22 September 2022 // Bernd Meyring - Neil Hoolihan - Joost Dibbits - Cécile Manong // Competition and Antitrust

Pre-notification duration – explaining the increase?

Anecdotal experience (the old "gut feeling") has progressively given the impression that the pre-notification duration has increased over the past 10 years. Rhino sought to investigate whether this feeling was borne out in the statistics.

Our proxy for duration, based on the time between deal announcement and formal notification, shows an increase of between 50% and 100% for non-simplified cases (see table below). Whilst acknowledging that this metric does not rest solely at the feet of the Commission (e.g. parties are also taking more time post-announcement to produce a well-developed Form CO), the trend remains clear.

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Type of case	Prenotification duration in months (2012-2014)	Prenotification duration in months (2019-2021)	Increase
Phase I with remedies	4.5	6.8	51%
Phase I unconditional clearance (non-simplified procedure only)	2.7	4.2	56%
Phase II	3.9	8.1	108%

So what are the factors driving this increase? Below we discuss five.

1. **More intensive RFIs.** One key development in the last year was the routine use of keyword search requests by the EC. This is likely to continue in the future, with digitalisation increasing both the quantity of data and the EC's capacity to review it. We also see (more) expansive market share or bidding data requests that add time to the pre-notification process and are aimed at supporting the Commission's increasingly complex quantitative analysis.

2. **A greater focus on complicated cases.** In 2012-2014, 63% of all merger cases were simplified. In 2019-2021, this percentage was much higher: 76%. This means that cases with more substantive considerations have got longer and more burdensome while others get simpler (and presumably faster). This suggests that the line between receiving cursory treatment and more substantive review is increasingly important and the more complex cases are becoming much more difficult to do, irrespective of the result. There is, however, no reason to worry unduly regarding non-issues M&A, though a pre-emptive approach towards likely substantive issues early on in the merger process is becoming even more critical.

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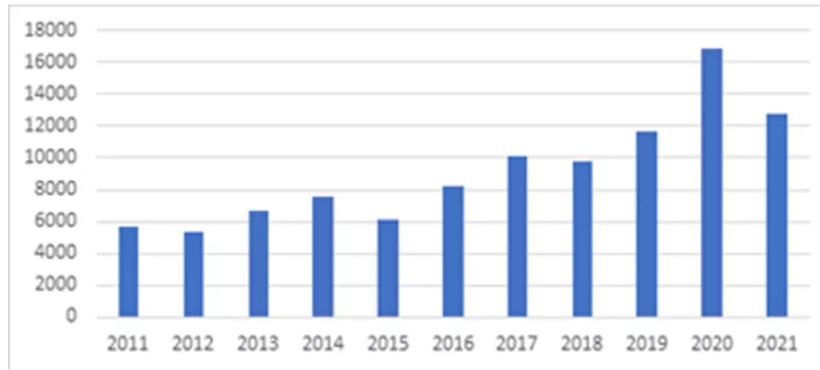
3. **The ‘strong probability’ standard of proof required by the GC.** The General Court, in O2 / Hutchinson, required the EC to demonstrate, to a “strong probability” standard, the existence of significant impediments to competition. The EC has also confirmed this approach when Guillaume Loriot, Deputy-General for Mergers, stated that “*for complex transactions, where competition concerns are likely, [the EC is] held to a very high standard … [the] decisions for non-simplified cases require robust analysis, extensive evidence, and a thorough investigative process*” in July 2021. Let’s see whether the pending appeal will shift this standard again.

4. **Frontloading the process.** At least partially outside the EC’s control, and unrelated to the evidentiary requirements imposed by the courts, frontloading is an additional factor potentially driving the increased duration of pre-notification. Frontloading refers to merging parties extending pre-notification in complex cases, sometimes already including remedy discussions, to obtain Phase I approval and avoid a Phase II investigation (e.g. ABInbev/SABMiller, Novartis/GSK). This strategy often comes with pre-notification market investigations that then also take time.

5. **Increasing hostility towards M&A?** This goes beyond Europe. There are more and more hoops that dealmakers need to jump through (more merger control jurisdictions, FDI screening regimes, foreign subsidies rules, referral risk assessments) and complex deals are likely to attract greater scrutiny. The EC certainly appears to need more words to explain its merger control decisions. The average word count for an unconditional clearance decision was around 12,000 words in 2021 (significantly up on the 6,000 it took 10 years ago).

Average word count EC Phase I non-simplified unconditional clearance decisions (2011-2021)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