

**COMMUNICATION FROM THE COMMISSION****Approval of the content of a draft for a Commission notice on a simplified treatment of certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings**

(2022/C 192/04)

The Commission has approved the content of a draft for a Commission notice on a simplified treatment of certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings on 6 May 2022.

The draft for a Commission Notice is attached as an Annex to this Communication.

The draft for a Commission Notice is open to public consultation at:

<http://ec.europa.eu/competition/consultations/open.html>

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## ANNEX

**Commission notice on a simplified treatment of certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings****DRAFT****I. INTRODUCTION**

1. The Commission's experience gained in applying Council Regulation (EC) No 139/2004 <sup>(1)</sup> has shown that certain categories of concentrations are generally not likely to raise competition concerns. The purpose of this Notice is to set out the conditions under which the Commission will review, in a streamlined manner, certain concentrations and to provide guidance on the simplified procedure laid down in Annex II of Commission Regulation (EU) [No [X]/2023 of [X] 2023] implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the 'Implementing Regulation') <sup>(2)</sup>. This Notice replaces the Notice from 2013 <sup>(3)</sup>.
2. The Commission will review under the simplified procedure concentrations meeting the conditions laid down in point 5 of this Notice, provided none of the safeguards or exclusions set out in Section II.C of this Notice apply <sup>(4)</sup>. For those concentrations, the Commission adopts a short-form decision declaring a concentration compatible with the internal market within 25 working days from the date of notification, pursuant to Article 6(1), point (b) of the Merger Regulation <sup>(5)</sup>. Furthermore, the Commission may, under certain circumstances, make use of the flexibility clause set out in points 8 and 9 of this Notice in order to review, under the simplified procedure, certain concentrations that do not meet the conditions laid down in point 5 of this Notice, provided none of the safeguards or exclusions set out in Section II.C of this Notice apply <sup>(6)</sup>. However, the Commission may launch an investigation, adopt a full decision or both under the Merger Regulation in respect of a proposed concentration, even if the proposal falls under the categories in this Notice, in particular if any of the safeguards or exclusions set out in Section II.C of this Notice apply.
3. Certain concentrations reviewed under the normal procedure may give rise to horizontal overlaps <sup>(7)</sup> or vertical relationships <sup>(8)</sup> meeting the conditions laid down in point 5(d) of this Notice. Provided that no safeguards or exclusions set out in Section II.C of this Notice apply, these horizontal overlaps or vertical relationships will be assessed in a streamlined manner (i.e. in the same way as in a short-form decision) in the Commission's final decision in the normal procedure. Furthermore, the Commission may in certain circumstances make use of the flexibility clause set out in point 8 of this Notice in order to assess, in a streamlined manner under the normal procedure, certain horizontal overlaps or vertical relationships, provided no safeguards or exclusions set out in Section II.C of this Notice apply.
4. By following the procedure outlined in the sections II to IV, the Commission aims to make Union merger control more focused and effective.

<sup>(1)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the 'Merger Regulation') (OJ L 24, 29.1.2004, p. 1).

<sup>(2)</sup> OJ L ... .

<sup>(3)</sup> Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (OJ C 366, 14.12.2013, p. 5).

<sup>(4)</sup> See Section II.C of this Notice.

<sup>(5)</sup> The notification requirements are set out in Annex I and II to the Implementing Regulation.

<sup>(6)</sup> See Section II.C of this Notice.

<sup>(7)</sup> A concentration gives rise to horizontal overlaps when the parties to the concentration are engaged in business activities in the same relevant product and geographic market(s), including the development of pipeline products. Horizontal overlaps involving pipeline products include overlaps between pipeline products and overlaps between one or more marketed product(s) and one or more pipeline product(s). Pipeline products are products (or services) that undertakings intend to bring to the market in the short or medium term.

<sup>(8)</sup> A concentration gives rise to vertical relationships when one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged, including the development of pipeline products. Vertical relationships involving pipeline products include relationships between pipeline products and relationships between one or more marketed product(s) and one or more pipeline product(s).

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

### A. Eligible concentrations

5. The Commission will apply in principle <sup>(9)</sup> the simplified procedure to any of the following categories of concentrations <sup>(10)</sup>:
- (a) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no current or expected turnover within the territory of the European Economic Area (EEA) <sup>(11)</sup>, and the undertakings concerned have not planned to transfer any assets within the EEA to the joint venture at the time of notification <sup>(12)</sup>;
  - (b) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has negligible activities in the EEA. This includes concentrations where all of the following conditions are fulfilled:
    - i) the annual current turnover of the joint venture and/or the turnover of the contributed activities <sup>(13)</sup> as well as the expected annual turnover is less than EUR 100 million in the EEA <sup>(14)</sup>;
    - ii) the total value of asset transfers to the joint venture in the EEA planned <sup>(15)</sup> at the time of notification is less than EUR 100 million <sup>(16)</sup>;
  - (c) 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 geographic market <sup>(17)</sup>, or in a relevant product market which is upstream or downstream from a product market in which any other party to the concentration is engaged <sup>(18)</sup>;

<sup>(9)</sup> Provided no safeguards or exclusions set out in Section II.C of this Notice apply.

<sup>(10)</sup> A concentration fulfilling all the conditions of any of the categories mentioned in points 5 (a), (b), (c), (d) or (e) will in principle be a concentration eligible for the simplified procedure. This however does not mean that a transaction will automatically benefit from the simplified procedure if it falls under one of those categories. For example, a transaction may fall under point 5(b) but, at the same time, give rise to horizontal overlaps exceeding the thresholds laid down in point 5(d). In such a case, the Commission may revert to the normal merger procedure, notably if any of the circumstances in Section II.C are present.

<sup>(11)</sup> The term 'current turnover' refers to turnover generated by the joint venture at the time of notification. The turnover of the joint venture can be determined according to the most recent audited accounts of the parent companies, or the joint venture itself, depending on the availability of separate accounts for the resources combined in the joint venture. The term 'expected turnover' refers to the turnover expected to be generated in the three years following notification.

<sup>(12)</sup> Any asset actually transferred or planned to be transferred at the time of the notification to the joint venture should be considered, regardless of the date when such asset will actually be transferred to the joint venture.

<sup>(13)</sup> That covers a variety of situations. 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.

<sup>(14)</sup> See footnote 11 for guidance on calculation of joint ventures' turnover and on the terms 'current' and 'expected' turnover.

<sup>(15)</sup> See footnote 12.

<sup>(16)</sup> The total value of the assets of the joint venture can be determined according to the last prepared and approved balance sheet of each parent company. The term 'assets' includes: (i) 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, pipelines or R&D programmes, etc.), and (ii) any amount of financing, including access to 'cash', credit or any obligations of the joint venture which any parent company of the joint venture has agreed to extend or guarantee.

<sup>(17)</sup> See Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5). Any reference in this Notice to undertakings' activities in markets should be understood as activities in markets within the EEA or markets which include the EEA, but may be wider than the EEA.

<sup>(18)</sup> See the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6), footnote 4. For the purposes of this Notice, a vertical relationship normally presupposes that the input is used directly in the own production of the downstream entity (i.e. it is integrated in the product or it is strictly needed for the production of the downstream product) or that the input is re-sold by the downstream firm (e.g. distributors). This excludes remote links or links with services provided to various sectors, such as supply of electricity or waste collection services.

- (d) two or more undertakings merge or one or more undertakings acquire sole or joint control of another undertaking and the conditions set out in points 5(d)(i) and 5(d)(ii) are fulfilled under all plausible market definitions <sup>(19)</sup>:
- (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market <sup>(20)</sup> (horizontal overlap) meets at least one of the following conditions <sup>(21)</sup>:
- aa) it is lower than 20 %;
- bb) it is lower than 50 % and the increment (delta) of the Herfindahl-Hirschman Index ('HHI') resulting from the concentration on this market is below 150 <sup>(22)</sup>;
- (ii) the individual and combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationship) <sup>(23)</sup> meet at least one of the following conditions <sup>(24)</sup>:
- (aa) they are lower than 30 on the upstream and the downstream markets
- (bb) they are lower than 30 % on the upstream market and parties to the concentration active in the downstream market hold a purchasing share <sup>(25)</sup> of less than 30 % regarding upstream inputs;
- (cc) they are lower than 50 % on both the upstream and downstream markets, the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150 on both the upstream and downstream markets, and the smaller undertaking in terms of market share is the same in the upstream and downstream markets <sup>(26)</sup>.
- (e) a party is to acquire sole control of an undertaking over which it already has joint control.

6. A concentration may however fulfil the criteria of more than one of the categories described in this Notice. Accordingly, notifying parties may submit a notification of a concentration on the basis of more than one category <sup>(27)</sup>.

<sup>(19)</sup> The thresholds for horizontal overlaps and vertical relationships apply to any plausible alternative product and geographic market definition that may have to be considered. 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 that may have to be considered are mentioned (including geographic markets narrower than national).

<sup>(20)</sup> See footnote 17.

<sup>(21)</sup> For the avoidance of doubt, if some of the plausible markets concerned by a transaction fulfil the conditions of 5(d) (i) (aa) and others those of 5(d) (i) (bb), the transaction will be considered to fulfil the conditions set out in 5(d)(i).

<sup>(22)</sup> The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. See point 16 in the Commission 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). However, in order to calculate the HHI delta resulting from the concentration, it is sufficient to subtract from the square of the sum of the market shares of the parties to the concentration (in other words, the square of the merged entity's market share post-concentration) the sum of the squares of the parties' individual market shares (since the market shares of all other competitors in the market remain unchanged and thus do not influence the result of the equation).

<sup>(23)</sup> See footnotes 17 and 18.

<sup>(24)</sup> For the avoidance of doubt, if some of the plausible markets concerned by a transaction fulfil the conditions of 5(d) (ii) (aa) and others those of 5(d) (ii) (bb) and/or 5(d) (ii) (cc), the transaction will be considered to fulfil the conditions set out in 5(d)(ii).

<sup>(25)</sup> An undertaking's purchasing share is calculated by dividing (i) the volume or value of the undertaking's purchases of products in the upstream market with (ii) the total size of the upstream market (in terms of volume or value).

<sup>(26)</sup> This category aims to capture small increments to a pre-existing vertical integration. For example, Company A, active in an upstream and a downstream market (with a share of 45 % in each) acquires Company B active in the same upstream and downstream markets (with a share of 0,5 % in each). This category does not capture situations in which the bulk of the vertical integration results from the transaction, even if the combined market shares are below 50 % and the HHI delta is below 150. For example, this category does not capture the following situation: Company A, active upstream with a market share of 45 % and downstream with a market share of 0,5 % acquires company B active upstream with a market share of 0,5 % and downstream with a market share of 45 %.

<sup>(27)</sup> When a concentration falls under more than one simplified category, the notifying parties should expressly indicate so in the notification form.

7. For the purpose of the application of points 5(c) and 5(d), in the case of an acquisition of joint control, where the joint venture is not active in the same product market as the undertakings acquiring joint control, the relationships that exist only between the undertakings acquiring joint control are not considered to be horizontal overlaps or vertical relationships within the meaning of this Notice <sup>(28)</sup>. Moreover, where the joint venture and the undertakings acquiring joint control are active in the same product and geographic market, the combined market shares should take into account the activities of all the undertakings active on that market. Where the concentration does not bring about any increment and the horizontal overlaps and vertical relationships are pre-existing, such pre-existing overlaps and relationships are not taken into account for the purposes of the application of points 5(c) and 5(d).

**B. Flexibility clause to change from normal to simplified procedure**

8. At the request of the notifying parties, the Commission may review under the simplified procedure certain concentrations not falling under any of the categories set out in point 5 of this Notice if two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided the conditions set out in points 8(a) and 8(b) are fulfilled under all plausible market definitions <sup>(29)</sup>:
- (a) the combined market share of all the parties to the concentration that are engaged in a horizontal overlap remains below 25 %;
  - (b) the individual and combined market shares of all the parties to the concentration that are engaged in a vertical relationship meet at least one of the following conditions <sup>(30)</sup>:
    - i) they are lower than 35 % in the upstream and downstream markets;
    - ii) they are lower than 50 % in one market while the individual and combined market shares of all the parties to the concentration in all the other vertically related markets are less than 10 %.
9. At the request of the notifying parties, the Commission may review under the simplified procedure certain concentrations not falling under any of the categories set out in point 5 of this Notice if two or more undertakings acquire joint control of a joint venture, provided that <sup>(31)</sup>:
- (a) the annual current turnover of the joint venture, and/or the turnover of the contributed activities <sup>(32)</sup> as well as the expected annual turnover is less than EUR 150 million in the EEA <sup>(33)</sup>; and
  - (b) the total value of asset transfers to the joint venture in the EEA planned <sup>(34)</sup> at the time of notification is less than EUR 150 million <sup>(35)</sup>.
10. The categories mentioned in points 8 and 9 apply alternatively, not cumulatively. For the avoidance of doubt, point 8 can be combined with point 5(d). Therefore, the notifying parties may request the application of the flexibility clause for certain markets provided that the conditions set out in point 8 are met and benefit from the simplified procedure if all the remaining markets fulfil the conditions laid down in point 5(d).

<sup>(28)</sup> Those overlaps or relationships may however give rise to coordination as referred to in Article 2(4) of the Merger Regulation and should be dealt with in line with point 19 of this Notice.

<sup>(29)</sup> See footnote 17.

<sup>(30)</sup> For the avoidance of doubt, if some of the plausible markets concerned by a transaction fulfil the conditions of 8(b) (i) and others those of 8(b) (ii), the transaction will be considered to fulfil the conditions set out in 8(b).

<sup>(31)</sup> A concentration fulfilling all the conditions of any of the categories mentioned in points 8 or 9 will in principle be a concentration eligible to benefit from the flexibility clause. This however does not mean that a transaction will automatically benefit from the simplified procedure if it falls under one of these categories. For instance, a transaction may fall under point 9 but, at the same time, give rise to horizontal overlaps exceeding the thresholds laid down in point 5(d) or 8. In such a case, the Commission may not accept to review the case under the simplified procedure.

<sup>(32)</sup> See footnote 13.

<sup>(33)</sup> See footnote 11 for guidance on calculation of joint ventures' turnover and on the terms 'current' and 'expected' turnover.

<sup>(34)</sup> See footnote 12.

<sup>(35)</sup> See footnote 16.

## C. Safeguards and exclusions

11. This section sets out examples of types of concentrations that may be excluded from the simplified procedure.
12. The presence of one or more of the circumstances set out in this section may be a reason for the Commission to inform the notifying parties that the simplified treatment is not suitable for concentrations falling under point 5. In cases where one or more of the circumstances described in the this section are present, the flexibility clause in points 8-9 will normally not be applied. In such cases, the Commission may revert to a normal procedure.

### C.1. *Joint ventures with negligible activities in the EEA [point 5(b)]*

13. For concentrations falling under point 5(b), the normal procedure may also be considered appropriate where horizontal overlaps or vertical relationships exist between the parties to the concentration, on the basis of which it cannot be excluded that the concentration will raise serious doubts as to its compatibility with the internal market, or if any of the special circumstances set out in Section II.C are present <sup>(36)</sup>.

### C.2. *Difficulty in defining the relevant markets*

14. In assessing whether a concentration that falls under points 5 and 8 or 9 should nevertheless be reviewed under the normal procedure, 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 notifying parties should provide information on all plausible alternative market definitions, generally during the pre-notification phase <sup>(37)</sup>. 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 all the data and information relating to the definition of such markets <sup>(38)</sup>. The Commission retains the discretion to take the final decision on market definition, after analysing the facts of the case. The Commission will not apply the simplified procedure where it is difficult to define the relevant markets or to determine the market shares of the parties to the concentration. Similarly, if the concentration involves novel legal issues of general interest, the Commission may abstain from adopting short-form decisions, and may revert to a normal procedure.

### C.3. *Non-controlling shareholdings*

15. One party to the concentration may have significant non-controlling shareholdings in companies active in the market(s) where another party to the concentration is active. For example, an acquirer may have a non-controlling minority shareholding in a company active in the same market(s) as the target company or in a market upstream or downstream to the market(s) where the target is active. If those companies have a very significant market share, under certain circumstances, the concentration may not be suitable for review under the simplified procedure, even if the combined market shares of the parties to the concentration are below the thresholds set out in point 5.

### C.4. *Other competitively valuable assets*

16. Certain types of concentrations may increase the market power of the parties to the concentration by combining technological, financial or other resources, or competitively valuable assets, such as raw materials, intellectual property rights (including for example patents, know-how, designs and brands), infrastructure, a significant user base or commercially valuable data inventories, even if the parties to the concentration do not operate in the same market. Those concentrations may not be suitable for review under the simplified procedure.

<sup>(36)</sup> In cases that fall under point 5(a), where the activities of the parties to the concentration give rise to horizontal overlaps or vertical relationships, the notifying parties are required to provide all the data and information relating to the definition of such markets.

<sup>(37)</sup> See point 28.

<sup>(38)</sup> 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, as set out in Article 6(3), point (a) of the Merger Regulation.

C.5. *Closely related neighbouring markets*

17. Concentrations where at least two parties to the concentration are present in closely related neighbouring markets <sup>(39)</sup> may also not be suitable for review under the simplified procedure, in particular where one or more of the parties to the concentration hold an individual or combined market share of 30 % or more in any product market in which there is no horizontal overlap or vertical relationship between the parties to the concentration but which is neighbouring to a market where another party to the concentration is active <sup>(40)</sup>. The determination of neighbouring markets should be undertaken in accordance with point 14 of this Notice.

C.6. *Circumstances mentioned in the Commission's Guidelines on the assessment of horizontal and non-horizontal mergers and other special circumstances*

18. The Commission is less likely to apply the simplified procedure if any of the special circumstances mentioned in the Commission's Guidelines on the assessment of horizontal mergers and non-horizontal mergers <sup>(41)</sup> and/or in this Section are present. That includes circumstances where:
- (a) the market is already concentrated (in particular where less than three competitors, in addition to the parties to the concentration, have meaningful market presence) <sup>(42)</sup>;
  - (b) the market share thresholds set out in points 5 or 8 this Notice are exceeded in terms of capacity or production in markets where these metrics could be important <sup>(43)</sup>;
  - (c) one of the parties to the concentration is a recent entrant <sup>(44)</sup>;
  - (d) overlaps arise in markets where products are highly differentiated <sup>(45)</sup>;
  - (e) the proposed concentration would eliminate an important actual or potential competitive force <sup>(46)</sup>;
  - (f) the proposed concentration would combine two important innovators <sup>(47)</sup>;
  - (g) the proposed concentration involves a firm that has promising pipeline products <sup>(48)</sup>;

<sup>(39)</sup> Product markets qualify as 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.

<sup>(40)</sup> See Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6), point 25 and Section V.

<sup>(41)</sup> See Commission 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) and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6).

<sup>(42)</sup> See Commission 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), point 17 and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6), point 36. Market presence can be considered meaningful when a competitor has a share of 5 % or more.

<sup>(43)</sup> See Commission decision of 19 September 2019, Case M.8674, BASF/Solvay's Polyamide Business, recital 475.

<sup>(44)</sup> See Commission 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), point 37.

<sup>(45)</sup> See Commission 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), point 28.

<sup>(46)</sup> See Commission 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), point 37 and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6), points 7 and 26(c).

<sup>(47)</sup> See Commission 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), point 38 and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6), point 26(a).

<sup>(48)</sup> See Commission 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), point 38 and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6), point 26(a).

- (h) the concentration would eliminate potential competition <sup>(49)</sup>;
- (i) there are indications that the proposed concentration would allow the parties to the concentration to hinder the expansion of their competitors or hamper rivals access to supplies or markets or increase barriers to entry <sup>(50)</sup>.

19. The Commission may revert to a full assessment under the normal procedure where an issue of coordination, as referred to in Article 2(4) of the Merger Regulation arises <sup>(51)</sup>.

#### C.7. *Change from joint to sole control*

20. 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 a former joint venture is integrated into the group or network of its remaining single controlling shareholder, with the removal of any constraints previously exercised by the potentially diverging incentives of the other controlling shareholders and the adoption by the former joint venture of a less competitive market strategy. 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 under which C is a direct competitor of A, where C and A will hold a substantial combined market position and where this removes a degree of independence previously held by C <sup>(52)</sup>. In cases where such scenarios require a closer analysis, the Commission may revert to a normal procedure <sup>(53)</sup>.
21. The Commission may also revert to the normal 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.

#### C.8. *Substantiated competition concerns raised by Member States or third parties*

22. Where a Member State or an EFTA State expresses substantiated competition concerns about the notified concentration within 15 working days from the receipt of the copy of the notification, or where a third party expresses substantiated competition concerns within the time limit laid down for such comments, the Commission will revert to the normal procedure.

#### C.9. *Referral requests*

23. The simplified procedure will not apply if a Member State requests the referral of a notified concentration pursuant to Article 9 of the 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 Merger Regulation.

#### C.10. *Pre-notification referrals at the request of the notifying parties*

24. Subject to the safeguards and exclusions set out in section II.C of this Notice, the Commission may apply the simplified procedure to concentrations where:
- (a) following a reasoned submission pursuant to Article 4(4) of the Merger Regulation, the Commission decides not to refer the case to a Member State;
  - (b) following a reasoned submission pursuant to Article 4(5) of the Merger Regulation the case is referred to the Commission.

<sup>(49)</sup> See Commission 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), point 58.

<sup>(50)</sup> See Commission 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), point 36 and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6), points 29, 49, and 75.

<sup>(51)</sup> See Commission 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 39 seq. and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6), point 26.

<sup>(52)</sup> Commission decision of 17 December 2008, Case M.5141, *KLM/Martinair*, recitals 14-22.

<sup>(53)</sup> Commission decision of 18 September 2002, Case M.2908, *Deutsche Post/DHL (II)*.



### III. PROCEDURAL PROVISIONS

#### A. Concentrations that may be notified directly without pre-notification contacts

25. Under the Merger Regulation, notifying parties are entitled to notify a concentration at any time, provided the notification is complete. The possibility to engage in pre-notification contacts is a service offered by the Commission to notifying parties on a voluntary basis in order to prepare the formal merger review procedure. While not mandatory, pre-notification contacts can be extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification and, in most cases, they will result in a significant reduction of the information required.
26. Based on the Commission's experience in the application of the simplified procedure, certain categories of concentrations eligible to be reviewed under the simplified procedure among those listed in point 5 of this Notice may be reviewed within a timeframe shorter than the 25 working days set out in Article 10(1) of the Merger Regulation. This is because those concentrations typically require less investigative measures. For example, concentrations falling under point 5(a) and all cases where there are no horizontal overlaps or non-horizontal relationships <sup>(54)</sup> between the merging parties' activities (including pipeline products) may be reviewed under a further streamlined 'super-simplified' procedure as described in this point. According to that super-simplified procedure, those concentrations must be notified by completing the relevant sections of the Short Form CO <sup>(55)</sup> (in particular section 7 indicating the type of simplified treatment). The notifying parties are invited to notify the concentration directly without any pre-notification contacts.

#### B. Pre-notification contacts in concentrations giving rise to horizontal overlaps or non-horizontal relationships

27. The notifying parties are strongly encouraged to engage in pre-notification contacts in cases giving rise to horizontal overlaps or non-horizontal relationships between the merging parties' activities (including pipeline products). This includes cases falling under points 5, 8 or 9 of this Notice, provided that the merging parties' activities overlap horizontally or are vertically related or belong to closely related neighbouring markets. For example, pre-notification contacts are strongly encouraged for a concentration falling under point 5(b) which gives rise to horizontal overlaps or non-horizontal relationships between the parties' activities. Such pre-notification contacts would be particularly important if the criteria in point 5(d) are not met for one or more markets.
28. In cases giving rise to horizontal overlaps or non-horizontal relationships between the activities of the merging parties, pre-notification contacts should be initiated at least two weeks prior to the expected date of notification.

#### C. Case team allocation request

29. Before formally submitting a notification under the simplified procedure the notifying parties must submit in all cases a case team allocation request, indicating the type of concentration, the point of the Simplified Notice under which the concentration falls, and the expected date of notification. In the cases identified in point 27 above where the notifying parties notify the concentration directly with no or very little pre-notification contacts, the case team allocation request must be submitted at least one week prior to the expected date of notification.

#### D. Short-form decision

30. If the Commission is satisfied that the concentration fulfils the criteria for the simplified procedure (see points 5, 8 and 9), it will normally issue a short-form decision. This includes appropriate cases not giving rise to any competition concerns where it receives a notification under Form CO. The concentration will thus be declared compatible with the internal market within 25 working days from the date of notification, pursuant to Article 10(1) and (6) of the 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 Merger Regulation. However, in the period leading up to the 25

<sup>(54)</sup> A concentration gives rise to non-horizontal relationship when the activities of the parties to the concentration are in a relationship that is not a horizontal overlap.

<sup>(55)</sup> See Annex II to the Implementing Regulation.

working day deadline, the option of reverting to a normal 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. In such cases, the Commission may also consider the notification to be incomplete materially pursuant to Article 5(2) of the Implementing Regulation if it has not received a Form CO.

**E. Publication of the short-form decision**

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

**F. Markets falling under point 5(d) or point 8 in decisions issued under the normal procedure**

32. Certain concentrations reviewed under the normal procedure may give rise to horizontal overlaps or vertical relationships meeting the conditions laid down in point 5(d) of this Notice. Certain concentrations reviewed under the normal procedure may also give rise to horizontal overlaps or vertical relationships meeting the conditions laid down in point 8 of this Notice. The final decision in these cases will not contain a detailed assessment of such horizontal overlaps or vertical relationships. In this respect, the final decision will contain a statement that certain horizontal overlaps or vertical relationships fall within one or more of the categories described in this Notice, with the applicable category(-ies) being explicitly identified.
33. The Commission may decide to include a detailed assessment for the horizontal overlaps or vertical relationships identified in point 32 if any of the safeguards and exclusions set out in section II.C of this Notice apply.

**IV. ANCILLARY RESTRICTIONS**

34. The simplified procedure is not suitable for concentrations in which the undertakings concerned request an express assessment of restrictions that are directly related to, and necessary for, the implementation of the concentration.
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