



December 2003

BRIEFING

# EU merger regulation: calm after the storm?

On 27 November 2003, the Council of the European Union reached political agreement to amend the EU merger regulation. After 13 eventful years – comprising over 2,300 merger filings and 18 prohibition decisions – this marks a new stage in the development of EU merger control.

The revised merger regulation forms the centrepiece of a far-reaching merger reform programme and follows a lengthy consultation period that started at the end of 2001. Following three consecutive high-profile court defeats in merger cases, in December 2002 the Commission announced a formal package of substantial legislative amendments to the merger regulation together with various internal improvement measures, including a draft Commission notice on the appraisal of horizontal mergers and draft best practice guidelines on the conduct of merger control proceedings. In parallel, the Commission announced a reorganisation of DG Competition, which included the appointment, for the first time, of a chief competition economist, the dissolution of the merger task force and the reintegration of its staff into DG Competition's existing industry-specific teams.

The new EU merger regulation introduces the following key changes.

## The new substantive test

The discussions surrounding the substantive test for merger control have been controversial at times. The Commission's initial proposal was to expand the wording

### Executive summary

The Council of the European Union has adopted important amendments to the EU merger regulation. They include:

- a new substantive test based on the notion of a 'significant impediment to effective competition';
- a more flexible timetable for merger review;
- a reinforced 'one-stop-shop' concept; and
- increased enforcement powers for the European Commission.

The new merger regulation will apply from 1 May 2004.

of the 'dominance' test to clarify that it covers all situations of oligopoly that may give rise to competition problems. However, some member states (supported by the European Parliament) wanted to maintain the current 'dominance' test, while others were in favour of introducing the 'substantial lessening of competition' test used in some other jurisdictions (particularly the UK, Ireland and the US). Ultimately, a compromise was reached to replace the dominance test with a 'significantly impede effective competition' test, in which dominance is expressly referred to as one factor to be taken into account.

A last-minute addition to the recitals of the regulation, backed by a joint Council and Commission statement, explains that the 'significant impediment to effective competition' test extends to so-called 'unilateral effects' cases – that is cases that could result in a non-dominant merged entity being able to exert and profit from market power following a merger, without being dependent on a co-ordinated response on the part of other competitors. Irrespective of the technical issues, it seems clear that the new wording expressly permits the Commission to prohibit more mergers than in the past. How the test will be applied in practice has yet to be seen.

The Commission is also expected to publish the final version of its guidelines on horizontal mergers soon, which clarify the application of the substantive test and explain the role of the 'efficiency defence' in merger review. A further guidance notice on vertical and conglomerate mergers is planned for 2004.

## Flexible timetable

The new regulation introduces flexibility into the review process by permitting the notification of a merger to the Commission before an agreement has been concluded. It also abolishes the present (but rarely respected) one week notification requirement. However, merging parties continue to be prohibited from implementing their merger until the Commission has approved the deal.

Changes have also been made to the investigation timetable. The initial investigation period (Phase I) will cover 25 working days (currently one month), while the submission of remedies during Phase I will extend the Commission's investigation to 35 working days (currently six weeks). In a detailed (Phase II) investigation, the submission of remedies will add 15 working days to the usual 90-working day period (currently four months), to give time for an offer of remedies to be properly considered. This extension does not apply if commitments are offered within 55 working days after the initiation of Phase II. The Commission may request a 20-working day extension (at any time – but with the consent of the parties) to look more closely into difficult aspects of complex cases. A Phase II investigation may also be extended by a maximum of 20 working days at the request of the parties provided the request is made within 15 working days of the start of Phase II.

## Corrective referral mechanisms

The regulation also simplifies the rules and procedures for the referral of mergers from the Commission to national regulators and vice versa in order to ensure that the best-placed authority examines the merger. In particular, companies that are party to a merger that does not meet the turnover thresholds of the EU merger regulation can ask to benefit from the Commission's 'one-stop-shop' if their transaction would have to be notified in at least three member states. Conversely, where the effects of a merger are limited primarily to one country, the merging firms can request the Commission to refer the case to the national regulator concerned. These changes are likely to result in uncertainty as to which authority will, ultimately, rule on any particular merger.

## Increased enforcement powers

The new regulation strengthens the Commission's enforcement powers, in particular by allowing it to impose higher fines if companies fail to supply information requested by the Commission, or supply incorrect or misleading information. The changes align the Commission's enforcement powers in merger cases with its powers under the new Regulation 1/2003 on the application of articles 81 and 82 of the EC Treaty. However, in conducting merger investigations the Commission will not be able to search private homes.

The amended merger regulation will apply to the enlarged European Union of 25 member states as well as to the three EEA countries (Iceland, Liechtenstein and Norway). It is expected to be adopted formally by the Council before the end of 2003 and to enter into force on 1 May 2004.

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