

Editorial

New Commission Regulations and Notices on Competition Law Matters

The Commission has published in the *Official Journal* of 31 December 1994 two new Regulations, Regulation 3384/94 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1994 L377/1) and Regulation 3385/94 on the form, content and other details of applications and notifications provided for in Council Regulation 17/62 (OJ 1994 L377/28). On the same date, the Commission published a series of Notices in the C series of the *Official Journal* providing guidance on a number of issues in relation to the interpretation and application of Regulation 4064/89: they deal respectively with the distinction between concentrative and cooperative joint ventures (the Interface Notice: OJ 1994 C385/1); the notion of a concentration (OJ 1994 C385/5); the notion of "undertakings concerned" (OJ 1994 C385/12); and the calculation of turnover (OJ 1994 C385/21). The Notice on Ancillary Restraints of 1990 has not been amended and remains in effect. Anyone involved in the practice or policy of EC Competition Law will need to have these Regulations and Notices readily to hand.

Form A/B

Regulation 3385/94 is of the greatest general interest. It deals with the new Form A/B that must be submitted when applying to the Commission for negative clearance under Articles 85(1) or 86 or notifying for an individual exemption under Article 85(3): the Regulation entered into force on 1 March 1995. A new Regulation had become necessary. The old Form A/B was certainly showing its age, and it failed to take into account developments in the Commission's own practice, in particular the attempt, on its part, to expedite the "clearance" (using that term non-technically) of cooperative joint ventures.

One of the reasons why the Commission is able to deal swiftly with concentrations under Regulation 4064/89 is that Form CO requires a considerable amount of information to be provided at the time of notification; armed with this information, the Commission can in many cases reach a decision reasonably speedily without having to revert to the parties with requests for considerable amounts of additional data. Based on this precedent, it is reasonable for the Commission to require, as a *quid pro quo* for speedy decisions under Article 85, that ample information should also be supplied when making notifications on Form A/B. At one point, the Commission had proposed that this more extensive information should be supplied in the case of *all* notifications; this was roundly criticised, however, as being too burdensome, and the new Regulation adopts a two-tiered approach: only in the case of "structural joint ventures for which accelerated treatment is claimed" must the more ample information be provided. Chapter III deals with the information required in such cases. No doubt there may be situations in the future in which there will be some

difficulty in establishing whether a particular agreement falls within the spirit or letter of Chapter III. However the approach of the Commission is, it is submitted, helpful and sensible, trying to maintain a balance between imposing too high a regulatory burden on undertakings when notifying agreements and ensuring that adequate information is available in those cases where the benefit of the accelerated procedure is sought.

The new Form A/B effects a certain amount of "tidying up" of the old Regulation, which is obviously to be welcomed. It also specifically states, in the recitals, that "the Commission, in appropriate cases, will give the parties, if they so request, an opportunity before the application or the notification to discuss the intended agreement, decision or practice informally and in strict confidence, whereas, in addition, it will, after the application or notification, maintain close contact with the parties to the extent necessary to discuss with them any practical or legal problems which it discovers on a first examination of the case and if possible to remove such problems by mutual agreement...". The Mergers Task Force (the "MTF"), from the moment it opened its doors, encouraged would-be notifiers to approach it confidentially and informally; anyone with experience of the Merger Regulation in practice will know how essential these informal contacts are to the smooth operation of the system. It is very welcome to see the practice now recognised in the Form A/B Regulation as well.

The Regulation contains new rules on the language of the notification and the effective date of notification. Seventeen copies of Form A/B and three copies of the Annexes thereto must be submitted to the Commission.

Form CO

Regulation 3384/94 deals with the new Form CO that must be submitted to the MTF when notifying concentrations having a Community dimension. It also came into force on 1 March 1995. It contains new rules on matters such as the effective date of notification and alterations in material facts. The rights of third parties to be heard are dealt with in Section III of the Regulation. A time-limit is imposed upon the notifying parties wishing to submit modifications to their proposals to the MTF. Twenty-four copies of Form CO and 19 copies of supporting documents must be submitted to the Commission. Not surprisingly the alterations to Form CO are less extensive than those to the old Form A/B.

Notices

The four new Notices are of considerable importance; they are also very helpful. Since the Merger Regulation came into force, the MTF, in conjunction with the lawyers and businesses with which it deals, has gathered considerable experience of a wide range of different and difficult issues: the most obvious (and in some respects the most obscure) has been the

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distinction between concentrative and cooperative joint ventures, but there have been many others as well.

The MTF has been widely praised for its efficiency in handling complex notifications within tight time-limits, and the system has worked better than most predicted at the outset. However there has been an anxiety that much of the relevant "know-how" under the Regulation was shared between a fairly limited number of specialist practitioners and the MTF itself. More transparency has been needed, and this is what the Notices help to provide by summarising the MTF's decisional practice to date.

Of particular interest is the new Interface Notice, which sheds important light on the MTF's approach to concentrative joint ventures: it replaces the earlier Notice of 1990, from which the MTF departed in material respects from a fairly early date. As is well known, some joint ventures are treated as concentrations and, as a result, fall to be dealt with under Regulation 4064/89

rather than Article 85, on the whole with beneficial consequences. The original Interface Notice suggested that a joint venture might be regarded as cooperative rather than concentrative where it could entail a restriction of competition between the parents of the joint venture themselves or "between any or all of them on the one hand and the joint venture on the other hand" (paragraph 20 of the old Notice). The MTF's practice, however, rapidly departed from this proposition by deemphasising the significance of the relationship between the parents and the joint venture, and this is now reflected in paragraph 17 of the new Notice: "[t]he coordination between the parent companies and the joint venture . . . is relevant only in so far as it is an instrument for producing or reinforcing the coordination between the parent companies". As a consequence of this, many joint ventures that might have been regarded as cooperative under the old Notice (and indeed Article 3(2) of the Merger Regulation itself: there is at least an argument that the new Interface Notice is inconsistent with this provision) will fall to be dealt with

as concentration instead with the benefits that flow therefrom.

The new Interface Notice is a welcome statement of the MTF's practice, providing clarity in what had been a somewhat murky area. It is a simpler document to follow than its predecessor and suffers from less internal tension. The "new" Notices are useful in numerous other respects as well, and the increased transparency that they bring is to be applauded.

Conclusion

These Regulations and Notices are welcome, both as housekeeping exercises and as indications of the Commission's decisional practice on certain matters. We must now await further important developments in 1995, including the adoption of the new block exemptions on technology licensing and motor car distribution and, perhaps, the long-awaited Agency Notice.

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