

Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004

(2005/C 56/04)

(Text with EEA relevance)

I. INTRODUCTION

1. This Notice sets out a simplified procedure under which the Commission intends to treat certain concentrations pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings (the EC Merger Regulation) ⁽¹⁾ on the basis that they do not raise competition concerns. This Notice replaces the Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 ⁽²⁾. The Commission's experience gained in applying Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽³⁾ has shown that certain categories of notified concentrations are normally cleared without having raised any substantive doubts, provided that there were no special circumstances.

2. The purpose of this Notice is to set out the conditions under which the Commission usually adopts a short-form decision declaring a concentration compatible with the common market pursuant to the simplified procedure and to provide guidance in respect of the procedure itself. When all necessary conditions set forth at point 5 of this Notice are met and provided there are no special circumstances, the Commission adopts a short-form clearance decision within 25 working days from the date of notification, pursuant to Article 6(1)(b) of the EC Merger Regulation ⁽⁴⁾.

3. However, if the safeguards or exclusions set forth at points 6 to 11 of this Notice are applicable, the Commission may launch an investigation and/or adopt a full decision under the EC Merger Regulation.

4. By following the procedure outlined in the following sections, the Commission aims to make Community merger control more focused and effective.

II. CATEGORIES OF CONCENTRATIONS SUITABLE FOR TREATMENT UNDER THE SIMPLIFIED PROCEDURE

Eligible concentrations

5. The Commission will apply the simplified procedure to the following categories of concentrations:

(a) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:

(i) the turnover ⁽⁵⁾ of the joint venture and/or the turnover of the contributed activities ⁽⁶⁾ is less than EUR 100 million in the EEA territory; and

(ii) the total value of assets ⁽⁷⁾ transferred to the joint venture is less than EUR 100 million in the EEA territory ⁽⁸⁾;

⁽⁵⁾ The turnover of the joint venture should be determined according to the most recent audited accounts of the parent companies, or the joint venture itself, depending upon the availability of separate accounts for the resources combined in the joint venture.

⁽⁶⁾ The expression 'and/or' refers to the variety of situations covered; for example:

- in the case of a joint acquisition of a target company, the turnover to be taken into account is the turnover of this target (the joint venture),
- in the case of the creation of a joint venture to which the parent companies contribute their activities, the turnover to be taken into account is that of the contributed activities,
- in the case of entry of a new controlling party into an existing joint venture, the turnover of the joint venture and the turnover of the activities contributed by the new parent company (if any) must be taken into account.

⁽⁷⁾ The total value of assets of the joint venture should be determined according to the last prepared and approved balance sheet of each parent company. The term 'assets' includes: (1) all tangible and intangible assets that will be transferred to the joint venture (examples of tangible assets include production plants, wholesale or retail outlets, and inventory of goods; examples of intangible assets include intellectual property, goodwill, etc.), and (2) any amount of credit or any obligations of the joint venture which any parent company of the joint venture has agreed to extend or guarantee.

⁽⁸⁾ Where the assets transferred generate turnover, then neither the value of the assets nor that of the turnover may exceed EUR 100 million.

⁽¹⁾ OJ L 24, 29.1.2004, p. 1.

⁽²⁾ OJ C 217, 29.7.2000, p. 32.

⁽³⁾ OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.

⁽⁴⁾ The notification requirements are set out in Annexes I and II to Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

- (b) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged ⁽⁹⁾;
- (c) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and:
 - (i) two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships) provided that their combined market share is less than 15 %; or
 - (ii) one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships) ⁽¹⁰⁾, provided that none of their individual or combined market shares is at either level 25 % or more ⁽¹¹⁾;
- (d) a party is to acquire sole control of an undertaking over which it already has joint control.

Safeguards and exclusions

6. In assessing whether a concentration falls into one of the categories referred to in point 5, the Commission will ensure that all relevant circumstances are established with sufficient clarity. Given that market definitions are likely to be a key element in this assessment, the parties should provide information on all plausible alternative market definitions during the pre-notification phase (see point 15). Notifying parties are responsible for describing all alternative relevant product and geographic markets on which the notified concentration could have an impact and for providing data and information relating to the

⁽⁹⁾ See Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

⁽¹⁰⁾ See footnote 6.

⁽¹¹⁾ This means that only concentrations, which do not lead to affected markets, as defined in Section 6 III of Form CO, fall into this category. The thresholds for horizontal and vertical relationships apply to market shares both at national and at EEA levels and to any plausible alternative product market definition that may have to be considered in a given case. It is important that the underlying market definitions set out in the notification are precise enough to justify the assessment that these thresholds are not met, and that all plausible alternative market definitions are mentioned (including geographic markets narrower than national).

definition of such markets ⁽¹²⁾. The Commission retains the discretion to take the ultimate decision on market definition, basing its decision on an analysis of the facts of the case. Where it is difficult to define the relevant markets or to determine the parties' market shares, the Commission will not apply the simplified procedure. In addition, to the extent that concentrations involve novel legal issues of a general interest, the Commission would normally abstain from adopting short-form decisions, and would normally revert to a normal first phase merger procedure.

7. While it can normally be assumed that concentrations falling into the categories referred to in point 5 will not raise serious doubts as to their compatibility with the common market, there may nonetheless be certain situations, which exceptionally require a closer investigation and/or a full decision. In such cases, the Commission may revert to a normal first phase merger procedure.
8. The following are indicative examples of types of cases which may be excluded from the simplified procedure. Certain types of concentrations may increase the parties' market power, for instance by combining technological, financial or other resources, even if the parties to the concentration do not operate in the same market. Concentrations where at least two parties to the concentration are present in closely related neighbouring markets ⁽¹³⁾ may also be unsuitable for the simplified procedure, in particular, where one or more of the parties to the concentration holds individually a market share of 25 % or more in any product market in which there is no horizontal or vertical relationship between the parties but which is a neighbouring market to a market where another party is active. In other cases, it may not be possible to determine the parties' precise market shares. This is often the case when the parties operate in new or little developed markets. Concentrations in markets with high entry barriers, with a high degree of concentration ⁽¹⁴⁾ or other known competition problems may also be unsuitable.

⁽¹²⁾ As with all other notifications, the Commission may revoke the short-form decision if it is based on incorrect information for which one of the undertakings concerned is responsible (Article 6(3)(a), of the EC Merger Regulation).

⁽¹³⁾ Product markets are closely related neighbouring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use.

⁽¹⁴⁾ See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C 31, 5.2.2004, p. 5, points 14-21.

9. The Commission's experience to date has shown that a change from joint to sole control may exceptionally require closer investigation and/or a full decision. A particular competition concern could arise in circumstances where the former joint venture is integrated into the group or network of its remaining single controlling shareholder, whereby the disciplining constraints exercised by the potentially diverging incentives of the different controlling shareholders are removed and its strategic market position could be strengthened. For example, in a scenario in which undertaking A and undertaking B jointly control a joint venture C, a concentration pursuant to which A acquires sole control of C may give rise to competition concerns in circumstances in which C is a direct competitor of A and where C and A will hold a substantial combined market position and where this removes a degree of independence previously held by C⁽¹⁵⁾. In cases where such scenarios require a closer analysis, the Commission may revert to a normal first phase merger procedure⁽¹⁶⁾.

10. The Commission may also revert to a normal first phase merger procedure where neither the Commission nor the competent authorities of Member States have reviewed the prior acquisition of joint control of the joint venture in question.

11. Furthermore, the Commission may revert to a normal first phase merger procedure where an issue of coordination as referred to in Article 2(4) of the EC Merger Regulation arises.

12. If a Member State expresses substantiated concerns about the notified concentration within 15 working days of receipt of the copy of the notification, or if a third party expresses substantiated concerns within the time-limit laid down for such comments, the Commission will adopt a full decision. The time-limits set out in Article 10(1) of the EC Merger Regulation apply.

Referral requests

13. The simplified procedure will not be applied if a Member State requests the referral of a notified concentration

pursuant to Article 9 of the EC Merger Regulation or if the Commission accepts a request from one or more Member States for referral of a notified concentration pursuant to Article 22 of the EC Merger Regulation.

Pre-notification referrals at the request of the notifying parties

14. Subject to the safeguards and exclusions set out in this Notice, the Commission may apply the simplified procedure to concentrations where:

(i) following a reasoned submission pursuant to Article 4(4) of the EC Merger Regulation, the Commission decides not to refer the case to a Member State; or

(ii) following a reasoned submission pursuant to Article 4(5) of the EC Merger Regulation the case is referred to the Commission.

III. PROCEDURAL PROVISIONS

Pre-notification contacts

15. The Commission has found pre-notification contacts between notifying parties and the Commission beneficial even in seemingly unproblematic cases⁽¹⁷⁾. The Commission's experience of the simplified procedure has shown that candidate cases for the simplified procedure may raise complex issues for instance, of market definition (see point 6) which should preferably be resolved prior to notification. Such contacts allow the Commission and the notifying parties to determine the precise amount of information to be provided in a notification. Pre-notification contacts should be initiated at least two weeks prior to the expected date of notification. Notifying parties are therefore advised to engage in pre-notification contacts, particularly where they request the Commission to waive full-form notification in accordance with Article 3(1) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings⁽¹⁸⁾ on the grounds that the operation to be notified will not raise competition concerns.

⁽¹⁵⁾ Case No. IV/M.1328 KLM/Martinair, XXIXth Report on Competition Policy 1999 – SEC(2000) 720 final, points 165-166.

⁽¹⁶⁾ Case No COMP/M.2908 Deutsche Post/DHL (II), Decision of 18.9.2002.

⁽¹⁷⁾ See DG Competition Best Practices on the conduct of EC merger control proceedings available at: http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf

⁽¹⁸⁾ OJ L 133, 30.4.2004, p. 1.

Publication of the fact of notification

16. The information to be published in the *Official Journal of the European Union* upon receipt of a notification ⁽¹⁹⁾ will include the names of the parties to the concentration, their country of origin, the nature of the concentration and the economic sectors involved, as well as an indication that, on the basis of the information provided by the notifying party, the concentration may qualify for a simplified procedure. Interested parties will then have the opportunity to submit observations, in particular on circumstances which might require an investigation.

Short-form decision

17. If the Commission is satisfied that the concentration fulfils the criteria for the simplified procedure (see point 5), it will normally issue a short-form decision. This includes appropriate cases not giving rise to any competition concerns where it receives a full form notification. The concentration will thus be declared compatible with the common market, within 25 working days from the date of notification, pursuant to Article 10(1) and (6) of the EC Merger Regulation. The Commission will endeavour to issue a short-form decision as soon as practicable following expiry of the 15 working day period during which Member States may request referral of a notified concentration pursuant to Article 9 of the EC Merger Regulation. However, in the period leading up to the 25 working day deadline, the option of reverting to a normal

first phase merger procedure and thus launching investigations and/or adopting a full decision remains open to the Commission, should it judge such action appropriate in the case in question.

Publication of the short-form decision

18. The Commission will publish a notice of the fact of the decision in the *Official Journal of the European Union* as it does for full clearance decisions. The public version of the decision will be made available on DG Competition's Internet website for a limited period. The short-form decision will contain the information about the notified concentration published in the Official Journal at the time of notification (names of the parties, their country of origin, nature of the concentration and economic sectors concerned) and a statement that the concentration is declared compatible with the common market because it falls within one or more of the categories described in this Notice, with the applicable category(ies) being explicitly identified.

IV. ANCILLARY RESTRICTIONS

19. The simplified procedure is not suited to cases in which the undertakings concerned request an express assessment of restrictions which are directly related to, and necessary for, the implementation of the concentration.

⁽¹⁹⁾ Article 4(3) of the EC Merger Regulation.