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Merger Manual of Procedures

Litigation before EU courts

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Merger Manual of Procedures

Internal DG Competition working documents on procedures for the application of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

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The text is made available on the internet:

https://competition-policy.ec.europa.eu/mergers/procedures/procedures-manual_en

NOTICE

DG Competition's Manual of Procedures for the application of the EU Merger Regulation is an internal working tool intended to give practical guidance to staff on how to conduct an investigation applying the EU Merger Regulation.

The Merger Manual of Procedures does not contain binding instructions for staff, and the procedures set out in it may have to be adapted to the circumstances of the case at hand. The guidance given in the Manual of Procedure does not claim to be complete or exhaustive and not every question that might arise is dealt with, or dealt with in the same level of detail. The content of the Manual of Procedure has not been adopted by the Commission. It is a working tool, which evolves through updates to reflect new experience gained in applying the competition rules of the Treaty, and the Regulations, notices and other guidance adopted thereunder.

In case of divergences between these rules and how these rules are interpreted by the Union Courts, on the one hand, and the Merger Manual of Procedures, on the other hand, the former apply. Staff has been instructed that, in case of doubt, they should always seek instructions from their hierarchy regarding the precise course of action in a particular situation.

The main chapters of the Merger Manual of Procedures are being made public in order to provide greater transparency about the Commission’s procedures in applying the competition rules.

The fact that the modules are in the public domain does not change their character as purely internal practical guidance to staff. The published modules therefore do not create or alter any rights or obligations arising under the competition rules of the Treaty and the Regulations, notices and other guidance adopted thereunder. Developments since this version of the Merger Manual of Procedures was published (such as new case law) may not yet be reflected.

Brussels, 29 November 2024

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1. LITIGATION BEFORE EU COURTS

1.1. EU Courts

(1) There are two courts: the CJEU and the GCEU, together referred as the "EU Courts". ([1])

(2) The EGC is made up of two judges from each Member State. The CJEU is composed of one judge from each Member State and eleven Advocates General, who do not decide on the case (only the judges do), but provide the CJEU with their opinion on the case and the solution in law that, in their view, should be applied. Opinions of Advocates General are made public. The EGC does not have permanent Advocates General but may appoint one in a given case of particular complexity. In practice, the EGC does not usually use this possibility.

(3) The language of the Court case is the EU official language in which the application before the Court is lodged. The Commission must respond to the application in that language.

(4) To keep it simple, for merger activities, the EGC is generally competent. Cases before the EGC are heard by chambers of five or three judges. It may also sit as a Grand Chamber (15 judges) when this is justified by the legal complexity or importance of the case. Before the EGC, merger cases are commonly decided by a chamber of three judges. One of the judges is appointed 'judge rapporteur' by the Chamber (she/he will be mainly responsible for the case, notably for the drafting of the Report for the Hearing – see below - or the judgment).

(5) Judgments of the EGC can be appealed before the CJEU. The CJEU may sit as a full court, in a Grand Chamber of 15 judges or in chambers of three or five judges. The CJEU sits as a full court in the particular cases prescribed by the Statute of the Court and where the Court considers that a case is of exceptional importance. It sits in a Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases. Other cases (namely, the majority of cases) are heard by chambers of three or five judges.

(6) Interim measures are, in principle, decided by the President of the relevant Court.

(7) More information can be found on the Curia website.

1.2. Main types of legal actions

(8) The TFEU provides for a number of possible legal actions before the EU Courts. The following paragraphs give an idea of the most relevant ones in relation to merger cases.

([1]) The Civil Service Tribunal, established in 2004, ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court in the context of the reform of the European Union's judicial structure.

1.2.1. Action for annulment (Article 263 TFEU)

(9) This is by far the most frequent type of proceedings related to DG Competition's activities and in particular, in the field of merger control. In actions for annulment, an applicant asks the EGC to annul an act of the EU institutions.

1.2.1.1. Legal requirements for action for annulment

(10) Article 263 TFEU provides that the EU Courts have jurisdiction to review the acts of the Commission (other than recommendations and opinions) that are *"intended to produce legal effects vis-à-vis third parties"*. The approach of the EU Courts is not a formalistic one so that all acts which have binding legal effects so as to affect the applicant's interests by modifying its legal situation can be contested before the EU Courts, irrespective of their form.

(11) By contrast, preparatory or preliminary measures do not constitute challengeable acts. For example, decisions to open Phase II proceedings under Article 6(1)(c) of the EU Merger Regulation or the issuance of a SO in Phase II proceedings do not constitute challengeable acts.

(12) Article 263 TFEU establishes a distinction between Member States, the Council, and the Parliament (which always have standing to bring actions for annulments of EU acts) on the one hand (Article 263(2) TFEU), and natural or legal persons (who must demonstrate standing to bring actions for annulments) on the other (Article 263(4) TFEU).

(13) Natural and legal persons must show that they are directly and individually concerned by a challengeable act. In addition, they must also show a factual interest in the annulment of the challenged act, that is, the annulment of the act would procure an advantage to the applicant. ([2])

(14) For DG Competition's merger activities, this can be for instance the notifying party to the concentration in case of a prohibition decision or a competitor of the merged entity asking for the annulment of a clearance decision.

1.2.1.2. Consequence of annulment of a Commission decision

(15) Article 10(5)EU Merger Regulation provides that in case of annulment of the whole or part of a Commission decision by the EU Courts, the Commission will re-initiate the merger proceedings with a view of adopting a decision pursuant to Article 6(1) EU Merger Regulation. The concentration shall be re-examined in the light of current market conditions.

(16) In practice, this means that the annulment of a merger decision by the EU Courts obliges the Commission to start a new Phase I proceeding. The case may be allocated, to the extent appropriate, to the same case team, but the case manager may be different from the one charged with the original proceedings.

([2]) By contrast, the Member States, the Council and the Commission are treated as privileged applicants and their actions are considered to be admissible without the need to prove the nature of the interest in question.

(17) Following the annulment of a Commission decision, the notifying party should submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the notifying party should certify this fact without delay. If no supplement of the original notification is needed, the legal deadline of the case will start on the working day after the notifying party certifies that there are no changes in the market conditions. Otherwise, the legal deadlines will start on the working day after the Commission receives a new or a supplement to the original notification, covering the changes in the market circumstances and therefore constituting a complete notification.

(18) As the outcome of the re-examination procedure, the Commission will take a new decision, carefully taking into account the court's judgment, e.g., even if the court annulled a Commission authorisation decision, the Commission may again authorise the concentration if this is the right decision in the light of the new market circumstances. The Commission will take into account the grounds on the basis of which the Court first annulled the original Commission decision.

(19) The information collected in the original procedure may be used for the new investigation and the new assessment given that the first and re-examined procedures constitute one and the same procedure. However, new information may have to be gathered in order to be able to assess the concentration in the light of the new market circumstances or to overcome any procedural shortcomings as explained by the Court.

1.2.2. Request for preliminary ruling (Article 267 TFEU)

(20) National courts frequently deal with questions involving EU law. They may then face difficult questions of interpretation of the relevant EU law or even have doubts as to the validity of that legislation.

(21) In order to have a uniform interpretation of EU law all over Europe, the Treaty allows national courts to raise such questions to the CJEU. Such requests by a national court to the CJEU are the "preliminary ruling requests".

(22) With regard to COMP activities, this may be for instance a question on the interpretation of the EU Merger Regulation.

1.2.3. Action for failure to act (Article 265 TFEU)

(23) By such an action, the applicant challenges an EU institution for not having adopted a decision.

1.2.4. Damage claim (Article 268 TFEU)

(24) By such action, the applicant requests the CJEU to find that it has suffered harm as a result of an illegal action of an EU institution and therefore asks the CJEU to award damages.

1.2.5. Expedited procedure

(25) This is not an independent form of action. The expedited procedure is a fast-track appeal designed to deal with cases of a particularly urgent nature.

(26) The request for the expedited procedure must be lodged as a separate document at the same time as the application initiating the proceeding or the defence.

(27) The EGC will decide whether to adjudicate the case under the expedited procedure having regard to its particular urgency and its circumstances. The EGC therefore exercises its discretion on whether to grant the 'fast track' procedure on a case-by-case basis.

(28) Once the request for the expedited procedure has been approved, the written and oral procedures follow modified rules, in particular (i) the case is given priority, (ii) the period prescribed for the lodging of the defence is reduced, (iii) the written procedure is limited to a single exchange of pleadings (application and defence) and (iv) an emphasis is usually placed on the oral procedure.

(29) The expedited procedure has been successfully applied in a number of cases in the field of merger control.

1.2.6. Interim measures (Article 278 and 279 TFEU)

(30) This is not an independent form of action. An applicant can only ask for interim measures in parallel to its main action.

(31) The reason for making such a request for interim measures is that the bringing of the main proceedings does not automatically suspend the implementation of the contested act.

(32) Interim measures are granted only if three conditions are met: (i) the action in the main proceedings must not appear, at first sight, to be without reasonable substance, (ii) the applicant must show that the measures are urgent and that it would suffer serious and irreparable harm without them, and (iii) the interim measures must take account of the balancing of the parties' interests and of the public interest.

(33) The order is provisional in nature and in no way prejudges the decision of the EU Courts in the main proceedings.

1.2.7. Intervention (Article 278 and 279 TFEU)

(34) This is not a distinct form of action in itself. With such a procedure, a party having an interest in the outcome a pending case can intervene in the case in support of the applicant or the defendant. The intervention must first be authorised by the EGC and the CJEU.

1.2.8. Appeal (Article 256 TFEU)

(35) Judgments of the EGC can in turn be appealed, in whole or in part, to the CJEU by the unsuccessful party.

(36) The Commission may therefore be the appellant if it has been unsuccessful before the EGC (for instance, the EGC annuls a decision, or considers that the Commission failed to act in a given case or finds that the Commission is liable for the harm suffered by an undertaking).

(37) A decision to appeal or not should therefore be taken as quickly as possible, in order to leave sufficient time for the drafting of the appeal itself.

(38) Such appeals are limited to questions of law (the CJEU does not review the facts of the case unless it can be shown that the EGC clearly distorted the obvious meaning of the evidence before it).

1.3. Procedure at EU Courts

(39) For all EU Courts cases, the Legal Service represents the Commission. It is therefore the responsibility of the Legal Service to draft the various written pleadings in a case and to notify them to the Court, to present the oral arguments of the Commission at the hearing or to reply to the questions of the EU Courts.

(40) The relevant case team assists the Legal Service in carrying out this responsibility.

1.3.1. Written procedure applied by EU Courts

(41) The written procedure is particularly important in fact-intensive cases, as many merger cases are.

(42) In direct legal actions (actions for annulment, damage claim, failure to act), the written procedure includes a number of successive written pleadings (‘mémoires’):

(a) Application (‘requête’): starting point of the procedure, the application is the basis of the legal action;

(b) Defence (‘défense’): Commission’s reply to the application (prepared and sent by the Legal Service with the assistance of DG Competition, including whether to ask for the expedited procedure or to support/oppose to it when requested by the applicant);

(c) Under the expedited procedure, there will normally be no further written pleadings.

(d) Reply (‘réplique’): applicant’s reply to the Commission’s arguments;

(e) Rejoinder (‘duplique’): Commission’s final reply to the applicant.

(43) In addition, there might for example be questions from the Court, for answer either in writing or orally at the oral hearing, and possibilities to provide observations for example on application to intervene, statements in intervention or requests for confidential treatment.

(44) Shortly after the receipt of the application (‘requête’) by the Legal Service, the case team typically liaises with the Legal Service to provide its assistance and informs the Commissioner of the appeal.

(45) In references for preliminary rulings, the starting point of the case (and accordingly of the written procedure) is the request of the national Court itself.

(46) All parties to the national court case are invited by the CJEU to submit written observations on the questions referred.

(47) In addition, all EU institutions and Member States receive a copy of the request for preliminary ruling and have a right to submit written observations to the CJEU. The Commission always submits observations in references from national courts.

1.3.2. Oral procedure applied by EU Courts

(48) The second part of the procedure before the EU Courts is the oral hearing.

(49) A few weeks before the hearing, the Court provides the parties with a "Report for the Hearing". This report, drafted by the Judge Rapporteur, is a brief summary of the parties' arguments. The EU Courts may also send a few written questions, either to be answered in writing in advance of the hearing or orally at the hearing and/or demand documents. In such instances, the case team should liaise with the Legal Service immediately to plan the response and/or provide the relevant documents. The Legal Service will be responsible to draft the response, taking into account the input from DG Competition.

(50) During the hearing, each party presents oral pleadings before the Court; parties may then be asked a series of questions by the judges and (in the case of the CJEU) the Advocate General (questions are an invariable feature of the hearing before the EGC but not always before the CJEU). Only the Legal Service agents can address the EU Courts.

1.3.3. Deadlines of procedures at EU Courts

(51) Deadlines to lodge written pleadings (including, for instance, rules on the starting point of such deadlines), are governed by the TFEU, the Protocol on the Statute of the CJEU, annexed to the TFEU, the Rules of Procedure of the CJEU and those of the EGC.

(52) Such deadlines are mandatory, and any late application will be inadmissible. It is not the purpose of this Manual to describe those rules (whether an application is late or not is a question for the Legal Service to assess), especially since the Commission is usually a defendant.

(53) The only situation where the Commission may initiate proceedings is an appeal before the CJEU against a EGC judgment. Such an appeal must be lodged within two months of the notification of the EGC judgment/order to the Commission (that date should be checked with the Legal Service), plus ten days on account of distance. Special rules apply when the deadline ends on an official public holiday or a weekend (deadline extended to the end of the first following working day). All in all, in practice, this means that an appeal must be lodged before the Court, on average, 2 and a half months after the date of the judgment.

(54) Deadlines during the Court procedure are governed by the Statute of the CJEU, the Rules of Procedure of the CJEU and those of the EGC. Most of them are at the

discretion of the EU Courts themselves (for instance: deadline for the Commission to lodge its defence or its rejoinder), which gives the possibility to the Commission (via the Legal Service) to ask for extensions. Typically, the Legal Service will have 2 months and ten days to draft and submit the Commission's defence (except for the expedited procedure) and six weeks for the rejoinder. DG Competition therefore needs to respond promptly to requests for assistance from the Lega Service in order to allow time for the relevant case team's contributions to be useful to the Legal Service in drafting pleadings. In addition, some deadlines are fixed in the relevant rules and cannot be extended. This is the case before the CJEU in preliminary ruling cases (the deadline to lodge observations on the request of the national court is two months, running from the date of notification of the reference to the parties) or in appeals against EGC judgments (the deadline to reply to such an appeal is two months and cannot be extended).

1.3.4. Outcome of procedures at EU Courts

(55) The normal outcome of a case is the delivery of a judgment after the written and oral procedure.

(56) Following the delivery of a judgment, the EU Courts may issue a short press release and will publish the full text of the judgement on their website. The case team prepares a short briefing for the Commissioner; in some cases, a press release may also be prepared referring to the main points of the case/judgement and published on DG Competition website.

(57) In particular situations, the outcome may however take the form of an 'order' ('ordonnance'), adopted without an oral procedure. There are a variety of possible orders that put an end to a case, such as: orders by which the Court finds that the action is inadmissible; orders by which the Court takes note of the withdrawal of the proceedings; orders by which the Court finds that there is no longer any reason to decide on the substance of the case, etc. Note that the Court may also adopt different sorts of orders during the lifetime of the case by which the Court decides on incidental issues (such orders do not put an end to the case): orders by which the Court accepts the intervention of a third party; orders dealing with confidentiality issues; orders deciding on an interim measure request, etc.