THE NATIONAL LAW JOURNAL

Antitrust Law
E.U. Merger Regulation

Janet McDavid • Catriona Hatton

Janet L. McDavid, based in Washington, D.C., and Catriona Hatton, based in Brussels, are partners at Hogan & Hartson and specialize in antitrust law.

The European Commission's ("E.C.") recent Green Paper on reform of the European Union Merger Regulation comes at a time when the international antitrust community is focusing on the need for multilateral merger review convergence. (Green Paper on Review of Council Regulation (EEC) No. 4064/89.) The divergent merger review processes across some 60 countries has led to a number of initiatives, including the International Competition Network (ICN) and the U.S.-E.C. bilateral merger working group. The E.C.'s proposals for reform meet some of the objectives of multilateral convergence, but also should set standards for merger review that are consistent with the principles and best practices being considered by the ICN and other efforts.

When the E.U. Merger Regulation was adopted in 1989, one of the principal objectives was to provide a single review procedure in Brussels for large transactions with a cross-border European dimension (a "one-stop-shop"). Transactions that met the E.U. Merger Regulation thresholds were subject to review only in Brussels and did not have to be notified to various E.U. national authorities. Because the revenue thresholds that triggered an E.U. filing were set very high, however, many transactions fell outside the E.C.'s jurisdiction, and companies often were faced with multiple merger filings with E.U. national authorities. The lower thresholds introduced in 1997 proved complicated to apply and did not capture a large number of transactions with a cross-border dimension.

In its recent Green Paper, the E.C. has proposed replacing this lower threshold with a three-country filing test, whereby transactions that do not meet the high threshold but that would require merger filings in at least three E.U. member states would be subject instead to the E.U. Merger Regulation and therefore benefit from a one-stop-shop.

The three-country filing test may be complicated

While the objective of increasing the application of the E.U.'s one-stop shop is welcome, this proposed solution is problematic because it leaves companies with the burden of conducting an E.U.-wide assessment of whether a transaction triggers local merger filings. There will be some transactions for which the three-country filing test clearly will be met, but in the member states the assessment can often be

complex and burdensome because of the divergent and subjective triggers for merger filings. In some member states, it is often not possible to determine whether a filing is required without consulting the national authority.

Against this background, efforts to simplify merger review procedures and eliminate burdensome multiple filings would be better served by lowering the E.U. thresholds. Furthermore, with the upcoming expansion of the European Union, the E.C. could also seek further harmonization of merger filing thresholds of E.U. member states and accession countries. The E.C. should work toward the elimination of market-share tests as a basis for determining a country's jurisdiction over a merger and introduce clear revenue based thresholds that require a minimum level of local revenue in the country concerned, which would be consistent with the approach being pursued by the ICN.

Formal notification under the E.U. Merger Regulation is not possible until the parties have executed a final binding agreement. The Green Paper proposes that earlier notification should be permitted based on a letter of intent or a memorandum of understanding, which would conform with the approach taken by many other jurisdictions, including the United States and Canada. In the interest of timely merger review, and to facilitate companies in coordinating their global merger filings, the E.C. should allow companies to notify it of transactions before signing a definitive agreement, provided the terms are sufficiently clear to allow the E.C. to conduct its assessment. In parallel with such a move, the E.C. should abolish the one-week filing deadline, which is almost never applied in practice and is unnecessary in a system that precludes closing pending clearance.

One of the best features of the merger regulation is the clear, strict deadlines for a decision on a proposed merger. Yet these deadlines have often posed problems for companies when it was clear that remedies were needed to address the E.C.'s competition concern. (See, e.g., Janet L. McDavid and Catriona Hatton, "Antitrust: Globalization and the E.U.," NLJ, Nov. 6, 2000, at B7.) This "time squeeze" may leave the parties with only a few days to come up with appropriate remedies, and the E.C. and member states may be left with a very short time to assess the adequacy of proposed remedies. This time squeeze was a significant factor in the failure of several deals.

In its Green Paper, the E.C. suggests allowing the parties to "stop the clock" to allow more time to propose and consider remedies. The E.C. has recognized the value of the current merger review timetable, and therefore proposes only a limited time extension of 20 to 30 working days, which would be split proportionately between the E.C. and the parties. However, given that the extension is finite and can only be invoked once, the E.C. should consider allowing more flexibility to the parties as to when they exercise this option. The remedies procedure could be greatly enhanced if the E.C. played a more active role in suggesting and discussing appropriate remedies.

One of the most widely criticised aspects of E.U. merger review is that the E.C.'s Competition Directorate and its Competition Commissioner are effectively investigator, prosecutor and judge in merger investigations, and that due process checks and balances are inadequate. These are some procedural protections in the review process, such as the Hearing Officer, whose task is to ensure that the proceedings safeguard the right of persons to be heard fairly and within a reasonable time; consultation with an advisory committee composed of representatives from the member states' competition authorities before adopting a decision; consultation with the E.C. Legal Service on any proposed decision; and the fact that the final decision in a second-phase investigation must be adopted by the College of Commissioners.

In practice, however, the role of the Hearing Officer is not sufficient to provide effective independent review of the proceedings, in part because the powers are not sufficient and the hearing officer is attached to the Competition Commissioners' cabinet. The Advisory Committee's opinion does not bind the E.C., and it generally rubber-stamps the E.C.'s decisions. An appeal from the E.C. decisions to the European Court of First Instance is possible, and several appeals are currently pending. However, despite recent reforms to expedite judicial review, the time required for an appeal means that most mergers will have been abandoned long before any decision can be secured. For example, the Air Tours appeal has been pending for two-and-a-half years. There are many elements in the E.U. system that could serve as a model for other merger review systems, such as the fact that the parties receive a written statement of objections, have access to the E.C. file, may request an oral hearing, and will receive a reasoned decision from the E.C. However, there is a wide spread view that the checks and balances in the system are generally insufficient to ensure due process. The E.C.'s willingness to remedy the flaws in the current system may be one indication of the success of the proposed reforms.

Substantive changes in the merger review process

The Green Paper launched a debate on the merits of the current "dominance test" in the E.U. Merger Regulation versus the "substantial lessening of competition test" used in the Unites States. While the multilateral convergence process might be served by such a change, the real question is whether it would lead to more consistent decisions between the major antitrust authorities. There is no guarantee that the E.C.'s interpretation of the competition test would be guided by US precedent; the United States and European Union might come to different results faced with the same set of facts and the same test. The E.C. has been regarded as hostile to efficiencies–perhaps unfairly–and a competition test may enhance the E.C.'s ability to consider efficiencies. While a statement from the E.C. on how it will assess efficiencies would be welcome, the E.C. can follow a U.S.-type approach to efficiencies without changing the dominance test. The E.U. Merger Task Force has confirmed its ability and willingness to consider efficiencies under the current test.

It has been suggested that the dominance test has been stretched to encompass anti-competitive effects that may involve dominance. But while some of E.C.'s theories may not fit comfortably the dominance sphere, there is some concern that a substantial-lessening-of-competition test would facilitate overregulation of mergers. It is also important to weigh convergence and the other objectives in moving to this test against the obvious downside–a period of legal uncertainty resulting from the application new test without E.U. precedents.

The E.C. could achieve some of the objectives of moving to a competition test focusing on the second part of the current dominance test, i.e. whether "effective competition will be significantly impeded in the common market." This element of the test might allow consideration of efficiencies arguments and provide greater scope for economics-based analysis. In any event, if the E.C. proposes to move to a competition test, it is important that any such move is accompanied by guidelines on how the test is to be applied.

Both the timing and content of E.C.'s Green Paper are welcome, as is widespread consultation that the E.C. is engaging in before formulating any proposals. The Green Paper provides important opportunity to improve merger regulation in the European Union and to take a significant step toward multilateral convergence.