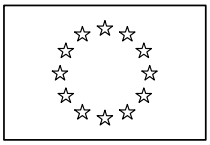

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Annule et remplace le document COM(2009)281 du 18 juin 2009; concerne uniquement les versions FR, DE et EN (ajout de la cote sur la page de couverture)

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

Report on the functioning of Regulation No 139/2004

{SEC(2009)808}

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1. BACKGROUND

1. Council Regulation (EEC) No 4064/89, the "EC Merger Regulation", entered into force on 21 September 1990. The EC Merger Regulation applies to concentrations which are deemed to have a Community dimension, i.e. where the turnover of the parties concerned satisfy the thresholds set out in Article 1 of the EC Merger Regulation.

2. One of the main principles of the EC Merger Regulation is the exclusive jurisdiction of the Commission with respect to concentrations having a Community dimension. The concept that the Commission should have sole competence to deal with mergers with a Community dimension follows from the principle of subsidiarity. From the viewpoint of the European business community, the Commission's exclusive jurisdiction also provides a "one-stop-shop" advantage, which is widely regarded as an essential part of keeping the regulatory costs associated with cross-border transactions at a reasonable level. In addition, the Commission's exclusive jurisdiction to vet such mergers is an important element in providing a "level playing field" for the concentrations that were bound to result from the completion of the internal market. This principle is widely accepted as the most efficient way of ensuring that all mergers with a significant cross-border impact are subject to a uniform set of rules.

3. In 1998, after a careful review of the experience gained, the EC Merger Regulation was amended, through Council Regulation No 1310/97. In relation to Article 1, a new sub-paragraph - Article 1(3) - providing for an alternative turnover threshold was introduced. The objective of this provision was to address the problem that a significant number of cases failed to meet the turnover requirements of Article 1(2) and had to be notified in several Member States. Many such concentrations had a significant cross-border impact but did not benefit from the one-stop-shop principle. The EC Merger Regulation had therefore not fully succeeded in creating a level playing field and a set of coherent rules for this category of cases.

4. The adoption of the recast EC Merger Regulation on 20 January 2004[1] (also referred to as the "EC Merger Regulation") was the next step to further improve the merger case allocation between the Commission and the Member States. It was the result of a far reaching review and a broad debate with all concerned parties which was launched in 2001 with the Commission Green Paper[2].

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1 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).

2 COM(2001) 745, 11.12.2001.

5. The recast EC Merger Regulation introduced a number of substantive and procedural changes. The review had found that, notwithstanding the introduction of the threshold under Article 1(3), there was still further scope for improved case allocation between the Commission and the national competition authorities ("NCAs"). Therefore, while the turnover thresholds set out in Articles 1(2) and 1(3) were left unchanged, a set of voluntary pre-notification referral mechanisms was introduced in order to "*further improve the efficiency of the system for the control of concentrations within the Community*"[3]. The principles guiding the system were those that decisions taken with regard to the referral of cases should take due account *"in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a 'one-stop-shop' system, and the importance of legal certainty with regard to jurisdiction"*[4].

2. SCOPE AND PURPOSE OF THE REPORT

6. This Report is a stock-taking exercise, the aim of which is to understand and assess how the jurisdictional thresholds and their corrective mechanisms have operated since the entry into force of the recast EC Merger Regulation on 1 May 2004, as provided by its Articles 1(4) and 4(6). It is to be read in conjunction with the accompanying Commission Staff Working Paper which contains a more detailed review.

7. In a number of areas, this Report highlights aspects which merit further discussion, but leaves open the question as to whether any amendment to the existing rules or practice is appropriate. It will serve as a basis for the Commission to assess, at a further stage, whether it is appropriate to take further policy initiatives.

3. A SYSTEM OF JURISDICTIONAL THRESHOLDS AND CORRECTIVE MECHANISMS

8. The division of competence between the Commission and the NCAs is based on the application of the turnover thresholds set out in Article 1[5] and includes three

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3 Recital 16 of the EC Merger Regulation. Other instruments that should also be mentioned are: the Commission Notice on Case Referral in respect of concentrations (Commission Notice on Case Referral in respect of concentrations - OJ C 56, 5.3.2005, p. 2), which sets out the guiding principles of the referral system. On 10 July 2007, the Commission adopted the Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Corrected French and German versions of the Commission Consolidated Jurisdictional Notice and the remaining languages versions of the Notice were adopted by the Commission on 17 March 2008). The Consolidated Jurisdictional Notice replaces the previous four jurisdictional Notices, all adopted by the Commission in 1998 under the previous EC Merger Regulation. The Consolidated Jurisdictional Notice covers all issues of jurisdiction relevant for establishing the Commission's competence under the EC Merger Regulation, including in particular, the concept of a concentration, the notion of control, the concept of full-function joint ventures and the calculation of turnover.

4 Commission Notice on Case Referral in respect of concentrations (OJ C 56, 5.3.2005, p. 2-23, paragraph 8).

5 Article 1(2) of the EC Merger Regulation stipulates that: "A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State." Article 1(3) stipulates that: "A concentration that does not meet the thresholds laid

corrective mechanisms. The first corrective mechanism is the so-called "two-thirds rule". The objective of this rule is to exclude from the Commission's jurisdiction certain cases which contain a clear national nexus to one Member State[6].

9. The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) or the Commission under Article 4(5) if certain conditions are fulfilled[7]. The initiative is in the hands of the parties prior to notification. However, referral is subject to approval by the Member States and the Commission under Article 4(4) and by the Member States under Article 4(5).

10. The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assess mergers that fall below the thresholds of the EC Merger Regulation under certain conditions (Article 22)[8]. Conversely, a Member State may, in cases that have been notified under the EC Merger Regulation, request the transfer of competence to the NCA under certain conditions (Article 9)[9].

4. JURISDICTIONAL THRESHOLDS

11. It appears that the threshold criteria in Article 1(2) and 1(3), considered in conjunction with the available corrective mechanisms, operate in a satisfactory way in allocating jurisdiction.

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down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

6 The threshold is construed in a way that even if the general thresholds under Articles 1(2) and 1(3) are met, notification under the EC Merger Regulation is not required if each of the parties concerned realises more than two thirds of its EU-wide turnover in one and the same Member State, see footnote above.

7 Under Article 4(4), unless the Member State expresses its disagreement, the Commission, when it considers that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law. Under Article 4(5) concentrations which do not have a Community dimension and which are capable of being reviewed under the national competition laws of at least three Member States can be referred to the Commission unless any Member State competent to examine the concentration under its national competition law expresses its disagreement.

8 For a referral to the Commission to be available under Article 22 the concentration must: (i) affect trade between Member States; and (ii) it must threaten to significantly affect competition within the territory of the Member State(s) making the request.

9 Under Article 9, a Member State may request that a case be referred to it in either of the following circumstances: (i) the concentration must "threaten to affect significantly competition in a market" and the market in question must be within the requesting Member State and present all the characteristics of a distinct market, or (ii) the concentration must affect competition in a market and the market in question must be within the requesting Member State and present all the characteristics of a distinct market and does not constitute a substantial part of the common market.

12. Nevertheless, the Commission's analysis of cases reported by the NCAs indicates that there are still a significant number of transactions which need to be notified in more than one Member State. In this regard, available data for 2007 indicate that there were at least 100 transactions which were notifiable in three or more Member States[10]. These concentrations together required more than 360 parallel investigations by the NCAs.

13. A large majority of the cases with filing requirements in three or more member States involve markets which are wider than national or relate to several national or narrower markets. Consequently, there are a number of transactions with significant cross-border effects which would appear to remain outside the scope of the EC Merger Regulation. Against this background, one can conclude that there is further scope for "one-stop-shop" review.

14. Available data also suggest that around 6% of the cases notified in at least three Member State gave rise to competition concerns. This is an indication that a number of additional concentrations may be appropriate candidates for review by the Commission also when considering the principle of the "more appropriate authority". In fact, the negative consequences of parallel proceedings and the potential for a contradictory outcome are particularly important for those cases which raise substantive competition issues.

15. Looking beyond the application of the existing jurisdictional thresholds and their corrective mechanisms, in order to fully achieve the objective of a level playing field in the Common Market, 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 to alleviate difficulties encountered in the context of multiple filings.

5. THE TWO-THIRDS RULE

16. There were at least 126 cases that fell under the two-thirds rule over the reference period[11]. There were thus few cases that met this threshold compared to the overall case load at the Member State level[12]. Furthermore, it has mostly been applied in relation to concentrations within large Member States. The two-thirds rule has, in most cases appropriately distinguished between concentrations that in terms of their cross-border effects, have a Community relevance and those that do not. However, there are a small number of cases with potential cross-border effects in the Community which nevertheless fall under the competence of the NCAs as a result of this rule. In a substantive respect, public interest considerations other than competition policy have been applied in a number of cases falling under this threshold to authorise mergers which could have given rise to competition concerns. More generally, it is desirable that, independently of which authority is the reviewing agency, merger control across the EU ensures the protection of undistorted competition. Against this background, the present form of the two-thirds rule merits further consideration.

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10 At least 240 cases were reviewable in two or more Member States in 2007.

11 Reference period between 2001 and 2008.

12 For the same reference period, more than 26,000 cases where reported at a Member State level.

6. PRE-NOTIFICATION REFERAL MECHANISMS

17. The Commission's own experience as well as the comments received from the NCAs and stakeholders clearly support the view that the pre-notification referral mechanisms introduced in 2004 have considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU. They have substantially improved the allocation of cases between the Commission and the Member States taking into account the principles of "one-stop-shop" and "more appropriate authority".

18. In fact, available information clearly supports the view that these mechanisms have allowed the appropriate authority to handle cases while also avoiding unnecessary parallel proceedings and inconsistent enforcement efforts. In fact, it is estimated that these mechanisms have allowed for the reduction of the number of proceedings to around 150 from almost a thousand potential parallel proceedings in the period between 2004 and 2008. Furthermore, they have allowed for the re-allocation of 40 cases from the Commission to the Member States over the same period. Referrals were refused only in four cases under Article 4(5) and in one case under Article 4(4).

19. Nevertheless, there are some problems that have been highlighted, in particular in a procedural respect. Stakeholders have expressed concerns notably with regard to the overall timing and cumbersomeness of the referral process. These factors have been identified as the main cause of parties' decisions not to request referral in a large number of cases.

20. In this respect, based on available data with regard to the number of multiple filings and having regard to stakeholder comments, there appears to be further scope to use the referral mechanism under Article 4(5) in more cases and thus to achieve increased "one-stop-shop"[13]. Conversely, there may be scope for more referrals in the direction of the Member States in application of Article 4(4).

7. POST-NOTIFICATION REFERRAL MECHANISMS

21. The post-notification mechanisms provided by Articles 9 and 22 of the EC Merger Regulation have proven to continue to be useful corrective instruments also after the introduction of the pre-notification referral mechanisms. This is a reflection of the different function of the post-notification mechanisms, allowing for a flexible reallocation of cases at the initiative of the Member States or the Commission when appropriate. Nevertheless, the business community's concern regarding the timing and cumbersomeness of the referral procedures described above extends also to these mechanisms.

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[13] Furthermore, it must be recalled that the Member States' refusal powers under article 4(5) have been rarely used. Many stakeholders therefore consider, having regard to the experience they acquired over the past years, that one should re-examine the possibilities of shifting to a system of automatic notification under the EC Merger Regulation when the three Member State criterion is met (or other intermediary solutions) as was initially proposed in the process leading up to the current system. This would in their view significantly increase transparency while lowering the cost and time for the review.

8. CONCLUSION

22. This report gives account to the Council of the operation of the notification thresholds under Article 1 of the EC Merger Regulation 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, pursuant to Articles 1(5) and 4(6) of the EC Merger Regulation, present proposals to revise the notification thresholds or the referral mechanisms.

23. 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 a 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.

24. 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.