International and Comparative Competition Law

Mergers – Part 2

Overview

- Merger Control Overview
- EU Merger Control Regime
- US Merger Control Regime

Merger Control Overview

Merger Control

- Procedure for reviewing M&A transactions under competition law
- Applies to mergers, acquisitions, and certain joint ventures
- Designed to avoid harm to competition (*e.g.*, higher prices, reduced choice or innovation)
- Broadly similar aims worldwide

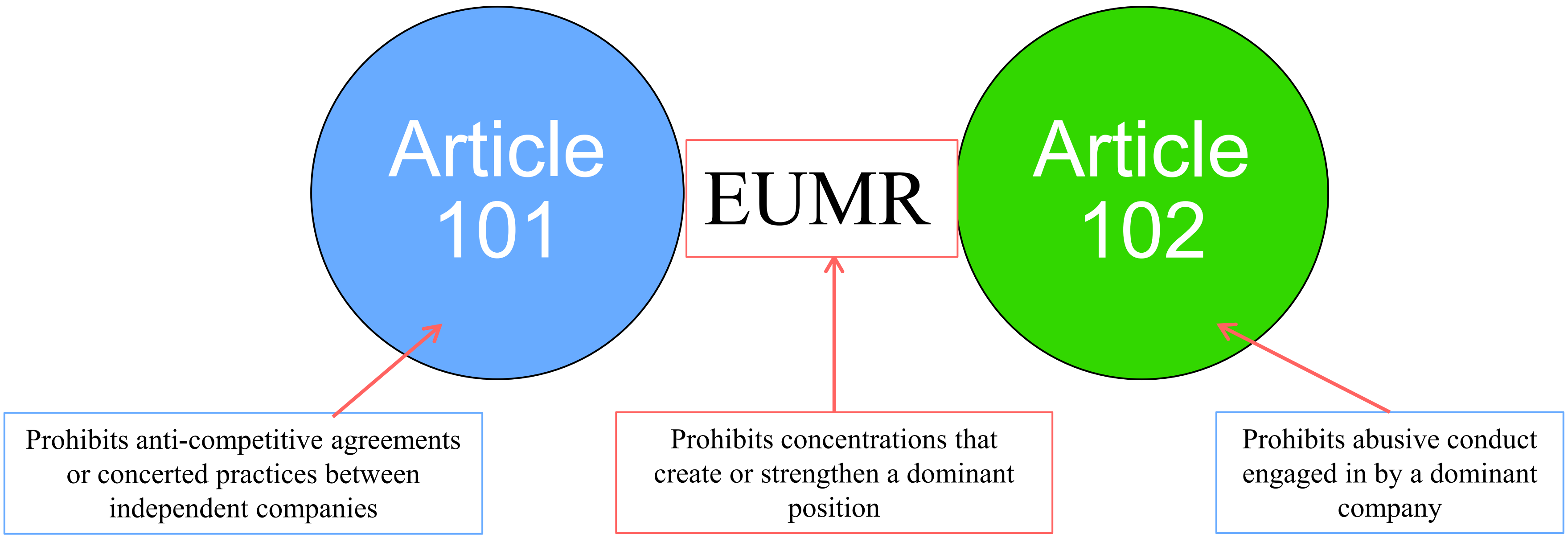
Types of Regimes

- Mandatory vs. Voluntary
  - Mandatory: parties must notify the transaction to relevant competition authority
  - Voluntary: if thresholds are met, it is recommended that parties notify the transaction to authority (possibility of *ex officio* investigation)
- Suspensory vs. Non-suspensory
  - Non-suspensory regimes: parties can close before receiving approval, at their own risk
  - Suspensory regimes: parties cannot close until approval is received, subject to exceptions
- Types of jurisdictional tests
  - Turnover
  - Assets
  - Market share / concentration levels
  - Transaction value

EU Merger Control Regime

EU Merger Control – The Enforcement Gap

- 1957 Treaty of Rome contained no merger control rules, which created an antitrust enforcement gap between Article 101 and Article 102.



- Commission nevertheless applied Article 101 and Article 102 to a number of transactions that might today be reportable under the EUMR.
- But absence of rules that could be applied to concentrations that created a dominant position represented a serious gap: prevention better than cure

The EU Merger Control Regime

- EU Merger Regulation (Council Regulation 139/2004)
  - Established mandatory notification of "concentrations" with a "community dimension"
  - One-stop-shop principle with possibilities for referral
  - Suspensory effect – notified transaction may not close without clearance (standstill obligation)
- Implementing Regulation (Commission Regulation 802/2004)
  - Establishes filing procedure and forms
- Commission Jurisdictional Notice (2008)
  - Defines and provides further guidance on key concepts – including
    - "Concentration"
    - "Control"
    - "Full Functionality"
    - "Community Dimension"
    - "Undertaking Concerned"
- Fines for failure to notify / pre-clearance closing
  - Up to 10% of aggregate turnover of parties concerned

"*the Commission considers that any infringement of* [the notification and standstill obligations] *of the Merger Regulation is, by nature, a serious infringement.*"

Case COMP/M.7184 – *Marine Harvest Morpol* (Art. 14(1) Proc.)

Referrals

- One-stop-shop principle: no concurrent jurisdiction over the same transaction
- If a transaction has an EU dimension: Commission notification
- If a transaction does not have an EU dimension: maybe NCA notification – but see Article 22 EUMR!
- 2 exceptions:
  - Transactions reportable at EU level may be referred to NCAs
    - At the request of an NCA
    - At the request of the Parties
  - Transactions may be referred to the EC
    - At the request of an NCA
    - At the request of the Parties (if subject to review in at least 3 Member States)

Concentration Defined

"Change of control in the undertakings concerned (…) on a lasting basis"
(Commission Consolidated Jurisdictional Notice, para. 7)

- Three types of concentrations:
  - **Merger** between previously independent undertakings
    - *(EC Merger Regulation, Article 3 (1) (a))*
  - **Acquisition of control** of the whole or parts of one or more undertakings whether by purchase of securities or assets, by contract or by any other means
    - *(EC Merger Regulation, Article 3 (1) (b))*
  - Creation of **full-function joint-venture**
    - *(EC Merger Regulation, Article 3 (4))*
- In all cases must be on a **lasting basis** (lasting change in the market structure)

The Illumina/Grail Saga

Illumina/GRAIL: The Parties

Illumina (US) is a company specialized in genomic sequencing, which **develops, manufactures and commercializes next-generation sequencing (NGS) systems** used, inter alia in the development and implementation of cancer screening tests.

GRAIL (US) is a healthcare company **developing blood-based cancer tests based on genomic sequencing** and data science tools. Its flagship product is « Galleri », a multi-cancer early detection test.

Art. 22 EUMR – Referral to the EC

"*1. One or more Member States may request the Commission to examine any concentration … that does not have a Community dimension … but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.*
Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned"

Article 22 and Killer Acquisitions

A traditionally <u>limited</u> use of Art. 22 EUMR

- Originally, Art. 22 EUMR was aimed to remedy the absence of national merger control system in some MSs (so-called "**Dutch clause**")
- EC historically **discouraged** Art. 22 referral requests from MSs that did not have jurisdiction
- Art. 22 became obsolete after almost all MSs adopted merger control laws

But then came the "enforcement gap"

- Enforcement gap: "**Killer acquisitions**" (*e.g.*, in **tech** and **pharma** sectors) often **do not reach national thresholds** and **pass through the EUMR net**

2021 POLICY CHANGE

EC's Guidance Paper on the application of Art. 22 EUMR

- "***Article 22 is applicable to <u>all</u> concentrations**, not only those that meet the respective jurisdictional criteria of the referring Member States*"
- Policy message: EC would in relevant cases "***encourage** and accept referrals … where the referring member state **does not have initial jurisdiction*** [under its merger control law] *over the case (but where the criteria of Article 22 are met)*"

The Turning Point: the Illumina/Grail Case

The *Illumina/Grail* case was the first test of the EC's **new stance** towards Art. 22 referrals

Illumina and Grail, both US-based, were generating <u>no revenues in the EU</u>

No EU or national merger control thresholds were triggered

No reportability to the EC or NCAs

1 **September 2020**
Illumina announces its USD 8 billion acquisition of Grail

2 **December 2020**
The EC receives a complaint regarding this acquisition

3 **February 19, 2021**
The EC sends NCAs a letter inviting them to make a referral request under Art. 22 EUMR

4 **March 9, 2021**
The French NCA requests the referral, subsequently joined by Belgium, Greece, the Netherlands, Iceland, and Norway

5 **April 19, 2021**
The EC accepts referral request under Art. 22 EUMR and asks the Parties to notify the transaction

The transaction "*could restrict access to or increase prices of next generation sequencers and reagents to the detriment of GRAIL's rivals*"

"***Genomic cancer tests****, having the potential to identify a wide variety of cancers in asymptomatic patients,* ***are expected to be game-changers in the fight against cancer***"

"***GRAIL's competitive*** *significance is not reflected in its turnover, as notably* ***evidenced by the USD 8 billion deal value***"

CVRIA

The Commission's Prohibition Decision: Core Arguments

ABILITY TO FORECLOSE	INCENTIVE TO FORECLOSE
— **Lack of substitutes**. ▪ GRAIL and its rivals rely on NGS systems to develop and run their early cancer detection tests ▪ Only Illumina's equipment meets the requirements ▪ No credible alternative to Illumina in short to medium term — **High barriers to entry**. ▪ Risk of IP litigation ▪ Need for GRAIL's rivals to rely on established, innovative and reliable NGS player — **High switching costs**.	— Blood-based early cancer detection testing is an **expanding market**, which has "*enormous market potential*" and "*ongoing close innovation competition*". — **GRAIL's Galleri – First mover but not unique.** Several players are developing tests that would closely compete with Galleri in the near future absent the transaction. — Ability to foreclose today **despite benefitting from this action only at a later stage**.

Illumina/Grail: The General Court Judgment (July 2022)

Renewed approach to Article 22 EUMR	▪ The GC confirmed that under Article 22 EUMR, the EC can examine transactions referred to it by Member States (MS), even where the national merger control thresholds are not met. ▪ A MS is entitled to refer "*any concentration*" satisfying the conditions set out in the Article (affects trade between MS + threatens to significantly affect competition within the territory of the MS)

Parties can appeal Article 22 referral decisions	▪ GC clarified that EC decisions accepting an Article 22 referral request can be challenged as:
	    ▪ They are binding and are not considered as intermediate measures preparing a decision on the substance of the case.
	    ▪ They trigger the filing and consequential suspensory obligations.

Referral deadline triggered when a transaction is "*made known*" to a MS	▪ "*The active transmission […] to the Member State concerned* [of] *sufficient information to enable that Member State to carry out a preliminary assessment of the conditions laid down in […] Article 22(1)"*. ▪ Public announcements, media coverage and "*mere knowledge of the existence of the concentration*" are <u>not</u> sufficient to trigger the 15-day period for referral requests.

Illumina/Grail: The ECJ Judgment (September 2024)

On 3 September 2024, the ECJ overturned the General Court's ruling and ruled the EC lacks jurisdiction to review merger falling below EU and national merger thresholds

Key Takeaway	An MS with domestic merger control rules cannot seek an Art. 22 EUMR referral if the transaction does not fall within its national merger control rules

Literal Interpretation	**Historical Interpretation**	**Contextual Interpretation**	**Teleological Interpretation**
▪ Even where a provision "*appears to be clear*," the Courts may still resort to other methods of interpretation "*to clarify* [its] *exact scope*," justifying a historical, contextual, and teleological interpretation of the provision (§§127-128)	▪ 22's legislative history (*travaux préparatoires*) contradicts the GC conclusions ▪ Art. 22 was enacted to address the absence of national merger control regimes in certain Member States and not the fact that certain concentrations that "*could affect the internal market would, in any event, escape* ex ante *review*" under the EUMR (§§146-148)	▪ The GC failed to consider the existence of a dedicated mechanism in the EUMR to revise the thresholds – Art. 1(4) and (5) – allowing for the "*rapid adjustment*" of the thresholds should they no longer be "*apt to capture concentrations with potentially harmful effects*" (§§175-184)	▪ Art. 22 is not a "*corrective mechanism*" ▪ Broad interpretation of Art. 22 is "*inconsistent with*" EUMR's objectives (legal certainty, effectiveness, and predictability) ▪ Need for "*clear allocation*" of competences btw the EC and MSs and "*predictable system of control*" ▪ Institutional balance, as "*it is for the EU legislature alone*" to review the thresholds or to "*provide for a safeguard mechanism*" for the EC to scrutinize below-thresholds transactions (§§191-199, 203-205, 2011-217)

Case-Specific Implications of the ECJ's Judgement

Illumina/Grail Saga

- Art. 266 TFEU: EU institution whose measure has been declared void must take the necessary steps to comply with the judgment annulling that illegal measure
- The ECJ's judgement indirectly invalidates a series of decisions based on the EC's decision which asserted jurisdiction over the case:
  - **Decision to open Phase II**
  - **Prohibition decision**
  - **2 decisions about interim measures**
  - **Decision ordering restorative measures**
  - **Gun-jumping decision** (€ 423 million fine for Illumina; € 1 million for GRAIL)

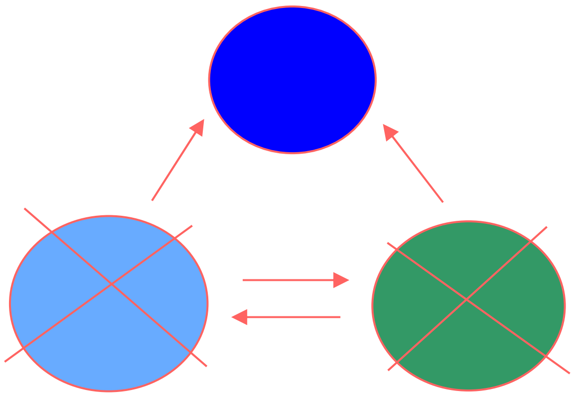
Compensation for Damages from the EC

- It also opens the possibility for the recovery of damages from the EC (decision not yet made by Illumina)
- Legal test under Art. 268 TFEU:
  - illegal conduct of the EU institutions/servants, in the light of EU law
  - real and certain damage
  - causal link
- Possible damages:
  - legal fees in the EC's administrative procedures
  - monitoring fees and payments to GRAIL to keep it separate/financially independent from Illumina
  - harm suffered from the restrictive conditions imposed for GRAIL's divestment

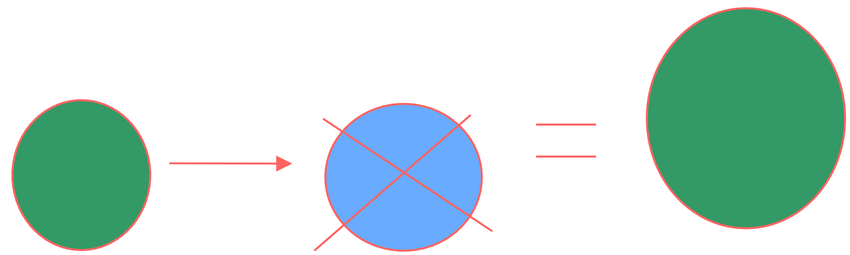
What Type of Transaction is Potentially Notifiable?

Concentration Defined - Mergers

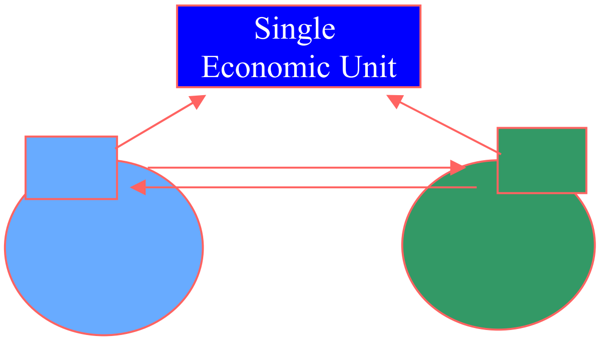
1. Legal Merger 1



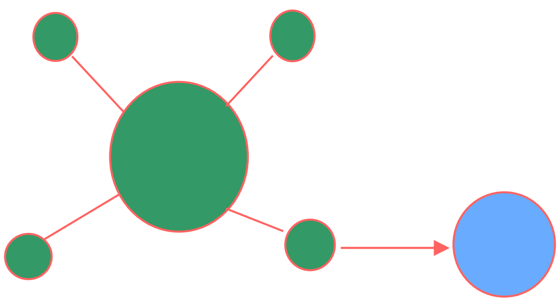
2. Legal Merger 2



3. De facto Merger



4. **<u>Not a Merger</u>**



Forms of Control

- Control must be assessed on a case-by-case basis by reference to:
  - Level of shareholding
  - Positive management rights (*e.g.*, board representation)
  - Veto rights over budget and strategic matters

- Acquisition of **sole control**
  - "*Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking*." *(Commission Consolidated Jurisdictional Notice, para. 54)*
  - Types
    - Acquisition of majority of voting rights in target
    - Acquisition of minority shareholding with preferential shares enabling buyer to determine strategy
    - "Negative sole control" – minority shareholding with strategic veto rights
    - *De facto vs. de jure*

Forms of Control

- Acquisition of **joint control**
  - *"Joint control exists where two or more undertakings have the possibility to exercise decisive influence over another undertaking." (Commission Consolidated Jurisdictional Notice, para. 62)*
  - ***Decisive influence***: the ability to block actions that determine the strategic commercial behavior of an undertaking.
  - Purchasers must reach a common understanding on matters of importance
  - Types
    - Parents with equal voting rights
    - Parents with veto rights over strategic decisions
    - Joint exercise of voting rights
    - *De facto vs. de jure*

Changes in Control

- A notifiable concentration may occur where there is a change in the quality of control of an undertaking, provided such changes affect (a) the powers held in that undertaking and (b) the composition of its control structure
- Examples
  - Joint to sole control – reportable
  - De facto to de jure sole control – not reportable
  - Negative sole control to positive sole control – not reportable
  - Sole to joint control – reportable
  - Entry of new jointly controlling shareholders – reportable
  - Reduction in number of preexisting shareholders – not reportable (except where qualitative change in the remaining shareholders positions)
  - Changes in scope of JVs - reportable

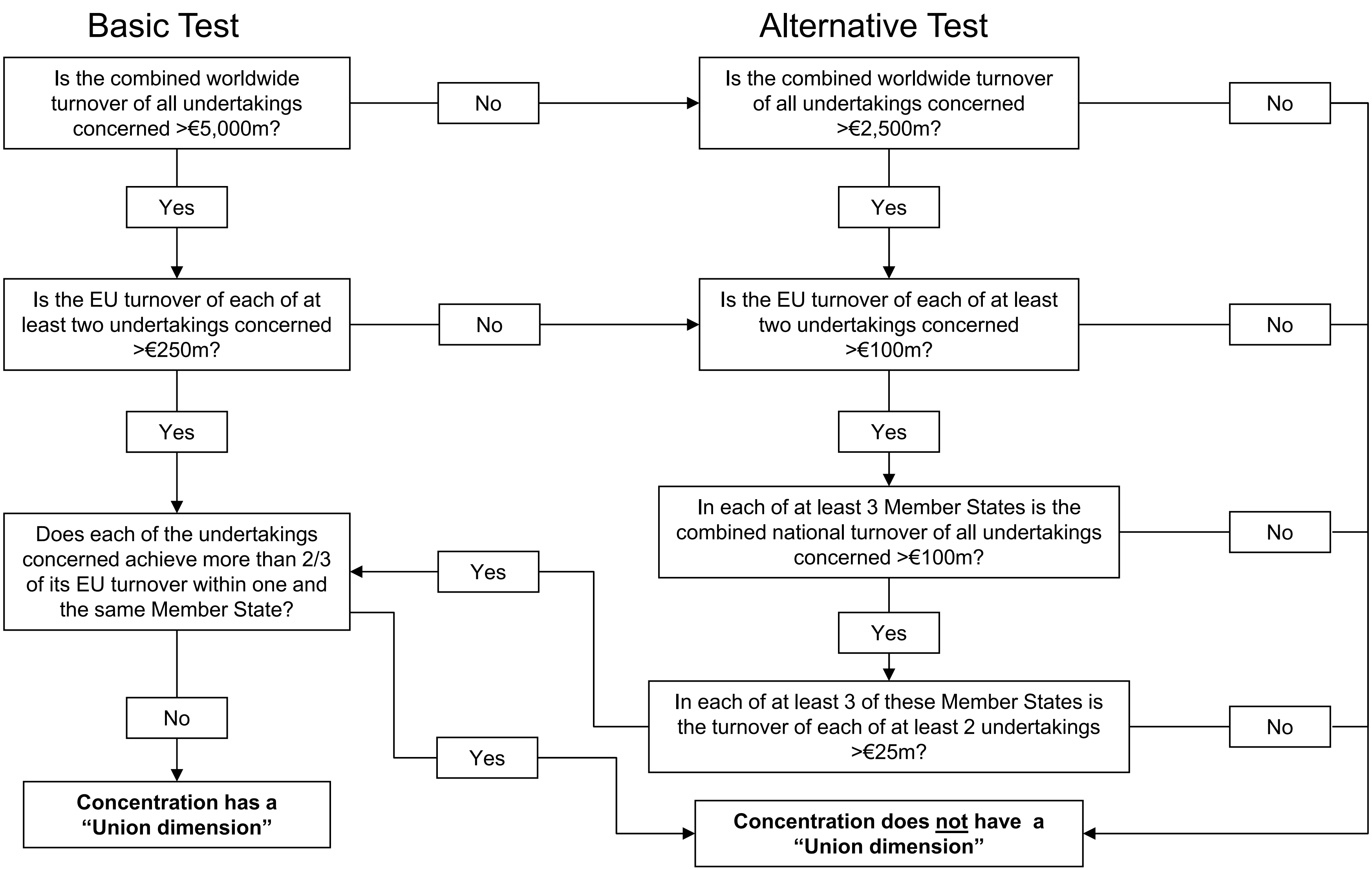
Full Functionality

- The creation of a joint venture performing on a **lasting basis all the functions of an autonomous economic entity** shall constitute a concentration which falls within the scope of the ECMR. (*ECMR article 3, para. 4)*
- Full function JV should be capable of performing functions typically carried out by competing undertakings that operate on the same market.
  - Sufficient resources to operate independently in the market
    - Intellectual Property
    - Raw materials
    - Infrastructure
    - Employees
  - Activities beyond one specific function
  - OK to rely on parents for some functions

Community Dimension

- A concentration has a Community dimension where:
  - Combined turnover of all the undertakings concerned is > €5,000M; and
  - Aggregate EU-wide turnover of each of at least two undertakings concerned is > €250M; and
  - Each of the undertakings concerned does not achieve more than two-thirds of its Community wide turnover in one and the same Member State
- An alternate set of turnover thresholds is provided by Article 1(3) ECMR
  - Combined turnover of all undertakings is > €2,500M; and
  - Aggregate EU-wide turnover of each of at least two undertakings is > €100M; and
  - In each of at least 3 Member States, combined aggregate turnover of all undertakings is > €100M, and aggregate of each of at least two undertakings is more than €25M; and
  - Each of the undertakings concerned does not achieve more than two-thirds of its Community wide turnover in one and the same Member State
- Both sets of jurisdictional criteria require identification of the "*undertakings concerned*" in the concentration

Community Dimension



Community Dimension: Calculation of Turnover

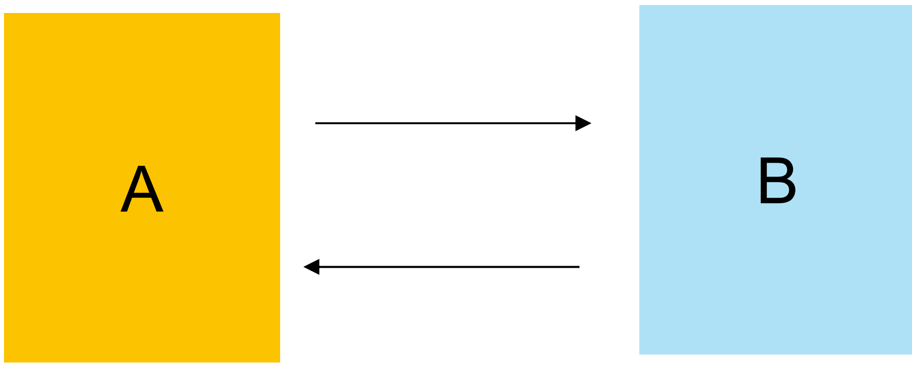
- The aggregate turnover of each party <u>must include</u>: *(ECMR, Article 5)*
  - Subsidiaries
    - The sales revenues of firms that party controls directly or indirectly, *i.e.* itself or via another subsidiary.
  - Parents
    - The sales revenues of firms by which the party is controlled directly or indirectly, *i.e.* parents and grandparents.
  - Sister Firms
    - The sales revenues of controlled subsidiaries of parents and grandparents, *i.e.* sister companies controlled by parents and grand parents.
  - Jointly Controlled Firms.
    - The sale revenues of controlled jointly by any two or more of the firms listed above, *i.e.*, by companies in the party's group.
- The aggregate turnover <u>shall not</u> include **intra-group revenues**:
  - The sale of products or provisions or services between any of the undertakings within the commonly controlled group to which the undertakings concerned belongs.

Community Dimension: Undertakings Concerned

- The Commission takes account of the aggregate and individual turnovers of the entities whose turnovers are combined or merged by the concentration.
- In the case of acquisitions: the undertakings concerned are the **target company and the acquirer**, with the turnover of the undertaking(s) controlled by and controlling the acquirer being included in the calculation of turnover
    - On the acquiring side there may be more than one undertaking concerned because control may be exercised jointly
    - On the acquired side the seller of a business will not be an undertaking concerned, unless it retains control jointly with another undertaking
- Mergers: Where several independent companies come together to create a new company or to form a single economic unit, each of the merging entities are treated as being undertakings concerned.

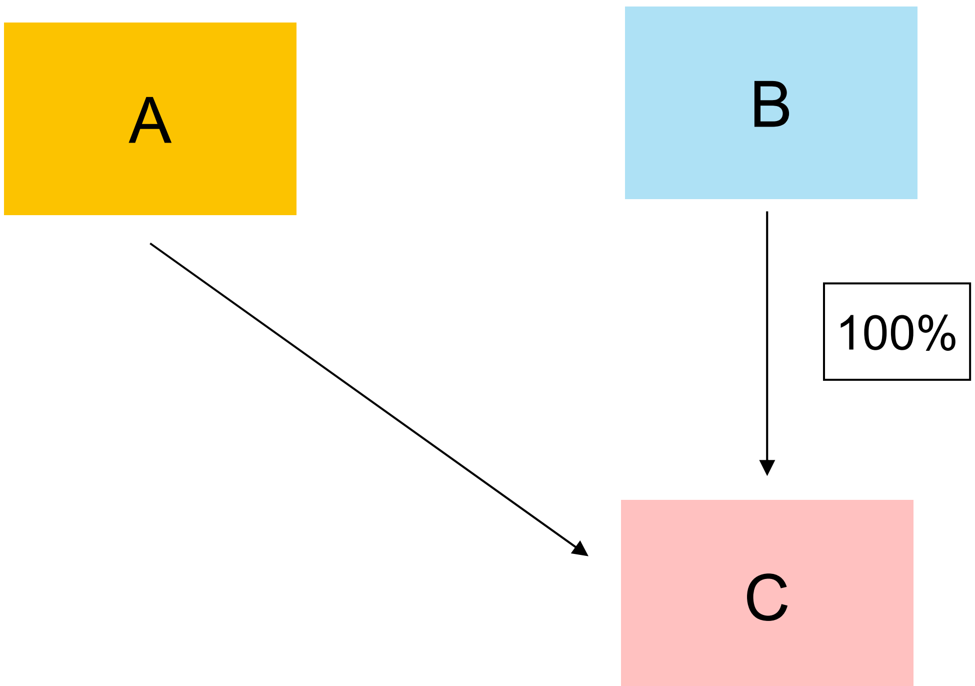
Union Dimension – Undertaking Concerned

Example 1: Merger between A and B



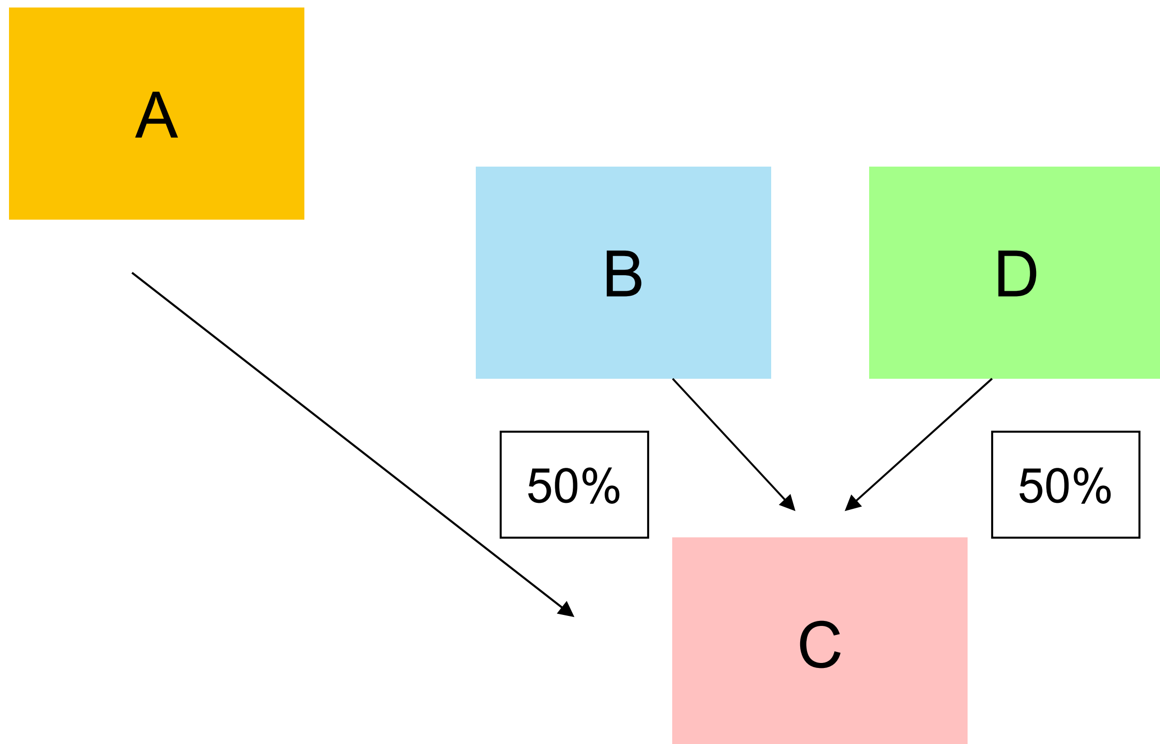
Union Dimension – Undertaking Concerned

<u>Example 2</u>: B purchases 100% of the shares in C from A



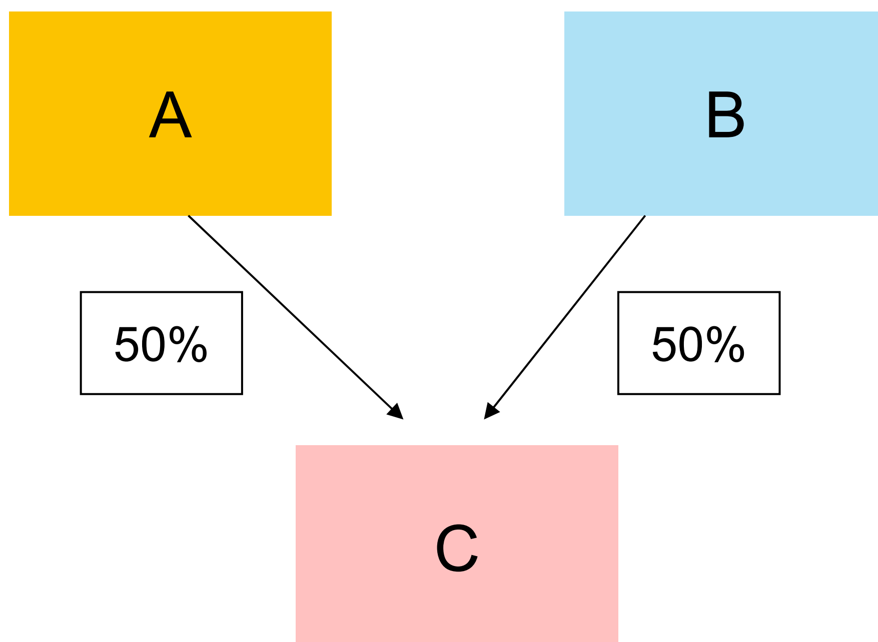
Union Dimension – Undertaking Concerned

<u>Example 3</u>: B and D each purchase 50% of the shares in company C from A



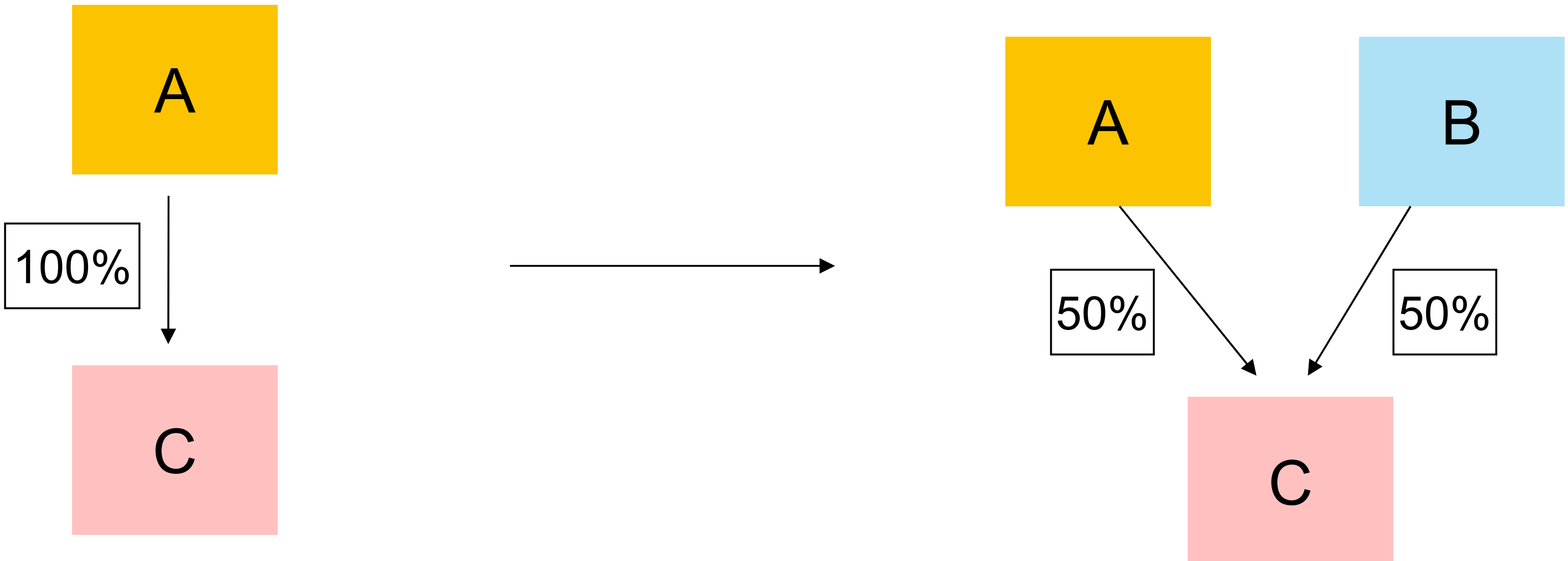
Union Dimension – Undertaking Concerned

Example 4: Companies A and B form (full-function) joint venture C



Union Dimension – Undertaking Concerned

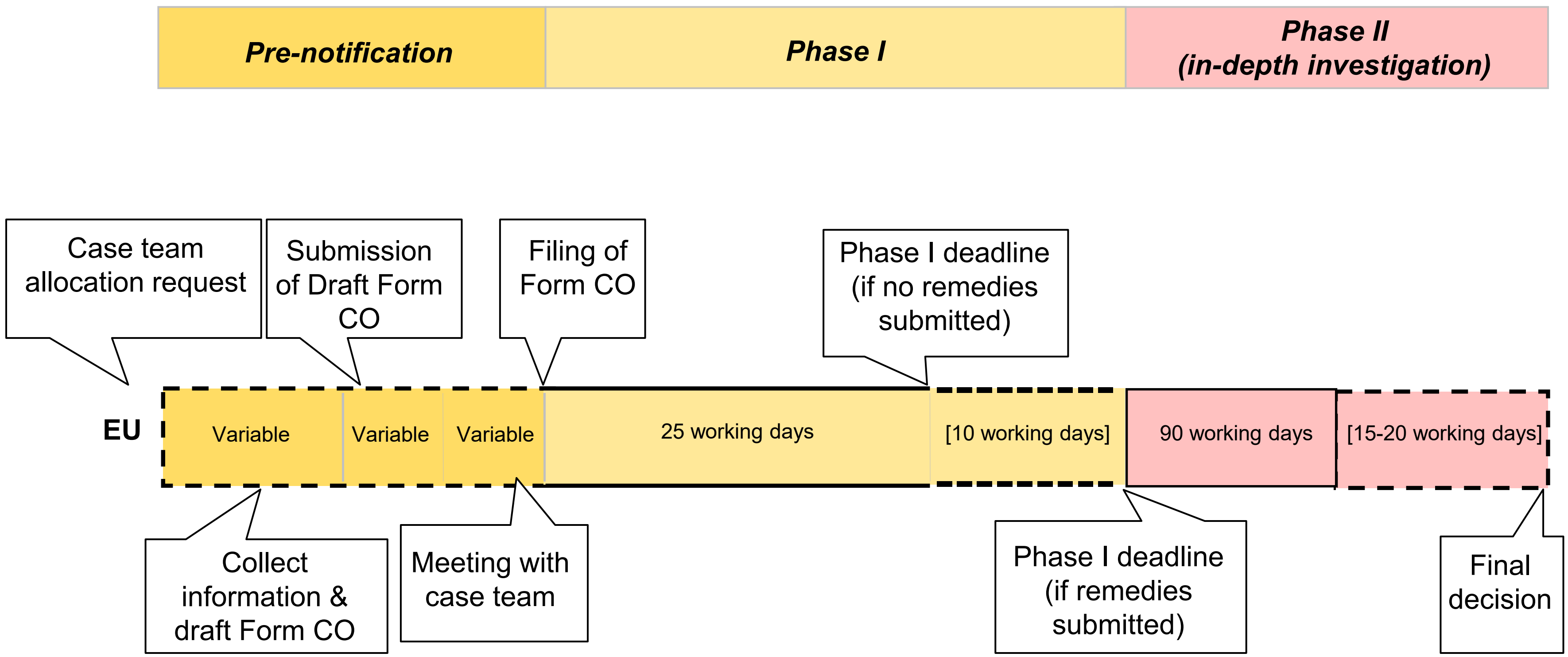
Example 5: Company A owns C. Acquisition of joint control by B over C – A and B have shared control over full-function joint venture.



Procedure

- Pre-notification
  - Case team allocation request
  - Drafting merger control filing: “Form CO” or “Short Form”; waivers
  - Discussing and revising drafts with Commission case team
- Phase I
  - Formal filing (25 working days; 35 working days if remedies offered)
  - Responding to requests for information
  - Remedies submissions due by Day 20
- Phase II
  - 6(1)(c) decision and response
  - Access to “key documents”
  - Responding to requests for information
  - SO and Response to SO; Oral Hearing
  - Consultation with NCAs
  - Remedies

Procedure


Pre-notification
Phase I
Phase II
(in-depth investigation)
Case team allocation request
Submission of Draft Form CO
Filing of Form CO
Phase I deadline (if no remedies submitted)
EU
Variable
Variable
Variable
25 working days
[10 working days]
90 working days
[15-20 working days]
Collect information & draft Form CO
Meeting with case team
Phase I deadline (if remedies submitted)
Final decision

Misleading Information

- Implementing Regulation, recital 5: "*It is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration*."
- Facebook/Whatsapp (May 2017)
    - Facebook's takeover of WhatsApp cleared October 2014
    - Facebook had told the Commission that post-transaction, it would be unable to establish automated matching between Facebook users' accounts and WhatsApp users' accounts
    - Post-transaction, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities
    - Facebook was fined €110 million

US Merger Control Regime

US HSR Act

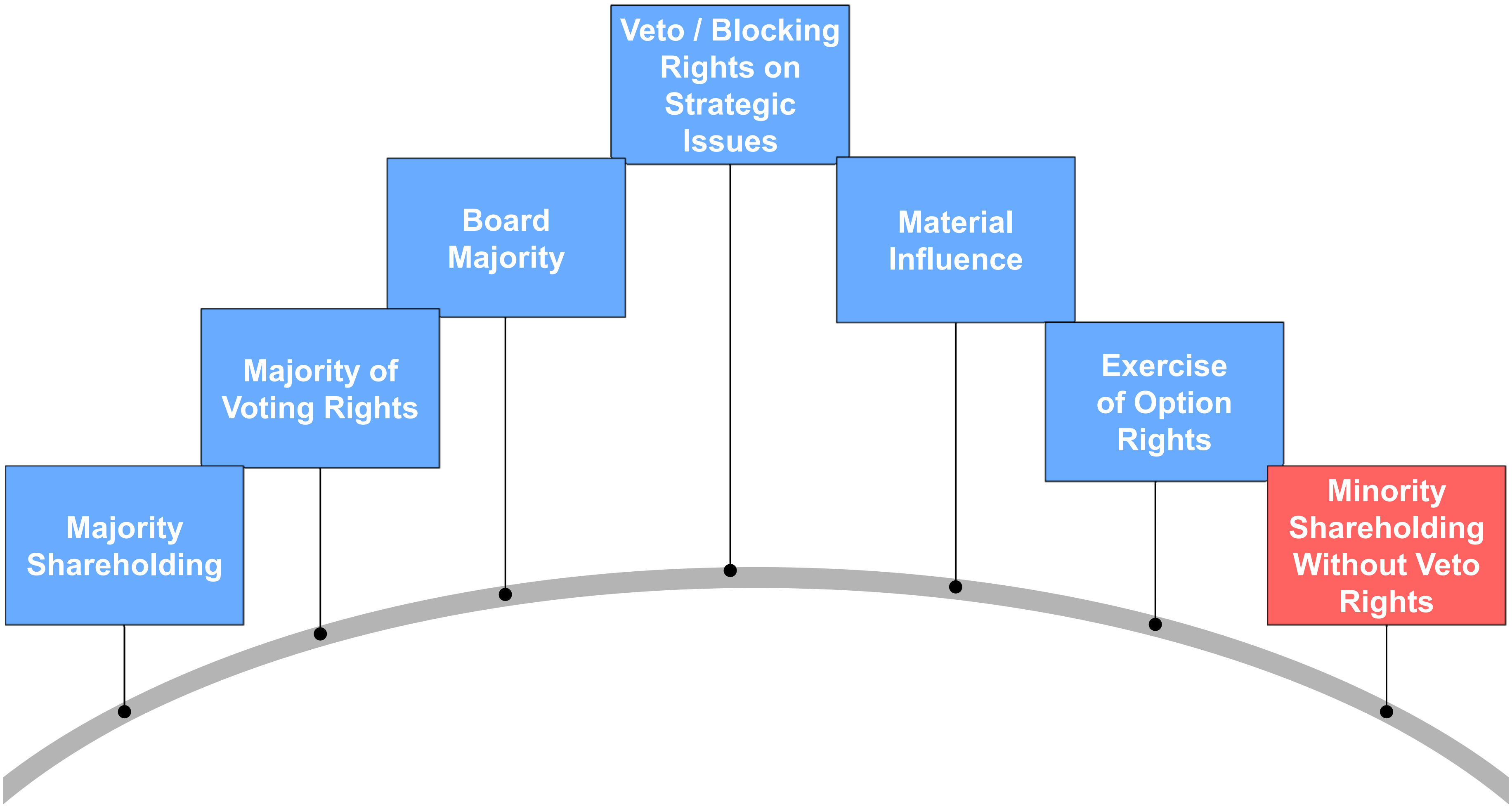
- Hart-Scott-Rodino Antitrust Improvements Act (1976) – introduced mandatory merger control regime
- Meant to catch "illegal" mergers before they happen
- Requires parties to report notifiable combinations to the FTC and DOJ before they are consummated
- Parties may not close during waiting period if transaction is notifiable
  - Usually 30 days
  - 15 days for all cash tender offers and certain bankruptcy transactions
  - Can be extended by in-depth investigation ("second request")
- Closing before expiration or termination of the waiting period is a violation of the HSR Act – also know as "Gun Jumping"
  - Section 1 concerns
  - HSR Act concerns

US HSR Act – Some History

- Meant to de-politicize antitrust enforcement in wake of ITT scandal, where Nixon Administration was accused of dropping case against ITT in return for campaign contributions
- From the White House tapes of April 19, 1971:

> *Nixon: I want something clearly understood, and, if it is not understood, [Assistant Attorney General in charge of the Antitrust Division] McLaren's ass is to be out within one hour. The IT-and-T thing-- stay the hell out of it. Is that clear? That's an order.*
>
> *[Deputy Attorney General] Kleindienst: Well, you mean the order is to--*
>
> *Nixon: The order is to leave the goddamned thing alone. Now, I've said this, Dick, a number of times, and you fellows apparently don't get the message over there. I do not want McLaren to run around prosecuting people, raising hell about conglomerates, stirring things up at this point. Now, you keep him the hell out of that. Is that clear?*
>
> *Kleindienst: Well, Mr. President--*
>
> *Nixon: Or either he resigns. I'd rather have him out anyway. I don't like the son-of-a-bitch.*
>
> *Kleindienst: That brief has to be filed tomorrow.*
>
> *Nixon: That's right. Don't file the brief.*
>
> *Kleindienst: Your order is not to file a brief?*
>
> *Nixon: My order is to drop the goddamn thing. Is that clear?*
>
> *Kleindienst: Yeah, I understand that.*

US “Merger” Control Captures A Range Of Transactions



The HSR Act Notification Thresholds

- **Threshold 1: Size-of-Transaction**
  - Generally, total consideration to be paid = size-of-transaction
  - BUT
    - If consideration not determined, fair market value = size-of-transaction
    - Must aggregate present holdings of issuer's voting securities (on groupwide basis)
    - Sometimes must aggregate prior asset acquisitions from same party (fairly unusual)
- Today set at $119.5 million – but adjusted every year to changes in GNP
- If parties assets and annual sales are below *de minimis* thresholds, size-of-transaction test is $478 million (adjusted annually)
- **Threshold 2: De-Minimis Threshold/Size of Person**
  - One party has sales and assets under $239 million, the other has sales and assets under $23.9 million (adjusted annually)
- **Informal Threshold 3: Exemptions!**

Exemptions

- HSR filing only required if no exemption applies
- Common exemptions
  - Acquisitions made "solely for the purpose of investment"
  - Certain non-U.S. transactions
  - Transactions where issuer holds exempt assets
  - Certain kinds of transactions requiring regulatory approval by other federal agencies (generally banking)
  - Intraperson transactions
  - Gifts
  - Real Estate
  - New Goods
  - Goods Acquired in the Ordinary Course of Business

Investment Only

- Acquisitions made “solely for the purpose of investment”
- Up to 10% of Outstanding Voting Securities (15% if certain institutional investors) BUT
  - Must have “investment-only intent”
  - NO board seats
  - NO special veto rights
  - NO intent to acquire control
  - Probably NO investor agreement
  - Probably NO special access to management or board
  - Probably NO competition with the issuer

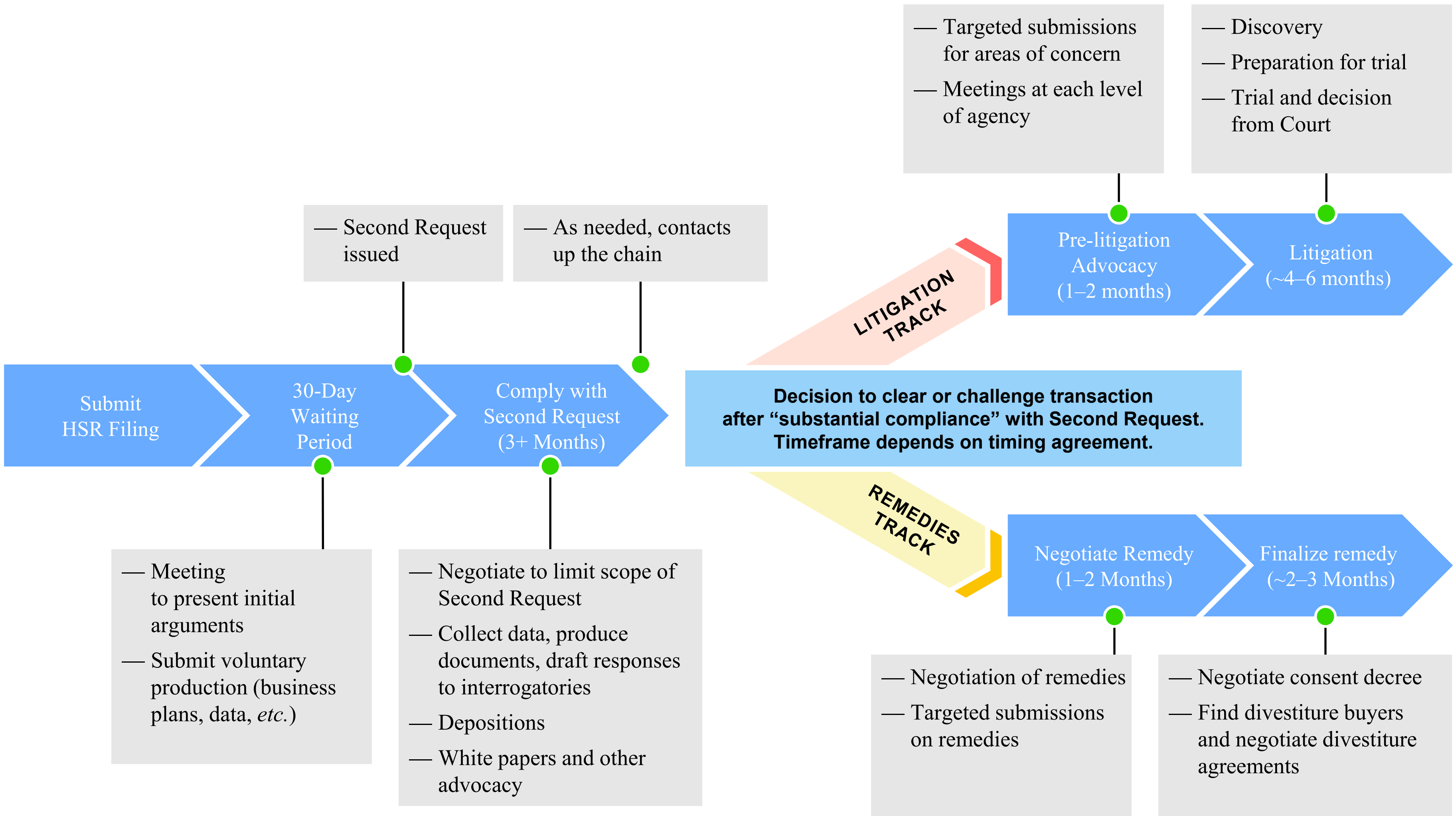
Non-US Transactions

- Exemptions for non-US transactions
  - If FOREIGN PERSON is acquiring less than control (<50%) of a FOREIGN ISSUER
  - If FOREIGN ISSUER is being acquired that did not have SALES in or into the United States of $ $119.5 million (as adjusted) AND does not hold ASSETS located in the United States valued at $119.5 million as adjusted
  - If FOREIGN ASSETS are being acquired that did not generate sales into the United States of $ 119.5 million (as adjusted)
- "Look through" – No HSR filing where
  - ISSUER is being acquired that holds assets that are EXEMPT
  - For example, for transactions with FOREIGN CONTENT:
    - If target does not hold assets in the United States valued at > $119.5 million AND
    - Did not make sales into the United States attributable to assets located outside the United States valued at >$101 million, no filing is required

HSR Filing

- Both parties must submit HSR filings
- Items to be submitted in an HSR filing – under new rules introduced in 2024 – include:
  - Description of the parties and relevant subsidiaries with annual reports/financial statements
  - Description of the transaction including its rationale
  - Business documents related to the transaction and all transaction related agreements
  - Description of the competitive overlap and details on products, sales and top 10 customers in overlap categories
  - Information on acquiring parties supplies to the target or purchases from the target
  - Historical revenues in overlap areas
  - Subsidies from foreign entities and defense/intelligence contracts
  - HSR filing fee varies from $30,000 to $2,335,000 depending on the size of the transaction (Customarily paid by the buyer)
  - Previous "4(c)/(d) documents" – documents prepared by or for any officers or directors that analyze the transaction with respect to markets, market share, competition, competitors, potential for sales growth or expansion, efficiencies, etc.

Sample US Merger Review Process



Antitrust Merger Enforcement Process Timeline