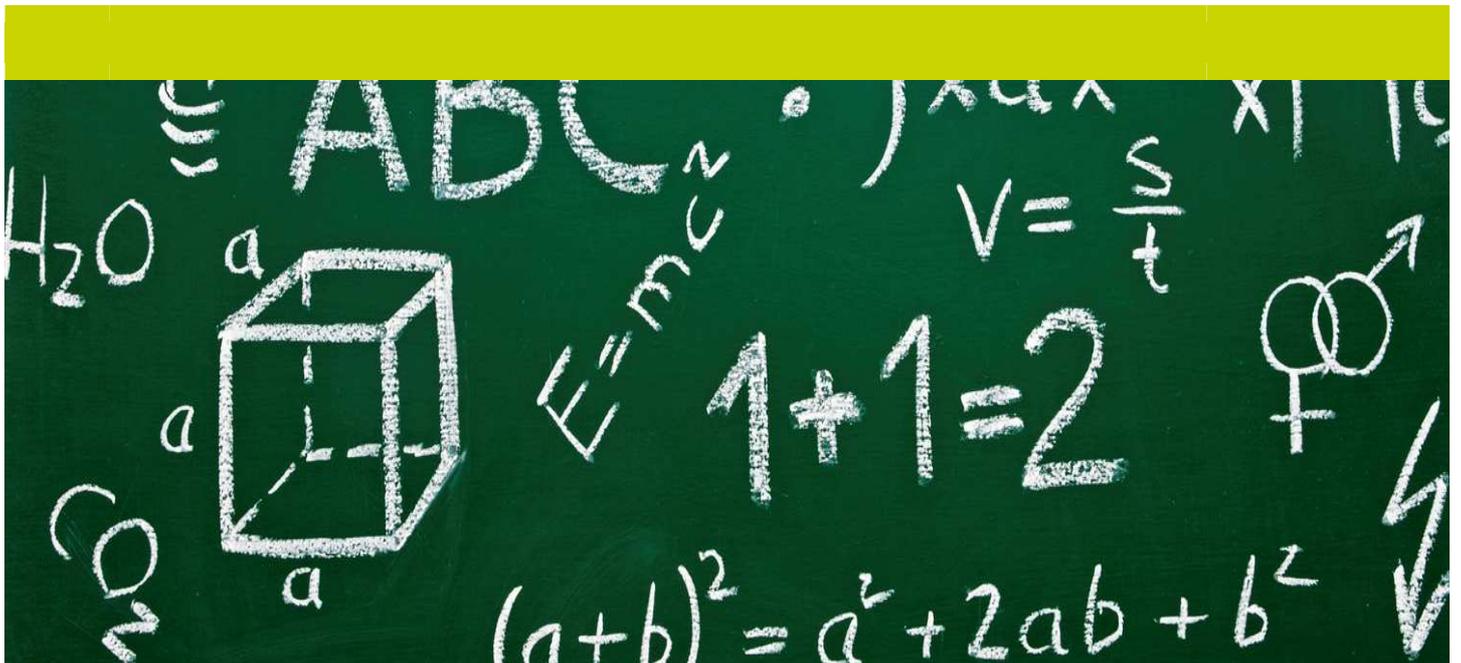


## Merger Filing Toolkit



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## (1) M&A - International Merger Control

### INTERNATIONAL TRANSACTIONS AND MULTI-JURISDICTIONAL MERGER NOTIFICATIONS

More than 80 countries world-wide have active merger control regimes with a wide variety of rules and approaches to jurisdiction, timing of reviews, content of filings, requirements for suspension of transactions under review and even substantive assessments. The sooner you know where your planned transaction needs to be notified, the more effectively and efficiently you can address issues raised by multiple merger filings. Lack of effective coordination of merger filings can jeopardise even a transaction which has little impact on competition.

Involve your competition counsel at the very early stages of negotiations. Your counsel needs to identify up-front any substantive issues which may jeopardise the deal or require the divestment of parts of the business concerned. Your counsel needs to have a sound knowledge of merger control rules across all major jurisdictions in order to manage effectively the filing process.

National regimes can vary significantly from country to country, which means that the earlier you know where your transaction needs to be notified, the more effectively and efficiently you can manage the process and accomplish a timely closing.

### SPECIFIC ISSUES

**Minority acquisitions** can be caught by merger control rules

- EU Merger Reg only catches minority acquisitions which confer the possibility of exercising control (e.g. veto over budget and/or business plan).
- Many European national and international merger regimes follow the EU approach but others will catch minority acquisitions short of control (e.g. Germany, Mexico).

*Joint ventures under EU Merger Reg* - can be a complex assessment:

- Do the parties exercise joint control? This requires a detailed assessment of how decisions are taken on strategic issues.
- Is this a full function JV? This requires a detailed assessment of e.g. the role of the JV on the open market, its relationship with the parents, its financial resources. Non full-function JVs are not subject to the EU Merger Reg. However, there may still be filings at national level, for example, Germany.
- JVs which start out as non-full-function may become full-function (for example, where they change from selling their output primarily to the parents to selling

to the market) and this change may trigger an EU filing.

### GENERAL POINTS

#### 1. Tight filing deadlines in some countries.

Examples include: within 1 week of signing – Cyprus; and within 3-6 weeks of signing - Hungary, Ireland, and Malta.

For many of these jurisdictions, submissions need to be drafted prior to signing in order to meet the filing deadlines.

#### 2. Voluntary vs. Mandatory filings.

Need to identify jurisdictions where filings are voluntary (e.g. UK, Australia, New Zealand, Singapore) and assess risks of not filing in those jurisdictions (for example, if the transaction meets the local thresholds for filing but has little impact on competition in the market concerned, generally, a filing need not be submitted). In most jurisdictions, filing is mandatory.

#### 3. General rule - no closing before regulatory approval.

Many countries do not provide for a filing deadline but in the majority of jurisdictions, closing before clearance is prohibited.

Therefore, early identification, preparation and submission of merger notifications and assessment of substantive issues is critical to calculating and achieving the deal timeline.

**Exceptions - closing permitted before regulatory approval but following filing** in some countries including: Italy and Mexico (under certain conditions). This option needs thorough risk assessment.

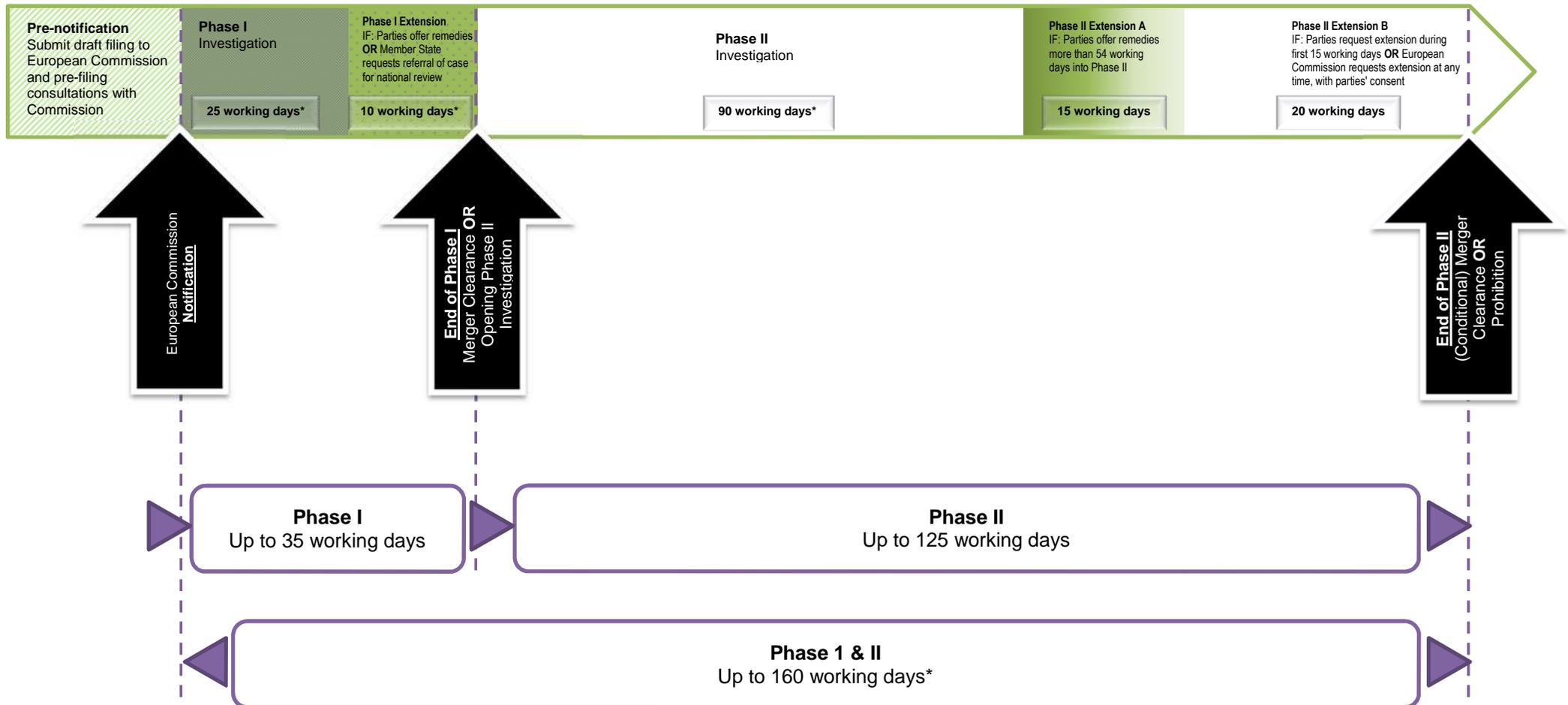
#### 4. Local carve-outs to permit global closing.

In certain jurisdictions, it is possible to carve-out local assets and proceed with global closing (this may be a useful option where waiting periods for approval are long and/or have been extended and go beyond the envisaged closing date). However, this option requires careful assessment in terms of feasibility for the businesses concerned and anti-trust risk.

#### 5. Sanctions for not filing a reportable transaction.

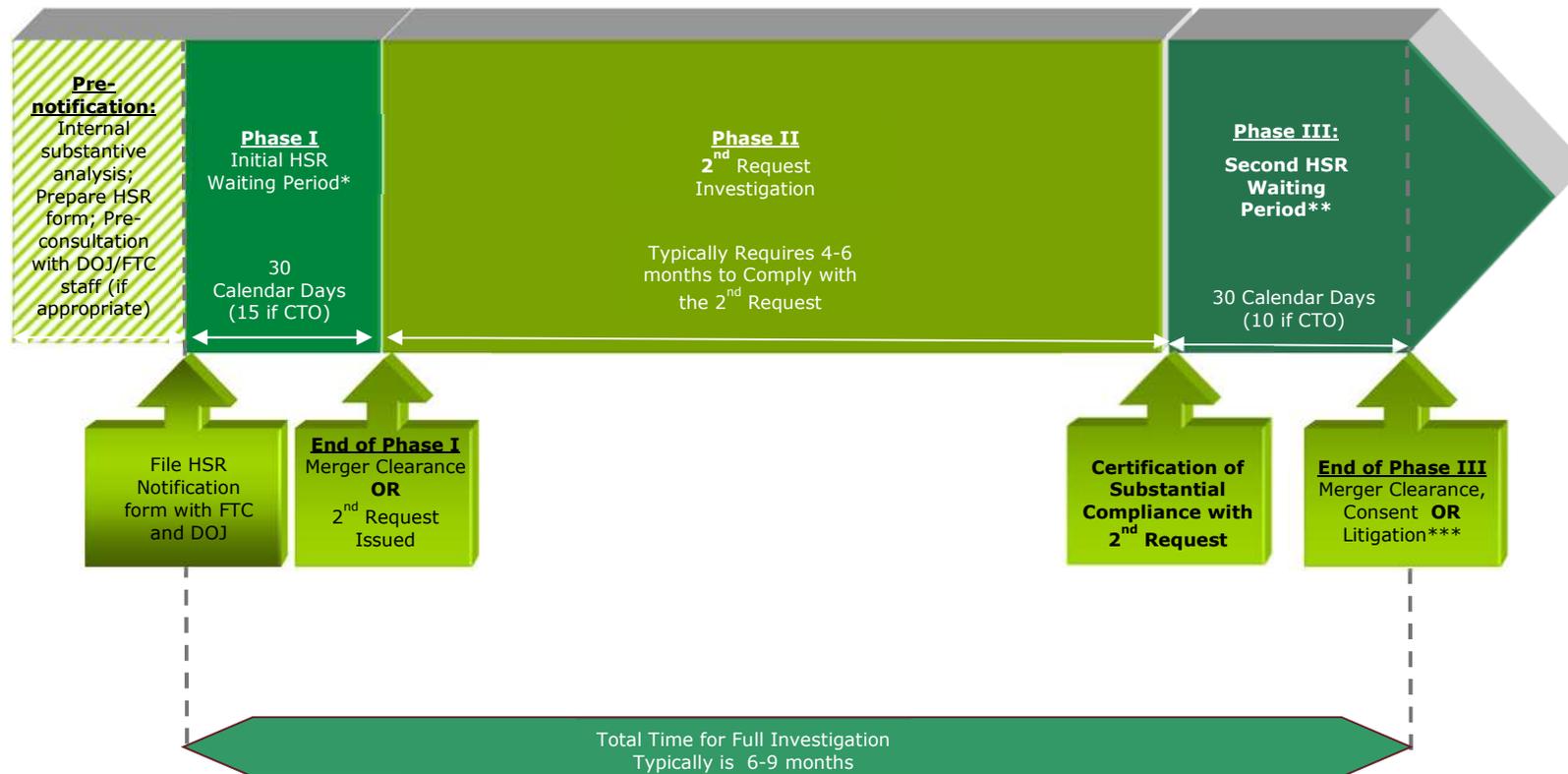
The transaction can be considered null void and/or substantive pecuniary sanctions may be imposed (e.g. the European Commission can impose a fine of up to 10% of annual turnover and the transaction will be invalid in the EU)

## (2) EU Merger Regulation Procedural Timeline



\* Time periods can be suspended ("Stop the clock") where due to circumstances for which an undertaking concerned is responsible, the European Commission has taken a formal decision requiring information to be supplied or, ordering an inspection.

### (3) HSR Merger Review Timeline

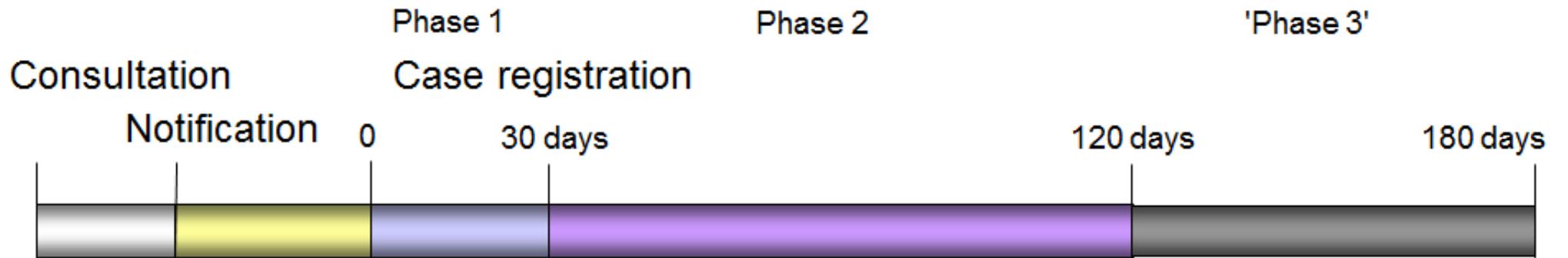


\* The Initial Waiting Period can be extended for an additional 30 days if the parties "Pull and Refile" their HSR Notification.

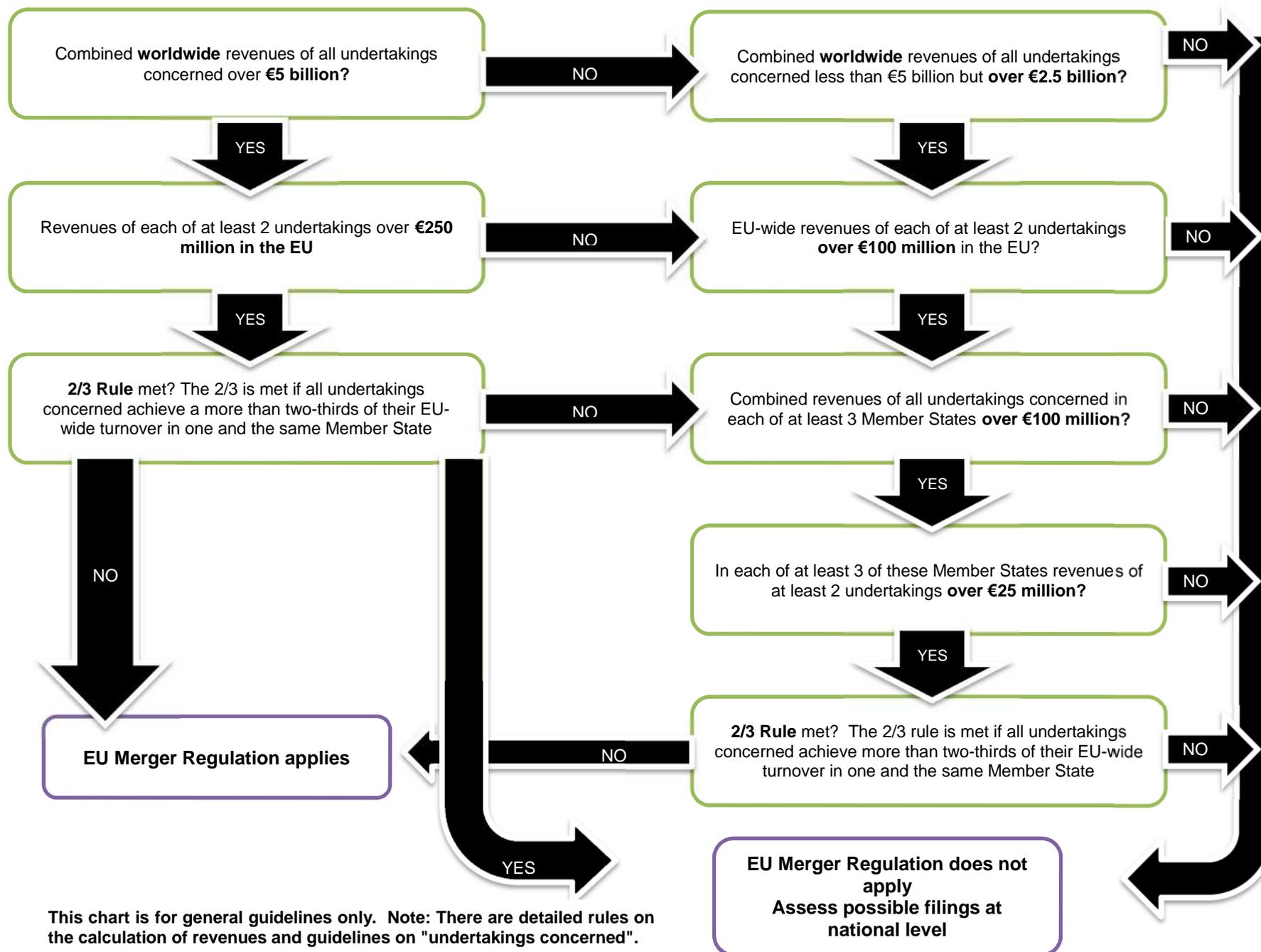
\*\* The Second Waiting Period is often extended by entering into a timing agreement with Agency staff. Timing Agreements typically extend the process 60-90 days past Certification of Compliance with the 2<sup>nd</sup> Request.

\*\*\* Litigation includes a preliminary injunction proceeding in Federal Court (which typically takes an additional 3-6 months to reach a decision); if the FTC is the reviewing agency, this also could include an administrative proceeding (which typically takes 1½ -3 years to complete, if not longer)

### (4) Chinese Merger Control Timeline



## (5) EU Merger Regulation Thresholds



## (6) Minority acquisitions and merger control

Acquisition of **< 20%** (no rights or arrangements allow influence over policy or strategic direction of target)

### No filing in most countries, but possible filing in:

- **Mexico** (in theory, any level of shareholding could trigger filing)
- **Canada** (in theory can be caught if lower than < 20%, but in practice only caught if 20% or over)
- **US** (filing may be required if >10%)
- **Germany** (filing may be required even if <20%)

Acquisition of **≥20%** (no rights or arrangements allow influence over policy or strategic direction of target)

### No filing in most countries, but possible filings in:

- **Austria** (acquisitions of  $\geq 25\%$ )
- **Brazil** (acquisition of  $\geq 20\%$ )
- **Germany** (acquisitions of  $\geq 25\%$  and  $\geq 50\%$ )
- **Israel** (acquisitions of  $\geq 25\%$ )
- **Korea** (acquisitions of  $\geq 20\%$ )
- **Russia** (acquisitions of  $\geq 20\%$  in a Russian company)

Acquisition of any level of shareholding with **influence** over **policy** and/or **strategic direction** of target

Acquisition of **management rights**

### If "change in control", possible filing in:

- **EU**
- **Individual EU Member States**
- **Majority of filing jurisdictions worldwide**

### If no "change in control", filing still possible in:

- **Germany**
- **UK** (if "material influence" test is met)
- **Brazil** (acquisition of 5% stake if involves competitor or vertically related company)

## (6) Minority acquisitions and merger control

### KEY CONCEPTS REGARDING CONTROL



#### EU/RoW: "change in control" ("control" is the ability to exercise decisive influence over target)

There are few key veto rights and powers that can give a minority shareholder "control", for example:

- the right to veto business plan or budget, or the right to veto appointment of senior management; or
- the right to veto business plan or budget, or the right to veto appointment of senior management; or
- control can also be based on contractual rights obtained through, for example, a management contract

Various other rights generally not considered to give rise to control include minority protection rights covering, for example:

- protection from dilution of equity stake;
- right to veto new issues of share capital; and
- right to veto changes to articles of association



#### Germany: "competitive relevant influence":

Acquisition of a shareholding falling below 25% can still be notifiable in Germany if the acquirer gains influence over the target through additional rights such as rights to consultation or board representation.



#### UK: "material influence":

"Material influence" is likely to be found where an acquirer gains a shareholding >25%, or where the acquirer otherwise has the ability to influence the board of the target e.g. through consultancy arrangements or veto over strategic investments.



**US:** Minority investments can be reviewed without regard to percentage acquired; evaluated for issues such as access to competitively sensitive information, control over a competitor, and changed incentives arising out of the minority investment.

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