Unclassified **DAF/COMP/GF/WD(2011)23**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **10-Feb-2011**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2011)23
Unclassified

Cancels & replaces the same document of 28 January 2011

Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL:
CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from the European Union

-- Session I --

This contribution is submitted by the European Union under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.

English - Or. English

JT03296313

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- European Union --

1. Merger control in the European Union

1.1 Cross-jurisdictional cooperation within the European Union

1. Merger control in the European Union (EU) is based on a sophisticated system for inter-jurisdictional co-operation. On the one hand, EU Member States have national legislation for merger control and on the other hand there is a supra-national system for mergers affecting more than one Member State.[1] Since the first Merger Regulation was adopted in 1989, EU merger control has evolved into a system which combines a clear and foreseeable allocation of jurisdiction while allowing sufficient flexibility for efficient work sharing between the supra-national level and national jurisdictions.[2]

2. The key to make such an intricate system work is deciding which jurisdiction should apply to mergers scrutinised in the EU. The primary guiding principle of the EU system is the "one-stop-shop", i.e. each merger should be handled exclusively by one jurisdiction. The allocation of jurisdiction is determined in the Merger Regulation. Mergers with "EU dimension" are examined at supra-national level by the European Commission (the Commission). Mergers that do not have EU dimension are examined by one or several of the national competition authorities (NCAs) within the EU, provided that these mergers are of a sufficient size to fall under national merger rules.

3. Mergers with EU dimension must be notified to the Commission beforehand. Whether or not a particular merger has EU dimension is regulated in the Merger Regulation.[3]

4. The Merger Regulation's main jurisdictional test stipulates that a merger has EU dimension where:

- the combined worldwide turnover of all the undertakings concerned exceeds EUR 5,000 million and
- the aggregate turnover of each of at least two of the of the undertakings concerned exceeds EUR 250 million, unless
- each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.[4]

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1 Council Regulation (EC) No 139/2004 (the Merger Regulation). The Merger Regulation applies to "concentrations". For the purposes of this paper the term "merger" is used.

2 The most important review of the EU merger rules resulted in the adoption of the 2004 Merger Regulation, which replaced Council Regulation (EEC) No 4064/89.

3 Article 1(1), paragraphs 2 and 3 of the Merger Regulation.

4 Article (1)(1), paragraph 2.

5. The main test has three components, each of them designed to target as precisely as possible mergers where the Commission is best-placed to scrutinise a merger. The first threshold should ensure that only mergers of a sufficient size fall under the Merger Regulation. The second threshold aims to avoid that mergers involving small target companies fall within the scope of the Merger Regulation. The so-called "two-thirds rule" works as a corrective mechanism ensuring that a merger having its nexus in one Member State falls within the scope of that Member State's merger rules. In such cases it is presumed that the NCA in the Member State concerned is best-placed to deal with the merger.

6. One problem identified during reviews of the Merger Regulation is multiple filings in different jurisdictions. Certain mergers not sufficiently large to fall under the Merger Regulation but large enough to be caught by national jurisdictions may have to be notified to a number of NCAs. Multiple filings increase the regulatory burden of the merging parties and make the process less transparent, less predictable and more time-consuming.

7. To reduce the number of multiple filings under national jurisdictions, the Merger Regulation includes a subsidiary jurisdictional test. Mergers which do not meet the thresholds of the main test may still have EU dimension where:

- the combined worldwide turnover of all the undertakings concerned exceeds EUR 2,000 million;
- the combined turnover of all the undertakings concerned exceeds EUR 100 million in each of at least three Member States;
- the combined turnover of each of at least two of the undertakings concerned exceeds EUR 25 million in each of the same three Member States, and
- the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR 100 million, unless
- each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.[5]

8. It should be noted that under the EU system, the notification thresholds in the Merger Regulation do not only determine whether a merger is caught by the merger rules as such but also whether a merger will be examined at the supra-national EU level or at national Member State level. The Merger Regulation is therefore a principal instrument for allocation of jurisdiction.

9. In addition to the "one-stop-shop" principle, allocation of jurisdiction is based on the "best-placed" principle, i.e. a merger should be allocated to the jurisdiction best-placed to handle the case. Even under the assumption that the turnover thresholds enumerated above are set at an appropriate level, it must be recognised that allocation of jurisdiction based on the merging parties' turnover does not always capture transactions with cross border impact and "EU relevance". To increase the flexibility of the system, to take full advantage of the "one stop shop" and to increase the possibilities to allocate a merger to the best-placed jurisdiction(s), the Merger Regulation contains rules for referral of cases to and from the Commission. Such referrals can take place either prior to the notification of a merger (pre-notification referrals) or after (post-notification referrals). For transparency reasons and to create consensus about possible referrals, the EU merger rules include an obligation for the Commission and the NCAs to consult each other. Experience so far indicates that in the vast majority of cases the Commission and the NCAs reach agreement when referrals are appropriate.

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5 Article 1(1) paragraph 3 of the Merger Regulation.

1.1.1 Pre-notification referral at the request of the notifying parties

10. Prior to formal notification, the notifying parties may request that the examination of a planned merger should be referred from the Commission to a Member State or from a Member State to the Commission.

11. By means of a reasoned submission, the notifying parties may inform the Commission that a merger may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market should be examined – in whole or in part – by that Member State. The Member State referred to in the submission must express its agreement or disagreement with taking over the case within 15 working days.[6] If the Member State in question agrees to take over the case and the Commission agrees with the notifying parties' view about the existence of a distinct national market, the Commission may refer the case to that Member State. The Commission must decide whether or not to refer the case within 25 working days.[7]

12. The notifying parties may inform the Commission by means of a reasoned submission that a planned merger - which does not have a EU dimension and which is capable of being reviewed under national law in at least three Member States - should be examined by the Commission. If at least one of the Member States competent to examine the merger disagrees with the proposed referral, the case may not be referred.[8]

1.1.2 Post-notification referral at the request of the Commission or Member States

13. Planned mergers may be referred from the Commission to the Member State concerned after the formal notification has been filed with the Commission. A Member State may inform the Commission within 15 working days[9] that:

- a merger threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market, or;
- a merger 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 internal market.[10]

14. If the Commission considers that there is such a distinct market and that such a threat exists, it Commission shall either:

- deal with the case itself; or
- refer the whole or part of the case to the NCA so that it may be examined under national competition law.[11]

15. The Commission must decide whether to refer or not refer a case within 35 working days of notification and within 65 days of notification if the Commission has initiated proceedings to go into

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6 Reasoned submissions must be forwarded to the NCAs "without delay".

7 Article 4(4) of the Merger Regulation.

8 Article 4(5) of the Merger Regulation.

9 All merger notifications filed with the Commission are directly forwarded to the NCAs.

10 Article 9(2) of the Merger Regulation.

11 Article 9(3) of the Merger Regulation.

"second phase" of its investigation. Once a case is referred to the NCA, it shall decide on the case without undue delay and the NCA must inform the notifying parties of the result of its preliminary investigation.[12]

16. Moreover, one or more Member States may request the Commission to examine a merger that does not have EU dimension, provided that the merger affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or Member States making the request. The request must be done within 15 working days after notification. Any Member State may join the initial request within 15 working days of being informed of the initial request. The Commission must decide whether or not to take over the case within 25 working days.[13]

17. In a report to the Council in 2009, the Commission concluded that the 2004 Merger Regulation contributes to more efficient merger control within the EU.[14] While there are possible areas for improvements, the system of "work sharing" between the national authorities and the Commission works well. According to the report, the turnover thresholds are in most cases effective in distinguishing between cases of EU relevance from those with a primarily national focus. The application of the two-thirds rule, has also achieved this objective in the majority of cases. The system for referrals allows the Commission and the NCAs to re-allocate cases in a more efficient manner for the benefit of the authorities and for businesses.

18. The referral system is beneficial also for businesses because it allows them to take full advantage of the "one-stop-shop" assessment and ensures that their cases are handled by the best-placed authority. The "one-stop-shop" assessment contributes to reducing firms' regulatory burden.

19. Finally, it should be noted that the Commission and NCAs cooperate within the confines of the European Competition Network (ECN). The ECN is a forum for discussion and cooperation between the Commission and the NCAs. The purpose of the ECN is to facilitate an efficient division of work and an effective and consistent application of the EU competition rules.[15] For merger cases there are no formal ECN rules for consultation and cooperation, as opposed to anti-trust cases under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Nevertheless, the ECN provides a forum for the Commission and the NCAs to meet and exchange information on a more informal basis also relating to merger issues.

1.2 Cooperation between the European Union and extra-European jurisdictions

20. The ongoing globalisation of the world economy and the ensuing increase in the number of mergers having an impact on competition in several of the world's main markets makes it increasingly important for competition authorities to coordinate merger cases investigated in parallel across jurisdictions. The Commission cooperates with a number of competition authorities outside the EU. To this end, the Commission has entered into bilateral agreements and Memorandums of Understanding for cooperation in competition cases with a number of jurisdictions such as Brazil, Canada, China, Japan, South Korea and the United States. While such codifications of cooperation facilitates provides a

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12 Article 9(4) of the Merger Regulation.

13 Article 22 of the Merger Regulation.

14 Communication from the Commission to the Council – Report on the functioning of Regulation No 139/2004, 18.06.2009. When preparing the report, the Commission asked stakeholders to submit their views about the Merger Regulation. Businesses, business associations, law firms, lawyer's associations and representatives of academia submitted their views. NCAs were consulted and provided detailed input for the report.

15 "Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities" available at http://ec.europa.eu/competition/ecn/joint_statement_en.pdf.

framework for cooperation, the absence of such arrangements does not prevent the Commission from cooperating with other jurisdictions in merger cases. In the past, the Commission has cooperated with a large number of competition authorities in ongoing merger investigations.

21. While competition authorities can always discuss parallel merger investigations in more general terms, confidentiality issues may sometimes make the exchange of case-specific information more difficult. However, in most cases cooperation between competition authorities simultaneously examining proposed mergers is in the notifying parties' interest because it may avoid delays and divergent outcomes. To allow competition authorities to exchange confidential information related to their respective merger reviews, the notifying parties therefore often agree to waive their confidentiality rights in affected jurisdictions.

22. Cooperation between competition authorities in ongoing merger investigations is mutually beneficial because it allows them to test e.g. market definitions, theories of harm and the feasibility of remedies with their peers in other agencies. Such an exchange of views may be useful not only between mature competition authorities but also between mature authorities and less experienced authorities from jurisdictions with recently adopted merger control regimes. Cooperation facilitates knowledge transfer allowing the less experienced authority to benefit from the mature authority's knowledge and experience of conducting merger investigations.

23. A crucial aspect of proposed mergers being examined by several jurisdictions is the timing of the merger reviews. While it may not be possible – due to divergent rules and notification requirements – to completely synchronise the investigations in different jurisdictions, merger investigations should nevertheless be carried out simultaneously to the extent possible. Experience shows that time-lags – for instance cases where one jurisdiction clears a merger while another has hardly started its review – may have unfortunate effects making the authority still investigating the case susceptible to interference and undue pressure to come to the same conclusion as the authority that already finished its investigation. For this purpose, the Commission regularly advises the merging parties to time their notifications in different jurisdictions with the aim of having decisions adopted as closely as possible to each other time wise.

24. The Commission cooperates most frequently with the federal competition authorities of the United States (the Federal Trade Commission and the Department of Justice). To facilitate this cooperation, an EU-US Merger Working Group published the document "Best Practices on Cooperation in Merger Investigations" in 2002. In the document best practices were established concerning *inter alia* coordination on timing, collection and evaluation of evidence and remedies.

25. The EU-US experience shows that despite divergent legal frameworks (substantially as well as procedurally), "hands on" cooperation and exchange of views between investigative teams is very fruitful, in particular as regards market definition and - in later stages of investigations - remedy design. Coordination in the latter respect is becoming increasingly important as firms internationalise and production facilities cater to demand across the world. For example, the sale of a production facility in the EU to remedy a competitive concern in the EU may have repercussions also in the US and vice versa.

26. In 2010, the Commission cooperated with competition authorities outside the EU in a number of merger cases. Notable examples are Microsoft's acquisition of Yahoo's search business (cooperation with the United States), Stanley Works' acquisition of Black & Decker (in this case the Commission liaised with competition authorities in four jurisdictions, namely Canada, Chile, Mexico and the United States). Cooperation with the Competition Bureau of Canada took place in the Teva/Ratiopharm merger and the Commission coordinated its review of Nokia Siemens Networks' acquisition of Motorola's mobile network business with the authorities in Switzerland and the United States.

2. Implications for developing and emerging economies

27. The EU system for cross-jurisdictional cooperation in merger control may serve as an example for other regions in the world considering setting up supra-national merger control regimes. However, it should be noted that the EU system does not exist in isolation but goes hand in hand with far-reaching economic integration, in particular the rules underpinning the EU internal market. Moreover, the EU has a longstanding supra-national judiciary to settle merger cases. It ought to also be remembered that the Member States negotiated for almost 20 years before the first Merger Regulation was adopted in 1989. In subsequent years the EU merger regime has been revised and fine-tuned (in particular as regards jurisdictional and cooperation issues as described above).

28. The "one-stop-shop" is primordial to any supra-national system for merger review. It is also important that the parameters defining whether or not a merger is subject to *ex ante* regulatory review are based on objective, transparent and foreseeable criteria.

29. Setting appropriate notification thresholds is a difficult exercise.[16] In merger regimes with supra-national and national reviews such as the EU, the thresholds ought to be designed in a manner which allocates mergers to the jurisdiction where the nexus of the transaction is situated. In a "single-jurisdiction" setting, notification thresholds should ideally be set in such a manner that all mergers with potentially adverse effects on competition must be notified to the regulator while all "harmless" mergers fall outside the scope of the merger rules. Designing such a perfect system is impossible in practice. For practical reasons, notification thresholds only serve as a rather crude proxy for identifying potentially harmful mergers and making them subject to merger review. Setting notification thresholds also has strong resource implications. If notification thresholds are set at a sufficiently low level, all anti-competitive mergers would be "caught" by the merger rules but the competition authority would risk being overwhelmed with harmless merger notifications which must be processed as well. Investigating and clearing large numbers of mergers having no adverse effect on competition is extremely resource-consuming. These activities may prevent the regulator from allocating sufficient resources to anti-trust enforcement. Threshold design is therefore a difficult balancing act where the lawmaker aims to "catch" as many potentially anti-competitive mergers as possible while not overburdening the regulator with notifications of mergers which do not affect competition.

30. Basing the obligation to notify a merger on the merging parties' market shares in markets affected by the transaction is a possible alternative to notification based on turnover. At first sight, using the merging parties' market shares seems like an attractive proposition since this measure would allow the regulator to easily identify mergers leading to problematic market shares which merit closer scrutiny.

31. However, a notification system based on market shares is problematic in practice because the obligation to notify would not be based on objective and verifiable criteria. The definition of the relevant market (on which market shares are calculated) is not always a straightforward exercise. In many industries defining the relevant market - in particular the relevant product market – involves complex economic analysis. In most cases, alternative market definitions are (more or less) feasible and may be subject to discussion. Leaving it to the merging parties to define the relevant markets (and thus the market shares) gives the parties an opportunity to circumvent regulatory review by defining artificially wide markets where market shares would seem unproblematic. Due to the ambiguities of market definition also merging parties that wish to fulfil their regulatory obligations find it difficult to determine whether their merger should be notified or not. Using market shares as notification thresholds therefore leads to uncertainty whether or not a proposed merger is subject to merger review and may lead to protracted discussions between the regulator and the merging parties. Merger notification based on market shares is therefore somewhat arbitrary, is likely to be resource-consuming and risks leading to delays.

16 The International Competition Network (ICN) has published a report that discusses "threshold design" in detail. "Setting Notification Thresholds for Merger Review", Report to the 2008 ICN Annual Conference by the ICN Merger Working Group, Notification and Procedures Subgroup.

32. Basing the obligation to notify on the merging parties' annual turnover is admittedly a rather blunt instrument for measuring the potential impact of a proposed merger. The main advantage of this approach is the fact that the thresholds are based on verifiable and objective data (audited accounts), which reduces the likelihood of disputes whether or not a merger is subject to merger review. The logic behind this type of notification threshold is the presumption that mergers involving larger companies are more likely to have an impact on competition in affected markets and therefore also more likely to adversely affect competition. While this is far from true in all cases, it nevertheless serves as a useful "rule of thumb" allowing the regulator to target mergers appropriate for review.

33. Which type of turnover to be included in the thresholds must be specified in detail. While the Commission has opted to use worldwide turnover for its first threshold (the combined turnover of all companies concerned), smaller jurisdictions may possibly consider whether it would be more appropriate to use national turnover for this threshold because it may allow "catching" to a greater degree those transactions that have their nexus in the country in question.

34. Turnover threshold levels should not only be determined in relation to the size of a country's economy, the sectors with particular preponderance in that economy and the size of its firms, but also in relation to how large proportion of planned mergers the lawmaker wishes to be "caught" by the merger rules. Setting the turnover thresholds too low means that the competition authority must examine a large number of mergers with minimal impact on competition. Setting the turnover thresholds too high would mean that some mergers that have an adverse impact on competition risk "slipping through the net".

35. One way of alleviating this dilemma – i.e. setting the turnover thresholds low enough to "catch" most potentially problematic mergers while avoiding to spend a disproportionate amount of resources on processing non-problematic mergers – is to introduce a simplified notification procedure for mergers that are above the merger thresholds but unlikely to cause competitive problems. Under the EU system, mergers fulfilling certain additional criteria may benefit from a simplified notification procedure.[17] In such cases, the Commission's investigation is very limited and the Commission publishes a "short form" decision of less than one page.

36. When establishing a new competition regime it may be advisable to err on the low side as regards turnover threshold values. Although this approach may increase firms' regulatory burden, it is certain that the competition authority will be able to review most potentially anticompetitive mergers. Once the competition authority gains experience and is able to find the right policy balance, the turnover thresholds may be adjusted upwards to a more appropriate level, thereby reducing regulatory costs. For political reasons, it may also be easier for stakeholders to accept reducing the scope of the regulation by increasing the thresholds rather than lowering them.

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[17] Merging parties may submit a short form notification in the following cases: (i.) for joint ventures (JVs) where the turnover of the JV and/or the turnover of the contributed activities are less than EUR 100 million in the European Economic Area (EEA) <u>and</u> the total value of the assets transferred to the JV is less than EUR 100 million in the EEA.; (ii.) when none of the merging parties are engaged in the same relevant markets (no horizontal overlap) or engaged in markets upstream or downstream from markets where another merging party is active (no vertical relationship); (iii.) when the merging parties are engaged in the same relevant market but their combined market share is less than 15% <u>and/or</u> the merging parties are engaged in markets upstream or downstream of each other but none of their individual or combined market shares at either level are 25% or more and (iv.) when a party acquires sole control over a company over which it already has joint control. Anticipating the potential arbitrariness of market share thresholds discussed above, the Regulation states that the Commission may require a full form notification *inter alia* in cases where it is difficult to define the relevant markets (e.g. in emerging markets or markets where there is no established case practice). [Annex II to Commission Regulation (EC) No 802/2004 of 21 April 2004, OJ L 133, 30.4.2004, p.1.]