Asking a lot

The information demands in European merger filings are enormous

by Axel Schulz and Cornelius Börner*

The explanation of the merger control procedure available on the European Commission’s website mentions the power to “request information from the merging companies or third parties”. As presented it seems fairly peripheral. In practice, the truth is the opposite: the European Commission makes enormous use of its right to demand an increasing amount of information from the merging parties.

A hungry consumer of paper

Although the template of the Form CO is only a few pages long, the standard official notification form used to notify a merger with an EU dimension can easily explode to over 350 pages without annexes and, by the end of the notification process, encompass 700 pages and 16 folders of annexes, as experienced in a former notification. Consequently, the amount of information requested and gathered during a merger filing can be immense, requiring a significant amount of manpower, the right resources and speed in order to meet tight timelines.

In practice, to collect, identify, review and submit the correct information can be very challenging and burdensome for the notifying parties. Keeping in mind the Commission’s threat that incorrect or incomplete information will significantly delay the investigation or lead to a declaration of incompleteness compromising the deal, this side of the merger procedure is worth looking at. The following article depicts the Commission’s power to request information from the notifying parties in merger procedures, with an emphasis on requests for internal documents.

Form CO and Short Form CO starting point

The prenotification phase is the first step of the European merger procedure. As set out in the Commission’s best practices on the conduct of EC merger control proceedings, the prenotification contacts intend to “discuss jurisdictional and other legal issues such as the scope of the information to be submitted”.

The starting benchmark for the amount of information required during the prenotification phase is the information necessary for the Form CO or Short Form CO, the two possible template forms that can be used to notify a merger. Apart from an executive summary of the concentration with a description of the parties, the nature of the concentration, the areas of activity of the parties as well as the affected markets, the Form CO asks for the strategic and economic rationale for the concentration.

The Form CO requires the parties to provide all documents bringing about the concentration as well as all documents prepared by or for or received by any member of senior management. The latter encompasses (among other things) minutes of meetings of the board of management, presentations, analyses, reports, studies, comparable documents for the purpose of assessing the concentration in terms of market shares, competitive conditions, competitors and potential sales growth or expansion into other product or geographic markets, and/or general market conditions. Moreover, the notifying parties have to provide information regarding the relevant product market and geographical market, including information related to market shares by value and volume, and data regarding competitors. This information also needs to be provided for all “plausible market definitions” (see more below).

Assembling information in the prenotification phase

The wide spectrum of necessary information has significant effects on the nature of the prenotification phase, which remains the only merger phase without set deadlines for the Commission’s assessment. This leaves the notifying parties in the uncomfortable position of being exposed to the Commission’s power to request information until it considers the information prerequisites fulfilled.

As a result, the prenotification phase can last from weeks up to several months. This applies not only to the standard notification procedure, but also in simplified cases. Even in straightforward instances, case teams sometimes require two or three rounds of responses to questions and new drafts of the Form CO until – a few months later – the case team indicates that the formal merger notification can be executed.

And the requests for information during the prenotification phase seem to have steadily increased. For example, to carry out an impact analysis of the merger on the competition on the relevant market, the Commission regularly asks for data regarding sales and market shares dating back several years, and for a potentially large number of “plausible markets”.

Simplification package

Against this background, the European Commission has attempted to improve the situation for the notifying parties. Therefore, in December 2013, it adopted a package of measures aimed at simplifying procedures without amending the Merger Regulation itself. According to the Commission, the package widens the scope of its simplified procedure to 60%-70% of cases and reduces the amount of information required for notifying transactions in all cases, irrespective of whether the simplified or standard procedure is applied.

However, in practice, the simplification package has increased the scope of information required by the notifying parties: first, the package introduced the requirement to present not only any product and geographic market the notifying parties consider relevant but also – as set out in section 6 of the Form CO – all “plausible alternative product and geographic market definitions”. Rather than providing relief, this can easily multiply the amount of data the parties are required to provide.

Second, the simplification package extended the scope of internal documents that must be provided for all notified concentrations. Such documents include the following:

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minutes of the meetings of the board of management, board of directors, supervisory board and shareholders’ meetings at which the transaction has been discussed;

- board and shareholder documents analysing different options for acquisitions, including (but not limited to) the notified concentration;

- analyses, reports, studies, surveys, and any documents created to assess or analyse the concentration’s rationale, market shares, competitive conditions, competitors (actual and potential), potential for sales growth or expansion into other product or geographic markets, and/or general market conditions; and

- any analyses, reports, studies, etc of market shares, competitive conditions, and/or competitors (actual and potential) from the previous three years.

It goes without saying that additional work is required to collect, identify and review all these documents.

Third, the simplification package widened the scope for the Short Form CO. As the Short Form CO requires less information than the standard Form CO, this can be seen as a step in the right direction. However, the goodwill shown is only half-hearted, as the Commission now increasingly requests information from the notifying parties to prove that the prerequisites for use of the Short Form CO have been fulfilled. Last but not least, the Short Form CO now includes the obligation to provide internal documents in some specific cases. From experience, even a Short Form CO can top 50 pages due to information requests.

In sum, the problem of the extensive amount of information required by the Commission has not been fully addressed. Rather, new obligations for the notifying parties have been added.

**Requests for information in Phase I and II**

With the prenotification phase keeping the parties already very busy complying with the Commission’s requests for information, the task can become even more intensified during Phase I and II. In this respect, the key provision is article 11 of the EC Merger Regulation, which states: “In order to carry out the duties assigned to it by this regulation, the Commission may, by simple request or by decision, require the persons referred to in article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.” In particular, it can be noted that the European Commission increasingly requires the submission of notable amounts of internal documents from the notifying parties. To give a noteworthy example regarding the request for internal documents in Phase II, in the case of Olympic/Aegean Airlines, the Commission requested a substantial amount of internal documents, including more than 90,000 internal emails. In another case, the European Commission analysed approximately 7,000 internal emails and other internal documents provided by the parties.

**The EU compared to the US**

Thus, the Commission’s practice is becoming more closely aligned to the second request of the US merger procedure, where internal documents are traditionally given more weight than external documents, such as economic studies. But in contrast to the EU, the US merger procedure requires only basic information regarding the notifying parties and the proposed transaction in the Hart-Scott-Rodino (HSR) notification: no lengthy forms describing the markets, the market shares, the competitive landscape etc are required in the HSR filing.

If the US authorities decide to open an in-depth second request review, which is comparable to the Phase II procedure within the European merger control procedure, the US authorities request immense amounts of additional information from the notifying parties, including many thousands of internal and other documents regarded as relevant. Complying with such requests can take many months and be very cost-intensive.

In contrast, by the time the European Commission initiates a Phase II investigation, it has had the benefit of prenotification, the formal Form CO with annexes, in all likelihood the response to various requests for information, and possibly meetings with senior executives of the companies concerned. Arguably, all this information ought to be sufficient, without adding a second request-type document review on top of it.

**Unpredictable timeframes**

In addition, the European Commission is working under procedural deadlines for Phase I and II that were not conceptualised for extensive document requests. The case team barely has enough time to carry out an in-depth and reflective review of the documents required to establish a balanced overall view of their contents. As a result, the Commission’s document review more closely resembles a cartel-style investigation, looking for the smoking gun, rather than a balanced review.

Moreover, an obligation to produce hundreds of thousands of documents within a week or two comprises the rights of the parties to review the documents properly so as to extract privileged and private documents. Electronic search engines may not always do the trick here. Due to the deadlines defined in the EC Merger Regulation, the notifying parties usually have to comply with information requests within very short timeframes. In one case, for example, the Commission issued a 322-question information request, giving the parties only 11 days to respond. As a result, more and more often we are seeing the Commission stop the clock while waiting for a request for information to be answered. This obviously results in unpredictable timeframes for the closure of the deal.

**Conclusion**

The amount of information required by the Commission during a merger control process is steadily increasing. In more complex Phase II cases, the process more closely resembles a war of attrition than a legal debate. There are other problems too. First, as the Commission’s procedural deadlines for Phase I and II are hardly compatible with the amount of information being requested, the Commission escapes the deadlines by steadily inflating the prenotification phase. If Phase II is reached, the Commission increasingly stops the clock, leaving the notifying parties with uncertainty about the timing to close a deal.

Second, the notifying parties need a lot of time and significant human resources to collect, review and submit the documents that the Commission requires.

Lastly, the Commission’s increasing demand to review internal documents further inflates the review process. It may seem like a review of internal documents is comparable to a US-style second request, but, unlike the US authorities, the Commission will have already requested and received a lot of information in earlier phases.