The Impact of the Amendments to the EC Merger Regulation (ECMR)

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SUMMARY VIEWS

The revisions to the ECMR consist of a number of procedural and substantive modifications including changes in relation to the notification triggering event, the merger control timetable, the rules on jurisdiction, and the substantive test for the assessment of mergers.

The main impact of these changes will be to introduce more flexibility into the EU merger control process. The key features of the new regime that companies should be aware of are as follows:

- **There are now more ways in which a transaction may be transferred from the jurisdiction of national competition authorities to the European Commission and vice-versa.** As part of the amendments, parties to a transaction notifiable at a national level now have the opportunity, in some instances, to request that it be dealt with under the “one stop shop” system of the European Commission or, in other circumstances, that a transaction caught by the ECMR be reviewed by a national authority.

- **There will be more flexibility for companies in relation to the timing of a merger filing.** This, combined with a general lengthening of the standard review process, and the ability now for the parties to extend those periods if necessary, is intended by the Commission to mean that there will be more opportunity to manage the filing process to ensure: (a) co-ordination with other authorities including the US anti-trust authorities; (b) that there are no unnecessary Phase II investigations; and (c) that there is a thorough assessment of the most complex cases.

- **The substantive test for the assessment of mergers has been broadened to enable the European Commission to prohibit mergers which do not give rise to either single or joint firm dominance but which nevertheless significantly impede competition in the market.** Although the Commission takes the view that, dominance will remain the main yardstick, the new test does seem to allow more scope to apply a US “substantial lessening of competition” type analysis.
NEW WAYS IN WHICH COMPETENCE CAN BE TRANSFERRED FROM NATIONAL AUTHORITIES TO THE COMMISSION AND VICE VERSA

Under the current system Member States may, in certain circumstances, refer a transaction to the Commission and in other cases may request that a transaction that is within the competence of the European Commission be referred back to a Member State. Parties to a transaction now have similar rights to request that transactions be referred from one authority to another.

Request to benefit from the “one-stop shop” procedure

Under the revised ECMR, where a transaction is outside the jurisdiction of the Commission, the parties will be able to request that the European Commission nevertheless takes jurisdiction where the transaction is subject to merger filings in at least three of the 25 Member States. Where none of the competent Member States object within 15 working days of receipt of such request, the transaction can benefit from the “one stop shop” review process of the European Commission.

With the addition of ten new Member States to the EU on 1 May this year\(^1\) there is an increased likelihood that transactions will be notifiable in three or more Member States. Companies will therefore increasingly be faced with a need to choose between making multiple filings or requesting the benefit of the one stop shop Commission review process.

As any such request must be submitted before any national notifications are made, this issue is one that should be considered at an early stage of the process - and certainly well in advance of the signature of any transaction agreement. Early notification should help avoid a situation in which national filing requirements are triggered, and filing deadlines missed, before such request is determined.

It remains to be seen how the various national authorities will exercise their veto rights and to what extent companies will have the opportunity to influence their decision-making process.

Request for a referral to a national authority

Under the new ECMR, the parties will also have the right to request that a transaction which falls within the jurisdiction of the European Commission under the ECMR is referred back for review to a Member State. Under the current regime, only the Member States themselves can make such a request. In general terms, such request can be made where the transaction would adversely affect competition in a distinct market within that Member State.

If the Member State concerned does not raise any objection within 15 working days of receipt of the request then, with the Commission’s agreement, the whole or part of the transaction may be referred for review by that Member State.

\(^{1}\) Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia
Again, timing is a factor here although is somewhat less of a concern in the sense that, if the referral is denied, there is no specific timing pressure in relation to the submission of the merger filing to the European Commission.

A LESS RIGID MERGER REVIEW PROCESS

The amendments to the ECMR include the abolition of the requirement that a transaction agreement be filed within 7 days of its signing; notifications will now be accepted by the European Commission prior to signature of a binding agreement provided that a firm intention to enter into the arrangements are demonstrated.

Although the Commission has for some time taken a flexible approach to the filing deadline and, more recently, in relation to the triggering event, these changes confirm that parties will now have considerable flexibility in relation to the submission of a filing.

This aligns the process more closely to the US process and is likely to be of assistance when considering co-ordination with the review process in the US and other jurisdictions. It may also be a factor in managing more complex cases where preliminary contact with the Commission can be used to avoid a Phase II investigation or indeed unpleasant surprises during a Phase II proceeding. It should however be noted that as clearance is required before a transaction may be closed there may be commercial pressures that determine the ultimate filing date.

The standard Phase I and Phase II review periods have been modified. The change of the Phase I review period from one month to 25 working days is primarily a reflection of the Commission’s aim to move from weeks to days in the ECMR. It will not significantly alter the existing review period. However, it is the changes to the Phase II review period that are more notable.

The general Phase II review period has been extended from four months to 90 working days – effectively a six week extension. Further, where commitments (e.g. offers to make divestitures) are offered in Phase II, an additional three weeks will be added to the Phase II review period. The exception to this is where the commitments are offered at an early stage of Phase II (i.e. before day 55), in which case there will be no extension of the 90 day review period.

Most significantly, the parties and the Commission (with the parties’ agreement) will have the ability to extend the Phase II period by up to a maximum of 20 days.

Our understanding from talking to contacts at the Commission is that there is an expectation that these changes will provide a better opportunity to give full consideration to the more complex cases that are generally the subject of Phase II investigations. Moreover, the parties themselves will have the ability to extend the review period where they believe it is in their interests to do so.

Thus, for those undertakings whose transactions are subject to Phase II review, there will be strategic timing issues to consider in relation to: (i) when to offer commitments (if any) and, (ii) the circumstances in which to ask for the review period to be extended.
THE NEW SUBSTANTIVE TEST FOR THE REVIEW OF MERGERS

Perhaps the most controversial change to the ECMR is the introduction of a new test for assessing mergers which is no longer based solely on the concept of dominance. The new test provides that a transaction may be prohibited where it “significantly impedes effective competition….in particular as a result of the creation or strengthening of a dominant position”

The Commission resisted calls for a wholesale switch from a dominance-based test to a test based solely on “a substantial lessening of competition” as applied in other jurisdictions such as the US and the UK. Instead they have effectively turned round the wording of the existing test to focus on a significant impediment to competition while specifying that the creation or strengthening of dominance is still an important way in which that test may be met.

In Recital 21 of the revised ECMR the statement is made that the new test is most likely to be used in relation to oligopolistic markets. Although this is an expression of intent, it does not preclude use of the new test in other circumstances. However, companies should be aware that, where the transaction takes place in oligopolistic markets or creates the circumstances for oligopoly, the Commission may use this test to prohibit transactions that it considers give rise to anti-competitive effects, without going through the process of examining whether there is joint dominance.²