

EU ADOPTS NEW MERGER CONTROL REGULATION

On 20 January 2004, the Council of Ministers formally adopted the new Merger Control Regulation (Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2004 O.J. L24/1). The new Regulation will simultaneously come into force with the other major reform of EU competition law, the new procedural Regulation (EC) No 1/2003, on 1 May 2004. The entry into force of the new Merger Control Regulation also coincides with the European Union's enlargement, and is in part a response to the challenges caused by the imminent enlargement.

Background

The Merger Control Regulation, which originally dates from 1989, underwent a first series of substantial amendments in 1997. The new Regulation entirely recasts the rules, even though an important number of the provisions in the existing Regulation remain unchanged. Overall, the EU's merger control regime is highly rated, and there was a broad consensus to preserve the Regulation's main underlying principles, i.e. the 'one-stop shop' principle, the tight deadlines for the review of cases, the legal certainty and hence the predictability.

The new Merger Control Regulation is the result of a long consultation process, which started in December 2001 with a Green Paper issued by the European Commission.

The changes introduced in the new Merger Control Regulation essentially address jurisdiction, the substantive review test and procedure. Within these changes, the following can be highlighted.

Jurisdiction

The new Merger Control Regulation does not modify the turnover thresholds triggering a notification to the European Commission. However, to cope with the problem of multiple national filings, the new Regulation allows the undertakings concerned to ask for the benefit of the one-stop shop if their concentration is capable of being reviewed in three or more Member States. This option offers a significant improvement to the current situation, as it could reduce the need for multiple national filings, and minimise the inherent legal uncertainty, costs and efforts for undertakings and the possibility of conflicting assessments. This is especially attractive in the perspective of a Union of 25 Member States.

However, the new Regulation also provides that any Member State competent to examine the concentration under its national competition law is entitled to veto the request to refer the case to the European Commission. If at least one Member State opposes a referral, the case will not come under the Commission's jurisdiction.

In an effort to optimise the case allocation between the European Commission and the national authorities, the new Regulation makes it possible for the Commission to refer cases which would normally fall under its jurisdiction to the national level in the pre-notification phase. In the same vein, the new Regulation also loosens the criteria to refer notified cases back to the national competition authorities.

Substantive test

One of the most debated issues in the review process was the substantive test to be applied

by the European Commission in the assessment of concentrations.

The current test is based on the concept of dominance, i.e. whether the concentration leads to the creation or the strengthening of a dominant position, as a result of which effective competition would be significantly impeded in the relevant market. Although the Commission has stretched the notion of dominance in its decisions, it encountered the limits and shortcomings of the test in the specific situation of an oligopolistic market structure, where, even in the absence of dominance, a concentration may lead to a significant anti-competitive effect.

Eventually, the compromise was to maintain dominance as the key test, but to provide an opening entitling the Commission to act where it establishes a significant impediment to effective competition. Thus, Article 2(3) of the new Merger Control Regulation provides that a concentration will be declared incompatible with the common market if it *'would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'*. Recitals 25 and 26 of the new Regulation clarify that dominance in its different forms will remain the basic test, and that the broader test will essentially be used to challenge concentrations in oligopolistic market structures.

Procedural changes

Timing of the notification

The new Merger Regulation introduces an element of flexibility both into the timing of notifications and the triggering event for notifying a concentration. Accordingly, the new Regulation abandons the one-week deadline for submitting notifications (without abandoning, however, the principle of ex-ante control). The new Regulation also provides the option to file a notification prior to the conclusion of a binding agreement.

These changes will facilitate the coordination of the EU notification with filings in third countries.

Merger review timetable

The consultation process showed almost unanimous support for a 'stop the clock' option, especially for complex Phase II investigations. One of the shortcomings of the current timetable is that at the end of a complex Phase II investigation, parties may have insufficient time to propose adequate remedies for review and market testing by the European Commission. A limited extension of the time-limits may also help the Commission verify final submissions and finalise its investigation.

The new Regulation introduces an optional extension of Phase II by up to 20 working days (subject to the agreement of the parties) and an automatic extension of Phase II by 15 working days when remedies are offered as from the 55th working day following the opening of the in-depth investigation.

A new feature is that time-limits are now defined in working days and no longer in calendar days, weeks or months. However, the newly defined time-limits basically correspond to the existing time-limits, and the principle of tight deadlines is maintained.

Commission's fact-finding powers

The Commission's fact-finding powers are strengthened under the new Merger Regulation, and brought in line with its powers under Regulation (EC) No 1/2003. More specifically, the Commission can now conduct interviews with any natural person who may be in possession of useful information, and who consents to being interviewed. The new provision fills a gap and allows for oral submissions to be recorded and used as evidence in proceedings. However, unlike Regulation (EC) No 1/2003, the new Merger Control Regulation does not provide for home searches.

The new Regulation also increases the ceilings for fines and periodic penalty payments, in line with the changes introduced in Regulation (EC) No 1/2003.

Further implementation

The European Commission will soon finalise its Guidelines on the appraisal of horizontal mergers, which should provide guidance on the Commission's assessment methods. The Commission also announced a recast of its Best Practice Guidelines.

For further information, please contact:

Koen Platteau (Brussels office): Tel. +32 (0)2 743 43 43

e-mail: koen.platteau@loyens.com

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