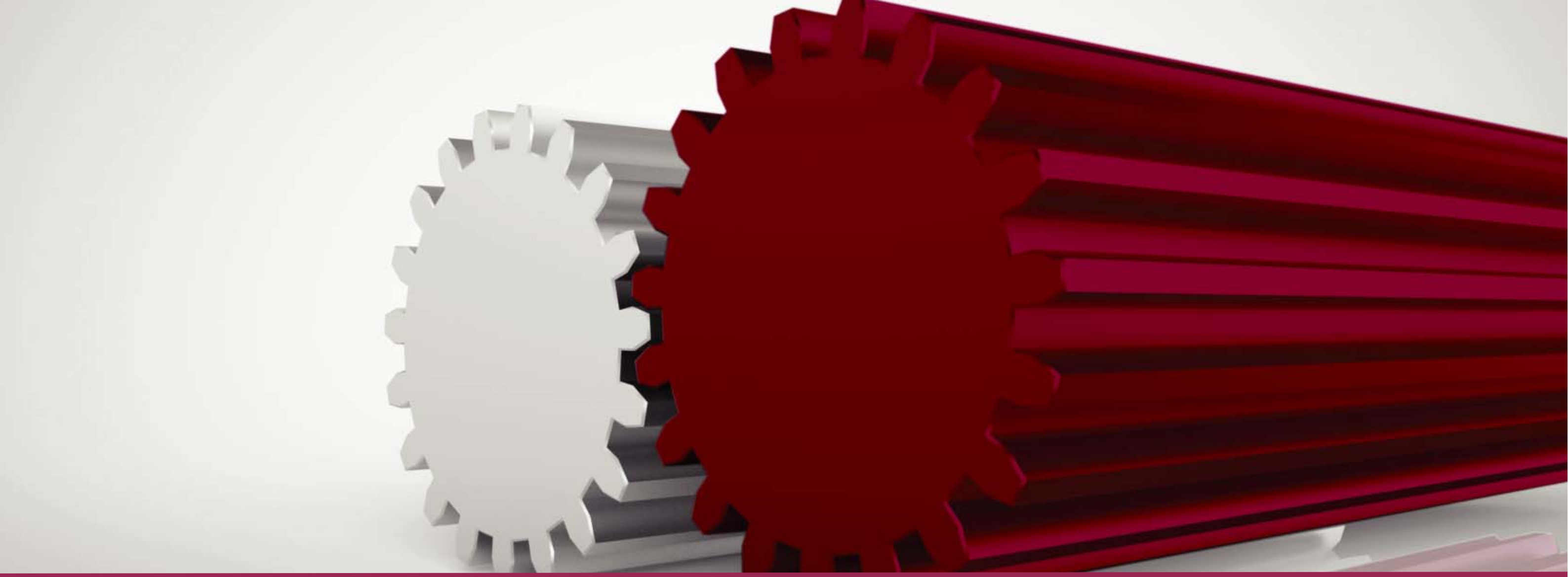

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The International Comparative Legal Guide to:

Merger Control 2014

10th Edition

A practical cross-border insight into merger control

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The International Comparative Legal Guide to: Merger Control 2014

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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 52 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Chapter 5

EU Merger Control: 2013 and Beyond

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EU merger control in 2013 laid the foundations of what will become quite an ambitious last year of Vice-President Almunia's term as Competition Commissioner in the current EU Commission. The Commission issued a number of important decisions, either prohibiting concentrations or submitting them to stringent conditions, continuing a trend of strong and active enforcement that shows no signs of abating. In addition, the Commission started a consultation process on its proposals for a set of amendments of the EU Merger Regulation ("EUMR"), the most important of which would be to expand the Commission's jurisdiction to review non-controlling minority interests/structural links. If adopted, these proposals will dramatically change the face of EU merger control.

I. Proposed Reform of the EUMR

On 20 June 2013, the Commission launched a public consultation on a number of proposals which could result in significant changes to the EUMR. The proposed amendments relate to: (i) the possible review of non-controlling minority shareholdings under the EUMR; (ii) the referral mechanism between the Commission and Member States; and (iii) other technical improvements to the EUMR. The consultation period closed on 12 September 2013.

In addition, on 27 March 2013, the Commission launched a public consultation on the reform of its Notice on a simplified procedure for treatment of certain mergers.

Both Consultation Papers are available on the Commission's website.

I.A. Changes to the Assessment of Non-Controlling Minority Shareholdings

Background

The Commission's previous major reform of the EUMR focused mainly on filling a perceived "enforcement gap" caused by the existing standard of review, which was limited to the creation or strengthening of a dominant position. In order to capture transactions that could have a significant impact on competition short of a dominant position, the amended EUMR changed the standard of review to the current Significant Impediment to Effective Competition ("SIEC") test.

The Commission has now identified another perceived enforcement gap, relating to the acquisition of a non-controlling minority shareholding ("NCMS"). Under the EUMR, an NCMS acquisition escapes prior review by the Commission, as the Commission's powers are limited to acquisitions of "control": the Commission can only review the acquisition by one company in another company's shareholding if the acquisition confers joint or sole control. The Commission has now concluded that NCMSs may, in some cases, lead to anticompetitive effects and that it does not have effective tools to systematically prevent such effects. As a result, it has elected to expand the scope of the EUMR.

It is important to note that throughout the years the Commission has adopted an expansive view on the scope of the concept of control, in such a way as to capture also minority shareholdings, but only under certain conditions. A firm owning less than 50% of the voting securities of Company A could still be considered to have or obtain control, for example, if it has the power to nominate the majority of Company A's Board of Directors, if *de facto* the minority stake would represent a stable majority at Company A's shareholders' meetings because of the fragmented nature of the remainder of the shareholdings or if Company A's bylaws or any contractual arrangements would give the minority shareholder a decisive influence over Company A, i.e., by giving the minority shareholder the power to decide on or veto strategic commercial decisions relating to Company A.

Minority share acquisitions that cannot be considered to confer control, however, fall outside the scope of the EUMR, as made clear in the *Ryanair/Aer Lingus* case (which appears prominently in the Commission's Consultation Paper). For years, Ryanair has held a minority shareholding of close to 30% in its direct competitor Aer Lingus. The Commission has twice prohibited the proposed acquisition by Ryanair of full control over Aer Lingus, and Ryanair abandoned a third attempt. However, despite these prohibitions, the Commission has not been able to force Ryanair to sell down its stake in Aer Lingus. Instead, it took a decision of the UK Competition Commission of 28 August 2013 to order Ryanair to reduce its stake to 5%, a decision that Ryanair plans to appeal (the UK is one of only three EU Member States that have statutory powers to review NCMSs).

In the past the Commission has sought to address possible anti-competitive effects of NCMSs by reviewing them in the context of the EUMR review of other transactions in which the minority shareholder was involved (provided of course that the NCMS was of relevance to the transaction under review). In some cases, the Commission ordered firms to divest their pre-existing NCMS (or significantly reduce the rights attached thereto) as a condition for approving the transaction under review. Evidently, the cases in which the Commission succeeds in reviewing NCMSs in this context are limited.

Alternatively, the Commission could elect to pursue an *ex post* review under Articles 101 or 102 TFEU of the NCMS as either an anticompetitive agreement or as an abuse by the minority shareholder of a dominant position. However, the Commission has not had a great deal of success pursuing such claims. And again, the conditions for the application of these treaty articles limit the situations in which the Commission can act.

Relevance of perceived enforcement gap

The Commission's proposed reform is based primarily on a prior study carried out by the Commission on NCMSs in Europe. The Commission performed a statistical analysis of information contained in the so-called Zephyr Database that collects information on transactions resulting in changes of ownership in companies listed in the EU, during the period 2005-2011. The study had a number of limitations (for example, it covered only transactions between companies registered in Europe, and only transactions involving listed companies) and, according to the Commission, it therefore underestimated the number of potentially relevant transactions. Nonetheless, the Commission found the database to offer at least a rough approximation of the number of NCMSs involving companies with EU revenues exceeding the EUMR thresholds for notification (and thus covered by the EUMR if the transaction had involved a change in control) that it believed were candidates for review. The Commission identified 91 transactions potentially meriting antitrust scrutiny, of varying size and value, situated mainly in the banking sector, followed by gas/water/electricity, construction, retail trade and insurance and pension funding. It is interesting to note that a number of jurisdictions in the EU, as well as outside the EU, have merger control regimes that allow scrutiny of minority shareholdings, regardless of whether or not they confer control. For example, in Germany, acquisitions of minority stakes need to be notified if they confer "competitively significant influence" while the UK has jurisdiction to review "material influence" situations. Other jurisdictions require notification if certain fixed shareholding thresholds are met, such as 25% in Austria and Germany. Outside the EU, these thresholds can be even lower (for example, 20% in Canada or Japan).

Commission proposal

In its Consultation Paper, the Commission proposes two alternative procedural options to address NCMSs:

- extend the current system of *ex ante* review to structural links under a "notification" system; or
- a discretionary review of selected acquisitions of structural links under either a "self-assessment" or a "transparency" system.

The Notification System

Under the first option, all "relevant structural links" would be subject to a mandatory pre-closing notification and, possibly, a suspension obligation pending Commission approval. The notification would consist of limited information similar in scope to the data currently required under the EUMR "short form" notification. However, the Consultation Paper remains vague as to which NCMSs would be covered as "relevant structural links".

Self-Assessment System and Transparency System

Under the second option, the Commission would have the discretion to investigate selected cases involving an NCMS. In particular:

- Under the *self-assessment system*, the Commission, relying on its own market intelligence or third-party complaints, would be able to investigate any structural links that could potentially raise concerns. However, the parties involved would have no obligation to notify in advance.
- Under the *transparency system*, parties to a *prima facie* problematic NCMS acquisition would be required to file a short information notice to the Commission, which would be published on the Commission's website for third-party comments. The Commission could then investigate, if appropriate.

Under either system, the Commission would require a full notification upon the commencement of an investigation, which would trigger a suspension obligation, at least for those steps of the transaction not already implemented at the time of the request, and the normal merger control review periods of the EUMR would apply. In addition, the Commission is considering whether, under either the self-assessment or the transparency system, companies should be given the option to submit a voluntary notification to obtain legal certainty, and whether this option should be considered only for transactions that have not yet been implemented, and whether, in that case, such transactions should be subject to a suspension obligation. Last, for purposes of legal certainty, the Commission proposes to insert a limitation period for investigating structural links, and is seeking comments on possible time limits within which it could do so.

Regardless of the procedural option selected, the Commission proposes to extend to structural links the same jurisdictional thresholds and substantive test as under the current EUMR (significant impediment of effective competition). The question remains whether the Commission will apply the same economic analysis to NCMS concentrations as to acquisitions of control, an issue not addressed in the Commission's Consultation Paper. In fact, the Paper's Annex 1 (Economic Literature on Non-Controlling Minority Shareholdings ("Structural Links")) explains that "*[t]his Annex is mainly based on theoretical considerations as there is currently only a limited empirical literature on the effects of structural links*".

Other Proposed Adjustments

In order to effectuate the revisions to the EUMR proposed under the above three options, a number of other changes to the current system would be required.

- Most importantly, the EUMR will need to define which NCMS transactions will be captured. The Commission is considering a pre-set safe-harbour threshold for structural links falling outside the Commission's scrutiny, such as a 10% shareholding, and/or the absence of special shareholder rights (veto rights or Board representation). According to the Commission, this would provide legal certainty to companies considering an NCMS acquisition, at least for transactions that are considered not to raise competition issues. A 10% threshold would be lower than the thresholds applied in other jurisdictions – see above. In addition, in the Consultation Paper the Commission suggests that, if a self-assessment or transparency system is adopted, the Commission should have the power to investigate any type of transaction, regardless of the size of the investment or the type of rights conferred.
- For transactions in which a company acquires a non-controlling interest in a joint venture, the EUMR would continue to apply only to "full-function" joint ventures. Acquiring an interest in a non-full function JV would remain subject to review under Article 101 TFEU.
- The Commission would have exclusive jurisdiction over NCMS acquisitions if the parties involved meet the revenue thresholds under the current EUMR. If those thresholds are not met, companies will need to consider whether the NCMS acquisition could still be subject to review under the national merger control regimes of any EU Member States.

Given the Commission's strongly expressed view that there is an enforcement gap under the current EUMR, it is likely that it will push for the EUMR to be expanded to include the review of NCMSs in some shape or form. The parameters of any such review remain to be determined. For example, it is unclear if the Commission will adopt a notification, self-assessment or transparency or even another system and which transactions will be covered or excluded (if any) from the Commission's jurisdiction.

In any event, the proposed expansion, if/when adopted, is certain to bring a large number of additional transactions within the Commission's jurisdiction and have a direct impact on M&A activity with effects in Europe and beyond. The resulting expansion of EU merger review is likely to prove controversial particularly in light of the Commission's acknowledgement that there is no well-established body of empirical economic evidence relating to non-controlling shareholdings.

I.B. Changes to the EU Referral Mechanism

Currently, if the Commission does not have jurisdiction to review a merger under the EUMR, jurisdiction passes to the national systems of the EU Member States. The EUMR (Article 4(5)) allows parties to request a referral to the Commission, but the current referral procedure is burdensome and time-consuming. As a result, parties are often reluctant to approach the Commission even when the Commission would be best placed to review the transaction.

In addition, under Article 22 EUMR, Member States may request the referral of a transaction to the Commission, even if the transaction does not satisfy the EUMR notification thresholds. The deadlines under this referral system are even longer than under Article 4(5) and can create prolonged uncertainty for the parties involved.

The Commission's Consultation Paper proposes to reform both referral procedures. The changes aim to make the referral system more efficient, mainly by shortening the relevant time periods involved in the referral process. Again, if adopted, the proposed changes would broaden the scope of the Commission's review. For example, under the current Article 22, the Commission may review the effects of a transaction only in those EU Member States that requested the referral. The Commission proposes to expand the scope of its review after an Article 22 referral to the entire European Economic Area ("EEA").

According to the Commission, the proposed changes are designed to streamline and accelerate the referral process, making it a more attractive option for companies involved in multi-jurisdictional mergers. On the other hand, in the case of Article 22, the proposed changes would significantly broaden the powers of the Commission to review the competitive effects of transactions on an EEA-wide basis instead of on a Member State basis only.

I.C. Other Changes to the EUMR

The Commission is also considering a number of technical improvements to the current EUMR system. The key changes are:

- abolition of the requirement to notify the creation of full-function JVs that have no effect in the EEA (i.e., JVs located and exclusively operating outside the EEA);
- revision of Article 4(1) of the EUMR to increase flexibility for notifying mergers that are implemented by way of acquisition of shares via the stock exchange, but without a public take-over bid;
- clarification of the methodology for calculating relevant turnover in JV scenarios; and
- amendment of Article 8(4) of the EUMR to enable the Commission to require the dissolution of partially implemented transactions that have been prohibited by the Commission.

I.D. Changes in the Assessment of Simplified Cases Under the EUMR

On 27 March 2013, the Commission also launched a public consultation on the reform of its Notice on a simplified procedure for treatment of certain mergers.

The vast majority of mergers notified to the Commission under the EUMR do not pose competition issues and are cleared within the 25-working day Phase I review. These include mergers with no, or limited, horizontal, vertical or other links between the merging parties or where the parties have market shares below certain thresholds (15% for horizontal links and 25% for vertical links). While still subject to the notification and approval requirements of the EUMR, cases qualifying for the simplified procedure may provide a relatively short, less burdensome notification form.

Under the new proposal the Commission will further expand the use of the simplified procedure. In particular, the market share threshold for treatment under the simplified procedure for mergers between competitors will be raised from 15% to 20%. For mergers between companies active in vertically related markets the market share threshold will be raised from 25% to 30%. The Commission also proposes to treat a case as simplified even where the combined market share of competing firms is above the 20% threshold but the post-merger increase in market share is very small.

In addition, the Commission proposes to amend the Regulation implementing the Merger Regulation in order to update and streamline the merger notification forms. In particular, in cases that do not fall under the simplified procedure, notifying parties would be required to submit detailed information only for those markets where their market share exceeds the threshold applicable for the simplified procedure.

I.E. Conclusion

The relevant stakeholders to whom the Consultation Papers are addressed and the public at large will undoubtedly focus their attention on the significant potential expansion of the Commission's powers if/when the new rules on NCMS are adopted. The proposed changes, whatever the form of their implementation, will have a direct impact on M&A activity and strategies in Europe and globally. The other changes are less controversial, but no less interesting to EUMR practitioners and companies involved in an ongoing merger with a desire to complete as quickly as possible. Most of the proposed changes will be beneficial as they are designed to make the EUMR approval system faster, more efficient and less burdensome.

II. Continuing Strong Enforcement Under the EUMR

In the past year, the Commission has further confirmed its reputation of being one of the strongest merger control enforcers globally. In 2013 alone the Commission has prohibited two proposed mergers (*UPS/TNT Express and Ryanair/Aer Lingus III*) whereas it prohibited only three mergers in the period from 2005 to 2012: one in each of 2006 (*Ryanair/Aer Lingus I*), 2011 (*Olympic/Aegean Airlines*); and 2012 (*Deutsche Börse/NYSE Euronext*). In addition, in the period January to August 2013, the Commission imposed conditions in nine cases (seven in Phase I and two in Phase II). Finally, on 16 October 2013 the Commission will issue its decision in *Olympic/Aegean Airways*, which is the second attempt by these two parties to obtain the Commission's blessing.

These cases confirm Commissioner Almunia's firm views that even in times of economic crisis, merger control and competition law enforcement remains paramount, despite demands from some corners to let industrial policy considerations play a more important role in the Commission's analysis (as is the case in other areas of the world). The Commission's continuing commitment to strong competition law enforcement is further confirmed by the recent appointment of the new Chief Economist, Prof. Massimo Motta, who will replace Prof. Kai-Uwe Kühn before 1 October of this year.

As is clear from the discussion below, the *UPS/TNT Express* decision (not yet published) is one of the few cases where the Commission applied the EUMR to the enforcement gap identified and filled in the previous EUMR reform of 2004, where the Commission found anti-competitive unilateral effects in markets where the merged entity was not the market leader. Another notable recent "gap" case is *H3G Austria/Orange Austria*, a four-to-three merger in the Austrian market for mobile telecommunication services. In H3G the Commission applied and described in detail its use of an Upward Pricing Pressure ("UPP") analysis (regularly used by the US and UK antitrust enforcement agencies), to estimate the closeness of competition between the merging parties and its potential effect on post-merger prices. The Commission imposed significant remedies on the parties after an in-depth Phase II investigation, despite the fact that the combined market share was less than 25%.

The brief summary below of the Commission's prohibition decisions this year also illustrates the Commission's demanding attitude towards an efficiency defence in merger cases, and the difficulties companies face to convince the Commission that efficiencies can outweigh the potential problems that the Commission has identified.

Last, the Commission continues to apply stringent requirements for remedies offered to address its concerns. In order to be accepted, remedies must fully address the competition concerns identified by the Commission and they must be capable of being implemented in a timely manner. In the case of divestitures (still clearly preferred by the Commission), they should consist of a viable and competitive business and the transfer should be made to a suitable purchaser that will be able to conduct the business as a competitive force in the market. Clearly, in both prohibition cases, the remedies offered were deemed insufficient, despite the fact that – at least based on publicly available information – the parties in both cases offered structural remedies (divestitures) for each of the overlapping markets where the Commission had identified concerns.

II.A. Case M.6570 - *UPS / TNT EXPRESS*

According to the Commission, the transaction would have reduced from four to three the number of players active in the global express delivery business in the EU. The Commission found that the transaction would have restricted competition in 15 Member States in relation to the express delivery of small packages within the EEA. In these Member States, the acquisition would have reduced the number of significant players to three or two, leaving DHL as the only credible alternative to the merged entity. The Commission found that in most of these countries, FedEx did not exercise a significant competitive constraint on DHL and UPS/TNT because of the lack of density and scale of its European network.

During the investigation, UPS offered to divest TNT's subsidiaries in these 15 countries, plus – under certain conditions – TNT's subsidiaries in Spain and Portugal, and to allow the buyer of the divestiture business to access its intra-European air network for a period of five years. However, the Commission concluded that these remedies did not adequately address the competition concerns it had identified. In order to provide intra-EEA express deliveries from the 17 countries covered by the remedy package, the purchaser would have needed suitable networks or partners in other countries. This requirement alone limited the number of potentially suitable purchasers. To dispel this uncertainty, UPS was required to sign a binding agreement with a suitable purchaser before closing of the transaction. However, UPS failed to propose this commitment before the end of the Commission's investigation. Moreover, the Commission identified serious doubts as to the ability of the few potential purchasers that expressed an interest in the divestiture business to exercise a sufficient competitive constraint on the post-merger entity in intra-EEA express delivery markets.

UPS had claimed that efficiencies (especially regarding management and administrative overhead, ground transport and its air network) would have resulted in €400-550 million of annual savings and would therefore offset any anticompetitive effects that might arise from the merger. Despite accepting that at least some of these efficiencies were merger-specific, the Commission found that the overhead costs reductions should be discounted because they essentially consisted in fixed costs savings that were unlikely to be passed on to consumers. Also, it was unclear to the Commission whether the claimed cost savings for ground transportation would be sufficiently linked to express deliveries (the area of competition concerns). Given the reduced scope of these cost savings, the Commission concluded that the efficiencies that should be taken into account for purposes of the assessment would not be sufficient to outweigh the anti-competitive effects of the merger.

II.B. Case M.6663 - *RYANAIR / AER LINGUS III*

This was the third time the Commission was asked to review Ryanair's attempted take-over of Aer Lingus. After an in-depth investigation, the Commission confirmed its 2006 conclusion that the combination of Ryanair and Aer Lingus would continue to lead to a significant impediment to effective competition, by creating a monopoly or a dominant position on 46 routes where Aer Lingus and Ryanair are direct competitors.

Ryanair offered three sets of remedies during the proceedings. The final remedy package consisted mainly of the divestiture of Aer Lingus' operations on 43 overlap routes to Flybe and the divestiture of take-off and landing slots to IAG/British Airways at London airports to allow it to operate three routes (Dublin-London, Shannon-London, and Cork-London). Flybe and IAG had committed to operate the routes for three years. Additional slot divestitures on London-Ireland routes were also offered.

The Commission concluded, based on its market investigation, that these remedies were insufficient to ensure that customers would not be harmed, taking into account the scope and magnitude of the competition concerns raised by the proposed transaction on the 46 routes. In particular, the Commission found that Flybe was not a suitable purchaser capable of competing sufficiently with the *Ryanair/Aer Lingus* merged entity. The investigation also showed that IAG/British Airways would not constrain the merged entity to a sufficient degree and would have little incentive to stay on the routes beyond the initial three-year period, thereby defying the structural effect of the proposed remedy. In addition, the Commission could not conclude with the requisite degree of certainty that the proposed commitments could be put in place in a timely manner.

Like UPS, Ryanair claimed that the transaction would generate synergies and savings in most cost categories, in particular staff costs, turnaround times, aircraft costs, fuel costs, maintenance costs, airport and handling costs, and distribution and other costs. The Commission rejected these claims arguing that Ryanair failed to provide all relevant information necessary for the Commission to assess whether the claimed efficiencies would meet the cumulative criteria set out in the Horizontal Merger Guidelines (verifiability, merger specificity and consumer benefit). In particular, the Commission believed that the data provided by Ryanair suffered from a significant lack of precision.

II.C. Conclusion

This year's EUMR decisions once again show the important role the Commission plays as a global competition law enforcer. The Commission's proposed changes to the EUMR will further widen the scope of its powers, while promising to improve the efficiency of the EUMR review, particularly for transactions that raise no or limited competition concerns.

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