

# Addendum

This replaces Chapter 9 in the current printed document

## Mergers

A guide to procedures under the Fair Trading Act 1973

September 2002

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## 9 THE EUROPEAN COMMUNITY MERGER REGULATION

- 9.1 Under the European Community Merger Regulation<sup>1</sup> the European Commission has jurisdiction over 'concentrations with a Community dimension' as defined in the Regulation. National competition authorities may not apply their own competition laws to these mergers, except in certain limited circumstances.
- 9.2 The United Kingdom competent authorities for the purpose of the Merger Regulation are the Secretary of State, the Director General and (in limited circumstances) the Competition Commission. As of 3 September 2002, OFT has sole charge of all UK competition advice to the European Commission on cases falling to the ECMR and for decisions on whether to request the referral of an ECMR case to the UK under Article 9 of the ECMR. On the entry into force of the Enterprise Bill, decisions on whether to refer a UK merger to the Commission in accordance with Article 22 will also fall to the Director General alone. The Secretary of State retains responsibility for UK policy on legislative initiatives in relation to the ECMR. The Secretary of State also has responsibility for the taking of decisions relating to mergers falling to the ECMR on action to protect the UK's national security and other legitimate non-competition interests in accordance with Article 296 EC Treaty or Article 21(3) ECMR.

### Concentrations

- 9.3 As from 1 March 1998, concentrations with a Community dimension are defined as those where either:
- a
    - (i) the combined aggregate world-wide turnover of all undertakings concerned is more than € 5 billion, and
    - (ii) the aggregate Community-wide turnover of each of at least two of those undertakings is more than € 250 million, or
  - b
    - (i) the combined aggregate world-wide turnover of all undertakings concerned is more than € 2.5 million, and
    - (ii) in each of at least three Member States, the combined aggregate turnover of all those undertakings is more than € 100 million, and
    - (iii) in each of at least three of the Member States included for the purposes of b(ii) above, the aggregate turnover of each of at

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<sup>1</sup> This procedure was introduced under the Companies Act 1989 and amended by the Fair Trading Act (Amendment) (Mergers Pre-notification) Regulation 1994 (SI 1994/1934)

least two of the undertakings concerned is more than € 25 million, and

(iv) the aggregate Community-wide turnover of at least two of the undertakings concerned is more than € 100 million, unless

c in either case above, each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

9.4 Those mergers which fall within the provisions of the Regulation must be notified to the European Commission within not more than one week after either:

- a the conclusion of the agreement, or
- b the announcement of a public bid, or
- c the acquisition of a controlling interest.

The European Commission has prescribed the form in which a notification should be made. This is set out in Form CO, published as an annex to the Commission's Implementing Regulation 3384, which can be obtained on the Commission's website [www.europa.eu.int/comm/competition](http://www.europa.eu.int/comm/competition).

9.5 Concentrations must not be implemented for at least three weeks (or longer if the European Commission extends the period) after notification. The Commission has one month from receipt of the notification to decide whether the merger falls within the scope of the Merger Regulation and, if so, whether there are serious doubts as to its compatibility with the Common Market.

9.6 If doubts exist, the Commission normally opens proceedings to initiate a full Investigation. In reaching a view on compatibility, it must consider whether the merger creates or strengthens a dominant position as a result of which competition would be significantly impeded in the Common Market or in a substantial part of it. After it initiates proceedings, the Commission has four months to reach a decision.

## Exceptions

9.7 In some circumstances a merger which would normally fall to be considered under the European Community Merger Regulation (ECMR) may instead, in whole or in part, fall to be considered under the Fair Trading Act. There are three relevant provisions of Community law.

- Article 296 of the Treaty of Amsterdam (formerly Article 223 of the Treaty of Rome) provides that Member States are not obliged to supply

information the disclosing of which it considers to be contrary to the essential interests of its security, and may take such measures as it considers necessary for protection of these essential interests. This provision has been used in relation to defence mergers.

- Article 21 of the ECMR allows Member States to take appropriate measures to protect legitimate interests, such as public security, plurality of the media, and prudential rules. It does not, however, prevent the European Commission examining the competition implications of such a merger.
- Article 9 of the ECMR allows the European Commission to refer a merger back to a Member State
  - a if it threatens to create or strengthen a dominant position in a distinct market within a Member State, or
  - b affects competition in a market within a Member State which is a distinct market but which does not constitute a substantial part of the Common Market.

The DTI and appropriate government departments take the lead on liaison with the parties to a merger and the Commission on mergers falling within Article 296 of the Treaty or Article 21 of the ECMR.

- 9.8 Normally, however, mergers that fall within the provisions of the ECMR are not subject to the United Kingdom merger control procedures described elsewhere in this guide. Nevertheless, the Commission always consults the UK competition authorities about such mergers, and the Regulation provides for the national competent authorities to assist the Commission in its assessment.
- 9.9 The OFT receives copies of all merger notifications sent to the Commission and it informs the Commission of any competition concerns such mergers may raise for the United Kingdom.
- 9.10 If the Commission decides to open proceedings to initiate a full investigation, OFT staff participate in any hearings with the merging companies and third parties in Brussels. OFT representatives also attend meetings of the Advisory Committee of Member States, which must be consulted before the Commission can reach a final decision on those cases which have been referred for a full investigation.
- 9.11 It is helpful if mergers with a Community dimension involving United Kingdom companies are brought directly to the attention of the OFT at the earliest possible stage, in addition to the mandatory notification to the European Commission.