alumetal*.

This was the case in *GE/Alstom*, which concerned General Electric's ("GE") proposed acquisition of Alstom's power generation business[48]. The EU Commission found that the transaction reduced the number of suppliers for heavy-duty gas turbines — which included the parties, in addition to Siemens and Mitsubishi Hitachi Power Systems — from four to three and would have eliminated a relatively close competitor of GE. The transaction was ultimately cleared after a phase II investigation, subject to remedies, and while reviewing it the EU Commission considered the fact that both GE and Siemens had developed machines that were similar to Alstom's machine in terms of emissions. This was viewed as an indicator that Alstom and GE (as well as Siemens) were largely targeting the same type of customers and, consequently, were close competitors.

Following the same rationale, in *Sika/MBCC*, the EU Commission concluded that the parties, which were both active in the development and supply of chemical admixtures and construction materials, were close competitors, based on the fact that they were both investing significantly in research and development with a strong focus on innovation, and in particular on green innovation (to develop new polymers and introduce more sustainable chemical admixture formulations into the concrete/cement industry)[49].

The EU Commission reached the same conclusion in *Hyundai Heavy Industries/Daewoo Shipbuilding & Marine Engineering* and found that the parties were close competitors according to various parameters, including innovation, as both were strong innovators, investing particularly in research and development for the development of vessel technologies[50].

*Prevention of green killer acquisitions*: Competition authorities (mainly the EU Commission, for the time being) are increasingly claiming jurisdiction (outside the traditional thresholds) over these acquisitions of (generally small) undertakings involved in sustainability-related innovations. The players active in green innovation are usually small entities and start-ups. Transactions aimed at acquiring nascent and innovative green firms with the alleged aim of removing them from the market, normally carried out by already well-established undertakings, usually do not trigger the existing notification thresholds. To this end, the EU Commission is likely to call upon the Article 22 referral mechanism (the legal criteria of which are broad enough to cover environmental concerns[51]) to allow it to review such potential green killer acquisitions, as it is already doing with other types of alleged killer acquisitions[52]. Therefore, certain concentrations may have to be reviewed even if the merger thresholds are not exceeded, on the basis that they may affect competition by potentially removing companies from the market that have significant potential for green innovation.

In *Norsk Hydro/Alumetal*, the EU Commission applied these considerations by opening a phase II investigation due to the concern, *inter alia*, that the acquirer, Norsk Hydro, could eliminate a growing competitor able to bring cheaper and more advanced recycled aluminium products to the market.

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48 Case (EC) M.7278 - GE/Alstom.

49 Case (EC) M.10560 - Sika/MBCC.

50 Case (EC) M.9343 - Hyundai Heavy Industries/Daewoo Shipbuilding & Marine Engineering.

51 Article 22 Guidance, paragraphs 19-22

52 Case (EC) M.11241 - EEX/Nasdaq Power; Case (EC) M.11212 - Qualcomm/Autotalks; and Case (EC) M. 10262 - META/Kustomer, amongst others.

While it is clear that competition authorities are likely to assess environmental/sustainability issues when involved transactions under review, they do not have jurisdiction to intervene in mergers solely because concentrations are able or likely to harm the environment. For example, in *Bayer/Monsanto*, the EU Commission clarified that the enforcement of rules not strictly related to competition (human health, food safety, consumer protection, and environmental and climate protection) takes place outside the context of the enforcement of the EUMR[53].

## Innovation

Innovation has always been a part of the merger review scene. The EU Horizontal Merger Guidelines[54] specifically mention innovation as an economic driver that can be benefited or harmed by a concentration. So it is not new for the competition authorities to look at innovation considerations, particularly when a transaction may have the ability to impact the parties research and development efforts.

However, there seems to have been a paradigm shift in the approach to innovation when analysing mergers, with it becoming a more central element that is addressed more explicitly.

In *Dow/Dupont*, for example, the EU Commission explicitly analysed whether the transaction could lead to a lack of incentives for the parties to pursue ongoing parallel innovation. The main concerns in this case were the possibility of the transaction leading to higher prices, but also to less innovation — as openly affirmed by Commissioner Vestager[55]. The EU Commission found that the entity resulting from the concentration would have incentives to reduce its research and development expenditure and there would be fewer incentives and lower ability to innovate post-transaction. As a result, the transaction was conditionally cleared, with significant divestments aimed at maintaining the merged entity's innovation efforts in the relevant market.

In *Novartis/GlaxoSmithKline's (GSK) oncology business*, the EU Commission reviewed all research and development by both parties and concluded that the transaction could raise concerns as the parties had similar pipeline projects. The transaction was cleared with divestment remedies.

In *GE/Alstom*, as discussed above, the EU Commission expressed concerns over the risk of the transaction leading to reduced innovation and higher prices in the market for a technology that is essential for tackling climate change. It argued that by bringing together two of the three main competitors in the market, the transaction would eliminate an important innovator, reduce the competitive pressure on other competitors and reduce rivals' incentives to invest in innovation. As a result, Alstom had to divest part of its heavy-duty gas turbine business.

53 Case (EC) M.8084 - Bayer/Monsanto.

54 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ (C 31, 5.2.2004), pp. 5–18.

55 EU Commission, Press release, *Mergers: Commission opens in-depth investigation into proposed merger between Dow and DuPont*, available at http://europa.eu/rapid/press-release_IP-16-2784_en.htm: "We need to make sure that the proposed merger does not lead to higher prices or less innovation for these products".

As such, when assessing a transaction and its potential to pose competition concerns, it may be relevant to not only assess whether the parties' activities overlap horizontally or whether there are significant upstream or downstream vertical relationships between them, but also whether they engage in similar research and development efforts. Such similarities are seen by the competition authorities as a potential indicator of the level of closeness between the parties, as it shows where they are heading and what their priorities in the market are, thus signalling potential overlaps that may not be visible yet in the market at the time of the transaction.

## Digital challenges

"Digital" has become a key word in the vocabulary of European authorities, including competition bodies.

In the context of merger control, the EU has produced some solutions to its concerns through the DMA, which, as discussed above, obliges gatekeepers to inform the Commission of any planned merger, even when below the thresholds. This provides a tool to review mergers with the principal aim of preventing or limiting so-called killer acquisitions and to ensure that these colossal digital platforms do not eliminate competition by acquiring smaller players. However, the DMA also provides the EU Commission the power to prohibit such gatekeepers from making new acquisitions if the substantive rules of the DMA are systematically ignored[56]. So this instrument also makes it possible to impose a line of conduct on these digital giants and require certain behaviour from them.

In parallel, when mergers involving digital platforms are notified to the competition authorities, they continue to be assessed through the lens of theories of harm. While classic theories of harm continue to be used in the context of operations that impact the digital sector, the reality is that authorities need to consider the specificities of this sector.

In this context, the authorities have begun to consider theories that take into account key elements of the digital markets. These include, among others, theories based on the following:

i. Access to data. Data is often at the heart of digital platforms' business models and can be seen as a new type of currency in digital industries. This can raise competition issues where competitors do not, or no longer, have access to certain data sets they need to provide their own goods or services. As such, access to data has become a relevant parameter of competition. Additionally, when privacy is an important factor in customer choices, competition may play a role in protecting such data. In this context, authorities are increasingly assessing the impact of a transaction on the treatment of such data post-merger. The EU Commission has considered access to data as a theory of harm in various decisions, notably in *Google/Fitbit*, *LSE/Refinitiv*, *S&P/IHS Markit*, *Microsoft/Nuance* and *Facebook/Kustomer*.

ii. The ecosystem — i.e. analysing the effects of the merger at all levels of the ecosystem, including potentially outside the relevant market targeted by the transaction. This theory has been tested, for example, by the UK Competition and Markets Autho-

56 Article 18(2) of the DMA.

rity (the "CMA") in the *Microsoft/Activision Blizzard* transaction. In this case, the CMA suggested a theory of harm according to which Microsoft could leverage its existing multi-product ecosystem, along with Activision's games catalogue, to strengthen network effects, raise barriers to entry and ultimately foreclose competitors in the market for cloud gaming services[57]. The Bundeskartellamt (the German competition authority), in the *Meta/Kustomer* case, also considered it relevant to not only assess the potential risk of the transaction for the relevant market for cloud-based CRM services, but to also assess the broader scope of Meta's ecosystem, which included Facebook, Whats App, Instagram and online advertising[58]. More recently, in September 2023, the EU Commission blocked the *Booking/eTraveli* transaction based on the ecosystem theory of harm. The EU Commission considered that the transaction would strengthen Booking's existing dominant position in the online travel agency market for hotels by acquiring a major customer acquisition channel. This would have enabled Booking to expand its ecosystem of travel services[59].

On the other hand, the specificities of the digital world also generally help smaller companies (those outside the so-called Big Tech companies — i.e. Alphabet, Amazon, Apple, Meta or Microsoft) demonstrate the absence of competition concerns, often enabling them to argue that the presence of these giants in the markets in question creates sufficient competitive pressure that one can exclude any competition concerns potentially posed by the transaction under review[60].

### Employment issues

Competition law has for some years now been becoming increasingly interested in employment issues. However, the main focus has so far been on detecting anti-competitive practices in labour markets (no-poach agreements, wage-fixing, etc.). There has been much less consideration of employment issues in merger control, except for ancillary restraints agreed to in the context of a transaction (in particular non-solicitation commitments). This seems likely to change.

Although the EU Commission has not been particularly active in this regard, the Dutch competition authority, the *Autoriteit Consument & Markt* (the "ACM"), is at the forefront here, regarding both employment and environmental issues. In *DPG/Sanoma*, the ACM examined, among other things, the consequences of the transaction for the purchase of freelance journalistic services[61]. The ACM reviewed whether the transaction could possibly lead to buying power on the market for journalistic services and ultimately concluded that there were no issues in this case.

57 Case (CMA) - *Microsoft/Activision Blizzard.*

58 Case (Bundeskartellamt) B6-21/22 - *Meta/Kustomer*.

59 Case (EC) M.10615 - *Booking Holdings/Etraveli Group*.

60 This argument was considered in, for example, the Spanish case C/1220/21 - Turnitin/Ouriginal Group; the Dutch case ACM/19/038207 - *DPG/Sanoma*; the French case 18-DCC-18 - *Axel Springer/Concept Multimédia*; the French case 18-DCC-63 - *TF1/Aufeminin*; the Irish case M/21/002 - *Booster/Liftoff Mobile*. On this subject, see OECD, *Digital Merger Control: Adapting Theories of Harm – Note by Viktoria Robertson* (DAF/COMP/WD(2023)59).

61 Case (ACM) ACM/19/035555 - *DPG/Sanoma*.

In June 2022, in a speech given at the New Frontiers of Antitrust Conference in Paris, Martijn Snoep, the ACM's Chairman, also called on the authority to take into greater account the effects of a M&A transaction on the labour markets, in particular in cases where the merger can result in the reduction of the number of employers for a certain job to one or a few (i.e. labour market monopsony)[62]. In short, the ACM's Chairman brought attention to cases where the undertakings involved compete on the demand side of the labour markets, giving them the ability to restrict input competition as a result of the transaction.

These issues will certainly come up in the near future.

## 3.2. Efficiencies – Balancing benefits and risks

Efficiency considerations when analysing concentrations stem from the assumption that although mergers can almost by definition affect competition (since they remove an independent player), they can also have economic advantages that sometimes sufficiently counterbalance the negative impact. As such, even if the merger in question raises competition concerns, all is not lost. There may still be light at the end of the tunnel, for when the EU Commission determines the impact of a concentration on competition, it must take account of "any substantiated and likely efficiencies put forward by the undertakings concerned"[63].

The criteria used by the EU Commission to examine the efficiencies brought up by undertakings are set out in Section VII of the EU Guidelines on the assessment of horizontal mergers, which state that efficiencies have to fulfil three cumulative conditions: (i) they must benefit consumers in the relevant markets; (ii) they must be merger-specific, or in other words be a direct consequence of the merger and be incapable of being achieved by less anti-competitive alternatives; and (iii) they must be verifiable such that the EU Commission is able to be reasonably certain that the efficiencies are likely to materialise.

Historically, the efficiencies referred to purely economic factors, that is to say lower prices, cost reductions in production or distribution, increased production, or innovation (i.e. new or improved products or services).

However, today competition authorities are increasingly assessing the potential efficiencies and benefits of mergers mainly in terms of sustainability, digitalisation and innovation. For example, a merger that leads to improved environmental performance, enhanced technological capabilities or increased research and development activities may be viewed favourably by competition authorities on the basis of the efficiencies created. At the same time, competition authorities are also mindful of potential risks and negative effects on sustainability, digital markets and innovation. So a merger that, for instance, results in reduced competition and stifled innovation in digital markets or hampers sustainable practices may face regulatory scrutiny.

62 *Speech: Labor markets, competition law's long neglected corner*, available at https://www.acm.nl/en/publications/speech-labor-markets-competition-laws-long-neglected-corner.

63 Recital 29 of the EUMR.

### Green efficiencies

As for sustainability, the so-called "green efficiency defence" has been used in several merger proceedings to seek authorisation by the EU Commission. This term refers to a concept in competition law where a merger is justified on the grounds that it would result in environmental benefits, such as improved sustainability or reduced environmental impact, that outweigh any potential anti-competitive effects and could not be attained without the transaction (i.e. by the parties individually). This defence is based on the premise that the merger would enable the merged entity to operate more efficiently and effectively in achieving environmental goals, and that it should therefore be allowed to proceed despite potential competition concerns.

In this context, environmental factors may be considered to be merger-specific efficiencies, rebalancing the negative impact the transaction may have on the market. For example, in the above-mentioned *Dow/DuPont* case, the EU Commission assessed the incentives to develop new and better quality products as well as the incentives post-merger to ensure the emergence of more environmentally friendly products on the agro-industrial market.

In *Veolia/Suez*, two French companies active in the waste management sector argued that the merger would result in synergies and efficiencies that would bring environmental benefits, such as improved waste recycling and reduced carbon emissions[64]. Veolia framed its tender offer as the creation of a "more powerful and sovereign Green Deal Europe" that "could become a major advance in the implementation of the Green Deal and of the European recovery plan", referring to it as "a perfect match for the ambitions of the European Commission"[65]. The EU Commission considered the green defence and ultimately approved the merger, subject to certain conditions, after assessing the potential environmental benefits and competition concerns.

On the other hand, in the *Siemens/Alstom* case, the parties argued that Siemens' proposed acquisition of Alstom would result in increased innovation and investment in green technologies, such as energy-efficient trains, which would contribute to environmental sustainability. However, in this case, the EU Commission rejected the green efficiency defence and blocked the merger in 2019, due to concerns about reduced competition, risks of higher prices and, consequently, potential harm to consumers. It concluded that the proposed merger would have led to a dominant market position for the resulting entity in several national markets for railway signalling systems and very high-speed trains, and would have limited competition and innovation in the rail transport sector, outweighing any potential environmental benefits.

In principle, there is no economic basis for excluding green efficiencies from the conventional efficiency defence. Just like any other type of efficiency, green ones must fulfil the three cumulative criteria listed above (i.e. benefit consumers, be merger-specific and be verifiable).

However, the verifiability of green efficiencies often proves difficult. In fact, for green efficiency gains to be taken into account, it is essential that the competition authority be able to assess the

64 Case (EC) M.9969 - *Veolia/Suez*.

65 See the key terms of Veolia's draft offer available at Finance_Communique_norme_relatif_au_depot_du_projet_de_note_d_information_de_Veolia_VENG.pdf.

impact of the transaction and likelihood of the benefits materialising within a longer time horizon than for other types of efficiencies. A broader assessment that goes beyond the usual notion of consumer welfare is also required.

For instance, in *Aurubis/Metallo*, the EU Commission found that the second type of efficiency brought up by the merging parties — which consisted of the application of a component at Aurubis' plants resulting in metal recovery and environmental benefits — could not be accepted, since the authority was unable to verify the assumptions underlying the submitted quantifications of the alleged efficiency gains[66]. The EU Commission explained that "the supporting documentation submitted by the Notifying Party only allows for the verification of the calculations based on these assumptions, but not of the assumptions themselves".

The difficulty may be caused by (i) the complexity of environmental impacts, which can be diverse and require detailed analysis of various environmental factors such as the use of materials and technologies and changes in supply and distribution networks; (ii) long-term and indirect effects; (iii) lack of standardised metrics; (iv) subjectivity and uncertainty since interpretation and valuation may vary depending on stakeholders' perspectives; and (v) trade-offs and conflicting interests.

The *Aurubis/Metallo* decision stresses the centrality of being able to quantify environmental considerations for them to be able to come into play in merger control proceedings. The above decision takes a bold approach by indicating that efficiency gains are not a *carte blanche* to proceed with a transaction and must be verifiable. Due to these challenges, any claims related to green efficiencies brought forward by merging parties must be supported by robust and credible evidence to withstand regulatory scrutiny.

There may also be a need for authorities to define more objective methods of measuring environmental efficiencies. Climate change economics can provide insights and methodologies for assessing and quantifying the environmental benefits resulting from a merger. For example, economic models can be used to estimate the potential reduction in greenhouse gas emissions, the value of avoided environmental damage or the potential resource savings associated with improved sustainability practices.

In any case, the green defence is still evolving, and the outcomes of specific cases will likely depend on various factors, including the specific circumstances of the merger and the jurisdiction and regulatory authorities involved.

### Digital efficiencies

As for digital considerations, one of the competition issues that often arises in digital mergers is access to data, which can represent a unique competitive advantage. Data has become a valuable resource, and all the more so in the ecosystems of many digital service providers. Because of the versatility of data, data from one market can be extremely useful across a wide range of related

66 Case (EC) M.9409 - *Aurubis/MetalloGroup Holding*, paragraphs 844 and 845.

or even unrelated markets. This can raise competition issues, as mentioned above, but can also create efficiencies.

One such efficiency is the ability of the parties to improve their related products by combining their data. Combining the merging parties' data may allow the resulting entity to offer a higher-quality product (e.g. as considered in the *Google/Fitbit*[67] case) or new products thanks to a data set to which the parties would otherwise not have had access (e.g. as considered in the *Microsoft/LinkedIn*[68] case).

The above illustrates that when alleging efficiencies, even outside the traditional ones, merging parties must duly substantiate their allegations. The authorities are looking at new factors, but not with less rigour.

As regards the standard of proof, crucial aspects were tackled by the ECJ in 2023 with its *CK Telecoms*[69] ruling. The ECJ clarified that the EU Commission must substantiate that a merger is "more likely than not" to result in a significant impediment to effective competition ("SIEC") in order to block the merger or impose corrective measures. This standard of proof does not demand a higher level of certainty (i.e. a "strong probability"), as was proposed by the General Court.

The ECJ also rejected the GC's stance that the EU Commission must establish a SIEC by proving that two cumulative conditions are met: (i) elimination of the important competitive constraints that the merging parties had exerted on each other; and (ii) reduction of competitive pressure on the remaining competitors. The ECJ found this interpretation to be too restrictive since, following this approach, neither of these factors alone would be enough to demonstrate a SIEC. Instead, it affirmed the requirement to assess mergers in terms of their impact on competition, even in gap cases (i.e. mergers that do not create or strengthen a dominant position but may still give rise to a SIEC).

On another note, this ruling upheld the EU Commission's interpretation of the "closeness of competition" and "important competitive force" concepts. The ECJ disagreed with the stricter interpretation suggested by the GC, stating that the proximity of competition should be evaluated relative to other competitors, and a company can be considered an "important competitive force" without necessarily standing out in terms of pricing behaviour. Instead, it is enough for it to have "more of an influence on the competitive process than its market share or similar measures would suggest". In addition, as regards closeness of competition, the ECJ did not consider it necessary to demonstrate that parties are "close competitors".

Lastly, the ECJ clarified that the EU Commission is not obliged to consider "standard efficiencies" as part of its quantitative analysis of price increases. According to the ECJ, it is up to the notifying parties to demonstrate efficiencies. Therefore, only efficiencies meeting the EU Commission's rigorous standard of proof must be taken into account, without a presumption that all transactions somehow lead to standard efficiencies.

67 Case (EC) M.9660 - *Google/Fitbit*.

68 Case (EC) M.8124 - *Microsoft/LinkedIn*, paragraph 249.

69 Judgment of 13 July 2023 - Case C-376/20 P, *Commision v CK Telecoms UK Investments*.

## 3.3. Proposal and definition of commitments – Addressing non-traditional concerns

Commitments, remedies and conditions are measures imposed or accepted by competition authorities as a condition for approving a merger. They are intended to mitigate the competition concerns that may result from a merger, as identified by the competition authority reviewing it.

In recent years, competition authorities have increasingly used commitments and remedies to address non-traditional concerns. For instance, companies involved in a merger may be required to commit to certain sustainability practices, employment-protection measures or innovation initiatives to address potential concerns identified by the competition authority in question. As such, it is not uncommon to see M&A transactions receive clearance if the parties involved make commitments to implement sustainable business practices, preserve jobs, protect employees' rights, invest in research and development, or share innovations with competitors. These commitments aim to address the potential negative impact of a merger on non-traditional factors and to ensure that the merger does not harm the evolving interests of consumers.

In fact, where sustainability is an important competitive factor, it may need to be considered as a remedial measure to counteract possible competition issues resulting from the merger. There are examples of remedies that have had a positive effect on the environment.

For instance, as previously mentioned, in the failed merger between Siemens and Alstom, the EU Commission required the companies to commit to divesting part of their high-speed train business and providing access to critical technologies to address concerns related to competition and sustainability in the rail transport sector. The merger was ultimately prohibited, as the commitments proposed were deemed insufficient.

In the merger between Fiat Chrysler Automobiles and PSA Group to form Stellantis, the EU Commission required the companies to commit to measures aimed at supporting electric-vehicle production, addressing potential anti-competitive effects in the small-van segment and protecting competition in the emerging market for hydrogen-fuel-cell vehicles[70].

The EU Commission very recently approved two transactions in which sustainability aspects were explicitly taken into account. In *Sika/MBCC*, the EU Commission approved the acquisition of MBCC by Sika, conditional on the divestiture of MBCC's global chemical admixture business[71]. The transaction involved two key innovators and global leaders in the development and supply of chemical admixtures and construction materials, which plays a key role for the concrete industry, particularly in addressing sustainability challenges.

The EU Commission's preliminary investigation showed that the transaction, as it was initially notified, would substantially reduce competition and lead to higher prices and less innovation in the

70 See Case (EC) M.9730 - *FCA/PSA*.

71 See Case (EC) M.10560 - *Sika/MBCC Group*.

EEA. Specifically, the conclusion was that the merged entity would have had very large market shares with limited competitors, and the market was characterised by significant barriers to entry[72].

To address those concerns, Sika offered to divest MBCC's chemical admixture business in the EEA, Australia, Canada, New Zealand, Switzerland, the UK and the US, including development facilities and global research.

The commitments consisted of the structural divestiture of a stand-alone business, and fully removed the horizontal overlaps between the parties in chemical admixture markets in the EEA. This enables a purchaser to run the divested business as viable competitive force in the market on a lasting basis. The EU Commission will closely monitor the divestment process, including the choice of purchaser for the divested businesses, which will have to be suitable and approved by the EU Commission itself. The decision is conditional upon full compliance with the commitments.

In *Medtronic/Covidien*[73], the EU Commission only cleared the transaction upon obtaining a divestment commitment, as Medtronic was in the process of selling a drug and Covidien was in the late stages of developing a potential competing product called Stellarex. As such, Medtronic had to divest the Covidien drug that was under development. Similarly, in *Pfizer/Hospira*[74], the EU Commission cleared Pfizer's acquisition of Hospira subject to the divestment of its sterile injectable drugs products and one biosimilar drug under development.

Similarly, as noted above, the EU Commission has also accepted data-related remedies to clear transactions. For instance, in Google's acquisition of Fitbit[75], it imposed commitments on Google to ensure that the data collected from Fitbit's wearable devices would not be used for anti-competitive purposes and that consumers would have the option to control and delete their data.

This trend of utilising commitments to address non-traditional concerns reflects competition authorities' growing role in shaping the behaviour of companies beyond traditional competition considerations, and highlights the need for companies to proactively address these concerns in their merger strategies and negotiations.

### 3.4. The apparent disinterest of the US towards non-traditional competitive factors in merger control

On the other side of the Atlantic, the US antitrust agencies continue to review mergers under the traditional standard and remain focused on competitive circumstances. So far, it seems that when reviewing mergers public-interest factors are not being considered as much as in the EU[76].

72 These barriers included the need to have a sufficiently large customer base, strong sales force and technical team, high volumes of orders and the know-how to compete. In addition, the market was found to operate on a strong brand-loyalty basis.

73 Case (EC) M.7326 - *Medtronic/Covidien*.

74 Case (EC) M.7559 - *Pfizer/Hospira*.

75 See Case (EC) M.9660 - *Google/Fitbit.*

76 See the written contribution from the United States to the 123rd meeting of the OCDE available at www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm.

There have been a few cases that show some concern for non-traditional factors, such as environmental, data-related and employment issues. This could suggest that the trend may also be changing on the other side of the Atlantic, but for the time being the US does not seem to be as active on this front.

For example, some attention has been paid to competition in the labour market in the context of merger control. In 2021, the Department of Justice (DOJ) for the first time prohibited a transaction based on its negative impact on the labour market. According to the DOJ, after the proposed acquisition of the publisher Simon and Schuster by the publisher Penguin Random House, the purchasing power of the merged parties would be so strong that authors would have little to no bargaining power to receive advances and fair royalties. The DOJ also concluded that consumers would have less choice in terms of literary offerings[77].

The US agencies have also looked into green concerns in the context of merger control. For instance, in two cases they analysed market definitions with a focus on sustainability and especially distinguishing between organic versus conventional products. Firstly, in *Post/TreeHouse* (ultimately abandoned by the parties)[78], the FTC alleged that the ready-to-eat cereal product market excluded "natural and organic" cereals, since they "tend to have healthier and more expensive inputs", which may result in more expensive downstream products. Secondly, in *Danone/WhiteWave*[79], while the DOJ was less explicit about non-price factors, it inferred differentiation from the description of the inputs for raw organic milk ("... is collected from organic cows on organic farms that must meet rigorous USDA regulations") and concluded that this impacts downstream prices. Finally, as regards employment issues, in Amazon's acquisition of Whole Foods, the FTC urged Amazon to maintain certain employment standards for Whole Foods workers to address concerns about potential negative effects on jobs and working conditions in the grocery retail sector.

On the other hand, it is also clear that the US antitrust agencies are paying increasing attention to Big Data. For the last few years, digital markets and large digital platforms have been a key focus of the US agencies' priorities. While they are still mostly reviewing transactions in these markets through the lens of traditional substantive assessment, their doing so has shed light on some issues with and shortcomings of the current tools. In July 2023, the FTC and the DOJ jointly issued their new draft Merger Guidelines. The draft guidelines broaden the scope of mergers potentially subject to control by adjusting the thresholds. They now include (i) a lower threshold for what is considered a highly concentrated market under the Herfindahl-Hirschman Index, (ii) a structural presumption against horizontal mergers that result in a combined market share of more than 30%, and (iii) a presumption against vertical mergers where access to more than 50% of the market can be foreclosed. The draft guidelines also address several issues that are highly relevant to mergers in digital markets, in particular to prevent the Big Tech giants from acquiring emerging competitors, aggregating data and developing network effects.

77 Case (DOJ) - *Penguin Random House/Simon and Schuster*.

78 See https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0128-post-holdings-inc-matter.

79 See https://www.justice.gov/atr/case/us-v-danone-sa-and-whitewave-foods-company.

This is reflective of Biden's Executive Order on Promoting Competition in the American Economy, which prioritises antitrust enforcement with respect to dominant internet platforms, to impede them from using "their power to exclude market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage"[80].

Certain regulators in the US have indicated that antitrust principles and factors such as ESG are not in conflict[81]. However, there have not been any significant developments in practice and it does not seem that a new approach is part of the Biden Administration's agenda.

The FTC's chair, Lina Khan, has also expressed similar views as regards these potential new factors. At the American Bar Association's antitrust spring meeting on 31 March 2023, she confirmed that the authority is "mindful" of its tools and that the FTC has already shared its views when companies have enquired about mergers that have sustainability benefits but raise competition concerns. In these cases, the FTC will analyse deals through a competition lens, while other types of ESG commitments or sustainability factors will not be key to its inquiries.

Thus, it seems that although the US antitrust enforcers appear to be considering new tools for antitrust assessment in order to adapt the new realities of recently developed markets as well as new consumers' interests and priorities, overall they are not yet considering these factors relevant for merger control purposes. According to the FTC and the DOJ, despite the fact that they "may be appropriate policy objectives and worthy goals [...] integrating their consideration into a competition analysis [...] can lead to poor outcomes to the detriment of both businesses and consumers"[82].

# 4. Conclusion

The landscape of merger control is evolving, with competition authorities increasingly taking into account non-traditional factors such as sustainability issues, employment issues, data-related aspects, digital markets and innovation in their substantive analysis of the potential impact of mergers. They also consider the efficiencies that mergers can create and balance them against the negative impact determined according to both traditional and non-traditional factors. Furthermore, commitments are increasingly being used to address non-traditional concerns as a condition for merger approvals.

This trend is part of a much more interventionist approach to reviewing and challenging mergers that is being taken by competition authorities worldwide. The authorities are using an ever-wider range of tools to acquire the prerogative to review transactions that have traditionally fallen outside of their jurisdiction. At the same time, several countries are considering (e.g. Australia) or

80 Executive Order on Promoting Competition in the American Economy, 9 July 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

81 Didden, D. G. (2023). Antitrust and ESG. Harvard Law School Forum on Corporate Governance.

82 "Core Competition Agency Principles: Lessons Learned at the FTC," Keynote Address by FTC Chairwoman Edith Ramirez, 22 May 2014, available at https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

See also "International Antitrust Enforcement: Progress Made; Work To Be Done," Keynote Address by DOJ Assistant Attorney General of the Antitrust Division Bill Baer, 12 September 2014, available at http://www.justice.gov/atr/speech/international-antitrust-enforcement-progress-made-work-be-done.

already have implemented (e.g. Egypt) a shift from a voluntary or non-suspensive system to the predominant mandatory notification model combined with a standstill obligation.

In addition, the arrival of new legislation with implications for merger supervision, such as the DMA, the FSR and the foreign direct investment (FDI) rules, has added a new level of complexity to an already challenging M&A landscape.

In short, competition authorities are seeking to review more transactions based on a broader analysis of criteria that go beyond the traditional boundaries of competition law. This has created a backdrop of increasing jurisdictional uncertainty, with competition authorities focusing on below-threshold mergers and new theories of harm. They are increasingly applying new analytical frameworks, leading to more comprehensive reviews and more complicated substantive assessments.

The current merger control framework is being shaped by a much more proactive approach from the authorities, one that sometimes goes beyond the applicable statutory framework and in so doing is creating additional uncertainty for businesses. On the one hand there is jurisdictional uncertainty, which has effects on the timing and completion of transactions, while on the other there is analytical uncertainty and a focus on new theories of harm, which are less predictable than traditional theories that benefit from an extensive set of helpful precedents.

Faced with these challenges and the need to guarantee the proper functioning of merger control systems at a global level, competition authorities must cooperate more and better, especially within the EU. That cooperation will be key to the smooth running of the EU merger control system and will most likely require increased coordination of NCAs through the European Competition Network. This is especially important in light of the repurposed Article 22 of the EUMR, as was shown by the *Illumina/Grail* case.

From the point of view of the parties to a merger, they face additional burdens both in terms of assessing when a transaction has to be notified and its substantive assessment. They must weigh up all the possible impacts of the transaction, not only in terms of conventional competition factors, such as prices, output, choice or quality of goods and services, but also the impact on environmental, sustainability, data, digital and employment aspects. These elements must be factored into transaction schedules, closing conditions and risk allocation provisions of the transaction documents, even for non-reportable transactions if they raise competition concerns.