

Procedure under the Merger Regulation

Procedure – legal documents

- **The Merger Regulation**
 - **Art. 4** – notification of concentration
 - **Art. 7** – suspension of concentration and derogation
 - **Art. 6 and 8** – decision making power
 - **Art. 10** – time limits
 - **Art. 11-13** – investigation powers
 - **Art. 14-15** – fining powers
 - **Art. 17** – confidentiality
 - **Art. 18** – right of defence
 - **Art. 19** – role of Advisory Committee
 - **Art. 20** – publication of decisions
 - **Art. 16** – judicial review with respect to fines
- **The Implementing Regulation**
- **The Notice on Simplified Procedure**
- **The Best Practices on the Conduct of Merger Proceeding**
- **The Notice of Access to the File**
- **The Hearing Officer's Mandate**
- **The Notice on Remedies**
- **The Notice on restrictions directly related and necessary to concentrations**

Basic Procedural Features of Merger Control

- **Administrative system**
 - The power of the European Commission to assess Merger cases and to authorize or prohibit mergers
 - Judicial review of Community Court
- **Ex ante system**
 - Mandatory notification of all concentrations with community dimension and a bar on closing („suspensive effect“ or „stand-still obligation“) prior to authorization by the Commission
- **Predictable timetable**
 - Pre-determined, short and legally binding deadlines
- **Legal certainty and transparency**
- **Involvement of Member States**
 - The Commission must cooperate closely with NCAs
- **Right of defence**
 - Before taking adverse decision, the Commission must communicate all its objections to the merging parties, allow them to respond in writing and at a formal oral hearing and give them access to its file

Proceeding before the Commission

- **Mandatory notification and waiting period**
 - Concentration with a Community dimension must be notified to the Commission
- **Commission investigation**
 - **Phase I** – within a period about 5 weeks following the formal notification
 - **Phase II** – in some cases more detailed investigation is needed – further four or five months
 - Sometimes formal commitments may be offered by the parties

The Pre-notification Stage

- **Pre-notification meeting**

- Commission provides informal guidance to the parties on technical jurisdiction and other aspects of the Merger Regulation.
- The parties inform Commission about the background to an intended concentration.
- The parties and the Commission discuss timing of the notification and of the subsequent procedure.
- They discuss the type and quantity of data necessary in the notification.
- The parties may learn how is the likely attitude of the Commission on substantive issues arising from the operation.
- The pre-notification discussion is confidential

Notification

- Who must notify?
 - Art. 4 (1) – all concentrations with Community dimension
 - Art. 4 (5) – concentration which is capable of being reviewed under the national competition laws of **at least three Member States**
- The concentrations must be notified before their implementation
- The notification must be made on specified forms that are annexed to the Implementing Regulation
 1. **Form CO**
 2. **Short form CO**
 3. **Form RS**

Forms for the notification

1. Form CO → a standard form

- it requires information as description of the concentration including an executive summary, details of concentration and information on the parties' turnover, details of the ownership and control of the concerned undertakings, market definition of all markets affected by the concentration, overall context of the concentration and efficiency claims,...

2. Short form CO → may be submitted in the cases of concentrations where one of the following conditions is met:

- the turnover of the joint venture and/or the turnover of the contributed activities is less than **EUR 100 million** in the EEA territory; and the total value of the assets transferred to the joint venture is less than **EUR 100 million** in the EEA territory;
- Cases with **no affected markets**
- **Low market share** of the parties to the concentration – less than **15 %** in the case of horizontal relationships, less than **25%** in the case of vertical relationships
- a party is to acquire sole control of an undertaking over which it already has joint control

3. Form RS → reasoned submission

- a reasoned submission for a pre-notification referral under Article 4(4) or (5) of the Merger Regulation

Decision making - Art. 6 decisions

1. Commission finds that the Concentration **does not fall within the scope of the Merger Regulation**
 - The decision shall be taken within 25 working days at most (the period shall be increased to 35 working days)
2. The Merger **falls within the scope of the Regulation** but it is **compatible with the common market**
 - The decision shall be deemed to cover restriction directly related and necessary to the implementation of the concentration
 - The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with **the commitments** they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
 - The decision shall be taken within 35 working days at most

Decision making - Art. 6 decisions

→ The decisions may be revoked where:

- The decision is based on incorrect information for which one of the undertaking is responsible or where it has been obtained by deceit
 - The undertaking commit a breach of an obligation attached to the decision
3. Merger falls within the scope of the Regulation and it raises **serious doubts as to its compatibility with the common market** → the Commission shall decide to **initiate proceedings**
- **Decisions under Art. 8**

Decision making - Art. 8 decisions (1)

- **Decisions declaring the concentration compatible with the common market**
 - Where the concentration does not significantly impede competition in the common market
 - Where the JV constituting a concentration fulfils the Art. 81(3) of the TFEU
- **Decision declaring the concentration compatible with the common market**
 - Where the undertakings concerned make modification of concentration
 - The Commission may attached to the decisions conditions and obligations intended to ensure that the undertaking concerned will comply with **the commitments**
- **Decision declaring the concentration incompatible with the common market**
 - Where the concentration significantly impede competition in the common market
 - Where the JV constituting a concentration does not fulfils the Art. 81(3) of the TFEU

Art. 8 decisions

- The decisions shall be taken within not more than **90 working days** of the date on which the proceedings are initiated - the period shall be increased to **105 working days** (the commitments)
- The Commission may **dissolve** the concentration / **order any other appropriate measure** to ensure that the undertakings concerned dissolve the concentration or take other restorative measures where a concentration:
 - has already been implemented and that concentration has been declared incompatible with the common market, or
 - has been implemented in contravention of a condition attached to a decision
- The decisions may **be revoked** where:
 - the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit
 - the undertakings concerned commit a breach of an obligation attached to the decision