

**Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004**

(2013/C 366/04)

**I. INTRODUCTION**

1. This Notice sets out a simplified procedure under which the Commission intends to treat certain concentrations pursuant to Council Regulation (EC) No 139/2004<sup>(1)</sup> (the 'Merger Regulation') on the basis that they do not raise competition concerns. This Notice replaces the Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 published in 2005<sup>(2)</sup>. The Commission's experience gained in applying the Merger Regulation, including Council Regulation (EEC) No 4064/89<sup>(3)</sup>, which preceded the current Merger Regulation, has shown that certain categories of notified concentrations are normally cleared without having raised any substantive doubts, provided that there were no special circumstances.

2. The purpose of this Notice is to set out the conditions under which the Commission usually adopts a short-form decision declaring a concentration compatible with the internal market pursuant to the simplified procedure and to provide guidance in respect of the procedure itself. When the necessary conditions set forth at point 5 or 6 of this Notice are met and provided there are no special circumstances, the Commission adopts a short-form clearance decision within 25 working days from the date of notification, pursuant to Article 6(1)(b) of the Merger Regulation<sup>(4)</sup>.

3. However, the Commission may launch an investigation and/or adopt a full decision under the Merger Regulation in respect of any proposed concentration, in particular if the safeguards or exclusions set forth at points 8 to 19 of this Notice are applicable.

4. By following the procedure outlined in the following sections, the Commission aims to make Union merger control more focused and effective.

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

*Eligible concentrations*

5. The Commission will in principle apply the simplified procedure to each of the following categories of concentrations<sup>(5)</sup>:

(a) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA); such cases occur where:

(i) the turnover of the joint venture and/or the turnover of the contributed activities<sup>(6)</sup> is less than EUR 100 million in the EEA territory at the time of notification<sup>(7)</sup>; and

(ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification<sup>(8)</sup>;

(b) 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>(9)</sup>, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged<sup>(10)</sup>;

(c) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled:

(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>(11)</sup> (horizontal relationships) is less than 20 %<sup>(12)</sup>;

(ii) the individual or 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 relationships)<sup>(13)</sup> are less than 30 %<sup>(14)</sup>;

(d) a party is to acquire sole control of an undertaking over which it already has joint control.

6. The Commission may also apply the simplified procedure where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled:

(i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and

(ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150<sup>(15)</sup><sup>(16)</sup>.

7. For the purpose of the application of points 5(b), 5(c) and 6 in the case of an acquisition of joint control outside the field of activity of the joint venture, relationships that exist only between the undertakings acquiring joint control are not considered horizontal or vertical relationships for the purpose of this Notice. Those relationships may however give rise to coordination as referred to in Article 2(4) of the Merger Regulation; such situations are dealt with in point 15 of this Notice.
- Safeguards and exclusions*
8. In assessing whether a concentration falls into one of the categories referred to in points 5 and 6, 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 parties should provide information on all plausible alternative market definitions, generally during the pre-notification phase (see point 22). 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 data and information relating to the definition of such markets<sup>(17)</sup>. The Commission retains the discretion to take the ultimate decision on market definition, basing its decision on an analysis of the facts of the case. Where it is difficult to define the relevant markets or to determine the parties' market shares, the Commission will not apply the simplified procedure. In addition, to the extent that concentrations involve novel legal issues of a general interest, the Commission would normally abstain from adopting short-form decisions, and would normally revert to a normal first phase merger procedure.
  9. While it can normally be assumed that concentrations falling into the categories referred to in points 5 and 6 will not raise serious doubts as to their compatibility with the internal market, there may nonetheless be certain situations which exceptionally require a closer investigation and/or a full decision. In such cases, the Commission may revert to a normal first phase merger procedure.
  10. The following are indicative examples of types of cases which may be excluded from the simplified procedure.
  11. The Commission is less likely to accept a proposed concentration under the simplified procedure if any of the special circumstances mentioned in the Commission's Guidelines on the assessment of horizontal mergers<sup>(18)</sup> are present. This includes instances where the market is already concentrated, where the proposed concentration would eliminate an important competitive force, where the proposed concentration would combine two important innovators, where the proposed concentration involves a firm that has promising pipeline products or where there are indications that the proposed concentration would allow the merging parties to hinder the expansion of their competitors.
  12. The same may also apply where it is not possible to determine the parties' precise market shares. This is often the case when the parties operate in new or little developed markets.
  13. Certain types of concentrations may increase the parties' market power by combining technological, financial or other resources, even if the parties to the concentration do not operate in the same market. Concentrations where at least two parties to the concentration are present in closely related neighbouring markets<sup>(19)</sup> may also be unsuitable for the simplified procedure, in particular, where one or more of the parties to the concentration holds individually a market share of 30 % or more in any product market in which there is no horizontal or vertical relationship between the parties but which is a neighbouring market to a market where another party is active<sup>(20)</sup>.
  14. The Commission may consider it appropriate to carry out a full assessment under the normal merger procedure of certain joint ventures with a turnover below the threshold specified in point 5(a) in the EEA at the time of notification, but which can be expected to significantly surpass that threshold in the EEA within the following 3 years. In cases falling under point 5(a) a normal procedure may also be considered appropriate if there are horizontal or vertical relationships 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 point 11 are present.
  15. Furthermore, the Commission may revert to a full assessment under the normal merger procedure where an issue of coordination as referred to in Article 2(4) of the Merger Regulation arises.
  16. 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, whereby the disciplining constraints exercised by the potentially diverging incentives of the different controlling shareholders are removed and its strategic market position could be strengthened. 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 in 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>(21)</sup>. In cases where such scenarios require a closer analysis, the Commission may revert to a normal first phase merger procedure<sup>(22)</sup>.

17. The Commission may also revert to a normal first phase merger 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.
18. In the case of concentrations described in point 6, the Commission will decide on a case-by-case basis whether, under the particular circumstances of the case at hand, the increase in market concentration level indicated by the HHI delta is such that the case should be examined under the normal first phase merger procedure.
19. If a Member State expresses substantiated concerns about the notified concentration within 15 working days of receipt of the copy of the notification, or if a third party expresses substantiated concerns within the time limit laid down for such comments, the Commission will revert to a normal first phase merger procedure.

#### *Referral requests*

20. The simplified procedure will not be applied 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.

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

21. Subject to the safeguards and exclusions set out in 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; or
- (b) following a reasoned submission pursuant to Article 4(5) of the Merger Regulation the case is referred to the Commission.

### III. PROCEDURAL PROVISIONS

#### *Pre-notification contacts*

22. The Commission has found pre-notification contacts between notifying parties and the Commission on a voluntary basis beneficial even in seemingly unproblematic cases<sup>(23)</sup>. The Commission's experience of the simplified procedure has shown that candidate cases for the simplified procedure may raise complex issues, for instance of market definition (see point 8), which should preferably be

resolved prior to notification. Such contacts allow the Commission and the notifying parties to determine the precise amount of information to be provided in a notification. Pre-notification contacts should be initiated at least 2 weeks prior to the expected date of notification. Notifying parties are particularly encouraged to engage in pre-notification contacts where they wish to request the Commission to apply the simplified procedure in the situation described in point 6. 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. As such, 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 the majority of cases, will result in a significant reduction of the information required.

23. Nonetheless, pre-notification contacts, in particular the submission of a draft notification, may be less useful in cases falling under point 5(b), that is in cases where there are no reportable markets<sup>(24)</sup> since the parties are not engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged. In such circumstances, notifying parties may prefer to notify immediately without submitting a draft notification beforehand<sup>(25)</sup>.

24. The determination of the absence of reportable markets needs to be undertaken in accordance with point 8 of this Notice. It therefore remains the responsibility of the notifying parties to submit all the information necessary for the Commission to conclude that the proposed concentration does not give rise to any reportable market in the EEA. The Commission will not apply the simplified procedure on the basis of point 5(b) if it is difficult to conclude that the proposed concentration does not give rise to any reportable markets. In such cases, the Commission may revert to the normal procedure and consider the notification as being incomplete in a material respect as set out under point 26 of this Notice.

#### *Publication of the fact of notification*

25. The information to be published in the *Official Journal of the European Union* upon receipt of a notification<sup>(26)</sup> will include: the names of the parties to the concentration, their country of origin, the nature of the concentration and the economic sectors involved, as well as an indication that, on the basis of the information provided by the notifying party, the concentration may qualify for a simplified procedure. Interested parties will then have the opportunity to submit observations, in particular on circumstances which might require an investigation.

*Short-form decision*

26. If the Commission is satisfied that the concentration fulfils the criteria for the simplified procedure (see points 5 and 6), it will normally issue a short-form decision. This includes appropriate cases not giving rise to any competition concerns where it receives a full form notification. 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 working day deadline, the option of reverting to a normal first phase merger 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 as being incomplete in a material respect pursuant to Article 5(2) of the Implementing Regulation if it has not received a full form notification.

*Publication of the short-form decision*

27. The Commission will publish a notice of the fact of the decision in the *Official Journal of the European Union* as it does for full clearance decisions. The public version of the 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, their country of origin, nature of the concentration and economic sectors concerned) and a statement that the concentration is declared compatible with the internal market because it falls within one or more of the categories described in this Notice, with the applicable category(ies) being explicitly identified.

**IV. ANCILLARY RESTRICTIONS**

28. The simplified procedure is not suited to cases in which the undertakings concerned request an express assessment of restrictions which are directly related to, and necessary for, the implementation of the concentration.

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

<sup>(2)</sup> OJ C 56, 5.3.2005, p. 32.

<sup>(3)</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989 p. 1); corrected version OJ L 257, 21.9.1990, p. 13.

<sup>(4)</sup> The notification requirements are set out in Annex I and II to Council Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the 'Implementing Regulation').

<sup>(5)</sup> The following categories apply alternatively, not cumulatively, i.e. fulfilling all the criteria of any of the categories mentioned in point 5 (a), (b), (c) or (d) or point 6 will in principle make a notified concentration eligible for the simplified procedure. A transaction may fulfil the criteria of more than one of the categories described in this Notice. Accordingly, notifying parties may submit a notification of a transaction on the basis of more than one of the categories described in this Notice.

<sup>(6)</sup> The expression 'and/or' refers to the variety of situations covered; 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>(7)</sup> 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 upon the availability of separate accounts for the resources combined in the joint venture.

<sup>(8)</sup> The total value of 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, etc.), and (ii) any amount of credit or any obligations of the joint venture which any parent company of the joint venture has agreed to extend or guarantee. Where the assets transferred generate turnover at the time of notification, then neither the value of the assets nor that of the annual turnover may exceed EUR 100 million.

- (9) 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 territory or markets which include the EEA territory, but may be wider than the EEA territory.
- (10) A vertical relationship normally presupposes that the product or service of the undertaking active in the upstream market in question constitutes an important input to the product or service of the undertaking active in the downstream market: 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), paragraph 34.
- (11) See footnote 9.
- (12) The thresholds for horizontal and vertical relationships apply to any plausible alternative product and geographic market definition that may have to be considered in a given case. 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).
- (13) See footnote 10.
- (14) See footnote 12.
- (15) The HHI is calculated by summing the squares of the individual market shares of all the firms in the market: 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 16. 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). In other words, the HHI delta can be calculated on the basis of only the market shares of the parties to the concentration, without a need to know the market shares of any other competitors in the market.
- (16) See footnote 12.
- (17) 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 (Article 6(3)(a) of the Merger Regulation).
- (18) 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), in particular paragraph 20.
- (19) Product markets are 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.
- (20) 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), in particular paragraph 25 and Section V.
- (21) Case COMP/M.5141 *KLM/Martinair*, 17.12.2008, recitals 14-22.
- (22) Case COMP/M.2908 *Deutsche Post/DHL (II)*, 18.9.2002.
- (23) See the Directorate-General for Competition's Best Practices on the conduct of EC merger control proceedings (the 'Best Practices') e online (<http://ec.europa.eu/competition/mergers/legislation/proceedingspdf>).
- (24) For the definition of reportable markets, see Section 6.2 of the Short Form CO (Annex II to the Implementing Regulation).
- (25) In light of the Best Practices, the Commission would nevertheless encourage parties to submit in advance a request for the allocation of a Directorate-General for Competition case team.
- (26) Article 4(3) of the Merger Regulation.
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