



EC official moots 'competition fund' to assist consumer organisations in EC merger appeals

27 Nov 09 | 09:00 GMT

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IN BRIEF

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Kay Parplies is a former merger official within the commission, and now heads the Chief Economist Unit at the executive's trade directorate.

Speaking at a conference* in what he stressed was a 'personal capacity,' Parplies said that since the introduction of the 'significant impediment to effective competition' (SIEC) test into the regulator's merger control regime in 2004, there was a possibility "that there has been an under-enforcement bias."

While, according to Parplies, this was hard to prove, he pointed to the fact that there had been "very few prohibition decisions since the introduction of the SIEC test in 2004."

Instances of phase II clearances with remedies are also down on pre-SIEC years, and this could be because of the "asymmetric litigation risk" faced by the commission in merger cases.

Parplies pointed out that the intervention rate in phase II reviews, where the commission either blocks a deal or clears it with remedies, has fallen from 4.6 percent of all notified cases in the ten years prior to the adoption of the SIEC test, to 2.2 percent for the five years since.

The most probable explanation for this drop is likely to be the three defeats the regulator suffered in 2002 court appeal cases where merging parties successfully argued against commission prohibition decisions. These, it is argued, have had an effect on the application of the SIEC test.

Responding to this perceived drop in enforcement, Parplies said that "an obvious solution to that would be to try and strengthen consumer agencies and to strengthen their ability" to bring litigation actions.

He put forward the idea of a compensation fund "to which designated consumer agencies would have access."

They could then "draw on these funds to hire specialised legal and economic advice," with the aim of putting them on a more equal footing with the merging parties, and consequently allow them to lodge appeals against merger clearance decisions in the courts.

Concluding, Parplies said that he believed the under-enforcement bias, "to the extent that it exists," is "a serious problem" which is "not only a problem for consumers, but would risk harming the overall economic efficiency."

Parplies' 'proposal' has been published as part of a paper** along with University of Bonn academic Frank Maier-Rigaud on merger-control trends since the introduction of the SIEC test.

*British Institute of International and Comparative Law Merger Conference, held at the Law Society, London, 26 November 2009.

**EU Merger Control Five Years After The Introduction Of The SIEC Test: What Explains the Drop in Enforcement Activity? European Competition Law Review (ECLR), vol. 11, pp. 565-579, 2009

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