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## A move to self-assessment in mergers

Stephen Kinsella asks whether it is time to abandon compulsory notification in favour of self-assessment for mergers



### **Stephen Kinsella**

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# A MOVE TO SELF-ASSESSMENT IN MERGERS

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It may be hard for some to believe now, but when the European Commission was first given jurisdiction over large mergers in the 1989 Merger Control Regulation (which came into force in late 1990) it was enacted in the face of substantial opposition and scepticism. Many commentators expressed reservations that the commission was bound to fail in its task. Some of the objections turned on substantive issues but even more of them were essentially procedural. In particular, how could an organisation which routinely took two or three years to review a simple notification of a commercial practice be expected to handle potentially complex mergers in large numbers and in a fraction of that time? References to “old dogs” and “new tricks” abounded. There was widespread concern that the tight deadlines which were imposed as part of the bargain for being given these powers would prove impossible to respect, and there was much discussion of the consequences of those fixed time limits expiring without a decision.

In the event those fears proved largely baseless. The planning that went into the selection and training of the Merger Task Force paid off, and with one minor exception which ended up as a mere footnote in EU merger control history,<sup>1</sup> the process ran relatively smoothly. Even at its peak of 400+ cases per year,<sup>2</sup> deadlines continued to be met. Moreover, once the commission learned the lessons of its “annus horribilis” with a flurry of successful appeals in 2002,<sup>3</sup> relatively few filings resulted in appeals against decisions, be they clearance or prohibition. On this point, Levy on European Merger Control Law recorded in 2010 that “only 80 of the approximately 4,200 decisions rendered by the commission have been appealed.”

Nevertheless, there were others who began to wonder whether the one-stop-shop had become a victim of its own success. To

some extent it could be said that transactions became larger and more complex while the failure or refusal to index the thresholds meant that more deals fell into the net. But what really happened was that the involvement of third parties and the potential for appeal, together with disproportionate risk-aversion prompted by the few successful appeals, had the predictable consequence that the enforcers felt under pressure to leave no stone unturned. For notifying parties this essentially meant that the demands for data grew exponentially. The cost of engaging in the process, even in the absence of filing fees, rose concomitantly. At the same time the deadlines in the Regulation became increasingly illusory, whether because of more frequent use of “stop the clock,” or even use very late in the process of the power to declare notifications incomplete.<sup>4</sup>

Inexorably over time and in an increasing number of cases, the point at which the clock was allowed to start was pushed back even further. Whereas at the outset it had been possible to consider filing a Form CO after an introductory phone call, companies and their advisers grew accustomed to routine requests for one, two or even more drafts in complex cases before filing would be permitted. Add to that the further complications caused by stretched resources or holiday periods, and it could often be many weeks before a filing was either permitted or advisable.

Yet despite all these reservations, the Merger Regulation was held up as a success. In the overwhelming majority of filings the right decision was taken even in the most difficult cases. And with respect to the more routine cases, more than 90 percent of the workload was being processed within the mandated 25 working days. The simplified notification procedure, coupled with an increasingly flexible approach to when it could be justified, played a major part in keeping the workload to

manageable proportions. Very few cases were blocked or excessively meddled with, and most of those involved would agree that the process had achieved an appropriate level of predictability.

The title of this article signals where I am heading, but I think it is time to step back and ask whether that clear-up rate can objectively be categorised as a “success.” Or to put it another way, if even the most cursory glance can confirm in 80 percent or more of cases that there will be no issue, does it make sense to put so many transactions to the costs of notification and the attendant delay in being able to complete the deal? What legitimate interest is being served by compulsory notification, and are the costs proportionate to that aim?

In my view, a compulsory system with a waiting period made sense at the outset. The system was new and the rules, both substantive and procedural, were untested. We needed time and a body of case-law to arrive at a point where the outcome would generally be quite predictable. We have now got to that point, and DG Comp must take a large share of the credit for the fact that we have done so.

**We have lived through the experience of the move to self-assessment in behavioural cases where notification was abolished**

Having achieved such a measure of success it seems appropriate to ask whether it is now time to review the merger notification system. After all, we have lived through the experience of the move to self-assessment in behavioural cases where notification was abolished. Companies whose behaviour could expose them to intrusive investigations, punitive fines and reputational harm are obliged to form their own view as to whether they are over-stepping the mark and cannot avoid exposure to those risks by means of a regulatory filing. One of the justifications for the “modernisation” programme was the need to free up resources to focus on genuinely important cases and it was pushed through despite many protestations that such filings served a valuable purpose in an area that is not always marked by bright lines and regulatory predictability. It certainly seems high time that we considered a deregulatory approach in relation to mergers – one that would fit with the commission’s overall objective to “do less and do it better.” Another reason that it seems timely to take an opportunity to review the compulsory notification system, is that the commission is actually considering widening the class of notifiable deals to include minority stakes. If ultimately the commission succeeds in persuading the Member States that there are good reasons to extend its competence in that direction, would it not make sense at the same time to reduce the regulatory burden for deals that clearly do not need review?

If such a deregulatory move is to be considered, we can learn a few lessons from what happened with the switch to self-

assessment in 2004.<sup>5</sup> There are a number of valid criticisms of how it was approached. First, there was no transitional arrangement and no provision for retaining some of the useful features of the notification system. It is true that on paper there remains the ability to notify and seek rulings in exceptional cases, but as far as one can tell there has not yet been a single instance where the commission has allowed itself to be persuaded that an agreement or practice was sufficiently exceptional to qualify.<sup>6</sup>

Moreover, in denying itself the opportunity to evaluate commercial practices in a non-contentious forum, the commission also shut itself off from experience as to how certain markets were evolving. This lack of institutional knowledge was particularly manifest in relation to e-commerce and the effect of vertical restraints when the new block exemption Regulation 330/2010 was being drafted in 2009. Applying that experience to the Merger Regulation, can we drain off some of the rather tepid bathwater without losing the baby?

Perhaps it is advisable that we should first debate the principle before getting into too much detail of what would replace it. Equally, we should

not embark on this task without some broad idea of where we might end up. My own preference would be a system that would include the following key elements:

- keep the current thresholds for deals over which the commission would in principle have exclusive jurisdiction;
- remove both the obligation to notify and the bar on implementing transactions until they are cleared, but retain the Form CO for companies who wish to seek prior clearance;
- allow the commission to intervene for a set period (perhaps up to six months) after a transaction has, or reasonably should have, come to its attention;
- provide a short form (let’s call it the Form Z) with bare details for parties to inform the commission and provide a trigger date for the six-month review period;
- confirm that the commission retains the full range of powers within the six-month period to initiate proceedings to order divestments or require a transaction to be unscrambled where it has not been notified;
- consider adding an explicit and non-appealable power for the commission to adopt interim standstill measures while pursuing its investigation.

To be clear, even though the decision whether to file would now rest initially at least with the merging parties and the commission would no longer be obliged to look at every transaction over the thresholds, those thresholds would still apply with respect to the exclusive jurisdiction of the commission. Although the parties would not be obliged to file or to submit to the waiting period before implementing, their transaction would still be excluded from a need to seek the approval of the various national authorities in the EEA. Indeed, because notification would not be automatic, one could even consider lowering the thresholds to widen what would become an effective safe harbour from the duty to notify in any jurisdiction.

And to take it one step further, one great benefit of the present system is the extension of the one-stop-shop and the ability to go to Brussels, where a transaction that falls below the thresholds would otherwise be reviewed by three or more national authorities. Consistent with the logic behind the core proposal, which is to give more control over the process to the merging parties and to produce a more efficient system where possible, we would want to preserve that option. Further down the line we might want to consider whether to temper the right of any national authority to object to that transfer, but given that past experience suggests that this aspect of the Regulation works well and that vetoes are very rare, this might not be necessary.<sup>7</sup>

It follows that one would probably also want or need to preserve the right for NCAs to refer deals to the commission of their

own motion. Perhaps the right to do so would run for a period from the filing of Form Z which could also serve as the date on which NCAs were fixed with notice of the transaction in those jurisdictions where notification is voluntary, such as the UK.<sup>8</sup> There would be a useful role for the ECN to act as a clearing house to co-ordinate and to increase regulatory certainty in cases where the NCAs retained competence.

This move would have other consequences. Once the commission was no longer automatically reviewing notifications of all significant mergers regardless of their impact on competition, there would probably be pressure on some Member States to revisit their own national laws so as to adopt a more rational approach to jurisdiction. It may seem invidious to pick on individual Member States, but we have to acknowledge that some of the national merger provisions are very hard to justify. Often it is the smaller and newer Member States that stand out. For instance, in Cyprus mandatory notification is required to the Cypriot Competition Authority, where the aggregate annual worldwide turnover of at least two of the participating enterprises exceeds 3.42 million euros. Similarly, mandatory notification is required to the Maltese Competition Authority, where the aggregate annual worldwide turnover of the undertakings is at least 2.33 million euros. Elsewhere, having a merger test based on, for instance, the share of supply of goods or services matching a particular description<sup>9</sup> or tests based on market shares,<sup>10</sup> is not compatible with international standards as promulgated by the ICN<sup>11</sup> and others.<sup>12</sup>

Footnotes

1 Case No. IV/M.330 McCormick/CPC/Rabobank/Ostmann. In this case the Commission miscalculated the phase I deadline for the initial assessment of the compatibility of a joint venture for the supply of dried herbs and spices to food retailers in Germany. However, the Commission decided that, due to an apparent difference in approach as to the calculation of time limits under Article 9, it was able to refer the matter to the German authorities for consideration under national law (see further Commission Press Release IP/93/943).

2 At its peak in 2007, the Commission received 402 notified cases. (<http://ec.europa.eu/competition/mergers/statistics.pdf>)

3 For instance see Case T-342/99 Airtours v Commission [2002] ECR II-2585; Case T-310/01 Schneider Electric v Commission [2002] ECR II-4071; Case T-77/02 Schneider Electric v Commission [2002] ECR II-4381; Case T-5/02 Tetra Laval v Commission [2002] ECR II-4381; Case T-80/02 Tetra Laval v Commission [2002] ECR II-4519.

4 EADS Case COMP/M.1754; Microsoft/Liberty Media/Telewest Case COMP/JV.27; Vivendi/Canal+ Case COMP/M.2050; Deutsche BP Case COMP/M.2345.

5 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, entered into force on 1 May 2004 (see Article 45).

6 This is recognised in the Commission's Report and Staff Working Paper on the Functioning of Regulation 1/2003. The Commission

notes that there have been very few requests for guidance and those that the Commission has received have not come close to satisfying the criteria of exceptionality established in the Notice on Guidance Letters.

7 For instance, the Commission Report on the functioning of Regulation No 139/2004 notes that there were only four vetoes invoked by Member States in five years.

8 It should be noted that the recent UK consultation paper on competition law reform suggests that the UK government is considering the implementation of a mandatory notification. This is regrettable given that there is no evidence that this reform is necessary and given the costs that such a reform would impose on business.

9 Section 23(2)(b) Enterprise Act 2002. Although the recent UK government consultation on reform of the competition regime suggests the abolition of this test.

10 Such as Latvia, Portugal, Slovenia and Spain.

11 For instance, the ICN Recommended Practices for Merger Notification Procedures suggest that notification thresholds should be based exclusively on objectively quantifiable criteria (such as assets and turnover) that establish a clear nexus to the jurisdiction. The ICN concludes that "market-share based tests"...are not.

12 Such as the OECD Recommendation on Merger Review. (<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False>)

In all likelihood it would take a while for the benefits of any change to be apparent. Initially the more cautious companies would probably take the view that it was safer to continue to file voluntarily to Brussels. Certainly those with a track record of doing so might prefer the devil they know.

A move to self-assessment for merging parties would in turn put more pressure on third parties such as customers and competitors to be more proactive. We would need to ensure that they were properly informed of when the review clock had started running, so as to allow them within the six-month period, and ideally much earlier than that, to raise any concerns that would merit the deal being called in for review. As for the mechanism of communication, it ought to be possible to summarise most transactions in fewer than 140 characters.

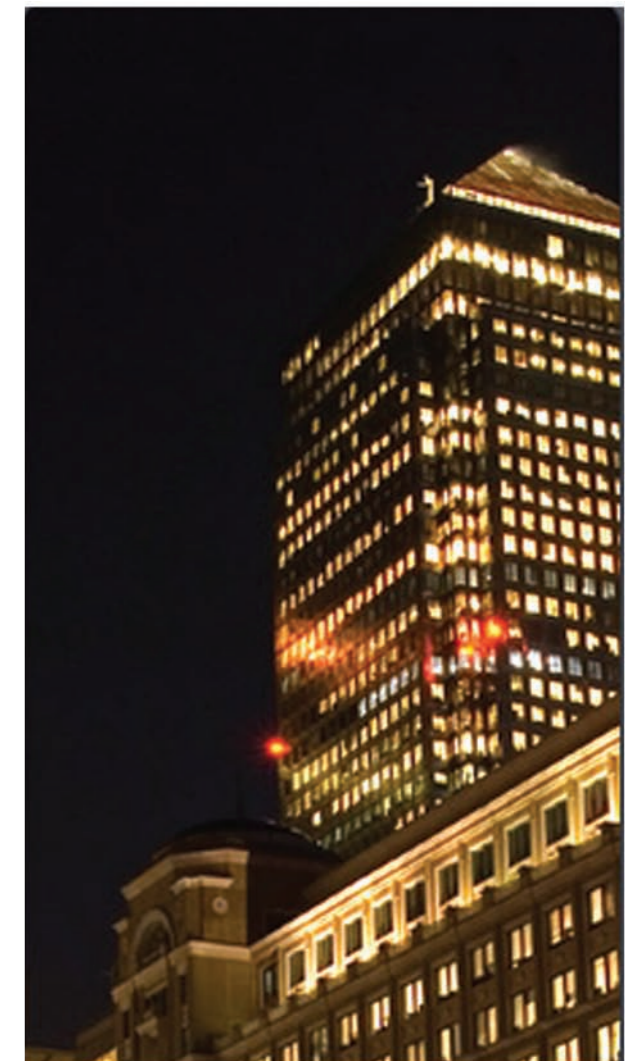
Doubtless some will fear the consequences of this relaxation of ex ante control of mergers. It would be important that later intervention be a speedy and credible threat. Where parties elect not to seek prior approval they would need to understand the risks of their decision including a costly unscrambling of the deal, and to weigh the risks as they presently do in jurisdictions such as the UK. As we say in other circumstances, caveat emptor.

There would be other aspects to work out also. What right would third parties have in a process where there is no longer mandatory notification, meaning they can no longer always count on a reasoned commission decision that can be challenged? There are issues that go beyond the scope of this article and would require more careful examination if the principle of a voluntary regime were accepted. However I do not believe that those concerns, which are real, should necessitate subjecting so many clearly innocuous transactions to automatic delay and cost.

Finally, I know that some will wonder why a lawyer, who presumably benefits from the merger workload (however pointless some of it may seem) would advocate for an end to the gravy train. Is this an appropriately seasonal example of turkeys voting for Christmas? The truth is that I don't believe the legal profession has much to fear from tearing up Form CO.

It is unlikely that any move to a less rigid system will lead to a reduction in the headcount at DG Comp. The bright and creative officials in Rue Joseph II can be counted on to find other ways to keep themselves occupied which will in turn generate more challenging and interesting cases with genuine antitrust issues. ■

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