EU MERGER CONTROL

4 NOVEMBRE 2005
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1.1. What is a concentration with a community dimension?

1.1.1. Concept of Concentration

(i) Merger of two (or more) previously independent undertakings; or

(ii) Acquisition

- by one or more persons already controlling at least one undertaking or by one or more undertakings;
- of control or joint control of the whole or part of another previous independent undertakings;
- Which brings the possibility of exercising decisive influence over strategic business decision undertaking (e.g. veto rights);
- whether by purchase of securities or assets, by contract or by any other means.

(iii) Creation of full-function joint-venture under the joint-control of two (or more) previously independent undertakings
1 - EU Jurisdiction
Caught Transactions

1.1. What is a concentration with a community dimension?

1.1.2. EU Jurisdictional Thresholds

• **Exclusive jurisdiction of the Commission** over concentrations between undertakings meeting the Community dimension jurisdictional thresholds;

• **Two sets of turnover thresholds** defined on the basis of both EC and worldwide turnover of the undertakings concerned;

• **Undertakings concerned**: buyer company(ies) and target company, or companies which are members of the JV.
1.1. What is a concentration with a community dimension?

1.1.2. EU Jurisdictional Thresholds

- First set of turnover thresholds

  (i) the aggregate world-wide turnover of the undertakings concerned exceeding €5 billion;

  AND

  (ii) the EU-wide individual turnover of each (or at least two) of the undertakings concerned exceeds €250 million;

  UNLESS

  each of the parties achieves more than two-third of its EU turnover in one and the same Member State.
1.1. What is a concentration with a community dimension?

1.1.2. EU Jurisdictional Thresholds

- Second set of TO thresholds
  
  (i) the aggregate world-wide turnover of all the undertakings concerned exceeds €2.5 billion;

  AND

  (ii) the individual Community-wide turnover of each of at least two the undertakings concerned exceeds €100 million;

  AND

  (iii) in each of at least three Member States, the aggregate turnover of all the undertakings concerned exceeds €100 million;

  AND

  (iv) in each of at least three Member States mentioned immediately above, the individual turnover of each of at least two undertakings concerned exceeds €25 million;

  UNLESS

  each of the parties achieves more than two-thirds of its aggregate Community-wide turnover in one and the same Member State.
1.2. What if the transaction constitutes a concentration, but not of a community dimension?

- **Member States local merger control** regimes can apply, respectively.
- **But Member State(s) may refer to the Commission a concentration with no Community dimension** but affecting trade between the Member States and threatening to significantly affect competition within the Member State(s) concerned.
- Where a concentration falls within the **merger control jurisdiction of at least three Member States**, notifying party(ies) can apply for a referral to the Commission by filing a reasoned submission.
2 - EU Merger Control Proceedings

2.1. Merger Notification

2.2. Timetable for Merger Review
   2.2.1. Pre-notification Contacts
   2.2.2. Phase I
   2.2.3. Phase II

2.3. Investigation and Sanction
   2.3.1. Commission Investigation Powers
   2.3.2. Applicable Fines
2 - EU Merger Control Proceedings

2.1 Merger Notification

- **Who?**
  - either the merging undertakings
  - or the members of a full function JV
  - or the party(ies) acquiring control on one or more undertakings

- **When?**
  - When a project of concentration is well advanced (e.g. a Letter of Intent or Memorandum of Understanding has been signed); or
  - When a binding agreement has been signed (Share Purchase Agreement)
2.1 Merger Notification

- **What?**
  - A « Form CO » filing document
  - Significant amount of legal and economical information to be provided

- **Effect?**
  - Suspensive effect: in principle, the transaction cannot be implemented until a final decision by the Commission
  - The notification must be complete to start the clearance process
2.2. Timetable for Merger Review

2.2.1. Pre-notification Consultations

- Informal and confidential consultations between the parties to a proposed concentration and the DG COMP.
- Purposes of the pre-notification include:
  - confirming the jurisdiction of the Commission over the proposed concentration;
  - application by the parties for a referral to Member State(s) or to the Commission;
  - identifying key issues and possible competition concerns;
  - ascertaining deadlines.
2.2. Timetable for Merger Review

2.2.2. Phase I

(i) Time Limits

- **25 commission working days starting** from the complete notification of the merger (if complete);
- **Extended to 35 working days:**
  - when remedies are submitted by the notifying party to solve competition concerns (to be submitted within 20 working days);
  - if referral is requested by and to Member States.
2.2. Timetable for Merger Review

2.2.2. Phase I

(ii) Main Steps

- **Within 3 working days from notification**: Transmission of a copy of Form Co Notification to Member States;

- **Within 15 working days from notification**: “State of Play” meeting the Commission where the concentration raises “serious doubts as to its compatibility with the Common Market”.

- **Within 25 working days from notification**: DG COMP will:
  - confirm that the merger meets the jurisdictional thresholds;
  - confer with other interested Commission Directorates (for example, the Telecommunications Directorate in cases involving the telecoms industry) and the Legal Service;
  - make inquiries (“market test”) and consider submissions by interested third parties;
  - decide whether the proposed concentration “raises serious doubts as to its compatibility with the Common Market”.
2.2. Timetable for Merger Review

2.2.2. Phase I

(iii) Decision of the Commission

- Formal clearance decision is issued if the merger does not raise “serious doubts as to its compatibility” with the Common Market. Most merger operations are cleared by a Phase I decision with remedies, if any.

- Conversely, if the concentration raises “serious doubts”, the Commission issues a decision to “initiate proceedings” i.e. to proceed an in-depth Phase II investigation.
2.2. Timetable for Merger Review

2.2.3. Phase II

(i) Time Limits

- **90 working days starting from the issuance of a formal decision** raising “serious doubts as the compatibility of the transaction with the Common Market”;

- **Extended to 105 working days** if remedies are proposed by the parties more than 55 days after the start of Phase II;

- Possibility for the notifying party(ies) and the Commission to “**stop the clock**” for not more than 20 days, subject to certain conditions.
2.2. Timetable for Merger Review

2.2.3. Phase II

(ii) Main Steps

- Within 10 working days approximately, “State of Play” meeting is held with the Commission “to facilitate the notifying parties’ understanding of the Commission’s concerns at an early state of the Phase II proceedings”.

- The Commission issues information request letters to the notifying party(ies), to customers, competitors and/or suppliers and it treats such information to ascertain its analysis (market test).
2 - EU Merger Control Proceedings

2.2. Timetable for Merger Review

2.2.3. Phase II

(ii) Main Steps

• Issuance of the Statement of Objections summarizing the factual and analytical grounds for opposing the transaction (within approximately six weeks after starting of Phase II);

  Statement of Objections triggers the parties’ right of access to the DG COMP’s investigative file, including third-party complaints;

• Parties’ reply to the Statement within 2 weeks of Statement of Objections;

• Oral Hearing (if requested by the notifying party) one week after the filing of the parties’ reply;

• Another “State of Play” meeting may take place, as an opportunity to discuss the scope and timing of possible remedy proposals.
2 - EU Merger Control Proceedings

2.2. Timetable for Merger Review

2.2.3. Phase II

(iii) Remedies

- Within 65 working days after the opening of Phase II, the parties can submit remedies in order to get clearance subject to conditions;

- Remedies must eliminate the factors which impede competition, as identified by the Commission in the Statement of Objections;

- Remedies are generally “structural” (e.g. divestiture of an existing business but can also be “behavioural” (e.g. pricing practices).
2.2. Timetable for Merger Review

2.2.3. Phase II

(iv) Final Decision

- The **Advisory Committee** (representatives of the EU Member State competition authorities) reviews the DG COMP’s proposed decision and issues non-binding opinion;

- All decisions on concentrations following Phase II proceedings have to be adopted by the **full college of Commissioners**;

- The Phase II decision **clears the transaction (subject to remedies) or blocks the transaction.**
2.3. Investigation and Sanction

2.3.1. Commission Investigation Powers

• The Commission is vested with wide investigative powers;

• Such powers include compulsory process to obtain answers to written questions and on-site inspection of books and records;

• The Commission’s powers include the ability to seal business premises and books and records at the undertakings’ promises.
2.3. Investigation and Sanction

2.3.2. Main Applicable Fines

- Up to 10% of the aggregate worldwide turnover of the undertakings concerned for (i) failure to notify and/or completion prior to approval or (ii) failure to comply with a remedy.

- Up to 1% of the aggregate worldwide turnover of the undertakings for (i) inaccurate information in Form CO or (ii) inaccurate information in a response to an Art. 11 information request letter (ii) refusal to submit to an on-site investigation.

- Up to 5% of the average daily turnover of the undertaking(s) concerned per day for delays in providing complete and correct information in response to an Art. 11 request or for non-compliance with an order to cooperate to an on-site investigation.
3 - Substantive Analysis for EU Merger Review

3.1. Substantive standard in the merger regulation
   3.1.1. The Applicable Substantive Test
   3.1.2. Statutory Factors

3.2. Market Definition

3.3. Dominance
   3.3.1. Single Dominance
   3.3.2. Collective Dominance

3.4. Other Competitive Harms

3.5 Countervailing Factors
3.1. Substantive Standard Test

3.1.1. The Applicable Substantive Test

- A new applicable substantive test has been introduced by ECMR dated 20 January 2004:

  “A concentration which would significantly impede effective competition in the Common Market or in a substantial part of it in particular as result of the creation or strengthening of a dominant position shall be declared incompatible with the Common Market” (referred to as “SIEC” test)

- The dominant position test remains however the applicable test in most cases;

- But the SIEC test may also apply to anti-competitive effects of a merger on already concentrated markets where dominance cannot be evidenced.
3 - Substantive Analysis for EU Merger Review

3.1.2. Statutory Factors

For the purposes of its review, the Commission takes into account *inter alia*:

- the structure of all the markets concerned;
- **the actual or potential competition** from undertakings located either within or outside the Community;
- **the market position of the undertakings concerned** and their economic and financial power;
- **the alternatives available to suppliers and users and** their access to supplies or markets;
- any legal or other **barriers to entry**;
- **supply and demand trends** for the relevant goods and services, and
- and the **development of technical and economic progress** provided that it is to consumers’ advantage and does not form an obstacle to competition.
3.2. Market Definition

The Commission defines product and geographic markets as follows.

- A relevant **product market** comprises all those products and/or services which are regarded as **interchangeable or substitutable by the consumer**, by reason of the products' characteristics, their prices and their intended use.

- The **relevant geographic market** comprises the area in which the undertakings concerned are active, in which **the conditions of competition are significantly homogeneous** and different from those in neighbouring areas.
3.3. Dominance

3.3.1. Single Dominance

- Single dominance is defined as «*the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers*»;

- Dominance relies on the *assessment of post-transaction market power of the undertakings concerned* with regards to their availability to increase price or reduce production or innovation;

- *Market shares of the undertakings concerned* provide for useful guidance but it is not the sole factor to take into account;

- The Commission provide for *indicative safe harbors* (e.g. market share under 25%).
3.3. Dominance

3.3.2. Collective Dominance

- Technical concept based on the **co-ordinated effects** on a market where competitors are incentivised to **act in (tacit) concert**;

- Collective dominance is based in particular on **the following factors**:
  - Highly concentrated market;
  - Transparency of prices;
  - Market conditions allowing an accurate understanding of competitors’ behaviour (products homogeneity, similar production costs…);
  - Existence of credible retaliation mechanism to punish another member to deviate from co-ordinated practices.
3.4. Other Competitive Harms

- **Unilateral or non-coordinated effects**: In substance, the SIEC test will catch situations where the merged firms are able to individually raise their prices regardless of the competitor’s reaction, even though a single or dominant position is not created or strengthened;

- **Vertical foreclosure**: vertical mergers can restrict the access of competitors to supplies, thereby raising their costs;

- **Co-ordinated (« spill-over ») effects between the partners of a joint-venture.**
3.5. Countervailing Factors

- **Lack of Barriers to Entry**
  Entry of competitors into the market must be likely, timely, and sufficient to prevent the potential anticompetitive effects of a merger.

- **Buyer Power**
  The ability of customers to counterbalance the increase of the market power of the undertakings concerned is a determining factor.
3.5. Countervailing Factors

- **Failing Firm**
  
  Similar to the failing firm defense as recognized by U.S., the EC has been willing to clear “rescue mergers”.

- **Efficiencies**
  
  The new 2004 EC Merger Control Regulation introduced expressly the possibility to take into account the efficiencies resulting from the merger when they are verifiable and benefit the consumers.