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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 139/2004
of 20 January 2004
on the control of concentrations between undertakings
(the EC Merger Regulation)

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the European Economic and Social Committee [3],

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [4] has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.

(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.

(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.

(4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.

(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

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[1] OJ C 20, 28.1.2003, p. 4.
[2] Opinion delivered on 9.10.2003 (not yet published in the Official Journal).
[3] Opinion delivered on 24.10.2003 (not yet published in the Official Journal).
[4] OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1). Corrigendum in OJ L 40, 13.2.1998, p. 17.

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.

(10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.

(11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the 'one-stop shop' principle.

(12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.

(13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

(15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.

(16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to

the Commission. Such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.

(17) The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.

(18) The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.

(19) Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

(21) This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.

(22) The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.

(23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.

(24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

(25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

(26) A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.

(27) In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.

(28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.

(29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.

(30) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.

(31) The Commission should have at its disposal appropriate instruments to ensure the enforcement of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.

(32) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.

(33) The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.

(35) A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.

(36) The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [1]. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(37) The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.

(38) In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.

(39) In the course of an inspection, officials authorised by the Commission should have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.

(40) Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

[1] OJ C 364, 18.12.2000, p. 1.