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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- European Union --

25 February 2014

This note is submitted by the European Union to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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1. Pre-merger notification regime

Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)

1. EU merger control rules apply to 'concentrations'¹ satisfying the turnover thresholds laid down in the Merger Regulation² (that is, concentrations having 'Union dimension'). Concentrations having Union dimension must be notified to the Commission and as a general rule may not be implemented until declared compatible with the internal market in terms of the Merger Regulation.

2. Indeed, the Merger Regulation is based on a principle of mandatory notification of concentrations having Union dimension before they are implemented.³ Furthermore, the Merger Regulation provides for an *ex ante* system of review by establishing a 'standstill obligation'. That is, subject to limited exceptions, concentrations having Union dimension (or which are to be examined by the Commission pursuant to a referral in terms of Article 4(5) of the Merger Regulation) may not be implemented either before notification or until declared compatible with the internal market.⁴ This standstill obligation allows for increased legal certainty for market players as well as effective protection of competition, given the difficulties to unscramble implemented transactions and undo competitive harm.

3. The Merger Regulation provides for limited exceptions to the standstill obligation.

¹ Within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.1.2004, p.1 (the Merger Regulation).

² The turnover thresholds laid down in the EU Merger Regulation serve to identify those concentrations which are subject to the exclusive jurisdiction of the European Commission, as opposed to jurisdiction by one/more EU Member State.

The relevant turnover thresholds are laid down in Article 1 of the Merger Regulation. A concentration has Union dimension where: (1) (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million and (b) an aggregate Union-wide turnover of each of at least two of the undertakings concerned of more than EUR 250 million; unless each of the undertakings concerned achieves more than 2/3 of its aggregate Union-wide turnover within one and the same Member State (Merger Regulation, Article 1(2)).

Where these thresholds are not met, a concentration can still be considered to have a Union dimension where: (2) (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 aggregated 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 aggregated turnover of each of at least two undertakings concerned is more than EUR 25 million; and (d) the aggregate Union-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 Union-wide turnover within one and the same Member State [Merger Regulation, Article 1(3)].

³ Merger Regulation, Article 4(1).

⁴ Merger Regulation, Article 7(1).

4. In terms of Article 7(2), the standstill obligation does not prevent the implementation of a public bid or a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control is acquired from various sellers, provided that the concentration is notified to the Commission without delay and the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments on the basis of a derogation granted by the Commission.

5. Furthermore, in terms of Article 7(3), the Commission may, further to a reasoned request from the parties, grant a derogation from the standstill obligation. In deciding on the request, the Commission may take into account *inter alia* the effects of the suspension on one/more of the parties to the concentration or on third parties and the threat to competition posed by the concentration. Such derogation may be made subject to conditions and obligations aimed at ensuring conditions of effective competition.⁵

2. Review of mergers falling below notification thresholds

For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

6. As a general rule, concentrations which do not meet the turnover thresholds set out in the Merger Regulation fall outside the Commission's jurisdiction. Member States may apply their national legislation on competition to such concentrations. In some instances though, cases which do not meet the turnover thresholds established in the Merger Regulation may be referred from EU Member States to the Commission.⁶

7. The Commission cannot challenge a consummated concentration which was not notifiable in terms of the Merger Regulation.

⁵ See for example Case No COMP/M.6812 - SFPI/ Dexia (Commission Decision dated 17 December 2012), Case No COMP/M.6696 – *Sofiproteol/ Actifs Doux* (Commission Decision dated 25 July 2012) and Case No COMP/M.6215 – *Sun Capital /Polestar UK Print Limited* (Commission Decision dated 15 April 2011).

⁶ Merger Regulation, Article 4(5) and Article 22.

3. Review of mergers that should have been notified but were not

If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

8. The validity of a transaction carried out in contravention to the standstill obligation, is as a general rule, dependent on a declaration of compatibility with the internal market in terms of the Merger Regulation.⁷

9. The Commission retains the power to review such concentrations in terms of the EU Merger Regulation. Behaviour in the context of implementing a transaction prior to clearance might, in addition, constitute an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU). For example, this may be the case where parties to the concentration operating on the same market share sensitive commercial information.

10. Implementation of concentrations in violation of the standstill obligation (so-called 'gun-jumping') occurs only vary rarely in practice. In cases where it does happen, the Commission takes measures with a view to ensuring that any negative impact on effective competition in the market arising from the implemented transaction are allayed to the extent possible and in any event are not protracted.

11. In terms of Article 8(5) of the Merger Regulation, where a concentration has been implemented in contravention of the standstill obligation and a decision as to the compatibility of the concentration with the internal market has not yet been taken, the Commission may take interim measures appropriate to restore or maintain conditions of effective competition.⁸ For example, the Commission ensures that voting rights in the company over which control has been acquired are not exercised until the Commission's decision as to the compatibility of the concentration with the internal market has been taken.

12. In terms of Article 8(4) of the Merger Regulation, where a concentration has already been implemented and the Commission declares that concentration incompatible with the internal market, the Commission may require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired so as to restore the situation prevailing prior to the implementation of the concentration. In circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through the dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible. The Commission may also order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.⁹

⁷ Merger Regulation, Article 7(4).

⁸ Merger Regulation, Article 8(5).

⁹ Merger Regulation, Article 8(4).

13. Instead of using the powers under Article 8(4) of the EU Merger Regulation, the Commission can also clear an originally anti-competitive merger which has already been implemented subject to commitments submitted by the parties. When accepting such commitments, the Commission will ensure that the modification to the transaction which was implemented in violation of the standstill obligation is such so as to ensure that effective competition is restored and that competition problems arising from the implemented transaction are not protracted. The Commission will apply the same considerations as to the design of remedies as in case of non-consummated mergers, i.e. in particular a preference for structural remedies and divestitures.

14. Furthermore, irrespective of the outcome of the competitive assessment of the implemented transaction, the violation of the standstill obligation constitutes a serious breach of the Merger Regulation which may result in an imposition of fines. Indeed, the Commission has discretion to impose fines on the parties (of up to 10% of the aggregate turnover of the undertaking concerned) if they fail to notify a concentration prior to its implementation or if they otherwise breach the standstill obligation by implementing the concentration prior to it having been declared compatible with the internal market in terms of the Merger Regulation.¹⁰

15. Pursuant to EEC Regulation 2988/74¹¹, the limitation period for the Commission to impose fines for infringement of the standstill obligation is five years. This limitation period starts on the day on which the Commission clears the transaction or the parties give up control as this type of infringement is continuous and lasts until the parties either obtain the Commission's authorisation or give up control.¹²

16. Given the importance of the standstill obligation for an effective functioning of EU merger review, the Commission takes breaches of the standstill obligation seriously.

17. The EU's General Court recently confirmed the Commission's decision to impose fines in the most recent of the three cases in which the Commission has imposed fines for gun-jumping, *Electrabel/Compagnie Nationale du Rhône*.¹³ In that case, the Commission imposed a fine of EUR 20 million on Electrabel, an electricity producer and retailer belonging to the Suez Group (now GDF Suez) for acquiring control of Compagnie Nationale du Rhône (CNR), another electricity producer, prior to having notified and received approval of the concentration under the EU Merger Regulation.¹⁴ Similarly, the Commission had imposed fines for gun-jumping in another two cases, case IV/M.920 - *Samsung/AST*¹⁵ and case IV/M.969 - *A.P. Møller*.^{16, 17}

¹⁰ Merger Regulation, Article 14(2). In terms of Article 14(3) of the Merger Regulation, in fixing the amount of the fine, the Commission must have regard to the nature, gravity and duration of the infringement.

¹¹ Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition, OJ 1974 L 319, p. 1, Article 1(1).

¹² Case T-332/09 – *Electrabel v Commission*, paragraph 206.

¹³ Case T-332/09 – *Electrabel v Commission*.

¹⁴ Case No COMP/M.4994 – *Electrabel/Compagnie Nationale du Rhône*, Commission Decision of 10 June 2009. The concentration had been cleared unconditionally by the Commission on 29 April 2008 following a notification by Electrabel on 26 March 2008.

¹⁵ Commission Decision of 18 February 1998.

¹⁶ Commission Decision of 10 February 1999.

¹⁷ The Commission had adopted unconditional clearance Decisions in both these cases.

18. These decisions send an important message to the business community and legal advisers that the Commission is prepared to take action in cases of gun-jumping by imposing fines in order to safeguard the effectiveness of its merger review system.

19. Parties suspected of having implemented a concentration in breach of the standstill obligation may also be subject to unannounced inspections.¹⁸ For example, in 2007 the Commission carried out dawn raids for suspected gun-jumping in the *Ineos/Kerling* case¹⁹. During the second phase investigation into Ineos's proposed acquisition PVC manufacturing competitor, Kerling, the Commission had obtained information that the merging companies might be implementing the transaction in breach of the suspension obligation. The allegations pertained to the fact that the acquiring party allegedly intervened in the management of the target (which was its competitor at the time) through appointment of individuals and giving of instructions. Moreover, there were allegations that the two companies were sharing sensitive commercial information which might, in addition, have constituted an infringement of Article 101 (then, Article 81) of the TFEU. The Commission conducted unannounced inspections but did not discover any evidence of the alleged violations. On the contrary, the majority of documents collected during the inspections were exculpatory and indicated that the parties were aware of their obligations and had put in place systematic rules to avoid sensitive commercial information being exchanged prior to the Commission's clearance. The Commission concluded on this basis that the parties had complied fully with the suspension obligation.

20. Such unannounced inspections also serve as a clear message that the Commission is prepared to vigilantly monitor compliance with the provisions of the Merger Regulation.

4. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

21. Where the Commission has reviewed a concentration and cleared it, it cannot, as a general rule, later challenge that concentration. The Commission may however revoke a clearance decision or a conditional clearance decision where that decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit.²⁰ In such cases, the Commission may reopen the examination of the transaction.

22. An example is the *Sanofi/Synthélabo* case, in which the Commission had first adopted a clearance decision and subsequently revoked that decision after it received third parties observations alerting it to possible problems of competition relating to activities which had not been described by the parties in their notification.²¹

¹⁸ Merger Regulation, Article 13.

¹⁹ Case No COMP/M.4734 – Ineos/Kerling.

²⁰ Merger Regulation, Article 6(3) and Article 8(6).

²¹ M.1397, M.1542 and M.1543 - Sanofi-Synthélabo (1999).