Economic concentrations: revision of the Merger Regulation (EEC) No 4064/89. Green Paper

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PURPOSE : to present the Green Paper on the Review of the Merger Regulation. CONTENT : Council Regulation 4064/89/EEC is known as the Merger Regulation. It sets out rules applicable to large concentrations, the market impact of which is presumed to go beyond any single Member State. In order to deal with the necessity for a level playing field following the establishment of the internal market, it conferred exclusive jurisdiction on the Commission over "concentrations with a Community dimension." Since its adoption, the EU has expanded to 15 states, and is facing further enlargement. There are also the challenges posed by global mergers, monetary union, market integration and the need to cooperate with other jurisdictions. A greater number of pre-merger control regimes are being introduced across the globe with a consequent increase in the costs associated with multiple filing requirements. In addition, whilst many national merger control systems largely follow the principles of the Merger Regulation, various degrees of discrepancy persist, notably in terms of procedure. All these factors lead to the need to revise the overall system of European merger control, so that the Commission and each national authority can use resources for protecting competition in the Community whilst at the same time reducing any unnecessary burden on industry in terms of compliance costs and increasing legal certainty. This is particularly true for medium-sized companies which do not meet the current thresholds of the Merger Regulation, but who still remain subject to multiple national filings. The paper discusses: 1) Jurisdictional issues : - Community dimension : the jurisdictional criteria contained in Article 1(3) have not solved the problem of multiple filing. Of particular concern is the trend indicating an increase in multiple filings to three or more Member States. Enlargement will exacerbate this trend. The Commission proposal focuses on the amendment of Article 1(3) and the introduction of an automatic Community competence over cases subject to multiple filing requirements to three or more Member States. There is a generally positive attitude towards a simplification of the test for an Article 9 referral - perhaps by disjoining the referral request from evidence of a threat of creation or strengthening of a dominant position or by eliminating the need to establish that the requested market is not a "substantial" part of the common market. This would allow cases whose effects do not extend beyond national borders to be more readily referred. The Commission would also refer cases to Member States when the establishment criteria are met. Article 22 should be modified along the same lines. - The concept of "concentration" has been reassessed. The paper discusses minority shareholdings and strategic alliances, and the possibility of extending the Merger Regulation to partial function production JVs. In the end it proposes amending current provisions on multiple transactions in order to ensure more effective application of the merger control rules to three specific types of such transactions and also questions the application of the regulation to certain venture capital transactions. 2) Substantive issues : - The Merger Regulation uses the concept of market dominance. The main alternative merger control test is that of substantial lessening of competition. The paper launches a debate on the respective merits of the two tests. - Simplified procedure : this concerns the Commission's 2000 Notice. This practice might be consolidated into a "block exemption" regulation, so that regulatory burden is removed from transactions harmless to competition. 3) Procedural issues : - Commitments : the most important proposal in the field of procedure concerns a reorganisation of the time schedule for the submission and discussion of commitments in the first and second phases of investigation, with a view to allowing more time for making considered contributions. The paper proposes a stop-the-clock provision. This would operate at the parties' request, thereby avoiding any ex officio prolongation of the procedure. - Due process : a number of issues are investigated, relevant to the investigation, the adoption of decisions and the right to judicial review. Ensuring transparency at each step is of paramount importance. The Green Paper discusses other procedural issues concerning the notification triggering event, as well as the "standstill obligation" in Article 7. It invites comments on electronic filing, submission of notification copies direct to Member States, and filing fees.