


Procedure file

Basic information		
CNS - Consultation procedure Regulation	2002/0296(CNS)	Procedure completed
Control of concentrations between undertakings. EC Merger Regulation		
Repealing Regulation (EC) No 1310/97 1996/0224(CNS)		
Subject 2.60.04 Economic concentration, mergers, takeover bids, holding companies		

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	ECON Economic and Monetary Affairs		17/02/2003
		NI DELLA VEDOVA Benedetto	
	Committee for opinion	Rapporteur for opinion	Appointed
	JURI Legal Affairs and Internal Market		20/02/2003
		PPE-DE DOORN Bert	
Council of the European Union	Council configuration	Meeting	Date
	Economic and Financial Affairs ECOFIN	2557	20/01/2004
	Competitiveness (Internal Market, Industry, Research and Space)	2547	27/11/2003
	Competitiveness (Internal Market, Industry, Research and Space)	2505	13/05/2003
European Commission	Commission DG Competition	Commissioner	

Key events			
12/12/2002	Legislative proposal published	COM(2002)0711	Summary
16/01/2003	Committee referral announced in Parliament		
13/05/2003	Debate in Council	2505	
08/07/2003	Vote in committee		Summary
08/07/2003	Committee report tabled for plenary, 1st reading/single reading	A5-0257/2003	
08/10/2003	Debate in Parliament		
09/10/2003	Decision by Parliament	T5-0428/2003	Summary

20/01/2004	Act adopted by Council after consultation of Parliament		
20/01/2004	End of procedure in Parliament		
29/01/2004	Final act published in Official Journal		

Technical information

Procedure reference	2002/0296(CNS)
Procedure type	CNS - Consultation procedure
Procedure subtype	Legislation
Legislative instrument	Regulation
	Repealing Regulation (EC) No 1310/97 1996/0224(CNS)
Legal basis	EC Treaty (after Amsterdam) EC 308; EC Treaty (after Amsterdam) EC 083
Stage reached in procedure	Procedure completed
Committee dossier	ECON/5/19102

Documentation gateway

Legislative proposal	COM(2002)0711 , OJ C 020 28.01.2003, p. 0004	12/12/2002	EC	Summary
Committee report tabled for plenary, 1st reading/single reading	A5-0257/2003	08/07/2003	EP	
Economic and Social Committee: opinion, report	CES1169/2003 OJ C 010 14.01.2004, p. 0029-0036	24/09/2003	ESC	
Text adopted by Parliament, 1st reading/single reading	T5-0428/2003	09/10/2003	EP	Summary
Implementing legislative act	32004R0802 OJ L 133 30.04.2004, p. 0001-0039	07/04/2004	EU	Summary
Follow-up document	COM(2009)0281	18/06/2009	EC	Summary
Follow-up document	SEC(2009)0808	18/06/2009	EC	Summary

Additional information

European Commission	EUR-Lex
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Final act

Regulation 2004/139 OJ L 024 29.01.2004, p. 0001-0022 Summary
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Control of concentrations between undertakings. EC Merger Regulation

PURPOSE : to present a new EC Merger Regulation. CONTENT : this new proposal follows the Green Paper on the review of Council Regulation 4064/89/EEC. (Please see COS/2002/2067). Following the review, the Commission proposes to recast the Merger Regulation. The main points are as follows: 1) Jurisdictional issues : - Community dimension: the Commission has concluded that the most effective way of meeting the two main objectives, that is, optimal allocation of cases and reduction in the incidence of multiple filings, could be achieved through a more streamlined system of referrals. Such a system would be based on an enhanced recourse to the Merger Regulation's referral mechanisms under Articles 9 and 22, including their improvement and use at a pre-notification stage, so as to provide for an effective means

of fine-tuning the allocation of cases brought about by the turnover threshold of Articles 1(2) and (3). Given their superior knowledge of the circumstances of the case, the notifying parties are given an exclusive right of initiative at this stage of the procedure. The Commission has exclusive jurisdiction if a minimum of three Member States agree to a case being referred under Article 22. The Commission will also be able to invite Member States to make referrals under Article 22. The main advantage of this system is its precision. Unlike relatively crude turnover, or 3+ type tests, this tests forms the basis of focussing on cases that have a significant cross-border impact at Community level. - Definition of a concentration: the general definition has been amended so as to explicitly include the criteria according to which a concentration requires a change in control and that this control has to take place on a lasting basis. In addition, a proposed new Article 3(4) now explicitly states that multiple transactions which are conditional on one another or are so closely connected that their economic rationale justifies their treatment as a single concentration shall be deemed to constitute a single concentration. 2) Substantive issues: The Commission felt that the dominance test and the substantial lessening of competition test have produced broadly convergent outcomes, and that the dominance test is proving to be an instrument capable of being adapted to a wide variety of situations where market power exists. The Commission therefore proposes a new Article 2(2), which aims to clarify the concept of dominance under the Merger Regulation. The definition now states that one or more undertakings shall be deemed to be in a dominant position if, with or without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition. This closely follows the characterisation given by the court of Justice. 3) Procedural issues: on the obligation to notify a concentration before its implementation, the response to the Green Paper show broad support for a flexibilisation of both the timing of notifications and the "triggering event" for notifying a merger. Accordingly, the new draft abandons the one-week deadline for submitting notifications but clearly spells out that the Community's system of merger review is based on ex-ante control. Notifications are allowed where the undertakings concerned demonstrate to the Commission a good-faith intention to conclude a binding agreement and thus flexibilises the triggering event. On the question of a more flexible timeframe regarding the different phases, the feedback from the Green Paper showed almost unanimous support for a "stop the clock" idea. The proposed key element of a more flexible timeframe has an automatic extension of the Phase 1 deadline to 35 working days if remedies are proposed. There is an optional extension of the Phase II deadline by up to 20 working days in complex Phase II cases and an automatic extension of the Phase II deadline by 15 working days in remedy cases. Additional changes to procedure include an automatic derogation for simplified procedure cases and for acquisitions through the stock market. Enforcement provisions are kept in line with antitrust and there is an increase of the ceilings for fines and periodic penalty payments related to "fact-finding". 4) Other proposed amendments: these include a provision extending the Commission's powers, so that the status quo ante is restored.?

Control of concentrations between undertakings. EC Merger Regulation

The committee adopted the report by Benedetto DELLA VEDOVA (Ind, I) amending the Commission proposal under the consultation procedure. While agreeing with many of the innovations introduced by the Commission, such as the increased flexibility of the time frame, MEPs nevertheless proposed a number of amendments. They deleted the Commission's new definition of "dominant position", arguing that, if it was broadened in the way the Commission envisaged, this would actually lead to less legal certainty than before, whereas one of the purposes of this revision of the legislation was to increase legal certainty. All parties concerned were used to applying the existing definition, on which ample case-law now existed. The committee also amended the provisions on determining whether a concentration has significant cross-border effects. It laid down objective benchmarks for evaluation: i.e. in at least three Member States the combined aggregate turnover of all undertakings concerned is more than 10% of the combined aggregate Community-wide turnover of all undertakings concerned, or the concentration is subject to national merger control rules of several Member States. The committee also made provision for "other reasons" to be taken into account in the assessment. In addition, MEPs adopted a series of amendments aimed at reinforcing due processes and the right of defence. They were also concerned to rein in the Commission's powers of investigation and to restrict the number of cases in which the Commission could impose fines on undertakings, arguing that there is an essential difference between the aim of merger control and that of combating violations of cartel rules. Increased powers for the Commission in the field of concentrations were therefore inappropriate.?

Control of concentrations between undertakings. EC Merger Regulation

The European Parliament adopted a resolution drafted by Benedetto DELLA VEDOVA (Ind, Italy) making several amendments to the proposed Merger Regulation. (Please see the summary of 08/07/03.) In addition, the following changes were made: - to avoid delays and increase certainty, the time period for the Member State to react should be five working days; - notification to Member States must be accompanied by a statement setting out which national provisions on mergers give grounds for assuming that the concentration would significantly affect competition on a market as well as the measures that the national competition authorities intend to take in the event of a referral; - Parliament changed several time limits related to taking the decision on whether to refer; - the application of national legislation must not lead to decisions which are blatantly in conflict with the provisions of the Regulation; - the rights of the defence are strengthened with regard to legal representation, self-incrimination and privileged communication with properly qualified lawyers; - the Commission's investigative powers are reduced. ?

Control of concentrations between undertakings. EC Merger Regulation

PURPOSE : to recast Regulation 4064/89/EEC on the control of concentrations between undertakings. LEGISLATIVE ACT: Regulation 139/2004/EC concerning the control of concentrations between undertakings. CONTENT: The Regulation aims at recasting Council Regulation 4064/89/EEC into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. It confines itself to the minimum required 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. The main change made to the Commission's proposal is the new test for the appraisal of concentrations which provides that a concentration will be declared incompatible with the common market if it would 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. As regards multiple transactions, the Council decided against enlarging the competencies of the Commission in this respect as it considered them too burdensome and confusing for enterprises. It decided also to abolish group derogations in general and the possibility of their adoption by the Commission. Regarding ancillary questions, the solution agreed by the Council provides that Commission decisions declaring concentrations compatible with the common market should automatically cover restrictions directly related and necessary to the implementation of the concentration. ENTRY INTO FORCE: 01/05/2004.?

Control of concentrations between undertakings. EC Merger Regulation

LEGISLATIVE ACT : Commission Regulation 802/2004 implementing Council Regulation 139/2004/EC on the control of concentrations between undertakings. CONTENT : As a result of recasting Council Regulation 4064/89/EEC as Regulation 139/2004/EC, Commission Regulation 447/98/EC on notifications and time-limits has to be modified. For the sake of clarity it is repealed and replaced by a new regulation. Regulation 139/2004/EC 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. This Regulation aims to define precisely the subject matter and content of the information to be provided in the notification. The main points are as follows: - Regulation 139/2004/EC 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 whether or not a referral ought to be made. To that end, the reasoned submission requesting the referral should contain certain specific information. This Regulation prescribes the forms to be used for notifications and reasoned submissions; - Notification sets in motion legal time-limits pursuant to Regulation 139/2004/EC. The Regulation determines the conditions governing such time-limits and the time when they become effective. Rules are laid down for calculating the time-limits provided for in Regulation 139/2004/EC. In particular, the beginning and end of time periods and the circumstances suspending the running of such periods are determined, with due regard to the requirements resulting from the exceptionally tight legal timeframe available for the proceedings; - In order to safeguard fully the right to be heard and the rights of defence, the Commission makes a distinction 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; - The Commission gives the notifying parties and other parties involved in the proposed concentration an opportunity before notification to discuss the intended concentration informally and in strict confidence. In addition, the Commission will, 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; - The notifying parties are 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 are informed of the Commission's objections and are granted the opportunity to express their views; - Third parties demonstrating a sufficient interest are also given the opportunity of expressing their views, if they make a written application to that effect; - In urgent cases the Commission may proceed immediately to formal oral hearings of the notifying parties, of other parties involved or of third parties; - The Regulation defines the rights of persons who are to be heard, to what extent they may be granted access to the Commission's file and on what conditions they may be represented or assisted; - 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 the procedure and time-limits for submitting the commitments is laid down; - 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. ENTRY INTO FORCE : 1 May 2004.?

Control of concentrations between undertakings. EC Merger Regulation

This Communication from the Commission gives account to the Council of the operation of the notification thresholds under Article 1 of the EC Merger Regulation (Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings) in allocating merger cases between the Community level and the national level and of the referral mechanisms provided for by its Articles 4, 9 and 22. The conclusions of this report are limited to taking stock of the situation to date without proposing any measures. Following this report and considering in particular the reactions of the Council, the Commission may present proposals to revise the notification thresholds or the referral mechanisms.

The Commission concludes that overall, the jurisdictional thresholds and the set of corrective mechanisms provided for by the EC Merger Regulation have provided an appropriate legal framework for allocating cases between the Community level and the Member States. This framework has in most cases been effective in distinguishing cases that have Community relevance from those with a primarily national nexus, in pursuit of the objectives of "one-stop-shop" and the principle of the "more appropriate authority". Notwithstanding this success, there is scope for further improvements of the current system of case allocation in a number of respects as set out in this report.

The Commission invites the Council to take note of the information set out in this report. The Commission also submits this report for information to the European Parliament and the European Economic and Social Committee.

Control of concentrations between undertakings. EC Merger Regulation

The main purpose of this Commission Staff Working Paper is to discuss the operation of the thresholds, as set out in the EC Merger Regulation, in allocating cases between the Community level and the national level pursuant to the objectives of a "one-stop-shop", the "more appropriate authority", and the need to achieve a "level playing field". It also aims to report on the operation of the pre- and post-notification referral mechanisms provided for in the Regulation.

The Commission concludes that, overall, the jurisdictional thresholds and the set of corrective mechanisms have provided an appropriate legal framework for allocating cases between the Community level and the Member States. This framework has, in most cases, been effective in distinguishing cases that have Community relevance from those with a primarily national nexus, in pursuit of the objectives of "one-stop-shop" and the principle of the "more appropriate authority".

Moreover, the pre-notification referral mechanisms have considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU. These mechanisms have improved the allocation of cases between the Commission and the Member States and have contributed to avoiding unnecessary duplication and inconsistent enforcement efforts. However, there is scope for further improvements of the current

system of case allocation. For example, the business community has expressed concern with regard to the way the referral system operates.

In addition, the post-notification mechanisms have proven to continue to be useful corrective instruments, also after the introduction of pre-notification referrals. Nevertheless, the business community's concern regarding the timing and cumbersomeness of the procedures extend also to these mechanisms.

Lastly, the public consultation has suggested that efforts towards further convergence of the various national rules governing merger control and their relation to Community rules should be envisaged in order to alleviate difficulties encountered in the context of multiple filings.