

Assessment of mergers face new deadlines



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Competition Commission
sets out new service
standards

DURING 2002, the mergers and acquisitions division of the Competition Commission published service standards designed to provide some transparency regarding the likely timing which could be expected for the commission to finalise merger investigations.

The service standards provided for specific turnaround times based on the level of complexity of mergers. Following this, the commission also introduced a "fast track" procedure which effectively provided for a turnaround time of 20 days for completion of its investigation of non-complex mergers (comprising notifiable mergers meeting certain criteria). In embarking on this exercise, the commission took a leaf from other leading competition agencies that had gone through similar exercises. These agencies have, like the commission, sought to identify the key factors that make for an effective competition regime.

The commission has now revoked those service standards and cancelled its "fast track" procedure. It has replaced the previous approach by way of its revised service standards. The need to review and revisit the commission's service standards stemmed in part from the previously applicable definitions of the various

categories of mergers and the commission's frequent inability to meet the turnaround times provided for in those service standards. For example, the average time period for the review of non-complex mergers has risen from 21 days in 2006, to 29 days in 2009 while the service standards stipulated a turnaround time of 20 days. Over the same period, the time required to review complex cases similarly increased from 44 to 51 days, while the service standards stipulated a turnaround time of 25 days.

The revised service standards set out review periods which the commission will strive to achieve in its assessment of mergers. To this end, the commission has devised differentiating factors to categorise mergers as non-complex (phase 1), complex (phase 2) or very complex (phase 3).

Non-complex mergers have little or no effect on competition in the market. These are mergers where the parties' combined market share is below 15%, where no complex control structures arise or no public interest issues arise. The commission anticipates reviewing phase 1 mergers within 20 business days.

Complex, or phase 2, mergers involve transactions between direct or potential competitors or between customers and suppliers where the

merging parties hold market shares in excess of 15% in their respective markets. Complex mergers usually require in-depth market analyses and consideration of public interest issues. The commission expects reviewing phase 2 mergers within 45 business days.

Very complex mergers involve transactions between leading market participants in any one of the markets in which they compete and are likely to create or result in a substantial prevention or lessening of competition. These phase 3 mergers require thorough investigation, including obtaining specific documents and information from the merging parties and third party industry participants. These are expected to be reviewed within 60 business days.

To achieve the above review periods, the commission stressed the importance of complying with the statutory filing requirements. In this regard the commission has released a practice note containing guidelines outlining the types of information and documents required for purposes of a complete merger filing. The guidelines expand the information which merging parties will now be required to submit in merger filings, particularly in regard to the scope of strategic documents and employment effects analyses.

The clear inference is that the commission intends to become far stricter about its finding (required to be made within five business days from the date of filing of a large merger and 10 business days from the date of filing of an intermediate or small merger) that parties have submitted a complete merger filing. If an incomplete filing is made, and a notice of incomplete filing is issued by the commission to the merging parties, the period for consideration of the merger by the commission begins to run only after the merging parties have completed their merger filing (and not on the date on which the merger was initially filed).

To minimise the risk of non-compliance with the merger filing requirements, merging parties are encouraged to seek advice from a competition law specialist at a very early stage of the transaction to ensure that all necessary information is included at the time when the merger filing is lodged. Merging parties may also approach the commission for a pre-notification meeting to discuss merger filing requirements on a proposed merger in more detail to avoid the risk of non-compliance.

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