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Merger intervention rates in the EU

Regulatory intervention rates reduced by half after the 2004 reform

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An ideological shift in the European competition policy in early 2000s inspired by the US Chicago School of economics led to new rules adopted in 2004. The implementation of the new rules was accompanied by lower intervention rates on average. This period has become problematic as it has coincided with large digital mergers that paved the way for the dominance of Big Tech companies.

#EUCompetitionPolicy
#MergerRegulationRe-form

1 Background

The first comprehensive merger control rules for the EU were adopted in 1989 with the Council Regulation 4064/89. This regulation established the fundamental principles for controlling mergers and acquisitions by evaluating transactions in terms of their potential to establish or strengthen market dominance. Mergers were evaluated based on structural factors like market share, and the potential for the new entity to amass enough power to control prices or exclude competitors.

In 2004, the EU shifted towards a new framework for merger regulation that emphasized an "effects-based" approach with the implementation of Council Regulation 139/2004. The new test in this EU Merger Regulation (EUMR) was presented as way to improve the accuracy of the merger review process by broadening considerations for effective competition beyond dominant positions to incorporate more economic analysis. Under these new rules, mergers between firms in concentrated markets could call for an intervention even if neither firm holds a dominant position.

However, despite the broadening of scope, the new rules from 2004 did not lead to a rise in the number of mergers prevented.

Under the 2004 rules, a merger's potential harm to consumers was to be considered through an economic approach, which economists would analyze for each individual case. Additionally, a compensation mechanism was introduced, where the negative anti-competitive effects of mergers could be weighed against potential positive effects the merger could bring to consumers. These positive effects would take the form of so-called "efficiencies", which broadly correspond to cost synergies, and again it would be for economists to rely on economic theory to assess whether the positive effects exist and would continue to in the future. In this way the 2004 reform gave a large role to economists and theoretical economics, largely inspired by US antitrust practice, at that time dominated by Chicago School economics. The 2004 rules also simplified procedures for mergers that are considered harmless but did not change the thresholds for review (notification thresholds).

2 Data

This report relies on the most recent merger case statistics data published by the European Commission as of November 30, 2023. Beginning with the first full year of merger case information in 1991, this report discusses the outcomes of the EU's merger review process.

In addition to simplified procedures for straightforward mergers, the EUMR includes an in-depth, "Phase II" procedure for cases with more complicated competition considerations. This study focuses on in-depth investigations that we compare to the total number of merger and acquisition (M&A) cases reviewed by the Commission (the total number of cases are all the notified cases). Regulation 4064/89 refers to all merger notifications from 1991 through 2004 and Regulation 139/2004 encompasses all merger notifications from 2005 to November 30, 2023

Table 1: Notified Merger Cases and Phase II Investigation Data Overview

Notified Merger Cases Overview							
	Cases	Investigations	Approvals	Remedies	Prohibitions	Withdrawals	Prevented
Regulation 4064/89	2586	138 (5.3%)	26 (1.0%)	70 (2.7%)	19 (0.7%)	23 (0.9%)	42 (1.6%)
Regulation 139/2004	6462	163 (2.5%)	39 (0.6%)	78 (1.2%)	14 (0.2%)	30 (0.5%)	44 (0.7%)

Source: European Commission, Merger Statistics (2023).

Since the implementation of the economic, effects-based approach to merger review of the 2004 reform, the rate of prevented mergers has more than halved.

- Under the application of the 1989 rules 1.6% of mergers were prevented (via prohibitions and withdrawals) by the European Commission on average over a period of 14 years (1991 – 2004).
- Under the application of the 2004 rules 0.7% of mergers were prevented by the European Commission on average over a period of 19 years (2005 – November 2023).
- The rate of merger investigations after notification went down from 5.3% to 2.5%; the rate of withdrawals went down from 0.9% to 0.5%, and the rate of prohibitions went down from 0.7% to 0.2%.

3 Discussion

Investigations in Table 1 corresponds to all merger cases that had Phase II investigations initiated. Phase II investigations can result in approval decisions with or without conditions imposed on the business, and these conditions, referred to as remedies, can be far-reaching. In cases where the proposed remedies are not accepted by the merging firms, or if the impacts on competition are so serious that no condition can remedy the harm, the Phase II investigations result in a prohibition of the merger.

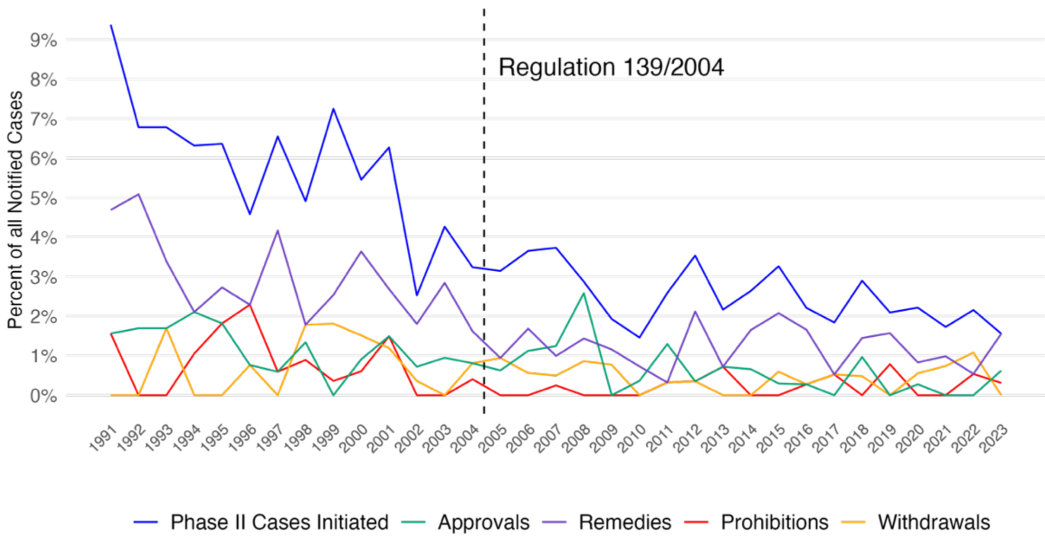
This study adopts a comprehensive prevention rate, including both prohibitions and Phase II withdrawals to capture that 0.7% of mergers have been prevented by the European Commission under the 2004 reform. While past analyses focused solely on prohibition as a metric for enforcement, this approach also accounts for the cases that were expected to result in a prohibition and therefore led companies to preemptively withdraw their merger in the midst of the in-depth investigation.

Although prohibitions are often highlighted as the sole indicator of how the Commission blocks companies from merging, withdrawals in the EU merger review process can be a direct consequence of the Commission’s investigations. Companies facing the possibility of regulatory hurdles, while being forced to recognize the depth of the Commission's concerns with their business practices, may opt to withdraw rather than pursue a costly process that could lead to a prohibition. Because such withdrawals can occur before an in-depth investigation is initiated (in Phase I investigations) as well, counting Phase II withdrawals as prevented mergers is not a perfect measure. Additionally, despite considerable sunk costs invested in the review process by the firms, withdrawals in Phase II can also be the result of a change of heart by the merging firms, especially as procedures tend to last many months and economic circumstances of businesses can materially change and alter the business case for a merger. These two effects tend to compensate each other and support the use of Phase II withdrawals as a proxy for withdrawals due to anticipation of a negative outcome of the regulatory review.

Phase II withdrawals occur more frequently than prohibitions from Phase II investigations. The mere opening of a Phase II review can prompt firms to reconsider their merger plans, suggesting that this procedure is an important tool wielded by the Commission. By focusing on the prohibition rate alone, a significant aspect of the Commission's regulatory impact is left out of the conversation. Incorporating Phase II withdrawal data in our estimation allows for a more accurate comparison between the two regulatory periods. To capture the full impact of the Phase II investigatory process under both rules, the prevented mergers rate in Table 1 reflects the sum values of both withdrawals and prohibitions.

From 2005 through November 2023, the European Commission has cleared the vast majority of mergers, with 99.3% of the 6462 merger cases allowed in some form. Of the mere 0.7% of prevented cases, only 0.2% were a result of the Commission's explicit prohibitions. Over time, there has been a rise in merger notifications, potentially due to the enactment of Regulation 139/2004 and its simplified procedure. Additionally, notification thresholds have remained static and unadjusted for inflation, and as a result these thresholds may now encompass transactions that would have previously been too small to trigger a review. The lower prohibition rates were not compensated through higher rates of mergers approved under these conditions. If this had been the case, the decrease in mergers prevented could have been a sign of an enhanced dialogue between the firms and the regulator. However, we see the percentage of mergers approved with remedies decreased under the 2004 regulation as well.

Figure 1: Rate of Phase II Intervention Decisions from Total Notified Merger Cases



Source: European Commission, Merger Statistics (2023).

In Figure 1, the percentage of in-depth investigations from all notified cases is visualized. Since the enactment of the 1989 regulation, the rate of interventions initiated has decreased dramatically, from over 9%, to below 2% in 2023. Moreover, we see declining rates for all Phase II intervention outcomes, with the use of remedies most closely resembling the rate of interventions. Following the implementation of the 2004 regulation rules, Commission interventions appear to have decreased. The 1989 rules resulted in interventions into 5.3% of all notified cases under the regulation; however, under the broader economic framework of the 2004 regulation rules, the intervention rate of all notified mergers has fallen to merely 2.5%.

The data included in this study is limited to the scope of notified merger cases. During the period analyzed there was no major change in such notification practice. However, in 2021, the European Commission adapted its practice under Article 22 of the EUMR. Under the new interpretation by the European Commission, EUMR may be applied to all concentration cases that affect trade between member states and threaten the competition within a member state, even if the concentration falls under the notification thresholds. The changes to the practice under Article 22 occurred in 2021 and would not affect the rates of intervention before this date.

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Brianna Rock is a Master of Public Policy candidate at the Hertie School with a research focus on market regulation, political economy, competition policy, and the dynamics between corporate power and government institutions.