

Law

Merger approval takes too long

More must be done to trim down ever-lengthening timescales, Alec Burnside and Michael Weiner write



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Timescales for the approval of merger and acquisition deals have grown and grown in recent years, both in Europe and the United States.

That would be a problem in any economic climate, creating uncertainty for customers, suppliers and key employees, but it is even more of an issue in these times of fast-moving change.

The length of merger reviews far exceeds the formal timetable. The main reason in Europe is the length of time needed to assemble a notification containing all of the information that the European Commission requires.

Over several years we have tracked the time lapse from announcement to clearance, and our latest research shows that the timescales continue to lengthen. The “pre-notification” exercise has been averaging 5.7 months lately and time incurred before the start of the formal timetable is about 6.4 months for in-depth reviews. It takes in total 12.5 months on average for deals to get through. The Eon-Innogy deal took 18.5 months.

However, there are good reasons why timescales have ballooned. Merger reviews are evidence-based

and nowadays involve ever more sophisticated economics. Officials also delve deeply into internal documents in the belief that they will reveal more candid opinions than those in formal submissions.

Several years ago the EU Court of Justice chastised the European Commission for playing fast and loose with evidence, and for “DIY” economics. Merging parties have since reaped the whirlwind, with officials demanding and weighing more evidence and writing decisions.

Twenty years ago a commission clearance after a detailed review might have run to 50 pages. The recent Bayer-Monsanto clearance ran to nearly 950 pages. And even with that level of caution, some recent commission decisions have been upheld in court — for example, the prohibition on UPS buying TNT, which ultimately allowed TNT to be snatched up elsewhere.

At the same time it is important to recognise that the commission fast-tracks 70 per cent of mergers that plainly present no competition concerns. Credit where it is due.

But the challenge remains to find a

way of expediting reviews in the more difficult cases. The lengthening duration of US reviews led to acknowledgment from the US Department of Justice and the Federal Trade Commission of the need to reform procedures. Nonetheless, delivery of those good intentions remains pending.

The practical result of longer and greater scrutiny is that businesses should aim to be far advanced with merger preparations before announcement, and in appropriate cases they should be ready to concede a remedy early on.

They should take care in written communications, both internal and external — a recent claim that a deal would allow substantial savings in a combined research and development budget came back to haunt the companies who were found to be restricting innovation competition.

Alec Burnside is a partner in Brussels and Michael Weiner a partner in New York at the US law firm Dechert, which has just released its latest antitrust merger investigation timing tracker.