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Tel & Fax (44) (0) 1451 861 464
Tel & Fax (1) (207) 439 5932

Email: anharr@cybertours.com

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More about Mergers

In the report in this issue on the *Metsa* case, the Commission makes the following observation: "This is only the fourteenth time the Commission has prohibited a merger since 1990, out of a total of over 1,500 cases notified for regulatory clearance in the past 10 years; prohibition is a decision of last resort when the companies involved do not address or insufficiently address the Commission's legitimate concerns about the creation or strengthening of dominant positions". In other words, prohibitions are rare and may well be avoided. Companies which are contemplating mergers, acquisitions or joint ventures, having a "Community dimension" are well advised to formulate a strategy based on the possibility that they may have to make some concessions to avoid a decision that the operation will create or strengthen a dominant position and be declared incompatible with the common market.

In our last issue, we referred to the main types of "remedies" which have been accepted in merger cases to date, such as divestiture provisions, and noted that the full document prepared by the Commission on merger remedies would shortly be available. The document is indeed a helpful set of guidelines. It rightly gives prominence to the question of divestiture, which is the most frequently employed remedy adopted in cases which would otherwise fail to pass the Commission's test. Company strategy should plainly take into account possible divestitures causing the minimum of disadvantage to themselves and the maximum of satisfaction to the Commission.

However, the guidelines point out that there may be situations in which divestiture is impossible and in which competition problems result from specific features. Of these, the Commission singles out three: the existence of exclusive agreements, the combination of networks or the combination of key patents. "Where the merged entity has a considerable market share, the foreclosure effects resulting from existing exclusive agreements may contribute to the creation of a dominant position"; their termination may be necessary to eliminate competitive concerns. By the same token, the change in market structure resulting from a proposed operation can impede market entry. "Barriers may arise from control over infrastructure, in particular networks, or key technology including patents, know-how or other intellectual property rights. In such circumstances, remedies may aim at facilitating market entry by ensuring that competitors will have access to the necessary infrastructure or key technology." This technology may be divested; but the Commission may accept licensing arrangements – preferably exclusive licences without any field-of-use restrictions on the licensee. (Source: Unofficial text on European Union website. Official text to be published in the Official Journal.)