The New European Merger Regulation

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On 1 May 2004 a new EC Merger Regulation[1] comes into effect, which introduces significant changes to merger review in Europe. The new regulation will automatically extend to the new member states by virtue of their accession to the European Union on the same date. The four key changes are:

- a new substantive test;
- new mechanisms to facilitate referrals of cases between the EC Commission and Member States;
- longer review periods; and
- enhanced enforcement powers.

1. The new substantive test

The new Merger Regulation changes the test for prohibition from 'the creation or strengthening of a dominant position' to a 'significant impediment to effective competition'.

The test can be seen as a compromise between those who wanted to maintain the concept of dominance as part of the substantive assessment (particularly Germany) and those who favoured the adoption of a 'substantial lessening of competition test', used by the UK, Ireland and several other jurisdictions including the U.S.

The new test is intended to fill a (perceived) gap by covering cases of "unilateral effects" i.e. where the fear is that the merged entity could raise prices even though it will not become the largest player (sole dominance) and without the need of any tacit coordination with other players (joint dominance).

Despite this change, it is unlikely that the new test will result in a sea change in enforcement practice. The Commission has hitherto been able to stretch the dominance test to apply to mergers that it perceived to be harmful.

In the current Oracle/PeopleSoft review, for example, any likely adverse finding would not easily fit into the dominance test. Oracle and PeopleSoft are the second and third largest competitors for high-end business software applications and the combined company would only have around 30% of the market. SAP, the market leader, has more than 50%. It is possible that such a transaction could be interpreted as constituting a 'significant impediment to competition' but not creating or strengthening a dominant position.

Nevertheless, the Commission's theory of harm seems to be based on joint dominance, while the U.S. Department of Justice is proceeding on the basis of a 'unilateral effects' analysis.

As a result, the test is more likely to align language with practice (and hence improve the rigour of the reasoning), rather than lead to additional prohibitions.

A more rigorous and economic based approach is, however, likely to lead to a significant increase in information which has to be provided by the parties. In particular, the Commission will want to review in much more detail the business case for the merger, the financials prepared by bankers and analysts and internal documentation prepared in relation to the merger and markets concerned.

2. Case referrals between the Commission and the Member States

The new Merger Regulation envisages that significantly more cases are reallocated to the authority best placed to undertake the review. The aim is to ensure that cases with a cross border effect are dealt with at EC level, while cases with pre-dominantly local or domestic effects are dealt with by national authorities.

References to Member States

The existing provisions for references from the Commission back to member states have changed little, although the Commission now has the formal power to invite Member

[1] Council Regulation 139/2004 replacing Council Regulation 4064/89.

States to request a referral. The parties still lack the power to initiate a reference after notification, but the new Article 4 (4) now provides for a formal process prior to notification in which the parties can request a ruling on jurisdiction.

References to the Commission

A provision originally designed to allow references by member states which have no merger control laws has recently been used to refer to the Commission cases with a wider than national impact. The new Merger Regulation formalises this practice and to some extent simplifies the process.

Notifying parties can now also request a ruling prior to notification if the merger would otherwise have to be notified in at least three member states. In such a case each member state has, however, a veto over whether or not the referral is made.

Remaining Issues

The key shortcomings of the revised reference procedure is that they are unlikely to enhance jurisdictional certainty and, if anything, will add significant delays.

First, there is still significant uncertainty on the Commission's reference policy. The Commission has promised formal guidance on the situations in which references should be made (or accepted) but this is still outstanding.

Second, the pre-notification procedure adds significantly to the timeline even before the examination of substantive issues: at least 25 additional working days for references to member states and 15 additional working days for references to the Commission.

Finally, the reasoned submission necessary for such a jurisdictional determination will require almost as much detail as the formal notification itself (i.e. the prenotification discussion can only commence once the entire competition case has been examined).

It is consequently unclear how useful the pre-notification process will be.

3. Timetable

No need for a trigger event

The new Regulation introduces some flexibility by allowing parties to notify a concentration before a binding agreement has been concluded, as long as they show a good faith intention to enter into an agreement. Notifications could therefore be made on the basis of a signed Letter of Intent or Memorandum of Understanding.

Parties will therefore be able to gain a time advantage by starting the clock on the review process at an earlier stage (provided there are no confidentiality constraints).

Move to working days

The Commission has changed the method of calculating its binding deadlines from calendar days/ weeks/ months to working days.

As a by-product, the process has become longer: a one month initial (Phase I) investigation has become 25 working days; a six week extended Phase I now takes 35 working days and a four month detailed (Phase II) investigation now takes 90 working days.

Extensions

The new Merger Regulation also introduces an extension of a Phase II timetable by 15 working days where the parties offer remedies to address the competition issues.

In addition, the timetable may be extended by another 20 working days at the request of the parties, or at the Commission's request, with the parties' approval.

A chart providing an overview of the new merger review timetable is attached.

4. Enforcement Powers

Powers of Investigation

The Commission will now have broadly the same powers in merger investigations that it already enjoys in relation to cartel and dominance investigations (except for the power to search the homes of individuals).

The Commission may conduct investigations at companies' premises and ask companies' representatives for explanations of facts or documents in connection with the investigation. Importantly, this is not limited to notifying parties, it can apply also to complainants, customers or competitors.

Most of these powers have in some form existed under the previous regulation and therefore little change in enforcement practice is to be expected.

Fines

The system of fines for supplying incorrect or misleading information has been changed from the relatively modest fixed maximum of €50,000 to 1% of the offending company's group turnover.

In the very few decisions in which the Commission has imposed a fine, the low maximum level has caused some concern (see for example, *Deutsche Post/trans-o-flex* – Case M.1610).

The existing maximum fine of 10% of group turnover for implementation in breach of the suspension obligation or in breach of a condition of a decision has now been extended to cover failure to notify.

This significantly extends the Commission's enforcement toolbox, but we would expect a change in practice only in relation to blatant breaches of the regulation or circumvention attempts.

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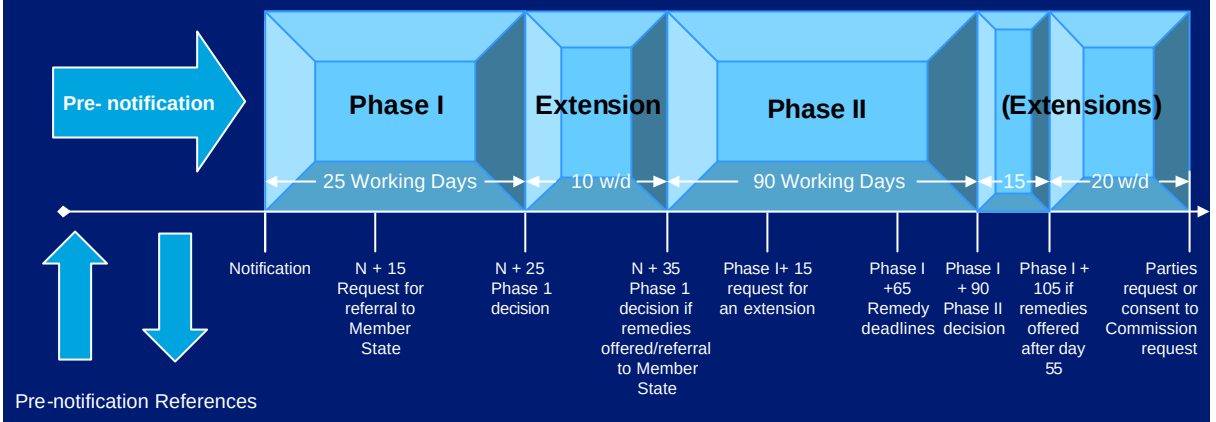
Timeline – ECMR Merger Review



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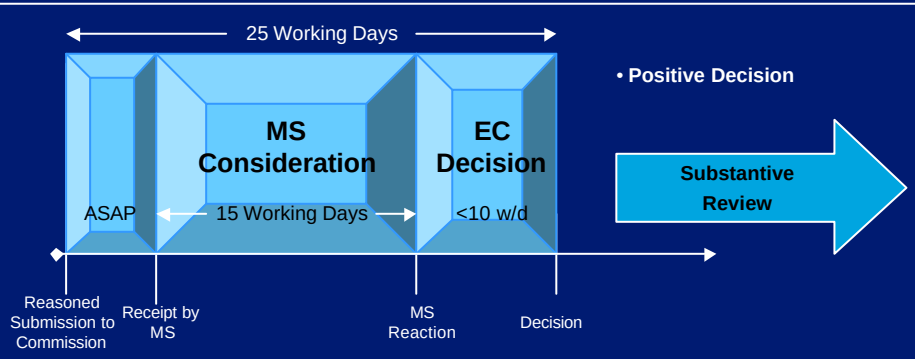
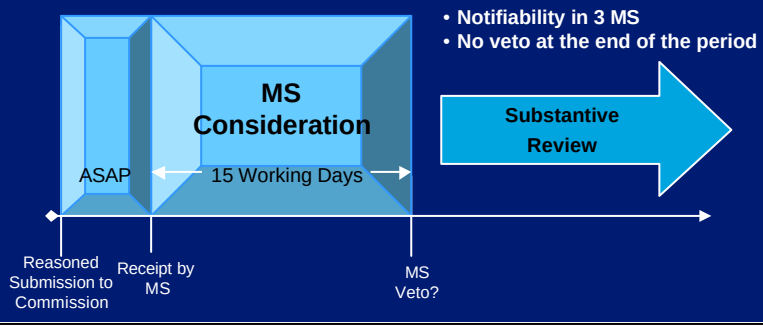
Timeline - Pre-notification References





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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. For more information on the topics covered in this publication or any other antitrust issue, please contact:

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