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Unscrambling mergers

In eleven years, out of a total of some 1,900 cases notified under the Mergers Regulation, the Commission has prohibited only eighteen operations. The number of prohibited *but already implemented* concentrations is even more limited: four cases pursuant to Article 8(4) of the Regulation in total. These are *Kesko/Tuko, Blokker/Toys 'R Us, Schneider/Legrand* and *Tetra Laval/Sidel.* Of these, the first two can be distinguished from the others by the fact that they had been implemented in accordance with national law, having no Community dimension. The *Tetra/Laval* case is reported briefly in this issue, on page 31. It illustrates a problem facing the Commission in all cases involving the "unscrambling" of an operation already carried out: namely, conformity with the legal principle of proportionality, under which the measure in question must be no more drastic than the circumstances of the case require.

As to how a corporation may legitimately complete an operation, only to find it prohibited at a later stage, the Regulation contains an exception to the normal principle, according to which corporations are prohibited from implementing a merger or acquisition without prior approval from the Commission. The exception, contained in Article 7(3) of the Regulation, covers cases in which corporations may implement public bids and acquire the shares of the target company before the Commission's final decision, provided the acquirer does not exercise the voting rights attached to those shares before obtaining the Commission's approval.

Merger Remedies

In the *Schneider/Legrand* case, mentioned above, there was a clear illustration of the risks run by parties who do not discuss remedies early enough. ("Remedies" in this context mean proposals for making an anti-competitive merger or acquisition acceptable to the Commission, mainly by way of some form of divestiture.) In this case, the first remedy package was offered on the very last day for the submission of remedies. Since the market test carried out by the Commission gave a negative result, and the second remedy package offered by the merging companies, after the deadline, was of great complexity, the Commission was not in a position to accept it.

Merging companies, particularly in complex cases, are well advised to start discussing remedies at the earliest possible stage. As explained in the Commission Notice on Merger Remedies, the Commission is prepared to discuss remedies on an informal basis even in the pre-notification phase. The *Total/Fina/Elf* case is a good example of a concentration, leading to the creation of a national champion and raising serious competition problems, being approved due to early discussions on remedies between the parties and the Commission. ■