



Session I – Planning and running merger investigations

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Sophie Moonen

European Commission, DG Competition

The views expressed are personal to the speaker

Overview

- *Composition of case team*
- *Merger Investigation Plan*
 - **Planning in pre-notification**
 - **Planning in Phase I**
 - **Planning in Phase II**
- *Interaction with notifying parties*
- *Interaction with third parties*
- *Consultation of other Commission services*
- *Interaction with other EU/EEA authorities (national competition authorities, national regulators)*
- *Interaction with competition authorities outside EU/EEA*

Case team composition

- *Case allocation request – useful information for staffing:*
 - Description of proposed transaction
 - Expected timing of first draft Form CO and notification
 - Link with prior cases
 - Complexity of the case
- *Case team: one case manager, 2 to 5 case-handlers depending on complexity of the case; members of Chief Economist Team in complex cases*
 - Existing workload; availability for the timing of the case
 - Prior expertise in complex mergers
 - Sectoral knowledge
 - Mix of skills (lawyers, economists, others)
 - (Rarely) secondment from national authority or regulator or other Commission service
 - Language needs of the case

Merger investigation plan

- *In terms of « procedure »:*
 - Timetable
 - Resources (case team, IT tools, etc.)
 - Involvement of third parties, other services, Member States
- *In terms of « substance », issues to be reflected upon:*
 - Possible theories of harms and key substantive elements on which these can be built or be safely dismissed (e.g. market definition, entry barriers, closeness of competition, etc.)
 - Reliable evidence already available in the file?
 - Arguments and data presented by the parties to be checked in the market investigation?
 - Types and sources of evidence needed to reach a decision, and how to ask for it most efficiently?

Planning in pre-notification

- *Pre-notification is a crucial stage*
 - To get understanding of the markets concerned
 - To focus the investigation
 - To plan timetable and resources
- *What needs planning?*
 - Timetable: date of notification
 - Possible jurisdictional issues
 - Completeness of information in Form CO
 - Possible pre-notification investigation
 - **Planning the first phase market investigation**
 - Different approach in cases already expected to require an in-depth investigation (longer term planning)

Planning the first phase investigation

- *Procedure:*
 - Notification, market investigation (requests for information and follow up), state of play meetings, deadline for submission of remedies, decision (including ISC)
 - Case team member availability (workload, holidays)
 - Tight timing: 2.5 weeks to form a view
- *Substance:*
 - Scope of the market investigation: no market investigation, markets to be investigated, issues to be investigated (market definition, market shares, competitive dynamics, entry barriers, theories of harm)
 - Type of investigation: requests for information, meetings, site visits, internal documents, data, etc.
 - Possible market test of remedies

Planning the second phase investigation - Procedure

- *Heavier procedure for adoption of the decision*
 - Need for a **detailed case calendar** (regularly updated)
- *Procedural milestones:*
 - Access to key documents after the 6(1)(c) decision
 - Market investigation
 - Meetings with Commissioner
 - State of play meetings
 - Deadline for submission of remedies and remedies negotiations and market test
 - Statement of objections, including interservice consultations; access to file; and possible hearing
 - Advisory Committee
 - Decision (2 interservice consultations)

Planning the second phase investigation - Substance

- Focus of the market investigation: market definition, competition dynamics and entry barriers, theories of harm/effects of the merger, counterfactual, efficiencies, failing firm defense, remedies
- Table with theories of harm, parties' arguments in reply to Article 6(1)(c) decision, counterarguments and evidence needed
- Case-shaping meeting; possible panel
- Type of market investigation: requests for information, requests for internal documents, site visits, meetings and conference calls with third parties, economic studies
- Involvement of CET (issues, useful data, type of economic assessment)
- Working methods (e.g. single document compiling evidence gathered, allocation of tasks within case team, e-mail communications, etc.)
- Cooperation with other competition authorities

Interaction with notifying parties

- *Pre-notification phase:*
 - Comments/questions on drafts of Form CO
 - Meetings to present the transaction and affected markets
 - Conference calls
 - Possible site visit
- *First phase:*
 - Requests for information (formal and informal)
 - State of play meeting on day 15 (one week prior to deadline for phase I remedies on day 20)
 - (if applicable) Meetings to discuss remedies
 - (if applicable) State of play meeting after remedies market test

Interaction with notifying parties

- *Second phase:*
 - Access to "key documents" from first phase and reply to Article 6(1)(b) decision
 - Requests for information (generally formal)
 - Meetings (e.g. to discuss economic studies presented by parties)
 - Conference calls
 - Possible site visits
 - State of play meetings at milestones of the case: after adoption of 6(1)(c) decision; after Phase II market investigation; after reply to Statement of Objections; after market test of remedies
- Meetings to discuss remedies

Interaction with third parties

- *Pre-notification:*
 - Possible requests for meetings and submissions from third parties
 - Possible limited market investigation in pre-notification (calls or requests for information)
- *First phase/second phase:*
 - *Market investigation through formal requests for information (including requests for data or internal documents – but confidentiality issues); possible adoption of request for information by decision if lack of cooperation and information needed*
 - *Meetings and submissions from active third parties; conference calls*
 - *Preparation of access to file/data rooms*

Interaction with other Commission services

- Other associated Commission services (depending on the sector concerned), but in any event the Legal Service
- Mostly in the context of inter-service consultations on draft decisions, draft statement of objections
- Other Commission services may provide input in the investigation due to sectoral knowledge (e.g. energy, transport, telecoms)
- Other Commission services attend hearing and Advisory Committee

Interaction with other EU/EEA authorities

- National competition authorities or national regulators
- Information about procedural steps and substantive outcome of the merger review
 - Regular conference calls
- National authorities may provide input in the investigation due to sectoral knowledge (e.g. energy, transport, telecoms)
- Receive Form CO, statement of objections, remedies (waivers required for regulators), decisions
- Attendance at hearing
- Advisory Committee (one national competition authority is rapporteur; adopts opinion)

Interaction with competition authorities outside EU/EEA

- On the basis of **waivers** provided by the parties and third parties
- Information about procedural steps and substantive outcome of the merger review
 - Regular conference calls
- If allowed by the waiver, or with cooperation of the parties/third parties: possible access to Form CO and replies to market investigation; possible exchange of interesting internal documents
- Coordination on remedies design