EU COMPETITION LAW IN A NUTSHELL

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## 5. Merger control

### 5.1. Regulation 139/2004 - General principles and jurisdiction

Exactly 20 years have passed since the adoption of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance) (hereinafter referred to as the "ECMR")[1].

The evolution of EU concentration rules has been significantly shaped by Council Regulation (EEC) No 4064/89 and its successor, Council Regulation (EC) No 139/2004, reflecting the need for continuous amendments to address new challenges and align competition law with the dynamics of the EU internal market since 1989..[2] To meet these needs, the Regulation (EEC) No 4064/89 was recast to ensure greater clarity and efficiency in regulating concentrations across the EU, leading to the adoption of Council Regulation (EC) No 139/2004 on January 20, 2004.[3]

In the period from 21 September 1990 to 31 August 2024, according to publicly available statistics, DG Competition processed 9,349 notified cases.[4] During the same period, a total of 56 decisions were made under Article 6.1(a) of the ECMR for cases out of the scope of the ECMR, while under Article 6.1(b) of the ECMR for compatible cases, a total of 8,367 decisions were made, which includes 5,875 decisions made under the simplified procedure mentioned in Article 6.1(b) of the ECMR. Additionally, under Article 6.1(b) of the ECMR in conjunction with Article 6.2 of the ECMR (compatible with commitments), a total of 355 decisions were made, and 303 procedures were initiated according to Article 6.1(c) of the ECMR.[5]

Regarding the statistics for decisions from Phase II, the following are noted: a total of 65 decisions were made under Article 8.1 of the ECMR (compatible, 8.2 under Reg. 4064/89), 151 decisions were made under Article 8.2 of the ECMR (compatible with commitments), 33 decisions

[1] OJ L 24, 29/01/2004*, p. 1–22.*
[2] Recital 1 of ECMR.
[3] Recital 2 of ECMR
[4] "Merger casess statistics." European Commision, accesed September 29 2024, https://competition-policy.ec.europa.eu/document/download/4b083559-e36c-44c2-a604-f581abd6b42c_en?filename=Merger_cases_statistics.pdf.
[5] Ibid.

were made under Article 8.3 of the ECMR (prohibition), and 6 decisions were made under Article 8.4 of the ECMR (to restore effective competition). [6]

Merger control was not initially included in the EC Treaty of 1957, despite its significance to economic and industrial policy.[7] Discussions on merger control emerged in 1966 with the Memorandum on the Concentration of Enterprises in the Common Market, but no specific agreement followed.[8] Lacking clear legal competence, the European Commission resorted to Articles 81 and 82 of the EC Treaty to regulate mergers.[9] [10]

In *BAT and Reynolds v Commission*, the CJEU ruled that acquiring shares in a competitor, though not automatically restrictive, could influence behavior and lead to anti-competitive practices, thereby extending Article 81's scope and prompting Member States to adopt the first European Community Merger Regulation (ECMR). [11]

In Europe Packaging Corporation and Continental Can Co v Commission, the CJEU held that mere strengthening of dominance, without active use of market power, could breach Article 82, thereby expanding the Commission's authority over mergers to prevent anti-competitive behavior using both Articles 81 and 82. [12]

In response to shortcomings identified in the old Merger Regulation and a series of 2002 Court of First Instance rulings that overturned three merger prohibition decisions—Airtours/First Choice, Schneider/Legrand, and Tetra Laval/Sidel—due to procedural unfairness, failure to meet the burden of proof, and flawed economic analysis, the European Commission proposed significant reforms, including a new regulation, Horizontal Merger Guidelines, and measures to improve transparency, culminating in the adoption of the updated ECMR in January 2004, which introduced a focus on preventing significant impediments to effective competition and created the role of Chief Competition Economist to enhance economic analysis. [13]

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[6] Ibid.

[7] Oliver Bretz, Marie Leppard, "EU Merger Control", accessed September 8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3385447, p.4

[8] Ibid.

[9] Recital 7 of ECMR.

[10] Investigations under Articles 81 and 82 present several issues. First, there is no formal timetable, which can hinder merging parties. Second, financial penalties may not effectively address market power concerns, as a post-merger monopolist could raise prices to offset fines. Additionally, Article 82's application is limited since it only applies to dominant companies. If a company is not dominant before the merger, Article 82 cannot be invoked. Recognizing these limitations, the European Commission introduced the European Community Merger Regulation (ECMR) in 1989, which came into force in 1990. The ECMR streamlined cross-border mergers and created a more uniform evaluation process. It used turnover thresholds to determine jurisdiction and set strict timelines for decisions: one month for Phase I and four months for Phase II investigations. In 1998, the ECMR was amended to include: (1) a second tier of turnover thresholds for mergers affecting three or more Member States, (2) gross income as the relevant turnover measure for financial institutions, (3) inclusion of more joint ventures, (4) First-phase remedies, (5) a suspension obligation preventing mergers from closing without clearance and (6) more flexible merger referral system between the Commission and Member States. Oliver Bretz, Marie Leppard, op.cit., p.4, 5, 6

[11] Ibid. p. 4-5.

[12] Ibid. p.4.

[13] Ibid. p.6

If we analyze the period of ECMR application from 2004 onwards, various approaches are evident in theory and literature. Mark Thatcher (2014) describes EU merger control as a balancing act between enforcing market competition and fostering large, cross-national European firms, suggesting the Commission's leniency supports this integrationist policy.[14] However, Billows, Kohl and Tarissan (2021) argue that, rather than leading to neo-mercantilist outcomes as suggested by Thatcher, merger policy has actually contributed to the convergence of European capitalism around market-centered principles, with DG COMP emerging as an integrationist force comparable to key developments such as the Single European Act and the expansion of the European Central Bank's powers. [15]

Also, several authors mention the Dow/DuPont approach as a new tendency; although it may seem revolutionary, its implications are likely limited. [16] Conversely, the Commission's increasing tendency to challenge traditional mergers involving pipeline products with a lower standard of proof could have more damaging effects, impacting a larger number of ordinary transactions and potentially leading to legal challenges regarding the standard of proof.[17]

When discussing the legal framework for merger control at the European Union level, the following are also included in addition to the ECMR:

- Commision Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004 (hereinafter "Implementing Regulation")(Text with EEA relevance)[18]:
- Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (hereinafter "Jurisdiction Notice")[19];
- Commision Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [20]
- Commission Notice on case referral in respect of concentrations[21];
- Commission Notice on the definition of the relevant market for the purposes of Community competition law[22]

[14] Sebastian Billows, Sebastina Kohl and Fabien Tarissan, „Bureaucrats or Ideologues? EU Merger Control as Market-centred Integration", Journal of Common Market Studies (2021), p.2, accessed September 9 2024, https://DOI: 10.1111/jcms.13130.
[15] Ibid.
[16] Mario Todino, Geoffroy van de Walle, and Lucia Stoican "EU Merger Control and Harm to Innovation—A Long Walk to Freedom (from the Chains of Causation)", The Antitrust Bulletin, 1-20, (2018), accessed September 9 2024, https://DOI: 10.1177/0003603X18816549.
[17] Ibid.
[18] OJ L 119, 5.5.2023, p. 22–102.
[19] OJ C 95, 16.4.2008, p. 1–48.
[20] OJ C 160, 5.5.2023, p. 1–10.
[21] OJ C 56, 5 March 2005.
[22] OJ C 372 9 December 1997, p.5.

- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings;[23]
- Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings;[24]
- Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22 October 2008
- Commission Notice on restrictions directly related and necessary to concentrations;[25]
- Commission Notice on the rules for access to the Commission file in case pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004[26].

The recitals of the ECMR provide the foundational principles and context for the regulation. They outline the objectives of EU competition law, the need for control over corporate concentrations, and the importance of maintaining competition within the internal market. These recitals set the stage for the legal provisions that follow, justifying the regulation's role in preserving a fair and competitive market while accommodating corporate reorganizations. Recital (2) emphasizes that the Treaty establishing the European Community, Treaty on the Functioning of the European Union (TFEU) sets out key objectives for the EU, including ensuring that competition in the internal market is not distorted. Specifically, Article 3(1)(g) of the Treaty lays down the principle of instituting a system of undistorted competition, while Article 4(1) establishes that the EU's activities must adhere to the principle of an open market economy with free competition.

Recital (3) highlights that the internal market's completion, EU enlargement, and global trade growth drive corporate reorganizations, necessitating EU oversight to prevent dominant players while ensuring competition, growth, and efficiency within the market. While Recital (4) highlights the benefits of concentrations, Recital (5) stresses that such corporate reorganizations must not result in lasting damage to competition. It states that Community law must provide rules to govern concentrations that could significantly impede effective competition within the internal market or in a substantial part of it. This recital sets out the problem that the regulation is designed to address: concentrations, while beneficial in some cases, can also create dominant players that stifle competition. The focus is on preventing anti-competitive mergers that would lead to a reduction in consumer choice, higher prices, or reduced innovation.

The ECMR introduced two key elements: the "one-stop shop" for reviewing mergers impacting multiple EU jurisdictions and the "significant impediment to effective competition" (SIEC) test. [27] The one-stop shop grants the European Commission exclusive authority over

[23] OJ C 31, OJ C 31, 5 February 2004, p. 5.
[24] OJ C 265, 18 October 2008, p. 6.
[25] OJ C 56, 5 March 2005, p. 24
[26] OJ C 325, 22 December 2005, p.7.
[27] Oliver Bretz, Marie Leppard, op.cit. p.29.

mergers with a Community dimension, while the SIEC test allows the Commission to block mergers that significantly hinder competition, replacing the earlier "dominance" test. If jurisdictional thresholds are not met, National Competition Authorities (NCAs) handle reviews, with referral mechanisms ensuring that the appropriate authority oversees each merger. [28]

### 5.1.1. Concentrations: transactions covered

The definition of concentrations is contained in Article 3 of the ECMR. According to paragraph (1) of Article 3, 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. Hence, based on the content of this relevant provision, it can be concluded that Article 3(1) of the ECMR distinguishes between mergers (as defined in subparagraph (a)) and acquisitions of control (as defined in subparagraph (b)).

Recital 20 of the ECMR, defines the concept of "concentration" to cover operations that result in lasting changes in control and market structure. It includes joint ventures that function as independent entities and treats closely connected transactions as a single concentration when linked by conditions or occurring within a short timeframe. This ensures comprehensive regulation of such operations under the Merger Regulation.

According to Jurisdiction Notice, a merger under Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings combine to form a new entity, ceasing to exist as separate legal entities.[29] Alternatively, a merger can happen when one company absorbs another, with the absorbed entity losing its legal status. [30] A merger may also be deemed to occur without a formal legal merger if previously independent companies combine their activities into a single economic unit through contractual agreements, such as common economic management or a dual-listed structure. [31] Key factors include permanent unified management, profit and loss compensation, revenue sharing, joint liability, or risk-sharing. Cross-shareholdings can further reinforce such arrangements.[32]

Article 3(1)(b) states that a concentration occurs when control is acquired by one undertaking acting alone or by multiple undertakings acting jointly.[33] Article 3(2) defines control as the ability, through rights, contracts, or other means, to exercise decisive influence over an

[28] Ibid.p.3.
[29] Paragraph 9 of the Jurisdiction Notice.
[30] Ibid.
[31] Paragraph 10 of the Jurisdiction Notice.
[32] Ibid.
[33] Paragraph 11 of the Jurisdiction Notice.

undertaking, particularly through ownership of assets or rights affecting the composition, voting, or decisions of its governing bodies.[34]

Control is generally acquired by entities holding rights under relevant contracts (Article 3(3)(a) of the ECMR), but sometimes the entity with actual control differs from the formal rights holder. [35] For example, an undertaking may use another entity to acquire a controlling interest, while maintaining real control behind the scenes (Article 3(3)(b) of the ECMR). [36] The Court of First Instance held that control can be attributed to exclusive or majority shareholders and, in cases of distributed shareholdings, to the entity overseeing the formal holders, with indirect control determined through factors like contractual relationships, financing, or family ties. [37]

Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets. [38]

Control can be acquired on a contractual basis if the contract grants control over the management and resources of the other undertaking, similar to acquiring shares or assets. [39] Such contracts, which must typically be of long duration without early termination options, can lead to structural changes in the market and may confer joint control if both parties hold veto rights over key strategic decisions. [40]

Franchising agreements generally do not confer control over the franchisee's business, as the franchisee typically operates its entrepreneurial resources independently, even if key assets belong to the franchisor. [41] Similarly, financial agreements like sale-and-lease-back transactions, with buyback options, do not usually constitute a concentration, as they do not alter control over management and resources. [42]

However, control can be established through other means, including economic relationships. [43] In rare cases, economic dependence, such as significant long-term supply agreements or credits paired with structural links, may confer decisive influence, leading to de facto control. [44] The Commission will assess if such economic and structural ties result in lasting control. [45] Control may also arise unintentionally or passively, such as through inheritance or the

[34] Paragraph 16 of the Jurisdiction Notice.
[35] Paragraph 13 of the Jurisdiction Notice.
[36] Ibid.
[37] Ibid.
[38] Paragraph 17 of the Jurisdiction Notice.
[39] Paragraph 18 of the Jurisdiction Notice.
[40] Ibid.
[41] Paragraph 19 of the Jurisdiction Notice.
[42] Ibid.
[43] Paragraph 20 of the Jurisdiction Notice.
[44] Ibid.
[45] Ibid.

exit of a shareholder, shifting control from joint to sole. Article 3(1)(b) covers these situations, stating that control may be acquired "by any other means." [46]

The ECMR (Article 3(1)(b), (2)) states that control over undertakings, parts, or assets constitutes a concentration if these assets generate turnover, but simple outsourcing without asset or employee transfer is considered a service contract and does not qualify as a concentration. [47] However, if the outsourcing provider receives assets or personnel that form a business with market access, a concentration may occur, especially if the transferred assets enable the supplier to offer services to third parties. [48]

If the transferred assets only serve the outsourcing customer, there is no lasting market change, and the contract remains a service agreement, not a concentration. [49] The Commission assesses whether the assets transferred can enable the acquirer to establish a market presence within a timeframe similar to joint ventures, considering business plans and market characteristics. If not, the transaction is not regarded as a concentration. [50]

### 5.1.2. Concentrations which have „Community Dimension“

Any activity that qualifies as a concentration under Article 3 of the ECMR and meets the threshold criteria defined in Article 1 of the ECMR is considered to have a community dimension. Article 1(2) of the ECMR determines which concentrations will have this community dimension. Additionally, even if a concentration is not covered by Article 1(2), it may acquire the community dimension if it falls under Article 1(3) of the ECMR.

The primary purpose of the criteria set out in Article 1(2) and Article 1(3) is to establish whether a specific concentration falls under the jurisdiction of the Commission. However, this should not prejudice the application of Article 4(5) and Article 22, as the ECMR applies to all concentrations with a community dimension as defined in this Article.

Article 1(2) of the ECMR sets out three distinct criteria: the worldwide turnover threshold assesses the overall size of the undertakings involved; the Community turnover threshold determines whether the concentration meets a minimum level of activity within the Community; and the two-thirds rule serves to exclude transactions that are purely domestic from Community jurisdiction. [51] A concentration has a Community dimension if the combined total worldwide turnover of all the companies involved exceeds EUR 5 billion. This measures the global scale and economic impact of the concentration. In addition, at least two of the companies involved must each generate more than EUR 250 million in turnover within the European Union. This ensures

[46] Paragraph 21 of the Jurisdiction Notice.
[47] Paragraph 24 of the Jurisdiction Notice.
[48] Paragraph 25 of the Jurisdiction Notice.
[49] Paragraph 26 of the Jurisdiction Notice.
[50] Ibid.
[51] Paragraph 125 of the Jurisdiction Notice.

that the companies involved have a significant presence in the EU market. However, if each of the companies generates more than two-thirds of its EU turnover within a single Member State, the concentration is considered predominantly domestic and is excluded from EU-level oversight. In such cases, the national competition authorities of that Member State would have jurisdiction. The second set of thresholds, outlined in Article 1(3), is aimed at addressing concentrations that do not meet the Community dimension under Article 1(2) but would significantly affect at least three Member States, resulting in multiple notifications under their national competition laws. [52] To address this, Article 1(3) establishes lower worldwide and Community-wide turnover thresholds, along with a minimum level of activity for the undertakings involved, both jointly and individually, in at least three Member States A concentration may still be considered to have a Community dimension if the combined worldwide turnover of all companies involved exceeds EUR 2.5 billion. This threshold is lower than the one in Article 1(2), capturing smaller, but still significant, concentrations.

The concentration must have a notable presence in at least three EU Member States. In each of those Member States, the combined turnover of the involved companies must exceed EUR 100 million. This ensures that the concentration affects multiple EU countries rather than being limited to just one. In each of the three Member States identified, at least two of the companies involved must individually have a turnover of more than EUR 25 million. This condition confirms that the companies have substantial activity in those Member States. Additionally, at least two of the companies must have an EU-wide turnover of more than EUR 100 million each, ensuring that the undertakings have a significant economic footprint across the European Union. Like Article 1(2), Article 1(3) also includes a two-thirds rule to exclude predominantly domestic concentrations.For jurisdiction determination under the Merger Regulation, "undertakings concerned" are those involved in a concentration, with their turnover calculated per Article 5 rules to assess threshold criteria, while Article 5(4) specifies how linked undertakings form a "group," distinct from terms like notifying or involved parties in related regulations.[53]

In a merger, the undertakings concerned are the merging entities, while in acquisitions, they are determined by who acquires control. [54] For newly-created joint ventures, only the parent companies are considered undertakings concerned, and concentrations involving state-owned entities can qualify if the entities were previously independent economic units. [55]

### 5.1.3 Turnover: Concept and Calculation

[52] Para 126 – jurisdiction notice.
[53] Paragraphs 129, 130 and 131 of the Jurisdiction Notice.
[54] Paragraphs 132 - 137 of the Jurisdiction Notice.
[55] Paragraphs 139 – 158 of the Jurisdiction Notice.

The concept of turnover, as defined in Article 5 of the ECMR, refers to the amounts generated from the sale of products and the provision of services. [56] These figures usually appear in a company's accounts under "sales." [57] For products, turnover can be easily calculated by identifying each commercial transaction involving a transfer of ownership. However, for services, turnover is more complex and depends on the specific service provided and the legal and economic context.[58] Turnover is calculated based on "ordinary activities" — sales of products or services made in the normal course of business.[59] Net turnover reflects the real economic strength of an undertaking after deductions. [60] The Regulation excludes internal sales, or those between undertakings within the same group, from turnover calculations.[61] Turnover is based on the most accurate and reliable figures, typically from the audited financial accounts of the closest financial year to the transaction.[62]

Article 5 of the Merger Regulation addresses the need for adjustments to turnover calculations after the date of the last audited accounts. These adjustments reflect permanent changes in the economic situation of the companies involved in a merger, such as acquisitions or divestments that may not be fully captured in the accounts.[63] These changes are important to ensure that the turnover figures accurately reflect the true economic resources being concentrated, thus providing a clearer picture of the companies' financial status. [64]

Article 5(4) of the EMCR outlines how turnover is attributed within a group of companies when determining whether the merger meets the thresholds for Commission review under Article 1 of the ECMR. The goal is to capture the full scope of economic resources being combined in a merger, regardless of whether the activities are carried out directly by the company in question or through subsidiaries and affiliated companies.[65] The regulation requires that, in addition to the turnover of the company directly involved in the merger, the turnover of any subsidiaries, parent companies, or other affiliated entities must be included if the company has certain rights or powers over them, as specified in Article 5(4)(b) of the EMCR. [66]

When considering turnover under Article 5(4)(b) of the ECMR, the entire turnover of a subsidiary is included, regardless of the actual shareholding of the parent company.[67] In joint

[56] Paragraph 157 of the Jurisdiction Notice.
[57] Paragraph 158 of the Jurisdiction Notice.
[58] Paragraphs 157 - 160 of the Jurisdiction Notice.
[59] Paragraphs 161-163 of the Jurisdiction Notice.
[60] Paragraphs 164-66 of the Jurisdiction Notice.
[61] Paragraphs 167-169 of the Jurisdiction Notice.
[62] Paragraphs 169 - 171 of the Jurisdiction Notice.
[63] Paragraphs 172-173 of the Jurisdiction Notice.
[64] Ibid.
[65] Paragraph 175 of the Jurisdiction Notice.
[66] Paragraph 176 of the Jurisdiction Notice.
[67] Para 185

ventures, Article 5(5)(b) specifies that turnover generated from third-party activities is to be divided equally among the concerned undertakings, irrespective of their capital or voting shares.[68]

Investment companies typically gain indirect control over portfolio companies through investment funds, exercising rights akin to those mentioned in Article 5(4)(b).[69]

According to Article 5(4) and recital 22 of the ECMR, turnover for State-owned companies should be calculated in a way that ensures no discrimination between public and private sectors.

Article 1(2) and (3) of the ECMR establishes that turnover must be allocated geographically to determine the scope of the case within the European Community. Turnover is generally allocated to the location of the customer at the time of the transaction. This applies to both goods and services, with the goal of assigning turnover to the place where competition occurs.

Turnover should be allocated based on the location of the customer, which typically coincides with where the product is delivered or the service provided.[70] In Internet transactions, where customer location is hard to determine, focusing on the place where the service or product is delivered helps in assigning turnover correctly. [71]

For goods, the place of delivery usually takes precedence over the location where the contract was entered into or where the billing occurred. [72] In cases where a multinational company uses a central purchasing strategy, the location of the central purchasing organization is key for turnover allocation. If goods are delivered directly to subsidiaries across different Member States, turnover is allocated to the respective countries. [73]

For services, turnover is allocated to where the service is provided to the customer. Services involving cross-border elements fall into three categories: (1) the service provider travels, (2) the customer travels and (3) neither travels, but the service is delivered remotely. [74] In the first two categories, turnover is allocated to the destination. [75] In the third category, turnover is typically assigned to the customer's location. [76] For example, when software or films are distributed from outside the Community to a customer within the EU, the turnover is attributed to the EU. [77]

[68] Paragraphs 186-189 of the Jurisdiction Notice. N
[69] Paragraphs 189-191 of the Jurisdiction Notice.

[70] Paragraph 196 of the Jurisdiction Notice. N
[71] Ibid.
[72] Paragraph 197 of the Jurisdiction Notice.
[73] Paragraph 198 of the Jurisdiction Notice.
[74] Paragraph 199 of the Jurisdiction Notice.
[75] Ibid.
[76] ibid.
[77] Paragraph 200 of the Jurisdiction Notice.

In cases like goods transport, turnover is allocated based on the customer's location, as the transport service is provided to the customer without them traveling. [78] In telecom cases, such as call termination, where a call originating in the EU is terminated in a non-EU country, turnover is allocated outside the EU, as that is where the service is delivered. [79]

### 5.2. Regulation 139/2004 - Substantive analysis

The substaintive analysis includes research on the advantages and disadvantages of the application of Regulation 139/2004, a comparative analysis of the benefits of Regulation 139/2004 in relation to Council Regulation (EEC) No 4064/89, the benefits of the implementation of the new system of testing and evaluation of concentrations , the application of the principle of subsidiarity from Article 5 of the Treaty on the Functioning of the EU, and the referral of specific cases from the Commission to the national authorities and vice versa.

Recital 8 from the Preamble explicitly established that: The provisions of this regulation should be applied to the essential (important) structural changes, the impact of which on the market goes beyond the borders of any member state. As a general rule, such concentrations should be assessed exclusively at Community level, applying the system of "providing services in one place" and in accordance with the principle of subsidiarity.

In substantive analytical sense, Regulation 139/2004 incorporates: the community dimension of its application, the quantitative and qualitative method of assessing concentrations, the referral and cooperation between the national authorities for the protection of competition and the Commission, the nature and legal force of the decisions of the commission, the investigative powers of the Commission, the penal policy of the commission, and finally, the review of the decisions of the commission by the Court of Justice, in terms of Article 229 of the Treaty establishing the EU.[80]

Fundamentally, the control on the concentrations in the EU is divided between the EC and the EU Member States. [81]The Commission has exclusive jurisdiction over concentrations that have a

[78] Paragraph 201 of the Jurisdiction Notice.
[79] Paragraph 202 of the Jurisdiction Notice.
[80] „Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements."
[81] John J. Parisi, A Simple guide to the EC Merger Regulation, Federal Trade Commission, 2010, p. 6 accessed 13 September 2024. https://www.ftc.gov/system/files/attachments/key-speeches-presentations/ecmergerregsimpleguide.pdf.

"community dimension", the concept of which we discuss on previously. The exclusive jurisdiction of the Commission is closely related to the national jurisdiction of the authorities responsible for the protection of competition, which is foreseen by several regulations of the Regulation. This question is logically connected with the question for “referral” between the Commission and the national authorities, under precisely defined conditions provided by the Regulation 139/2004. The concept for “referral” determines who has the jurisdiction to conduct the concentration control test in certain cases and how to apply it.

In principle, the fundamental issue on which the entire Regulation 139/2004 is based on, is the "concentration control test" and the "concentration assessment criteria". In the substantive-analytical approach of Regulation 139/2004, two issues have the central position: What is the notion of "substantive test", how is it applied, what are the advantages and disadvantages in relation to the test from Regulation 4064/89?! The position of the test is crucial, especially due to the fact that Articles 101 and 102 of the Treaty are not sufficient to protect the interests of healthy and fair competition.

### 5.2.1. Substantive test

The new legal regime of concentration assessment, implemented by incorporation of a revised "substantive test" (SIEC) in Article 2 of Regulation 139/2004, represents one of the issues that has raised huge scientific and professional debate: Which are the advantages of the new (revised) test compared with the old test contained in Regulation 4064/1989, known as the "dominance test", what are the disadvantages of the "dominance test"?[82] Over-all, the supporters of the new "substantive test" base their views on the fact that the implementation of the "substantive test" will contribute to filling certain legal gaps in the assessment of concentrations[83] (mind the gap concept).[84] On the other hand, the opponents of this position point out that the revision of the concentration control test provided for in Regulation 4064/1989 is pure semantics, which in an economic sense does not change the situation in any segment.[85] In the context of this issue, the positions of the Commission and the European Parliament were diametrically opposed. Namely, according to the Commission's position regarding the implementation of the new concentration assessment test, it will only contribute to the creation of legal uncertainty regarding the implementation. In contradiction of this, the European Parliament was on the opinion that the new definition of a dominant position proposed by the Commission, as a way to include

[82] Alexander Riesenkampf, New E.C. Merger Control Test under Article 2 of the Merger Control Regulation, The Symposium on European Competition Law, Northwestern Journal of International Business Law, Volume 24, Issue 3., p. 721.

[83] Lars–Hendrik R., Miguel de la Mano, The impact of the new substantive test in European Merger Control, European Commission, 2006, p. 2.

[84] Riesenkampf A., *ibid.*

[85] Milne M., A contextual analysis of the 2004 revisions to the substantive test for competitive harm in the EU Merger Regulation, Dundee Student Law Review, Vol III, No 3.

concentrations in the oligopolistic business structure, will only generate complications and legal uncertainty, so after several essential consultations, in November 2023 at a meeting realized within the work of the Council, a compromise[86] was reached and the SEIC test was implemented, with a focus on the standard „significant impediment of common market, instead of previously recorded "dominant position on the common market."

According to Riesenkampf, the new test is a compromise among the most referent authorities in EU for the protection of competition. This compromise generated form three ideas: First, to close the alleged gap in the market dominance test; Second, the new test is meant to harmonize with U.S. law Third, legal certainty is assured through the reference to the creation or strengthening of a dominant market position. Of the stated reasons, only the first one is the subject of controversy, theoretical and practical deliberation. The second and third are more of a factual nature. Namely, considering the solutions from Article 1 of Regulation 139/2004, where it is determined that its application is tied to the effects caused by the concentrations, and not to the headquarters or the place of the registered activity, we are of the opinion that the approximation to the USA model is not a bad idea, on the contrary, it will contribute to a harmonized legal regime for the protection of competition worldwide.

The new Merger Regulation adopted on May 1st 2004 reformulates the substantive test (SIEC). Namely, according to article 2 (3),

> "A concentration which 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, shall be declared incompatible with the common market."

In the same Article 2 (2), the Regulation points out in which cases concentrations do not represent a violation of competition rules, that is, in which cases concentrations are perceived as actions compatible with the common market.

In this direction, it is expressly emphasized: "A concentration which would not 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, shall be declared compatible with the common market". Despite the views that this is a pure inversion of the sentences, it is more than clear that according to the new test from Regulation 139/2004, the dominant position in the common market *per se* is not perceives as a basis for conditioning or prohibiting concentration. A comparative analysis of the old and new solutions is enough to state that the focus of new test is on the concept of „significantly impede effective competition" in the common market, regardless of whether this was achieved through the creation or strengthening of a dominant position. In the context of this claim, the EU Merger Regulation, adopted in 1990,

[86] Colomo Pablo I., EU merger control between law and discretion: when is an impediment to effective competition significant? LSE research Online, 2021, p. 11-33.

prohibits mergers that “create or strengthen a dominant position as a result of which effective competition would be significantly impeded ”.

According to the concept of the test from Regulation 4064/1989, the creation or strengthening of a monopoly position in the common market is condition without which prohibited concentrations cannot be discussed, i.e. the creation or strengthening of a monopoly position is a necessary condition to prohibit a particular merger, takeover or joint venture. The essential question is whether the very interpretation of the definition implies that the creation or strengthening of a dominant position is in itself a sufficient condition to prevent the merger?!

Although there are several different views regarding this issue, our opinion fully corresponds with the opinion that the "dominance test" requires the cumulative fulfillment of both conditions. So "creation or strengthen a dominant position" is not a sufficient condition to prevent a certain merger or acquisition etc. In this direction, the judicial practice has also ruled: Air France v. Commission (Case T-2/93).[87]

The new "substantive test" focuses on the determination of "significant impediment of effective competition", which in theory and practice has proven to be a more compatible concept in economic and legal terms.[88] In concreto, the new test focuses on evaluating whether the specific merger reflects the creation of a "significant impediment of effective competition' (SIEC)." This is applicable, even without a finding of dominance. In concreto, the new test focuses on evaluating whether the specific merger reflects the creation of a "significant impediment of effective competition' (SIEC)." This is applicable, even without a finding of dominance.

A few analyzes have been made regarding the effects of the SIEC Regulation 139/2004. In our opinion, the essence of the new test has the most beautiful elaboration in Roller L.Hendrik, Mano de la Miguel, through the two hypotheses he puts forward: Hypothesis 1., dominance is not necessary, Hypothesis 2., dominance is not sufficient. Through these hypotheses, the authors want to to indicate the real economic conditions of the market, emphasizing that the creation or strengthening of a dominant position in itself does not necessarily mean a violation of consumer welfare, on the contrary, there are numerous economic theories and practices that indicate that a merger can reduce prices, increase production, reduce marginal costs in the market and expand the range of products.[89] Hence, the monopoly position *per se* cannot in any case be an obstacle to a merger, and thus is no longer a necessary condition in assessing concentrations. According to the second hypothesis, the focus is on the effects of a violation of competition in the market, so in this direction, the interpretation that significant violations of effective competition can exist even in the case beyond „dominance“. This has been perceived as the essential advantage of the new test, and

[87] Blockx J., Renshaw A. Judicial review of mergers in the EU, available from: https://www.hoganlovells.com/-/media/hogan-lovells/pdf/publication/judicial-review-of-mergers-in-the-eu_pdf.pdf, accessed 2 September 2024.
[88]Roller L.Hendrik, Mano de la Miguel, The impact of new substantive test in European Merger control, 2006, p. 14.
[89] Caves R.E., Effects of merger and acquisitions on the Economy: An industrial Organization perspective, Harvard University, available from: https://core.ac.uk/download/pdf/6706812.pdf, [accessed on 3 September 2024].

a modus to fill the legal gap typical for oligopolistic markets.[90] Even after 20 years since Regulation 139/2004, "substantive test", is facing numerous and new challenges. The attitudes regarding this issue are generally the same.[91]

### 5.2.2. Assessment of concentration

The assessment of market concentrations is based on the fundamental postulates/objectives provided by Regulation 139/2004 in general, and on the Treaty on the functioning of the EU too. The application of the legal regime anticipated in Regulation 139/2004, in connection with the assessment of concentrations, cannot and must not exclude the application of the fundamental principles of the EU Treaty, part three: Union policies and internal actions - title VII: common rules on competition, taxation and approximation of laws - chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 101 (ex Article 81 TEC). However, essentially this issue is regulated by Regulation 139/2004, through solutions that regulate several different, but interrelated solutions.

Article 2 from the Regulation 139/2004, titled as “appraisal of concentration”, emphasized that the assessment of concentration is conditioned with valuing the anticipated principles. In this context, art. 2 stressed that concentrations within the scope of this Regulation shall be appraised in accordance with the objectives within the Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

ECMR Article 2(1.) requires the EC to take into account the following factors when appraising a merger:

a) 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 and the actual or potential competition from undertakings located either within or outside the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.[92] Additionally, article 2 (5) anticipated concrete standards that the Commission should take into account:

[90] Final Report for the European Commission Enterprise Directorate General by Europe Economics, Study on assessment Criteria for distinguishing between Competitive and Dominant Oligopolies in Merger Control, 2001, available from: https://www.cea.fi/course/material/EuropeEconomics.pdf, [accessed on 11 September 2024].

[91] EU Merger Regulation 139/2004: 20 Years that Made a Difference | Highlights, available from: https://www.youtube.com/watch?v=RkVKCpY33t8, [accessed on 5 September 2024].

[92] Parisi J.J., A simple Guide to the EC merger Regulation, 2010, p. 11.

-whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

In essence, the Commission takes into account whether a specific merger, acquision, joint venture or other form of concentration significantly impede effective competition in the common market, or in a significant part of the market. Article 2 is closely related to "notion of concentration", "dominance position", "significant impediment of the effective competition."

In order to achieve the required level of assessment, the Commission adopts the "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings" (2004/C 31/03), where, among other things, in Recital 7, expressly provides that the Commission's interpretation of the Merger Regulation as regards the appraisal of horizontal mergers is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

The logistics of the Court of Justice or the Court of First Instance of the European Communities in the appraisal process proved to be an effective solution. Practice abounds with cases where the decisions of the commission are reviewed by the Court, so in this direction, several decisions of the Commission are subject to analysis by the Court as well.[93] A relevant example in the context is the judgment from The Three/O2 case from 2020.[94] In this case, the Court is critical of the Commission's approach to the concept of 'an important competitive force' (ICF) in the context of non-coordinated effects.[95]

EU General Court annulled the European Commission’s decision to block Three-O2 deal – potential implications for in-market mobile consolidation. Related to this practice of the EU General Court is the Judgment of the Court in Case C-376/20 P | Commission v CK Telecoms UK Investments. In this case, the Court of Justice annuls the judgment of the General Court and refers the case back to it.[96]

Apart from this, the greatest support in the process of evaluating the concentration comes from the “Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings“(2004/C 31/03). Horizontal mergers presents a merger of two companies that produce similar products or services in the same industry branch. The main aim of these guidelines is to help the Commission when assessing mergers of two competitors

[93] Dunn G., European Court of Justice Strengthens the European Commission’s Hand in Merger Control, 2023, available from: https://www.gibsondunn.com/european-court-of-justice-strengthens-the-european-commissions-hand-in-merger-control/, [accessed on 13 September 2024].

[94] Connolly D., Three/02 – all-you-can-eat merger control? 2021, available from: https://www.dlapiper.com/en/insights/publications/2020/09/antitrust-matters-august-2020/three-o2-all-you-can-eat-merger-control, [accessed on 15 September 2024].

[95] Roberts V., Fountoukakos K., Shenolikar C., Geeurickx, General Court Landmark Ruling in Three/02 Commission Prohibition, Herbert Smith Freehills, London, 2020, https://www.herbertsmithfreehills.com/insights/2020-06/general-court-landmark-ruling-in-threeo2-commission-prohibition, [accessed on 16 September 2024].

[96] Court of Justice of the European Union, Press Release No.120/23, Luxembourg, 2023, available from: https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-07/cp230120en.pdf, [accessed on 1 September 2024].

in the same relevant market. In essence, these guidelines find application when certain horizontal merger produce anticompetitive effects. Horizontal mergers may significantly impede effective competition by eliminating important competitive constraints and by producing coordinated effects.[97]

According to article 5 from the guidelines, “horizontal mergers are concentrations when the undertakings concerned are actual or potential competitors on the same relevant market.” In 2016, the European Commission blocked the contemplated acquisition of Telefónica Europe Plc (O2) by CK Telecoms (Hutchison/Three) (Case M.7612), refereeing inter alia to guidelines for horizontal merger. The Commission's assessment of mergers normally entails:

(a) definition of the relevant product and geographic markets;

(b) competitive assessment of the merger.

Market definition is crucial for the proper assessment of the concetration. Guidance on this issue can be found in the Commission's Notice on the definition of the relevant market for the purposes of Community competition law (guidelines article 10). Additionally, this Commission’s Notice in correlation with the guidelines on the assessment on the horizontal mergers, serves as a main support of the Regulation 139/2004 in the part of the assessment of the concentration. The support comes from the detailed elaboration of some core elements of competition protections. Among many of them, the guidelines focus on the definition of “market share and concentration level”, (Herfindahl-Hirschman Index (HHI), Possible Anti-Competitive Effects of Horizontal Mergers etc.

### 5.3. Regulation 139/2004 - Procedural analysis

#### 5.3.1. Introductory remarks – initiating of a procedure

When explaining and discussing procedures, rules, and phases, including Phase I and Phase II, one should always start with an analysis of Article 6 of the ECMR. Based on a detailed analysis of the provisions of Article 6(1) of the ECMR, we can conclude that the European Commission is required to examine merger notifications immediately upon receipt of the notification to determine whether the concentration falls within the scope of the ECMR and whether it poses any competition concerns. This paragraph outlines three possible scenarios:

6 (1) (a) Out of Scope: If the concentration does not fall within the ECMR's scope (i.e., does not meet the thresholds for a "Community dimension"), the Commission will issue a decision confirming this. The merger would then not be subject to EU-level review.

6 (1) (b) No Competition Concerns: If the concentration falls within the scope of the ECMR but does not raise serious doubts about its compatibility with the internal market (i.e., no competition issues), the Commission will issue a decision declaring the concentration compatible with the common market. This effectively means the merger can proceed without further review. Such a decision also covers any restrictions that are directly related and necessary to the implementation of the merger.

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6 (1) (c) Serious Doubts - Further Investigation Required: If the Commission concludes that the concentration may raise serious competition concerns, it will initiate formal proceedings (i.e., launch a Phase II investigation). These proceedings are aimed at conducting an in-depth analysis of the merger's potential effects on competition. If, however, the undertakings abandon the concentration, the proceedings are closed without further action.

### 5.3.2. Initiating the procedure: Notification and pre-notification contacts

The initial step in the procedure for the assessment of concentrations is outlined in Article 4 of the ECMR. In accordance with this provision, concentrations with a Community dimension, as defined in the EMCR, must be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Additionally, it is important to highlight the provision that allows notification to be made when the undertakings concerned can demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, when they have publicly announced their intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

In mergers (under Article 3(1)(a) of the ECMR), both merging entities must jointly notify the Commission. In cases involving joint control (under Article 3(1)(b) of ECMR), those acquiring control must jointly notify. In transactions where one party acquires control of one or more undertakings, the responsibility to notify lies with the acquiring party. This is also addressed in the Implementing Regulation. In accordance with Article 2(1) of the Implementing Regulation, if submissions are made by authorized external representatives, they must provide written proof of their authority to act on behalf of the person or undertaking.

The Implementing Regulation stipulates in Article 3 that notifications must be submitted using Form CO (or Short Form CO under certain conditions), along with supporting documents. Regarding technical conditions, the forms and documents must be submitted to the Commission in accordance with Article 22 of the Implementing Regulation and Commission instructions. Furthermore, notifications must be drafted in one of the EU's official languages, which will also be used for the proceedings. Supporting documents should be in their original language, with translations provided if necessary. For notifications under the European Economic Area (EEA) Agreement, other EFTA languages can be used, but a translation into an EU official language must also be provided. This translated language will be used for the proceedings.

Pre-notification contacts are highly valuable for the undertakings concerned, as they typically lead to a significant reduction in the information required for notification, allow the Commission to offer notifying and other involved parties the opportunity to informally and confidentially discuss the intended concentration, help avoid wasted time and resources by clarifying whether the operation qualifies as a concentration or falls within the Community

dimension, and can even prevent a decision of incompatibility by adapting the contract(s) to competition requirements in the common market, with effective consultation continuing throughout the entire procedure, including post-notification, as the Commission maintains close contact with the parties to address and resolve any legal or practical issues that arise.[98]

The purpose of the pre-notification contacts step is specifically and thoroughly outlined in the Best Practices on the conduct of EC merger control proceedings, which aim to promote transparency and improve communication between DG Competition, notifying parties, and third parties in merger cases.[99]

The pre-notification phase is crucial parto of the DG Competition's review process, as it allows for informal, confidential discussions that address legal and jurisdictional issues, clarify required information, and identify potential competition concerns, ensuring complete notification forms and reducing the risk of delays—especially in cases with limited pre-notification contact.[100]

Pre-notification contacts should ideally begin at least two weeks before the expected notification date, though more complex cases may require a longer pre-notification period. [101] Early contact with DG Competition is recommended to facilitate case planning. The process starts with a memorandum providing background on the transaction, relevant markets, competition impact, and case language. In simpler cases, submitting a draft Form CO may suffice. [102] Depending on the case's complexity, DG Competition will decide whether to provide feedback orally or in writing, or if pre-notification meetings are necessary, especially for complex or procedural issues.[103]

### 5.3.2 Referral: pre-notification referrals and post-notification referrals

The ECMR establishes the legal rules for handling referral processes between the European Commission and Member States.[104] The relevant provisions are set out in Articles 4(4), 4(5), 9,

[98] Magdalena Laskowska, *"The Control of Community Concentrations under Regulation No.139/2004"* (master thesis, Warsaw University, (2007), p.51

[99] Paragraph 29, "Best Practices on the conduct of EC merger control proceedings", DG Competition, accessed August 8, 2024, https://competition-policy.ec.europa.eu/document/download/a288a6d8-3962-4072-b6a1-93e2ba08d12e_en?filename=proceedings.pdf

[100] Paragraph 5 and 6, ibid.

[101] Paragraph 10, ibid.

[102] Paragraph 11, ibid.

[103] Paragraph 12, ibid.

[104] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02) (Text with EEA relevance) para 47, p.177.

and 22, which outline the steps required for cases to be referred to or from the Commission and Member States. The referral system is categorized into two types:

1. Pre-notification Referrals:
    - Article 4(4): From the Commission to Member States.
    - Article 4(5): From Member States to the Commission.
2. Post-notification Referrals:
    - Article 9: From the Commission to Member States.
    - Article 22: From Member States to the Commission.

Each article operates as a distinct mechanism for specific categories of mergers or concentrations. According to Recital 11 of the ECMR, the rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in light of the principle of subsidiarity. These rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the "one-stop shop" principle.

The Commission Notice on Case Referral outlines the rationale and legal criteria for the referral system under Articles 4(4), 4(5), 9, and 22 of the ECMR It provides guidance on recent changes, decision-making factors, and practical steps, focusing on pre-notification referrals.
Pre-notification referrals can only be requested by the undertakings concerned if the concentration has a Community dimension (Article 4(4)) or is reviewable under the laws of at least three Member States (Article 4(5)). [105] Member States have 15 working days to express agreement or disagreement with the request, after which the Commission has additional time to decide. [106] If no objections are raised, the case is either referred to Member States (under Article 4(4)) or deemed to have a Community dimension (under Article 4(5)), granting the Commission exclusive jurisdiction. [107]

Post-notification referrals can be initiated by Member States or following an invitation from the Commission under Articles 9(2) and 22(1).[108] Under Article 9, a Member State may request the Commission to refer a concentration with a Community dimension if it significantly affects competition within a distinct market in that Member State, with the Commission deciding within 35 to 65 working days depending on the case. [109] Under Article 22[110], a Member State can

[105] Ibid. p.177.
[106] Ibid. Paragraph 49, p.177.
[107] Ibid. p.177.
[108] Ibid. para 50, p.177-178.
[109] Ibid. p.177-178.
[110] Known as the Dutch clause due to its origins in a time when the Netherlands lacked a national merger control system and relied entirely on Commission referrals for problematic concentrations, this provision has become less relevant as most Member States have established their own national regimes for merger control, with Luxembourg as the only exception; consequently, the Commission has developed a practice of discouraging Member States from requesting Article 22 referrals for transactions beyond their jurisdiction, based on the belief that such transactions are generally small and unlikely to significantly impact the internal market. Jotte Mulder, Wolf Sauter, “A new regime

request the Commission to examine a concentration with no Community dimension if it affects trade between Member States and threatens competition within its territory, allowing other Member States to join the request. [111] If the Commission accepts, it gains exclusive jurisdiction, and national proceedings in the referring Member States are terminated. [112]

When discussing the latest events related to referrals, it should be pointed out that two recent cases have significantly revised the functioning of Regulation 139/2004 and Regulation 1/2003[113] regarding the traditional division between ex-ante merger control and ex-post behavioral oversight.[114] In *Illumina/Grail* (2022), the General Court ruled that NCAs can refer a concentration to the European Commission even if they lack jurisdiction under national law, provided it affects trade between Member States and significantly impacts competition. [115] In *Towercast* (2023), the Court confirmed that NCAs can, ex-post, challenge concentrations that bypass national merger control thresholds using Article 102 TFEU, expanding the scope of merger control at both EU and national levels. [116]

### 5.3.4. Phase I Investigation

The Phase I investigation begins on the date the Commission receives the complete notification. A notification is only effective when the Form CO is fully complete and accurate. Notifying parties must ensure all information, especially contact details for customers, suppliers, and competitors, is correct. [117] Incomplete or incorrect information will delay the investigation and may result in the notification being declared incomplete. [118] To expedite the process, contact details should be provided electronically by the day of notification. [119] DG Competition may informally confirm the adequacy of a draft notification during pre-notification but may still declare it incomplete if issues are found later. If omissions are discovered after formal notification, parties usually have 1-2 days to correct them unless they severely impact the investigation. [120]

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for below threshold mergers in EU competition law? The Illumina/Grail and Towercast judgments", Journal of Antitrust Enforcement, 2023, 00, 1–11, p.3accessed August 22 2024, https://doi.org/10.1093/jaenfo/jnad029.

111 Commission Notice on Case Referral in respect of concentrations, op.cit., paragraph 50, p.177-178

[112] Ibid. paragraph 50, p.177-178.

[113] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), *OJ L 1, 4.1.2003, p. 1–25.*

[114] Jotte Mulder, Wolf Sauter, op.cit, p.2

[115] ibid.

[116] Ibid.

[117] Paragraph 20, DG COMPETITION, op.cit.

[118] Paragraph 20, Ibid.

[119] Paragraph 21, ibid.

[120] Paragraph 23, Ibid.

Without prejudice to Article 6(4) of the ECMR, the decisions referred to in Article 6(1) of the ECMR shall be made within a maximum of 25 working days.[121] This period commences on the working day following the receipt of the notification, or, in the case of incomplete information, on the working day following the receipt of all required information. [122] The time frame shall be extended to 35 working days if the Commission receives a request from a Member State in accordance with Article 9(2), or if the undertakings involved propose commitments under Article 6(2) to ensure the concentration is compatible with the common market. [123]

A special rule is contained in Article 10(6) of the ECMR. According to this rule, where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), or Article 8(1), (2), or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed compatible with the common market, without prejudice to Article 9. It should also be noted that this rule applies to decisions in both Phase I and Phase II.

When the Commission determines that a notified concentration falls within the scope of the ECMR, it will publish the notification, including the names of the involved undertakings, their countries of origin, the nature of the concentration, and the relevant economic sectors.[124] In doing so, the Commission will also respect the legitimate interests of the undertakings, particularly in protecting their business secrets.[125]

Before notifying a concentration, companies can request that the EC refer the case to a specific Member State's national authority if it significantly affects competition in that state's distinct market, and if no objection is raised within 15 working days, the request is deemed accepted, allowing the EC to refer the entire case or parts of it, after which EU competition law no longer applies and the case is handled under national law. [126]

If a concentration falls below Community dimension thresholds but is reviewable under the laws of at least three Member States, companies may request the EC to examine it, and if no Member State objects within 15 working days, the concentration is deemed to have a Community dimension and must be notified to the EC, granting the EC exclusive jurisdiction and preventing national competition authorities from applying their laws. [127]

As previously explained, Phase I will conclude either with the adoption of a decision in accordance with Article 6(1)(a) — that the concentration does not fall within the scope of the Merger Regulation — or with the adoption of a decision in accordance with Article 6(1)(b) — that the concentration does not raise serious doubts as to its compatibility with the common market

[121] Article 10 (1) of the ECMR.
[122] Article 10 (1) of the ECMR.
[123] Article 10 (1) of the ECMR.
[124] Article 10 (3) of the ECMR.
[125] Article 10 (3) of the ECMR.
[126] Article 10 (4) of the ECMR.
[127] Article 10 (5) of the ECMR.

(i.e., approval). If a decision is made in accordance with Article 6(1)(c) — that the concentration raises serious doubts — Phase I will transition into Phase II.

#### 5.3.4.1 Simplified procedures

In 2023, the Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2023/C 160/01) was adopted, replacing the Commission Notice on a simplified procedure for the treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04). This new notice sets out the conditions under which the Commission will review certain concentrations in a streamlined manner and provides guidance on the simplified procedure laid down in Annex II of Commission Regulation (EU) 2023/914 of 20 May 2023, which implements Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Implementing Regulation").

The European Commission applies a simplified procedure to certain types of concentrations, allowing faster approval processes for mergers and joint ventures that pose limited competitive concerns. These include: Joint Ventures with No EEA Activity[128], Joint Ventures with egligible EEA Activity[129], Non-overlapping Markets[130], Minimal Market Share Overlap[131] and Acquisition of Sole Control[132]

[128] When two or more companies acquire joint control of a joint venture with no current or expected turnover in the European Economic Area (EEA), or where there are no planned asset transfers within the EEA at the time of notification.

[129] When the joint venture or contributed activities have a current and expected annual turnover below EUR 100 million in the EEA, and the total value of assets transferred to the joint venture is also less than EUR 100 million at the time of notification.

[130] If two or more undertakings merge, or one or more undertakings acquire control of another company, the simplified procedure applies provided none of the involved parties are engaged in the same product or geographic market, or in upstream/downstream markets.

[131] The procedure may apply if there is a horizontal overlap (same product/geographic market) and the combined market share is below 20%, or if it is below 50% with a limited market impact measured by the Herfindahl-Hirschman Index (HHI). In vertical relationships (upstream or downstream markets), the simplified process is available if individual and combined market shares are below 30%.

[132] The simplified procedure applies when a party that already has joint control of a company acquires sole control.

The Commission may also apply the simplified procedure upon request for concentrations that do not strictly fall under the above categories. For instance: if the combined market share in a horizontal overlap is below 25%; or in vertical relationships, if individual and combined market shares in upstream and downstream markets are below 35%, or if one market has less than 50% while others are below 10%.

Additionally, the procedure can be used for joint ventures where the annual turnover and asset transfers in the EEA are both below EUR 150 million. The conditions outlined in different categories are applied alternatively and can be combined where applicable, offering flexibility in the review process.

This approach aims to expedite approvals for concentrations that are unlikely to harm competition, reducing the burden on both the Commission and businesses while maintaining effective regulatory oversight

If the Commission determines that a concentration qualifies for the simplified procedure (under points 5, 8, or 9), it will typically issue a short-form decision. This occurs when no competition concerns are raised. The decision will confirm the concentration's compatibility with the internal market within 25 working days from the date of notification. However, during this period, the Commission retains the right to revert to the normal procedure if further investigation is deemed necessary. In such cases, the Commission may declare the notification materially incomplete if it does not meet all the requirements, such as submitting the Form CO. Once the short-form decision is made, the Commission will publish a notice in the Official Journal of the European Union, similar to full-clearance decisions.

### 5.3.5 Phase II- In-Depth Investigation

The Phase II review entails a thorough investigation involving the collection and examination of information, market data, legal and economic opinions, and presentations. It also includes analyzing studies and submissions from third parties. Based on this, especially third-party feedback, the Commission will assess the competition concerns linked to the proposed merger. Additionally, the Commission may scrutinize internal documents from the involved companies, particularly strategic materials.

Article 11 of the ECMR grants the European Commission the authority to request necessary information from individuals, undertakings, and associations to fulfill its regulatory duties. The Commission may issue a simple request or a formal decision, specifying the legal basis, purpose, required information, and deadlines. It also outlines potential penalties for providing incorrect or misleading information, as set out in Article 14. Recipients of these requests are obligated to comply within the set time frame.

Article 13 of the ECMR outlines the European Commission's powers to conduct inspections of undertakings and associations of undertakings to enforce competition regulations. Authorized officials can enter premises, examine business records, take copies, seal locations, and request explanations from staff. Inspections require a written authorization specifying the purpose, and the Commission must notify the relevant Member State in advance. Companies are legally obliged to comply with inspections, and decisions include the scope, start date, penalties, and the right to appeal before the Court of Justice. The Commission consults with the Member State before issuing a decision.

The Commission's position will be formally outlined in a written Statement of Objections. Before consulting the Advisory Committee, the Commission shall hear the parties pursuant to Article 18(1) and (3) of Regulation (EC) No 139/2004 when it intends to take a decision under Article 6(3) or Article 8(2) to (6) of that Regulation. Article 12(2) of this Regulation applies mutatis mutandis if the Commission has taken a provisional decision under Article 8(5) of Regulation (EC) No 139/2004, in line with Article 18(2).[133] The Commission shall address its objections in writing to the notifying parties in a statement of objections and may issue supplementary statements if new objections arise or previously raised objections are modified. The Commission will set a time limit for notifying parties and other involved parties to submit their comments in writing.[134]

Notifying parties and other interested parties may submit written observations within a set timeframe, request an oral hearing, and participate in meetings with the Commission to clarify concerns, align positions, and develop remedies to ensure the concentration's compatibility with the Common Market before the Statement of Objections is issued.

A separate chapter, Chapter IV of the Implementing Regulation, outlines the procedures for hearings and the right to be heard under the ECMR. According to Article 11, four categories of parties with the right to be heard are foreseen.[135]

According to Article 12 of the Implementing Regulation, if the Commission plans to suspend a concentration, it must inform the notifying and involved parties, allowing them to present their views in writing within a set timeframe. If a provisional decision is made without consulting the parties, they must still be allowed to submit comments before a final decision is made.

Before making substantive decisions on a concentration, the Commission must hear the parties involved, issue a written statement of objections with a deadline for response, and may

[133] Article 13 (1) of the Implementing Regulation.

[134] Article 13 (2) of the Implementing Regulation.

[135] The following entities are included: (i) notifying parties, those submitting a notification regarding a concentration; (ii) other involved parties, such as the seller and the target company in a concentration; (iii) third parties, including customers, suppliers, and competitors who have a sufficient interest, such as consumer associations and employee representatives; and (iv) parties facing fines, i.e., those against whom the Commission plans to impose penalties.

issue additional statements for new objections, noting that comments submitted after the deadline are not guaranteed to be considered.[136]

Notifying parties and other involved parties can request oral hearings to present their arguments, especially if the Commission plans to take significant decisions, such as approving or blocking a merger.[137] Hearings may also be granted at other stages of the proceedings.[138]

Oral hearings, conducted by an independent Hearing Officer, are private proceedings where the Commission and Member State authorities can attend and ask questions, with participants permitted to be represented by legal or authorized representatives. [139]

Third persons can apply to be heard, and if accepted, the Commission must inform them of the case, provide a non-confidential version of the objections, set a deadline for written comments, and may invite them to participate in hearings.[140]

Special provisions for access to the file are contained in Article 17 of the Implementing Regulation, which allows parties involved in a case (those receiving a statement of objections) to request access to the file in order to defend themselves.

Confidential information, such as business secrets, will not be disclosed unless necessary for the proceedings, and parties must identify such material and provide a non-confidential version; if they fail to do so, the Commission may treat it as non-confidential and can require parties to specify confidential content in key documents, with non-compliance potentially resulting in the loss of confidentiality..[141]

Without prejudice to Article 8(7) of the ECMR, decisions under Article 8(1) to (3) of the ECMR regarding notified concentrations must be made within 90 working days from the initiation of proceedings. This period may be extended to 105 working days if the involved parties propose commitments under Article 8(2), second subparagraph, to make the concentration compatible with the common market, provided such commitments are offered no later than 55 working days after the proceedings begin. The time limits mentioned in the first subparagraph may also be extended if the notifying parties request an extension within 15 working days of the initiation of proceedings under Article 6(1)(c). Only one such request is allowed. Additionally, the Commission may extend the time limits with the agreement of the notifying parties at any point after the proceedings have started. However, the total duration of any such extension(s) cannot exceed 20 working days.

Upon expiry of the relevant Phase II time period the Commission must take a decision under one of the following provisions: (i) Article 8(1)—if the concentration is compatible with the Common Market; (ii) Article 8(2)—if the concentration is compatible with the Common Market

[136] Article 13 of the Implementing Regulation.
[137] Article 14 of the Implementing Regulation.
[138] Article 14 of the Implementing Regulation.
[139] Article 15 of the Implementing Regulation.
[140] Article 16 of the Implementing Regulation.
[141] Article 18 of the Implementing Regulation.

following modification by the parties; or (iii) Article 8(3)—if the concentration is incompatible with the Common Market. In addition, the Commission can make a decision in accordance with Article 8(4) for the dissolution of the merger in cases of premature implementation or implementation in breach of a condition for clearance, or in accordance with Article 8(6) for the revocation of a clearance decision in cases of incorrect information or breach of obligation. The Commission can also make a decision on temporary measures in accordance with Article 8(5).

### 5.3.2. Clearance and Conditional Clearance

"Clearance" and "conditional clearance" are part of the procedure for appraisal of concentration notified in the context of Article 6 from the Regulation 139/2004. Article 6 refers to "examination of the notification and initiation of proceedings" and one of the main obligation of the Commission is to examine the notification as soon as it received. Under article 6 (1b), where the Commission finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market. In article 6 (2), the Regulation incorporate the concept of "clearance" anticipating that "where the Commission finds that, *following modification by the undertakings concerned*, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b)". The Commission may attach to its decision under paragraph 1(b) 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. For example, Hutchison 3G Italy/Wind/JV in Italy in August 2016 saw Iliad enter the Italian market as a full-blown fourth MNO on the basis of a remedy package."[142] This issue is related to the phase I and phase II form the procedure anticipated in the part "Examination of the notification and initiation of proceedings." There are two main conclusions of a phase I investigation: The merger is cleared, either unconditionally or subject to accepted remedies; or the merger still raises competition concerns and the Commission opens a phase II investigation. This phase II most often open the question of remedies.

#### 5.3.2.1. Remedies

[142] Final report of the Hearing Officer, Official journal of the European Union, Hutchison 3G Italy/WIND/JV (Case M.7758) (2016/C 391/04), available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=uriserv:OJ.C_.2016.391.01.0005.01.ENG, [accessed on 15 September 2024].

Remedies are the most used instrument by the Commission in merger approval procedures.[143] Some statistical data display that for a period of 30 years, the Commission has prohibited only 30 concentrations, and about 450 cases have been approved with the use of remedies. [144]

Importance of remedies in the appraisal of concentration was confirmed by Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004.[145] According to paragraph 3, "this Notice sets out the general principles applicable to remedies acceptable to the Commission, the main types of commitments that may be accepted by the Commission in cases under the Merger Regulation, the specific requirements which proposals of commitments need to fulfil in both phases of the procedure, and the main requirements for the implementation of commitments." Proper legal basis for the implementation of remedies in certain cases lays down in article 8 (2) which refer to the activities of the Commission in phase II. Namely, in the legal frame of the powers of decision, "Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

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. Finally, a decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration. Where the Commission finds that a concentration: a) has already been implemented and that concentration has been declared incompatible with the common market, or (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty, the Commission may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

[143] Südzucker/ED&F MAN, Case COMP/M.6286, Commission decision of 16 May 2012; Universal Music Group/EMI Music, Case COMP/M.6458, Commission decision of 21 September 2012; Outokumpu/ Inoxum, Case COMP/M.6471, Commission decision of 7 November 2012; and Hutchison 3G Austria/ Orange Austria, Case COMP/M.6497, Commission decision of 12 December 2012.

[144] For more statistical data see: Simon VANDE WALLE, Remedies in EU Merger Control – An Essential Guide, 2021, available from: https://ssrn.com/abstract=3782333, [accessed on 28 August 2024].

[145] Full text available from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC1022%2801%29, [accessed on 30 September 2024].

The theory and practice are aware with few types of remedies applicable in merger control: structural remedies (divestments of business, divestments of shares, termination of agreements), behavioural remedies, and hybrid" remedies. Divestitures is the most common type of remedy in EU merger control. Divestments of business or divestments of shares, are one of the most used instrument in the appraisal procedure and approval of the merger, acquisition or joint venture. For example, In 2018, for instance, Bayer, a German-based multinational, agreed to divest part of its business as a remedy to obtain clearance for its acquisition of U.S. seeds company Monsanto. The resulting deal, which had a value of 7.6 billion euro.[146] Very famous cases of merger or acquisition have been realized with the help of remedies: *Dow / DuPont, Commission decision of 27 March 2017., AB InBev / SAB Miller, GE / Alstom, Holcim / Lafarge, Ball / Rexam etc.* Namely,

> "under the Initial Commitments package AB InBev had already agreed to the sale, conditional on completion of the Transaction, of SABMiller's interest in MillerCoors LLC (a joint-venture in the US and Puerto Rico between Molson Coors and SABMiller) and of the Miller Global Brand Business (the Miller Brand) to Molson Coors ("the US Agreement")";
>
> „on 8 April 2016, the Parties submitted the PGM package with the aim to remove overlaps between their businesses in Western Europe. It consists on the divestment of three entire businesses currently owned by SAB, namely the Peroni business in Italy, the Grolsch business in the Netherlands and the Meantime business in the United Kingdom";
>
> Further more, the Commission considers that the sale of the Peroni brands family would essentially removes the overlap between the Parties 'activities in Italy and the UK. The on-sale of the Grolsch brand family removes the overlap between the Parties activities in the Netherlands and in France etc. [147]

Anyway, in the last few year, this concept of remedies has been very criticized in the academicals and professional circles.[148] In this regard, the theory deals with the issues related to the the effort invested by the commission and the costs it incurs, in the process of proving significant impediment to effective competition, personnel engagement, etc., bearing in mind that the concept of conditional approval is always option.

According to relevant experts, the concept of remedies should be used very carefully, and only in cases where all means have been exhausted by the commission to prove that the specific transaction is inadmissible from the point of view of competition law. As an argument in support of this opinion, there is the fact that exactly mergers, acqusitions, joint investments, etc., have an essential role in the growth and development of the economy. Hence, insufficient investigation by the Commission of the conditions under which the concentration can be allowed or prohibited, may jeopardize the economy, and the well-being of the consumers for which the Commission basically advocates.[149]

### 5.4. Joint ventures

[146] Ongun A., The Bayer-Monsanto Deal: One of the worst corporate deals ever? School of Business and Economics., 2020.

[147] Walle Vande S., *ibid.*

[148] Dertwinkel Kalt M., Wey C., Evidence Production in Merger Control: The Role of Remedies, Review of Industrial Organization, 2021, pp.1-12.

[149] Dertwinkel Kalt M., Wey C, *ibid.*

Joint ventures take a wide range of forms, from structural arrangements comprising the transfer by parents of assets or businesses into a commonly owned legal entity, to looser forms of cooperation that seek to achieve more discrete goals.[150] Theory and practice are familiar with 4 types of joint ventures: Project base joint ventures, Functional – Based joint venturs, vertical joint ventures, horizontal joint ventures.

For the purposes of competition law, joint ventures have been defined in 1998, in Official Journal C 066 , 02/03/1998 P. 0001 - 0004 1998 OJ C 66, through the COMMISSION NOTICE on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (98/C 66/01). Under INTRODUCTION I from the COMMISSION NOTICE, "under the Community competition rules, joint ventures are undertakings which are jointly controlled by two or more other undertakings."

Joint ventures are subject of the committee's interest, mainly when it comes to the concept of full-function joint ventures. In cases where certain joint ventures do not fall under the application of Regulation 139/2004, the general rules from Article 101, 103 of the treaty are applied. Regulation 139/2004 deals with joint ventures concept through few articles. At the beginning, in the preamble of the Regulation, point 20, in defining the concept of concentration, the regulation includes joint ventures. Additionally, point 27 from the Preamble, anticipates that the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis. Related to this is the solution from article 3(4), which is crucial for appraisal of concentration. In this regard, "the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)".

The regulation 139/2004 has jurisdiction over joint ventures in terms of concentration assessment, expressly provided through the prism of multiple solutions (article 2 (4)).[151] In making this appraisal, the Commission shall take into account in particular:

- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,
- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Practice abounds with cases assessing the concentration, in the case of a joint venture. Case T-584/19, *Thyssenkrupp v Commission*, judgment of 22 June 2022 Case T-399/16, *CK Telecoms,* judgment of 28 May 2020 Case C-376/20 P, *Commission v CK Telecoms*, Opinion of Advocate General Kokott of 20 October 2022, Case-376/20 P, *Commission v CK Telecoms*, judgment of 13 July 2023 Case C-724/17, *Skanska*,

[150] Pepper R., Humpe C., Delvaux L., European Union: The evolving assessment of joint ventures under EU law, 2023.
[151] To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

judgment of 14 March 2019, Case C-882/19, *Sumal v Mercedes Benz Trucks España*, judgment of 6 October 2021.

One tremendously interesting case in the context of appraisal of concentrations in the case of a joint venture is the well-known case C-248/16 Austria Asphalt vs Bundeskartellanwalt.[152] The main question in the preliminary ruling was: Must article 3(1)(b) and (4) of [Regulation No 139/2004] constitutes a concentration in the event when in the process of joint venture between two undertakings, control becomes joint, on a permanent basis? Many opinions around this case has been given in the theory. As a part of the judgment, Kokott opinion is:

> „The transfer of an existing undertaking or part of an undertaking from sole control by one company to joint control by the selfsame company and another company unrelated to it constitutes a concentration within the meaning of Article 3 [EUMR] only where the joint venture resulting from that transaction performs on a lasting basis all of the functions of an autonomous economic entity". [153]

[152] ECJ's Judgment of 7/9/2017, European Commission, All views presented are personal and do not necessarily reflect the official position of the European Commission, 2017.
[153] *Ibid, p.* 15.