British Institute of International and Comparative Law

Competition Law Forum

Introduction

This paper is submitted to the European Commission ('Commission') by the Competition Law Forum ('CLF'),[1] as a response to its public consultation "Evaluation of procedural and jurisdictional aspects of EU merger control".[2] The Commission has, in addition to the consultation questionnaire, provided an opportunity to submit a position paper to be published alongside our questionnaire. The CLF welcomes the opportunity to submit a position paper explaining the CLF's views in more detail. This response does not purport to reflect the views of all CLF members or of their firms or necessarily the views of all individuals in the working group.

The Commission is seeking views on possible improvements of the EU Merger Regulation, in particular:

[1] The Competition Law Forum (CLF) was set up by the British Institute of International and Comparative Law in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The Forum comprises of leading legal practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to competition law and policy. For further information, please see www.competitionlawforum.org or contact its Director, Dr Liza Lovdahl Gormsen, at l.lovdahlgormsen@biicl.org or +44 207 862 5164.

[2] The members of the CLF working group are: Simon Chisholm (Charles River Associates); Simon Pritchard (Linklaters); Mat Hughes (Alix Partners); Aurora Luoma (Slaughter & May); Tim Cowen (Preiskel & Co.). The group's chairman is Liza Lovdahl Gormsen (BIICL).

- Section IV.1 of the consultation seeks comments on the functioning of the EUMR's simplified procedure and investigates whether more simplification could be achieved.

- Section IV.2 of the consultation seeks comments on whether the jurisdictional scope should be broadened.

- Section IV.3 of the consultation seeks comments on whether the referral mechanisms under the EUMR can be improved.

- Section IV.4 of the consultation considers whether additional improvements to the EUMR could be made.

The EUMR's simplified procedure

The consultation seeks feedback on the EUMR's simplified procedure and whether more simplification can be achieved with the possibility of exempting certain transactions from the notification requirement or, at least, introducing a lighter information requirement. It also focuses on the treatment of non-EEA joint ventures ('JVs') or so-called 'extra-EEA JVs', which may require notification under the EUMR even if there is no connection to the EEA.

Before proceeding further, it is perhaps helpful to put these issues in context by having regard to the Commission's statistics as to the outcomes of its Phase 1 merger decisions from 2010 to November 2016. These are summarised below. It is striking that over this period, 96% of mergers were cleared unconditionally. Given that filing is compulsory under the EUMR, it is welcome that the Commission considers carefully how best to reduce the burden and delays caused

in relation to these unproblematic mergers. The simplified procedure is welcome in this regard and is widely used, but it is clearly sensible to consider whether the Commission's resources could be more focussed on potentially problematic mergers by reducing the scope of the EUMR where appropriate and limiting the information burden on the parties to unproblematic mergers.

Outcome	Number of cases	%
Compatible	1934	57.0%
Held to be Compatible on the basis of the Simplified procedure	1325	39.0%
Commitments at Phase 1	81	2.4%
Referred to Phase 2	55	1.6%
	3395	100.0%

The CLF welcomes a simplification of the treatment of certain categories of cases that do not generally raise competitive concerns. We note that non-EEA JVs are relatively uncomplicated and rarely have any spill-over effects. Logically, such JVs outside the EEA only raise concerns within the EEA if they might somehow facilitate competitive coordination within the EEA.[3] However, the Commission rarely reaches adverse findings on the basis of coordinated effects, and the CLF is not aware of any cases where these spill-over effects have been

[3] For example, a non-EEA JV could theoretically increase the sustainability of coordination if a firm can punish a deviating partner by investing less in a joint venture or if this non-EEA JV leads to anti-competitive information exchanges that facilitate coordination within the EEA. It should be noted that these possibilities are highly speculative where a merger does not also reduce the number of competitors in the EEA.

the sole or key basis of adverse findings. Unless, the Commission can provide some statistics as to how many cases are affected by spill-over effects, and that number is significant, the CLF would advocate excluding non-EEA JVs from the scope of the EUMR without residual power to re-open such transactions. Alternatively, another solution would be to allow those JVs to benefit from lighter information requirements. This solution would have the advantage that the benefit of one-stop merger control would be retained, and would counter the risk of multiple national filings, for instance in the case of JVs with limited EEA presence

Point 5a JVs have been subject to the Simplified Procedure since 1994. They are unlikely to give rise to harmful effects in the EEA. Thus, the CLF argues in favour of excluding those transactions from the scope of the EUMR.

Point 5b JVs – mergers without any horizontal and vertical overlaps within the EEA – have been subject to the Simplified Procedure since 2000. In the absence of any horizontal or vertical overlap, they should be exempted from the scope of the EUMR. While the Commission mentions potential harmful effects and conglomerate effects, it does not provide any examples of cases where such effects have been a problem, which justifies keeping those transactions within the scope of the EUMR.

Point 5c transactions – no affected markets – have benefitted from a higher threshold since the previous reform in 2013. This has allowed a number of parties to avoid the full notification procedure. That said, the new Short Form CO's requirement to produce certain internal documents and the need to consider plausible markets mean the Short

Form CO at times ends up being longer than the Form CO. The CLF encourages the Commission to consider whether the current Short Form CO is appropriate and whether the administrative burden can be reduced.

Point 5c transactions – joint to sole control – has also been subject to the simplified procedure rules since 2000. Whether or not such transactions ought to be exempted from the scope of the EUMR depends on whether Article 101 TFEU applies between a parent and its JV. In other words, whether a parent and its JV should be treated as being part of the same economic entity. If so, then it is unlikely to create any effects in the EEA and those transactions should be exempted from the EUMR.[4]

In general, the CLF encourages the Commission to engage in a discussion with the parties at a much earlier stage. It also invites the Commission to produce 'Best practices guidelines on JVs', as JVs can be complicated in new markets and adjacent markets.

Introduction of a value-based threshold in EUMR

The Commission proposes to introduce a value-based threshold (or deal-size thresholds) in the EUMR. This is to capture significant acquisitions where the target does not meet the current turnover-based thresholds.

The debate on how to properly design jurisdictional thresholds is by no means new. The CLF is aware of the arguments in favour of a

[4] If two entities are already treated as a single undertaking for the purposes of Article 101, then there should be a presumption that they are already a single undertaking for merger control purposes.

value-based thresholds and against a turnover-based threshold. By focusing on turnovers, competition authorities might find themselves solely scrutinising specific industries, which involve high-turnovers but potentially low profit margins.[5] This problem is exacerbated in markets where knowledge and information hold high value. A merger regime based on the size of turnover, might not be able to catch acquisitions of innovative start-up companies by big tech firms, by virtue of the low turnover of the target company. There is a concern about missing transactions between platforms where the product is still gaining users so the life-cycle of the industry determines that competition is on the non-revenue generating or free side of a platform, yet to be monetised and thus revenue is negligible.[6] This, however, might underestimate the growth potential of the target company and the competitive constraints, which it could possibly exert.[7] Where the target is much less established, the Commission does seem to miss these and the UK by comparison picks them up through share of supply. To not review these transactions, because no missed prohibition or remedies case can be flagged, does not seem right.[8] However, the CLF is not entirely persuaded that the Commission has made a convincing case for an

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[5] This was acknowledged by the American Bar Association Section of Antitrust Law already from 1990, see 'Comments of the American Bar Association Section of Antitrust Law with Respect to the Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations between Undertakings' (1990) 59 Antitrust Law Journal 245, 252; see also Morten Broberg, 'Improving the EU Merger Regulation's Delimitation of Jurisdiction: Re-defining the Notion of Union Dimension' (2014) 5(5) Journal of European Competition Law & Practice 261, 264.

[6] For example Google/Waze.

[7] See Michael Grenfell, 'Antitrust in the digital age' (Competition Law Forum, 15 November 2016) <https://www.gov.uk/government/speeches/michael-grenfell-on-antitrust-in-the-digital-age> accessed 13 December 2016, also stated that the UK regime does not face such a problem.

[8] For example *Facebook/Whatsapp* and *Facebook/Instagram* the merging parties are now closest "competitors" in social networks and messaging respectively. Similarly, *Google/Waze* – Google is more readily sharing data between the two but absent the deal, it is not unlikely that Google would have invested to obtain the data it now gets from Waze.

‘enforcement gap’ in the current turnover-based thresholds test. The CLF notes that the most often recent cited transaction, which fell below the thresholds in the EUMR, is *Facebook/Whatsapp*. Despite being below the EUMR thresholds, the transaction ended up being reviewed by the Commission following a referral request. Thus, it is a good example of the referral procedure working well, rather than an argument in favour of changing the thresholds in the EUMR. Moreover, the Commission cleared the *Facebook/Whatsapp* transaction unconditionally. Thus, the Commission ought to provide some examples of previous cases, which fell below the EUMR turnover-based thresholds, but ought to have been prohibited or otherwise subject to remedies. It would also be appropriate to consider whether any such enforcement gap could be better addressed by ensuring that the referral procedures operate efficiently. It is also appropriate to consider whether looking at more mergers by extending the scope of the EUMR would be a good use of the Commission’s scarce resources.

Another jurisdiction operating with a value-based threshold is the United States. Germany is currently in the process of amending the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) to add such thresholds to bring into the remit of merger control high-value transactions between low-turnover entities. The German legislator was particularly aware of recent mergers in high-technology markets which fell below the turnover thresholds in national legislation. According to an explanatory note from the German Federal Ministry for Economic Affairs, the “value of the consideration” will be interpreted very broadly and will include all tangible and intangible assets, shares and other payments in kind, or otherwise, that the seller receives from the purchaser in connection with the transaction. The value of all liabilities assumed by the

purchaser will also be included. This is contrary to the treatment of such liabilities under the United States merger filing rules applicable to stock and non-corporate interest acquisitions.

In the CLF's view, neither of these two regimes are good examples for Europe to follow. While the EU can learn from the US regime, the latter has a number of exemptions,[9] which result in high-value transactions in which the target's sales levels are low and would likely not be notifiable if they involved non-US companies. Since the EU is trying to capture non-EEA transactions including US parties, the US regime would probably not appeal to the EU. The German regime, if approved, will operate with very low and wide thresholds, which is not ideal either.

To decide whether or not value-based thresholds in the EUMR are a good idea, depends partly on how the thresholds are set. The CLF would be interested in knowing:

1) The geographic area. Without actual sales or supply within an area it seems to risk jurisdiction being too permissive.
2) The definition of value, e.g. how to value goodwill;
3) The actual value (number) of the threshold. The cost would be disproportionate if thresholds are set too low due to the number of transactions being notified;
4) How value-threshold is being established;
5) What types of transactions the Commission is trying to review.

[9] For example acquisitions of foreign assets and voting securities of foreign issuers are exempt from notification unless the target meets certain US asset value or sales thresholds.

Until we have some more concrete answers to the above, the debate is rather abstract. If the Commission is changing the EUMR, it will have an impact on national merger regulations. It is important that the Commission considers the impact on the national merger control as lack of coordination can lead to inconsistent approaches at the national level and EU level.

Finally, the Commission may be particularly concerned with transactions in the pharmaceutical sector and the digital industry, which holds commercial valuable data. We acknowledge the lively debate on whether these sectors merit more rigorous competition scrutiny, by virtue of the speed with which they are changing and the difficulty of addressing market power once established.[10] In this regard, whatever approach is taken, sector-specific tests are far from ideal, and the Commission is encouraged to adopt a general test, if at all.

The EUMR's referrals mechanisms

The consultation seeks comments on whether the referral mechanisms under the EUMR can be improved.

Article 4(4) of the EUMR was introduced on 1 May 2004. It entails the right of the notifying parties to submit to the Commission that a concentration may significantly affect competition on the market of a Member State that has the characteristics of a distinct national market, so that the merger should be reviewed at the level of the relevant

[10] This debate inevitably brings into question the ability of traditional concepts of antitrust in digital markets.

Member State despite having a Community dimension. Procedurally, the parties must submit a Form RS to the Commission showing that the merger in question has a significant effect on competition in a distinct market in one or more Member State(s). The Commission's decision to refer the merger to the relevant Member State will be based on whether it agrees with the parties that there is a distinct market in the Member State(s) and whether competition would be significantly affected in that market. Unlike Article 9, where the Commission can decide to refer a merger back to the Member State after the merger is notified, Article 4(4) relates to a situation where the undertakings concerned inform the Commission prior to notification that the concentration may significantly affect competition in a market in a Member State. Referrals to the Member States by the Commission under Article 4(4) occur far less frequently than referrals to the Commission pursuant to Article 4(5). The CLF does not have any strong views on whether or not to remove the provision from the scope of the EUMR.

Since 1 May 2004, Article 4(5) of the EUMR has allowed the parties to a merger, or those acquiring joint control, faced with the obligation to file in three or more Member States, to make a reasoned submission prior to notification to the Commission seeking to have the concentration examined and cleared under the Merger Regulation. The purpose of the request is to obtain Commission jurisdiction in a multijurisdictional merger, where national merger notification thresholds are met in three or more Member States, but not the thresholds for a Community dimension concentration. The Commission sends the reasoned submission to all Member States and they have 15 working days to indicate whether they agree or disagree. In the absence of such an objection, the concentration will be deemed

to have a Community dimension. Much like with Article 4(4), the CLF does not have any strong views on whether or not to remove the provision from the scope of the EUMR.

The original idea behind Article 22 of the EUMR was that some countries without merger control could refer a merger to the Commission. It was the Netherlands and Italy that raised this particular concern. To allay their anxiety, Article 22(3) – the so-called Dutch clause – provides that a Member State can request an investigation by the Commission where a concentration involves undertakings, each of which generates more than two-thirds of its turnover in one and the same Member State without the merger having a community dimension. The Commission is permitted to use its powers to investigate a merger that would otherwise fall below the EUMR thresholds and outside the Commission's jurisdiction.[11] This is a benefit, but there is no doubt that referral under Article 22 adds significant delay to the merger review process. The Commission is proposing to expand its jurisdiction to the entire EEA. The CLF does not have any strong views on this specific provision However any reform should ensure that under Article 22 only member states with competence under national merger rules could join (or veto) such a request and the European Commission would have competence to review transactions only in Member States which have such competence, rather than for example the entire EEA; unless the relevant market is actually EEA-wide. This would reduce the current uncertainty in the process and seems appropriate since, as pointed

[11] Use of Art 22(3) by a single Member State is likely to be rare, since all the Member States, with the exemption of Luxembourg, now have a system of merger control.

out, almost all Member States now have their own merger control regimes.

Additional improvements to the EUMR

Section IV.4 of the consultation considers whether additional improvements to the EUMR could be made. The CLF does not have anything to add to this section of the consultation.