EU merger control

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This publication is intended to provide general information and does not cover every aspect of the topics with which it deals. It was not designed to provide legal or other advice and is no substitute for consultation with legal counsel before taking any action.

I. EU merger control in a nutshell

What is EU merger control?

The European Merger Control Regulation (EUMR) prohibits any transactions that would significantly reduce competition in the EU single market. For certain transactions with a "Community dimension"[1], the European Commission reserves itself the right to examine whether transactions such as acquisitions, mergers, or the creation of joint ventures may lead to an appreciable reduction of competition in the EU single market.

Why does it need control?

The combination of competitive power may result in adverse effects for the competitive landscape of an industry. Such negative effects include lessened competition on price, performance, and innovation as well as concerns on future coordination among industry players.

Three reasons to be aware of EU merger control

1. It is compulsory

No concentration with a Community dimension can be implemented before the European Commission is informed and has approved of the transaction ("standstill" obligation).

2. It is applicable to all types of undertakings and transactions

Competition law matters are not reserved for industrial companies or for certain type of transactions. Once the relevant turnover thresholds are met, EU merger control applies to all economic entities, including a range of financial actors and funds.

3. Ignorance is costly

The closing of a notifiable transaction without Commission approval may – and in most cases will – lead to the imposition of fines of up to 10% of the aggregate turnover of the undertaking(s) concerned.

[1] Where a transaction has no Community dimension, it may potentially be subject to national merger control proceedings. Cf. infra (section IV - practical recommendations).

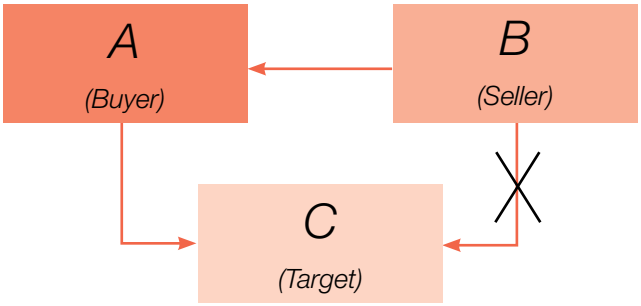
II. What constitutes a concentration?

Definition

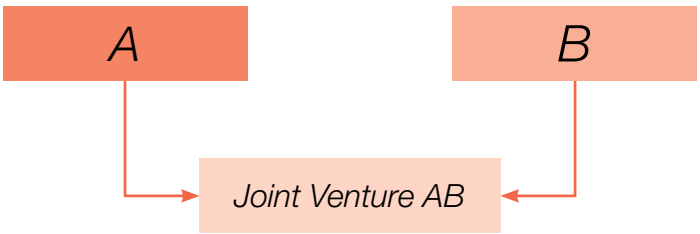
A concentration arises where a **change of control on a lasting basis** results from:

- The (legal or *de facto*)[2] merger of two or more previously independent undertakings or parts of these undertakings

- An undertaking's acquisition of control of (parts of) another undertaking



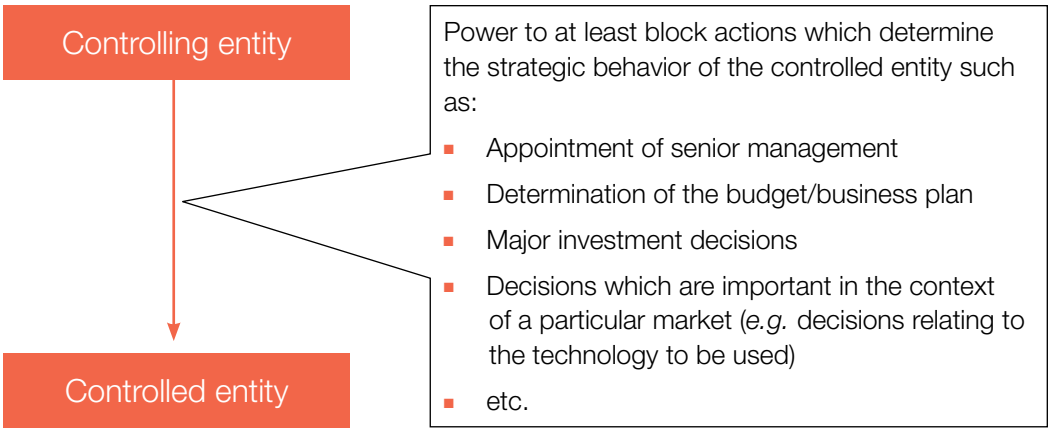
- The creation or extension of a joint venture performing on a lasting basis all the functions of an autonomous economic entity



[2] A factual merger can take place when, in the absence of a legal merger, the activities of previously independent entities are combined, with the result that a single economic unit is created under a permanent, single economic management structure.

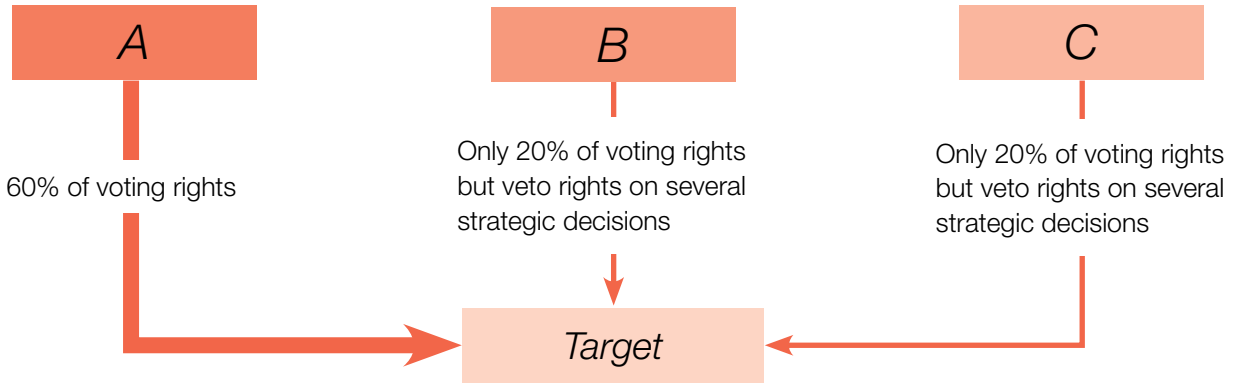
Key notions

- **Control**. Possibility of exercising "decisive influence" – by means of active (positive) decision making, but also by means of negative control



- Negative vs positive control
  - Negative control: power to block actions which determine the strategic behavior of an undertaking (typically: veto rights on strategic decisions)
  - Positive control: power to adopt actions which determine the strategic behavior of an undertaking (typically: majority of voting rights)
- Sole or joint control
  - Sole control: undertaking exercises negative or positive control over another undertaking **on its own**
  - Joint control: two undertakings exercise negative or positive control over another undertaking **jointly**

Example: A, B and C acquire joint control over the target



III. When does a transaction have a "Community dimension"?

Two alternative thresholds

If the annual turnover of the combined businesses exceeds certain global, EU-wide, and intra-EU-wide thresholds, the proposed transaction must be notified to the European Commission.

There is no requirement of a competitive relationship between the undertakings concerned. It is also not required that the head office of the businesses is situated within the European Union.

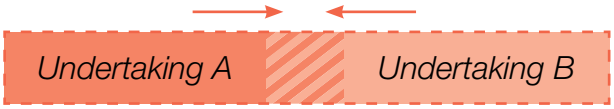
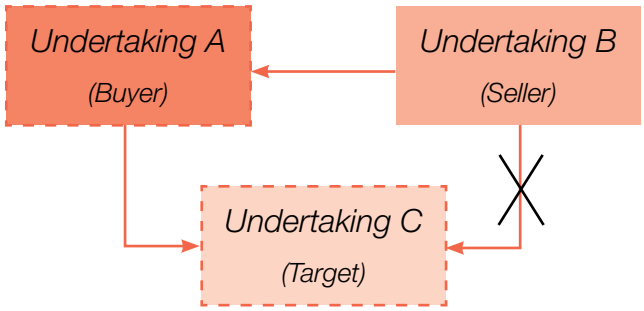
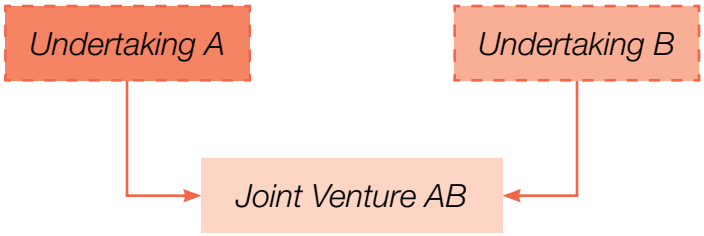
A concentration will have a "Community dimension" where:

	1st option	2nd option
Global requirement	The combined aggregate worldwide turnover of all the undertakings concerned is more than **EUR 5,000 million, *and***	The combined aggregate worldwide turnover of all the undertakings concerned is more than **EUR 2,500 million, *and***
EU requirement	The aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than **EUR 250 million, *and***	The aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than **EUR 100 million, *and*** In each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than **EUR 100 million, *and***
Minimum intra-EU dispersion requirement	The undertakings concerned do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.	In each of those three (or more) Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than **EUR 25 million, *and*** The undertakings concerned do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

Thresholds are met quickly

1. Many entities qualify as "undertakings concerned"

- The notion of "undertakings concerned" includes all entities that form part of the transaction[3] or whose economic dependency and interests are affected by the transaction.

Type of concentration	Undertakings concerned
Merger	The merging undertakings 
Acquisition of control	The undertaking(s) acquiring control and the target over which the control is acquired 
Establishment of a joint venture	The undertaking(s) acquiring control of the newly established joint venture and not the new joint venture itself 

- The notion of undertaking is broad in EU Competition law. It encompasses any entity that:
  - engages in "economic activity[4] regardless of its legal status and the way in which it is financed; and has autonomous decision-making power.

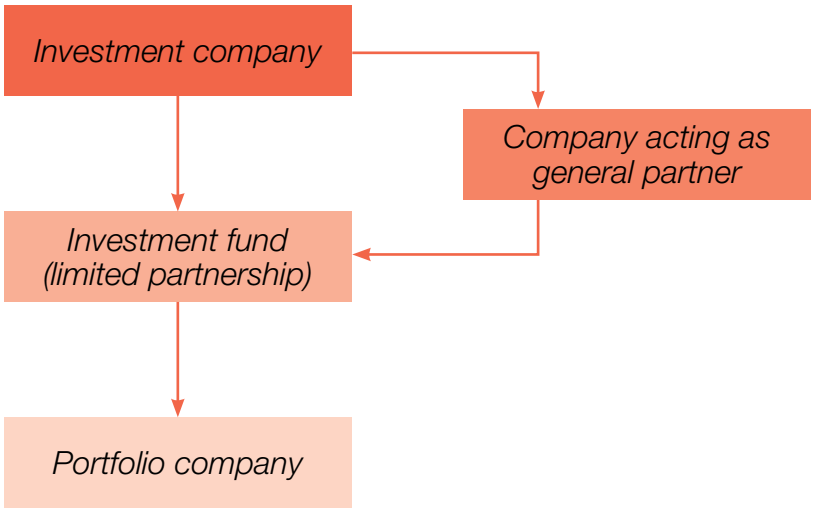
For example investment companies in risk capital (SICAR) typically fall under this definition, whereas special purpose vehicles (SPVs) do not.

[3] Beware! The undertakings concerned are those involved in the concentration rather than in the corporate deal by which the concentration is effected. Therefore, a company which is selling a subsidiary or a business is not, as such, an undertaking concerned in that transaction.

[4] Economic activity = the offering of goods or services on a given market.

The notion of autonomous decision-making power is of particular importance in the identification of an “undertaking concerned” – notably when it comes to determining who actually acquires control over an undertaking.

Example:
Operation of private equity. Which entities, except the target portfolio company, should be considered as undertakings concerned?



The answer depends on who is ultimately directing operations and has in fact autonomous power to control the target undertaking.

- By derogation, any target to which a turnover can be attached (i.e. real estate) may be considered an undertaking concerned without necessarily qualifying as an “undertaking” within the meaning of EU Competition law.

  Undertakings concerned can therefore include:

  - Parts of undertakings that do not have autonomous decision-making power
  - A real estate asset, the rent of which would be considered as “turnover”

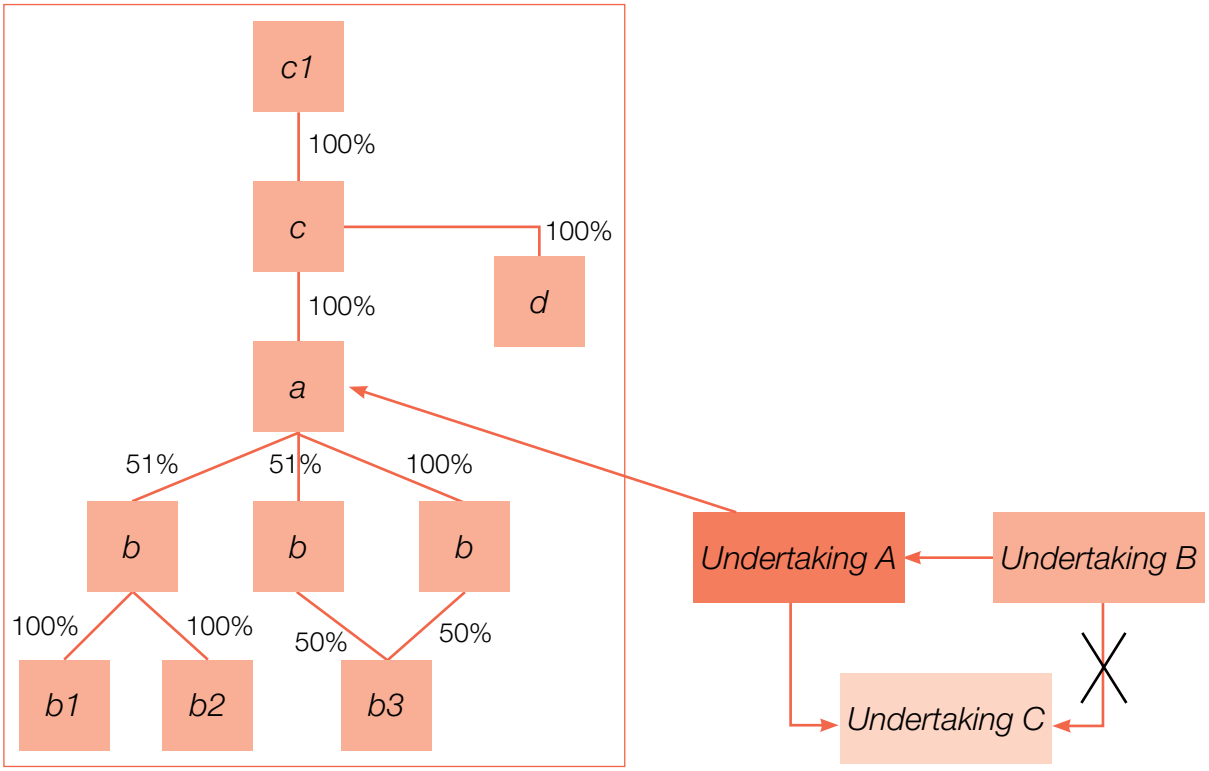
2. The relevant turnovers often exceed those of each undertaking concerned

- As a general rule the turnover of the whole group of each undertaking concerned is taken into account.

  This includes the acquirer’s subsidiaries, parent companies (if applicable), other subsidiaries of the parent companies and any other undertaking jointly controlled by two or more of the companies belonging to the group.

Example:

Acquisition by one undertaking of control over another undertaking: turnover of the buyer.



a: The undertaking concerned

b: Its subsidiaries and their own subsidiaries (b1 and b2)

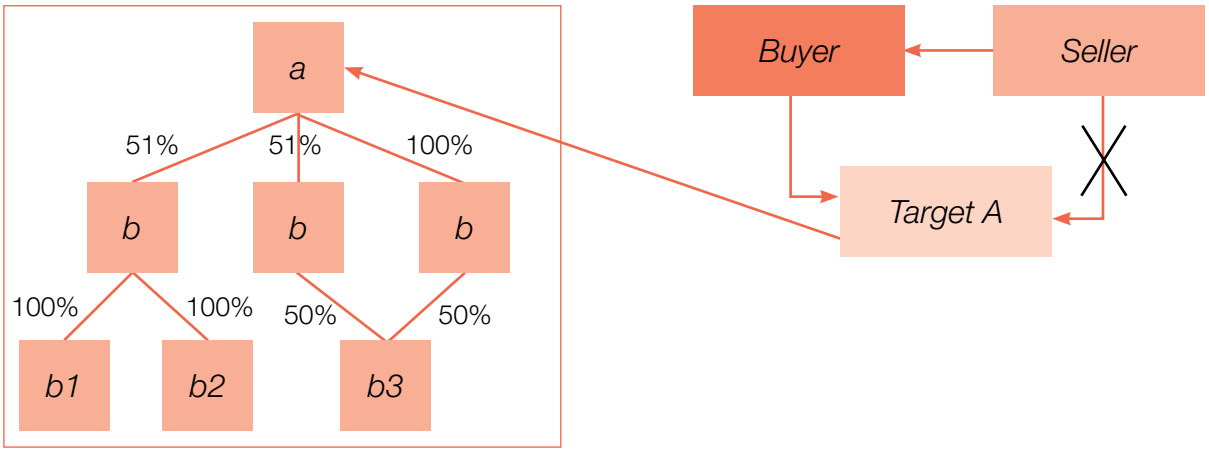
c: its parent company and its own parent company (c1)

d: Other subsidiary of the parent company of the undertaking concerned

Example:

Acquisition by one undertaking of control over another undertaking: turnover of the target.

By way of derogation, in case of an acquisition of control, the turnover of the target must only be aggregated with the turnover of its subsidiaries (not of the whole group).



a: The undertaking concerned

b: Its subsidiaries and their own subsidiaries (b1, b2 and b3)

3. The notion of concentration may be surprisingly wide

- Some changes in the quality or nature of control (from sole to joint control, a change in the identity of the controlling entities, etc.) are also deemed a “change of control” within the meaning of EU merger control.

IV. Implications for private equity players – Luxembourg in the spotlight

1. Merger Control – a growing concern for funds and authorities alike

- Private equity transactions have rapidly increased in volume, size, and competitive impact on markets.
- The European Commission has reviewed hundreds of private equity transactions over the past years and engaged in in-depth reviews where specialised funds attempt to acquire stakes in competing firms within consolidated industry clusters.
- Luxembourg, as one of the world's primary private equity forum and popular choice for collective investment vehicles is closely involved with these transactions.

2. The question of control and which turnover to take into account

- The European Commission's far reaching definition of positive or negative control makes it increasingly difficult for private equity players to circumvent notification obligations.
- The turnover of any portfolio entity over which general managers or investment committees can ultimately exercise control will have to be taken into account for the purpose of turnover calculations.
- Private equity governance structures are increasingly complex and require an in-depth analysis of which managers or committees can ultimately exercise such control (see notion of control as explained on page 7).

3. The need for multi-jurisdictional filing analyses

- While a number of established private equity players consider multi-jurisdictional merger control analyses already an integral part of their transaction planning, other players are – due to their rapid growth – increasingly exposed to gun-jumping risks for turning a blind eye to these questions.
- Funds and managers are advised to scrutinise closely

  (i) The degree of control that can be exercised over portfolio companies

  (ii) The turnover and geographic allocation of revenues for these assets, and

  (iii) The own corporate governance structures to understand which assets need to be grouped together or may be separate for the purpose of merger control procedures

V. Recent Commission practice

Notification obligation

The Commission has been vigorous over the past years to pursue actions of gun-jumping (i.e. implementation of the transaction without prior Commission approval):

- In June 2019, the Commission fined Canon EUR 28 million for partially implementing its acquisition of Toshiba Medical Systems before notification and before merger control approval.
- In March 2020, the CJEU confirmed on appeal a Commission decision from 2014 to impose two fines of EUR 10 million each, one for failure to notify and the other for implementing the transaction before approval.

Misleading information

The Commission has also imposed fines on companies that have misled the Commission during the merger control proceeding:

- In May 2017, the Commission fined Facebook EUR 110 million for providing misleading information about in the course of the merger control proceeding of the WhatsApp takeover.
- In April 2019, the Commission fined General Electric EUR 52 million for providing incorrect information in its LM Wind takeover.

Prohibition

Where the Commission is of the opinion that a concentration would lead to significant anti-competitive effects, it either requests far reaching remedies or blocks the transaction entirely:

- In February 2019, the Commission prohibited the proposed acquisition of Alstom by Siemens, expecting harmed competition in markets for railways signaling systems and very high-speed trains and rejecting remedies offered by the parties which did not address the Commission's concerns.
- In June 2019, the Commission prohibited the proposed merger between Tata Steel and ThyssenKrupp, expecting a significant reduction of competition and increased prices for different types of steel.

VI. Practical recommendations

- EU merger control should always be kept in mind when contemplating transactions of larger scale. This also holds true where a change of control does not raise any substantive competition concerns on first sight. One should be particularly cautious where:
  - The aggregate worldwide turnover of the undertakings concerned amounts to more than EUR 2,500 million and the aggregate Community wide turnover is at least EUR 300 million;
  - Operations concern undertakings which are part of large groups (regardless of the size of the operation and its location);
  - Joint venture operations are contemplated.
- Where there is a risk that the combined turnover of the undertakings concerned approaches the relevant thresholds, advice should be sought from merger control experts that can give further insight on calculation methods and European Commission jurisdictional guidance.
- Where a transaction has no Community dimension, it should always be verified whether the transaction is subject to national (i) merger control or (ii) foreign direct investment control rules.
- Practically all EU Member States (except Luxembourg) have adopted national merger control rules. In most of those jurisdictions, the application of merger control rules requires:
  - That previously independent parties come under common ownership or control;
  - That the parties have a certain size;
  - A sufficiently close link between the jurisdiction and the transaction.

However, given the variety of tests applied in respect of each of these matters, specific advice is needed for each of those jurisdictions.

The majority of EU Member States have also adopted foreign direct investment screening mechanisms – some of which laying down notification and standstill obligations. Luxembourg is also in the course of passing legislation in this respect, with the aim of scrutinising more closely investments from outside the European Union. In particular investors from outside the EU are well advised to seek legal advice on their exposure for investments in assets that could be considered critical infrastructure or technology.

[5] The Competition Council reserves itself however the right to investigate transactions by dominant players, whose acquisition may constitute an abuse of their market position (see Utopia (2016) in line with ECJ case law of Continental Cans (1973).

VII. Our experience

Our highly experienced team advises clients on EU merger control issues ranging from notification obligations to European Commission clearance decisions. Where we identify notification requirements in other EU Member States, we redirect our clients to our relevant partner firms for assistance.

The Arendt EU & Competition law team has a strong expertise in the banking, financial and insurance law sector, facilitating and expediting merger control filings with the relevant authorities.

Recently, the Arendt EU & Competition law team has notably been involved in:

- Numerous EU merger control notification assessments, in particular for significant private equity players.
- Obtaining comfort letters from the European Commission confirming that there is no need for notification.
- Obtaining regulatory clearance from the European Commission and national regulators recently for clients active in:
  - financial and capital markets;
  - emerging technology markets;
  - regulated energy markets.
- Coordinating notification proceedings across the world for Luxembourg companies.
- Redesigning transactions to avoid merger control scrutiny.

EU Financial & Competition Law

Our team advises on EU and national competition law, including State aid and merger control law, European banking and financial law, international and European law of the institutions and EU staff law. Our services include both non contentious matters and contentious matters such as proceedings before the EU and Luxembourg competition authorities and courts. We represent clients before the CJEU (Court of Justice of the European Union) on a regular basis.

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Arendt & Medernach is the leading independent business law firm in Luxembourg. The firm's international team of 350 legal professionals represents clients in all areas of Luxembourg business law, with representative offices in Dubai, Hong Kong, London, Moscow, New York and Paris.

Our service to clients is differentiated by the end to end specialist advice we offer, covering all legal, regulatory, taxation and advisory aspects of doing business in Luxembourg.

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