



The European Approach to Fast-Track Merger Control

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MOFCOM Sino-EU Workshop
Kunming, October 24, 2013

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European Merger Control - Background

- The EU Council's Merger Regulation ("EUMR") governs all concentrations with a European Union dimension
- EU Member State merger control regimes (in 27/28 States) apply:
 - to concentrations that do not have an EU dimension and
 - to transactions that do not qualify as concentrations under the EUMR, but are treated as concentrations under the applicable national law
- There are significant differences between these regimes – including in:
 - filing obligations and thresholds
 - the concept of "concentration" (e.g. JVs, acquisition of control, etc.)
 - the substantive test (SIEC vs. SLC vs. dominance)
 - remedies
 - the duration of proceedings
 - information to be provided, and
 - **the existence of fast-track proceedings**

European Merger Control – Background (2)

- Simplified procedure (including short form notification) is available at the **EU level** and in 16 Member States – *e.g.*:
 - Finland
 - France
 - Italy
 - Spain
- Nine Member States require full notifications but are satisfied with less extensive information for transactions with no competition issues – *e.g.*:
 - Austria
 - **Germany**
 - Ireland
- In most European countries with fast-track procedures, the majority of cases qualify for the fast track process
- Only two Member States (Bulgaria and Cyprus) have no expedited review at all

Simplified Procedure - EU

- **2005 Simplified Procedure Notice** allows for Short Form CO where:
 - Merging parties have no horizontal overlap/vertical relationship; OR
 - Combined share is less than 15% (horizontally) and individual or combined shares are less than 25% (in any market vertically); OR
 - The transaction Involves a JV with no or negligible activities in the EU; OR
 - The transaction involves a change from joint to sole control.
- In 2011/2012 approx. 60% of cases notified qualified for simplified procedure
- Commission estimates simplified procedure saves companies $\frac{1}{3}$ to $\frac{1}{2}$ of filing costs and burden

**Commission completed consultation process
on proposed revisions this summer**

Proposed Changes To Procedure - EU

- Proposed adjustments to rules meant to:
 - Extend the scope of simplified procedure to additional cases that are unlikely to raise competition concerns by:
 - Raising simplified procedure market share thresholds for horizontal overlaps/vertical relationships to 20%/30% (from 15%/25%)
 - Allowing simplified procedure in cases with very small increments in market share (HHI delta < 150 and combined share < 50%)
 - Update and streamline the forms that merging parties must file with the Commission to notify a merger
 - Reduce burden on the notifying parties and on the Commission in cases unlikely to raise competitive concerns

The Commission estimates that 70% of notifications will qualify for simplified procedure under the new rules



Summary of Information Required - EU

Europe - Currently

- General information on parties and concentration
- Market shares – including for possible alternative market definitions
- Contacts for top 3 competitors
- Information on cooperative JVs

Not Required:

- Section 5.4 documents
- Information on imports, production, capacity, distribution, prices, supply and demand, pipeline and R&D, market entry
- Contact details for customers, potential entrants, trade associations

Europe – Proposed Changes

No reportable markets:

- Only general information on parties and concentration and reasons simplified procedure applies

If horizontal or vertical “overlaps”:

- Section 5.4 Documents (except for JVs or changes from sole to joint control)
- Market share data on *all plausible* alternative market definitions
- Contacts for top 3 competitors
- More detailed information if parties have combined horizontal shares of 20% or more – including information on market concentration, pipeline products, etc.

Notification Regime - Germany



- No formal fast-track review or simplified procedure – all notifications must comply with statutory information requirements (Sec. 39 ARC)
 - Basic information on the structure of the concentration
 - Basic information on parties and affiliated undertakings
 - Turnover information
 - Market shares for each undertaking and affiliate, except where the parties ‘ combined share is < 20% within Germany
- While not formally required in cases that do not raise competitive issues, parties generally provide a basic competitive assessment.
- **Note:** Detail required to be produced in German filing comparable to EU simplified procedure – particularly in cases that do not raise issues
 - FCO can require more detailed information from the parties if it sees possible competition concerns (just as the European Commission does)

Timing and Mechanics – Simplified Procedure

Europe



- Pre-notification contacts encouraged by Commission two weeks prior to filing – primarily to resolve market definition questions
- Upon filing, Commission publishes names/countries of parties, nature of the transaction, econ. sectors involved and fact that concentration may qualify for simplified procedure
- Unless Commission (exceptionally) requires filing of full Form CO, Commission issues decision no later than 25 working days from filing and as soon as 15 working days from filing

Germany



- No mandatory or encouraged pre-notification
 - Only occurs in difficult cases
- Cases involving no or limited overlaps generally cleared well within first phase deadline (*i.e.* one month from filing) – often after one or two weeks.

Fast-Track Decisions

Europe



- Commission generally issues 2-page summary decision where no competitive concerns (including in cases where it received full form notification)
- Commission publishes notice of decision in its Official Journal
- Public version of decision is then made available on Commission's website; includes:
 - Background on the transaction
 - Statement that the transaction is compatible with the European common market
- No competitive assessment

Germany



- FCO issues clearance letter stating transaction does not meet prohibition requirements – no substantive analysis
- FCO publishes information that transaction has been filed
- Not a formal decision that can be challenged by third parties in court

Key Conclusions

- Whether formalized - or applied as part of a Phase I analysis - fast-track merger procedure for transactions unlikely to raise competitive concerns have been extremely successful in Europe
- This has resulted in:
 - Substantial cost savings and burden reduction for both the parties and the reviewing regulators
 - More efficient resource allocation, with regulators able to focus limited resources on more complex cases that raise competition issues
 - Increased transparency and legal certainty for merging parties
 - Expedited processing of transactions, which has meant transactions have closed sooner and efficiencies have been realized and passed-on to consumers sooner



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