

Factsheet on the Scope of EU merger control

This factsheet provides information on the distribution of powers between the European Commission and the Bundeskartellamt in the area of merger control. It lists and explains the criteria according to which the Council Regulation (EC) on the Control of Concentrations between Undertakings¹ (hereinafter: EC Merger Regulation) gives the European Commission exclusive competence to investigate merger cases. Mergers that do not meet these criteria but require notification under the ARC² remain subject to merger control by the Bundeskartellamt (see information leaflet relating to the German control on concentrations).

I. Turnover thresholds and calculation of turnover

1. Turnover thresholds

All mergers with a so-called Community dimension fall within the competence of the EU Commission. A merger has a Community dimension if the following turnover criteria are met (Article 1 (2) (a) and (b) of the EC Merger Regulation):

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion
and
- the aggregate Community-wide turnover of *each of at least two* of the undertakings concerned is more than EUR 250 million,
or:
- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.5 billion
and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,
and

¹ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24, 29/1/2004; effective from 1 May 2004). The supplementary regulations, notices and guidelines of the Commission are listed in the *annex* to this factsheet.

² Act against Restraints of Competition as published on 26 August 1998 (Federal Gazette I, p. 2546).

- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million
and
- in each of at least three of these Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million.

Proviso (Article 1 (2) and (3), end of last sentences, of the EC Merger Regulation):

Where *each* of the companies concerned achieves more than two-thirds of its *Community-wide* turnover (not its aggregate worldwide turnover!) within one and the same Member State, the Commission has no competence even if the thresholds indicated above are exceeded. This proviso is meant to ensure that mergers which have effects mainly within one Member State remain within the competence of the national competition authority.

2. Calculation of turnover

Turnover is calculated largely in the same way as under the German merger control system. Value-added tax and other taxes directly related to turnover are to be deducted, and intra-group revenues left out of account (Article 5 (1) of the EC Merger Regulation). Enterprises that are associated with the undertakings concerned by the concentration are to be included in the calculations as well (for details see: Article 5 (4) of the EC Merger Regulation).

3. Special provisions for credit institutions and other financial institutions and insurance companies

Credit institutions and other financial institutions (Article 5 (3) (a) of the EC Merger Regulation):

In place of aggregate worldwide turnover, the decisive criterion under Article 1 (2) and (3) of the EC Merger Regulation, the sum of the following income items (after deduction of value added tax and other taxes directly related to these items) is to be used:

- interest income and similar income
- income from securities (income from shares and other equity interests, income from non-fixed interest bearing securities, income from participating interests, income from shares in affiliated undertakings)
- commissions receivable
- net profit on financial operations
- other operating income.

Decisive for the application of the “two-third clause” (Article 1 (3), end of last sentence, of the EC Merger Regulation) and the calculation of the Community-wide turnover is the turnover from the income items as defined above which are received by branches or divisions of an institution established in the Community or in the Member State in question.

Insurance companies (Article 5 (3) (b) of the EC Merger Regulation):

The value of gross premiums written replaces “aggregate worldwide turnover”. Gross premiums received from Community residents or from residents of one Member State substitute “Community-wide turnover” and “turnover within one and the same Member State”.

Note: *Contrary to the ARC, there are no special provisions for turnover achieved in the trade and in the publishing or press sectors.*

II. Definition of a concentration

According to Article 3 (1) and (4) of the EC Merger Regulation concentration is deemed to arise where a change of control on a lasting basis results

- from the merger of two or more previously independent undertakings or
- the acquisition, by one or more persons already controlling at least one undertaking or the acquisition by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect *control* of the whole or parts of one or more undertakings or
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

The decisive factor is the criterion of gaining *control of one or more undertakings* which is defined in Article 3 (2) of the EC Merger Regulation as the possibility of exercising *decisive influence* on an undertaking.

Consequently, the application of the EC Merger Regulation to minority shareholdings is not principally excluded. Since only those minority shareholdings are covered where the purchaser gains the possibility of exercising decisive power, the application of the EC Merger Regulation depends on the particular circumstances of the respective case. For details see the Commission Notice on the concept of concentrations (see Annex No 8).

Note: *Where the acquisition of a minority shareholding or the creation of a joint venture does not fall under the EC Merger Regulation according to the above criteria, even though the turnover thresholds are exceeded, but where the transaction concerned satisfies the conditions for being subject to notification under the ARC, the Bundeskartellamt is competent to deal with the case..*

III. Referrals of concentrations from the Commission to national competition authorities

1. Referral upon request of a Member State

Even where all the pre-requisites for an application of the EC Merger Regulation are met, the Commission *may* still refer a merger to the national competition authority, providing it with the decision-making competence in the specific case. According to Article 9 (2) of the EC Merger Regulation the referral is subject to the condition that the Member State informs the Commission within 15 working days of the date of receipt of the copy of the notification that

- a concentration threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market **or**
- a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market **and**
- the Commission shares that view **and**
- the Commission does not itself deal with the case but refers it to the competent national authority with a view to the application of national competition law.

The Commission may refer a case wholly or in part to the competent national authority of the Member State. It may also invite the Member State to make a referral request.

2. Referral upon request of the undertakings concerned

According to Article 4 (4) of the EC Merger Regulation, prior to the notification of a concentration the undertakings participating in the concentration may apply for a referral from the Commission to a Member State (so-called reasoned submission) if the concentration *may* significantly impede competition in a market within the respective Member State, which presents all the characteristics of a distinct market.

The referral is bound to the condition that

- the Commission shares the above view of the applicants *and*
- the Member State referred to in the reasoned submission expresses its consent to the referral of the case within 15 working days of receiving the submission (silence is taken to signify consent).

The Commission decides within 25 working days starting from the receipt of the reasoned submission whether or not to refer the case.

Where a concentration is referred, the competition law of the respective Member State is applied. Where a case is referred to Germany, the proposed concentration has to be notified to the Bundeskartellamt by the undertakings concerned under Section 39 of the ARC.³

IV. Referrals of concentrations from national competition authorities to the Commission

1. Referral upon request of one or more Member states

According to Article 22 (1) of the EC Merger Regulation one or more Member States may request the Commission to examine a concentration that does not have a Community dimension within the meaning of Article 1 of the EC Merger Regulation.

The possibility to apply for referral depends on the following legal preconditions:

- the concentration falls under the definition of Article 3,
- it affects trade between Member States *and*
- it threatens to significantly affect competition within the territory of the Member State or States making the request.

The Member State or States have to make the request within 15 working days of the date on which the concentration was notified or otherwise made known to them.

The EU-Commission informs the Member States without delay of the receipt of the initial request in the respective case; other Member States that have not yet requested a referral have the right to join the initial request within a period of 15 working days. All national time limits relating to the concentration are suspended until it has been decided where the concentration is examined.

The Commission decides within 25 working days after receipt of the initial request on the request of the Member State or States. If the Commission agrees to examine the concentration in accordance with the request, the national legislation on competition of the Member State or States having made the request no longer applies. The Commission may request a notification pursuant to Article 4 of the EC Merger Regulation from the undertakings concerned.

The EU-Commission may inform one or several Member States that it considers a concentration to fulfill the criteria for a referral and may invite that Member State or those Member States to make a referral request.

³ See Sec. 39 (4), 40 (5) ARC.

2. Referral upon request of the undertakings concerned

Where a concentration has no Community dimension within the meaning of Article 1 of the EC Merger Regulation, but is capable of being reviewed under the national competition laws of at least three Member States, the undertakings concerned may request the Commission to examine the concentration pursuant to Article 4 (5) of the EC Merger Regulation.

The Member States that would be competent to examine the concentration have 15 working days upon receipt of the parties' reasoned submission to express their disagreement as regards the request to refer the case. Where at least one of these Member States has rejected the request the case is not referred to the Commission at all, i.e. not even as regards the competence of those Member States that have expressed their agreement to the request. Where no Member State has expressed its disagreement the concentration is deemed to have a Community dimension and is to be notified to the Commission in accordance with Article 4 (1) of the EC Merger Regulation. The national competition law of the Member States is not applicable in this case.

V. Obligation to notify and ban on completion of a concentration

In general, EC merger control follows the concept of prevention. A concentration must not be implemented until it has been declared compatible with the common market (Article 7 (1) of the EC Merger Regulation). The EU-Commission may suspend the completion of a merger until a final decision has been taken (Article 7 (3) of the EC Merger Regulation).

In accordance with Article 10 (1) of the EC Merger Regulation the Commission decides to open a full investigation (so-called second phase) within 25 working days upon receipt of the complete notification. That period is increased to 35 working days where the Commission receives a request from a Member State pursuant to Article 9 (2) or where the undertakings concerned offer commitments to prevent the Commission from prohibiting the concentration (Article 10 (1) sub-paragraph (2) of the EC Merger Regulation). The decision on whether a concentration is compatible with the common market must be taken within no more than 90 working days of the date on which the investigation proceedings are initiated (Article 10 (3) of the EC Merger Regulation). Where the undertakings concerned offer commitments more than 55 working days after the initiation of proceedings, the period is increased to a maximum of 105 working days.

The period may be extended upon request of the notifying parties provided that the Commission receives the request no later than 15 working days after the initiation of proceedings pursuant to Article 6 (1) (c). The notifying parties may make only one such request. The Commission may extend the period at any time with the agreement of the notifying parties. The total duration of any extension or extensions must not exceed 20 working days (Article 10 (3) sub-paragraph (2) of the EC Merger Regulation).

Notifications must be made in one of the official EU languages, and must contain the information required in Form CO (see Annex, No 1). Where incorrect or misleading information is supplied either intentionally or negligently, or where the ban on completion is disregarded, the Commission may impose fines under Article 14 (1) and (2) of the EC Merger Regulation.

ANNEX

Implementing Regulation and Commission Notices and Guidelines on the EC Merger Regulation

- (1) Commission Regulation (EC) No. 802/2004 of 7 April 2004 on the implementation of Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (OJ No. L 33 of 30 April 2004, p. 1) – includes as Annex 1 the “**Form CO**” for notification of a concentration pursuant to the EC Merger Regulation, as Annex 2 the “**simplified Form**” for notification of a concentration pursuant to the EC Merger Regulation, and as Annex 3 the “**Form RS**” for a reasoned submission pursuant to Article 4 (4) and (5) of the EC Merger Regulation; available on the Internet at:
<http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing>
- (2) Commission notice on case referral in respect of concentrations pursuant to Regulation (EC) No. 139/04 – **Case Allocation** - ; available on the Internet at:
<http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing>
- (3) Guidelines on the assessment of horizontal mergers under the Council Regulation (EC) No. 139/04 on the control of concentrations between undertakings (OJ No. C 31 of 5 February 2004, p. 5-18) – **Horizontal Merger Guidelines** -; available on the Internet at:
<http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing>
- (4) Commission notice on **calculation of turnover** under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings (OJ No. C 66 of 2 March 1998, p. 25), available on the Internet at:
<http://www.europa.eu.int/comm/competition/mergers/legislation/mergin98.html>
- (5) Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/04 – **Simplified Procedure** - ; available on the Internet at:
<http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing>
- (6) Commission notice on restrictions of competition directly related and necessary to concentrations under Council Regulation (EC) No. 139/04 – **Ancillary Restraints** - ; available on the internet at:
<http://.europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing>
- (7) Commission notice on the concept of **full-function joint ventures** under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ No. C 66 of 2 March 1998, p. 1); available on the Internet at:
<http://www.europa.eu.int/comm/competition/mergers/legislation/mergin98.html>

- (8) Commission notice on the **concept of concentration** under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ No. C 66 of 2 March 1998, p. 5); available on the Internet at:
<http://www.europa.eu.int/comm/competition/mergers/legislation/mergin98.html>
- (9) Commission notice on the **concept of undertakings concerned** under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ No. C 66 of 2 March 1998, p. 14); available on the Internet at:
<http://www.europa.eu.int/comm/competition/mergers/legislation/mergin98.html>
- (10) Commission notice on the **definition of the relevant market** for the purposes of Community competition law (OJ No. C 372 of 9 December 1997, p. 5); available on the Internet at:
<http://www.europa.eu.int/comm/competition/mergers/legislation/mergmkt.html>