AntitrustConnect Blog

The one-handed European Merger Simplification Project?

Gavin Bushell (Baker & McKenzie) · Wednesday, June 12th, 2013

Like the European Commission, I am confident that the European Merger Simplification Project will bring benefits for clients. As many commentators have affirmed, I do not doubt that the increase of the currently applicable market share thresholds for the identification of horizontally and vertically "affected markets" by 5 per cent to 20% and 30% respectively will allow more cases to be treated with less pain. Equally, the "safe harbour" for mergers with very small increments in concentration should be welcomed. If this leads to a lesser administrative burden for companies trying to business in Europe during these continuingly difficult times, then all the better.

However, I am concerned that these improvements are accompanied by certain other and ostensibly less noted proposals that risk undermining the aim of streamlining the information and documentation gathering requirements of the Form CO and the Short Form CO. My fear is that this initiative may lead to a false economy, making certain merger notifications as burdensome – if not more so – than they are currently.

More fundamentally, there is an absence from the Merger Simplification Project of any kind of indicative commitment from the Commission to deal with pre-notification procedures in a more efficacious manner. Many of us, I am sure, would find it useful if the Commission were to provide indicative timeframes for handling pre-notification matters, particularly in simplified procedure cases. If the State aid rules can set out non-binding but indicative timetables – then why not for the Merger Regulation? But I digress.

Proposed Section 5.4 of the Form CO and Section 5.3 of the Short Form CO cause the most consternation. A number of issues are apparent, but below are some of the Merger Simplification Project issues that need careful attention. The deadline for the Commission's public consultation is 19 June 2013.

Internal documentation overload? Broader than HSR?

The proposed new language of Section 5.4 would dramatically increase its scope. In fact, colleagues are already speculating that the proposal may result in the Form CO having the most onerous document disclosure requirement out of all global merger control regimes (even compared to the U.S. and Brazil). Whether this in fact will be true remains to be seen.

Yet the wording of the proposed Section 5.4 is clearly broader than before. This broader requirement potentially risks a significant impact on the timing of the pre-notification procedure and the Commission being overwhelmed with irrelevant documentation.

The old Section 5.4 has been reworded to move “analyses, reports, studies, surveys and any comparable documents” to point (iii). The effect of this is that ALL documents “prepared by, or for or received by” the specified recipients would appear to be caught by Section 5.4. This interpretation is reinforced by the use of the words “in particular”, such that the language suggests that Sections 5.4(i)-(iv) only contain illustrative examples. Thus, as currently drafted, Section 5.4 would appear to include any document electronic or otherwise, such as email. At the same time, the 5.4 requirement to provide all documents is not subject to any cut-off date.

The proposed Section 5.4 also incorporates reference to “the board of management” as well as the “board of directors and the supervisory board”. Thus, the scope of the specified recipients is potentially broadened. The “board of management” may not be a term of art for many companies (even though reference is made to “as applicable in the light of the corporate governance structure”). Indeed, it may refer to a large number of individuals within a company. Large multinational companies may arguably have a “board of management” encompassing senior management in each business unit, division or subsidiary as well as at topco level. Greater clarity is required.

Proposed Section 5.4(i) asks for minutes of various meetings where the “transaction has been discussed”. Query whether “transaction” is intended to have a different meaning to “notified concentration”, which is the phrase used elsewhere. Are companies required to produce documents relating to previously considered but abandoned variations or attempts of the notified concentration or other similar deals? Equally, the requirement is not restricted to minutes recording consideration of the competitive aspects of the transaction. Are companies obliged to provide detailed minutes relating to non-antitrust issues such as tax aspects and employment issues? Again, there is no cut-off date for relevant minutes, questioning how far back the disclosure obligation extends.

Proposed Section 5.4(ii) asks for presentations analysing “different options for acquisitions, including but not limited to the notified concentration”. Pursuant to the Merger Regulation, the Commission enjoys jurisdiction only over the notified concentration. It has no jurisdiction over other contemplated but as yet unimplemented or un-notifiable transactions – these are out of scope. Such documents may be of interest but are they really relevant? In addition, the language in Section 5.4(ii) is so broad it could encompass any acquisition, anywhere in the world in any part of the company’s organisation. Again, this category does not have a cut-off date. Concerns arise that much important client time and effort will be expended considering compliance with this apparently open-ended obligation.

Internal document disclosure for simplified procedure cases?

Proposed Section 5.3 of the Short Form CO effectively negates a large part of the benefits of the simplified procedure because it requires the submission of documents. Previously companies avoided the considerable time, resources and effort required for, identifying, reviewing, checking, cataloguing and submitting disclosable documents. This is a particularly negative consequence for concentrations involving no horizontal or vertical overlap (which have been rolled into the point 5(b) concentrations).

In any event, Section 5.3 is too broadly worded (despite being limited by the words “presentations prepared by or for”). Reference is made again to “the board of management”. Section 5.3 also asks for presentations analysing “different options for acquisitions, including but not limited to the notified concentration” and it does not have a cut-off date. Query why the Commission would find it relevant to review such documents – particularly during a simplified procedure.

Section 5.3 should be deleted in its entirety. The Commission remains free to request documentation from parties to concentrations in which it has concerns even though the simplified procedure conditions are met.

Do we understand the concept of "plausible" markets?

Another potentially expansionistic effect of the proposal comes from the revised Section 6 of the Form CO. The concept of "plausible markets" is used – potentially broadening the basis for the substantive appraisal.

The adjective "plausible" does not appear in the Merger Regulation itself. It does however appear in the definition of "reportable markets" in the previous Short Form CO as well as the Commission's existing Notice on the simplified procedure. But this term has now been elevated to main text of the Form CO (as well as the Short Form CO).

Proposed Section 6.1 stipulates that the notifying parties must submit "in addition to any product and geographic market definitions they consider relevant, all plausible alternative product and geographic market definitions (in particular but not limited to alternative product and geographic market definitions that were considered in previous Commission decisions)". Proposed Sections 6.3 and 6.4 also refer to "plausible" relevant product and geographic markets. It is unclear whether the Section 7 and 8 requirements extend to those "plausible" markets identified in Section 6 (the word does not appear thereafter).

Good practice should be to draft Form CO notifications to address genuine alternative product and geographic market definitions that are "economically realistic" (i.e. they make sense from the industry's perspective). "Plausible" suggests an interpretation that is far broader. but what does this really mean? "Conceivable"? "Credible"? "Reasonable"? "Possible"?

Whilst splitting market data to take account of geographic alternatives is typically manageable (e.g. local, national, regional, global), problems can arise with respect to product market alternatives. Very many narrow niches and sub-sub-segments may be deemed "plausible" in certain circumstances, particularly if the Commission's Notice on Market Definition is applied strictly. Does a company, for example, have to provide details and data on a range of markets between "the European snacks and confectionery market" and "the market for the sale of chocolate ice-cream in mobile vans in parks in Brussels on a Wednesday afternoon"?

Without greater clarity as to what is specifically meant by the term "plausible", and what is required to be produced in Sections 7 and 8, there is a material risk of an expansion of the data required to be submitted to the Commission in the Form CO under this approach.

The Commission should define precisely and clearly what is meant by "plausible" (e.g. "generally held to be economically realistic in the industry under review"). Market definition may be a very subjective exercise (even if the term "plausible" is applied in a wide sense), and new or different approaches to markets may be taken by different stakeholders. Therefore, it would also be prudent to clarify that if additional new "plausible" market definitions arise as a result of the market investigation, the conclusion should not be drawn that the Form CO was incomplete.

The entrance to the safe harbour needs a better lighthouse

The proposal to treat concentrations resulting in a minor increment in concentration under the simplified procedure should be welcomed. However, the reference to an increment of 150 HHI is unhelpful (particularly when the references to HHI calculations have been deleted from the full

Form CO).

Greater simplicity and clarity for companies would arise with a clear market share threshold than an HHI threshold (even though the change in HHI can be calculated independently of the overall market concentration on the basis of the market shares of the parties).

With an HHI delta, the threshold in market share terms will vary according to the combination – which is arguably inconsistent with a "bright line" test.
For example, consider the following concentrations:
• Firms A and B have shares of 17% and 5% respectively. Pre-merger HHI ((17×17=289)+(5×5=25)) equals 314. Post merger HHI (22×22) equals 484. Delta = 170. Combined share 22%. NOT A SIMPLIFIED PROCEDURE CANDIDATE.
• Firms C and D have shares of 27% and 3% respectively. Pre-merger HHI ((27×27=729)+(3×3=9)) equals 738. Post merger HHI (30×30) equals 900. Delta = 162. Combined share 30%. NOT A SIMPLIFIED PROCEDURE CANDIDATE.
• Firms E and F have shares of 37% and 2% respectively. Pre-merger HHI ((37×37=1,369)+(2×2=4)) equals 1,373. Post merger HHI (39×39) equals 1,521. Delta = 148. Combined share 40%. A SIMPLIFIED PROCEDURE CANDIDATE.

A very large number of permutations are possible and there is no clear "bright line" test that can be easily applied for the purposes of advising clients without engaging in HHI considerations (made even more complex by the need to consider "plausible" markets?).

Therefore, the HHI threshold should be replaced with a market share threshold (as with the other thresholds in the application of a simplified procedure). A significant impediment to effective competition is unlikely to arise in a concentration where the combined market share is 50% or less and the increment is 3% or less. The Commission retains the right to ask for a full Form CO in any event (e.g. where there appear to be "special circumstances") so this should not be controversial.

Cataloguing economic data and databases should be left to sidebar discussions with external economists

Whilst the information requested under proposed Recital 1.8 of the Form CO is not obligatory, this point is covered sufficiently in Section 3.4.2 of the Commission's Best Practices for the Submission of Economic Evidence and Data Collection. As those Best Practices note, "In the case of mergers, pre-notification discussions should routinely deal with data issues". In appropriate cases, external economic advisors are highly likely to be involved and such discussions will invariably take place in any event in pre-notification (and would not be a part of the Form CO notification procedure). Recital 1.8 risks generating further work for notifying parties less familiar with the procedure. A simple reference to the Commission's Best Practices for the Submission of Economic Evidence and Data Collection should suffice in Recital 1.2 of the Form CO (which already refers to the Best Practices on the conduct of EC merger control proceedings).

Requests for waivers to facilitate international cooperation should be put into context

I am sure all of us welcome the Commission's efforts to engage in increased international cooperation with other competition agencies around the world, particularly in the areas of substantive appraisal and the formulation of remedy proposals in cases with effects in worldwide markets.

Waivers are obviously necessary to facilitate joint discussion and analysis. However, caution

should be used against the need for such waivers and contacts in cases involving purely local or regional markets. In a prior case in which I was involved, which had clearly separate European and North American geographic markets, international cooperation – encouraged by U.S. counsel – led to a very burdensome request in Europe for internal management documents "equivalent to those provided to the U.S. DOJ". This had a detrimental impact on procedural timing, as well as, ultimately the selection of divestiture assets. Perhaps the following words "and the same geographic markets" should be used in this section?

Incomplete contact details are not incorrect or misleading information

Proposed Recital 1.4(c) of the Form CO inserts the words "including instances of missing or incomplete contact details" immediately after the words "Incorrect or misleading information in the notification". I urge caution with this insertion. The use of the word "including" risks making "missing or incomplete contact details" a category of "incorrect or misleading information" (the submission of which may lead to the imposition of a fine pursuant to Article 14(1)(a) of the Merger Regulation).

It is often the case that companies are unable to complete the Commission's template for contact details with all relevant data, even relying on publicly available information. The Commission is often in a better position itself to obtain information from competitors, customers and suppliers than the notifying parties. "Missing or incomplete contact details" should simply be treated as "incomplete information" (for which fines can only be imposed if supplied in response to a formal request for information – but not in the notification itself).

Concluding remarks

So bottom line, the Merger Simplification Project is a good initiative from the Commission, that should be welcomed. But once again, the devil is in the detail. Caution should taken to ensure that the bold initiatives of the policy and strategy directorate to streamline the procedure are not undermined by expansive, imprecise or unclear drafting that may – unintentionally or not – lead to an increase in the actual administrative burden for companies in the day-to-day handling of cases.

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