

# Competition *merger brief*

## Celebrating ‘20 Years that Made a Difference’ of the EU Merger Regulation<sup>1</sup>

Joanna Kay, Lauriane Mons



### Introduction

To mark the 20<sup>th</sup> anniversary of the EU Merger Regulation (Regulation 139/2004, ‘EUMR’), the Directorate General for Competition of the European Commission (‘DG COMP’) organised a conference on 18 April 2024, bringing together leading experts, including some of the main architects of the 2004 reform,<sup>2</sup> to discuss and reflect on the impact of EU merger control over the last decades.

<sup>1</sup> The event was recorded. The highlight video is available at the following link : <https://www.youtube.com/watch?v=RkVKCpY33t8> The full webcast of the conference is available here: [https://competition-policy.ec.europa.eu/about/reaching-out/20-years-eumr-conference\\_en](https://competition-policy.ec.europa.eu/about/reaching-out/20-years-eumr-conference_en)

<sup>2</sup> DG COMP thanks all speakers that largely contributed to the success of the event, namely Commission Executive Vice-President Margrethe Vestager; moderators Olivier Guersent, Lewis Crofts, Maria Tadeo, Javier Espinoza and Aoife White; panellists Mario Monti, Philip Lowe, Juliane Kokott, Natalie Harsdorf-Borsch, Carles Esteva Mosso, Tomaso Duso, Saar Dierckens, Vanessa Turner, Massimo Motta, Ana Sofia Rodrigues, Frederic Depoortere, Viktoria Robertson and Jenine Hulsmann; as well as DG COMP speakers Guillaume Lorient, Hans Zenger, Daniele Calisti, Ulla Schwager, Annemiek Wilpshaar and Master of Ceremony Julia Brockhoff.

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Discussions were designed to both “look back” at the past 20 years of enforcement under the EU Merger Regulation, and “look ahead” to shape a vision of merger control for the future, in view of current and upcoming challenges and market developments.

The 20<sup>th</sup> anniversary of the Merger Regulation occurred at a timely moment. With the Commission’s policies focused on reinforcing the EU’s competitiveness and completing the Single Market, the contribution of merger control enforcement to these goals is a subject of attention.<sup>3</sup>

### In a nutshell

This year the 2004 EU Merger Regulation turns 20 years old. To mark this significant milestone DG COMP organised a conference, bringing together experts from across the competition field. Building on such momentum the conference was designed to take stock, reflect on what the 2004 reform has meant as well as look forward to what the future may entail.

This brief seeks to capture and summarise some of the many highlights and interesting discussions of the day (in words and pictures).

### Learning from the past: the roots of the EUMR

Executive Vice-President (‘EVP’) Vestager opened the conference by telling the audience that the Merger Regulation, like “*every tall tree*” has “*caught its fair share of wind. But it has shown that it can bend without breaking, even in the strongest of storms.*” How has it stood the test of time over the last 20 years? EVP Vestager recalled how merger control had continued to adapt to new market realities, including recent evolutions towards an

<sup>3</sup> The first half of 2024 was marked by the publication of two reports commissioned by the President of the European Commission Ursula Von Der Leyen. Enrico Letta’s report (*Much more than a market*, April 2024) and Mario Draghi’s report (*The Future of European Competitiveness*, September 2024) respectively aimed at exploring avenues to complete the Single market and enhance EU competitiveness.

increasing focus on non-price competition factors, a significant uptake in merger enforcement in digital markets, often handling new forms of impediments to competition. She also welcomed the European Court of Justice’s judgment<sup>4</sup> in the *CK Telecoms* case confirming the possibility to capture the complex effects of mergers, notably when they take place – like in that case – in oligopolistic market structures.

The roots of the allegorical tree portrayed by EVP Vestager were explored in the Fireside Chat. The speakers explained why the 2004 reform came to light. Professor and former Commissioner for Competition, Mario Monti, while highlighting the merits of the previous 1989 Merger Regulation, explained how the 2002 court defeats<sup>5</sup> spurred the Commission to improve the merger regulation and its review framework. With the adoption of a ‘significant impediment to effective competition’ test, the new framework was designed to address all mergers, be these horizontal, including outside of dominance cases (so-called ‘gap’ cases), vertical, or conglomerate. In order to adequately review the wide range of effects resulting from mergers, Sir Philip Lowe, former Director General of DG COMP, stressed the importance of market knowledge in competition policy. He explained how the procedural reform that accompanied the new regulation sought to ensure that DG COMP was equipped with a good understanding of market trends and realities. As economics became part and parcel of the review, DG COMP teams were geared to engage on substance with the parties and stakeholders during the review process.

From a procedural standpoint, a number of speakers from the legal and business community pointed to the key importance of the transparency of DG COMP’s process and its engagement with stakeholders following the reform. Saar Dierckens, in-house counsel, welcomed the “openness” and the possibility of having a “dialogue with the European Commission”; while Frederic Depoortere, lawyer noted that the 2004 reform meant that DG COMP “does its work as it should: in a case-by-case and disinterested way”.

Speakers nonetheless also pointed out that it was important to keep sight of the fundamentals that have made the Merger Regulation a success since 1989, namely the independence of the regulator, with an exclusive mandate based solely on competition assessment.



### Keeping on delivering: the role of the EUMR in the economy and society

The EUMR’s contribution to the European economy and consumer welfare in general was at the centre of the discussions.

There was a consensus that recent years were marked by an increase in concentration levels across industries, although some diverging views emerged on what the follow-up should be. Professor of Economics Tomaso Duso, who co-authored an in-depth study on competition enforcement and concentration across industries<sup>6</sup> shared some insights which led him to call for stricter enforcement. Views from the business side were more nuanced, with Saar Dierckens defending the possibility for healthy consolidation and the need for economies of scale.

The discussions naturally touched upon the well-known debate of European/National champions. On this topic, Professor Monti warned against the temptation to distinguish companies according to e.g., their nationality, size or sector of activity, that could impair the EU’s credibility vis à vis other competition enforcers at global level. On a different scale, Vanessa Turner, on behalf of consumer organisations, highlighted the importance of the ecosystem of small and medium-sized companies in the EU, in particular in the agri-food sector, that could be put at risk by excessive consolidation, thereby also directly affecting the purchasing power of consumers.

<sup>4</sup> *Commission v. CK Telecoms UK Investments*, Case C-376/20 EU:C:2023:561.

<sup>5</sup> *Airtours plc. v. Commission*, Case T-342/99 EU:T:2002:146 ; *Schneider Electric SA v. Commission*, Case T-310/01 EU:T:2002:254 ; *Tetra Laval v. Commission*, Case T-80/02 EU:T:2002:265.

<sup>6</sup> Affeldt, P., T. Duso, K. Gugler, J. Piechucka, 2021, ‘Market Concentration in Europe: Evidence from Antitrust Markets’, CEPR DP 15699.



As to the interrelation between competition and competitiveness, many highlighted the importance of competition in promoting competitiveness. EVP Vestager, in her opening speech, emphasised that “*effective merger control drives true competitiveness*” and warned against calls for laxer enforcement, which would at the expense of the EU’s competitiveness, growth and employment rate.

Several speakers highlighted that merger control plays its part in enabling competition to thrive and companies to operate on a level playing field. On telecoms for example, Tomaso Duso noted that empirically, an additional player on the market translated into a decrease of “*6 to 9% in prices*”. In this respect, a recent study from DG COMP ‘Preserving competition in a changing world’<sup>7</sup> assessing how the conditions of competition have changed in the EU over the past 25 years showed that, on average and in a wide range of sectors, market concentration levels, markups and profits have increased, the gap between industry leaders and followers as regards markups, profits and productivity has increased, and business dynamism has declined.

Another theme that emerged from the discussions was the EUMR’s ability to adjust to new realities. Speakers valued the EUMR framework’s predictability, but also suggested a potential need for an update of the Commission’s Guidelines on Horizontal and Non-Horizontal Mergers, to account for some parameters of competition that have increasingly gained in importance, such as innovation or non-price competition. Professor of Economics and former DG COMP Chief Economist Massimo Motta noted that “*it is very welcomed that competition enforcers have moved away from the static status quo and started looking at dynamic effects*”. Ana Sofia Rodrigues, from the Portuguese Competition Authority, agreed that on the side of enforcers there has been an “*incremental path of refining theories of harm*” in how to approach innovation, feeding on academic research and economic studies – and allowing for the definition of innovation-centric theories of harm where warranted.

<sup>7</sup> ‘Protecting competition in a changing world, Evidence on the evolution of competition in the EU during the past 25 years’, DG COMP, 24 June 2024 available at the following link: <https://op.europa.eu/en/publication-detail/-/publication/c03374f1-3833-11ef-b441-01aa75ed71a1>.

The discussion was also a forum for businesses to remind the Commission to remain mindful of the burden put on companies in the context of a merger review process, highlighting notably the depth and volume of information requested. The importance to give to internal documents in competitive analyses was particularly debated. In relation to this point, speakers also acknowledged that the evidence presented to the Commission has grown increasingly complex, requiring the Commission to rely on ever more sophisticated analyses to determine the effects of mergers.



### Looking ahead: the EUMR in the face of new challenges

A number of challenges were raised during the day for the EU Merger Regulation in the future such as how to deal with perceived enforcement gaps, and whether the EUMR framework is still sufficiently agile and fit-for-purpose in light of novel, dynamic and technology markets.

On enforcement gaps, the Commission’s revised guidance on Article 22 to tackle ‘killer acquisitions’ and other problematic transactions that may fall below the thresholds of the current EUMR was discussed. Nathalie Harsdorf-Borsch, Director General of the Austrian Competition Authority, described how national regimes can also expand their own jurisdiction to support reviews at EU level. She discussed the introduction of transaction value-based thresholds in national law and explained how the revised thresholds enabled Austria to refer a number of digital mergers to the European Commission under Article 22, based on the Authority’s original jurisdiction. Carles Esteva Mosso, lawyer and former Deputy Director General for Mergers, put forward that the Commission could reflect upon the option to amend the Merger Regulation thresholds only. On the possibility of using other tools to address problematic below-threshold mergers other than merger control, Advocate General and Law Professor Juliane Kokott indicated that, in her view, the use of Article 102 by Member States against such mergers as reaffirmed by the *Towercast* judgment should remain “*the absolute exception*.”

No speaker, from consumer representatives to businesses and their counsels, considered that turnover thresholds always deliver. In the face of sectors being increasingly innovation-heavy, there was a consensus that this jurisdictional gap would

need to be addressed. The question is how to best close the gap, while causing the least regulatory burden and ensuring the most legal certainty. With the Court of Justice judgment in *Illumina* overturning the General Court and finding the Commission’s interpretation of Article 22 to be invalid,<sup>8</sup> the Commission will have to reflect on an alternative way forward.<sup>9</sup>



On the challenges posed by novel market realities, Law Professor Viktoria Robertson, explained how digital markets pose particular complexities for the competition enforcer. On the one hand these markets are very dynamic and fast-paced; on the other hand, they display characteristics prone to structural competition issues related to digital ecosystems, and risks related to market tipping and the entrenchment of market power. The question then arises whether we wish “*big tech to continue to consolidate at the current rate*” via mergers. Lawyer Jenine Hulsman, for her part, stressed the need to stick to the basics of merger analysis and assess digital and tech deals on a “*case-by-case and market-by-market*” basis as is inherent to the EUMR framework.

In this context, a key question was whether the Commission’s Horizontal and Non-Horizontal Merger Guidelines remain relevant in the face of emerging risks that did not exist when they were initially designed. Such risks are apparent in recent case practice where the Commission found concerns in relation to mergers between complementary firms that raise concerns consisting in entrenching their market power, such as in *Booking/eTraveli*.

Hans Zenger of DG COMP’S Chief Economist Team explained that mergers between firms that offer complementary products or services, particularly in the digital and tech space, can often have effects that are more horizontal in nature and that “*conglomerate mergers are often horizontal mergers in disguise*”. He cited potential competition concerns, such as those that preliminarily arose in the *Adobe/Figma* case as an example and stressed the

<sup>8</sup> *Illumina v. Commission*, Joined Cases C-611/22 P and C-625/22 ECLI:EU:C:2024:677.

<sup>9</sup> Possible solutions could involve either a legislative change in the Merger Regulation or to rely on Member States to expand their own jurisdictions – see speech of EVP Vestager at the 28<sup>th</sup> Annual Competition Conference of the International Bar Association on 6 September 2024, available at the following link: [EU Competitiveness and an Effective Competition Regime \(europa.eu\)](https://www.europa.eu/competition/press/20240906).

need in digital and tech markets, to protect the uncertainty as to how the markets will evolve based on competition on the merits.

The importance of judicial review in assessing certain theories of harm under the EUMR was also widely discussed. The appeal of the *Booking/eTraveli* decision was thus considered an important case to provide clarity on which circumstances and evidence can justify a finding that a merger significantly impedes competition by strengthening dominance in a non-horizontal merger.



## Conclusion

In his closing remarks, DG COMP’s Deputy Director for Mergers Guillaume Lorient highlighted the set of “*core values of the competition community*” that transpired from the exchanges (stability, credibility and agility) but also underlined the need to show openness towards improving, especially on processes and guidance.



All in all, it is vital to reflect, evolve with the times and adjust enforcement policy when warranted. Yet, it will be crucial for the future to not set aside the fundamentals that have underpinned the EU Merger Regulation’s success. The consensus from the stakeholder community present was that the best way to support the continued growth and blossoming of the “stable tree”, is in pursuing a balanced, case-by-case, and independent merger control policy. Merger enforcement is not a goal in and out of itself; rather, it has proved, and must continue to be, an invaluable tool in support of the Single Market’s integrity and competitiveness, benefitting European interests as a whole.