EUROPEAN COMPETITION LAWYERS FORUM

EC MERGER REGULATION

BEST PRACTICE GUIDELINES

INTRODUCTION

One of the fundamental principles underlying the EC Merger Regulation is that in all cases that do not involve "serious doubts", a clearance decision is taken by the Commission within one month from notification. The confidence of European industry and of legal practitioners in the Commission's regulation of mergers is dependent on the Commission being able to process the majority of cases that do not raise competition issues within the one month period.

Declarations of incompleteness under Article 4(2) of the Merger Regulation have only been made in a few cases (17 cases out of a total of 142 decisions in 1997 and 10 cases out of a total of 125 decisions until 30.6.1998).

However there has been a certain increase in declarations of incompleteness in recent years. Members of the ECLF Committee have had an open discussion with the Merger Task Force with a view to coming to a better understanding of the reasons for these declarations.

We have been informed that declarations under Article 4(2) are still only made in exceptional circumstances. The Merger Task Force has explained that notifications have been declared incomplete for principally the following reasons:

- In some cases it was not technically possible to accept a notification. These cases include for example notifications made by two parties while they should have been made by three or more parties, or notifications made before there were sufficiently clear legally binding agreements.

- A number of notifications have been poor in terms of the drafting and adequacy of the information provided.

- In some cases the Merger Task Force has identified late during the one month period potential affected markets that should have been identified by the notifying parties in good faith during the pre-notification stage and in the notification itself.

As a more general point, it was explained that in a number of cases in which the notification has been declared incomplete the notification was not preceded by a pre-notification contact, or such contact has been very limited. There is a higher risk of a declaration of incompleteness in such circumstances.

It is in the interests of the Commission, European business and the legal community to ensure that declarations of incompleteness are kept to the minimum. With this in mind, we have developed the following best practice guidelines in consultation with the Merger Task Force. We recognise that it will not be possible for notifying parties to follow these guidelines in all circumstances.

GUIDELINES

- It is always appropriate even in straightforward cases to have pre-notifications contacts with the Merger Task Force case team. Notifying parties should submit a briefing memorandum at least three working days before a first meeting. This first meeting should take place preferably at least one or two weeks before the expected date of notification. In more difficult cases, a more protracted pre-notification period may well be appropriate.

- Following this first meeting, the parties should provide before notification the Merger Task Force with a substantially complete draft Form CO. The Merger Task Force should be given in general at least one week to review the draft before a further meeting or being asked to comment on the adequacy of the draft.

- At pre-notification meetings, a discussion should take place on what should and what should not be included in the notification. Indeed, it may not be necessary to provide all information specified in Form CO. However, all requests to omit any part of the information specified should be discussed in detail and agreed with the Merger Task Force beforehand.

- Potentially affected markets should be openly discussed with the case team in good faith, even if the notifying parties take a different view on market definition. Furthermore, wherever there may be uncertainty or differences of view over market definitions, it will be more prudent to produce market shares on one or more alternative basis - e.g. by national markets as well as by an EU-wide one.

- Notifying parties and their advisers should take care to ensure that the information in the Form CO has been carefully prepared and verified. Contact details for customers and competitors should be carefully checked to ensure that the Merger Task Force's investigations are not delayed.

- At meetings in general (both at the pre-notification stage and during notification), it is preferable that cases are discussed with both legal advisers and business representatives who have a good understanding of the relevant markets.

Provided these guidelines are complied with, the Merger Task Force case team will in principle be prepared to confirm informally the adequacy of a draft notification

at the pre-notification stage or, if appropriate, to identify in what specific respects it is incomplete.

Despite these guidelines, we recognise that it will not be possible for the Merger Task Force to exclude the possibility that it may have to declare a notification incomplete in appropriate cases.