

## HT.1277 – Public Consultation on the Application of the

### EC Merger Regulation

#### Response prepared by Reed Smith

## 1. INTRODUCTION

1.1 The following comments are submitted on behalf of Reed Smith. With global capabilities and a multidisciplinary approach, our Antitrust, Competition and EU law group represents clients with operations in the United States, Europe and many other parts of the world. We regularly act for clients in merger proceedings in a wide range of jurisdictions, including before the European Commission (the ‘Commission’).

1.2 We welcome the opportunity to respond to the Commission’s consultation on the application of Council Regulation (EC) No 139/2004 (the ‘ECMR’) and accompanying questionnaire.

1.3 We limit our comments to section B of the questionnaire which deals with the case referral provisions in Articles 4(4), 4(5), 9 and 22 of the ECMR. In general we consider that the case referral provisions are working well and help fulfil the principle of subsidiarity which is enshrined in the EC Treaty. From a business perspective, the referral provisions contained in Article 4(5) also sensibly give companies the option to consider a “one-stop-shop” when merger filings are required in a number of EU Member States. We consider, however, that issues relating to time limits and procedures may deter parties from using this facility.

## 2. PRE-NOTIFICATION REFERRALS – FUNCTIONING OF ARTICLES 4(4) AND 4(5)

2.1 We note that statistics on the Commission’s website show that, as at 31 October 2008, 43 Article 4(4) requests had been made to the Commission since the ECMR became effective in 2004. Of these, there had been 39 referrals to Member States and no refusal to refer. Over the same time period there had been 157 requests for referral under Article 4(5), of which 147 had been accepted and only four had been refused. These statistics suggest that parties are generally using these provisions as they were intended and are correctly identifying those transactions which are suitable for referral. It would seem that these provisions are not simply being used as a means of forum shopping.

2.2 The popularity of Article 4(5) indicates that there is a need for such a provision when parties are faced with notifying a transaction in a number of EU Member States. It allows parties to concentrate their resources on making one filing and managing one

timetable, without incurring filing fees. In theory the existence of the Article 4(5) procedure should have cost benefits for parties faced with multiple jurisdictional filings.

- 2.3 However, when weighing up the benefits of notifying to the Commission against the possibility of making multiple national merger notifications, clients will still tend to opt to make multiple filings in different Member States. This will particularly be the case where the transaction does not raise any competition concerns and has only triggered filings in different Member States because turnover thresholds have been met.
- 2.4 In our experience, clients are deterred from using the referral provisions in Articles 4(4) and 4(5) primarily because the procedure lengthens the decision-making timetable and places an additional burden on the parties to provide detailed information to the Commission before formal notification is made.
- 2.5 The referral procedures contained in Articles 4(4) and 4(5) require a period of 15 working days to be added to the decision making timetable, to allow for the referral request to be approved or vetoed by the Member States. This additional period can deter parties from requesting a referral, as it can delay the completion of the transaction. This is particularly the case where the transaction does not raise competition concerns and clearance can be expected without a detailed investigation being initiated. In such circumstances, parties will often prefer to coordinate notifications across a number of jurisdictions to ensure clearance as quickly as possible so as not to delay the transactional timetable.
- 2.6 We would therefore suggest that the Commission consider introducing an expedited referral procedure under Articles 4(4) and 4(5) in those circumstances where the transaction does not raise any competition concerns and a 'technical' notification requirement has only been triggered because turnover thresholds have been met.
- 2.7 The detailed information that has to be provided with Form RS also acts as a deterrent from using the referral procedures under Articles 4(4) and 4(5). We acknowledge that the parties do have to provide sufficient information to enable the Commission and the Member States to take a decision on referral. However, if the transaction obviously does not raise competition concerns at either a Member State or Community level, we query whether the parties should be required to provide detailed information on the affected market, as set out in Section 5 of the Form RS. This information, which includes details of customers, competitors, suppliers and changes to the market over a five year period, is overly burdensome in relation to proposed transactions that manifestly do not raise any competition concerns.
- 2.8 We would therefore suggest that a Short Form RS be introduced for transactions which do not raise any competition concerns. This could be based on the Short Form CO, with Section 5 of the full Form RS being replaced with a new section based on Section 7 of the Short Form CO. This would only require parties to provide information on markets over a three year period. Alternatively, where the parties can show that the transaction does not raise any competition concerns, the Commission should waive the requirement to provide the information required in Section 5 of Form RS.

### **3. POST-NOTIFICATION REFERRALS – FUNCTIONING OF ARTICLES 9 AND 22**

3.1 For a Member State to request jurisdiction to review a transaction notified to the Commission, it has to show that the transaction threatens significantly to affect competition within that Member State which presents all the characteristics of a distinct market. This places a lower burden on the national competition authorities than would the case if they were required to show that the transaction was likely to strengthen or create a dominant position. As such, the national competition authority does not have to present detailed preliminary conclusions about the competition assessment of the case. In our view, this provision has helped to allow referral requests under Article 9 to be processed more quickly and efficiently. From the parties' point of view, this is particularly important because they will not want the review of their filing to be delayed as this could have a detrimental effect on the transactional timetable.

3.2 We note that since the ECMR became effective in 2004, there have been only 14 referral requests to the Commission from Member States under Article 22. In contrast, there have been 157 Article 4(5) referral requests to the Commission from the notifying parties. This suggests that post-notification referral requests under Article 22 have been displaced by pre-notification requests by the parties to the transaction under Article 4(5). We would suggest that the reason for this is that parties, where they believe the transaction may raise competition concerns, will want to retain some control over the notification timetable. They can do this by making pre-notification referral requests in appropriate circumstances.

### **4. CONCLUSION**

4.1 We hope these comments are helpful. Please contact us if you would like us to expand on them further.

**Reed Smith**

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