Control of concentrations between undertakings. EC Merger Regulation

2002/0296(CNS) - 12/12/2002 - Legislative proposal

PURPOSE : to present a new EC Merger Regulation. CONTENT : this new proposal follows the Green Paper on the review of Council Regulation 4064/89/EEC. (Please see COS/2002/2067). Following the review, the Commission proposes to recast the Merger Regulation. The main points are as follows: 1) Jurisdictional issues : - Community dimension: the Commission has concluded that the most effective way of meeting the two main objectives, that is, optimal allocation of cases and reduction in the incidence of multiple filings, could be achieved through a more streamlined system of referrals. Such a system would be based on an enhanced recourse to the Merger Regulation's referral mechanisms under Articles 9 and 22, including their improvement and use at a pre-notification stage, so as to provide for an effective means of fine-tuning the allocation of cases brought about by the turnover threshold of Articles 1(2) and (3). Given their superior knowledge of the circumstances of the case, the notifying parties are given an exclusive right of initiative at this stage of the procedure. The Commission has exclusive jurisdiction if a minimum of three Member States agree to a case being referred under Article 22. The Commission will also be able to invite Member States to make referrals under Article 22. The main advantage of this system is its precision. Unlike relatively crude turnover, or 3+ type tests, this tests forms the basis of focussing on cases that have a significant cross-border impact at Community level. - Definition of a concentration: the general definition has been amended so as to explicitly include the criteria according to which a concentration requires a change in control and that this control has to take place on a lasting basis. In addition, a proposed new Article 3(4) now explicitly states that multiple transactions which are conditional on one another or are so closely connected that their economic rationale justifies their treatment as a single concentration shall be deemed to constitute a single concentration. 2) Substantive issues: The Commission felt that the dominance test and the substantial lessening of competition test have produced broadly convergent outcomes, and that the dominance test is proving to be an instrument capable of being adapted to a wide variety of situations where market power exists. The Commission therefore proposes a new Article 2(2), which ails to clarify the concept of dominance under the Merger Regulation. The definition now states that one or more undertakings shall be deemed to in a dominant position if, with or without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition. This closely follows the characterisation given by he court of Justice. 3) Procedural issues: on the obligation to notify a concentration before its implementation, the response to the Green Paper show broad support for a flexibilisation of both the timing of notifications and the "triggering event" for notifying a merger. Accordingly, the new draft abandons the one-week deadline for submitting notifications but clearly spells out that the Community's system of merger review is based on ex-ante control. Notifications are allowed where the undertakings concerneddemonstrate to the Commission a good-faith intention to conclude a binding agreement and thus flexibilises the triggering event. On the question of a more flexible timeframe regarding the different phases, the feedback from the Green Paper showed almost unanimous support for a "stop the clock" idea. The proposed key element of a more flexible timeframe has an automatic extension of the Phase 1 deadline to 35 working days if remedies are proposed. There is an optional extension of the Phase II deadline by up to 20 working days in complex Phase II cases and an automatic extension of the Phase II deadline by 15 working days in remedy cases. Additional changes to procedure include an automatic derogation for simplified procedure cases and for acquisitions though the stock market. Enforcement provisions are kept in line with antitrust and there is an increase of the ceilings for fines and periodic penalty payments related to "fact-finding". 4) Other proposed amendments: these include a provision extending the Commission's powers, so that the status quo ante is restored.