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THE EU MERGER WORKING GROUP: LOOKING THROUGH THE REAR VIEW MIRROR

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Abstract:

The article provides the author's personal perspective on the establishment and works of the MWG and describing the functions of a closed and informal transnational network of European NCAs in the following aspects: policy development and the guidance document on NCA-cooperation; as a platform for the exchange of experiences between NCAs for current issues regarding the interpretation of EU rules; as a forum for new and sometimes controversial ideas and space for discussions in conflict; and as an incubator for building up mutual trust.

Keywords:

EU Merger Working Group, merger control, cooperation between NCAs

Introduction

The EU Merger Working Group (MWG) was established in January 2010. The idea for such a forum concerning mergers, as an equivalent to the plenary of the European Competition Network (ECN), which only deals with antitrust issues, was initially formulated by several national competition authorities (NCAs) at a break out session of the European Competition Authorities (ECA) and was later taken up by the EU Commission. It started out as an ad hoc group, but was quickly recognised as a permanent working group. Its members were drawn from NCAs and the policy section of the EU Commission.

The working group is presided over and managed by three chairs. A permanent chair held by the EU Commission and two vice-chair positions filled on an alternating basis by NCAs that volunteer for the job. The vice-chair positions usually rotate in a frequency of two to three years. The first two vice-chairs were the Irish and German competition authorities (January 2010 to October 2011).[1] The MWG holds about three meetings a year on average. During the time that the author can report on, the chairs usually had frequent telephone conferences to prepare the meetings. Depending on the projects, there were also intensive exchanges between all the members, or members of particular project teams, to advance the work on particular topics or documents, including best practice documents, papers, and presentations.

The purpose of this article is to set out some of the features of collaboration in the MWG from an inside-perspective. The author was involved in the work of the MWG from its establishment until mid-October 2016. He represented the Bundeskartellamt, the German competition authority, as one of the first two co-chairs of the MWG, remaining an active member until he left his position as head of unit merger control at the Bundeskartellamt's general policy department. The positions and opinions expressed here are his own and do not necessarily reflect the past or current positions of the Bundeskartellamt. The contribution is limited to personal observations. It is not an academic contribution to the subject. Therefore, footnotes are rather limited and a current review of the available literature is not included.

The article focuses on the following aspects of the work of the MWG and provides a glimpse of each topic: (i) policy development and the guidance document on NCA-cooperation; (ii) a platform for the exchange of experiences between NCAs; (iii) the lounge of the NCA merger network; (iv) a platform for current issues regarding the interpretation of EU rules; (v) a laboratory for new and sometimes controversial ideas; (vi) a space for discussions in times of conflict; and (vii) an incubator for building up mutual trust.

Seven aspects regarding the role and work of the MWG

1. Policy development and the guidance document on NCA-cooperation

The MWG's first major project was the development of a guidance document on NCA cooperation.[2] The project started out with the initial idea of complementing existing

1 Then the United Kingdom and Austria, the third couple of vice-chairs came from France and Poland, the fourth from Spain and Italy.

2 MWG, *Best Practices on Cooperation between EU National Competition Authorities in Merger Review* (2011) [adopted November, 8 2011]. Available from: http://www.ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf [Accessed January, 12 2020]; EC, *European Competition Network Cooperation in Merger Control*. Available from: http://www.ec.europa.eu/competition/ecn/mergers.html [Accessed January, 12 2020].

guidance documents developed by ECA with a lean list of ten learnings regarding NCA cooperation. The project gained momentum, evolved into ever more ambitious drafts and finally resulted in a substantial guidance document whose objective is to enhance cooperation between the NCAs in the EU in order to increase overall efficiency, transparency, effectiveness and timeliness of merger review. In order to reach this objective, it contains guidance for NCAs as well as for merging parties.[3]

The successful achievement of this project proved the value of the MWG both as a think tank for NCA co-operation and as a group that was able to formulate and reach agreement on policy issues and how to implement them in practice. The development of the guidance document relied on very intensive and close co-operation between the two vice-chairs and the EU Commission, with a high frequency of telephone conferences between the meetings of the MWG and a small core group that was able and willing to devote a significant amount of their time to the project. At a second stage of the project, a large number of NCAs provided comments on the draft, offering significant contributions to the document. Not all the positions were compatible or likely to be agreed on by consensus. Finally, after extended discussions, it was possible to find solutions or compromises on all the open issues and to reach an agreement on the document. The guidance document was subsequently subject to public consultation (in April 2011) and was, after further discussions and revisions, agreed on by the heads of the EU national competition authorities and the Commission's Director General for Competition (on 8 November 2011), before being published in its final form.

2. Platform for the exchange of experiences between NCAs

The MWG quickly established itself as a platform for the exchange of experiences in merger control cases and merger policy. In contrast to the plethora of conferences in the area of competition law that also serve this function, the MWG provides added value as a platform because it serves as a closed user group. It allows a frank exchange of opinions within the peer group of competition authorities. This open exchange is important to allow for an environment that enables its participants not only to share success stories, but also to reflect on investigations that did not run smoothly. It is important for enforcers to understand why particular cases ran into problems and how to avoid mistakes. This applies to process and procedure, as well as to results, i.e. the aim is to avoid type I as well as type II errors.

During the author's participation in the work of the MWG, the topics covered included, in particular, merger remedies and gun jumping. Both topics provide a lot of interesting material for success stories and difficult situations.[4] The topics were covered

3 For a summary of the guidance document's substance and a comment on the issues raised during the consultation of the draft document see BARDONG, A. (2012) Cooperation between National Competition Authorities in the EU in Multijurisdictional Merger Cases—the Best Practices of the EU Merger Working Group. *Journal of European Competition Law & Practice*, 3 (2), pp. 126–140, https://doi.org/10.1093/jeclap/lpr091.

4 See, for example, BARDONG, A. (2012) Germany: The Bundeskartellamt's New Merger Guidelines.

in several consecutive sessions of the MWG. Several NCAs as well as the EU Commission presented cases and discussed their experiences and learnings. The discussion also provided an opportunity for the other NCAs to add further examples from their own jurisdiction. The presentations were shared. The MWG did not record and publish the discussions. The results of the discussions were not compiled in a paper. This is an approach that differs from the discussions in the equivalent forums of the OECD. It seems a loss not to go through this process and not to make the results publicly available. However, in my opinion, this approach of the MWG is justified because it allows for a very open exchange of experiences in a forum that includes NCAs from all Member States and the EU Commission.

3. The 'lounge' of the NCA merger network

Merger investigations are dealt with either by the EU Commission or by one or several NCAs in the EU. Case allocation between the EU and the national level is based on the turnover of the merging parties (to be more precise, the 'undertakings concerned'), the sometimes complex rules defining the undertakings concerned, and the definition of concentration. In principle, the rules provide a clear allocation of a case either to the EU or the national level. However, the framework leaves some flexibility to change the case allocation before or after the case has been notified. In this context, there are cases in which close cooperation between the NCAs concerned by a merger case among each other and with the EU Commission is necessary.

A more informal function of the MWG is that it provides a time and place for bilateral discussions on ongoing cases, in particular with regard to case allocation and referrals. During breaks, as well as before and after the formal meetings is usually a good time to initiate or continue discussions with regard to the preparation of applications for case referrals by Member States, or to discuss whether case referral applications by merging parties will be accepted. On occasions, the evenings before MWG meetings were also used for informal exchanges and social meetings of the delegations that arrived in time for the gathering.

4. Platform for current issues regarding the interpretation of EU rules

The meetings of the MWG also function as a platform to discuss issues of interpretation with regard to various provisions in the rules, guidelines, and notices in the area of merger control. Its role can be described as a hybrid of a message board/living wiki. During the author's participation at MWG meetings, some issues were usually raised during a formal item on the agenda closer to the end of the meeting. This slot was explicitly set aside for such questions. Usually, the competition authority that expressed an interest in putting a specific question on the agenda introduced the subject and explained the background,

Journal of European Competition Law & Practice, 4 (3), p. 481-488, https://doi.org/10.1093/jeclap/lps042; BARDONG, A. Market Test in German Merger Control (2013) *Concurrences. Revue des droits de la concurrence*, 1, pp. 17-20. Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223173 [Accessed September 12, 2020].

in particular the underlying investigation or procedure in which the issue had presented itself. Most of the time, the issue was identified before the meeting, in order to allow the other participants to check their own practice on the matter. The discussion then allowed the group to share their views and practical experiences on the issue.

It is also worth mentioning that many issues of interpretation were also raised at the sidelines of the meeting in bilateral discussions or smaller groups, for example over a good cup of coffee in the cafeteria of the Commission's conference building, Centre Albert Borschette, or in the open spaces in front of the meeting rooms over a cup of free-of-charge but less-than-in-spiring coffee.

The issues discussed spanned a broader range of topics, but a large number of questions concerned issues of the rather complex rules of jurisdiction. The guidelines on jurisdictional issues already address a fairly comprehensive set of issues. However, the real life situations that arise in business arrangements and corporate structures tend to be even more diverse and dynamic. In addition, it is sometimes difficult to apply the general rules to the facts of a particular case that has to be decided in a merger investigation. Many topics raised concerned issues of jurisdiction, including, if the recollection of the author is correct, issues of the acquisition of control, the calculation of turnover, joint ventures, the attribution of turnover to parent companies, the treatment of state-owned companies, etc. Specific issues concerning the substantive assessment of particular mergers were also discussed. The discussion benefitted from the extensive experience of the members of the group, and from the frank discussions that provided sufficient background without disclosing business secrets.

5. Laboratory for new and sometimes controversial ideas

The MWG sometimes also played the role of a think tank for merger policy, as well as a laboratory for new ideas. This is an important role and the members of the MWG are well equipped to provide insights on their national regimes. This background can be very helpful in order to develop policy, instruments and institutions at an EU level. This is even more true when it comes to the assessment of initial thoughts or projects that consider steps to harmonise certain elements of national merger control throughout the European Union.

One example of this role of the MWG was the intensive discussion on the proper place for public policy considerations in merger control procedures. This project started with a stock-taking exercise that made apparent the differences between the national approaches to this issue. Not all Member States have written rules and procedures on how public interest is taken into account. A number of regimes focus more on the definition of acceptable public interest grounds as an instrument to limit public interest interventions in the assessment of mergers, which is otherwise driven by competition concerns.

By contrast, the German public interest regime reaches a similar result by focusing on procedural and institutional rules that guarantee maximum transparency in the process. If merging parties apply for ministerial authorisation (Ministererlaubnis) after a merger

has been prohibited by the competition authority, there are several procedural steps that make sure a public debate on the application of public interest rules in the particular case is initiated, or at least facilitated. The German model also clearly allocates political responsibility for the balancing of competition goals and other political goals. It provides certain limits to non-competition goals, but the legal provisions do not define them. In the author's opinion, this approach may not be easily transferrable as a model to other Member States, and may not function properly in a different institutional context. This is one example that illustrates that the harmonisation of the national rules on public policy considerations in merger control may not be the best approach. One of the conclusions that the MWG has rightly drawn for the treatment of public policy considerations in merger control is indeed that harmonisation is not put forward as a recommendation. It was coupled with a clear message to continue to design merger regimes in a way that places the emphasis on the competition assessment of mergers and limits public policy considerations to very exceptional cases. The results were published in a MWG document that also provides a detailed overview of the various rules applicable in the EU Member States.[5]

Another project concerned information requirements in national merger control regimes. It took a similar course. It started with a stock-taking exercise of merger notification forms and respectively information requirements. The comparison identified a broad level of convergence, but also a number of similarities and differences with regard to the details, as well as the general approach. A deeper analysis showed that a one-size-fits-all approach would not work in the different Member States. For example, initial information requirements in Germany turned out to be extremely light in comparison to other merger regimes. More detailed information requirements are tailored to the particular case and restricted to cases that require the provision of broader information. This system works in the context of the German competition authority, which has an extremely high retention rate, meaning that its officials can build up a lot of experience over the years and its decision-making structure is lean, which allows for a very speedy completion of investigations. At the same time, this approach is necessary because of the high number of mergers that have to be notified to the German competition authority. Transplanting this system to other Member States may not be workable. By contrast, increasing the information requirements in the German system does not seem to be a good idea either. The MWG was right not to conclude in its report that the harmonisation of merger forms would be the recommended way forward.[6] A very useful result of

5 MWG, Public Interest Regimes in the European Union – differences and similarities in approach. Final Report of the EU Merger Working Group, March, 10 2016. Available from: https://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf [Accessed January, 4 2020].

6 MWG, Report: Information requirements for merger notification. Available from: http://www.ec.europa.eu/competition/ecn/mir_report_en.pdf [Accessed January, 5 2020] at the end.

the project was the publication of comparative tables,[7] which were produced as a result of the stock-taking exercise.

A further example of a hot topic discussed at the MWG is the Zivy report, containing far-reaching proposals advanced by the French competition authority ('Making merger control simpler and more consistent in Europe'[8]). This report and its ten recommendations were developed by a high-ranking official of the French competition authority on a mission by the French government. The mission was launched in the aftermath of a politically sensitive merger case on which the French and the UK competition authorities came to different results (Eurotunnel's buyout of Sea France).[9] Quite a number of these proposals were intensively debated and attracted a lot of criticism from other NCAs. The MWG was a very appropriate forum for this debate, because it allowed an open discussion based on arguments and practical experience in these fields. Such discussion provides a solid basis that should be available before a political debate is started, which is subject to different dynamics.

In the author's opinion, most of the proposals were not the most helpful response to the challenges of consistency raised by (a low number of) parallel in-depth investigations of multijurisdictional mergers by two (or infrequently more than two) national competition authorities. However, the MWG was definitely the right place to have a meaningful and informed debate on the proposals. The German competition authority favoured a different remedy to address the issue: introducing a stop-the-clock provision that allows national competition authorities to bring parallel national investigations of multijurisdictional mergers onto the same timeline, in the event that NCAs identify serious competition issues that need to be handled in an in-depth investigation. If there is time and room for intensive cooperation on the basis of the same facts available to the NCA's conducting their investigations in parallel, then the risk of inconsistent decisions is extremely low.

The MWG performs a similar function when legislative proposals are discussed. The MWG debated in detail the Commission's proposals to amend the EU merger control regime. In particular, the treatment of minority shareholdings,[10]

7 See EC, *European Competition Network Cooperation in merger control*. Available from: http://www.ec.europa.eu/competition/ecn/mergers.html [Accessed January, 12 2020].

8 Autorité de la concurrence, Pour un contrôle des concentrations plus simple, cohérent et stratégique en Europe, Une réforme «gagnant-gagnant» au service de la compétitivité, Rapport au Ministre de l'Économie et des Finances, December, 16 2013, Paris (rapporteur, chargé de mission: Fabien Zivy). Available from: http://www.economie.gouv.fr/files/rapport_concentrations-transfrontalieres.pdf [Accessed January, 5 2020]; English translation available from: www.economie.gouv.fr/files/rapport_concentrations-transfrontalieres_en.pdf [Accessed January, 5 2020].

9 See, for example, ZIVY F., BOSCO, D., STEENBERGEN, J., BRIGGS, J.D., OAKES, D.K. (2014) Zivy's Report: Diverse Perspectives on the Cross-Borders Mergers. *Concurrences Review*, 1, pp. 10-23.

10 For a discussion of the approach in German competition law on this topic, see BARDONG, A. (2011) Minority Interests in Germany. *Concurrences*, 3, pp. 14-41.

the referral system[11] and foreign-to-foreign mergers[12] were discussed at various stages of the project.

6. Space for discussions in times of conflict

The MWG also provided a forum to discuss issues that arose in the context of advisory committee meetings, notably conflicts that became apparent between the position of Commissioner Almunia's DG Competition and at least the vast majority of Member States with regard to voting rules applicable to the Advisory Committee. The string of four-to-three mergers of mobile network operators in the telecoms industry met with increasing opposition by NCAs (including the UK, Ireland, Austria and Germany). A significant number of NCAs were not convinced that the remedies proposed by the merging parties and accepted by the EU Commission were sufficiently robust to effectively address the competition issues identified by the investigations of the EU Commission.

The Commissioner tried to downplay the NCAs' criticism in his statements to the press.[13] Attempts were made to come up with a requirement of a quorum for the adoption of Advisory Committee opinions. This requirement had no defendable basis and was strongly rejected by the NCAs. Not all the NCAs had been critical of the Commission's position with regard to the mobile telecom network mergers, but almost all the NCAs were critical of the Commission's interpretation of voting rules applicable to the Advisory Committee. At least some authorities saw this approach as an attempt to bend the procedural rules in order to downplay the weight of an Advisory Committee opinion that did not agree with the Commission's assessment of remedies in one of the major mobile network merger cases. The NCAs agreed that what is required for Advisory Committee's opinion is a majority of its members present and voting yes or no. It was clear to them that a majority means that more votes are in favour of the position than against. They were equally clear that abstentions do not effectively count as votes for or against, but that the balance of Yes and No votes is decisive. It was also clear to them that voting on Advisory Committee opinions does not require a majority of

11 See e.g. Statement of the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt (German Competition Authority) on the White Paper published by the European Commission 'Towards More Effective EU Merger Control', October, 31 2014. Available from: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Stellungnahmen_Opinion/Statement%20-%20White_Paper_more_effective_EU_merger_control.html [Accessed January, 12 2020]; Statement of the Federal Ministry of Economics and Technology and the Bundeskartellamt on the Consultation Paper published by DG Competition on possible improvements to some aspects of the EC Merger Regulation (ECMR), ('Towards more effective EU merger control'), September, 17 2013. Available from: http://www.bundeskartellamt.de/EN/AboutUs/Publications/Opinions/opinions_node.html [Accessed: January, 12 2020].

12 The approach on this issue in German competition law is discussed e.g. BARDONG, A. (2015) Foreign-to-Foreign Mergers: the German Guidance as a Blueprint for Reform?. *Journal of European Competition Law & Practice,* 6(7), pp. 477-491, https://doi.org/10.10093/jeclap/lpv029 (which does not include an account of the latest legislative changes on this issue).

13 Compare e.g. Regulators revolt against Telefónica and E-Plus merger. *Financial Times*, 20 June 2014.

the members of the committee. A majority of votes is sufficient, when compared to the sum of yes and no votes.

The example shows that the MWG can also be a useful forum for NCAs to defend their procedural rights in the context of EU merger investigations against interpretations of the procedural rules by the EU Commission, which were seen at least as very biased, in the hopefully unlikely event that such an exceptional situation should arise again. However, in the context of conflicts between the NCAs and the EU Commission, the MWG is a less effective forum because it is chaired by the EU Commission and two NCAs. This puts the Commission in an advantageous position when it comes to fending off criticism against its positions or actions. In addition, the MWG is a forum for the exchange between experts. When it comes to issues that are more of a political nature, the forum can discuss the underlying legal, economic and administrative matters, but it cannot function as a forum to balance out or decide on the political issues. In the end, these issues have to be dealt with at a higher level, e.g. at the level of Commissioner and the Heads of NCAs.

7. Incubator for building up mutual trust

In the author's opinion, a crucial role of the MWG is to serve as an incubator to build up mutual trust between NCAs. Regular meetings, personal contacts, the frequent exchange of opinions and experiences in practical cases, cooperation on positions on policy questions to be commented on or decided on by the MWG – all of these exchanges help to build up mutual trust.

The bridges built up in this process can then be used subsequently, when it comes to cooperation in parallel merger investigations. Cooperation in merger cases often has to be implemented under tight time constraints. Cooperation is not only required in situations in which the burdens and benefits of cooperation are equally shared in the same case. Sometimes, the different timeframes of the investigations mean that investigations are at different stages of the procedure. It is not unusual for one investigation to be more advanced and for cooperation to be more beneficial for the authority going second. The subsequent investigation can build on the results of the investigation that started earlier. In these situations, cooperation requires mutual trust. Cooperation can be facilitated if give and take can be established in a larger context going beyond the individual case, for example, if cooperation can be reciprocated in subsequent cases with an inverse timing.

Conclusion

The MWG is an important platform for cooperation between NCAs, as well as for cooperation between NCAs and the EU Commission. It also plays an important role in the development and formulation of policy. The way the role of the chair has been organised, i.e. by having a permanent chair of the EU Commission and two vice-chair positions filled by two alternating member states, has worked best when the MWG ad

dressed topics on which the NCAs and the EU Commission had common, or at least compatible, interests. It has been less effective in other situations.

In addition to its role as an important platform for discussions on policy, the MWG has also contributed significant work products. The author would like to mention the guidance document on cooperation between NCAs. This was crucial in providing a transparent reference for NCAs and stakeholders with regard to interagency cooperation in merger investigations.

Based on his personal experience, the author would like to underline the high level of commitment of the individuals involved in the work of the MWG. It was a pleasure to work with such a group of interesting and very dedicated people from the NCAs and from the EU Commission. The MWG has established itself as a place for discussions of high quality. The input, based on hands-on experience in a broad range of real life cases, has been instrumental in all the topics dealt with by the group.