

Key issues and recent trends in EU merger control

Michele Carpagnano

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2019 merger control: the numbers

168 reviewed mergers at EEA level (EU Commission and NCAs)

102 authorized mergers, of which **26** authorized with conditions

10 prohibited mergers / withdrawn due to concerns

3 non-compliance decisions

1 referral from the EU Commission to an NCA

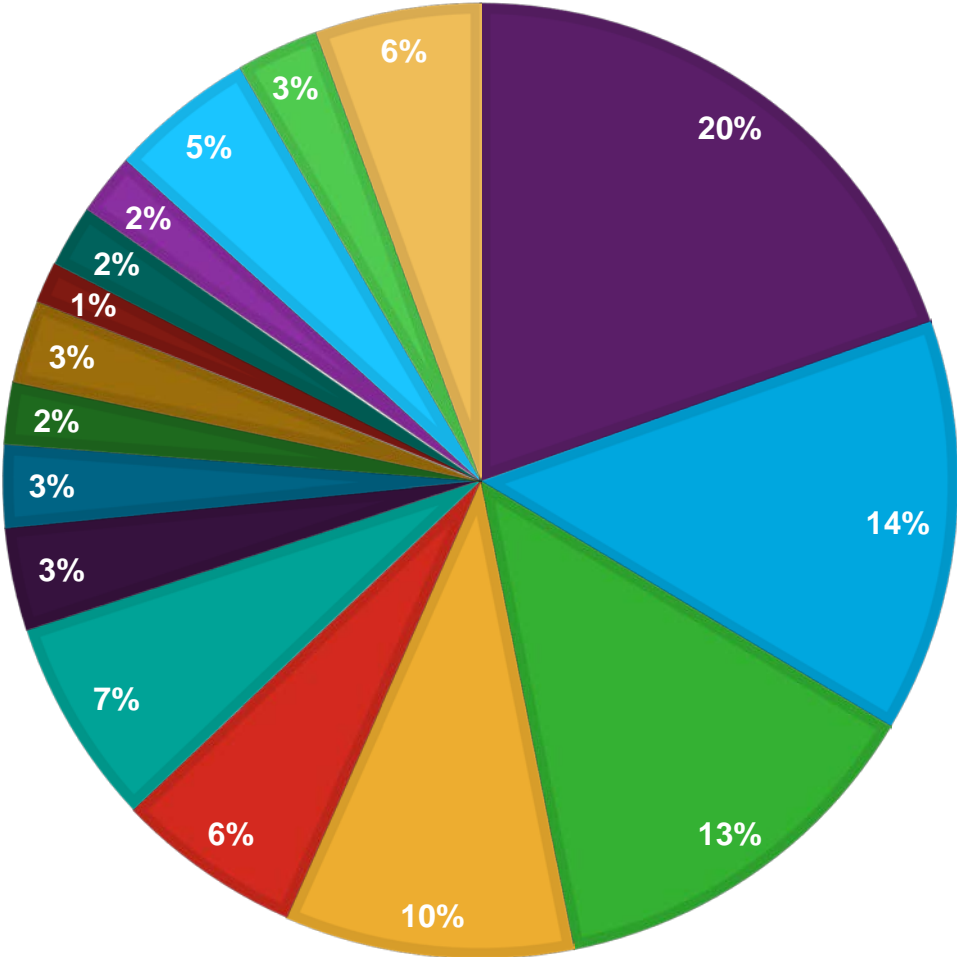
3 fines for late notification / failure to notify

10 appeal procedures before the EU Court of Justice

2 national appeal proceedings

Source: NCAs, DGComp, Mlex.

2019 merger control: the sectors



- TMT
- Chemical and industrial
- Transportation
- Food and beverages
- Shops and malls
- Healthcare
- Press and bookstores
- Construction
- Clothes and footwear
- Toys and games
- Cosmetics
- Entertainment
- Post
- Energy
- Banking & finance
- Other
(car parking, travel industry, recycling, stationery, B to C services)

Source: NCAs, DGComp, Mlex.

Recent trends in EU merger control

- Increased focus on internal documents of the parties through artificial intelligence, especially aimed at identifying killer acquisitions (Bayer / Monsanto);
- Cooperation between EU Commission and NCAs (Dow / Dupont);
- Increased focus on conglomerate mergers (Essilor / Luxottica);
- Increased focus on failure to notify (gun-jumping) and stand-still obligation violations:
 - Step-by-step implementation of transactions via acquisition of minority stakes (Marine Harvest, Canon / Toshiba)
 - Contractual acquisition of control (Altice / PT Portugal)
 - Early integration (Altice / SFR; Ernst & Young / KMPG)

- Structural solutions preferred:
 - Divestiture of a stand-alone business or subsidiary (AB InBev and SABMiller; HeidelbergCement / Italcementi);
 - Upfront buyer remedy (Ball / Rexam);
 - Fix it first (Alstom / General Electric).
- Non divestiture remedies:
 - Removal of links between the parties to solve horizontal effects (Hapag Lloyd /CSAV)
 - Interoperability remedies for vertical and conglomerate issues (Microsoft / LinkedIn).

Recent trends in merger regulation across EEA

11 June 2018, UK
UK merger control thresholds are revised to broaden the scope for the Secretary of State to intervene in acquisitions of military technology, computer hardware and quantum technology companies

1 January 2019, Ireland
Increased merger control thresholds enter into force. Simplified clearance procedure to be implemented.

20 April 2019, France
A decree simplifying merger notifications to the French competition Authority is published.

White Paper "Towards more effective EU merger control", 2014
The Commission's White Paper proposes to complement the Merger Regulation with a light system for reviewing the acquisition of minority shareholdings.



17.6.2019, Finland
Changes to the calculation of deadlines in merger control: timelines to be counted in working days instead of months.

Introduction of **transaction value thresholds** to scrutinize digital economy M&A (Germany-Austria)

Source: Mlex

Franco-German Manifesto for a European industrial policy, March 13, 2019

“Current merger guidelines to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets”

German Federal Ministry of Economic Affairs and Energy, February 2019

“Often German or European mergers, which are meaningful and necessary in view of the world market, fail because of the focus on national and regional markets under current law. European and German competition law must be reviewed and, if necessary, amended so that German and European companies can compete at international level on an equal footing”

Proposal to relax EU merger control to allow for National champions

Public policy considerations other than economic efficiency based on Article 21 of the EU Merger Regulation may allow Member States to block mergers otherwise permitted.

FDI rules are also in force in some Member States.

New EU FDI Regulation (EU) 2019/452.

Wieland/Aurubis

According to the EU Commission the transaction would have eliminated price competition between two important producers that currently compete closely, namely in the supply of rolled copper products for electric connectors used in the automotive and other industries. Furthermore, European customers cannot rely on suppliers outside the EEA due to import duties and just-in-time delivery requirements, as well as the superior technical capabilities of EU suppliers.

Siemens/Alstom

According to the EU Commission the merged entity would have become the market leader in several railway signalling markets in the EEA. For very high-speed trains, the proposed transaction would have reduced the number of suppliers by removing one of the two largest manufacturers. In all of the above markets, the competitive pressure from remaining competitors would not have been sufficient to ensure effective competition.

Source: Competition Merger Brief

Apple /Shazam

The EU Commission takes into account the importance of privacy legislation when assessing the ability of the merged entity to engage in anti-competitive conduct based on the use of data.

Praxair / Linde

EU Commission clears merger between two of the world's four largest gas suppliers subject to divestment of a comprehensive package of remedies

2018

Tronox/Cristal

The Commission conditionally clears the acquisition of Cristal by Tronox, two major suppliers of titanium dioxide pigments. As the product market definition leads to the discovery of a high market concentration, the parties offer to divest a Tronox business.

Daimler/BMW/Car Sharing JV

The Commission clears the creation of six joint ventures in the field of car sharing services by analyzing substitute services such as public transport. The authorization has been subject to access solutions and tests for specific market entry plans.

Bayer / Monsanto

In order to resolve the horizontal overlaps, Bayer presents a comprehensive divestiture package which includes all its activities in the seed and trait sector, its activity in the glufusinuous and in the digital agriculture sector. The Commission cooperates with other competition authorities.

UTC/Rockwell Collins

The operation results in the world's largest supplier of aircraft components. Horizontal overlaps are resolved by commitments to divest the activities of one of the parties in the affected markets. Vertical and conglomerate aspects are also investigated.

2018

Ilva / ArcelorMittal

The largest producer of flat carbon steel in Europe and worldwide is authorized to acquire the Italian company Ilva, which operates the largest integrated flat carbon steel plant in Europe, subject to major divestments of steel assets. The case also provides insight on the defense of the company in difficulty.

Qualcomm / NPX

Conglomerate problems related to baseband chipsets and closefield communications, as well as cellular and non-cellular IP. The EU Commission considers the potential foreclosure effects of bundling in a highly technological sector.

Essilor / Luxottica

The EU Commission's assessment deals with the effects of conglomerates, namely that the merged entity could bundle or link the offers of Luxottica brand glasses and Essilor lenses and thus reduce competition in the lens market. The case has been resolved unconditionally.

Altice / PT Portugal

The EU Commission fines Altice for failure to notify. Altice was able to exercise decisive influence because of the rights granted in the settlement agreement which could not be justified for the purposes of preservation of value. Finally, Altice actually exercised control by giving instructions to PT Portugal.

2018

Source: Competition Merger Brief

- According to the EU Commission some mergers may lead to an increase in innovation as countervailing efficiency.
- In Dow/DuPont and in Bayer/Monsanto, in some industries the protection against imitation may be strong already pre-merger thanks to effective IP rights or product life-cycle management techniques. Hence, it is less likely that a merger would increase the incentives to innovate by internalizing significant involuntary knowledge spill-overs.
- Structural remedies (divestitures) are preferred to behavioral ones. For an innovation remedy to work, it is important to include all key elements of the innovation value chain, such as R&D facilities, IP rights, data, test results, documentation, know-how, etc.
- In a number of recent mergers involving concerns only regarding the overlaps in existing products, the parties committed to divest also their pipeline products, R&D facilities and employees to ensure that the transferred businesses/assets remain competitive in the long run.

- Pre-notification contacts allow the parties to discuss the proposed concentration in confidence so as to smooth the merger review process;
- Pre-notification can be used to file remedy proposals in order to avoid the opening of an in-depth investigation;
- However, before market investigation is carried out meaningful discussions can only take place when the parties propose remedies which eliminate the entire overlap (Holcim/Lafarge);
- Pre-notification contacts also allow the EU Commission to point out missing information that could have led to an incompleteness decision;
- Extensive pre-notification contacts may also allow to resolve a case in phase I that otherwise might have required an in-depth assessment.

Michele Carpagnano

Partner, Dentons Europe Studio Legale Tributario
Head of Competition & Antitrust
Via XX settembre 5, 00187 Roma
T +39 06 809 120 00
E michele.carpagnano@dentons.com

Founder and Co-Director
Osservatorio permanente sull'applicazione delle regole di concorrenza
Facoltà di Giurisprudenza
Via Verdi 53, 38122 Trento
T +39 0461 281847
E michele.carpagnano@unitn.it

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