

Brussels, 20 January 2004

## New Merger Regulation – frequently asked questions

(see also [IP/04/70](#))

### **When does the EU have jurisdiction over a merger or acquisition and is this going to change with the new Regulation?**

Under the original Merger Regulation which came into force in 1990, the European Commission has exclusive jurisdiction for mergers between firms with a combined worldwide turnover of at least €5 billion and a turnover within the European Economic Area of more than €250 million for each of them. In this way, mergers can be assessed in a single procedure, and don't have to go through a number of different procedures in individual EU countries (the "one stop shop" principle). If the companies concerned have more than two-thirds of their European turnover in one and same EU country, the merger is examined by the competition authority of that country because the latter is better placed than the Commission to examine its potential effects.

The turnover thresholds remain the same in the new Regulation.

### **It is common to say that the new Regulation is going to reinforce the one-stop shop. How is this going to happen?**

The Merger Regulation was created to provide a one-stop shop where companies can request clearance for their mergers and acquisitions in the whole of the EU. This is hugely appreciated by companies as it reduces costs, bureaucracy and legal uncertainty -- all inherent to the multiple filings that they would need to comply with absent the Merger Regulation.

One of the reasons of the review -- started with a report to the Council of ministers, in July 2000, on the operation of the current turnover thresholds -- was precisely to ascertain whether mergers were indeed being notified to the best placed authority or whether there was a significant number of mergers that had to be notified in three or more Member States.

To resolve the problem of the multiple filings, of which there are still plenty, the Council has agreed that companies will be able to ask to benefit from the one-stop shop if they have to notify in three or more Member States. Where none of the competent Member States object to the referral within 15 working days of receiving the submission, the merger benefits from the one-stop shop, and will be examined by the Commission.

**The Merger Regulation comes into force at the same time as the enlargement. Does it mean it will have a particular effect on the new Member States?**

The merger regulation, both old and new, applies to all Member States of the EU, the existing ones as well as the 10 more set to join on May 1<sup>st</sup>. In the future, the review by the Commission will cover these countries as well.

The new Merger Regulation is to facilitate, however, the use of the “one stop shop” principle (see above): companies will be able to apply for the one-stop shop if they have to notify in three or more Member States. With 25 future Member States, this is of great benefit.

In addition, but this was already the case under the current Regulation, a Member State may refer to the Commission the examination of a merger if it significantly affects competition in a national market or more.

The rationale behind the improved referral process to and from the Commission is to ensure that mergers are examined by the best placed authority.

**One of the main changes in the Regulation concerns the review timetable. Can you explain how it’s going to work?**

The legally-binding review timetable is unquestionably the most appreciated feature of the current Merger Regulation. The Commission’s and Council’s objective has been to change this only to the extent necessary to avoid even the perception that a merger may have to be blocked because there was no time left to discuss remedies to the competition problems. Allowing more time in a clearly defined and controlled way may also be essential for the Commission as it is held to high standards to prove both the existence and non-existence of competition problems. The predictability of the review timetable remains unaffected (see table).

**Merger review timetable**

<u>Now</u>	<u>After May 1st</u>
1 <sup>st</sup> phase <ul style="list-style-type: none"> <li>• <b>One month</b> starting the day which follows the receipt of notification</li> <li>• Extended to <b>six weeks</b> if undertakings are offered or a referral request is received</li> </ul>	<ul style="list-style-type: none"> <li>• <b>25 working days</b> starting the day which follows the receipt of notification</li> <li>• Extended to <b>35 working days</b> if undertakings are offered or a referral request is received</li> </ul>
2 <sup>nd</sup> phase <ul style="list-style-type: none"> <li>• <b>four months</b> from the day that follows the decision to carry out an in-depth inquiry</li> </ul>	<ul style="list-style-type: none"> <li>• <b>90 working days</b> from the day that follows the decision to carry out an in-depth inquiry</li> <li>• + <b>20 working days</b> if requested by the notifying parties or by the Commission with the agreement of the notifying parties</li> <li>• + <b>15 working days</b> if companies offered remedies after the 54th working day that followed the initiation of the in-depth inquiry</li> </ul>

**Another much publicised change concerns the so-called ‘substantive test’. Can you explain?**

The substantive test is the ‘carbon test’, the *raison d’être* of the Merger Regulation. It’s the test that the Commission must bear in mind when deciding whether a merger must be challenged or not.

The existing regulation is based on the concept of dominance: a merger must be blocked if it creates a dominant position, and therefore would likely result in higher prices, less choice and innovation. This concept has been interpreted by the Commission and the European courts along the years as applying also to situations of “joint dominance” or duopolies (Kali und Salz/MdK and Gencor/Lonrho) as well as to situations of “collective dominance” or oligopolies (Airtours/First Choice).

The test has now been adapted to make clear that all anti-competitive mergers resulting in higher prices, less choice or innovation are covered. This is achieved by the new test, which states that a merger must be blocked if it would “significantly impede effective competition”. Dominance, in its different forms, will remain the main scenario. But the test will also now clearly encompass anticompetitive effects in oligopolistic markets where the merged company would not be strictly dominant in the usual sense of the word (i.e. much bigger than the rest). The central question is whether sufficient competition remains after the merger to provide consumers with sufficient choice.

**Does this mean that the Commission will have more powers?**

The Commission regards this change in the wording of the test as a clarification of, rather than an addition to, its powers. This provides legal certainty for the business community by making it clear that the test enshrined in the regulation covers all those categories of anti-competitive mergers.

**Where do we stand with regard to the other aspects of the EU merger control reforms announced in December 2002?**

On top of the new Merger Regulation, the Commission’s Guidelines on the appraisal of mergers between competing firms (so-called *Horizontal Guidelines*), which are the result of the Commission’s experience in almost 14 years and of Court rulings, will provide useful guidance to companies and their lawyers as to those mergers likely to be challenged.

The package also includes non-legislative measures designed to increase the internal checks and balances, to strengthen the underlying economic analysis in merger decisions and to enhance the rights of the defence. These reforms, which include the appointment of a Chief Competition Economist and the setting up of a panel to scrutinise the investigating team’s conclusions with a “pair of fresh eyes”, are already in place.

## **Merger control: facts and figures**

The Commission has been notified 2,399 mergers between September 1990 (when the Merger Regulation first came into force) and the end of 2003. The number of notifications in 2003 fell sharply to 212 cases accentuating the downward trend initiated in 2001 when the merger wave came to a halt. This compares with a record number of notifications of 345 in 2000 and 279 in 2002.

Since 1990, the Commission has cleared a total of 2,235 cases after only a routine one month/six weeks review (see review timetable above). It blocked a total of 18 mergers. For full statistics see:

<http://europa.eu.int/comm/competition/mergers/cases/stats.html>