AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

20 Years of the EU Merger Regulation

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Executive summary

As we celebrate the contributions that the EU Merger Regulation (EUMR) has made to merger control in the EU over the past twenty years, we also have an opportunity to discuss how the EUMR could be improved. Improvements are desirable and timely in several areas, namely in further promoting harmonisation of national merger control regimes, refining procedures, clarifying the EUMR's jurisdictional reach, and excluding extra-European Economic Area joint ventures (extra-EEA JVs) from the scope of merger control. Likewise, with the advent of foreign subsidies screening and Foreign Direct Investment screening in the EU, there is ample opportunity to align these three transaction screening mechanisms.

Introduction

A well-structured and transparent merger control regime is at the core of ensuring that the transaction screening process in the EU is predictable, effective, and efficient. The EU Merger Regulation has promoted efficient and effective transaction screening and made a substantial contribution to increasing deal certainty over the past 20 years.

Through the EU merger regime, the European Commission has been able to achieve numerous successes in the past 20 years, including:

- Relying (until recently) on a set of objective criteria to define, and limit, the Commission's jurisdiction to review transactions, thus promoting predictability and facilitating deal planning in international transactions.

- Building a well-established track record and proven framework for the evaluation of transactions, documented in a large body of publicly available decisions.

- Promoting transparency and predictability through detailed guidelines on the substantive evaluation of mergers, the jurisdictional framework and remedies to effectively address competition concerns.

- Focussing its review on transparently assessing the competitive impact of each transaction without reference to outside political considerations or pressures. This approach has facilitated the planning of global transactions in an increasingly interconnected global economy.

- Streamlining its procedures over time by building on its enforcement experience, which has helped to improve efficiency while ensuring an effective review. Recognising that a significant number of transactions do not require a close review, the Commission has reduced the administrative burden on merging parties and its own resources through the adoption of a simplified procedure, which has been further adapted over time. The Commission has also taken advantage of the experience gained during the COVID-19 pandemic to shift to a purely digital notification submission process.

Recommendations

AmCham EU has been a key stakeholder in EU merger control discussions for decades, and a consistent advocate for a merger control system that promotes deal certainty and is efficient for both notifying parties and enforcers.[1, 2] The 20th anniversary of the EU merger control regime provides an opportunity to call for renewed efforts to further improve the efficiency and functioning of the regime.

Promoting harmonisation between national merger control regimes

One of the EUMR's crowning achievements is its impact on national merger control regimes, resulting in increased harmonisation across Member States. To date, this has been accomplished without intervention by EU legislators. To ensure further progress towards greater consistency, lawmakers should consider EU legislation to harmonise documentation requirements, remedy packages and filing fees among Member States.

Lawmakers should consider developing a common list of corporate information and documentation required for a typical merger notification, and evaluate whether reduced information and documentation requirements could be harmonised for transactions that clearly do not raise any competition law concerns. Likewise, lawmakers should create common translation requirements, requiring notifying parties to submit only translations for provisions that are strictly relevant for the analysis of the transaction.

Refining Procedures

The EUMR also makes significant contributions to Europe's attractiveness as an investment destination by centralising, and thereby reducing, administrative burdens for notifying parties through a system that allows Member States to refer a transaction to the Commission for review. However, further procedural alignment can be achieved by refining the referral system, and by improving the veto system.

The current referral system creates several liability and administrative issues for notifying parties. Article 4(4) requires notifying parties to justify the appropriateness of a referral on the basis that it may 'significantly affect competition'. Acknowledging this may be prejudicial to parties and is unnecessary when a referral should be tied, simply, to a community dimension. Likewise, companies are discouraged from using the article 4(5) system due to the timeline and the need to produce two separate forms (Forms RS and CO) with their respective pre-notification discussions.

The veto system could be improved by only allowing a referral to be refused with the majority, if not all, of NCAs involved in such a severe decision. If a veto is used, the NCAs should accept Form CO as a notification.

Article 22

[1] https://amchameu.eu/position-papers/position-paper-consultation-response-evaluation-procedural-and-jurisdictional

[2] https://amchameu.eu/position-papers/position-paper-public-consultation-response-towards-more-effective-eu-merger-control

Businesses around the world have observed the Commission's shift in its policy on accepting referrals of merger control cases under article 22 EUMR with great concern. The Commission's longstanding approach in accepting the referral of merger cases only where the referring Member State either had jurisdiction to review the case itself or did not have a merger control regime in place contributed significantly to the predictable architecture of the EU merger control system. Parties could readily assess whether their transaction met EU or Member State review thresholds and plan notifications accordingly.

Unfortunately, the Commission's new policy has created substantial uncertainty for transactions that do not meet EU and Member State thresholds, as parties cannot obtain clarity on whether they may face – possibly lengthy – merger control scrutiny without proactively making all the details of their transaction known to each NCA. Parties that do not wish to shoulder this substantial burden must then plan for the possibility – however remote – of a referral in transaction agreements. However, it is exceedingly difficult to negotiate and plan for such an unpredictable transaction risk – which can be presumed to have a chilling effect on investment in Europe. Although the Commission's guidance indicates that the new policy aims to target certain types of transactions and sectors where underenforcement was most likely to raise competition law risk, the practical effect of this enforcement change falls heavily on all sectors and transactions.

The recently issued opinion of Advocate General Nicholas Emiliou in the *Illumina/Grail* case recognises the uncertainties and inefficiencies that this new approach to article 22 has created for transaction parties. We welcome and share his view that the change in policy runs counter to the EUMR's aim of providing a swift and efficient review of transactions. While recognising that the Commission's shift in policy aims to address alleged enforcement gaps, such as so-called 'killer acquisitions' in the pharmaceutical and technology sectors, we do not see the expansion of the Commission's review powers through the use of article 22 as the most effective or legally sound means to address these concerns.

Any significant changes in the Commission's jurisdiction, particularly given the consequences for the global business community, should be introduced through the use of the EU legislative process. A deliberative legislative procedure that takes all stakeholder views into account would help ensure that any change to the EUMR finds the right balance between addressing potential enforcement gaps and the legitimate need for efficiency and predictability, two cornerstones on which the EU's merger regime has been built.

Extra-EEA Joint Ventures

The Commission should continue to explore ways to further simplify the treatment of joint ventures (JVs) where both parents meet the thresholds but the JV itself has no appreciable activities in the EEA. The creation of these JVs should be exempted from notification or subject to a self-assessment system. Requiring these non-EEA JVs to be notified, even under the simplified procedure, is not aligned with international legal principles and sets a flawed example for competition authorities worldwide.

Need for international cooperation

The need for coordination in merger control extends beyond just national competition authorities within the EU. For larger cross-border deals, coordination is also required with authorities outside the EU, notably the Competition and Markets Authority (CMA) in the UK. As the global economy becomes increasingly interconnected, mergers and acquisitions often have implications that extend beyond

national or regional boundaries. This necessitates close coordination and cooperation among competition authorities worldwide to ensure a consistent and harmonised approach to merger control.

Links with the broader transaction screening process

Transactions today are subject to more screening in Europe than ever before, with merger control, foreign subsidies screening and foreign investment screening happening in parallel. During the short time in which the three notification regimes have co-existed, there is already ample evidence that misalignment between these regimes creates significant administrative costs for transactions and complicates deal timelines.

Lawmakers should streamline the submission of parallel notifications for the same transaction, as well as align different review timelines. While we recognise that as different review regimes focus on different substantive concerns and follow different jurisdictional rules, the experiences with the EU merger control regime provide valuable insights for newer screening tools that can inform further reforms.

For example, the Commission can take further steps to coordinate or streamline its own review procedures under the EUMR and Foreign Subsidy Regulation (FSR). Helpfully, the FSR’s concentration instrument has adopted the same review timelines as those applicable in EU merger control. However, these coordinated timelines are only of practical value if the pre-notification process can be managed efficiently under both instruments in unproblematic cases. Recognising that most transactions do not raise competition law concerns, the Commission has introduced simplified merger control mechanisms to ensure that such transactions can be quickly reviewed and approved without lengthy pre-notification discussions. However, as many transactions that trigger the EUMR will also require an FSR filing, the quick review process established under the EUMR is of little practical value if the same transaction is held up far longer in pre-notification in the FSR review process despite raising no material FSR-related concerns. Therefore, the Commission should consider introducing simplified procedures for the FSR, as the majority of foreign financial contributions likewise do not present a risk of distorting competition in the EU.

The Commission has made successful efforts to improve the predictability of the EU merger regime through a publicly available body of decisions and guidelines. Published decisions will be less common under the FSR and foreign investment screening tools. Nevertheless, making public key parameters that guide the evaluation of particular cases and publishing guidelines on substance and process would be important steps in aligning the transparency and predictability of foreign subsidy and foreign investment screening with the EU merger control regime.

Finally, the experience under the EU merger regime shows that the efficiency and effectiveness of the review process can be continuously improved, which can materially lessen the burden on notifying parties and reduce the use of public resources without undermining enforcement effectiveness. AmCham EU supports all efforts to develop the same approach in foreign subsidies and foreign investment screening, which will ultimately strengthen the value of these tools.

Conclusion

Over the past 20 years, the EU Merger Regulation has made significant contributions to a well-functioning merger control regime. But there is still room to further enhance the efficiency,

predictability and transparency of merger control in Europe, in particular by promoting harmonisation between national merger control regimes, refining procedures such as the referral and veto systems, addressing concerns related to article 22, excluding extraterritorial joint ventures from the EUMR and streamlining transaction screening processes across regimes. Our recommendations aim to enhance deal certainty and reduce administrative burdens for businesses operating and investing in the EU.

An even more efficient merger control regime will not only facilitate smoother transaction screening for investors and authorities but also bolster Europe's attractiveness as an investment destination. As a longstanding voice for US companies who are committed to and invested in the EU, AmCham EU looks forward to remaining engaged in merger control reform discussions and stands ready to provide input to lawmakers.