

## Concurrences

02-2024

### **DECIPHERING ARTICLE 7(3): A STRATEGIC ANALYSIS OF EARLY MERGER IMPLEMENTATIONS IN EU COMPETITION LAW**

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# SUMMARY

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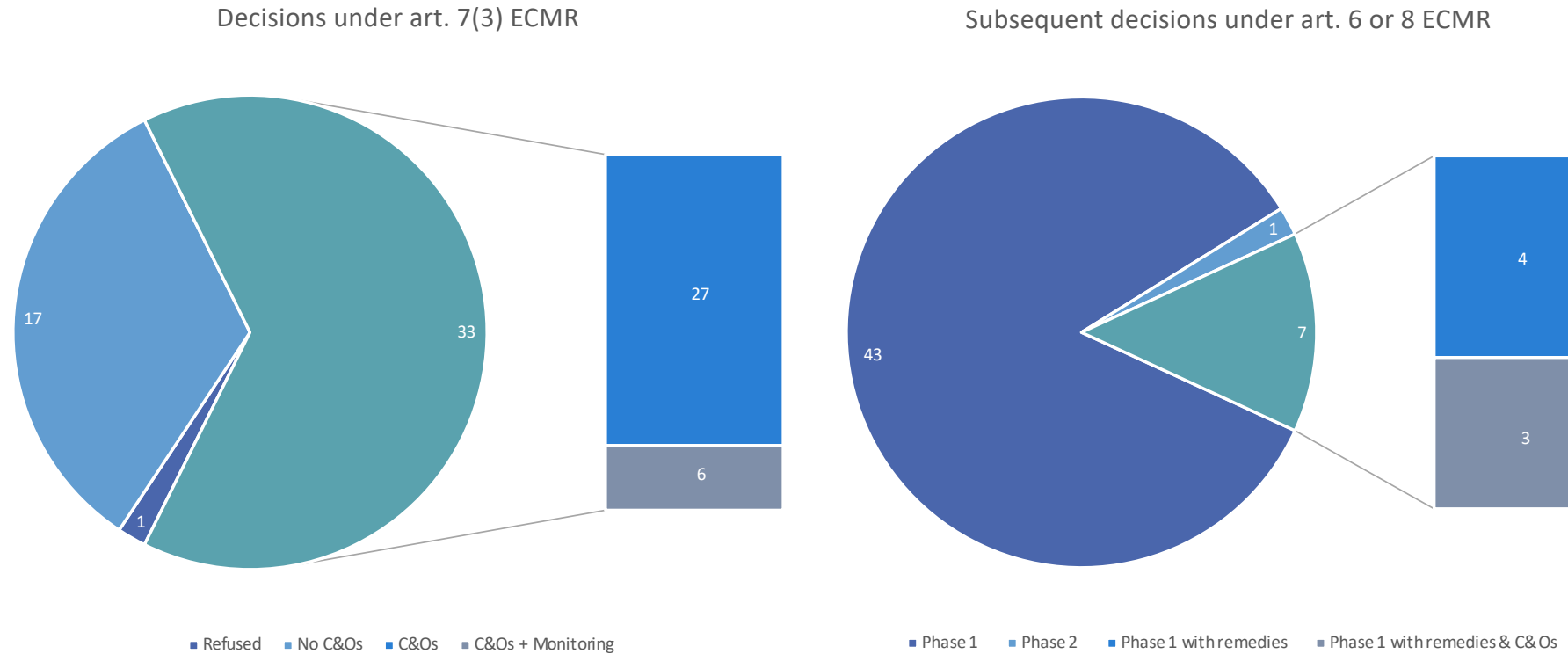
## 1. STATE OF PLAY

- i. The data
- ii. Main Conditions & Obligations in article 7(3) ECMR decisions

## 2. VIEWS FROM THE MONITOR

- i. Relevance of external monitoring
- ii. Key factors of success in the implementation of Conditions & Obligations
- iii. Main challenges

## 1.1 THE DATA



In the 51 cases, 98% of derogations were granted, with conditions and obligations (C&Os) attached in 66% of the cases.

Most subsequent decisions (art. 6 or 8 ECMR) were issued without remedies, with remedies in only 13% of the cases.

Only 3 art. 7(3) ECMR cases with C&Os led to decisions on the merits with remedies attached.

## 1.2 MAIN CONDITIONS AND OBLIGATIONS IN ARTICLE 7(3) DECISIONS

Art. 7(3) ECMR: *“The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, **the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition.** A derogation may be applied for and granted at any time, be it before notification or after the transaction.”*

### Procedural C&O

Occurrences: ★★★★★☆

Trend: ↑ since 2015

UBS / Crédit Suisse (2023): *“UBS and Credit Suisse shall **submit a complete notification of the Transaction to the Commission without delay**, and in any event no later than six weeks from the adoption of the Article 7(3) decision in order to allow the assessment of the compatibility of the proposed concentration with the internal market and the EEA agreement.”*

### Preservation of the viability and stability of the target

Occurrences: ★★★★★☆

Trend: ↓ since 2015

Sun Capital / SCS Group (2008): *“Until the Commission has adopted a decision on the compatibility of the operation, **this derogation is granted solely insofar as it allows the acquirer to take all actions that are strictly necessary to restore the viability** of the Target as a going concern following signing of the share purchase agreement. [...] The day-to-day operation of the Target is the responsibility of its management. **Any actions by Sun Capital apart from those outlined above must be approved by the Commission** after a reasoned request.”*

### Ring-fencing

Occurrences: ★☆☆☆☆

Trend: ↓ since 2006

Banco Santander / Banco Popular Group (2017): *“The derogation is made subject to the condition that **Santander will adopt the organizational measures to ensure that the BPE's business is ring-fenced and not operationally integrated with the Notifying Party**, limiting the Notifying Party's influence to the minimum necessary, until the Commission has taken a final decision on the Transaction.”*

### Hold Separate and limitation of influence

Occurrences: ★☆☆☆☆

Trend: ↓ since 2015

Parcom / Pon / Imtech Marine (2015): *“In order to ensure the orderly implementation of the measures under (ii) whilst maintaining Imtech Marine separate from Pon and Parcom businesses until clearance is eventually granted, **Pon and Parcom shall appoint a hold-separate manager.**”*

### Reversibility

Occurrences: ★☆☆☆☆

Trend: =

ICG / Scopelec / Setelen (2023): *“**Not to implement the transaction in an irreversible manner or to enter into agreements that could prevent or make difficult the possible sale of the targets' assets to third parties (jointly or separately).**” (loose translation)*

## 2.1 RELEVANCE OF EXTERNAL MONITORING

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... aka “Extension du domaine de la lutte”

Transparent attempt to generate more assignments for Monitoring Trustee?

Perhaps, **but...**

- Art. 7(3) ECMR are out of the ordinary, as the standstill obligation is at the heart of EU merger control
- The nature of the transaction (distressed assets) means that the parties may be more focused on implementing, rather than on fulfilling the C&Os

So, our view is that...

- An external monitor is key to ensuring that the balance of art. 7(3) ECMR is maintained

## 2.2 KEY FACTORS OF SUCCESS IN THE IMPLEMENTATION

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The key factors of success in implementing art. 7(3) ECMR Conditions & Obligations are very similar to any case with remedies.

**Engagements, transparency, and adaptability.**

### **Rapidity of execution and practical decision-making**

#### **Transparency and access to key people**

Decisions need to happen in real-time

- Dedicated organization, with C-level executives (and the usual suspects of legal, strategy, etc.)
- Monitoring Trustee as troubleshooter and pragmatic advisor

### **Interactions with the Case Team**

#### **Expectations must be shared between stakeholders**

Preservation of viability vs. threat to competition...

- A “*do first, ask permission later*” approach only works if the Case Team is fully appraised of the needs of the situation
- Monitoring Trustee as key player to assess, and explain, what can or cannot be done

## 2.3 MAIN CHALLENGES

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### Impact of Court-mandated obligations

**Bankruptcy courts decisions may be at odds with the art. 7(3) ECMR C&Os and contain their own conditions**

- Monitoring Trustee as support for the Case Team to report and propose decisions balancing the two sets of C&Os

### The Condition of Reversibility

**Isn't the point of art. 7(3) ECMR to *allow* for irreversible decisions to be implemented?**

Dozens of decisions will in fact be irreversible, either by the effect of the acquisition of control, the conditions imposed by the Court, or simply because business is, well, business

Examples include:

- Rebranding (forced or necessary for the viability)
- Direct integration of assets
- Impact of labor regulations
- Transfer of customer contracts
- Divestments necessary to preserve viability

- These situations (and the likeliness of their happenstance) must be discussed with the Case Team, preferably before the art. 7(3) ECMR decision, and in any case ASAP thereafter
- Placing the acquired assets in an *ad hoc* HoldCo from the start could help mitigate some of the effects
- The Monitoring Trustee is -again- a key stakeholder

**Do you want to know more?**

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