MERGERS (GENERAL): COMMISSION REVIEW

Subject: Mergers

Industry: All industries

Source: Commission Statement IP/00/671, dated 28 June 2000

(Note. Commission plans to review the working of the recently amended Mergers Regulation will be salutary. The amended regulation introduced complicated rules on the criteria based on thresholds; and the vast majority of cases are still relatively straightforward and do not need to be subjected to detailed investigation. The Commission's statement outlines the way in which, subject to the views of industry, it proposes to improve the procedures.)

According to the Commission, in a report to the Council, too many mergers with cross-border effects still fail to meet the turnover thresholds set in the merger regulation as revised in 1997. This report will act as the basis for a more in-depth investigation into whether to propose new modifications to Merger Regulation 4064/89 at a later stage. The Commission has also approved a simplified merger review procedure for mergers, acquisitions and joint ventures which pose no competition problems, with a view to concentrate its scarce staff resources on more complex and problematic deals.

The review of the merger regulation

The merger regulation as last amended requires the Commission to report back to the Council primarily on the working of the new turnover thresholds and the referral procedures. The report covers the period between March 1998, when the revised regulation came into force, and the end of 1999. It provides prima facie indications that more merger cases should be dealt with under Community rules.

Of the total of 4,303 mergers, acquisitions and joint ventures or "concentrations" requiring clearance in the European Union during that period, no fewer than 294 cases were notified to two national competition authorities, rather than to the Commission, because they did not meet the turnover thresholds. Another 31 cases were notified in three Member States and 39 in more than three Member States. By comparison, the Commission received a total of 494 notifications between March 1998 and the end of 1999.

For deals to qualify for the "one-stop shop" review by the Commission, they need to involve companies with a combined worldwide turnover of over € 5b and a Community-wide turnover of over € 250m for each of the companies. The 1997 revision of the regulation introduced complex, secondary thresholds to avoid multiple filings to national competition authorities. However, it appears, on the basis of the survey carried out so far, that a significant number of operations with cross-border effects continue to fall outside the scope of the Regulation. This is of

concern to the business community, for which multiple notifications are tantamount to legal uncertainty, increased efforts and costs.

The Commission recognises that merger control forms an important part of competition policy in many Member States. It therefore believes that any changes to the current jurisdictional rules can be proposed only on the basis of a thorough examination, involving active participation by all interested parties.

Commenting on the way forward, Competition Commissioner Mario Monti said: "If our preliminary data are confirmed in the review process, my ambition will be to introduce amendments by which the Commission's jurisdiction will cover better those operations which have a Community dimension and to offer a greater number of companies the advantages of the one-stop shop principle. After ten years of application of the Merger Regulation, it is appropriate to conduct a forward-looking inventory also of other legal and practical aspects of the Merger Regulation to ascertain the continued effectiveness of this important policy instrument."

Other aspects of the regulation

The 1997 revision also introduced modifications to the mechanisms for referral of cases between the Member States and the Commission (Articles 9 and 22). The report indicates the divergent views of industry and the Member States on the effectiveness and desirability of these provisions. In the review, the Commission intends to assess the functioning of these rules, as well as to collect objective information concerning the impact, if any, on the costs that involved firms will have to bear in referral cases.

Finally, the Commission intends to carry out a more thorough inventory of the Community merger control system, in order to assess whether or not the existing system is well equipped to face the challenges of the foreseeable future. These challenges will include external factors, such as the extension of the Community through the accession of the applicant countries and the continuing "merger boom", as well as internal factors, such as the modernisation of Community anti-trust rules.

In the context of the further review, the Commission will have to rely on information provided by companies with experience from merger control proceedings at the Community level as well as in the Member States. It would therefore encourage the active participation of all interested parties, and in particular those who have not yet made their views known to the Commission.

A simplified procedure for certain cases

In parallel to launching the merger review, the Commission has adopted a Notice, which makes merger procedures more efficient within the present legislative framework. The Notice is based on the experience gained in the application of Merger Regulation, which has shown that certain categories of concentrations do not normally raise competition concerns and are therefore cleared.

The Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 identifies three categories of cases, which would qualify for a short-form decision adopted by the Commission at the end of the usual one month review. The Notice applies to concentrations where: two or more undertakings acquire joint control over a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the EEA territory (turnover of less than € 100m and assets less that € 100m in the European Economic Area – that is, the 15 European Union states plus Norway, Iceland and Liechtenstein); none of the parties is engaged in business activities in the same product and geographical market (horizontal relationships), or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships); and two or more of the parties are engaged in business activities in the same product and geographical market or upstream or downstream market, provided that their combined market share is not 15% or more for horizontal and 25% or more for vertical relationships.

The short-form decision will contain information about the parties, nature of the concentration and economic sectors concerned as well as a statement that the concentration is declared compatible with the common market because it falls within one or more of the categories contained in the Notice, with the applicable category or categories being explicitly identified. As in all full clearance decisions, the Commission will publish a public version of the decision in the Official Journal of the European Communities and on the Internet. There will be no press release, but clearance will be announced in the Commission's Midday Express.

The simplified procedure can reduce the administrative burden on notifying parties. It will still give the Member States and third parties the same opportunities to comment or intervene as under the ordinary procedure. The Commission may also, if necessary, at any time revert to the ordinary investigative procedures. ■

The BASF / American Cyanamid Case

The Commission has decided to authorise the acquisition of American Cyanamid, the crop protection subsidiary of American Home Products, by BASF subject to undertakings submitted by BASF. The takeover will create the third largest crop protection company worldwide. The deal raised serious competition concerns in certain herbicide and fungicide markets, but BASF proposed undertakings, consisting largely of the divestiture or licensing of certain products to a viable independent third party, which will guarantee healthy competition and protect consumers' interests.

Source: Commission Statement IP/00/697, dated 3 July 2000.