The EU Merger Regulation

An overview of the European merger control rules

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1. Introduction

1.1 The EU Merger Regulation provides a mechanism for the control of mergers and acquisitions at the European level. The original Merger Regulation was adopted in 1989.[1] After a wide-ranging consultation exercise initiated in 2001, it was revised and replaced by the current version of the Merger Regulation which came into force on 1st May 2004.[2]

WHEN DOES THE MERGER REGULATION APPLY?

1.2 The Merger Regulation applies to any "concentration" which has, or is deemed to have, an "EU dimension":

– "**Concentration**": This is a concept which is widely defined to cover mergers, acquisitions of control and the creation of full-function joint ventures. The concept is considered further at Part 2 below;

– "**EU dimension**": A transaction has an EU dimension where certain turnover thresholds are met, as described at Part 3 below.

WHAT HAPPENS IF THE MERGER REGULATION APPLIES?

1.3 **Jurisdiction**: The Merger Regulation lays down the conditions under which the Commission or the National Competition Authorities (NCAs) have jurisdiction over concentrations. Generally, concentrations with an EU dimension fall to be investigated by the Commission, whereas those without an EU dimension fall to be investigated by the NCAs in accordance with their domestic merger control rules; summaries of those national rules in the 27 EU Member States (plus the three EFTA states party to the EEA Agreement) are included at Annex 1. As an exception to this general rule, procedures were introduced with effect from 1st May 2004 under which parties can engage in pre-notification contacts with the authorities with a view to reallocating jurisdiction between the Commission and the NCAs, as considered at Part 4 below. Procedures also exist for the post-notification reallocation of cases between the Commission and the NCAs, and in certain limited circumstances Member States may still apply their national laws to concentrations with an EU dimension (as considered at Part 6 below).

[1] Council Regulation (EEC) 4064/89 (OJ 1989 L395/1, 30.12.1989), as amended by Council Regulation (EC) 1310/97 (OJ 1997 L180/1, 9.7.1997; corrigendum OJ 1998 L40/17, 13.2.1998).
[2] Council Regulation (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004).

1.4 **Mandatory notification and waiting period**: Transactions falling under the Merger Regulation must in principle be notified to the Commission and generally cannot be implemented unless and until the Commission declares them compatible with the internal market. The European Commission adopted a revised Implementing Regulation in 2004, which include the Forms to be completed when notifying deals under the Merger Regulation.[3] It has also issued a number of Notices (the current versions of which are referred to in this publication) explaining how it applies various aspects of the Merger Regulation regime.

1.5 **Commission investigations**: Deals notified under the Merger Regulation are investigated by the Commission under formal procedures to determine whether or not they are compatible with the internal market (see Part 5 below). Once a deal is formally notified to the Commission under the Merger Regulation, in most cases the investigation is completed within a "Phase I" period of 25 working days. If the Commission opens a further in-depth "Phase II investigation", this will typically take a further 6 – 7 months. Charts illustrating the various timetables for the handling of cases under the Merger Regulation are included in Parts 4 and 5.

STATISTICS

1.6 Since the implementation of the first Merger Regulation[4] in 1990, the Commission has received over 4,800 notifications. In recent years it has been handling 300 to 400 formal notifications a year with a record high of 402 in 2007 (although it only received 309 notifications in 2011). For statistics on cases notified under the Merger Regulation, see Annex 2. All significant Merger Regulation decisions are published (subject to removal of business secrets), providing useful insights into how the Commission has defined markets in previous cases.

[3] Commission Regulation (EC) 802/2004 (OJ 2004 L133/1, 30.4.2004), as amended by Commission Regulation (EC)1033/2008 (OJ 2008 L279/3, 22.10.2008).

[4] Council Regulation (EEC) 4064/89 (OJ 1989 L395/1, 30.12.1989), as amended by Council Regulation (EC) 1310/97 (OJ 1997 L180/1, 9.7.1997; corrigendum OJ 1998 L40/17, 13.2.1998). This Regulation remains applicable for concentrations agreed prior to 1st May 2004.

2. Concentrations

2.1 The concept of "concentration" includes:

- the **merger** of two or more previously independent undertakings;
- the **acquisition of direct or indirect control** (whether by purchase of securities or assets, by contract or otherwise) of the whole or parts of one or more other undertakings; or
- the establishment of a joint venture where this involves the acquisition of **joint control** of a **full-function joint venture undertaking**.

WHEN IS THERE CONTROL?

2.2 **Control** is widely defined and is constituted by rights, contracts or any other means which, either separately or in combination, confer the possibility of exercising **decisive influence** over an undertaking.[5] Decisive influence arises where a party acquires the ability to determine an undertaking's commercial strategy.

2.3 There is no defined shareholding level at which decisive influence arises. Depending on the circumstances (including the size of other shareholdings and the existence of veto rights and other powers granted to shareholders), the acquisition of a minority shareholding in another undertaking may confer the possibility of exercising decisive influence, in particular if the minority shareholder acquires the ability to block strategic commercial decisions (e.g. the adoption of annual budgets or business plans) or the appointment of key management.

2.4 A transaction gives rise to "**sole control**" where it results in a single undertaking having the possibility of exercising decisive influence over the whole or part of another undertaking. Where two or more undertakings together acquire the ability to exercise decisive influence over another undertaking, there is said to be "**joint control**".

[5] For further guidance, see the Commission's 2007 Consolidated Jurisdictional Notice (OJ 2008 C95/1, 16.4.2008). This replaced the previous four jurisdictional notices adopted by the Commission in 1998 under the old Merger Regulation which had considered the concept of concentration, the concept of full-function joint ventures, the concept of undertakings concerned, and the calculation of turnover.

FULL-FUNCTION JOINT VENTURES

2.5 The establishment of a JV undertaking will give rise to a concentration where the following conditions are met:

- **Joint control**: Two or more parents must together exercise decisive influence over the JV undertaking, e.g. through rights of veto over strategic matters such as the adoption of annual budgets or the appointment of senior management;

- **Autonomy**: The JV must have sufficient personnel, facilities and resources to enable it to perform the functions normally carried out by other undertakings operating on the same market. If the JV is required to take most of its raw material requirements from its parents or to sell its production mainly to its parents, this will generally indicate that the JV is not sufficiently autonomous; and

- **Durability**: The JV must be established on a "lasting basis".

2.6 Joint ventures which do not fall within the Merger Regulation – because they are not "full-function" in this sense (or because they lack an "EU dimension") – may be subject to review by the NCAs under national merger control rules. In some cases they may also be subject to investigation (by the Commission or the NCAs) under Article 101 and/or 102 of the Treaty on the functioning of the European Union ("TFEU").

CHANGES IN THE NATURE OF CONTROL

2.7 A concentration will also arise where there is a durable change in the quality or nature of control of an undertaking. Thus, there will be a concentration where a party with joint control of an undertaking moves to a position of sole control.

2.8 Similarly, there may be a concentration as a result of changes in the number of shareholders which jointly control a JV undertaking following the withdrawal or entry of one or more controlling shareholders.

3. EU dimension

3.1 The Merger Regulation applies to concentrations with an "EU dimension". Whether a transaction has an EU dimension depends on whether it satisfies certain turnover thresholds. These turnover tests are purely **jurisdictional** in nature. They are applied without regard to substantive competition issues, to the nationality of the parties, to the country where the transaction takes place or to the law applicable to the transaction. As a result, the Merger Regulation can apply to transactions with little or no EU connection.

TURNOVER THRESHOLDS

3.2 There are two **alternative** sets of thresholds (as illustrated by the flowchart on page 7):

(a) **Original thresholds**: The Merger Regulation's original thresholds (which date back to 1989) remain in force. They apply the concept of "one-stop shopping" at the European level to any deal which meets the following tests:

– *Worldwide turnover test:* The combined worldwide turnover of all the undertakings concerned must be more than **€5,000 million**;

– *EU-wide turnover test:* Each of at least two of the undertakings concerned must have EU-wide turnover of more than **€250 million**; and

– *Two-thirds rule:* A concentration does not have an "EU dimension" if each of the undertakings concerned achieved more than **two-thirds** of its EU-wide turnover in one and the same Member State.

(b) **Alternative thresholds**: When the operation of the original Merger Regulation was reviewed in the mid-1990s, there was broad support for the "one-stop shop" principle to be extended to deals which would otherwise be subject to merger control by three or more NCAs in the EU. There was considerable debate about how this might be achieved. Eventually some fairly complex changes were introduced in 1998 and these remain in place under the current Merger Regulation. Deals which do not meet the original thresholds nevertheless have an "EU dimension" if they meet all the following tests:

– *Lower worldwide turnover test:* The combined worldwide turnover of all the undertakings concerned must be more than **€2,500 million**;

- *Lower EU-wide turnover test:* Each of at least two of the undertakings concerned must have EU-wide turnover of more than **€100 million**;

- *Additional three Member States test:* In each of at least **three EU Member States**:

  - the combined national turnover of all the undertakings concerned must be more than **€100 million**; and

  - each of at least two of the undertakings concerned must have national turnover of more than **€25 million**; and

- *Two-thirds rule:* A concentration does not have an"EU dimension" if each of the undertakings concerned achieved more than **two-thirds** of its EU-wide turnover in one and the same Member State.

UNDERTAKINGS CONCERNED

3.3 In general, the "undertakings concerned" for these purposes are the undertaking(s) acquiring sole (or joint) control and the undertaking over which control is being acquired.[6]

3.4 For the purpose of calculating the turnover of the undertaking(s) acquiring control, the turnover relating to all entities belonging to the group must be considered. This is wider than the concept of legal control, and may result in the inclusion of companies that would not in other contexts be considered as part of the group. For example, where the undertaking concerned jointly controls a JV undertaking with third parties, the turnover of the JV is split equally between its controlling parents, irrespective of the size of their financial or voting interests.

3.5 Where an acquisition is made by a **joint venture**, the Commission looks at the economic reality of the operation in determining whether or not to lift the corporate veil. If the JV is simply an acquisition vehicle for its parent companies, the Commission looks through it and treats each parent as an undertaking concerned. On the other hand, where the acquisition is carried out by a pre-existing full-function JV undertaking, the Commission usually treats the JV as a single acquiring undertaking.

[6] Accordingly, for the purpose of calculating the vendor's turnover, only the turnover attributable to the parts which are the subject of the transaction is to be taken into account.

CALCULATION OF TURNOVER

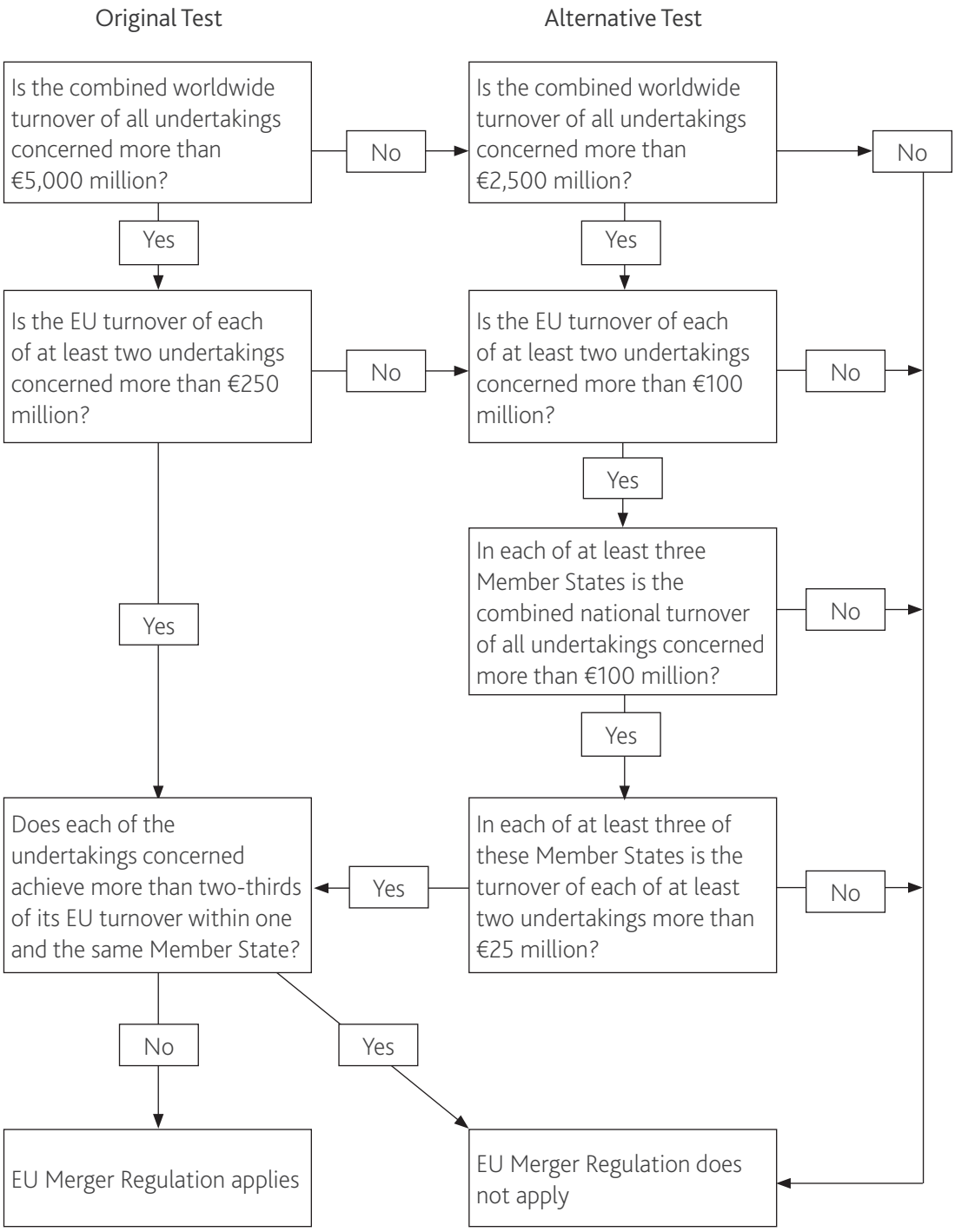
3.6 The turnover to be considered is the amount derived from the sale of products and the provision of services. Turnover must be allocated according to the geographic location of the customer. It must correspond to the ordinary activities of each undertaking concerned in its previous audited financial year, adjusted to account for acquisitions and divestments that occurred after the date of the audited accounts. The turnover considered is "net" turnover, after sales rebates, value added tax, other taxes directly related to turnover; intra-group turnover should be disregarded.

3.7 The whole turnover of all companies under the sole control of an undertaking concerned must be aggregated. In relation to JV undertakings jointly controlled by an undertaking concerned and third parties, the turnover of the JV is attributed equally between its controlling parents, irrespective of the size of their financial or voting interests.

SPECIAL RULES

3.8 There are special rules for calculating the turnover of **banks** (and other financial institutions) and of **insurance companies**.

EU MERGER REGULATION THRESHOLDS



4. Pre-notification allocation of cases between the Commission and Member States

4.1 Where a transaction gives rise to a concentration with an EU dimension, in principle it must be notified to the Commission which has exclusive jurisdiction to investigate, without the NCAs being able to apply their national merger control rules. By virtue of the EEA Agreement, the Commission's exclusive jurisdiction is also extended to cover the three EFTA contracting states if such an "EU dimension" is established.[7] Conversely, the NCAs are in principle competent to investigate mergers which do not have an EU dimension (subject to their national rules, summarised at Annex 1, being applicable), without the Commission having any jurisdiction to investigate.

4.2 This simple allocation of jurisdiction is, however, subject to a number of exceptions (as illustrated on page 10).[8] For these purposes, it is convenient to distinguish:

- **Pre-notification reallocation of jurisdiction**: In 2004 procedures were introduced which allow for the possibility of cases to be reallocated at the initiative of the parties. These Article 4(4) and 4(5) referral procedures are considered below;

- **Post-notification reallocation of jurisdiction**: The Merger Regulation also maintains procedures (which already existed prior to 2004) allowing for notified cases to be referred from the Commission to the NCAs or *vice versa*. These Article 9 and 22 referral procedures are considered at Part 6 of this publication.

ARTICLE 4(4) PRE-NOTIFICATION REFERRALS FROM THE COMMISSION TO A NCA

4.3 There may be some circumstances in which parties to a proposed concentration with an EU dimension conclude that it would be simpler or more advantageous if their transaction could be reviewed (either in whole or part) at the Member State level rather than by the Commission under the Merger Regulation. This might be the case, for example, if the only competition issues of any significance are limited to one Member State (particularly if they are issues over which the relevant NCA would likely seek to assert jurisdiction under Article 9 discussed at Part 6 of this publication).

[7] See Article 57 of the EEA Agreement: the turnover thresholds applied relate to the undertakings concerned's activities in the EU only. However, the parties' turnover in the EFTA States (Iceland, Liechtenstein and Norway) will be relevant to establishing the degree of involvement of the EFTA Surveillance Authority and EFTA NCAs under Protocol 24 EEA.

[8] For further guidance, see Commission Notice on case referral in respect of concentrations (OJ 2005 C56/2, 5.3.2005).

4.4 For such cases a voluntary procedure exists under which the parties may opt to have the case referred – in whole or part – to the NCA in question instead of notifying it to the Commission. To use these procedures, the parties must prepare and submit a reasoned submission (using Form RS)[9] to the Commission which will then forward copies to all the NCAs. The identified NCA then has 15 working days in which to agree or object to the proposed referral. If the NCA agrees, the Commission must then decide (within a maximum of 25 working days from the submission of the Form RS) whether or not to make the requested referral.

4.5 If the Commission agrees to refer the case in whole, it will then only be necessary for the parties to notify the case to the NCA in question (which will review the case under its applicable national merger control rules). If the Commission agrees to a partial referral request, the aspects concerned will be reviewed by the NCA in question and the parties will need to make a notification to the Commission under the Merger Regulation in respect of the remaining aspects of the concentration. In either case, the concentration continues to have an "EU dimension" such that the other NCAs will not be able to apply their national merger control rules (unless the Commission were to agree to a subsequent Article 9 request).

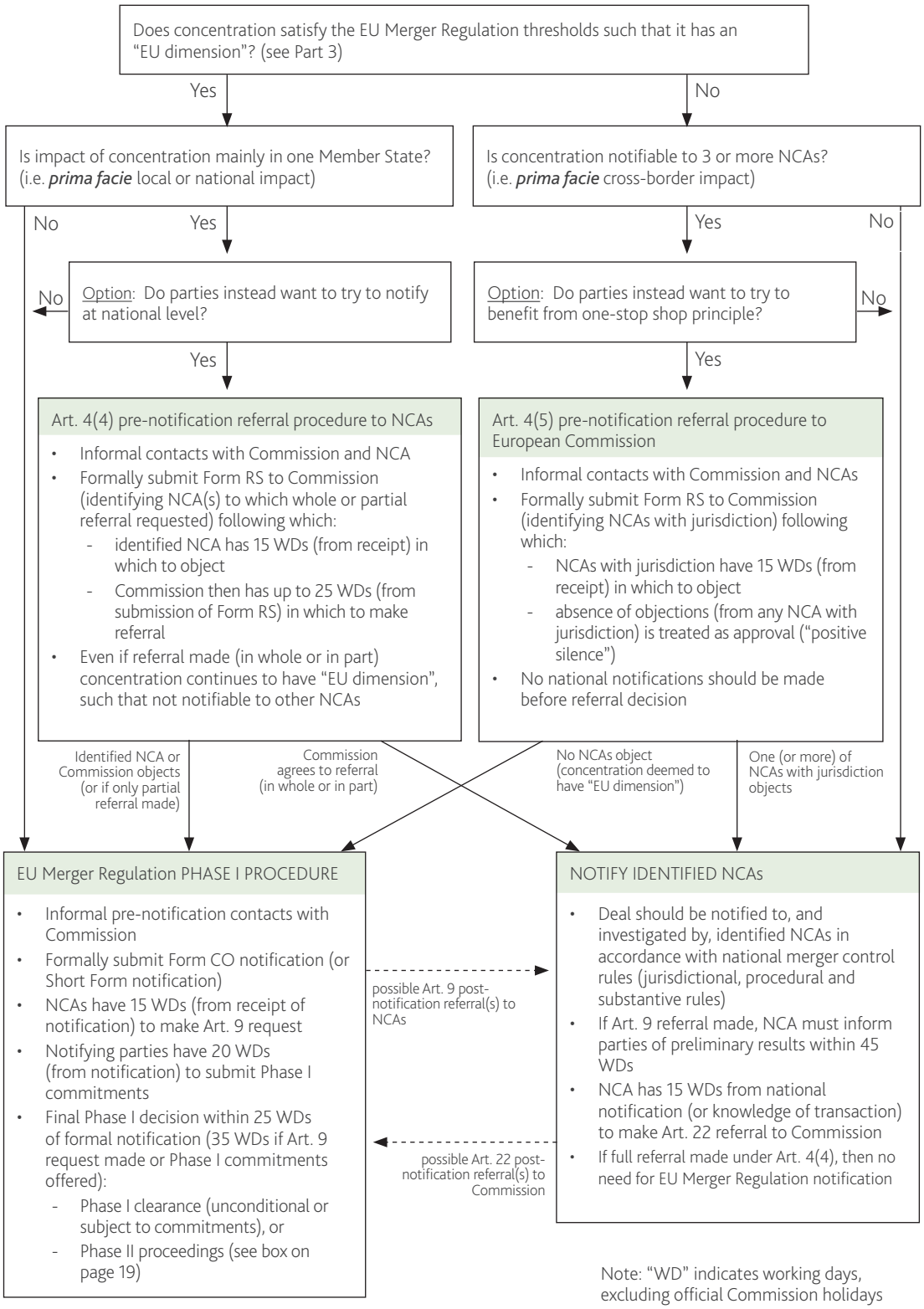
ARTICLE 4(5) PRE-NOTIFICATION REFERRALS TO THE COMMISSION

4.6 Many cross-border mergers which fall below the Merger Regulation's thresholds will instead be subject to notification and review by a number of NCAs within the EEA. Recognising that there could be advantages to business if some of these transactions could benefit from the one-stop shop principle, a voluntary procedure exists under which parties may seek to have cases handled by the Commission if they would otherwise have been subject to investigation by the NCAs in at least three EU Member States (and possibly also in an EFTA contracting state).

4.7 To take advantage of these pre-notification procedures, before notifying to any of the NCAs the parties must prepare and submit a reasoned submission to the Commission (using Form RS) which will then be forwarded to all the NCAs. Each of the NCAs which would in principle have jurisdiction to investigate under its national merger control rules then has 15 working days from receipt of the Form RS in which to object. If no NCA objects, the transaction is deemed to have an EU dimension and must be notified to the Commission. But if any of the Member States objects (even if only one of them) then jurisdiction is not transferred and the deal remains subject to notification and review at the Member State level.

[9] Form RS is annexed to the Commission's 2004 Implementing Regulation. The Form RS and explanatory notes published by the Commission (available on the DG Competition website) include information on the extension of the procedure to the EFTA contracting states.

PRE-NOTIFICATION AND POST-NOTIFICATION REFERRAL PROCEDURES (AND PHASE I PROCEDURE)



Note: "WD" indicates working days, excluding official Commission holidays

5. Procedure for the notification of cases to the Commission

5.1 Where a transaction will give rise to a concentration with an "EU dimension", it should be formally notified to the Commission prior to its implementation (unless it has been referred in whole to a NCA pursuant to the Article 4(4) procedures considered at Part 4). The notification should be made following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The notification can also be made at an earlier stage:

– if the undertakings concerned demonstrate to the Commission a **good faith intention** to conclude an agreement, for example on the basis of a Memorandum of Understanding (MoU) or a Letter of Intent (LoI); or

– in the case of a **public bid**, if the undertakings have publicly announced an intention to make the bid.

5.2 The Commission has extensive powers of investigation under the Merger Regulation. In particular, it can seek information from the parties and third parties, either by simple requests or by formal decision. It is also able to conduct inspections at premises and examine books and records (but is not able to conduct searches at private homes). Furthermore, the Commission is entitled to interview any natural or legal person who consents, in order to collect information in relation to an investigation.

PRE-NOTIFICATION DISCUSSIONS

5.3 Within the Directorate-General for Competition, each operational Directorate has a mergers unit with officials who focus on handling Merger Regulation cases (including a number of officials seconded from the NCAs). In addition there is some staff operating under the Deputy Director-General for Mergers and Antitrust with responsibility for allocating new cases and ensuring that they are adequately resourced.[10]

[10] Currently, the operational Directorates' prime areas of responsibility are as follows: Directorate B – Energy and environment; Directorate C – Information, communication and media (including telecommunications and media, information industries, internet and consumer electronics); Directorate D – Financial services; Directorate E – Basic industries, manufacturing and agriculture (including pharma and health services, consumer goods, agriculture and foods, basic industries, chemicals and other manufacturing) and Directorate F – Transport, Post and other Services. The Deputy Director-General with special responsibility for Mergers (currently Bernd Langeheine) is responsible for the work undertaken by those Directorates as regards Merger Regulation cases and reports to the Director-General (currently Alexander Italianer). New cases are generally allocated to case teams at DG Competition's Merger Management Meetings, usually held on Monday afternoons.

5.4 The Commission strongly encourages parties and their advisers to have pre-notification contacts with the Commission, even in seemingly non-problematic cases.[11] Such contacts usually begin by providing the Commission with an outline of the terms of the proposed transaction with a view to the early allocation of a Commission case team.

5.5 These discussions are confidential and often take place before the transaction is announced (in general at least two weeks prior to notification and in some cases many months in advance). These discussions can be helpful to the parties for a number of reasons, including:

- They enable the parties to obtain informal advice on jurisdictional issues such as the calculation of turnover or whether a JV undertaking is "full-function";
- In some cases, they can be used to discuss whether it may be appropriate to use the pre-notification referral procedures of Article 4(4) or 4(5) (see Part 4 above);
- They allow the parties to discuss waivers from the strict requirements of the Form CO questionnaire, thereby minimising the risk of a formal notification being subsequently declared incomplete;
- They assist in identifying any special concerns officials may have, thereby enabling the parties to address these in the notification and, if appropriate, to consider changes to the transaction;
- Where the parties consent, they may enable the Commission to start the process of third party consultation before formal notification.

THE NOTIFICATION FORMS

5.6 The Commission's 2004 Implementing Regulation includes (as annexes) the forms to be used when notifying deals to the Commission. **Form RS** is to be used by parties making reasoned submissions requesting use of the pre-notification referral procedures (see Part 4 above). For formal notifications to the Commission, the forms to be used are as follows:

- **Form CO** specifies the information that notifying parties must generally provide when submitting a full-form notification. It requires extensive information on the parties, the transaction and the relevant markets, as well as contact details for customers, competitors, suppliers and trade associations whom the Commission will consult as part of its investigations;

[11] For further guidance, see the Commission's "Best practices" on the conduct of EU merger control proceedings (available on DG Competition's website). For cases with a strong transatlantic element, see also the EU-US Best Practices on cooperation in merger investigations (also available on DG Competition's website).

– The alternative **Short Form** may be used when notifying concentrations that are unlikely to raise competition concerns, i.e. those which are likely to qualify for the Commission's simplified procedure (for which only a short-form clearance decision will be issued).[12]

5.7 With the notification, the parties are also required to supply supporting documentation, including copies of the agreements bringing about the concentration, reports and accounts and also copies of analyses, reports, studies and surveys submitted to or prepared by or for the management board or shareholders meeting where these assess or analyse the concentration with respect to market shares, competitive conditions, rationale for the deal, etc.

5.8 The complete notification and supporting documents must be submitted to the Commission in hard copy together with 5 paper copies and 32 CD or DVD copies (for transmission *inter alia* to the NCAs).

SUSPENSION OF THE TRANSACTION

5.9 A merger falling under the Merger Regulation cannot be implemented unless and until the Commission declares it compatible with the internal market (Article 7) except:

– in the case of a **public bid** (or a series of transactions in securities listed on a stock exchange) – provided the concentration is notified to the Commission without delay and the acquirer only exercises voting rights attached to the securities in order to maintain the full value of its investment; or

– where the Commission has granted a **derogation** following a reasoned request from the parties (which may be made before the formal notification of the deal). Such derogations are very rare and depend on the Commission's view of the effect of the suspension and the threat to competition posed by the concentration. The Commission may attach conditions and obligations to such derogations.

5.10 The validity of a transaction completed in breach will depend on the Commission's decision as to its compatibility with the internal market. The Merger Regulation enables the Commission to dissolve a concentration which has already been implemented if it concludes that the deal is incompatible with the internal market.

[12] For further guidance, see Commission Notice on a simplified procedure for treatment of certain concentrations under the Merger Regulation (OJ 2005 C56/32, 5.3.2005). Essentially, this procedure is available for: (a) joint ventures with EEA turnover and assets below €100 million; (b) concentrations where there is no horizontal market overlap between the parties, nor any vertical relationships; (c) concentrations where there is a horizontal overlap but with combined market shares below 15% or where there is a vertical relationship but market shares are below 25%; or (d) concentrations involving a move from joint to sole control of a pre-existing joint venture. About half of all notifications are dealt with under this simplified procedure.

FORMAL PHASE I INVESTIGATIONS

5.11 Following receipt of the formal Form CO notification, subject to being satisfied that the notification is complete, the Commission has an initial period of 25 working days to undertake a formal investigation. This time period can be suspended if the Commission adopts a decision pursuant to Article 11 formally asking for more information (having failed to receive the information under a previous request under Article 11).

5.12 The Commission's review in Phase I usually involve sending detailed requests for information to the parties and to third parties, including customers and competitors; it may also hold meetings as part of this process.[13]

5.13 At the end of the Phase I process the Commission will reach one or more of the following decisions (see Annex 2 for statistics):

- **Clearance**: The deal may proceed because it does not give rise to serious doubts about its compatibility with the internal market;

- **Clearance subject to commitments**: Even where a deal raises serious competition concerns, it may nevertheless be the subject of a Phase I clearance decision subject to conditions, e.g. that the parties must divest certain businesses within a certain period following completion or must give commitments regarding their future behaviour. If parties wish to secure a Phase I clearance subject to such conditions, they must offer appropriate commitments no later than 20 working days following notification – in which event the Phase I period is extended to a total of 35 working days;

- **No jurisdiction**: The deal does not fall within the Merger Regulation because it is not a "concentration" or because it lacks an "EU dimension";

- **Article 9 referral**: The deal "threatens to affect significantly competition" in a distinct market within a Member State and can more appropriately be investigated at national level. A referral will be made only if a NCA has made a formal request to that effect, whether on its own initiative or because it was invited by the Commission to do so (see Part 6 below for more information). Deals may be referred to NCAs in whole or in part: in the case of a partial referral, the Commission will assess the non-referred part of the deal); or

- **Launch of Phase II investigation**: The deal raises "serious doubts" as to its compatibility with the internal market such that a more detailed Commission investigation is necessary.

[13] For further guidance see the Commission's Best Practices for the submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in merger cases.

FORMAL PHASE II INVESTIGATIONS

5.14 Phase II proceedings involve detailed in-depth investigations which places significant burdens on the parties, the Commission and interested third parties involved in the process.

5.15 In addition to ongoing information gathering (sometimes including site visits), Phase II proceedings involve a number of formal steps by the Commission:

- Following further investigations, if the Commission still retains concerns it will issue a formal written **Statement of Objections** to which the parties will generally respond with a written **Reply**;

- On issuing the Statement of Objections, the Commission is under a formal obligation to grant the parties **access to the file**. At this stage the parties are entitled to obtain copies of information submitted to the Commission by third parties (subject to removal of business secrets) during the course of the Commission's investigation, so as to assist them in preparing their Reply to the Statement of Objections.[14]

- Following the Statement of Objections and the Reply, a formal **Oral Hearing** can take place in Brussels should the parties request one. This is chaired by a Hearing Officer who is responsible for overseeing the proceedings. The Oral Hearing is attended by the DG Competition case team and various other Commission officials (including from the Legal Service and the Chief Economist's office). Interested third parties (usually complainants) may be permitted to attend. It is also attended by representatives from the NCAs (for whom this is usually a first opportunity to focus on the arguments of all sides);

- Prior to adoption of the final Phase II decision, whether or not there has been a Statement of Objections, the Commission must consult the **Advisory Committee** (made up of representatives of the NCAs) which issues an opinion on the draft decision. The EFTA states may also be invited to present their views;

- There is also the possibility of **"State of Play meetings"** between the parties and the Commission staff (in addition to less formal meetings) which may be held at certain points in the process. Thus, it would be normal for the parties to have the opportunity of such a meeting during the course of Phase I if the case looks likely to raise "serious doubts" (so that the parties have the opportunity to table Phase I commitments before the expiry of the 20 working days deadline). State of Play meetings may also take place during Phase II investigations. The 2004 Best Practices guidelines provide for these at the following stages:

  (a) within a couple of weeks of the opening of Phase II proceedings (to facilitate the parties' understanding of the Commission's concerns, and the Commission's understanding of the parties' reactions, as well as to discuss the likely timeframe for the Phase II proceedings),

[14] In accordance with the 2004 Best Practices Guidelines, the Commission may give parties access to non-confidential versions of key documents received from third parties (notable substantiated submissions running counter to the parties' own objections) earlier in the Phase II proceedings (and even in some cases at Phase I).

(b) shortly in advance of the Statement of Objections (to help clarify certain issues and facts),

(c) following the Reply to the Statement of Objections and the Hearing (which may serve as a basis for discussing the scope and timing of any remedial commitments), and

(d) in advance of the Advisory Committee meeting (which should enable a discussion of the market-testing of any commitments tabled by the parties and possible final improvements);

– In addition to these bilateral meetings between the parties and the DG Competition staff, the Commission's Best Practices guidelines also envisage the possibility of **"triangular meetings"** where the views of the notifying parties and opposing third parties can be heard in a single forum (generally in advance of the Statement of Objections); and

– In some Phase II cases, DG Competition establishes a **Peer Review Panel** comprising three or so Commission officials with no prior involvement in the case under review. These officials are given access to the file and will scrutinise the draft Statement of Objections prepared by their colleagues, acting as a "fresh pair of eyes" or "devil's advocates", with a view to improving the quality of the Statement of Objections and the prospect of the final Phase II decision standing up to challenge before the Court (e.g. in the event of a subsequent appeal by the parties or by third parties). These are internal checks within the Commission, so the parties do not have formal contact with the Panel.

5.16 The Merger Regulation provides for a standard Phase II investigation period of 90 working days. If the parties offer commitments, this Phase II time period is automatically extended to 105 working days, unless the parties offer commitments less than 55 working days from the start of Phase II. The general deadline for offering commitments is 65 working days from the start of Phase II. The Phase II timetable may also be extended by up to 20 working days in complex cases at the request of the parties (if requested within 15 working days of the start of Phase II) or, at any time, by the Commission with the consent of the parties.

5.17 The Commission may be able to clear a case (conditionally or unconditionally) sooner than the standard 90 workings days, subject to resolving all outstanding issues rapidly, usually as a result of the party offering satisfactory remedies, so circumventing some of the intermediate formal steps in the Phase II proceedings. In some cases clearance can be secured without the Commission issuing a Statement of Objections.

5.18 There are also procedures for the Commission to **stop the clock** if the parties have not supplied information required by the Commission for its investigations. In some cases this can result in a significantly lengthier review process. These procedures are summarised in the box on page 19.

5.19 Following a Phase II investigation, the Commission will either clear the deal (often subject to conditions) or prohibit it (unless the deal has already been abandoned by the parties). Phase II decisions are adopted by the full College of Commissioners.

COMPLIANCE WITH COMMITMENTS

5.20 In cases where the Commission's final clearance decision (at Phase I or Phase II) is made subject to conditions, compliance with those commitments is vigorously enforced by the Commission. This almost invariably involves the parties appointing a **trustee** (or trustees) to monitor compliance with the commitments. Typically the trustee must be given the power to divest the identified divestment package (at no minimum price) if the parties themselves are unable to identify an acceptable purchaser within the specified period.[15] Failure to comply with remedial commitments can be punishable by a fine of up to 10% of turnover. In the case of concentrations that have been implemented in contravention of a condition attached to the clearance decision, the Commission has the power to take measures necessary to ensure that the concentration is dissolved and to restore the pre-concentration market position and conditions of effective competition.

STATISTICS

5.21 The tables at Annex 2 give an overview of Merger Regulation cases over the years. The vast majority of cases are cleared at Phase I (many using the simplified procedure).

5.22 Of Phase II cases, on average about half have been cleared by the Commission only after the parties agreed to certain conditions. These commitments are usually of a "structural" nature (i.e. involving divestments of overlapping businesses), although some involve "behavioural" commitments (which require ongoing monitoring by the Commission). Of the remaining Phase II cases, either the parties have withdrawn their notifications (abandoning the deal) or the Commission has concluded the proceedings with an unconditional clearance or an outright prohibition. To date, there have been 22 prohibition cases, the most recent being *NYSE Euronext/Deutsche Börse* in February 2012.

[15] For further guidance on remedies acceptable to solve competition problems, see the Commission Notice on Remedies acceptable under Regulation 139/2004 and under Regulation 802/2004 (OJ C 2008 C 267/1, 22.10.2008), the Revised Implementing Regulation (Regulation 1033/2008, OJ 2008 L279/3, 22.10.2008) and the Commission's Best Practice Guidelines for Divestiture Commitments (available on DG Competition's website). The Commission's Revised Notice on Remedies and Revised Implementing Regulation provide guidance on the types and form of remedies acceptable to restore competition problems, as well as on important substantive and procedural issues (including the use of a Form RM) the notifying parties should consider.

PHASE II PROCEDURE

Basic Phase II deadline: 90 WDs (working days)

- calculated from WD following initiation of Phase II proceedings

+

Extra time in event of Phase II commitments: +15 WDs = 105 WDs

- objective: to allow extra time to consult third parties and NCAs
- exception: if remedies submitted less than 55 WDs into Phase II
- deadline for offering Phase II commitments: 65 WDs into Phase II (automatically extended by agreed "stop the clock")

+

Extra time in event of agreed "stop the clock": + max 20 WDs = 125 WDs

- objective: for complex Phase II cases to allow for investigation/verification of facts
- only possible:
  - at request of parties (one request only, to be made within 15 WDs of initiation of proceedings), or
  - with consent of parties (if proposed by Commission at any stage in process)

+

Extra time in event of "stop the clock" where party responsible: potentially indefinite

- These provisions have been used extensively in a number of Phase II cases (under both original and current EU Merger Regulation)

NB: These "stop the clock" provisions may also be used at Phase I

⇨ Thus it would not be unusual for Phase II proceedings to extend to 125 WDs plus Commission holidays (which can equate in total to 6-7 months), and potentially longer if Commission "stops the clock" e.g. on grounds that parties did not supply information requested by Commission.

6. Exclusive jurisdiction and exceptions (including post-notification reallocation of cases)

6.1 Concentrations with an "EU dimension" generally fall under the exclusive jurisdiction of the European Commission, to the exclusion of the NCAs throughout the EEA.[16] Member States may, however, intervene in the following exceptional cases:

- Under the **Article 9** procedure a Member State can request that a concentration notified to the Commission under the Merger Regulation be referred to it (in whole or part) if the deal (a) threatens to affect significantly competition in a market within that Member State which presents all the characteristics of a distinct market or (b) affects competition in a market within that Member State which presents all the characteristics of a distinct market and does not constitute a substantial part of the internal market. The Member States have 15 working days (from receipt of their copy of the notification) in which to make such a request. If such a request is made, the Phase I timetable is extended from 25 to 35 working days. The Commission must then accept or reject the request. If the Commission accepts the request and the case is referred to the Member State, the NCA has no fixed timeframe within which to reach its final decision; however, it must inform the Commission of its preliminary assessment and proposed future actions within 45 working days (and must reach a final decision without undue delay);

- Member States can also intervene to take appropriate measures to protect legitimate interests other than competition, e.g. **public security**, **plurality of the media** and **prudential rules for financial services** such as in the banking and insurance sectors (Article 21(4) of the Merger Regulation); and

- In the **defence** sector the Member States may prevent parties from notifying military aspects of merger deals to the Commission (Article 346 of the TFEU).

6.2 **Article 22** of the Merger Regulation provides that one or more NCAs may request the Commission to review a concentration **without an EU dimension** provided the concentration affects trade between Member States and threatens to affect significantly competition within the territory of the Member State or States making the request. The Article 22 procedure includes time limits for the consideration of cases: a request must be made to the Commission within 15 working days of the concentration being notified to the Member State.[17]

[16] Transactions falling within the Merger Regulation may also raise issues in jurisdictions outside the EEA, whether elsewhere in Europe (e.g. Switzerland, Croatia, and Ukraine) or further afield (e.g. USA, Canada, Brazil, South Africa, Australia, Japan, China, etc.). In international merger cases, the Commission seeks to cooperate with the competition authorities in relevant third country jurisdictions. See also Part 4 above which describes the possibility for a concentration with an EU dimension to be referred to a NCA under Article 4(4).

[17] In 2002 the NCAs agreed a number of principles on the application of Article 22 (these are available on several of the NCAs' websites). See also Part 4 above which describes the possibility for a concentration without an EU dimension to be referred to the Commission under Article 4(5), in which case it will be deemed to have an EU dimension.

7. Substantive appraisal of concentrations

7.1 In appraising the compatibility of a concentration with the internal market under the Merger Regulation, the Commission must make a prospective analysis of whether the concentration would "significantly impede effective competition, in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position" (Article 2(2) and (3)).

THE SIEC TEST

7.2 This substantive test is sometimes referred to as the "SIEC" test to distinguish it from the earlier "dominance" test which existed under the original Merger Regulation. The SIEC test is generally viewed as similar to the "SLC" (substantial lessening of competition) test which exists in a number of other jurisdictions, including the UK and USA. The Courts have interpreted the notion of "dominance" to include collective dominance, including mergers in oligopolistic markets giving rise to "coordinated effects" (or "tacit collusion"). Recital 25 to the Merger Regulation explains the rationale behind the SIEC test in terms of a desire to ensure that the non-coordinated effects of a merger in an oligopolistic market can be caught. It states that the notion of a significant impediment to effective competition should be extended beyond the existing concept of dominance "only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the markets concerned."

7.3 If the concentration involves the establishment of a cooperative joint venture undertaking, the Commission must also determine whether it is compatible with the provisions of Article 101 of the TFEU (Article 2(4) and (5)) (see page 27 below).

7.4 There was much discussion and debate over whether the introduction of the SIEC test would have a significant effect on the standards applied by the Commission in deciding whether to open Phase II proceedings or whether to seek commitments from the parties or even to prohibit deals. Much of this debate focused on whether there was a "gap" under the old dominance test, in particular if a merger raised serious competition concerns but resulted neither in a firm enjoying a strong No. 1 position of say 40-50% or more in a market (indicative of **single-firm dominance**) nor in the creation or strengthening of an oligopolistic market structure conducive to tacit collusion between a small group of players (indicative of **collective dominance**). Some of these concerns were driven by the fact that in 2002 the Court of First Instance (now re-named the General Court) annulled three Phase II prohibition decisions on the basis that the Commission had failed to prove that the deals were caught by the old Merger Regulation's dominance test.[18]

[18] Judgments of the Court of First Instance in 2002 regarding the Commission's Phase II prohibitions of *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*.

7.5 To the extent that future cases fall within such a "gap", it will continue to be a matter of debate, on a case-by-case basis, whether the SIEC test should be applied to prohibit the deal if the parties do not agree commitments. The Commission has continued to apply an economics-focused approach to the assessment of mergers, indicating that its policy towards mergers has not changed as a result of the move to the SIEC test; however, it is generally perceived that the SIEC test gives a wider degree of discretion to the Commission. For any prohibition cases which are the subject of appeal proceedings, the Court will continue to require the Commission to put forward convincing evidence that the merger would be incompatible with the maintenance and development of effective competition – and it can be expected that the standards will be particularly high if the case does not involve the creation or strengthening of single-firm dominance or the likelihood of tacit coordination between the members of an oligopoly. This ultimate check imposed by the possibility of an appeal to the Court may provide some comfort to notifying parties; however, the Commission does not need to go to Court to prohibit a deal.

7.6 The Commission has sought to allay concerns (about the exercise of its wide powers) by introducing a number of procedural checks and balances to its administrative process.[19] It has also published guidelines providing a sound economic framework for the application of its merger control policy. The Commission's 2004 Horizontal Merger Guidelines[20] have been complemented by Guidelines on the assessment of non-horizontal mergers, i.e. vertical mergers (for example, the acquisition of a supplier by a customer) and conglomerate mergers (concerning companies whose activities are complementary or otherwise related).[21]

7.7 The Horizontal Merger Guidelines set out the factors that the Commission generally considers when appraising whether a merger is likely to have anti-competitive effects. This substantive appraisal involves a dynamic approach, in which the Commission must compare the likely post-merger market structure with the "counterfactual", i.e. the market structure which would be likely to develop if the merger did not proceed. Adopting an economics-based approach, the Guidelines identify two main ways in which horizontal mergers may significantly impede effective competition:

- In the case of **non-coordinated** (or "unilateral") effects the Commission examines whether the merger will eliminate important competitive constraints on one or more firms, which consequently would enjoy increased market power. These concerns can arise in situations of "**single-firm dominance"** or potentially in some mergers in oligopolistic markets; and/or

- In the case of **coordinated effects** the Commission examines whether the pre- and/or post-merger market structure is oligopolistic (e.g. limited to say only three or four major players) and whether the merger will facilitate "tacit collusion" between the members of that oligopoly with the consequence of prices being

[19] These have included the creation of a Chief Economist position in 2003, with a staff of qualified economists who can be called upon to assist the DG Competition case teams; the current Chief Economist is Kai Uwe Kühn. Other checks and balances involve the introduction of Peer Review Panels for more challenging Phase II cases and various other procedural improvements outlined in its 2004 Best Practices guidelines (see Part 5 above).

[20] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C31/5, 5.2.2004).

[21] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C265/6, 18.10.2008).

raised, output being reduced or other harmful effects on competition. In making this assessment, the Commission examines the structure of the market and the past behaviour of firms on the market (notably whether there is a stable economic environment conducive to tacit collusion, whether it is possible to monitor compliance with the terms of tacit coordination and whether there is a form of deterrent mechanism to prevent deviation).

NON-COORDINATED EFFECTS

7.8 **Dominance** equates to a position of market power which allows a party (or parties) to behave to a considerable extent independently of other competitors, customers and ultimately consumers. In the context of a merger or acquisition, the critical factor tends to be the extent to which the merged entity may, as a result of the merger, be able to raise prices (or reduce choice or levels of innovation) without losing customers. In making this assessment, the Commission places considerable reliance on the parties' market shares on markets affected by the merger.[22] Traditionally, market share figures of more than 40% may be regarded as indicative of **single-firm dominance**. There is a tendency for the Commission to define product markets narrowly for these purposes. However, depending on the products or services concerned, the Commission may be prepared to define the relevant geographic market as EU-wide or even global. In other cases the Commission will look at markets at the Member State level or even locally.

7.9 The Commission also envisages situations in oligopolistic markets where, despite the absence of single-firm dominance, a merger may result in the elimination of important competitive constraints that the parties previously exerted on each other. This, combined with a reduction of competitive pressure on the remaining undertakings may result in non-coordinated (or unilateral) effects, so giving rise to a significant impediment to effective competition even if there is little likelihood of co-ordination between the members of the oligopoly.

7.10 In defining relevant markets and appraising the parties' market positions for these purposes, the Commission also takes account of factors such as:

- Whether the merging firms are **close competitors**: If the parties' products are particularly close substitutes (compared with those of other competitors), this will generally increase the risk of significant price rises following the merger as rivals' products are less likely to act as a constraint on pricing;

- **Entry and expansion conditions**: If barriers to market entry or expansion by other players are low (and such entry or expansion is realistic) a substantial increase in market share and concentration may nevertheless not raise competition concerns;

[22] For further guidance on market definition, see the Commission Notice on the definition of the relevant market for the purposes of EU competition law (OJ 1997 C372/5, 9.12.1997). The Commission's Horizontal Guidelines also refer to the use of tests such as the HHI (Herfindahl-Hirschman Index) as an indicative measure of concentration levels.

- **Actual or potential competition**: The ability of the merged group to raise prices may be constrained by actual or potential competition from other undertakings (within or outside the EU), including their ability to increase output (e.g. if they have spare capacity) and increase sales if the merged group were to seek to increase prices;

- **Buyer power**: The merged group may also be constrained by countervailing power of customers (including their ability to switch to other suppliers);

- Other relevant supply and demand considerations: These may include whether the merging parties are **vertically integrated** or otherwise control or exercise influence over the supply of inputs or demand for outputs, e.g. through ownership of **intellectual property rights**;

- Whether the merger eliminates an important **competitive force**: Some firms may have more of an influence on the competitive process than their market shares may suggest, e.g. a recent new entrant which may have innovative new products or may be expected to play the role of a **maverick** in a concentrated market.

7.11 In effect, the Commission tends to apply the "dominance" and "unilateral effects" assessments in parallel to any given case. This increases the scope for intervention by the Commission under unilateral effect theories in cases where the parties' *pro forma* combined market share falls short of single-firm dominance but is above the 25% safe harbour provided by the Commission's Merger Guidelines. It also increases the scope for the Commission to have "serious doubts" that warrant an in-depth Phase II investigation.

COLLECTIVE DOMINANCE AND COORDINATED EFFECTS

7.12 An oligopolistic market is one which is dominated by a relatively small number of major players, even if none enjoys a position of **single-firm dominance**. The term "duopoly" may be used to describe a two-firm oligopoly; "oligopolies" may be found to exist even where three or more substantial players are active in the relevant market. In 1999 the Court of First Instance upheld the Commission's view that a position of **collective dominance** can occur *"where a mere adaptation by members of the oligopoly to market conditions causes anti-competitive parallel behaviour whereby the oligopoly becomes dominant. Active collusion would therefore not be required for members of the oligopoly to become dominant and to behave to an appreciable extent independently of their remaining competitors, their customers and, ultimately, the consumers"* (*Gencor/Lonrho*).

7.13 An oligopolistic market may provide opportunities for "tacit collusion" by the members of the oligopoly where "cheating" (i.e. deviations from the tacitly coordinated pricing or output levels) can be "monitored" (because of market transparency) and "punished" (through some form of deterrent mechanism or retaliation measures). Thus the Commission takes the line that it can prohibit a concentration in an oligopolistic market if it would result in or reinforce a market structure where it would be economically rational (or more rational) for members of the oligopoly, in adapting themselves to market conditions, to act in ways which will substantially reduce competition between them.

7.14 Accordingly, where a concentration may raise oligopoly concerns, the parties need to demonstrate that it will not result in a market structure which would create incentives for the remaining major players on the relevant markets to constrain capacity, discourage market entry or otherwise distort competition – to the detriment of customers (e.g. higher prices) or of smaller competitors or "mavericks" outside the oligopoly (e.g. reducing their competitiveness or even driving them out of the market in the longer term). For these purposes, historical analyses of the past level of competition in the relevant market (including variations in market shares and prices) may assist. While cautioning against adopting a mechanical "checklist" approach, the Commission typically expects to find some of the following characteristics in an oligopolistic market:

- **product homogeneity** (e.g. "commodity" markets) with limited differentiation in the nature and pricing of the products. Oligopoly concerns are less likely to arise where suppliers offer differentiated product ranges and/or different distribution methods and associated services with different customers having different requirements (e.g. in terms of product quality, reliability of supply, contract terms);

- **high market transparency** regarding key competitive parameters (e.g. production capacities, output or prices);

- **stagnant and inelastic demand growth**, given that volatile demand will generally make coordination less likely;

- **low levels of technological change**, recognising that in markets where innovation is important it will be possible for one firm to gain a major advantage over its rivals, so it will not be attractive to seek a tacitly coordinated outcome;

- substantial **entry barriers**;

- interdependence and extensive commercial links, giving rise to **multi-market contacts** between the major suppliers;

- **symmetries or similarities** between the major suppliers' business activities in terms of:

  - cost structures,

  - market shares,

  - capacity levels,

  - levels of vertical integration;

- **insignificant buyer power**.

7.15 Accordingly, where a concentration may raise oligopoly concerns, the parties need to demonstrate that it will not create incentives for the remaining major players on the relevant markets to constrain capacity,

discourage market entry or otherwise distort competition – to the detriment of customers or of smaller competitors or "mavericks" outside the oligopoly. For these purposes, historical analysis of the past level of competition in the relevant market (including variations in market shares and prices) may be of assistance.

EFFICIENCIES DEFENCE

7.16 In appraising concentrations under the Merger Regulation, the Commission will also consider any **efficiencies** that the parties expect to flow from the merger. Thus, if the parties can put forward substantiated and verifiable evidence of cost-savings or other merger-specific efficiencies, the Commission may rely on these to find that the merged entity will be better placed to act pro-competitively for the benefit of consumers (thereby counteracting the adverse effects on competition which the merger might otherwise have). With regard to the merger-specific aspect, it is necessary to demonstrate that there are no less anti-competitive, realistic and attainable alternatives to achieve the claimed efficiencies, i.e. alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger). In general, there is greater scope for non-horizontal mergers to offer demonstrable efficiencies, e.g. in the form of synergies arising from the combination of complementary assets.

FAILING FIRM DEFENCE

7.17 In very exceptional circumstances the Commission may conclude that an otherwise problematic merger is nevertheless compatible with the internal market if one of the merging parties is a **failing firm**. For these purposes, however, it is necessary to demonstrate that:

- the failing firm would in the near future be forced out of the relevant market because of financial difficulties;
- there is no less anti-competitive alternative deal (as may be verifiable by the fact that various other scenarios have been explored without success); and
- in the absence of the deal, the assets of the failing firm would inevitably exit the market (which may, in the case of a merger between the only two players in a market, justify such a merger-to-monopoly on the basis that the market share of the failing firm would in any event have accrued to the other merging party).

VERTICAL MERGERS AND CONGLOMERATE MERGERS

7.18 **Vertical mergers**: Vertical mergers are mergers between firms that operate at different, but complementary, levels in the chain of production and/or distribution. They may give rise to competition concerns, in particular if they could have the effect of foreclosing market access by, for example, limiting competitor access to upstream raw materials or components (input foreclosure), or to downstream distribution channels (customer

foreclosure), or by making such access more expensive, thereby increasing rivals' costs. The focus should be on whether, post-transaction, competitors will have sufficient access to alternatives supplies or outlets and on whether the notified concentration is likely to change the incentives of the parties to continue to deal with third parties, or whether vertical integration is likely to facilitate collusion among competitors. Serious competition concerns should only arise if the parties to the concentration have a substantial level of market power in one or more relevant markets in the supply chain, in circumstances where customers may be adversely affected by the concentration.

7.19 **Conglomerate mergers**: Conglomerate mergers involve firms that operate in different product markets. In general, they do not raise competition issues. However, in circumstances where the products acquired are complementary to the acquirer's own products, such a merger may give rise to concerns about "so-called" "portfolio power". This may occur when the market power deriving from a portfolio of brands exceeds the sum of its parts, thereby enabling the merged group to exercise market power in individual markets more easily. For these purposes, the Commission has assessed the risk of market foreclosure through "bundling" and consumer goods' "category management"; however, it faces a high evidentiary burden when seeking to develop theories of harm based on conglomerate effects.

COOPERATIVE JOINT VENTURES

7.20 A joint venture is "cooperative" where it has as its object or effect the coordination of the competitive behaviour of its parents. In making this appraisal, the Commission has regard to the risks of any **spillover effects** arising from the presence (to a material extent) of two or more of its parents:

- in the **same** markets as the JV;
- in markets **downstream** or **upstream** from that of the JV; or
- in **neighbouring** markets closely related to the JV's market.

7.21 Where a joint venture is "cooperative" in this sense, it may be caught by the Article 101(1) prohibition; in such cases, the Commission must also examine (in accordance with Article 2(4) of the Merger Regulation) whether any coordinative aspects satisfy the exemption criteria of Article 101(3). In effect, the Commission conducts an economic balance sheet analysis. It appraises whether any potential for elimination of competition (through coordination between the parents) is outweighed by likely benefits which may result (e.g. through improvements in production, technology or distribution); a fair share of those benefits should flow to consumers.

7.22 Where a joint venture raises significant spillover effects, there will be a high possibility of a Phase II investigation to appraise these Article 101 issues. If a JV involves two or more parents retaining significant activities on the same market as the JV, then there will be a real risk of a prohibition decision. It may prove necessary for the parties to offer commitments in order to ensure either that the risk of spillover effects is removed or that the Article 101(3) criteria are satisfied.

ANCILLARY RESTRAINTS

7.23 The Merger Regulation also provides that a decision approving a merger (whether at Phase I or Phase II) shall be deemed to cover any restrictions that are "ancillary" to the concentration, i.e. "directly related and necessary to the implementation of the concentration" such that they will not be caught by Article 101(1). This may cover, for example, typical vendor non-compete clauses, interim purchase and supply agreements or technology licences between the parties, etc. The Commission is not required to rule on such issues as part of its Merger Regulation appraisal; only in exceptional circumstances, where a case raises novel and unresolved questions giving rise to genuine uncertainty, will the Commission consider such issues if requested by the notifying parties.[23]

7.24 Where restrictions are not ancillary to a concentration, they may be caught by Article 101(1) if they have an appreciable effect on competition in the EU and on trade between Member States. Any such agreements will be subject to scrutiny under the general competition rules (including whether they may satisfy the exemption criteria of Article 101(3)).

JUDICIAL REVIEW

7.25 The EU's General Court (formerly the Court of First Instance) has the power to review the legality of all Commission decisions, including decisions under the Merger Regulation. An appeal can be brought not only by the merging parties, but also by third parties "directly and individually concerned" by the decision.

7.26 The filing of an appeal does not suspend the application of the decision, but parties may apply to the General Court for an order that the application of the decision be suspended and for any necessary "interim measures".

7.27 The General Court also has jurisdiction to review decisions imposing penalty payments or fines and, where appropriate, it may increase, reduce or cancel any such sanction.

7.28 Appeals from the General Court to the EU's Court of Justice (ECJ) may only be made on points of law. The only possible grounds for appeal are: lack of competence of the General Court; breach of the General Court's procedure, adversely affecting the appellant; or breach of EU law.

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[23] For further guidance, see the Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C56/24, 5.3.2005).

Annex 1: Outline of national merger control regimes in the EEA

This list is for indicative purposes only. Special rules may apply for certain sectors, e.g. banks, insurance, media, regulated utilities. National rules and exchange rates are subject to change; for countries not in the eurozone, the approximate euro figures below are calculated by reference to average 2011 exchange rates.

A. THE 27 EU MEMBER STATES

Jurisdiction	Jurisdictional criteria	Notification requirements
Austria	• Combined worldwide turnover of €300m; and • Combined turnover in Austria of €30m; and • At least two parties each have worldwide turnover of €5m However, even if above thresholds are met, transaction is not notifiable if: • Only one of the parties has turnover of €5m within Austria; and • All other parties have combined worldwide turnover of less than €30m	Mandatory prior notification to Bundeswettbewerbsbehörde (Federal Competition Authority)
Belgium	• Combined turnover in Belgium of €100m; and • At least two parties each have turnover in Belgium of €40m	Mandatory prior notification to Conseil de la Concurrence/Raad voor de Mededinging (Competition Council)

Jurisdiction	Jurisdictional criteria	Notification requirements
Bulgaria	• Combined turnover in Bulgaria of BGN 25m (c. €12.8m); and • Either (1) at least two parties each have turnover in Bulgaria of BGN 3m (c. €1.5m); or (2) target has turnover in Bulgaria of BGN 3m (c. €1.5m)	Mandatory prior notification to Commission for Protection of Competition
Cyprus	• At least two parties each have worldwide turnover of €3.4m; and • At least one party carries on business in Cyprus; and • Combined turnover in Cyprus of €3.4m	Mandatory prior notification to Commission for the Protection of Competition
Czech Republic	• Combined turnover in Czech Republic of CZK 1,500m (c. €61m); and • At least two parties each have turnover of CZK 250m in Czech Republic (c. €10.1m) OR • Target has turnover in Czech Republic of CZK 1,500m (c. €61m), and • At least one other party has worldwide turnover of CZK 1,500m (c. €61m)	Mandatory prior notification to Úrad pro Ochranu Hospodárské Souteže (Office for the Protection of Economic Competition)

Jurisdiction	Jurisdictional criteria	Notification requirements
Denmark	• Combined turnover in Denmark of DKK 900m (c. €120.8m); and • At least two parties each have turnover in Denmark of DKK 100m (c. €13.4m); OR • At least one undertaking has turnover in Denmark of DKK 3,800m (c. €510m); and • At least one other undertaking has worldwide turnover of DKK 3,800m (c. €510m)	Mandatory prior notification to Koncurrencestyrelsen (Competition Authority)
Estonia	• Combined turnover in Estonia of €6,391,200; and • At least two parties each have turnover in Estonia of €1,917,350	Mandatory prior notification to Konkurentsiamet (Competition Board)
Finland	• Combined worldwide turnover of €350m; and • At least two parties each have turnover in Finland of €20m	Mandatory prior notification to Kilpailuvirasto (Competition Authority)
France	• Combined worldwide turnover of €150m; and • At least two parties each have turnover in France of €50m Special thresholds for concentrations in the retail trade sector or in the French Départements or Collectivités d'Outre-Mer	Mandatory prior notification to l'Autorité de la concurrence (Competition Authority)

Jurisdiction	Jurisdictional criteria	Notification requirements
Germany	• Combined worldwide turnover of €500m; and • At least one party has turnover in Germany of €25m, and • At least one other party has turnover in Germany of €5m Exceptionally notification may not be necessary if: • There is an independent (non-affiliated) undertaking, merging with another undertaking, which has worldwide turnover of less than €10m; or • The only relevant market is a minor market where goods/services have been offered for at least five years and total annual value of less than €15m in last calendar year	Mandatory prior notification to Bundeskartellamt (Federal Cartel Office)
Greece	• Combined turnover of €150m worldwide, and • At least two parties each have turnover in Greece of €15m	Mandatory prior notification to Hellenic Competition Commission
Hungary	• Combined turnover of HUF 15,000m in Hungary (c. €53.7m); and • At least two parties each have turnover of HUF 500m (c. €1.7m) in Hungary	Mandatory prior notification to Gazdasági Versenyhivatal (Office of Economic Competition)

Jurisdiction	Jurisdictional criteria	Notification requirements
Ireland	• At least two parties each have worldwide turnover of €40m; • At least two parties each carry on business in any part of the island of Ireland (i.e. including Northern Ireland); and • At least one party has turnover in the Irish Republic of €40m	Mandatory prior notification to Competition Authority
Italy	• Combined turnover in Italy of €468m; or • Target has turnover in Italy of €47m *(Thresholds are revised annually to take account of inflation; above figures were revised in November 2011)*	Mandatory prior notification to the Autorità Garante della Concorrenza e del Mercato (Competition Authority)
Latvia	• Combined turnover (in Latvia) of LVL 25m (c. €35m), and each of the two merger participants has turnover of LVL 1.5m (c. €2.1m) in Latvia; or • Combined market share in relevant market of 40%, and each of the two merger participants has turnover of LVL 1.5m (c. €2.1m) in Latvia	Mandatory prior notification to Konkurences Padome (Competition Council)
Lithuania	• Combined turnover of Lt 30m (c. €8.7m); and • At least two parties each have turnover of Lt 5m (c. €1.4m)	Mandatory notification to Konkurencijos Taryba (Competition Council)
Luxembourg	No specific merger control regime	Not applicable

Jurisdiction	Jurisdictional criteria	Notification requirements
Malta	• Combined turnover in Malta of €2,329,373,40 and • Each of the undertakings concerned has turnover in Malta equivalent to at least 10% of parties' combined turnover	Mandatory prior notification to Director of the Office for Fair Competition
Netherlands	• Combined worldwide turnover of €113.45m; and • Each of at least two parties has turnover in the Netherlands of €30m	Mandatory prior notification to Nederlandse Mededingingsautoriteit (Dutch Competition Authority)
Poland	• Combined worldwide turnover of €1,000m; or • Combined turnover in Poland of €50m De minimis exemption: if target (in cases involving an acquisition of control, rather than a merger or JV) does not achieve turnover of more than €10m in Poland in any of the two financial years prior to notification	Mandatory prior notification to the Prezes Urzędu Ochrony Konkurencji i Konsumentów (President of the Office of Competition and Consumer Protection)
Portugal	• Combined turnover in Portugal of €150m; and • At least two parties each have turnover in Portugal of €2m OR • Implementation of concentration creates or reinforces a share exceeding 30% of the national market for a particular good or service or for a substantial part of it	Mandatory prior notification to Autoridade de Concorrência (Competition Authority)

Jurisdiction	Jurisdictional criteria	Notification requirements
Romania	• Combined worldwide turnover of €10m; and • At least two parties each have turnover in Romania of €4m	Mandatory prior notification to Consiliul Concurentei (Competition Council)
Slovakia	• Combined parties turnover in the Slovak Republic of €46m and at least two parties each have turnover in the Slovak Republic of €41m, or • Turnover in Slovak Republic of one party (this is (a) at least one merging party or (b) the party being acquired or (c) at least one of the parties creating a joint venture) of €14m and worldwide turnover of the other party of €46m	Mandatory prior notification to Protimonopolného úrad (Antimonopoly Office)
Slovenia	• Combined turnover in Slovenia of €35m; AND • (i) Target has turnover in Slovenia of €1m; or • (ii) In cases of joint ventures of at least two parties, including affiliated companies, have turnover in Slovenia of €1m NB: If thresholds are not met, but parties to the concentration, together with the affiliated companies, have more than 60 % market share in the Slovenian market, the undertakings concerned are obliged to inform the CPO of the concentration (but not submit a formal notification).	Mandatory prior notification to Urad RS za Varstvo Konkurence (Competition Protection Office)

Jurisdiction	Jurisdictional criteria	Notification requirements
Spain	• Combined turnover in Spain of €240m; and • At least two parties each have turnover in Spain of €60m OR • Creation or strengthening of combined market share in Spain of 30%, or acquisition of target which has 30% market share (even if no overlap) [NB: This threshold will not apply when target's turnover in Spain was under €10m in the last financial year, provided that the parties' individual or combined market share is under 50%]	Mandatory prior notification to Comisión Nacional de la Competencia (National Competition Commission
Sweden	• Combined turnover in Sweden of SEK 1,000m (c. €110.7m); and • At least two parties each have turnover in Sweden of SEK 200m (c. €22.1m)	Mandatory prior notification to Konkurrensverket (Swedish Competition Authority). Voluntary notification may be submitted by the parties if only the first turnover threshold (SEK 1,000m) is met
United Kingdom	• Target has UK turnover of £70m (c. €80m) ('turnover test'); or • As a result of the transaction, parties have a share of supply of goods or services of any description of 25% or more in UK (or a substantial part of the UK) ('share of supply test')	Voluntary notification to Office of Fair Trading

B. THE 3 CONTRACTING EFTA STATES

Jurisdiction	Jurisdictional criteria	Notification requirements
Iceland	Prior notification if: • Combined turnover in Iceland of ISK 2,000 m (c. €11.6m); and • At least two parties each have turnover in Iceland of ISK 200 m (c. €1.1m) Post merger notification: • May be required for mergers not meeting the above thresholds if Authority believes that there is significant probability that merger can substantially reduce competition. This is subject to combined turnover [in Iceland] of ISK 1,000m (c. €5.8m)	Mandatory prior or post merger notification to Samkeppnisstofnun (Competition Authority) (depending on jurisdictional criteria)
Liechtenstein	No specific merger control regime	Not applicable
Norway	• Combined turnover in Norway of NOK 50m (c. €6.4m); and • At least two parties each have turnover in Norway of NOK 20m (c. €2.5m)	Mandatory prior notification to Konkurransetilsynet (Competition Authority)

Annex 2: Merger Regulation statistics (1990-2011)

A. TOTAL NUMBER OF NOTIFICATIONS AND REFERRALS BY YEAR

Year	Notifications to Commission	Referrals from Member States to Commission		Referrals from Commission to Member States	
		pre-notification (Art 4(5))	post-notification (Art 22)	pre-notification (Art 4(4))	post-notification (Art 9)
1990	11	-	-	-	-
1991	64	-	-	-	-
1992	59	-	-	-	1
1993	59	-	1	-	1
1994	95	-	-	-	1
1995	110	-	1	-	-
1996	131	-	1	-	3
1997	168	-	1	-	7
1998	224	-	-	-	4
1999	276	-	-	-	5
2000	330	-	-	-	5
2001	335	-	-	-	7
2002	277	-	2	-	11
2003	211	-	1	-	9
2004	247	16	1	2	3
2005	313	24	4	11	6
2006	356	39	4	13	2
2007	402	50	3	5	2
2008	347	22	2	9	4
2009	259	25	1	6	1
2010	274	24	3	7	7
2011	309	17	1	10	2
Total	**4,857**	**217**	**28**	**63**	**81**

B. DIFFERENT PHASE I OUTCOMES BY YEAR

Year	Clearance decisions				No jurisdiction decisions		Referred to Phase II		Notifications withdrawn during Phase I	
	Unconditional		Conditional							
1990	5	(71%)	-	-	2	(29%)	8-	-	-	-
1991	47	(77%)	3	(5%)	5	(8%)	6	(10%)	-	-
1992	43	(68%)	4	(6%)	9	(14%)	4	(6%)	3	(5%)
1993	49	(84%)	-	(7%)	4	(7%)	4	(7%)	1	(2%)
1994	78	(80%)	2	(3%)	5	(5%)	6	(6%)	6	(6%)
1995	90	(80%)	3	(3%)	9	(8%)	7	(6%)	4	(4%)
1996	109	(87%)	-	-	6	(5%)	6	(5%)	5	(4%)
1997	118	(82%)	2	(1%)	4	(3%)	11	(8%)	9	(6%)
1998	196	(86%)	12	(5%)	4	(2%)	11	(5%)	5	(2%)
1999	225	(84%)	16	(6%)	1	(0%)	20	(7%)	7	(3%)
2000	278	(84%)	26	(9%)	1	(0%)	18	(5%)	8	(2%)
2001	299	(87%)	11	(4%)	1	(0%)	21	(6%)	8	(2%)
2002	238	(92%)	10	(4%)	1	(0%)	7	(3%)	3	(1%)
2003	203	(91%)	11	(5%)	-	-	9	(4%)	-	-
2004	220	(91%)	12	(5%)	-	-	8	(3%)	3	(1%)
2005	276	(90%)	15	(5%)	-	-	10	(3%)	6	(2%)
2006	323	(91%)	13	(4%)	-	-	13	(4%)	7	(2%)
2007	368	(91%)	18	(4%)	-	-	15	(4%)	5	(1%)
2008	307	(89%)	19	(5%)	-	-	10	(3%)	10	(3%)
2009	225	(91%)	13	(5%)	-	-	5	(21%)	6	(2%)
2010	253	(92%)	14	(5%)	-	-	4	(1.5%)	4	(1.5%)
2011	299	(93%)	5	(1.5%)	-	-	8	(2.5%)	9	(3%)
Total	**4,249**	**(87.5%)**	**209**	**(4.5%)**	**52**	**(1%)**	**203**	**(4.5%)**	**109**	**(2.5%)**

C. DIFFERENT PHASE II OUTCOMES BY YEAR

Year	Clearance decisions				Prohibition decisions		Notifications withdrawn during Phase II	
	Unconditional		Conditional					
1991	1	(20%)	3	(60%)	1	(20%)	-	-
1992	1	(25%)	3	(75%)	-	-	-	-
1993	1	(25%)	2	(50%)	-	-	1	(25%)
1994	2	(40%)	2	(40%)	1	(20%)	-	-
1995	2	(29%)	3	(42%)	2	(29%)	-	-
1996	1	(12%)	3	(38%)	3	(38%)	1	(12%)
1997	1	(11%)	7	(78%)	1	(11%)	-	-
1998	3	(25%)	4	(30%)	2	(15%)	4	(30%)
1999	-	-	7	(54%)	1	(8%)	5	(38%)
2000	3	(14%)	12	(54%)	2	(9%)	6	(23%)
2001	5	(22%)	9	(39%)	5	(22%)	4	(17%)
2002	2	(25%)	5	(62%)	-	-	1	(13%)
2003	2	(25%)	6	(75%)	-	-	-	-
2004	2	(22%)	4	(44%)	1	(11%)	2	(22%)
2005	2	(25%)	3	(38%)	-	-	3	(38%)
2006	4	(33%)	6	(50%)	-	-	2	(17%)
2007	5	(42%)	4	(33%)	1	(8%)	2	(17%)
2008	9	(60%)	5	(33%)	-	-	1	(7%)
2009	-	-	3	(60%)	-	-	2	(40%)
2010	1	(33%)	2	(67%)	-	-	-	-
2011	4	(58%)	1	(14%)	1	(14%)	1	(14%)
Total	**51**	**(25%)**	**94**	**(47%)**	**21**	**(10%)**	**35**	**(18%)**

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