

DG Competition Information note on Art. 6 (1) c 2nd sentence of Regulation 139/2004 (abandonment of concentrations)

The revised EC Merger Regulation¹ introduced a new provision related to the closure of merger control procedures without a final decision after the Commission has initiated proceedings under Art. 6 (1) c 1st sentence. That sentence reads as follows: “Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration”. Prior to the initiation of proceedings, such requirements do not apply.

This note sets out the requirements for this satisfaction to be achieved.

As a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, format, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the latest act.

In line with this principle, in case of implementation of the concentration prior to a Commission decision, the re-establishment of the *status quo ante* has to be shown.

In other cases, the mere withdrawal of the notification is not considered as sufficient proof that the concentration has been abandoned in the sense of Article 6(1)c. Likewise, minor modifications of a concentration, for example as regards the agreed time of implementation or minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, cannot be considered as an abandonment of the original concentration².

§ Binding agreement: proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by the parties will not be considered sufficient.

§ Good faith intention to conclude an agreement: In case of a letter of intent or memorandum of understanding reflecting such good faith intention, documents proving that this basis for the good faith intention has been cancelled will be required. As for possible other forms that indicated the good faith intention, the abandonment must reverse this good faith intention and correspond in terms of form and intensity to the initial expression of intent.

¹ Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings; OJ L 24/1, 29.1.2004.

² The qualification of a modification as “minor” in the sense of this paragraph does not prejudice the assessment whether the modification requires to submit additional information to the Commission under Art. 5 (3) Reg. 802/2004.

- § Public announcement of a public bid or of the intention to make a public bid: a public announcement terminating the bidding procedure will be required. The format and public reach of this announcement must be comparable to the initial announcement.
- § Implemented concentrations: In case the concentration has been implemented prior to a Commission decision, the parties will be required to show that the situation prevailing before the implementation of the concentration has been re-established.

It is for the parties to submit the necessary documentation to meet these requirements.

This information is without prejudice to the interpretation of Community law which may be given by the Court of Justice or the Court of First Instance of the European Communities.