INTRODUCTION


1.2. The Commission has now published a revised Draft Implementing Regulation (the Draft Regulation) and associated annexes and has invited public comments on these measures. Baker & McKenzie’s European Competition Law Practice Group welcomes the opportunity to submit its comments on the Commission’s draft merger implementing measures in light of our experience in handling EC merger filings.

SPECIFIC COMMENTS: DRAFT IMPLEMENTING REGULATION

Article 3 - Notifications

2.1. The requirement to submit one original and 35 copies of the notification and a copy burnt on a CD/DVD-ROM seems excessive. Surely the point in having a CD/DVD-ROM made (which will in itself be costly to produce as it will require several hundred pages to be scanned) is to limit the need to have multiple paper copies. We understand that the Commission has developed an Extranet together with the ECN in recent years, and using it to disseminate filings among the NCA’s would seem an ideal use of that system. The Commission has been making innovative use of IT applications in the merger filing process, for example by allowing the use of electronic signatures, and it should build upon the progress it has made by making further use of electronic filing processes.

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2 Baker & McKenzie’s Response is available on DG Comp’s website at: [http://europa.eu.int/comm/competition/mergers/review/comments/ref050_baker_mckenzie.pdf](http://europa.eu.int/comm/competition/mergers/review/comments/ref050_baker_mckenzie.pdf)
2.2. In this context, the Commission also needs to appreciate the cost of physically moving all this material to Brussels. Even from London, an average sized filing (4 lever arch files) generates around EUR1,400 in courier charges. The cost of moving material from, say, Cyprus or Poland, would be significantly higher.

2.3. We strongly suggest that, given the general stated aim of making the merger control “modern [and] more flexible”\(^6\), notifications should only comprise one original paper filing and a copy on CD/DVD-ROM (in any event, such a policy will not be irrevocable since the new merger rules are subject to review in 5 years’ time).

**Articles 15 & 16 - Oral Hearings**

2.4. The protection of the rights of the defence require the Commission to allow the parties to be afforded the widest opportunity to make their case with full knowledge of the issues which are likely to be of concern to the Commission or raised during the course of oral hearings. We therefore propose that Articles 15 and 16 of the Draft Regulation should specify that the Commission will provide the parties with details of all persons who have been invited to attend the oral hearing.

**Article 17 - Access to the file**

2.5. The Commission’s new Best Practice Guidelines\(^7\) make provision for enhanced access to the file by reference to the Commission using its “best endeavours” to provide access to “key documents”. In view of the need to maximise legal certainty as to what is meant by these concepts, we invite the Commission to incorporate these new measures into the text of the Draft Regulation itself.

**Article 20 - Commitments**

2.6. We are concerned that Article 20(2) of the Draft Regulation is not consistent with Article 10(3) of the EC Merger Regulation. This latter provision is designed to automatically extend Phase II proceedings by 15 working days if commitments are submitted after day 55. However, Article 20(2) requires the parties to obtain the Commission’s permission to submit commitments after day 65. This inconsistency should be resolved and we suggest that the parties have a right to submit commitments until day 70 (i.e. 55 plus 15) at the earliest, whilst requiring the parties to obtain the Commission’s consent in the event commitments are submitted after this date until day 85 at the earliest.

2.7. The Commission should recognise that it is not in its interests to prohibit mergers where there remains a prospect of negotiating workable commitments. Adding flexibility to the timetable in the latter stages of Phase II would therefore help to avoid such situations in the future.

3. **SPECIFIC COMMENTS: FORM CO**


\(^7\) Best Practices on the Conduct of EC Merger Control Proceedings:
E-mail Addresses

3.1. The parties should only be required to supply e-mail addresses of competitors, customers and suppliers where these are easily available. It is not always possible under the current system to be able to supply telephone and fax numbers for the appropriate personnel within competitors, customers and suppliers. Whilst we agree that supplying e-mail addresses is helpful, the Commission needs to recognise that this may not always be possible.

3.2. More generally, while the parties should be expected to make every effort to verify contact data (Preamble to Section 1.4), the Commission should also recognise the practical difficulties of obtaining, in particular, appropriate contact names and individual direct telephone numbers on a comprehensive basis. This is particularly true of competitors, where the parties may have no knowledge of the precise corporate structures and the identity of staff in competing businesses.

Section 5.4

3.3. We are concerned that the scope of this Section has been extended to cover documents that are of no relevance to the analysis of competition issues. Valuations in particular seem to have questionable relevance to Phase I competition analysis. To the extent that such documents do address competition issues, they are already covered by the existing Section 5.4 of the Form CO. We therefore suggest that the wording of Section 5.4 should remain in its present form.

3.4. An alternative might be for the Commission to devise a standard "Phase II Information Request" which could cover such other documents and which the parties would know in advance that they would be expected to provide by, say, Day 10 or 15 of Phase II. This is the case in the US as regards second requests in HSR filings.

3.5. In any event, if the revised wording of this Section is retained, it should specify that any documents prepared by legal advisers - whether external or in-house counsel - are excluded from its scope.

Section 5.5

3.6. This Section is unnecessary and should be deleted. To the extent that it covers any documents of relevance to competition analysis of the notified concentration, these will already be covered by Section 5.4 as drafted in its present form.

Section 6

3.7. We note that the new draft Form CO incorporates additional substantial information requirements, which in our view places additional onus on the parties in an otherwise already burdensome process.

3.8. We are particularly concerned about the novel requirement to provide information relating to “other markets”, without further indication as to what these might be. We therefore suggest that Section 6.2.2 of the Form CO should provide illustrations as to the nature of the impact
which a concentration may have on these “other markets”. If the purpose of this Section is to analyse conglomerate mergers, for example, then this should be clearly stipulated. We therefore invite the Commission to provide further guidance as to the scope of analysis required as regards “other markets”.

**Section 9.3**

3.9. We appreciate that this Section is optional, but would prefer confirmation that this Section need only be completed where efficiencies are pleaded as a relevant issue for competition analysis in a particular case. The parties should not be obliged to show efficiencies where there are no competition concerns to start with.

3.10. The Commission should understand that the detail of Section 9.3 makes its completion a challenge. We would propose that the Commission, in practice, take a pragmatic approach towards the precise level of detail they require in any given case.

4. **SPECIFIC COMMENTS: SHORT FORM CO**

4.1. We do not understand why the information required in the Short Form CO as regards the impact of the merger is made by reference to a “reportable” market. The terminology used is confusing.

4.2. We therefore suggest that the terminology concerning markets in the Short Form CO should be the same as that used in the existing Form CO, since all practitioner’s are familiar with these concepts.

5. **SPECIFIC COMMENTS: FORM RS**

5.1. The draft Form RS purports to “simplify and expedite examination of ... reasoned submissions” (*Draft Regulation, Recital 7*). In our view, far from simplifying the process, the draft Form RS defeats the object of an informal "reasoned submission" process.

5.2. Form RS is very similar to Form CO in terms of detail, and will be time consuming to compile in circumstances where time may well be at a premium. Form RS goes well beyond what some authorities (e.g. Bundekartellamt or the Office of Fair Trading) might require in their full national filings. Companies will simply not avail themselves of this route if it is likely to be slower and more burdensome than making separate national filings. If this is the case, then Articles 4(4) and (5) and the reasoned submission process will have failed completely to address the problem of multiple filings.

5.3. Form RS requires substantial revision. In our view, only Section 6 should be necessary as is current practice in respect of briefing notes addressed to the Commission in pre-notification discussions. We would favour transforming Form RS into a general guidance note as to the kind of information that the Commission would ideally require parties to provide. This would grant case officers and parties more flexibility to decide on the precise level of information required in each case. As it stands, case officers will not have the same flexibility in relation to information required by Form RS (*Draft Regulation, Article 6*) as they have in relation to derogations from Form CO (*Draft Regulation, Article 4(2)*).
6. **CONCLUSION**

6.1. We thank the Commission for taking these suggestions into consideration and remain at the Commission’s disposal to provide a further explanation of our comments should this be required.

6.2. If there are any queries in relation to these comments, we would be grateful if all correspondence in this matter is addressed to:

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