EC Merger Regulation contributes to more efficient merger control in EU

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According to a recent Commission report (2) Regulation 139/2004 (the ‘EC Merger Regulation’) has contributed to more efficient merger control within the EU since it came into force on 1 May 2004. Its turnover thresholds have, in most cases, been effective in distinguishing merger cases of EU relevance from those with a primarily national focus. Also, the improved system of case re-allocation (introduced in 2004) has allowed businesses to have their cases reviewed by the more appropriate authority: either a Member State’s National Competition Authority or the Commission’s ‘one-stop-shop’ facility. The report nevertheless identifies certain areas where further reflection may be useful.

1. Background — Objective of the report

On 18 June 2009, the Commission adopted a report on the application of the EC Merger Regulation after five years of operation since its entry into force in May 2004. The report is a stock-taking exercise, the main aim of which is to examine the operation of the notification thresholds provided for by Article 1 of the Regulation. The thresholds are a mechanism for allocating merger cases between Community level and national level. The report also evaluated the operation of the referral instruments provided for by Articles 4, 9 and 22. (3) In a number of areas, the report highlights aspects that merit further discussion, but leaves open the question of whether any amendment to the existing rules or practice is appropriate. The report will serve as a basis for the Commission to assess, at some further stage, whether or not it is appropriate to take further policy initiatives. The report was preceded by consultations with the Member States’ national competition authorities (‘NCAs’) and stakeholders.

2. A system of mutually exclusive competences, jurisdictional thresholds and corrective mechanisms

One important feature of the EC Merger Regulation is the exclusive jurisdiction of the Commission to review concentrations that have a Community dimension. The concept that the Commission should have sole competence to deal with such mergers follows from the principle of subsidiarity. From the viewpoint of the European business community, the Commission’s exclusive jurisdiction also provides the advantage of a ‘one-stop-shop’, which is regarded as essential in keeping the regulatory costs associated with cross-border transactions at a reasonable level. In addition, the Commission’s exclusive jurisdiction to vet such mergers is an important factor in providing a ‘level playing field’ for mergers that result naturally from the completion of the internal market. This is widely accepted as the most efficient way of ensuring that all mergers with a significant cross-border impact are subject to a uniform set of rules.

The division of competence between the Commission and the NCAs is based on the application of the turnover thresholds as set out in Article 1. (4) It is also supplemented by three corrective mechanisms. The first corrective mechanism is the so-called ‘two-thirds

(1) Article 1(2) of the EC Merger Regulation stipulates that: ‘A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.’ Article 1(3) stipulates that: ‘A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.’


(3) The Commission has an obligation to report on these issues under Articles 1(4) and 4(6) of the Merger Regulation.

rule’. The objective of this rule is to exclude cases which contain a clear national nexus to one Member State (1) from the Commission’s jurisdiction.

The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) or to the Commission under Article 4(5) when certain conditions are fulfilled. (2) The initiative is in the hands of the parties prior to notification. Such referrals are subject to approval by both the Member States and the Commission under Article 4(4) and solely by the Member States under Article 4(5).

The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assesses mergers even though they fall below the thresholds of the EC Merger Regulation (Article 22). (3) Conversely, a Member State may, in cases that have been notified under the EC Merger Regulation, request the transfer of competence to the NCA under certain conditions (Article 9). (4)

3. Jurisdictional thresholds

The report concludes that the threshold criteria in Article 1(2) and (3), considered in conjunction with the available corrective mechanisms, operate in a satisfactory way in allocating jurisdiction. (5) Nevertheless, the Commission’s analysis of the merger case data collected by the NCAs in 2007 indicates that there are still a number of transactions which need to be notified in parallel in more than one Member State. In fact, the report identifies at least 100 concentrations which were notifiable in three or more Member States that year. (6) These concentrations together required more than 360 parallel investigations by the NCAs.

A large majority of these cases involved markets which were wider than national or which involved several national (or even narrower) markets. There are, therefore, a number of transactions with significant cross-border effects which remained outside of the scope of the EC Merger Regulation. The report therefore concludes that there is further scope for ‘one-stop-shop’ review.

Available data also suggests that around 6 % of the cases notified in parallel in at least three Member States gave rise to competition concerns. This is a good indication that a number of additional concentrations may be appropriate candidates for review by the Commission when applying the principle of the ‘more appropriate authority’. The negative consequences of parallel proceedings and the potential for contradictory outcomes are particularly important for those cases which raise substantive competition issues.

4. The ‘two-thirds’ rule

As noted, there are three main corrective mechanisms established by the EC Merger Regulation, the first one being the so-called ‘two-thirds’ rule. This rule provides that mergers where each of the parties concerned achieve more than two thirds of their EU-wide turnover in one and the same Member State.

(1) Under Article 4(4), unless the Member State expresses its disagreement, the Commission, when it considers that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State’s national competition law. Under Article 4(5) concentrations which do not have a Community dimension and which are capable of being reviewed under the national competition laws of at least three Member States can be referred to the Commission unless any Member State competent to examine the concentration under its national competition law expresses its disagreement.

(2) For a referral to the Commission to be available under Article 22 the concentration must: (i) affect trade between Member States and (ii) threaten to significantly affect competition within the territory of the Member State(s) making the request.

(3) Under Article 9, a Member State may request that a case be referred to it in either of the following circumstances: (i) the concentration must ‘threaten to affect significantly competition in a market’ and the market in question must be within the requesting Member State and present all the characteristics of a distinct market, or (ii) the concentration must affect competition in a market and the market in question must be within the requesting Member State and present all the characteristics of a distinct market and does not constitute a substantial part of the common market.

(4) m should be noted that only 43 pre-notification referral requests and 25 post-notification referral requests were made between 2004 and 2008 compared to the total number of about 1 530 own-jurisdiction cases dealt with by the Commission over the same reference period.

(5) At least 240 cases were reviewable in two Member States.

(6) For the same reference period, more than 26 000 cases were reported at Member State level.

(7) Most of the cases were reported in France, Germany, Italy, Spain and the UK.
general turnover thresholds globally and within the EU while still having two thirds of their turnover in a single small Member State.

As regards the substance of these cases, the two-thirds rule has in most cases appropriately distinguished between concentrations having a cross-border impact and those that do not. However, there are a small number of cases with potential cross-border effects in the Community which nevertheless fell under the competence of the NCAs as a result of this rule. The report also gives account of how, in a substantive respect, public interest considerations other than competition policy have been applied in a number of these cases. While the exercise of public interest considerations is a feature in many merger control systems which may well be justified, the report highlights the need for a pan-European merger control regime spanning the EU which ensures the protection of undistorted competition, irrespective of which authority is the reviewing agency.

5. Referral mechanisms

The adoption of the recast EC Merger Regulation in 2004 introduced the option for the parties to request the referral of certain concentrations prior to notification to the Commission or the Member States as the case may be. The Commission’s own experience as well as the comments received from the NCAs and stakeholders clearly support the view that this mechanism has considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU. It has substantially improved the allocation of cases between the Commission and the Member States, taking into account the principles of ‘one-stop-shop’ and review by the ‘more appropriate’ authority.

Available information clearly supports the view that these mechanisms have allowed the appropriate authority to handle cases while also avoiding unnecessary parallel proceedings and inconsistent enforcement efforts. It is estimated that this mechanism has allowed the number of proceedings to be reduced to around 150 from almost a thousand potential parallel proceedings during the period between 2004 and 2008. Furthermore, it has facilitated the re-allocation of 40 cases from the Commission to the Member States. Referrals from the Member States to the Commission were vetoed in only four cases and from the Commission to a Member State only once.

Nevertheless, some problems were highlighted, in particular from a procedural standpoint. Stakeholders have expressed concerns with regard to the time taken and cumbersomeness of the referral process. In a large number of cases, these factors are regarded as the main disincentives to requesting referral. In this respect, having regard to the number of multiple filings and stakeholder comments, there appears to be further scope for referrals to the Commission, thereby increasing the use of the ‘one-stop-shop’ facility. Conversely, there may be scope for more referrals in the direction of the Member States.

The report also concludes that the post-notification mechanisms provided by the EC Merger Regulation have operated satisfactorily. These mechanisms also existed under the previous Merger Regulation and have continued to be a useful corrective mechanism following the introduction of pre-notification referrals. This reflects the complementary nature of the two mechanisms. The former allows for flexible re-allocation of cases at the initiative of the Member States or the Commission at any stage of the proceedings.

6. Convergence

When consulted on the experience gained with regard to multiple filings, a large number of stakeholders pointed out that they often meet with difficulties and incur additional cost as a result of diverging national merger control rules. Differences exist not only in determining where jurisdiction should lie but also between the various procedures of the Member States. Prime examples are the duration of the jurisdictional thresholds in some Member States and their interpretation of the standstill obligations. Sometimes substantive rules have also been a source of concern. Many stakeholders therefore suggest that, independently of the allocation of cases between the Community and national level, in order to fully achieve the objective of a level playing field in the common market, efforts towards further convergence of the various national rules governing merger control should be pursued to alleviate difficulties encountered when multiple filings are necessary.

7. Concluding remarks

The report concludes that, overall, the jurisdictional thresholds and the set of corrective mechanisms established by the EC Merger Regulation have provided an appropriate legal framework for allocating cases between Community and Member State level. It finds that this framework has in most cases been...
effective in distinguishing cases that have a Community dimension from those with a primarily national nexus. Notwithstanding this, it concludes that there is scope for further improvement in the current system of case allocation in a number of respects. In particular, there are still a relatively large number of mergers that are notified in two or more Member States. There was also a small number of cases dealt with by the Member States under the two-thirds rule, which nevertheless had a potential cross-border impact. Finally, stakeholders have suggested that case allocation between the Commission and the Member States could be improved through more efficient referral mechanisms or by moving towards automatic re-allocation of jurisdiction to the Commission in cases with a cross-border impact. In addition, increased convergence between the national merger control regimes would in their view be beneficial to businesses as it would reduce the costs incurred and the time needed for cross-border mergers. The report is now with the Council.