



## **Working Arrangements**

### **for the functioning of the Advisory Committee on concentrations<sup>1</sup>**

#### ***Purpose***

The purpose of these Working Arrangements is to contribute to the proper functioning of the Advisory Committee on concentrations established by Article 19 of Council Regulation (EC) No. 139/2004 (hereafter “the Merger Regulation”)<sup>2</sup>, and thereby to strengthen the close and constant liaison between the Commission and the competent authorities of the Member States which is envisaged by that Article.

1. These Working Arrangements are complemented by the modalities on the organisation of and participation in Advisory Committee meetings by video-link, provided in the Annex.

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<sup>1</sup> These Working Arrangements have been drawn up by the European Commission’s DG Competition and the competent authorities of the Member States. The Arrangements have been drawn up bearing in mind the joint declaration on the Advisory Committee on concentrations adopted by the Council and the Commission on 20 January 2004, on the occasion of the adoption by the Council for Economic and Financial Affairs of Council Regulation (EC) No 139/2004 on the control of concentration between undertakings (the EC Merger Regulation), and on the basis of preparatory work undertaken by the competent authorities of the Member States in the context of the ECA working group on merger control and by DG Competition. The current version of the Working Arrangements reflects the agreement reached between the European Commission’s DG Competition and the competent authorities of the Member States on 28 June 2016.

<sup>2</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.01.2004) [the “Merger Regulation”].

### ***Convening a meeting***

2. The Commission, as Chair of the Advisory Committee on concentrations, will convene a meeting on its own initiative by sending invitations to the “competent authorities of the Member States”<sup>3</sup>, as set out in Article 19 (5) of the Merger Regulation.
3. In setting the date for a meeting, the Commission should take into account the possible convenience or inconvenience of holding a meeting on a particular day, for example by grouping together similar or related issues in the same or adjacent meetings, or so as to facilitate the attendance of members at other meetings in Brussels.
4. Where appropriate, the Commission as Chair can allow representatives of the competent authorities to attend remotely by video-link a meeting held in person. Such meetings are organised in accordance with the modalities on the organisation of and participation in Advisory Committee meetings by video-link, provided in the Annex. A meeting may, on the initiative of the Commission as Chair and in the absence of disagreement by any of the competent authorities of the Member States, also take place by telephone conference. Normally speaking, it is considered that holding a meeting by telephone conference should only be contemplated in cases where the issues involved are not generally regarded as substantively or procedurally contentious, or where particular urgency justifies resorting to this format for discussion.

### ***Representation***

5. Each of the competent authorities of the Member States should make its best efforts to attend Advisory Committee meetings and, if it does, will be represented by one or two representatives in the manner set out in Article 19(4) of the Merger Regulation.

### ***The “rapporteur”***

6. It has for many years been the practice for a rapporteur to be appointed from among the representatives of the competent authorities of the Member States in the Advisory Committee so as to facilitate discussion in the Committee meeting.

### ***Appointment of the rapporteur***

7. Shortly after the adoption of a decision pursuant to Article 6(1)(c) of the Merger Regulation initiating a second phase investigation, the Commission, as Chair of the Advisory Committee, should appoint one Member State whose representative will serve as rapporteur at the Advisory Committee meeting on the case in question. The nomination of a rapporteur should normally be made in accordance with an order derived from the list of Presidencies of the Council.

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<sup>3</sup> This is the term used in Article 19.

8. Once the selection of a Member State has been made, the Commission should normally then notify the competent authorities of that Member State, and ask them to confirm that the Member State has no objection to its representative being appointed as rapporteur. The rapporteur should be the representative of the competent authorities of that Member State on the Advisory Committee in question, or one of its two representatives.
9. If the competent authorities of the Member State accept the appointment, an individual should be designated as the rapporteur, which individual may in turn request that he or she be supported in his/her functions by a “co-rapporteur”. The nomination of such a co-rapporteur should likewise normally be made in accordance with an order derived from the list of Presidencies of the Council.
10. Once appointed, the rapporteur and co-rapporteur should normally determine between themselves how they wish to share the tasks of rapporteur.
11. If the competent authorities of the Member State decline the appointment of its representative or one of its representatives as rapporteur or co-rapporteur, a reason should be given for doing so and the Commission should proceed to choose an alternative nominee from the rotating list of Presidencies of the Council.
12. Once an individual has been appointed as rapporteur or co-rapporteur, the Commission should without delay inform the competent authorities of the Member States accordingly.

*Role of the rapporteur before the meeting*

13. The rapporteur may wish to prepare for the discussion within the Advisory Committee meeting by familiarising him/her-self with the case during the period of time between being appointed and the meeting taking place. The Commission should facilitate this preparation by ensuring that the appropriate staff are made available to meet with the rapporteur upon his/her request, or by ensuring that the appropriate staff are made available to show documents in the case file to the rapporteur upon his/her request. The latter documents may, in particular, consist of significant third party comments submitted during the course of the Commission’s investigation.
14. The rapporteur should generally, in advance of the meeting, send to the competent authorities of the Member States and the Commission a list of questions to be raised, or a summary of issues to be discussed, at the meeting. A summary of issues to be discussed may include a summary of the main issues raised by third parties during the course of the investigation. A Member State representative may wish to suggest to the rapporteur and the Commission, in advance of the meeting, any further questions which he/she believes ought to be raised, or any further issues which he/she believes ought to be discussed, at the meeting.

*Role of the rapporteur during the meeting*

15. The rapporteur has the function of stimulating a probing discussion of the Commission's draft decision at the meeting of the Advisory Committee. To this end, the rapporteur may propose to the Chair the format for discussion which he/she feels would be most appropriate for the case in question.

**Documentation to be sent to members of the Committee***Documentation to be sent during the course of the investigation*

16. As set out in Article 19(1) of the Merger Regulation, the Commission will send to the competent authorities of the Member States copies of notifications (Form CO<sup>4</sup>) within 3 working days of receiving them.
17. The Commission will, moreover, in keeping with what is set out in Article 19(1) of the Merger Regulation concerning "copies of the most important documents lodged with or issued by the Commission", send copies of, in particular, the following documents to the competent authorities of the Member States, as soon as possible following their promulgation or receipt:
- Copies of Form RS5, together with a note to Member States setting out the preliminary views of the Commission's services concerning the referral request;
  - Copies of all decisions adopted under the Merger Regulation, including in particular those taken pursuant to Articles 6(1)(a), 6(1)(b), 6(1)(c), 4(4), 8, 9, 14, 15, 21 and 22;
  - Copies of "statements of objections"<sup>5</sup>;
  - Copies of legal and economic replies to statements of objections<sup>7</sup>;
  - The report of the Hearing Officer;
  - Copies of commitments offered by the notifying parties<sup>8</sup>.

Generally, those copies shall be sent in their confidential versions, with the exception of copies of commitments, in which the divestiture deadline will be redacted.

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<sup>4</sup> Annex I to Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No. 139/2004, OJ L 133/1, 30 April 2004 ("Implementing Regulation").

<sup>5</sup> Annex III to Commission Regulation (EC) No 802/2004.

<sup>6</sup> See Article 18(1) & (3) of the Merger Regulation, and Article 13(1)-(3) of the Implementing Regulation.

<sup>7</sup> See Article 18(1) & (3) of the Merger Regulation, and Article 13(1)-(3) of the Implementing Regulation.

<sup>8</sup> See Article 19(1), second sentence, of the Merger Regulation.

18. As set out in Article 11(5) of the Merger Regulation, copies of decisions taken pursuant to Art. 11(3) will be sent to the competent authorities of the Member State/s in whose territory the undertaking in question is located and to the competent authorities of the Member State/s whose territory is “affected”, as soon as possible following their promulgation. Upon a “specific request” of a competent national authority, that authority will also be sent copies of “simple requests for information”.
19. Beyond this, as set out above, the Commission should facilitate the preparation of the Advisory Committee meeting by ensuring that documents in its case file - in particular significant legal and economic submissions by the parties (other than those mentioned in paragraph 18) and significant third party comments submitted during the course of the Commission’s investigation - can be made accessible to the rapporteur upon his or her request. In addition, a representative of a competent authority of a Member State may wish to prepare for the discussion at the Advisory Committee meeting by familiarising him/her-self with documentation not normally transmitted to the competent authorities of the Member States. In the context of the close and constant liaison between the Commission and the competent authorities of the Member States as envisaged by Article 19 of the Merger Regulation, the Commission should facilitate such preparation by ensuring that documents in the case file can be made accessible to a representative of the competent authority of a Member State upon his or her request in their confidential version. Those documents may, in particular, consist of
- legal and economic submissions by the parties (other than those mentioned in paragraph 18), including copies of legal and economic replies to decisions pursuant to Article 6(1)(c) of the Merger Regulation;
  - and significant third party comments submitted during the course of the Commission’s investigation, including responses to the Commission’s requests for information from selected third parties.

*Documentation to be sent in advance of the Advisory Committee meeting*

20. As set out in Article 19(5) of the Merger Regulation, the Commission will send a preliminary draft of the decision to be taken in the case, as well as a summary of the case and an indication of the most important documents, to the competent authorities of the Member States not less than 10 working days in advance of the Advisory Committee meeting.
21. In exceptional cases, the Commission may send this documentation to Member States less than 10 working days before the Advisory Committee meeting, as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration. However the period of time allowed should nevertheless be sufficient in order to allow adequate consultation of Member States.

*Means of transmission*

22. Transmission of documentation to Member States should, to the extent possible, be carried out by electronic means or in electronic format.

**Conduct of the meeting**

23. The Advisory Committee meeting is chaired by the Commission.
24. The Commission, as Chair of the meeting, should draw up an agenda for the meeting. This agenda should be sent to the competent authorities of the Member States, together with the invitation.
25. The Commission as Chair should determine the general structure of, and format for, the discussion taking place in the meeting; in doing so and, according to what is most appropriate for the case in question, it may wish to strive for a balance between a formal “tour de table” format, which encourages active contribution by all Member States, and a more informal format. The Commission should at the same time accord a prominent role to the rapporteur in that discussion, in the manner described above, and may discuss with the rapporteur in advance of the meeting how it should best be conducted.

**Opinion of the Committee**

26. The Committee will render a single Opinion.
27. In the absence of unanimity on the Opinion or on a part of the opinion, the opinion is determined by a simple majority of the members of the Committee participating in the Advisory Committee meeting and voting on the opinion (not counting abstentions). This determination will be made by calling a vote, as provided for in Article 19(6) of the Merger Regulation.
28. In the absence of unanimity, the number of votes in favour and against the Opinion, as well as the number of abstentions will be recorded. The record should not identify the members of the Committee having voted in favour of the Opinion, against it or having abstained.
29. The Opinion may briefly record the reasons for views which diverge from, or go beyond, the analysis of the Commission in its draft decision, if a simple majority of the members of the Committee participating in the Advisory Committee meeting and voting on the opinion (not counting abstentions) agrees to the inclusion of such reasoning.
30. Each Member State, irrespective of the number of representatives which it sends to the meeting, is considered as having a single vote for the purposes of adopting an Opinion of the Committee.

31. Members of the Committee must participate in the Advisory Committee meeting in order to be able to contribute to content of the Opinion, or to vote on its adoption. The Opinion should be delivered by the Advisory Committee before the conclusion of the Advisory Committee meeting.
32. As set out in Article 19(7) of the Merger Regulation, the Commission will communicate the Opinion of the Advisory Committee to the notifying parties together with the decision. Moreover, the Commission will publish on DG COMP's website the Opinion together with the public version of the decision or a provisional version thereof within two months after the adoption of the decision, having regard to the need to protect legitimate business secrets. Should the public version or a provisional version thereof not be available within that timeframe, the Commission will nevertheless proceed to the publication of the Opinion on DG COMP's website.
33. The Commission will take the utmost account of the Opinion delivered by the Advisory Committee, and will inform the competent authorities of the Member States of the manner in which the Advisory Committee's Opinion has been taken into account. The Commission will do so at the earliest feasible opportunity following the adoption of the final decision in relation to which the Opinion was rendered. Generally, this could be done on the occasion of the first meeting of an Advisory Committee following the adoption of the decision, or by some other appropriate means. In cases of a (partially) negative Opinion, the Commission shall explain in writing to the competent authorities of the Member States how it took the utmost account of the Opinion within 15 working days after the adoption of the Decision and offer a telephone conference to address possible questions in relation to its written explanations. This telephone conference shall take place within fifteen working days upon receipt by the Commission of a request by a Member State.

#### ***Secretarial support***

34. The Commission, as Chair of the meeting, should provide secretarial support for the Committee.

#### ***Attendance List***

35. The Commission, as Chair of the meeting, should draw up and distribute an attendance list specifying the authorities to which the persons designated by the competent authorities of the Member States to represent them belong.

#### ***Confidentiality***

36. The Commission and the members of the Advisory Committee on concentrations will, in keeping with their obligation of professional secrecy set out in Article 17 of the Merger Regulation, not disclose any information of the kind covered by this obligation which they have acquired *via* the deliberations of the Advisory Committee. Nor should they reveal the Opinion of the Committee before it is made public or any information concerning the deliberations which led to the formulation of that Opinion.

**Status**

37. The European Commission's DG Competition and the competent authorities of the Member States intend to make their best efforts to fully adhere to these Working Arrangements. However, these arrangements do not create any rights or obligations going beyond those set out in the Treaties, the Merger Regulation, and in particular Article 19 thereof, or its Implementing Regulation, as amended from time to time, and as interpreted by the case law of the Court of Justice of the European Union. These arrangements do not alter the Commission's interpretative notices, and failure to abide by them in any respect is not intended to have any legal consequences for the application of the Merger Regulation.
  
38. The European Commission's DG Competition and the competent authorities of the Member States may from time to time decide to amend these arrangements. It is intended that the operation of these arrangements should be reviewed two years following their adoption.