

EU Merger Control



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Overview

The EU Merger Regulation (“Merger Regulation”) gives the European Commission in Brussels power to control “Community dimension mergers” that is, mergers which involve large companies with significant activities in the EU. The Merger Regulation applies whether the parties are established inside or outside the EU. The planning and implementation of such mergers must take account of the impact and requirements of the Merger Regulation.

Merger control at the EU level was introduced in 1990.

Practical implications of the Merger Regulation include:

- **mandatory notification and suspension:** a Community dimension merger must be notified to the Commission and cannot be implemented without approval
- **waiting periods:** the Commission has 25 working days from notification either to clear the merger or to start Phase II proceedings (extended to 35 days where a Member State asks for referral back of the merger to the national competition authorities or if undertakings are offered by the parties). If it starts Phase II proceedings, the Commission has a further 90 working days to take a final decision, although in various circumstances this may be extended by up to a total of a further 35 working days
- **Form CO:** the information required in the notification form (Form CO) is extensive. Parties need to start assembling it at an early stage. Failure to provide complete information may cause the Commission to refuse or suspend the notification until such information is provided
- **substantive appraisal:** a merger’s compatibility with EU competition law is appraised according to whether or not it will “significantly impede effective competition” within the EU (the “SIEC” test)
- **conditions:** clearance may be made conditional upon satisfaction of structural or, more exceptionally, behavioural undertakings given by the parties
- **jurisdiction:** there are a number of possibilities under which mergers with a Community dimension may be referred in whole or in part to national competition authorities for review, or under which mergers which do not have a Community dimension but which are capable of being reviewed in three or more EU Member States may be reviewed under the exclusive competence of the Commission under the Merger Regulation (avoiding multiple filings). Jurisdictional issues have to be taken into account at an early stage of any proposed merger, and liaison with the Commission and national competition authorities may be appropriate
- **timing of notification:** proposed mergers may be notified at any time after a good faith intention to conclude a transaction can be evidenced
- **pre-notification:** it will often be appropriate to make an early informal approach to the Commission for confidential discussion of substantive or jurisdictional issues, and to engage in a process of pre-notification contacts. Time for this process should be factored into overall transaction timing
- **sanctions:** the Commission may impose substantial fines and, in appropriate cases, order divestiture, where prior clearance is not obtained for a transaction
- **joint ventures:** the Merger Regulation applies not only to traditional merger or take-over situations, but also to the creation of “full function”(autonomous) joint ventures
- **application to complex transactions:** although the Commission has issued guidance Notices, the application of the Merger Regulation to transactions such as strategic alliances, cross-shareholdings and joint ventures is sometimes unclear and requires careful consideration at the planning stage
- **internal documentation:** certain kinds of internal documentation assessing a merger will have to be provided to the Commission with the notification – care is required in the creation of such documentation
- **allocation of resources:** parties need to ensure that adequate time and resources are allocated to consideration of the applicability of the Merger Regulation, preparation of Form CO or other required forms and to dealing with follow-up action required under the procedures
- **contested bids and third party rights:** the Merger Regulation provides a means by which target companies in receipt of unwelcome bids, and interested third parties (for example, competitors and customers) may raise objections to a merger.

Community dimension mergers

TURNOVER THRESHOLDS

The Merger Regulation¹ applies to mergers that have a “Community dimension”, namely where:

- the combined worldwide turnover of all the parties involved in the merger is more than €5 billion and
- the Community turnover of each of at least two of the parties involved in the merger is more than €250 million.

In addition, a merger which falls below the thresholds set out above will still have a Community dimension if:

- the combined worldwide turnover of all the undertakings concerned is more than €2.5 billion
- the Community-wide turnover of each of at least two of the undertakings concerned is more than €100 million
- in each of at least three Member States², the combined turnover of all the undertakings concerned is more than €100 million and
- in each of at least three of the same Member States the turnover of each of at least two of the undertakings concerned is more than €25 million.

As an exception, the Merger Regulation does not apply if a merger has its primary impact within a single Member State. This is deemed to be the case where more than two-thirds of the Community turnover of each of the parties involved in the merger is in one and the same Member State. This is known as the “two-thirds rule”.

The turnover thresholds draw a dividing line between the merger control powers of the Commission and those of individual Member States. Mergers which exceed the thresholds are generally subject to the exclusive jurisdiction of the Commission; those which are below the thresholds are generally subject to control by one or more Member State authorities. However, mergers which do not have a Community dimension will nonetheless be handled by the Commission under the Merger Regulation, to the exclusion of national competition authorities, if they are capable of being notified in at least three Member States and if the notifying party submits a reasoned request and the Member States concerned do not object³.

The Merger Regulation explains in general terms how turnover is to be calculated:

- turnover comprises sales from ordinary activities in each party’s preceding financial year according to its audited accounts; the figures in the accounts need to be adjusted to reflect any acquisition or disposal since the beginning of the last financial year.
- turnover is not just that of the parties directly involved in the merger; it comprises the turnover of the groups of which they form part

- where the merger involves the acquisition of a part of a business, only the turnover relating to the part being acquired is taken into account as the seller’s turnover
- turnover within the Community (or a particular Member State) comprises turnover derived from sales to businesses or consumers within the EU (or Member State).

Specific rules apply for the calculation of turnover of credit and other financial institutions and of insurance companies. For insurance companies, turnover is replaced by gross premiums written; for credit and other financial institutions, the Merger Regulation identifies specific items of income to be included in the calculation of turnover such as interest income from securities, and commissions. Companies that have both special sector and ordinary activities are required to calculate the turnover of each part separately before aggregating the figures.

The basic rules for calculating turnover are easily stated. By contrast, the practical application of the rules has given rise to a number of difficulties over the years. This has prompted the Commission to issue explanatory Notices providing guidance on the more important issues. The Consolidated Jurisdictional Notice⁴ consolidated four of the previous notices on jurisdictional issues.

THE CONCEPT OF UNDERTAKINGS CONCERNED

The Merger Regulation requires turnover to be included in the calculation if it is attributable to an “undertaking concerned” or to a company related to such an undertaking. The undertakings concerned are the “direct participants” in a merger or acquisition and identifying them is an essential step in calculating turnover. In the case of an acquisition of one company by another, the undertakings concerned will be those two companies; where one company acquires the subsidiary of another the acquirer and the subsidiary (but not the vendor) are the undertakings concerned. However, in a number of transactions it is not so readily apparent which companies are the direct participants. The Consolidated Jurisdictional Notice explains how the rules apply to various different types of transaction, for example, acquisitions by joint ventures, changes from joint to sole control and asset swaps.

CALCULATION OF TURNOVER

The Consolidated Jurisdictional Notice gives guidance on a number of main issues:

- “net” turnover: turnover calculations must be based on net figures, that is, after deducting sales rebates, VAT and other turnover related taxes (including taxes on alcohol) and excluding intra-group sales⁵

- “group” turnover: calculation of group turnover requires the turnover of all associated companies to be aggregated with the turnover of the “undertakings concerned”. Associated companies include both holding companies and subsidiaries of the undertakings concerned. A holding company or subsidiary relationship is established where (directly or indirectly) a company owns more than 50% of another company’s capital or assets; or where a company has power to exercise more than half the voting rights of the other company or to appoint more than half the members of its board (and the existence of this power may be determined by how shareholders actually cast their votes at recent meetings); or where a company has the right to manage the other company’s affairs
- geographic allocation of turnover: when calculating Community or Member State turnover, turnover is allocated to the country where the customer is located. It does not generally matter, for example, that the customer may ultimately consume the goods or services in another Member State. Exceptionally, turnover of banks and other financial institutions is allocated by reference to the country in which the branch or division is located and not by reference to the location of the customer.

EXTRA TERRITORIAL EFFECT

One consequence of the rules on turnover is that the Merger Regulation can apply to a merger between two companies neither of which is located in the EU and where the main impact of transaction is outside the EU. Thus the acquisition of one US group of companies by another will fall under the Merger Regulation if, for example, the groups have a combined worldwide turnover of €5 billion and each of them has turnover of more than €250 million in the Community (unless the two-thirds rule applies).

MULTIPLE EUROPEAN FILINGS

Notwithstanding the alternative lower turnover thresholds (see the turnover thresholds section above), many transactions without a Community dimension will trigger notification obligations in more than one, often even in multiple, Member States. In recognition of the practical difficulties, inefficiency and expense of multiple filings within the EU, parties can apply for exclusive review under the Merger Regulation of a merger capable of notification in at least three Member States.

Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

- ³ See section on Procedures, Residual powers of the Member States and Miscellaneous issues for more detailed explanations of “referral” situations.
- ⁴ Commission Consolidated Jurisdictional Notice (OJ 2008 C95/1) which replaces (i) Notice on the Concept of full-function joint ventures (OJ 1998 C66/1); (ii) Notice on the concept of a concentration (OJ 1998 C66/5); (iii) Notice on the concept of undertakings concerned (OJ 1998 C66/14); and (iv) Notice on the calculation of turnover (OJ 1998 C66/25)
- ⁵ Note, however, that when a part only of a business is acquired, sales of that part to the test of the group to which it belongs are not excluded.

¹ Council Regulation (EU) Number 139/2004 on the control of concentrations between undertakings.

² Member States are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland,

What is a merger?

WHAT IS A MERGER?

The Merger Regulation applies to so-called “concentrations”. A concentration may occur in one of two ways:

- two or more businesses that were previously independent merge so as to become one new independent business
- one or more persons who already control one business acquire direct or indirect control of the whole or part of another business. This is the most common form of merger in the Community and includes takeovers and public bids.

In either case, the concentration has to involve change of control on a lasting basis.

CONTROL

Under the Merger Regulation a party is regarded as acquiring control if, by whatever means, it has the possibility of exercising “decisive influence” on another party, in particular by:

- ownership or the right to use all or part of the assets of the other party
- rights or contracts which confer decisive influence on the composition, voting or decisions of the other party’s board of directors or of its shareholders’ meeting.

The question of control has been dealt with by the Commission in its Consolidated Jurisdictional Notice, which explains the Commission’s current views on the issue of control.

THE CONCEPT OF CONCENTRATION

The Merger Regulation is concerned with concentrations which involve a change in control. A change in control may occur where one party acting alone acquires control of another party (“sole control”), or where two or more parties acting jointly do so (“joint control”). A change in control may also occur where one of a number of parties that share joint control acquires sole control; or where a party loses sole control so as to share control with others.

Sole control: in the absence of any special voting or management rights, a party acquiring over 50% of the share capital of a company invariably acquires sole control. The same may be true even where a party acquires a minority (that is, less than 50%) shareholding in a company if, for example, the holding is of shares which carry preferential voting rights; or if the spread of other shareholdings is such that the party’s holding is sufficient to exercise de facto control of shareholders’ meetings.

Joint control: in the case of sole control a single shareholder has power to determine strategic decisions. By contrast, joint control is characterised by the possibility of deadlock because two or more shareholders have power to reject proposed

strategic decisions. In such a situation it follows that the shareholders must reach agreement on the commercial policy of the company. In this sense, the company is a “joint venture”. As with sole control, joint control may be established on a legal or de facto basis. The main situations where joint control exists are the following:

- where there are only two shareholders and each of them has equal voting rights in the joint venture. It does not matter whether the equality of voting rights is based on a 50/50 shareholding, or on an agreement between the parties
- where one or more minority shareholders each have rights which allow them to veto strategic business decisions of the joint venture. It does not matter whether the veto rights are contained in the Articles or in an agreement between the parties. Such rights must go beyond the protection commonly accorded to minority shareholders, such as rights to veto changes in the statutes, increases or reductions in capital, or liquidation. To confer joint control the veto rights must exist (whether or not they are exercised) on issues such as the budget, business plan, major investments or appointment of senior management
- where two or more minority shareholders, who together own shares that carry a majority of the voting rights, agree that they will cast their votes the same way, or have sufficiently strong common interests that they are very likely to vote together. In this situation, they will have joint control.

Exceptionally a single shareholder without a majority shareholding may acquire sole control through having a right of veto. This can occur where the shareholder is able to veto strategic decisions but does not have power on its own to impose its decisions on a company. This can arise where the shareholder has only 50% of the shares in the company, or a veto right attached to a minority shareholding, and the other shareholdings are minority shareholdings without veto rights. Since the shareholder can produce a deadlock situation, the Commission regards the shareholder as having decisive influence and as therefore having control within the meaning of the Merger Regulation.

A situation may arise where no party acquires control. Where investors in a company are numerous and have no common interest in how the company should be run, the company may be controlled by shifting alliances. In such a situation, none of the investors acquires control.

JOINT VENTURES

The Merger Regulation applies to all jointly controlled⁶ joint ventures, as long as they are “full function”, that is, they perform on a lasting basis all the functions of an autonomous economic entity. Other joint ventures may be examined under Article 101 TFEU⁷. The Commission’s Consolidated Jurisdictional Notice explains the Commission’s current views on joint ventures falling within the Merger Regulation.

FULL FUNCTION JOINT VENTURES

In the Commission’s view, a joint venture will be full function where:

- resources: the joint venture has sufficient resources including financing, staff and assets, to enable it to conduct its business activities as an autonomous economic entity
- duration: the joint venture is established on a lasting basis. A period of as short as five years has been accepted where there was a possible continuation of the joint venture beyond that period
- relationship with parents: the joint venture is an autonomous economic entity, and does not merely serve only a particular aspect of its parent companies’ business activities. If the joint venture’s sales or purchases are primarily to or from its parents, or if the parent companies act as exclusive distributors for the joint venture’s products (other than for a start-up period), the joint venture is unlikely to be full function.

Joint ventures which are not full function and to which the Merger Regulation does not therefore apply may be subject to Article 101 TFEU. This provides a much less favourable regulatory framework, not least because of the different procedures and substantive tests that apply⁸. Parties may therefore wish, in so far as possible, to bring their joint venture within the scope of the Merger Regulation. In practice it can sometimes be difficult to determine whether a proposed joint venture is likely to be full function. In such cases parties may seek to discuss this issue with the Commission at an early stage.

CO-ORDINATION

If the full function joint venture leads to the “co-ordination of the competitive behaviour of undertakings that remain independent”, such co-ordination is appraised within the Merger Regulation’s procedural framework, but applying the criteria contained in Articles 101 (1) and (3) TFEU in making an assessment⁹.

“Co-ordination” is likely to arise where:

- the parent companies retain activities in the same relevant geographic and product market as the joint venture
- the parent companies retain activities in neighbouring markets (for example, upstream or downstream) where this leads to a likelihood of co-ordination between the parties, for example, where the joint venture is the parents’ main customer or supplier
- the parties accept restrictions on competition which are not ancillary to the concentration, for example, a long-term exclusive supply agreement.

CONSORTIUM BIDS

A consortium established for the purpose of acquiring a company followed by a rapid subsequent division of assets between the consortium members can fall within the Merger Regulation. For the purpose of the Merger Regulation and of applying the turnover rules, such a transaction is normally treated as a series of separate transactions, each one involving a consortium member and the part of the company to be acquired by that member.

⁶ See the section on the concept of concentration above for the meaning of joint control.

⁷ Article 101 TFEU can apply to joint ventures between actual or potential competitors. Where Article 101 (1) TFEU applies to a joint venture, it may nonetheless be permitted as long as the joint venture satisfies the conditions for exemption under Article 101 (3) TFEU. See the Co-ordination section.

⁸ Joint ventures assessed under Article 101 TFEU are prohibited if they involve a significant restriction on competition and affect trade between Member States unless the benefits they produce outweigh their detrimental effects on competition. Parties are required to “self-assess” their arrangements’ compatibility with Article 101 TFEU on the basis of published guidelines, and their arrangements are subject to investigation and assessment by any of the Commission, national competition authorities in Member States, or national courts in Member States. Generally, there are no established timeframes for such proceedings, which may therefore produce a situation of legal uncertainty.

⁹ See the Appraisal by the Commission section below.

Appraisal by the Commission

IMPACT ON THE COMPETITIVE STRUCTURE OF THE MARKET

The Commission's role is to assess the likely impact of a merger on the competitive structure of any EU markets that would be affected. The Commission will prohibit a merger if it concludes that 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"

(the "SIEC test"). Unless the Commission concludes that a merger would have such an effect, it must approve it.

In making its assessment the Commission first has to identify the relevant product and geographic markets in which the merger can be expected to affect competition¹⁰.

- The relevant product market comprises the products or services supplied by the parties and any other products or services which can be regarded as functionally and economically substitutable. In determining this, the Commission looks at the characteristics, price and intended use of the products or services. In some cases it will be relatively simple to identify the relevant product market; in others it can be a complex exercise.
- The relevant geographic market comprises the area in which the parties supply the products or services and in which conditions of competition are sufficiently homogeneous, so as to be distinguishable from neighbouring areas where conditions of competition are appreciably different. In practice, the Commission has often found it difficult to identify the relevant geographic market. In part this is because the structural issues that the Commission has to assess under the Merger Regulation require it to look at the position in the longer term; and although a number of traditional national markets are in the process of breaking down, it is not yet clear that a genuine Community-wide market will develop in the longer term. Moreover, different products have different geographic markets. Thus the relevant geographic market may be global (aircraft), Europe-wide (automotive parts, steel tubes), limited to one or more Member States (many branded consumer products), or even restricted to part of a single Member State (bricks).

In a significant number of its decisions, the Commission has not found it necessary to make a formal finding about the relevant product or geographic markets, because the merger would raise (or not raise) competitive concerns whatever market definition was adopted.

In assessing the probable impact of a merger on the competitive structure of a particular market, the Merger Regulation requires the Commission to take account of the need to maintain and develop effective competition within the EU and of actual or potential competition, whether from inside

or outside the EU. It also requires the Commission to take account of the market position and economic and financial strength of the parties to the merger; of the availability of alternative products; barriers to entry; supply and demand trends; the interests of consumers; and the development of technical and economic progress as long as it is to consumers' advantage and does not form an obstacle to competition.

In moving to the SIEC test as the standard for substantive appraisal of the competition impact of a given merger, the intention of the legislators was to clarify that the substantive test (which previously was based only upon the creation or strengthening of a dominant position) covers all types of scenarios, whether dominance by a single firm or effects stemming from an oligopoly, that might adversely harm the interest of European consumers.

Thus, although it is expected by the Commission that most cases of incompatibility of a merger with the competition rules will continue to be based on the concept of dominance, it is nonetheless clear that the Commission will consider any other factors stemming from a merger which may result in a significant impediment to effective competition.

The Commission has published detailed guidelines on its methodology for assessment of horizontal mergers under the Merger Regulation ("the Horizontal Merger Guidelines"). "Horizontal" mergers are those between actual or potential competitors active at the same level of the production or distribution chain. However, "vertical" (that is, between parties active in upstream and downstream markets) or "conglomerate" (that is, between parties in neighbouring or related markets) mergers may also be prohibited if they significantly impede effective competition. The Commission has published guidelines explaining its competitive appraisal of such mergers.¹¹

HORIZONTAL MERGER GUIDELINES

The Horizontal Merger Guidelines identify two main ways in which horizontal mergers may significantly impede effective competition:

- so-called "non-co-ordinated effects": this is where a merger would eliminate important competitive constraints on one or more firms which consequently would enjoy increased market power without resorting to co-ordinated behaviour
- so-called "co-ordinated effects": this is where a merger would change the nature of competition in such a way that firms that previously were not co-ordinating their behaviour would now be significantly more likely to co-ordinate and raise prices or otherwise harm effective competition. Such a merger may also make co-ordination easier, more stable or more effective for firms which were co-ordinating prior to the merger.

The Commission's approach to market share and concentration levels provides the starting point of the analysis of market structure and of the competitive importance both of the merger parties and of their competitors.

Generally, the Commission will use current market shares in its competitive analysis, though these may be adjusted to reflect reasonably certain future changes. Where market shares are volatile (for example, in markets with "lumpy" patterns) historic data may be used, for example, to see which competitors have been gaining or losing share over a longer time frame. In assessing the possible existence of a dominant position, very large shares – 50% or more – may in themselves be evidence of the existence of a dominant position. Specific market structures however may also lead to dominance findings and concerns at lower market share levels, even below 40%. However, where a merger leads to a post-merger market share not exceeding 25% this will be an indication of absence of competition concerns.

The Commission will also measure concentration levels in a given market by reference to the Herfindahl-Hirschman Index (HHI). Horizontal competition concerns are unlikely to exist in a market with a post-merger HHI below 1,000. Similarly, concerns are unlikely in a market with a post-merger HHI between 1,000 and 2,000 where the increase in HHI is below 250, or above 2,000 where the increase is less than 150 except where other factors are present, such as a merger with a potential or recent entrant, the elimination of a maverick competitor, indications of past or ongoing co-ordination, or one of the merging parties has a pre-merger share of 50% or more.

ASSESSMENT OF NON-CO-ORDINATED EFFECTS

Mergers which may significantly impede effective competition through non-co-ordinated effects will generally be those which create or strengthen the dominant position of a single firm – for example, where the merged firm would have a market share post-merger which is significantly larger than its next competitor. Further, mergers in oligopolistic markets which involve the elimination of important competitive constraints previously exerted upon each other by the merging parties together with a reduction of competitive pressure on remaining competitors may also be found significantly to impede effective competition even where there is little likelihood of co-ordination between members of the oligopoly.

In assessing the extent to which a merger may produce significant non-co-ordinated effects the Commission will look at factors such as:

- market shares of the merging parties, where a larger merged share (and a larger addition of share from a merger) will generally indicate increased market power
- whether the merging parties are close competitors – that is, the products they produce are closer substitutes for each other than other firms' products: in bidding markets,

historic data of bids may indicate if the merging parties particularly constrain each other

- the ease with which customers of the merging parties may switch to other suppliers
- whether competitors have enough capacity, and would find it profitable, to increase output, or whether the merged firm would be able to make expansion by smaller or potential competitors more difficult
- whether the merger eliminates a player that has a greater influence on the competitive process than its market share might indicate – for example, a maverick, a recent important entrant or an innovator.

ASSESSMENT OF CO-ORDINATED EFFECTS

A merger which does not produce non-co-ordinated effects may nonetheless significantly impede effective competition where firms would consider it possible, economically rational and hence preferable to adopt on a sustainable basis a course of action aimed at increasing prices or other uncompetitive behaviour. An example would be a merger in a concentrated market resulting in the creation or strengthening of a collective dominant position and increasing the likelihood that firms are able to co-ordinate their behaviour even without entering into an unlawful agreement or concerted practice.

Co-ordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of co-ordination. Three conditions are necessary for co-ordination to be sustainable.

- the co-ordinating firms must be able to monitor to a sufficient degree whether the terms of co-ordination are being adhered to – this is more likely to be the case in a less complex and more stable economic environment for example, with fewer players, more homogeneous products, transparency of information, lack of innovation etc
- there must be some form of credible deterrent or retaliation mechanism that can be activated if deviation is detected – retaliation that manifests itself only after some significant lapse of time, or that is not certain to be activated, may not offset the benefits from deviating;
- the reactions of outsiders, such as current and future competitors not participating in the co-ordination, or customers must not be able to jeopardise the outcome expected from the co-ordination – for example, by competitors increasing capacity in response to a capacity reduction by the co-ordinating players, or by new competitors entering a market.

NON-HORIZONTAL MERGER GUIDELINES

Non-horizontal mergers are less likely to significantly impede effective competition than horizontal mergers and can provide substantial scope for efficiencies.

The Commission considers it is unlikely to find concerns where the post-merger market share of the merged entity in each of the markets concerned is below 30% and the post-merger HHI is below 2000. Under these circumstances the Commission will not extensively investigate such mergers except where:

- the merger involves a company likely to expand significantly in the near future (e.g. by developing new technology)
- there are significant cross-shareholdings or cross-directorships in the market
- there is a high likelihood that one of the merging parties would disrupt co-ordinated conduct
- there is an indication of past or ongoing co-ordination in the market

The Commission distinguishes in the Non-horizontal Merger Guidelines the main competition concerns that could arise from vertical and conglomerate concentrations.

The main risk in vertical concentrations comes from possible market foreclosure when the merged entity enjoys considerable market power. The Commission will assess if the merged entity will have the ability and incentives to carry out a foreclosure strategy and its likely effect on competition. Foreclosure can be either:

- input foreclosure: where, post merger, the new entity is likely to restrict downstream competitors from accessing products or services that it would have otherwise supplied, thereby raising its downstream competitors' costs; or
- customer foreclosure: when a supplier merges with an important customer it may foreclose access to a sufficient customer base to its competitors in the upstream market.

In relation to conglomerate mergers possible foreclosure can arise from tying or bundling one product to another one with a strong market position, although not necessarily a dominant one.

OFFSETTING FACTORS

Where a merger would on its face appear to raise a concern that competition would be significantly impeded as a result of it, a number of factors may nonetheless, individually or jointly, argue in favour of its approval. The most significant of these include:

- countervailing buyer power: the ability of customers to counter an increase in market power through for example, bargaining strength, possibility to switch to alternative

suppliers, credible threat of vertical integration or sponsoring new entry

- entry: the possibility of new entry from potential competitors that is likely, timely and sufficient to deter or defeat potential anti-competitive effects of a merger
- efficiencies: where efficiencies brought about by a merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers; such efficiencies can only be taken into account positively where they benefit consumers, are merger-specific, and verifiable
- failing firm: where the deterioration of the competitive structure cannot be said to be caused by the merger because, absent the merger, the failing firm would be forced out of the market because of financial difficulties, there is no less anti-competitive purchaser, and the assets of the failing firm would inevitably exit the market.

CO-ORDINATION IN JOINT VENTURES

The criteria applied when appraising any co-ordination in a joint venture which falls under the Merger Regulation are those set out in Articles 101 (1) and 101 (3) TFEU, namely:

- could the co-ordination affect trade between Member States, and does it have as its object or effect the prevention, restriction or distortion of competition within the EU, to an extent which is not insignificant? If so:
- will the co-ordination contribute to improving the production or distribution of goods or to promoting technical or economic progress?
- will the co-ordination allow consumers a fair share of the benefit?
- are the restrictions indispensable to the attainment of these objectives?
- will the co-ordination afford the possibility of eliminating competition in respect of a substantial part of the products in question?

The Merger Regulation provides that the Commission is to take into particular account the last of these factors, as well as whether the parent companies will retain to a significant extent activities in the same market as, or in a market related to that of, the joint venture.

¹⁰ Guidance on how the Commission will make its assessment is contained in the Commission's Notice on the definition of relevant market (published in the Official Journal of 9 December 1997 at C372/5).

¹¹ Guidelines on non-horizontal mergers (vertical and conglomerate mergers) (OJ 2008 C265/7)

Procedures

OVERVIEW

A Community dimension merger must be notified to the Commission for clearance and cannot be implemented until approval is forthcoming. The Commission has 25 working days from notification either to clear the merger or to start Phase II proceedings (extended to 35 working days if a Member State asks for referral back of the merger to the national competition authority¹² or if undertakings are offered). If the Commission starts Phase II proceedings, it has a further 90 working days to take a final decision; which is automatically extended to 105 working days where undertakings are offered after the 54th working day following the initiation of Phase II. In addition, Phase II may be extended by up to 20 working days at the request of the parties during the first 15 working days, or at any time at the request of the Commission and with the consent of the parties. The running of time may also be suspended in certain limited circumstances.

Following the reorganisation of the Commission's Directorate General for Competition, including the Merger Task Force, merger cases are handled by units specialised in certain industry sectors.

SYSTEM OF STREAMLINED REFERRAL REQUESTS BY THE PARTIES

The Merger Regulation has a system of streamlined referral requests, which raises the possibility of referral of mergers from Member States to the Commission and vice versa. Parties may, prior to notification, request the Commission to take jurisdiction over certain concentrations which do not satisfy the turnover thresholds under the Merger Regulation. Similarly, parties may make a request prior to notification that a concentration with a Community dimension is wholly or partially referred to a Member State.

REFERRAL TO THE COMMISSION

If a concentration does not have a Community dimension but is capable of being notified in at least three Member States, the parties may request that the concentration should be examined by the Commission. Before any notification, the parties should inform the Commission of the request by means of reasoned submission using Form RS which requires the provision of a considerable volume of information to enable the request to be assessed. This will then be transmitted to all Member States. The Member States concerned have 15 working days to express disagreement to such a referral. It is sufficient that one of the Member States competent to examine the concentration under national competition law disagrees, to prevent the referral to the Commission. Where no Member State expresses its disagreement, the concentration will be regarded as having a Community dimension and national merger control rules will not be applicable. The parties will then be required to notify the concentration to the Commission.

REFERRAL TO A MEMBER STATE

Parties may also request that a concentration satisfying the turnover thresholds under the Merger Regulation is referred in whole or in part to a Member State provided that the concentration significantly affects competition on a distinct market within that Member State. Prior to notification, the parties should inform the Commission of its request by means of a reasoned submission, again on Form RS, which will be transmitted to all Member States. The Member State concerned has 15 working days to express its position on the referral request. Unless the Member State disagrees, the Commission may decide to refer the whole or part of the case to the competent national authorities. The Commission has in total 25 working days from receipt of the parties' reasoned submission to decide whether to refer the case.

Member States also have the possibility to request that a case is referred back from the Commission to the national authority (described in the Residual powers of Member States section below) or conversely, that a case is referred from the national authority to the Commission (described in the Miscellaneous issues section below.)

MANDATORY NOTIFICATION

All Community dimension mergers must be notified to the Commission on the prescribed form (Form CO) prior to implementation. Notifications can be made once there is a good faith intention to conclude an agreement or an openly announced intention to make a public bid, although precise timing of a notification will depend on a number of factors, in particular whether appropriate pre-notification contacts have been completed. The requirements of Form CO are further described in the Form CO section below. The Commission sends a copy of the Form CO to each Member State. The Commission also publishes a notice about the merger in the Official Journal inviting interested parties to comment.

SUSPENSION

Parties must not give effect to a merger before they notify it to the Commission; nor can they do so until clearance or expiry of the relevant time limits. The Commission has power to waive the suspensory requirement, taking into account the effects of the suspension and threat of the merger to competition. This power is exercised only exceptionally.

In the case of a public bid, the suspensory provision does not prevent a bidder from acquiring shares in the target, but the bidder must not exercise voting rights attaching to any shares acquired without the prior consent of the Commission.

PHASE I

Within 25 working days of receiving formal notification of a merger ("Phase I"), the Commission has to decide whether the Merger Regulation applies and, if so, whether to approve the merger or to open formal proceedings ("Phase II"). The Commission will open Phase II proceedings only if there are serious doubts about the impact of the merger on competition in the EU. Otherwise it will issue a decision approving the merger at the end of Phase I.

If the Commission considers that the information supplied with the notification is materially incomplete or if there is a material change in the facts after the notification has been submitted, the Commission may suspend the notification and notify parties that the 25 working day period will not start running until the missing information is supplied. Time limits may also be suspended where the Commission has to take a formal decision requiring information to be supplied or has to order an inspection.

During Phase I, the Commission normally contacts competitors, suppliers and customers to obtain their views on a merger so as to enable it to decide whether to approve the merger or to open Phase II proceedings. The Commission may sometimes request extensive information from such parties – as well as from the parties to the merger.

The Commission is able to accept undertakings from parties during Phase I if this would avoid the need to open Phase II proceedings. The offer of undertakings in Phase I must be made within the first 20 working days and has the effect of extending the 25 working day period to 35 working days. The Commission may accept such undertakings if it is satisfied that they meet its concerns about the merger. In general such undertakings must be structural in nature rather than behavioural. For example, they may involve modifying the scope of the original agreement or agreeing to sell off one or more overlapping businesses to a third party.

PHASE II

Where it opens Phase II proceedings, the Commission has a further 90 working days from that date in which to issue a final decision. The time period may be extended by up to 20 working days at the request of the parties during the first 15 working days; or at any time at the request of the Commission and with the consent of the parties.

During Phase II proceedings, the Commission carries out a more detailed appraisal of those aspects of the merger that give rise to the "serious doubts". The Commission has power to request information from the parties (and others). It can also inspect documents and business records at the parties' premises (although it has rarely done so in practice). The Merger Regulation also allows the Commission to take statements during its investigations. The Phase II time period may be suspended if the Commission has to take a formal decision requiring information to be supplied or has to order

an inspection. Such "stopping the clock" has become more common.

In Phase II, the Commission issues a written Statement of Objections detailing its objections to the merger. The parties have the right to inspect the Commission's file and invariably provide a written response to the Statement of Objections. The Commission holds an oral hearing for the parties involved in the merger and for third parties with a legitimate interest, for example, complainants. The Commission liaises with Member States throughout the proceedings and, before reaching a decision, consults the Advisory Committee, which comprises representatives of all the Member States.

The Commission also has power to accept undertakings in Phase II and parties may try to avoid a prohibition decision by offering appropriate undertakings to the Commission. To encourage early submission of undertakings, Phase II will be extended by 15 working days only if undertakings are offered before the 55th working day. Undertakings must in any event be offered within the first 65 working days of Phase II. Parties who submit Phase I or Phase II undertakings must submit the information and documents required by Form RM.

In total a full proceeding may take up to 160 working days from notification (that is, assuming offer of undertakings in Phase I and Phase II with all automatic and optional extensions – but excluding any suspension of applicable periods).

COMMISSION'S POWERS

The Commission has power to prohibit a merger. It also has power to order divestiture (or other appropriate action) if a merger has been completed. It can impose substantial fines (of up to 10% of turnover) on parties who give effect to a merger either during the suspensory period or after the Commission has issued a decision prohibiting it¹³. The Commission may impose similar fines on parties who fail to divest a business or to take other action required by a Commission decision. It can also impose fines (of up to one per cent of turnover) for submitting incorrect, incomplete or misleading information during the investigation. In addition, the Commission may impose periodic penalty payments (of up to five per cent of daily turnover) for failure to comply with certain procedural requirements.

INFORMAL DISCUSSIONS

It is possible to approach the Commission to discuss a proposed merger on an informal basis and (if a merger is not public at the time) in confidence. In practice, parties commonly approach the Commission on this basis at an early stage. This provides an opportunity for the parties to give the Commission an early briefing about the transaction. Once a draft notification has been submitted, there may be the opportunity to discuss potential competition concerns and receive preliminary feedback on the Commission's views; to discuss possible waivers of certain of the information

requirements in Form CO; and to discuss any jurisdictional issues that may arise, for example, on the turnover thresholds or the “full function” nature of a joint venture.

APPEALS

Decisions of the Commission can be appealed to the EU's General Court in Luxembourg. Such appeals must be lodged within two months. There have been a limited number of such appeals to the General Court, although Commission prohibition decisions have been overturned in a number of high profile cases¹⁴. A further right of appeal on a point of law lies from the General Court to the Court of Justice.

Where the court annuls the whole or a part of a Commission Decision under the Merger Regulation, the concentration has to be re-examined by the Commission. The parties have to submit a new notification, supplement the original notification or certify to the Commission that there have been no changes in the market conditions since the original notification. The notification procedure will then restart from Phase I.

PROCEDURAL STATISTICS

Statistics on the way in which the Commission has dealt with transactions notified under the Regulation between 1990 and 2009 are contained in the ANNEX.

¹² See the section on the Residual powers of Member States.

¹³ In June 2009, the Commission fined Electrabel Euro 20 million for acquiring control of CDR without having received prior approval.

¹⁴ Airtours/First Choice (T-342/99), CFI 6 June 2002; Schneider/Legrand (T-310/01 and T-77/02), CFI 22 October 2002; Tetra Laval/Sidel (T80/02), CFI 25 October 2002.

Residual powers of the Member States

ONE-STOP SHOP

The Commission has primary responsibility for reviewing all Community dimension mergers and the Merger Regulation goes a long way towards meeting the original objective of providing a “one-stop shop”. In all cases, however, the Commission liaises closely with Member States directly concerned by a merger. For this reason, even where the Commission has jurisdiction over a merger, it may on occasion be advisable for parties also to approach national merger control authorities in affected countries.

There are two situations in which Member States can apply their own laws to prohibit or control a Community dimension merger. These are the exceptions relating to “distinct markets” and “legitimate interests”.

DISTINCT MARKET

After receiving a copy of the notification a Member State may give notice to the Commission that a merger threatens significantly to affect competition on a distinct market within that Member State and request that it should have jurisdiction to examine the merger.

A Member State may also request referral back of a merger which affects competition in a distinct market of that Member State where that market does not constitute a substantial part of the EU (without the need to show that the merger threatens significantly to affect competition in that market). A distinct market is one which can be distinguished from markets in neighbouring areas because the conditions of competition in the markets are appreciably different.

In addition, prior to notification of a concentration with a Community dimension, the parties themselves have the option to inform the Commission by means of a reasoned submission that the concentration may significantly affect competition in a distinct market within a Member State and request that it be examined, in whole or in part, by that Member State.

A Member State has 15 working days in which to give notice of its request to the Commission (or to agree or disagree with a reasoned submission from the parties). Where the Commission receives such a notice, the 25 working day period in which it must decide whether to approve a merger or to open formal proceedings is extended to 35 working days. If the request is made on the basis that competition will be significantly affected in a distinct market, and the Commission agrees with the Member State's view, it can either take action itself under the Merger Regulation or it can authorise the Member State concerned to take action. In the latter case, the Member State has 45 working days in which to carry out its investigation and the Member State can only take such measures as are necessary to safeguard or restore effective competition on the market concerned. Alternatively, if the request is made on the basis that the merger affects competition in a distinct market that does not form a

substantial part of the EU, the Commission must refer the whole or part of the matter back if it agrees that a distinct market is affected.

LEGITIMATE INTERESTS

Even if the Commission approves a Community dimension merger, a Member State may still take appropriate measures in relation to the merger to protect certain “legitimate interests” as long as those interests are compatible with Community law and are not concerned with the effect of the merger on competition. The Merger Regulation expressly recognises as legitimate interests:

- public security: for example, regarding ownership of strategic defence businesses
- plurality of the media: for example, assuring an adequate diversity of ownership of newspapers and broadcasting media
- prudential controls: for example, for ensuring that banks, insurance companies and other financial institutions are controlled by fit and proper persons.

If a Member State proposes to take action to protect any other legitimate interest, it must seek the Commission's approval before doing so. The Commission has 25 working days to decide whether the interest in question is of a kind that the Member State is entitled to protect.

APPLICATION OF NATIONAL MERGER CONTROL LAWS

Member States may invoke their own laws to control any transaction which is not a Community dimension merger (except a non-Community dimension merger capable of being reviewed under the law of at least three Member States which has been referred to the Commission under the procedure described at the Procedures chapter above). Thus, Member States can seek to control a merger if the turnover of the parties does not meet the worldwide or Community-wide thresholds; or if the turnover thresholds are met but the two-thirds rule applies.

Even where a transaction meets the turnover thresholds in the Merger Regulation, it is possible that a transaction might not give rise to a concentration within the meaning of the Merger Regulation, yet might be caught by the merger control laws of one or more Member States. For example, acquisition of a shareholding of 20% may be unlikely to give a company “decisive influence” so as to amount to a concentration within the meaning of the Merger Regulation; however, it may give it an “ability materially to influence policy” within the meaning of UK merger control law, or a “competitively significant influence” within the meaning of German merger control law, so as to be controllable under the laws of those countries.

All Member States except Luxembourg now have their own merger control laws. Compulsory notification requirements

exist in all other Member States with the exception of the United Kingdom where notification is voluntary.

Miscellaneous issues

REMEDIES

In October 2008, the Commission adopted a new Remedies Notice¹⁵. This Notice sets out the general principles for the offer and acceptance of merger remedies, considers the different types of remedies, and explains the procedure for the submission of undertakings and the requirements for the implementation of undertakings. The Notice states that the Commission on the whole favours structural remedies over behavioural remedies as the latter require continual monitoring and can be more difficult to draft. The Notice emphasises that it is for the parties to propose suitable undertakings that eliminate competition concerns entirely and which are comprehensive and effective from all points of view. Parties who submit Phase I and Phase II undertakings must submit the information and documents required by Form RM¹⁶.

ANCILLARY RESTRICTIONS

The Commission's Notice "on restrictions directly related and necessary to concentrations"¹⁷ explains how to treat certain restrictive arrangements that may be entered into in connection with a merger. The Notice states that a clearance decision under the Merger Regulation is deemed to cover certain restrictions of competition which might otherwise be open to separate review under Article 101 TFEU, as long as the restrictions are directly related and necessary to the implementation of the merger. The Commission will not assess restrictions of this type unless the parties explicitly so request (for example, in case of doubt whether the provisions can be regarded as ancillary and benefit from deemed clearance). The Notice identifies common examples of restrictions that may be considered as ancillary to a merger, including:

- non-competition covenants on the sale of a business, generally permitted for two or three years depending on the nature of the transaction
- non-solicitation and confidentiality clauses, evaluated in the same way as non-competition covenants. Confidentiality clauses may, if justified in the circumstances of the case, be for periods longer than three years
- non-compete covenants by controlling shareholders entered into in the context of joint ventures, generally permitted for the life-time of the joint venture
- non-exclusive supply or purchase obligations based on limited quantities are generally permitted. Any other types of supply or purchase obligations need to be considered in the circumstances of each case. Supply or purchase obligations are regarded as transitional arrangements where businesses are being broken up in a manner which interferes with existing supply arrangements so alternative arrangements can be put in place. For complex industrial products, an interim supply arrangement may be justified

for up to three years, but in any event the nature of the goods or services must be considered.

REFERRALS TO THE COMMISSION AT THE REQUEST OF MEMBER STATES

One or more Member States may request the Commission to examine a concentration, which does not have a Community dimension, but threatens significantly to affect competition within the Member State or States and affects trade between Member States. Such a request must be made within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned. Other Member States then have 15 working days to join this request.

Any national time limits for the concentration will be suspended until it has been decided where the concentration should be examined. However, the suspension period for a given Member State will end as soon as the Member State informs the Commission and the parties that it will not join the request. After the expiry of these time limits, the Commission has 10 working days to decide if the concentration affects trade and threatens significantly to affect competition within the Member State or States making the request. The Member States having made the request can no longer apply national competition law to the concentration. The Commission may also on its own initiative inform a Member State that it considers that a concentration satisfies the criteria for referral, and invite the Member State to make such a request. This provision (which was originally included in the Merger Regulation at the request of countries not having their own domestic merger control legislation) complements the ability of the parties themselves to request referral to the Commission of a concentration not having a Community dimension but capable of being reviewed in at least three Member States (described in the section on Procedures above).

SIMPLIFIED PROCEDURE

The Commission's Notice on its "simplified procedure"¹⁸ explains how the Commission intends to treat mergers that are notifiable, but do not raise competition concerns. Such mergers may be notified using the Short Form notification instead of Form CO. The time limits for the Commission to review the merger are not affected. However, in simplified procedure cases, the parties are required to provide less information and the Commission issues a short-form decision only. Decisions in such cases are very short and are often issued in less than 25 working days.

The Short Form CO may generally be used where:

- none of the parties are active in the same market, or in an upstream or downstream market
- the parties' combined market share on a market where they are both active is less than 15%

- the parties are only active in markets which are vertically related and neither has a market share of 25% or more on the upstream or downstream market
- in a joint venture situation: the joint venture has sales of less than €100 million in the EEA and the joint venture has assets of less than €100 million in the EEA; or
- a party is changing from joint to sole control of an undertaking.

ARTICLES 101 AND 102 TFEU

Article 101 TFEU prohibits parties from making agreements that have anti-competitive effects within the EU. Article 102 TFEU prohibits a party that enjoys a dominant position within the EU from abusing it. In a limited number of cases in the past, the Commission has sought to apply Articles 101 and 102 TFEU to certain mergers and similar transactions. Since the Merger Regulation came into being the procedural regulations by which the Commission applies Articles 101 and 102 TFEU¹⁹ can no longer be applied to concentrations as defined in the Merger Regulation. Thus the Commission no longer has power to apply Articles 101 and 102 TFEU to such transactions whether the turnovers of the parties involved are above or below the thresholds in the Merger Regulation²⁰.

¹⁵ Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004: Published in the Official Journal of 22 October 2008.

¹⁶ See the section on Form CO below.

¹⁷ Commission Notice on restrictions directly related and necessary to concentrations: Published in the Official Journal of 5 March 2005 (C56/24).

¹⁸ Commission Notice on simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004: Published in the Official Journal of 5 March 2005 (C56/32).

¹⁹ Council Regulation (EC) Numbers 1/2003, 1017/68, 4056/86 and 3975/87.

²⁰ As noted in the What is a merger? chapter above, the Commission must however assess co-operative aspects of a joint venture under Article 101 TFEU (but within the procedural framework of the Regulation).

Form CO

As noted above, Community dimension mergers must be notified to the Commission on Form CO. In the case of a merger or an acquisition of joint control, all parties should complete the Form. In the case of an acquisition of sole control or a public bid, the acquirer or bidder should complete the Form.

The information required by Form CO is summarised briefly below by reference to the Section numbers in the Form.

SUMMARY OF THE CONCENTRATION

Section 1 requires a summary of the concentration – the parties, the nature of the concentration, the areas of activity of the notifying parties, the markets on which the concentration will have an impact, and the underlying strategic and economic rationale.

DETAILS OF THE PARTIES

Section 2 requires information about the notifying parties, contact details for them and their appointed representatives.

DETAILS OF THE CONCENTRATION: TURNOVER

Section 3 requires more detailed description of the concentration, its legal form and structure, and its value. It also requires detailed turnover information so as to establish that the turnover thresholds under the Merger Regulation are met.

OWNERSHIP AND CONTROL

Section 4 requires information about other companies in the groups to which the notifying parties belong. This may be illustrated by organisation charts showing the structure of ownership and control. It also requires information about stakes of 10% or more which any group company may hold in other companies active in affected markets; director of group companies who sit on boards of other companies active in affected markets; and acquisitions of companies active in affected markets which any group company has made in the past three years.

SUPPORTING DOCUMENTATION

Section 5 requires copies of certain documents to be provided, namely, the latest versions of any agreement or bid document; the most recent annual report and accounts of the parties; and analyses or reports assessing the competitive impact of the merger prepared by or for any member of the board of directors or the supervisory board. The need for such analyses and reports to be disclosed should be borne in mind when they are prepared.

MARKET DEFINITIONS

Section 6 requires the parties to identify and briefly describe so-called “affected markets”. The first step in identifying affected markets is to identify the relevant product and geographic markets. Affected markets consist

of relevant product markets where in the EU, a part of the EU, or a Member State:

- two (or more) of the parties are active and would have a combined market share of 15% or more (horizontal relationships)
- any of the parties is active upstream or downstream of a product market in which any other party is active and either of them has a market share of 25% or more in its market (vertical relationships).

Identifying affected markets is a critical exercise not simply in terms of information gathering (because sections 7 and 8 of Form CO require market data to be provided for each affected market), but also in terms of the Commission’s assessment of the competitive impact of the merger.

Section 6 also requires the parties to describe the product and geographic scope of markets other than affected markets where the notified concentration may have a significant impact. This will be the case for example where:

- any party has a greater than 25% market share in a market where any other party is a potential competitor
- any party has a greater than 25% market share in a market in relation to which another party holds important intellectual property rights
- any party is present in a product market which is a neighbouring market closely related to a product market in which any other party is present, and the individual or combined market share of the parties is 25% or more . The Commission may in practice request more detailed information to be supplied in relation to these other markets.

INFORMATION ON AFFECTED MARKETS

Section 7 requires extensive market data to be provided over three years for each affected market – for the Community as a whole, for any individual Member States where the parties do business and for any other relevant geographic market. The information to be provided includes the size of the market in value and volume; sales and market shares of the parties; an estimate of shares of competitors having at least 10% of the market; the value and volume of imports; and price levels in Member States and other areas (for example, USA or Japan).

Section 8 requires information about the parties’ largest suppliers and customers, distribution and service networks (if any), capacity, structure of demand, market entry, research and development, the role of co-operative agreements in the industry and trade associations.

OVERALL MARKET CONTEXT AND EFFICIENCIES

Section 9 requires parties to describe the merger in its worldwide context. It also invites the parties to provide information to substantiate claims that they might make in relation to efficiency gains generated by the concentration which would allow the new entity to act procompetitively for the benefit of consumers.

Section 10 requires the parties to explain the impact of any co-operative aspects of a joint venture, and whether the joint venture satisfies the criteria for exemption under Article 101 (3) TFEU.

DISPENSATIONS

In appropriate cases the Commission may agree to waive certain of the information requirements in Form CO. As noted above, the possibility of agreeing such a waiver is often raised with the Commission in a meeting at an early stage prior to submission of the Form CO.

FORM RM

When offering Phase I or Phase II undertakings, parties must submit the information and documents prescribed by Form RM.

Form RM requires that parties provide:

- detailed information on the object of the undertakings offered and the conditions for their implementation
- information showing the suitability of the undertakings offered to remove the significant impediment of effective competition identified by the Commission
- details of any deviations from the model commitments published by the Commission, and an explanation of their differences
- a non-confidential summary of the nature and scope of the undertakings and their impact (which may be used by the Commission to market test the proposals)
- where the undertakings consist in the divestiture of a business, information about the business to be divested. This includes a general description of the business, any legal obstacles to transfer, details of the products manufactured or services provided, the way in which essential functions are operated, details of any links between the business to be divested and the retained businesses, all relevant tangible and intangible assets, a description of the customers of the business, details of any changes in the organisation of the business over the last two years or anticipated in the next two years, an organisational chart, and financial data.
- details of any areas where the business to be divested differs from the business as currently operated

- the reasons why the business will be acquired by a suitable purchaser in the time-frame proposed in the undertakings.

Annex

PROCEDURAL STATISTICS 1990-2009²¹

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Merger notifications received	11	64	59	59	95	110	131	168	224	276	330	335	277	211	247	313	356	402	347	259
Notifications withdrawn	0	0	3	2	6	4	6	9	9	12	13	12	4	0	5	9	9	7	13	8
Cleared under Phase I procedure	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	368	307	225
Phase I clearance with undertakings	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	18	19	13
Phase II Proceedings opened	0	6	4	4	6	7	6	11	11	20	18	21	7	9	8	10	13	15	10	5
Cleared under Phase II procedure	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	5	9	0
Phase II clearance with undertakings	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3
Prohibition decisions	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0

²¹ From Commission statistics

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