EUROPEAN COMPETITION LAWYERS FORUM

REPORT ON THE EU MERGER REGULATION - SHOULD THRESHOLDS BE REDUCED?

1. INTRODUCTION

1.1 The European Competition Lawyers Forum is an association of lawyers experienced in the field of European competition law. 61 law firms are currently members with representation from all the Member States of the European Union. The current members of the Forum and certain other details concerning this Association are to be found in the attached Annex 1. All members have been given an opportunity to comment on the report.

1.2 The purpose of this report is to contribute to the current debate on whether the jurisdictional turnover thresholds of the EU Merger Regulation (Council Regulation 4064/89) should be reduced. This report analyses the burden faced by businesses engaged in cross-border mergers and acquisitions that fall below the current thresholds.

1.3 Amongst the considerable benefits to business of the EU Merger Regulation has been the one-stop shop. For transactions caught by the EU Merger Regulation, a notifying party need only make one filing to the European Commission, which has exclusive jurisdiction to review the transaction (save in certain rather exceptional circumstances) and whose decision covers the whole of the European Economic Area of 18 States ("EEA"). The one-stop shop avoids the inconvenience, expense and uncertainty of multiple reviews by the national authorities of the EEA States.

1.4 However, Member States do have an important role to play in controlling mergers in Europe. Certain merger transactions are properly controlled at a national level. For example, it is clear that acquisitions of small companies whose activities are predominantly in one Member State are more appropriately dealt with by national competition authorities under their local law. Each Member State has a merger control system that enables clearances to be obtained more cost effectively in straightforward cases than under the EU Merger Regulation (assuming a filing is made in only one Member State), as is apparent from Table 1 below. It is also more efficient for national authorities to investigate the effects of a merger on competition in small regional markets.

1.5 The more difficult issue is to determine the dividing line between the type of transactions that should be covered by the EU Merger Regulation and those that are properly covered by national merger control regimes. Under Article 3b of the Treaty, the Commission should take action in accordance with the principle of subsidiarity "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". Applying this principle, the key question is whether it is more efficient for national authorities or the Commission to control certain mergers. There is growing concern that a number of transactions are being reviewed inefficiently under the current legal rules because they are the subject of multiple filings under the national merger control regimes.

1.6 This report provides information about the practical effects of the national merger control regimes to demonstrate in a balanced manner the costs and effort involved in multiple filings in merger transactions falling below the current EU Merger Regulation thresholds.

1.7 In this report we analyse:

1.7.1 which EU Member States have introduced some form of merger control and, if so, in what circumstances a filing is either required or considered appropriate.

1.7.2 the effort and cost required to prepare and process relevant national filings.

1.7.3 the time taken by national authorities to process merger filings.

Annex 2 to this report contains a summary of the national laws of the Member States and Norway[1] on merger control which have been prepared in response to a standard questionnaire. The questionnaire and a list of the contributors who drafted the national summaries is also included.

1.8 In the final section of this report we draw some conclusions.

2. MERGER CONTROL IN THE MEMBER STATES

2.1 11 EU Member States have now introduced national merger control regimes. The only exceptions are Denmark, Finland, Luxembourg and The Netherlands. Finland is actively considering introducing a merger control regime. Legislation to introduce merger control in The Netherlands has been proposed and has government support. As a result, it is quite possible that within a few years 13 of the 15 EU Member States will have introduced merger control.

[1] The other EEA states, Iceland and Liechtenstein have no system of control of mergers involving mandatory prior notification although Iceland does have merger control legislation.

2.2 Since the introduction of the EU Merger Regulation a number of Member States, which previously had no national regime requiring the prior notification of mergers, have introduced such a regime, namely Austria, Belgium, Greece, Italy, Portugal and Sweden. These states have largely modelled their national merger laws on the EU Merger Regulation. It is clear that one of the effects of introducing the EU Merger Regulation has been to increase substantially the regulation over mergers within the European Union at a national level. Prior to the introduction of the EU Merger Regulation only 4 Member States had well established national merger control regimes, namely France, Germany, Ireland and the UK. The burden of regulation imposed on cross-border M&A has substantially increased as a result of Member States introducing national merger control for the first time.

2.3 A number of Member States impose mandatory filing requirements on mergers, at least on those involving substantial enterprises, namely Austria, Belgium, Germany, Greece, Ireland, Italy, Portugal and Sweden. In other Member States, mergers giving rise to significant market shares in the country concerned are typically notified for reasons of legal certainty namely in the United Kingdom, France and Spain.

2.4 The amount of information required for national merger control filings will depend on the nature of the issues raised - the more serious the competition issues raised, the greater the amount of information that will generally need to be supplied. The same is true for filings under the EU Merger Regulation.

2.5 We have estimated the amount of effort and cost required to prepare and process notifications in three types of situation:

2.5.1 a straightforward merger between two companies whose businesses are complementary (see Table 1 below);

2.5.2 a more complicated case involving a merger between competitors and a full presentation of the relevant market (the sort of case that would be cleared within a one month period by the Merger Task Force) (see Table 2 below);

2.5.3 a case involving substantial competition issues resulting in a detailed investigation (Table 3 below).

In each case we have compared the effort and cost of filings under the national jurisdictions with one under the EU Merger Regulation.

2.6 In assessing such effort and cost, we have taken a broad view of cost, including both management time and legal costs (whether incurred internally or externally by notifying parties). The particular factors that have been taken into account include the amount of information typically required, the time taken to prepare a filing, and the follow up work with the relevant authorities to the point where a clearance is obtained. We have used as our comparator the effort and cost involved in EU Merger Regulation cases. We have also included national merger control fees. The estimates provided below have not been established on a statistical or scientific basis and are clearly judgemental. However, in our view they provide a reasonably reliable basis for a comparison between the effort and cost of compliance with the EU national merger control systems concerned and that of compliance with the EU Merger Regulation.

TABLE 1
Straightforward Filing

Country	Effort/Cost	Typical timescale for clearance (from date of filing)
Austria	5-15	4 weeks
Belgium	60-80	4 weeks
Denmark	no routine filing	
Finland	no routine filing	
France	20-40	4-8 weeks
Germany	20-40[1]	1-4 weeks
Greece	20-80	4-12 weeks
Ireland	10-25	4 weeks
Italy	80	4 weeks
Luxembourg	no routine filing	
The Netherlands	no routine filing	
Portugal	20	4-7 weeks
Spain	40-60	4 weeks
Sweden	25-50	up to four weeks
United Kingdom	20-60[2]	4-8 weeks
EU filing under Regulation 4064/89	100 (INDEX)	4 weeks

Effort/cost is represented as a proportion of the effort/cost involved in a filing under EU Merger Regulation which is the index base of 100 (see para. 2.6).

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[1] The German estimate assumes that between DM5,000 and DM15,000 are paid by way of fees to the Federal Cartel Office.

[2] The UK estimate assumes that between £5,000 and £15,000 are paid by way of fees to the UK authorities.

TABLE 2

More Complicated National Merger Filing (no detailed investigation)

Country	Effort/Cost	Typical timescale for clearance (from date of filing)
Austria	20-25	4-12 weeks
Belgium	60-80	4 weeks
Denmark	no routine filing	
Finland	no routine filing	
France	30-60	4-8 weeks
Germany	50-75[1]	8 - 16 weeks
Greece	50-100	4 weeks - 24 weeks
Ireland	25-40	4-6 weeks
Italy	70	4 weeks
Luxembourg	no routine filing	
The Netherlands	no routine filing	
Portugal	20-40	4-7 weeks
Spain	50-100	4-16 weeks
Sweden	50-75	4 weeks + 12 weeks
United Kingdom	50-115[2]	7 - 8 weeks
EU filings under Regulation 4064/89	100 (INDEX)	4 weeks

Effort/cost is represented as a proportion of the effort/cost involved in a filing under EU Merger Regulation which is the index base of 100 (see para. 2.6).

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[1] The German estimate assumes that between DM 10,000 and DM 50,000 are paid by way of fees to the Federal Cartel Office.

[2] The UK estimate assumes that between £5,000 and £15,000 are paid by way of fees to the UK authorities.

TABLE 3
National Merger Filing Resulting in Detailed Investigation

Country	Effort/Cost	Typical timescale for clearance (from date of filing)
Austria	50	20 weeks
Belgium	60	15 weeks
Denmark	no routine filing	
Finland	no routine filing	
France	80-100	22 weeks
Germany	80-100[1]	12-16 weeks
Greece	100 and above	12 weeks - 24 weeks
Ireland	50-75	16 weeks
Italy	60	4 weeks + 2 weeks[2]
Luxembourg	no routine filing	
The Netherlands	no routine filing	
Portugal	50-80	4-14 weeks
Spain	100	16-28 weeks
Sweden	50-75	4 weeks + 12 weeks
United Kingdom	100[3]	24-28 weeks
EU filings under Regulation 4064/89	100 (INDEX)	20 weeks

Effort/cost is represented as a proportion of the effort/cost involved in a filing under EU Merger Regulation which is the index base of 100 (see para. 2.6).

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[1] The German estimate assumes that between DM 50,000 and DM 100,000 are paid by way of fees to the Federal Cartel Office.

[2] Can be extended by up to 30 days if additional information is required from the parties.

[3] The UK estimate assumes that between £5,000 and £15,000 are paid by way of fees to the UK authorities.

3. CONCLUSIONS

3.1 The following conclusions can be drawn in relation to the above tables:

(a) Effort/Cost Comparison:

(i) The effort and cost of obtaining clearances in Belgium and Italy are relatively high. The tables suggest that if a straightforward transaction (Table 1 case) had to be notified in both these countries, the effort and cost involved would exceed that of an EU Merger Regulation filing.

(ii) If a straightforward transaction (Table 1 case) is filed in three or more EU Member States, the effort and cost involved is likely in most cases to be comparable with or exceed that involved in an EU Merger Regulation filing.

(iii) If a more complicated transaction is involved requiring the presentation of market information (Table 2 cases) or involving a detailed investigation (Table 3 cases), national merger control regimes involve comparatively more effort and cost. If such cases involve filings in two or more EU states, the resulting effort and cost is likely in most cases to be comparable with or to exceed that involved in an EU Merger Regulation filing.

(b) Time Comparison

(iv) Even in straightforward cases (Table 1), national merger control clearances can exceed 4 weeks. This is so for the UK, Portugal and France where clearances can take up to 7 to 8 weeks and Greece where they can take up to 12 weeks.

(v) In the more complicated cases (Table 2), which would be cleared within one month under the EU Merger Regulation, clearances in a number of Member States could in comparable circumstances take considerably longer, namely Austria, Germany, Greece, Spain and Sweden.

(vi) There are a number of Member States whose competition authorities typically carry out detailed investigations quicker than the Commission. This is the case for Belgium, Germany, Ireland, Italy, Portugal and Sweden. Other national authorities typically take longer than the Commission, in particular the UK.

3.2 There have been a number of merger cases in recent years which have involved more than two or three national filings. Members of the Forum have submitted evidence directly to the Commission and other competition authorities on this issue. We are aware of a number of cases which have involved multiple filings in several jurisdictions. We understand that the Commission has identified at least 27 cases that have involved notifications in more than 2 EU states in the last two years. We are also aware of two recent merger cases which were notified in 10 EU jurisdictions. In addition, in the future the number of cases involving filings in more than two or three jurisdictions is likely to increase given that certain national merger control regimes have only recently been introduced (for example, a mandatory prior notification has only been required in Greece since the beginning of 1995) and because businesses are increasingly active in several Member States. The full burden of national merger control regimes in the EU has for these reasons not yet been experienced by many companies.

3.3 What is evident from our research is that:

(i) There are good grounds on the basis of administrative efficiency for increasing the jurisdiction of the Commission under the Merger Regulation to cover cases that would currently be filed in three or more national jurisdictions. Transactions involving filings in not more than two states are in many cases more efficiently controlled by national authorities than by the Commission.

(ii) This is so in particular given that the Commission analyses the effects of a transaction on all 18 EEA States and gives the notifying parties a clearance decision giving legal certainty in all those EEA States

(iii) Businesses will also be able to obtain clearances quicker under the EU Merger Regulation than they could in a number of national jurisdictions in Table 1 and Table 2 cases. These constitute the vast majority of cases.

3.4 Finally we note that there are other advantages to businesses involved in European cross-border mergers and acquisitions that would flow from increasing the jurisdiction of the Commission to cover multiple filing cases:

(i) Even in Table 1 cases, a considerable effort and cost needs to be devoted by the acquiring businesses to find out (a) what filings are mandatory in the 18 EEA states and (b) what filings should be made on a voluntary basis in those jurisdictions. We have only assessed in the above Tables the effort/cost involved in those jurisdictions where filings are made. Typically in merger transactions significant effort/cost is involved in assessing whether filings should be made in countries where no filings are ultimately made. In addition, significant effort/cost is typically involved in coordinating multiple filings which is not necessarily included in the assessments made in the above cases.

(ii) National merger control rules have not been harmonised and different approaches can be taken by the national authorities in comparable circumstances. In addition, certain national merger control systems give a wide margin of discretion to the national authorities to take into account non-competition issues and this serves to create uncertainty and unpredictability. If a transaction is assessed by a number of national competition authorities applying substantive law which is significantly different, this can lead to a prohibition decision in one or more states and clearances in others. This is inherently unsatisfactory for businesses whose interests are best served by a consistent and predictable application of competition rules.

(iii) If a transaction raises substantial competition issues that can easily be solved by a structural solution, such as the sale of a business, there are considerable efficiencies to be gained if such cases are handled by a single competition authority rather than by several authorities, in particular in circumstances where the businesses involved are established in a number of different jurisdictions. Structural solutions are often complex and require detailed discussions as evidenced by some of the conditions negotiated by the Commission under the EU Merger Regulation. Parallel negotiations with multiple national authorities in such cases can be a complex and time consuming process.

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