# Commission Regulation (EC) No 1033/2008 of 20 October 2008 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Text with EEA relevance)

## COMMISSION REGULATION (EC) No 1033/2008

## of 20 October 2008

## amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

## (Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[(1)], and in particular Article 23(1) thereof,

After consulting the Advisory Committee on Concentrations,

Whereas:

(1) Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings[(2)] sets out procedural rules for the notification and examination of concentrations. In order to take account of the accession of Bulgaria and Romania to the European Union it is necessary to update the notification form used for concentrations which requires certain information based on a list of all Member States.

(2) In relation to the submission of documents or statements made by persons, undertakings or associations of undertakings within the procedure, it appears advisable to clarify the procedure whereby such documents or statements can be considered as non-confidential.

(3) On 8 June 2004 the EEA Joint Committee adopted Decision No 78/2004 and Decision No 79/2004. These decisions incorporate Regulation (EC) No 139/2004 into the EEA Agreement. In order to take account of these decisions and for reasons of legal clarity and transparency adaptations need to be introduced into the notification forms, in particular the Form RS relating to reasoned submissions (Form RS), which deals with information requirements for pre-notification referrals under Article 4(4) and Article 4(5) of Regulation (EC) No 139/2004.

(4) In order to ensure that the Commission is in a position to carry out a proper assessment of commitments offered by the notifying parties pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 with a view to rendering a concentration compatible

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with the common market, the notifying parties should be required to submit detailed information concerning the commitments offered and, in particular, to submit specific information if the commitments offered consist in the divestiture of a business.

(5) In order to satisfy the Commission that the commitments will be implemented in due time and manner it seems appropriate to clarify that the commitments may include details on the appropriate mechanisms proposed by the parties, including the appointment of a trustee to assist the Commission in overseeing compliance.

(6) Regulation (EC) No 802/2004 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

*Article 1*

Regulation (EC) No 802/2004 is amended as follows:

1. In Article 18, the following paragraph 4 is added:

4. If persons, undertakings or associations of undertakings fail to comply with paragraphs 2 or 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

2. In Article 20, the following paragraph 1a is inserted:

1a. In addition to the requirements set out in paragraph 1, the undertakings concerned shall, at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004, submit one original and 10 copies of the information and documents prescribed by the Form RM relating to remedies (Form RM) as set out in Annex IV to this Regulation. The information submitted shall be correct and complete.

3. The following Article 20a is inserted:

*Article 20a*

**Trustees**

1 The commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 may include, at the own expense of the undertakings concerned, the appointment of an independent trustee (or trustees) assisting the Commission in overseeing the parties' compliance with the commitments or having a mandate to implement the commitments. The trustee may be appointed by the parties, after the Commission has approved its identity, or by the Commission. The trustee shall carry out its tasks under the supervision of the Commission.

2 The Commission may attach such trustee-related provisions of the commitments as conditions and obligations pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004.

4. The Annexes are amended in accordance with the Annex to this Regulation.

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*Article 2*

**Entry into force**

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 October 2008.

*For the Commission*

Neelie KROES

*Member of the Commission*

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# ANNEX

The Annexes to Regulation (EC) No 802/2004 are amended as follows:

1. Annex I is amended as follows:

(a) In point 1.1, the first paragraph is replaced by the following:

> This Form specifies the information that must be provided by notifying parties when submitting a notification to the European Commission of a proposed merger, acquisition or other concentration. The merger control system of the European Union is laid down in Council Regulation (EC) No 139/2004 (hereinafter referred to as "the EC Merger Regulation"), and in Commission Regulation (EC) No 802/2004 (hereinafter referred to as "the Implementing Regulation"), to which this Form CO is annexed[(3)]. The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site. Your attention is drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as "the EEA Agreement")[(4)].

(b) In point 1.1, the last sentence of the second paragraph is replaced by the following:

'Mergers which do not meet the turnover thresholds may fall within the competence of the Member States' and/or the EFTA States' authorities in charge of merger control.'

(c) Footnote 1 referred to in subsection 3.5 is replaced by the following:

([1]) See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.

(d) In Section 10, point (b) is replaced by the following:

> (b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, and, where applicable, the corresponding provisions of the EEA Agreement[(5)], give your reasons.

(e) In Section 10, the introductory wording of point (c) is replaced by the following:

> Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) of the EC Treaty and, where

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applicable, the corresponding provisions of the EEA Agreement[6] apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation:

2. Annex II is amended as follows:

(a) In point 1.1, the second paragraph is replaced by the following:

> In completing this Form, your attention is drawn to Council Regulation (EC) No 139/2004 (hereinafter referred to as "the EC Merger Regulation"), and Commission Regulation (EC) No 802/2004 (hereinafter referred to as "the Implementing Regulation"), to which this Form is annexed[7]. The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as "the EEA Agreement")[8].

(b) In point 1.2, the fourth indent of the second paragraph is replaced by the following:

— a Member State or an EFTA State expresses substantiated competition concerns about the notified concentration within 15 working days of receipt of the copy of the notification; or

(c) Footnote 3 referred to in subsection 3.5 is replaced by the following:

([3]) See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies to be treated as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.

(d) In Section 8, point (b) is replaced by the following:

> (b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, and, where applicable, the corresponding provisions of the EEA Agreement[9], give your reasons.

(e) In Section 8, the introductory wording of point (c) is replaced by the following:

> Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement[10] apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation: