Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Text with EEA relevance)

COMMISSION REGULATION (EC) No 802/2004

of [X1 21 April 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 (EC Merger Regulation)[(1)], and in particular Article 23(1) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[(2)], as last amended by Regulation (EC) No 1310/97[(3)], and in particular Article 23 thereof,

Having consulted the Advisory Committee,

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings has been recast, with substantial amendments to various provisions of that Regulation.

(2) Commission Regulation (EC) No 447/98[(4)]of 1 March 1998 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 must be modified in order to take account of those amendments. For the sake of clarity it should therefore be repealed and replaced by a new regulation.

(3) The Commission has adopted measures concerning the terms of reference of hearing officers in certain competition proceedings.

(4) Regulation (EC) No 139/2004 is based on the principle of compulsory notification of concentrations before they are put into effect. On the one hand, a notification has important legal consequences which are favourable to the parties to the proposed concentration, while, on the other hand, failure to comply with the obligation to notify renders the parties liable to fines and may also entail civil law disadvantages for them. It is therefore necessary in the interests of legal certainty to define precisely the subject matter and content of the information to be provided in the notification.

Changes to legislation: *There are outstanding changes not yet made to Commission Regulation (EC) No 802/2004. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(5) It is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration.

(6) Regulation (EC) No 139/2004 also allows the undertakings concerned to request, in a reasoned submission, prior to notification, that a concentration fulfilling the requirements of that Regulation be referred to the Commission by one or more Member States, or referred by the Commission to one or more Member States, as the case may be. It is important to provide the Commission and the competent authorities of the Member States concerned with sufficient information, in order to enable them to assess, within a short period of time, whether or not a referral ought to be made. To that end, the reasoned submission requesting the referral should contain certain specific information.

(7) In order to simplify and expedite examination of notifications and of reasoned submissions, it is desirable to prescribe that forms be used.

(8) Since notification sets in motion legal time-limits pursuant to Regulation (EC) No 139/2004, the conditions governing such time-limits and the time when they become effective should also be determined.

(9) Rules must be laid down in the interests of legal certainty for calculating the time-limits provided for in Regulation (EC) No 139/2004. In particular, the beginning and end of time periods and the circumstances suspending the running of such periods must be determined, with due regard to the requirements resulting from the exceptionally tight legal timeframe available for the proceedings.

(10) The provisions relating to the Commission's procedure must be framed in such a way as to safeguard fully the right to be heard and the rights of defence. For these purposes, the Commission should distinguish between the parties who notify the concentration, other parties involved in the proposed concentration, third parties and parties regarding whom the Commission intends to take a decision imposing a fine or periodic penalty payments.

(11) The Commission should give the notifying parties and other parties involved in the proposed concentration, if they so request, an opportunity before notification to discuss the intended concentration informally and in strict confidence. In addition, the Commission should, after notification, maintain close contact with those parties, to the extent necessary to discuss with them any practical or legal problems which it discovers on a first examination of the case, with a view, if possible, to resolving such problems by mutual agreement.

(12) In accordance with the principle of respect for the rights of defence, the notifying parties must be given the opportunity to submit their comments on all the objections which the Commission proposes to take into account in its decisions. The other parties involved in the proposed concentration should also be informed of the Commission's objections and should be granted the opportunity to express their views.

(13) Third parties demonstrating a sufficient interest must also be given the opportunity of expressing their views, if they make a written application to that effect.

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(14) The various persons entitled to submit comments should do so in writing, both in their own interests and in the interests of sound administration, without prejudice to their right to request a formal oral hearing, where appropriate, to supplement the written procedure. In urgent cases, however, the Commission must be enabled to proceed immediately to formal oral hearings of the notifying parties, of other parties involved or of third parties.

(15) It is necessary to define the rights of persons who are to be heard, to what extent they should be granted access to the Commission's file and on what conditions they may be represented or assisted.

(16) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The Commission should be able to ask undertakings that have submitted documents or statements to identify confidential information.

(17) In order to enable the Commission to carry out a proper assessment of commitments offered by the notifying parties with a view to rendering the concentration compatible with the common market, and to ensure due consultation with other parties involved, with third parties and with the authorities of the Member States as provided for in Regulation (EC) No 139/2004, in particular Article 18(1), 18(4), Article 19(1), 19(2), 19(3) and 19(5) thereof, the procedure and time-limits for submitting the commitments referred to in Article 6(2) and Article 8(2) of that Regulation should be laid down.

(18) It is also necessary to define the rules applicable to certain time limits set by the Commission.

(19) The Advisory Committee on Concentrations must deliver its opinion on the basis of a preliminary draft decision. It must therefore be consulted on a case after the inquiry in to that case has been completed. Such consultation does not, however, prevent the Commission from reopening an inquiry if need be.

HAS ADOPTED THIS REGULATION:

Editorial Information

X1 Substituted by Corrigendum to Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Official Journal of the European Union L 133 of 30 April 2004).

Changes to legislation: *There are outstanding changes not yet made to Commission Regulation (EC) No 802/2004. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

CHAPTER I

SCOPE

Article 1

Scope

This Regulation shall apply to the control of concentrations conducted pursuant to Regulation (EC) No 139/2004.

CHAPTER II

NOTIFICATIONS AND OTHER SUBMISSIONS

Article 2

Persons entitled to submit notifications

1 Notifications shall be submitted by the persons or undertakings referred to in Article 4(2) of Regulation (EC) No 139/2004.

[F1 2 Where notifications are signed by authorised external representatives of persons or of undertakings, such representatives shall produce written proof that they are authorised to act.**]**

3 Joint notifications shall be submitted by a joint representative who is authorised to transmit and to receive documents on behalf of all notifying parties.

Textual Amendments

F1 Substituted by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Text with EEA relevance).

Article 3

Submission of notifications

1 Notifications shall be submitted in the manner prescribed by Form CO as set out in Annex I. Under the conditions set out in Annex II, notifications may be submitted in Short Form as defined therein. Joint notifications shall be submitted on a single form.

[F1 2 The Form CO and the supporting documents shall be submitted to the Commission in the format and with the number of copies specified by the Commission from time to time in the *Official Journal of the European Union*. The notification shall be delivered to the address referred to in Article 23(1).**]**

3 The supporting documents shall be either originals or copies of the originals; in the latter case the notifying parties shall confirm that they are true and complete.

***Changes to legislation:** There are outstanding changes not yet made to Commission Regulation (EC) No 802/2004. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

4 Notifications shall be in one of the official languages of the Community. For the notifying parties, this language shall also be the language of the proceeding, as well as that of any subsequent proceedings relating to the same concentration. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages of the Community, a translation into the language of the proceeding shall be attached.

5 Where notifications are made pursuant to Article 57 of the Agreement on the European Economic Area, they may also be submitted in one of the official languages of the EFTA States or the working language of the EFTA Surveillance Authority. If the language chosen for the notifications is not an official language of the Community, the notifying parties shall simultaneously supplement all documentation with a translation into an official language of the Community. The language which is chosen for the translation shall determine the language used by the Commission as the language of the proceeding for the notifying parties.

Textual Amendments

F1 Substituted by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Text with EEA relevance).

Article 4

Information and documents to be provided

[F1 1 Notifications shall contain the information, including documents, requested in the applicable forms set out in Annexes I and II. The information shall be correct and complete.**]**

2 The Commission may dispense with the obligation to provide any particular information in the notification, including documents, or with any other requirement specified in Annexes I and II where the Commission considers that compliance with those obligations or requirements is not necessary for the examination of the case.

3 The Commission shall without delay acknowledge in writing to the notifying parties or their representatives receipt of the notification and of any reply to a letter sent by the Commission pursuant to Article 5(2) and 5(3).

Textual Amendments

F1 Substituted by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Text with EEA relevance).

Article 5

Effective date of notification

1 Subject to paragraphs 2, 3 and 4, notifications shall become effective on the date on which they are received by the Commission.

2 Where the information, including documents, contained in the notification is incomplete in any material respect, the Commission shall inform the notifying parties or their