COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNITY MERGER CONTROL

REPORT FROM THE COMMISSION TO THE COUNCIL

ON THE IMPLEMENTATION OF THE MERGER REGULATION

COMMISSION OF THE EUROPEAN COMMUNITIES

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I. INTRODUCTION

The Merger Regulation which was adopted by the Council on 21 December 1989, created for the first time an adequate legal instrument at Community level for control of mergers which could affect trade across the boundaries of the Member States. This new framework of Community merger control is widely regarded as having been successful. It has provided undertakings which are developing their businesses across the borders of the Member States with a rapid and efficient system of merger control based on a "one-stop" shop and a level playing-field of rules equally applied across the Community.

The Regulation establishes exclusive Commission competence for the assessment of concentrations having a Community dimension. These are mergers, acquisitions or "structural" joint ventures where the annual turnover of the undertakings concerned exceed certain thresholds. Below these thresholds concentrations are only subject to national merger control law if it exists.

After nearly three years of application[1] of the Regulation it is now appropriate for the Commission to report to Council and Parliament on specific aspects of its operation and effectiveness.

In the first place there is a legal obligation to conduct a review of two important aspects of the Regulation[2]. These are the turnover thresholds under Article 1(3) and case referral to the competent national authorities under Article 9(10). The former is of prime importance since it determines the scope of the Commission's exclusive competence; the latter is also of major importance since it establishes the circumstances in which cases which are notified to the Commission could nevertheless be dealt with by national authorities.

At the time of the adoption of the Regulation, a number of specific policy declarations concerning future changes to the Regulation were made:

The Commission itself stated that:

- the main (i.e. world) turnover threshold should be reduced from 5,000 to 2,000 million ECU at the end of the initial stage of implementation and that the Community turnover threshold of 250 million ECU should also be revised in the light of experience and the trend of the main threshold. If the same proportionate reduction is made as for the main threshold, this implies a threshold of 100 million ECU instead of 250 million ECU;

Furthermore, the Commission and the Council together stated that:

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1 The Regulation entered into force on 21 September 1990

2 There is also an implicit review for referral of concentrations of non-Comunity dimension by Member States to the Commission implied under Article 22(6)

- they were ready to consider taking other factors into account in addition to turnover when the thresholds were revised;

- threshold review should be combined with a special re-examination of the method of calculation of the turnover of joint undertakings for the application of Article 5(5);

- a more precise concept of banking income should be applied either, subsequent to the entry into force of the relevant provisions of Directive 86/635 or, at the time of threshold review; and

- the arrangements for the publication of opinions of the Advisory Committee should be reviewed.

The first two declarations concern Article 1 of the Regulation whilst the third declaration bears on Article 5(5). The last two relate to Article 5(3)a and Article 19(7) respectively.

Within the framework provided by the above considerations the present paper

- presents a summary on the implementation of the Regulation to date,

- conducts an examination of specific provisions of the Regulation (including of turnover thresholds and Article 9 referral which is legally required) and examines the case for the scope for improvements, with and without amendments of the Regulation, and assesses the possibility of solving problems within the framework of the existing Regulation.

- proposes that the Commission should postpone any formal proposal to revise the Regulation until, at the latest, the end of 1996.

II. PROGRESS ON IMPLEMENTATION

A. SUMMARY OF DECISIONS

Decisions under Articles 6(1) and 8

1. As of 30th June 1993, 165 operations had been notified under the Merger Regulation and there have been 159 Article 6(1) decisions:

	Number of cases	% of all cases notified	% of cases falling under Regulation
Article 6(1)a (outside scope of Regulation)	17	11	-
Article 6(1)b (compatible with common market)	131	82	92
Article 6(1)c (initiating proceedings)	11	7	8
	159	100	100

As can be seen, of all cases falling under the Regulation, 92% could be cleared in the first Phase whereas Phase 2 proceedings were initiated in the other 8% of cases. However, 8 cases approved under Article 6.1(b) were cleared subject to the inclusion of specific undertakings offered by the parties.

2. Phase 2 proceedings must be closed within a maximum of four months by means of a decision under Article 8 declaring either that

- the concentration is compatible with the common market, but may be subject to conditions and obligations (Article 8(2)); or

- the concentration is incompatible with the common market and is prohibited (Article 8(3)).

To date there has been one prohibition, but in seven other cases the final decision was subject to conditions and/or obligations. In the other two cases no conditions or obligations were attached.

Article 9(2) referrals and Article 22(3) applications

3. Under Article 9(2), a Member State may request the Commission to refer to it notified concentrations which threaten to create or strengthen a dominant position in a distinct market within its territory. To date five such requests have been received. In three cases the Commission initiated Phase 2 proceedings and in one case the operation was cleared in Phase 1. In the remaining case there was partial referral and partial clearance.

Under Article 22(3) a Member State may request the application of the Regulation to concentrations having no Community dimension. The only request to date was that of the Belgian Government that the Commission investigate the effect of the acquisition by British Airways of Dan Air's scheduled air service activities on the Belgian market.

Profile of cases notified

4. Of those cases notified, the majority were in industrial manufacturing particularly the food and drink, chemicals and motor vehicle sectors. Nonetheless, nearly half of the operations notified included service activities, particularly retailing, insurance, computing, banking and wholesaling. These results reflect general trends in the merger activity of the thousand or so largest companies operating in the Community.

Most of the operations concerned either majority acquisitions or establishment of joint ventures in fairly even proportions.

5. By far the majority of notifications concerned undertakings from France, Germany and the United Kingdom, with French companies being particularly active (involved in just over half of all operations notified). This picture was true of acquisitions generally over the same period.

With regard to non-Community undertakings, the most active have been companies from the United States, which were involved in about a quarter of all notifications, followed by companies from Sweden, Switzerland and Japan.

Reflecting the aims of the Merger Regulation, nearly three quarters of all notified cases concerned undertakings from different Member States or from one Member State and a non-Member State. The balance related to firms of the same nationality or extra-Community companies only.

6. Similarly, analysis of the individual case decisions show that 64% of decisions in the first two years involved Community-wide markets and a further 11% concerned markets extending over more than one Member State.

B. EFFECTIVENESS OF THE IMPLEMENTATION OF THE REGULATION

The effect on competitive conditions

7. Over the last three years the Commission has aimed to apply the Regulation in conformity with its fundamental objectives: allowing concentrations which bring about necessary corporate reorganisations in the Community as a result of the opening of national markets to Community and world markets, while prohibiting or modifying concentrations which are likely to result in lasting damage to effective competition in the common market or in a substantial part of it.

The first category of concentrations must be welcomed because they stimulate a dynamic of competition in the common market, open up national markets and increase the competitiveness of European industry by improving the cost structure of the undertakings and by stimulating innovation in a wider competitive environment. The second category of concentrations is harmful to the development of the internal market because they remove the pressure of competition necessary to achieve the benefits of the process of reorganisation. The maintenance and development of effective competition plays a central role in the functioning of the

internal market in terms of trade flows and best allocation of resources of the economy.

The very existence of EEC merger control legislation, supplemented by the considerable amount of informal guidance given to undertakings by the Commission's services, has arguably a significant preventive effect on anti-competitive business strategies in the Community. With respect to formally notified cases the percentage of cases where the Commission raised serious doubts leading either to a modification of the concentration plan already in Phase 1 or to an opening of Phase 2 proceedings amounted to around 15% (20 cases out of 142 as of 30.06.93). This percentage is comparable to that of other merger control agencies.

The Commission prohibited one merger because no other remedy was available to remove the dominant position which would have been created by the merger (Alenia-Aérospatiale/de Havilland). In all other cases, where the serious doubts were confirmed by the outcome of the investigation, the parties modified their original concentration plan in such a way as to remove the competition problem. In those cases, effective competition was preserved and developed through mainly three types of remedies:

- the removal of barriers to entry to the market concerned such as the cancellation of exclusive distribution agreements, the opening up of supply or sales markets which were previously foreclosed or the severance of vertical links between the merging firms and the final customers (cf. Fiat/Ford, TNT/Canada Post et.al., Grand Metropolitan/ Cinzano, Elf Aquitaine/Minol, Air France/Sabena, British Airways/TAT and Alcatel/Telettra);

- the ending of capital, personal or contractual links between competitors in oligopolistic markets (cf. Courtaulds/SNIA, Varta/Bosch, Nestlé/Perrier);

- the divestiture of assets or shares to reduce the market share of the merging firms and facilitate the entry by new competitors (cf. Magneti Marelli/CEAc, Accor/Wagons-Lits, Nestlé/Perrier, Du Pont/ICI, KNP/BT/VRG).

Specific impact on national markets

8. National merger control legislations examine mergers, including mergers having a cross-border impact, from a national perspective (effects on the national market). The EEC Regulation on the other hand has entrusted the Commission with the task of examining the effect of mergers on the structure of competition at Community level, i.e.:

- the market-partitioning effect of mergers resulting from dominant positions on national markets (danger of national champions) and

- the anti-competitive effect of mergers creating dominant positions at Community level through single-firm dominance or oligopolistic dominance resulting from too narrow supply structures.

In its implementation of the Regulation, the Commission has prevented a number of dominant positions which could have foreclosed national markets (e.g. Fiat/Ford, Alcatel/Telettra, Magneti Marelli/CEAc, Varta/Bosch, Accor/Wagons-Lits, Nestlé/Perrier). It has also closely examined cases with a narrow supply structure at Community level (e.g. Du Pont/ICI, Tetrapak/Alfa-Laval, Thorn EMI/Virgin, Rhône-Poulenc/SNIA).

Link between Community and national merger control policies

9. With increasing integration of EC markets, there are less and less markets of purely national dimension. This trend towards integration of national markets is in itself procompetitive and the implementation of the Regulation must take this factor into account. It is in part reflected in the high number of clearance decisions. However, the Commission has to take a realistic view by defining geographic markets in relation to the area where competition actually occurs (national, EEC or even world markets).

Since the adoption of the EEC Regulation most Member States now have merger control laws for mergers below the thresholds of the Regulation. This development is welcomed by the Commission since it guarantees a complete system of protection of effective competition at national and Community level.

The main objective of the national legislations is of course the prevention of dominant positions at national level.

However, this control can lead to:

- authorisations of mergers without taking into account the negative effects at Community level,

- authorisations of mergers in several Member States without taking into account the cumulative effect of these mergers.

These effects can only be mitigated by a lowering of the thresholds or by according the Commission the right to deal with concentrations notifiable under the legislation of two or more Member States.

If firms within the Community are to be able to develop their business on a Community-wide basis and subject to a common set of rules, it is essential that the objectives and methodology and procedures of national and Community merger policies should as far as possible converge. Otherwise, there is the real danger of undertakings seeking to tailor their proposed mergers in such a way as to fall under one jurisdiction rather than another ("forum-shopping"), whether between national jurisdictions, or between national and Community jurisdiction.

Use of referrals procedures

10. The Regulation has a built-in safeguard for cases where action is better carried out at the national level even if

all the thresholds of the EEC Regulation are fulfilled. Article 9 provides for referral of such cases by the Commission to the national authorities in accordance with the subsidiarity principle.

Out of the five requests for referral mentioned above four were from the Bundeskartellamt; one from the competent UK authorities. In three cases (Varta/Bosch, Mannesmann/ Hoesch and Siemens/Philips) the Comission recognised the existence of a threat to competition. The Commission therefore decided to deal with the case itself by initiating Phase 2 proceedings. In general the reason why the Commission decided upon this course of action, notwithstanding the particular threat to effective competition in the Member State concerned, was that the extent of the geographic reference market was not known with certainty at the date of the decision particularly having regard to the fact that markets were in a state of progressive integration.

In one of the two remaining requests for referral (Alcatel/ AEG Kabel), the Commission concluded that a threat to a distinct local or regional market did not exist. The Commission therefore cleared the case after first having addressed a decision to this effect to the national authority concerned.

In the remaining case (Steetley Tarmac) the Commission concluded that for some of the product markets concerned (e.g. bricks), a threat to a geographic market of a local nature existed. Moreover, given the specific characteristics of the other product markets concerned there were no or insignificant spillover effects on markets outside the Member State concerned. Therefore, the Commission referred the assessment of these product markets to the competent national authority.

III. SCOPE OF REGULATION REVISION

A. TURNOVER THRESHOLDS

The existing thresholds

1. The establishment of the existing turnover thresholds in 1989 was made on the basis of very uncertain forecasts as the exact frontiers they would draw between the volume and nature of cases which would be notifiable at Community level and those which would be left to national jurisdiction. The Council recognised this uncertainty by agreeing itself to review the existing thresholds within four years following the adoption of the Regulation and also by stating its readiness to consider taking other factors into account in addition to turnover when the thresholds were revised.

The original Commission proposals and declarations were based on the assessment that a main threshold of 2 billion ECU and a minimum Community turnover threshold of 100 million ECU would in normal circumstances cover the bulk of concentrations having a significant impact on Community trade. This is not to say that there would be no significant operations below these thresholds. The assumption is that below this level concentrations would primarily have a

national impact and, in accordance with the subsidiarity principle, would therefore better be handled at national level.

Need for "one-stop shop" and level playing-field

2. At the time of the adoption of the Regulation, the major advantages of an exclusive Community competence for cross-border mergers were identified as the establishment of a one-stop shop providing a level playing-field for merger control combined with rapid decision-making. The need for a one-stop shop and level playing-field are even greater today.

One consequence of the advent of additional national systems for merger control (e.g. in Belgium, Italy and Portugal) will be an increase in the number of potential 'stops' at which regulatory approval will be required for a given concentration. This will be particularly true for those operations having a competitive impact reaching across several Member States but which, because of failure to satisfy the existing threshold criteria, do not benefit from the "one-stop shop" control available under the Merger Regulation.

At the same time, the need for a level playing-field is not restricted to the largest companies and sectors. With progressive integration in the single market, cross-border trade will increase in more and more sectors and involve firms of smaller size. The relevant geographic market[3] will increasingly be the Community as a whole. The changes induced by the single market program have arguably already provoked an unprecedented wave of cross-border merger activity. This is amply demonstrated by an analysis of merger activity[4] as shown in Annex 1. After the launch of the single market programme in 1985, and encouraged by a favourable economic climate, there was a very substantial increase in merger activity rising to a peak in 1989/90. Due to the general economic downturn, this has now decreased, but merger activity is still running at a level which is approximately 25% above its 1986/87 level.

However, the significant point is that this peak and the maintained high level of overall merger activity is primarily due to the very substantial increase in Community-wide as opposed to national operations. Examination of the first graph in Annex 1 shows that the peak for national mergers was only 30% above its 86/87 level and that this activity has now returned to that level. For Community-wide mergers the peak was 250% above the 86/87 level and is now still double that level. Moreover, there would still appear to be a large number of mergers of Community interest falling outside the Regulation. Currently only about 50 to 60 mergers a year fall under the Regulation. This has to be compared with the 282 Community mergers identified in the Commission's latest Annual Competition Report for the period 91/92.

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3 Exceptions will of course remain, e.g. non-tradeable services such as local retailing or construction

4 Cf. Annual Competition Reports for the corresponding years

Operations falling outside the current thresholds

3. In addition to increasing cross-border activity in the Community, there is other evidence which shows that there are still cases falling below the current thresholds, which have a size and nature which are likely to affect competitive conditions in the Community as a whole and therefore, in accordance with the subsidiarity principle, would be better examined under a single Community jurisdiction.

During the course of the application of the existing Regulation, the Commission has frequently encountered cases, usually through case presentation by parties during pre-notification meetings, where, although the operation was likely to have a strong impact on competitive conditions throughout the Community, the operation nevertheless did not fall under the Regulation because the existing thresholds represented by the 5 billion, 250 million and two-thirds rule were not all satisfied. Specific examples demonstrating this point are listed in Annex 3.

The list in Annex 3 covers a wide variety of sectors. Particularly important cases are likely to arrive in cases involving specific chemicals or high technology products where total turnover for the whole product market concerned can be relatively small compared to the existing thresholds or where turnover for the sector is low generally, e.g. textiles, carpets and paper products. In such types of cases, even if a very large company with annual turnover exceeding 2 billion ECU acquires a smaller company having a high Community market share, the fact that the latter has a Community turnover below the threshold of 250 mECU, will mean that the operation falls completely outside the scope of the Community Merger Regulation. Consequently, it is not sufficient just to reduce the main world turnover threshold. There is in fact an even greater need to reduce the Community threshold.

Traditionally analysis has focused on the industrial sector but appropriate regard must also be had to the increasingly important service sector. Although a large part of these service activities relate to non-tradeable services, there remain key activities in the service sector such as publishing, advertising and computer services, which are increasingly being structured on cross-border lines but, with the existing thresholds, remain outside the scope of Community jurisdiction.

Survey results

4. In order to investigate the practical impact of threshold reduction the Commission has conducted a special survey among nearly 300 of the Community's largest business undertakings as well as among associations representing the views of the business community. This survey was felt necessary because the available data bases on merger and acquisitions were ill-adapted to the analysis required, primarily because of the absence of Community and Member State data which is

critical for the application of the two-thirds rule. A further difficulty was obtaining data on joint venture operations.

The survey aimed to establish what additional operations would have fallen under the Merger Regulation in 1991 and 1992 had the various thresholds been relaxed by:

- lowering the world-wide turnover threshold from 5 to 2 billion ECU,
- reducing the Community turnover from 250 to 100 million ECU,
- abolishing the two-thirds rule.

Given the difficulties in the application of the turnover rules to the financial sector, banks and insurance companies were purposely excluded from the sample. Non Community companies were also excluded. Although the identified sample is not comprehensive, it is believed to cover, subject to the exceptions mentioned, the vast majority of companies in the Community having an annual turnover exceeding 2 billion ECU.

France, Germany and the United Kingdom - the three countries representing the great bulk of merger activity in the Community - represent over 80% of the 276 companies contacted. Participation in the survey was on a voluntary basis and 174 companies have replied to date. This corresponds to a response rate of 63%.

Forecast number of extra cases

5. Extrapolating from the results of this survey, a forecast can be made of the expected number of extra cases falling within the scope of the Regulation if the world-wide turnover threshold were reduced from 5 to 2 billion ECU, in accordance with the Commission's declaration at the time of adoption of the Regulation, and if a corresponding reduction were made in the Community turnover threshold from 250 to 100 million ECU. The forecast extra annual number of cases falling under the Regulation is 50 extra cases if the two-thirds rule is maintained.

As merger activity is subject to considerable fluctuation it is impossible to predict precisely the extra number of cases which would be covered. However the above orders of magni-

tude are comparable to the forecasts of the British and German merger control authorities. Both estimated that if the current thresholds were reduced there would be an approximate doubling of the 50-60 cases a year currently handled by the Commission.

The two-thirds rule

6. In the survey, the current two-thirds rule did not play a role in 33 operations, of which 24 had a cross-border impact.

In 20 operations the two-thirds exclusion rule came into play. Nine cases concerned sectors such as retailing or construction and building products where normally the geographical reference market would be local or regional and where the competitive assessment of such operations would in general be better handled at the national level. On the other hand for the remaining 11 cases, the geographical reference market concerned by the operation was almost always much wider than the Member State for which the two-thirds rule applied. For example, these cases concerned sectors such as steel, textiles, automobile components, machine tools and electric equipment for railways.

If the two-thirds rule were replaced by a three-quarters rule, all 9 cases where a geographical reference market was of a national nature would still all be excluded, whereas of the 11 other cases, 7 would now no longer be excluded. More particularly, each case specifically mentioned above concerning a sector having a geographical reference market typically much wider than the national level, would not be excluded.

The three-quarters rule could therefore arguably represent a better calibration of the existing rule for separating those cases having only a national dimension and better dealt with at the national level from those cases where a wider Community dimension was involved. A further possibility would be a derogation of the two-thirds rule in cases where the merging companies have a substantial absolute Community turnover outside the Member State where the requirements of the two-thirds rule are fulfilled. This would mean that the two-thirds rule would not apply where the turnover in other Member States exceeds a certain threshold. This proposal would in particular solve the problem that large groups of companies such as Siemens or Daimler Benz come frequently under the two-thirds rule, given their strong home markets and considerable exports to countries outside the EC, although the mergers where they are involved have frequently substantial repercussions across the Community.

Position of Community institutions

7. The European Parliament has already formally stated that it is in favour of reducing thresholds. More specifically, in its Resolution on the Nineteenth Report on Competition Policy[5], which was adopted on 24th January 1991, Parliament

5 cf. Point 26 of the Resolution as well as Point 25 of the preceeding DESMOND Report (Document A3-0374/90).

considered that the aggregate world turnover threshold of ECU 5 billion was unrealistically high and that, having regard to the inadequate basis provided by Article 89 of the EEC Treaty for the assessment of concentrations below the thresholds, it would support any proposal to reduce the thresholds provided for in Article 1 of the Regulation.

Similarly, the Economic and Social Committee has raised the question of whether the threshold at which merger control is triggered is not unduly high. In its Opinion[6] on the Twenty-first Report on Competition Policy it expressed the view that the main threshold of ECU 5 billion was too high and that it gave rise to a major series of doubts. Furthermore, it considered that this threshold could neither be justified from an economic nor from a competition policy point of view.

Position of national administration and competition agencies

8. Experts from the Member States and representatives of naional competition agencies were consulted extensively on the result of the Commission's survey and the advisability of the threshold reduction, in particular at a multilateral meeting on 21st June 1993.

A majority of national authorities expressed satisfaction with the existing Regulation but were reluctant to envisage threshold reduction without further experience of the impact of the Regulation. While acknowleding the benefits of the "one-stop" shop and level playing field, they remained unconvinced that there was a sufficient number of cases below the existing thresholds which raised problems, either in terms of operations being covered by several jurisdictions or because the operations concerned genuinely endangered competitive conditions in the Community as a whole and would not be dealt with adequately by national authorities. In this context they recalled the recent strengthening of national merger control policies in Belgium, Italy, Portugal and Spain.

Some national authorities suggested too that inflation would gradually erode the real value of thresholds and that the addition of turnover in the new Member States after enlargement in 1995 would mean that some operations would be eligible that are not eligible now. The Commission acknowledges these factors but is of the view that their potential impact on jurisdiction is limited.

Two authorities link the question of threshold reduction to the establishment of an independent investigation procedure, including, in the longer term, the creation of a European Cartel office.

Some authorities believe that any extension of Community competence for mergers should be examined in the wider context of a general review of the share-out of tasks between the Commission and the Member States in the application of the Treaty articles on competition.

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6 cf. Point 1.3.2 of the Opinion on the Twenty-first Report on Competition Policy adopted by the Economic and Social Committee on 25th November 1992.

Observations of national industry associations, individual undertakings

9. The UNICE and International Chamber of Commerce favour only a reduction of the main threshold from 5 to 2 bECU, with no other changes for the moment.

The BDI, CBI and VNO/NCW-Netherlands are strongly in favour of reduction of the world turnover threshold and the removal/relaxation of the two-thirds rule. With exception of the BDI, they do not wish to see a reduction of the Community threshold of 250 mECU. The CNPF, AGREF and Confindustria are broadly against threshold reduction, although Confindustria would appear in favour of a step-wise increase in future Community competence. The Danish and Greek Industry Associations appear against lowering thresholds.

All industry associations are opposed to an enlargement of the current scope of Article 9, largely on the basis that it would undermine the one-stop shop principle.

The positions are summarised in Annex 2 Part B. The individual comments of the large undertakings indicated in Annex 2 Part C, generally reflect the position of the national industry associations.

Impact of extra workload for the Commission

10. Representatives of business, of legal firms and of national authorities have raised concern as to whether the Commission would be able to maintain the effectivess of the existing control procedures if it had to deal with the increased workload which threshold reduction would bring with it.

Due to a number of factors the Commission believes that the increase in staffing necessary to deal with extra cases following threshold reduction would be significantly less than the proportionate increase in the number of cases (from ± 60 to 110 a year). However it is clear that the additional resources required would have to be taken into account by the Council and the Commission in their final decision on the question.

Overall assessment

11. If the turnover thresholds were reduced in accordance with the Commission's declaration, an additional 50 cases[7] would fall under the Regulation. However, if no change were made to the Community turnover threshold, which generally seems to be the preference of the business community, the number of extra cases is likely to be much smaller (up to 20 cases).

12. From an economic point of view, there are strong arguments for a reduction of the current thresholds in Article 1(2). The progressive integration of the markets within the

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7 or 60 cases if the two-thirds rule is replaced by a three-quarters rule

Community and, linked to this, the increase in the number of cross-border transactions require an extended scope of the Community rules on mergers in order that cross-border operations can be dealt with fairly according to a common set of rules and by one, rather than several, competition agencies throughout the Community.

However there are clear hesitations among the competent authorities and competition agencies at national level on the need to proceed to an immediate reduction in thresholds without further experience of the application of the existing Regulation.

This preliminary assessment on thresholds is expanded in the general conclusions to the paper under point IV.

Use of other criteria to determine jurisdiction

13. The application of fixed quantitative thresholds is inevitably an approximate and somewhat crude method for allocating jurisdiction between the national and Community levels. Ideally, it would be possible to take into account both sectoral and qualitative criteria. The difficulty is that such criteria create genuine problems, especially within the Community framework for merger control which is based on an ex-ante control with rapid decision-making.

Whilst other criteria, such as market share data, can be useful to help determine jurisdiction they are often unavailable or imprecise. Usually, they can only be accurately established after extensive analysis and in critical cases are frequently a subject of contention.

Similarly, another question that could be considered is the introduction of differentiated thresholds on a sectoral basis. This too would raise considerable problems. There would in the first place be the difficulty of establishing varying thresholds by sector in terms of obtaining an "equivalent" measure for merger control. The application of the current thresholds would also become much more complex, particularly in cases concerning firms active across a number of sectors.

At the level of the individual undertakings, turnover data is nearly always fully available and objective. The present approach has the great advantage of providing legal certainty in relation to jurisdictional allocation.

The theoretical advantages gained by the introduction of other criteria such as sectoral or qualitative data, would therefore be considerably outweighed by the practical difficulties they would raise.

B. ARTICLE 9(2) REFERRALS AND ARTICLE 22(3) APPLICATIONS

14. The turnover of undertakings and the size of product markets vary considerably by economic sector. On average a petrochemicals company has much higher turnover than a textile company. A single threshold will necessarily have a varying impact on a sectoral basis. The only way to obtain the same advantages of single Community jurisdiction for those

sectors with below average turnover is a reduction in thresholds. On the other hand, for sectors where average turnover is relatively high, one consequence of threshold reduction is the possibility that there may be an increase in notification of more nationally oriented mergers in these particular sectors. Referral of such cases by the Commission to the Member States allows some fine-tuning in case allocation. This raises the question as to whether there should be a more flexible approach to referral under Article 9 in the interests of a more balanced allocation of cases between the Commission and the Member States.

There are a variety of technical changes that could be made to Article 9 to achieve this objective. The following changes could, for example, be envisaged:

- where an operation concerns only markets representing a non-substantial part of the Community (i.e. local or regional) within a Member State the threat requirement could be removed. This would mean in practice that the Commission would always, upon request, refer a case back to the Member State concerned where a concentration has no impact on a substantial part of the Community;

- the threat requirement could be removed for all cases where a Member State demonstrates that an operation only concerns a distinct market within that Member State, be it a substantial part of the common market or not.

However, since it is now the general position of the Commission to either refer a case to national authorities or open Phase II proceedings where a justified request for case referral has been lodged, it is generally considered that the current terms of Article 9 provide an adequate instrument if existing turnover thresholds were maintained.

15. Lastly, certain concentrations falling below the thresholds may still have a significant impact on competition across national boundaries. It would therefore seem sensible to keep the possibility open for Member States to refer cases to the Commission under Article 22.

Conclusion on referrals

From the experience gained and the evolution in the Commission's practice with regard to application of Article 9, there appears to be no case for amendment of the referrals procedures of the Regulation at this stage. However the matter could be looked at again in the proposed future review of the Regulation by some adjustments of the referrals procedures.

C. OTHER IMPROVEMENTS REQUIRING A CHANGE IN THE REGULATION

16. In the context of the review of the Merger Regulation, the Commission has also examined a number of other possible improvements to the Regulation which were mainly related to procedural issues. In this respect, a distinction has to be made between those procedural changes which need an amendment of the Regulation and those which can be implemented by the Commission on its own authority.

(i) Commitments in the first phase

17. As has already been described above, during the first years of merger control the Commission has felt it justified to accept commitments from companies in Phase 1 examination. It has done so in cases where the competition concern was clear-cut, could easily be remedied and where compliance was easily monitored. Examples were Fiat/Ford New Holland, Elf/Minol, Courtaulds/Snia and British Airways/TAT. This provided the notifying parties with an option to modify their concentration plan so as to remove serious doubts presented by the original plan without needlessly suffering the loss of time incurred in entering Phase 2 proceedings.

Such an approach provides a regulatory response proportionate to the size of the competition problem and the remedy already at hand. Secondly, Recital 8 of the Implementing Regulation[8] provides for the Commission services to discuss difficulties encountered with the companies concerned at any stage in the procedure.

It nevertheless raises questions with regard to procedure and especially transparency and to the ability of the Commission to enforce commitments which can only be fulfilled after the clearance decision has been adopted. Under other competition jurisdictions, proposed undertakings must be made public before they can be accepted in a final decision. Publication of the proposed undertakings before the final Commission decision would give competitors and interested third parties the opportunity to comment.

The following amendments to Article 6(1)b could therefore be considered:

- it could be explicitly stipulated that the Commission may attach to its decision conditions and obligations ;

- subject to confidentiality provisions the commitments proposed by the parties could be made known to third parties, and if appropriate, published in the Official Journal of the European Communities;

- in addition, if it had received settlement proposals at a late stage the Commission could be empowered to prolong the usual time limit of one month for Phase 1, by a maximum of one additional month;

- as a corollary it would be necessary to foresee the same penalties as for Article 8(2) decisions in the event of any failure to fulfil undertakings.

This new procedure would not only allow the Commission to obtain a better knowledge of the practical implications of the envisaged conditions, but it would also allow Member States to be fully informed of any undertakings envisaged and, if necessary, to make their views known in due time.

8 Commission Regulation (EEC) No. 2367/90 of 25 July 1990

(ii) Improving transparency of commitments in the second phase

18. For the same reasons as outlined under point 17 above, the Commission could, subject to business secrecy, make proposed settlements known to third parties and, where appropriate, publish commitments proposed in Phase 2 cases in the EC Official Journal. This would render the Commission procedure more transparent and give third parties a fuller opportunity to comment.

Experience shows, however, that the parties concerned frequently propose commitments only at a relatively late stage of the second phase. Where a commitment is proposed immediately before or after the meeting of the Advisory Committee it would normally not be possible, given the procedural constraints of Phase 2 proceedings, to publish the proposed commitments, grant third parties adequate time to comment and consult Member States before any final decision is adopted within the original deadline. Taking into account the requirements of transparency and the rights of third parties on the one hand and the procedural constraints on the other hand, it appears that an appropriate and balanced solution would be that:

- the Commission would be empowered to prolong the usual time limit of four months for Phase 2 by a maximum of one additional month, where commitments were not proposed sufficiently in advance of the meeting of the Advisory Committee under Article 18(1);

- the Commission may communicate the proposed commitments to interested third parties and, where appropriate, publish them in the Official Journal before the adoption of a clearance decision.

(iii) Changes with respect to banking and credit institutions

19. For the purposes of the application of the turnover rules to banks (i.e. credit and other financial institutions), assets and loans and advances are used as a tool to generate notional turnover. This is prescribed in the existing Article 5(3)a of the Regulation. However, the Commission's experience in banking cases to date has shown weaknesses in the ability of this approach to provide solutions to problems such as:

- the allocation of turnover by geographical area; and

- the calculation of turnover for institutions whose activities either do not include lending or advancing money, or are widely diversified.

Council and Commission partially anticipated this problem. In their joint declaration, they considered that "the criterion defined as a proportion of assets should be replaced by a concept of banking income as referred to in Directive 86/635." This Directive is now implemented in every Member State.

The use of the banking income criterion which includes mainly interest income, income from securities, commissions

receivable and net profit on financial operations has several advantages. It enables credit and financial institutions to be afforded equal treatment; it allows non-lending income to be taken into account and it provides a better reflection of the economic reality behind the activities of these financial institutions. The use of the banking income criterion thus appears more coherent and consistent.

(iv) Appraisal criteria

20. In its resolution of 10th October 1991 (OJ No. C 280/140 of 28.10.91), the European Parliament called on the Commission for a proposal to the Council to amend the Merger Regulation with a view to including in the appraisal of mergers criteria reflecting social, local, regional and environmental policy considerations.

It should be underlined here that the Merger Regulation contributes to the fundamental objective, laid down in Article 3A and 130 of the Maastricht Treaty of ensuring undistorted competition within an open market economy. In the Commission's view it is vital to maintain these efforts through the Merger Regulation, given the fundamental importance of effective competition for the proper functioning of the internal market. However the regulation also requires the Commission to carry out its appraisal of mergers within the general framework of the achievement of the fundamental objectives referred to in the Treaty (see Recital No. 13 and Article 2 para. 1 of the Merger Regulation). Within the existing Treaty, these objectives cover the social, regional and environmental fields. The treaty of Maastricht adds to these objectives the explicit aim of strengthening industrial competitiveness.

Subject to the objective of ensuring effective competition, the Commission can therefore assess competitive conditions and in particular apply the test of dominance in a flexible way which takes account, as far as possible, of other Community objectives.

However the Commission believes that it would be wrong to allow dominant positions to be created on the Community market. Such a policy could initially harm consumers and would ultimately act to the detriment of European firms themselves. Sapped by a lack of competitive pressure they would become less cost efficient and less innovative than their foreign competitors. Nevertheless, the Commission will of course have to take account of the strength of foreign firms both in the Community and on the world market when assessing the impact of a merger inside the Community. At the same time, the strengthening of Community firms to enable them to be better competitors on the Community market and on the world market can and must be taken into account, provided of course this does not result in their obtaining a dominant position which would impede effective competition.

In these circumstances, the Commission considers that there are insufficient grounds for any proposal to the Council to amend the assessment criteria set down in Article 2 of the Regulation. It is nevertheless fully aware of the need for

its merger decisions to be firstly soundly reasoned in relation to the objectives and criteria laid down in the Regulation and secondly to be explained with the maximum of transparency subject to the protection of valid business secrets.

D. JOINT VENTURES

Distinction between concentrative and cooperative JVs

21. The distinction between concentrative and cooperative JVs has proved to be, in practice, one of the most difficult problems in applying the Merger Regulation. Structural, full function JVs fall under the Regulation provided that they do not give rise to the coordination of competitive behaviour between the parent companies or between them and the JV (Article 3(2), subpara. 2). If such coordination is found to exist, the JV is rendered cooperative and is examined under Regulation No. 17 and Article 85 of the Treaty.

On the basis of around 70 decisions on JVs to date under the Merger Regulation, it has been possible to establish a certain case law and to draw a clearer and more realistic borderline between concentrative and cooperative JVs. This development is in line with the Commission's Notice on concentrative and cooperative joint ventures which provides that the principles set out in this text will be followed and further developed by the Commission's practice in individual cases.

The case law developed in the practice to date has established in particular the following principles:

- where only one parent company stays in the JV's market while the other parent company is either inactive or withdraws on a lasting basis from that market the JV is normally considered to be concentrative.

- the cooperative elements of a JV do not prevent the assumption of a concentration where they are only of minor economic importance ('de minimis' rule),

- where the coordination of competitive behaviour between the parent companies takes place on geographic markets outside the EC and has no appreciable effect on competition within the EC, the JV is considered to be concentrative despite this coordination.

For the purpose of legal certainty, the Commission's Notice on concentrative and cooperative operations should, therefore, be modified in the light of the case law developed in the practice to date.

Treatment of cooperative JVs

22. It has been recognised that, compared with concentrative JVs, the treatment of cooperative full function JVs under Regulation No. 17 has been less favourable in terms of rapid proceedings and legal certainty. Since some of these JVs entail important changes in the structure of the

participating undertakings, the Commission decided in December 1992 on a series of measures aimed at facilitating the creation of cooperative JVs. These measures include:

- broadening of existing group exemptions,

- publishing a notice on the assessment of cooperative JVs,

- speeding up proceedings under Regulation No. 17 in cases of cooperative full function JVs.

These new measures strengthen the parallelism in the Commission's handling of joint ventures under the Merger Regulation on the one hand and under Regulation No. 17 on the other. Some experience needs to be gained in their implementation before the need for further improvements is assessed.

De minimis JVs

23. A number of JVs have been notified which either, were of insignificant economic importance or, engaged in activities outside the Community having no or minimal impact within the Community.

The difficulty is that some cases, notwithstanding the minimal JV turnover, can be important. This can be because of the specific product market concerned, e.g. in the case Péchiney/Viag the JV achieved a turnover of only 20 mECU but already had a 33% Community market share. In other cases this can be because of the importance of their parents. Therefore, it does not seem advisable to remove them completely from the scope of the Regulation - only to find an efficient way to deal with them.

This could be achieved by accepting reduced notification requirements for JVs having annual turnover below some threshold. Based on experience a figure between 20 and 50 million ECU seems suitable. Similarly, it could also be envisaged to introduce a threshold based on the market shares of the JV. The parties concerned would need complete only Sections 1 and 2 of Form CO plus provide some basic market information so that the economic significance of the JV could be properly assessed.

Furthermore, joint ventures which are only engaged in activities outside the Community need to be examined under simplified arrangements. According to the "effects doctrine", a principle of international law, an antitrust authority has jurisdiction on those operations completed outside its territory which have direct or indirect and reasonably foreseeable effects on its territory. In the light of this doctrine, it has been argued that where a joint venture obviously has no impact on the markets within the Community, there should be no notification even if the turnover criteria of Article 1 are fulfilled by its parent companies.

However, even so it is necessary to carry out a cursory assessment of the direct or indirect effects of an operation on Community markets. Moreover, if there is no

notification, then doubt remains as to whether the operation concerned might fall within the competence of the Member States. Under these conditions, a pragmatic approach is the most preferable, featuring in particular reduced notification requirements and, where appropriate, a rapid decision-making procedure under Article 6(1)b.

Calculation of the turnover of joint ventures

24. In their joint declaration, the Council and the Commission both considered that the method of allocating the turnover of a JV between its parents should be reviewed. Under the current provisions of Article 5(5), turnover of a jointly controlled JV is shared equally between its parents, irrespective of the size of the financial or voting interests.

To date this rule was relevant in only a few cases. These have not posed difficulties and the rule still remains a valid one from the perspective of shared control. The rule should therefore remain unchanged.

IV. GENERAL CONCLUSION ON THE REVIEW

A. THRESHOLDS

1. As the Commission has endeavoured to explain in this memorandum there are strong economic arguments for threshold reduction. Mergers which may have a significant cross-border effect within the single market are of concern to the Community and it is logical that with progressive integration of Community markets the Community itself should monitor and control them according to a common set of rules applied across the Member States. The "one-stop" shop principle is both administratively sensible and good for business. The Commission nevertheless believes there is a need for caution. The Regulation, as decided in 1989, has proved to be a considerable success, despite some initial scepticism. Indeed there is now widespread acceptance of and satisfaction with the existing arrangements for merger control by the Commission among not only the business community and legal firms but also with national authorities.

There is also a strong level of commitment both at national level and at Community level to ensuring the Regulation is applied effectively.

Any proposal for change must therefore be seen to bring tangible additional benefits and not call into question the progress made up to now. In this respect, the case for threshold reduction rests principally on the judgement as to whether mergers not covered by the existing thresholds will be important enough in terms of their effect on cross-border trade to justify an extension of Community jurisdiction. If their cross-border effect is important, then it is essential to lower the thresholds. Otherwise, business will suffer from the lack of a single jurisdiction across the Member States, and the Community as a whole and in particular its consumers, will suffer from the absence of effective control of mergers of genuine Community dimension.

if, however, their cross-border effect turns out to be less significant, a lowering of thresholds could lead to requests for referrals to Member State authorities, less legal certainty for firms, and as a result a general deterioration in the constructive relationships which the Commission has built up with national authorities and with the business community. The balance of risks must be judged carefully. In the Commission's view, the results of its survey among undertakings tend to suggest there is more to lose by not lowering the thresholds than by leaving them at their present level.

At the same time it is clear to the Commission, from the extensive consultations[9] it has had, that a majority of national administrations and competition agencies feel there is still insufficient evidence of significant benefits from threshold reduction to make a proposal for reduction. They stress in addition that a proposal to modify the Regulation at this stage could call into question the consensus and commitment which has been generated around the application of the existing Regulation. They point in particular to the lack of cases below the thresholds where the Commission would have taken a different decision on a merger to the one taken by national control authorities; as well as to the strengthening since 1989 of merger control policies in a number of Member States.

They also draw attention to the impact of inflation on the real value of the existing thresholds (less 15-20%) and the fact that, if the Community is enlarged, there will be an automatic increase in their Community turnover. Inflation and enlargment are not in the Commission's view of particular significance in jurisdiction terms. However they cannot be ignored. The Commission is also conscious of the fact that while the business community is almost unanimous in its support for a reduction in the world turnover threshold of ECU 5bn, only a small minority of business associations are so far in favour of reducing the Community turnover threshold of ECU 250m at this stage.

In these circumstances, the Commission believes that it would be prudent to gain further experience of the operation of the existing Regulation and of the impact of national merger control policies before making any proposal for revision.

Community-wide merger control is nevertheless a vital element in the functioning of the internal market and this market is integrating rapidly. The Commission therefore believes it would be wrong to delay reexamination of the threshold indefinitely. It would consequently intend to reexamine the possibility of making a proposal to Council to reduce thresholds at the latest by the end of 1996.

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9 in particular multilateral meetings on 21st June and 14th July 1993

B. REFERRALS

2. With respect to the referrals procedures under Article 9, the Commission believes in the light of this review that there is no case at this stage for any specific change to Article 9 although this question could be reexamined at the same time as any review of thresholds.

Since pursuant to Article 22(6) the review of Article 22(3) to (5) is linked to a review of the thresholds, it is furthermore proposed to keep the rules on referrals under Article 22 until the thresholds have been reviewed.

C. OTHER IMPROVEMENTS REQUIRING A CHANGE IN THE REGULATION

3. Given that no change is proposed at this stage with regard to the principal substantive issues of the review (i.e. thresholds and referrals procedures), the Commission suggests that possible improvements of the current procedure, including introduction of the concept of banking income for threshold calculation, which would require an amendment of the Merger Regulation should also be reexamined in the context of any proposal for amendment that the Commission may make, in particular in relation to thresholds, between now and end 1996.

D. IMPROVEMENTS NOT REQUIRING A CHANGE IN THE REGULATION

4. In the meantime, the Commission is envisaging improvements to the current procedure under the Merger Regulation by measures which it can implement on its own authority. In this respect, one basic aim is to increase the transparency of the application of the Regulation.

Improving transparency appears in particular important with regard to commitments accepted by the Commission in the first Phase. It could be envisaged to accept commitments in Phase 1 only where they are offered by the parties at such a stage of the procedure that it would be still possible for concerned third parties to make their views on the proposed remedies known in due time. Where the parties offer a commitment at a stage which is too late in this respect, the parties could either withdraw their original notification and re-notify a modified concentration plan or the Commission could initiate proceedings under Phase 2.

On the basis of these proposals the number of cases in Phase 2 could, however, increase. It would therefore be appropriate, for the Commission, together with the Advisory Committee on Concentrations, to consider the possibility of an accelerated procedure in the second phase in clear-cut cases where an adequate remedy has been proposed by the parties. One possible solution would be to distribute the statement pursuant to Article 18, which contains the commitments, in a limited number of languages and for the Advisory Committee to agree to adopt some opinions in an accelerated and written procedure. Under the very best hypothesis, a final decision under Article 8 could then be adopted in cases which are not disputed within two months after Phase 2 proceedings were initiated.

As to commitments offered by the parties at a late stage of Phase 2, the Commission could pursue a policy of refusing those commitments which are offered at a time when a consultation of interested third parties is no longer possible.

The Commission could bring about further improvements in transparency and legal certainty by issuing guidance statements on the application of the Merger Regulation. This particularly applies to technical and legal issues relating to jurisdiction, calculation of turnover and the notion of concentration. In this context, the Commission's Notice on concentrative and cooperative operations should be modified in the light of the case law developed in the practice to date.

With regard to joint ventures which are only of minor economic importance a more efficient solution could be achieved by accepting reduced notification requirements for joint ventures having annual turnover or a market share below some threshold to be defined by the Commission.

Finally, the decision-making procedure could be made more transparent if the opinion of the Advisory Committee on draft decisions under Article 8 were to be published at the same time as the Commission's final decision is first announced. Similarly, the Commission intends to explain in its decision why it has departed, where applicable, from the opinion delivered by the Advisory Committee.

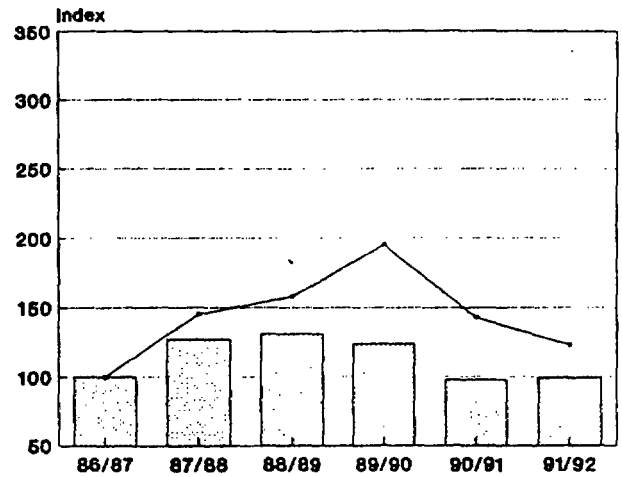
E. PROPOSED ACTION

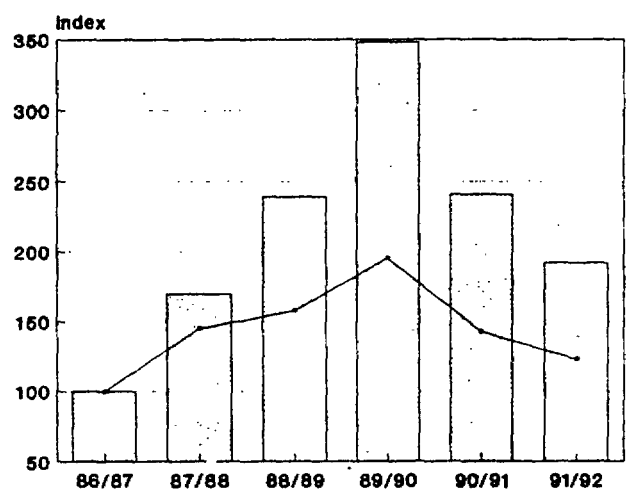
In conclusion, the Commission invites the Council to undertake the review foreseen in Article 1 paragraph 3 and Article 9 of Regulation 4064/89 at the latest by the end of 1996.

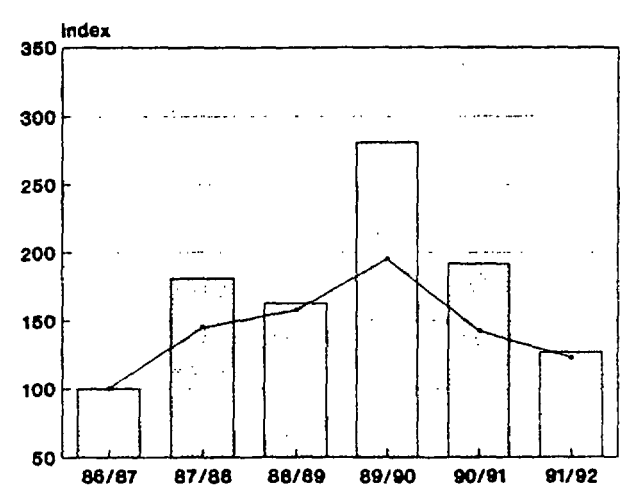
It is also submitting this report for information to the European Parliament and the Economic and Social Committee.

ANNEX 1

ANALYSIS OF TOTAL NUMBER OF MERGERS







1) The pictographs show the development of the number of national or community or international operations expressed as index with a base year of 1986/87 (=100).
2) This analysis is based on the data provided in the Anual Competition Reports for the same period.
3) The operations examined are the acquisition of majority and minority holdings, mergers and industrial and commercial joint ventures.
4) The National classification relates to operations with companies from the same Member State.
The Community classification relates to operations with companies from different Member States.
The international classification relates to operations with companies from Member States and third countries with effects in the Community market.

EXECUTIVE SUMMARY OF RESPONSES RECEIVED TO DATE IN CONSULTATIVE PROCESS

ANNEX 2

BODY	GENERAL POSITION	THRESHOLDS 5bn	THRESHOLDS 250m	THRESHOLDS 2/3	ARTICLE 9	OTHER / GENERAL
Deleted on grounds of confidentiality						

ANNEX 3

Qualitative assessment of prenotifications and otherwise known cases not falling under the existing thresholds

The present annex lists a series of concentrations below the present worldwide and Community-wide turnover thresholds which have been discussed in prenotification meetings between the parties concerned and the Merger Task Force or have otherwise been brought to the attention of the Merger Task Force during the first two and a half years of the initial stage of implementation of Council Regulation 4064/89.

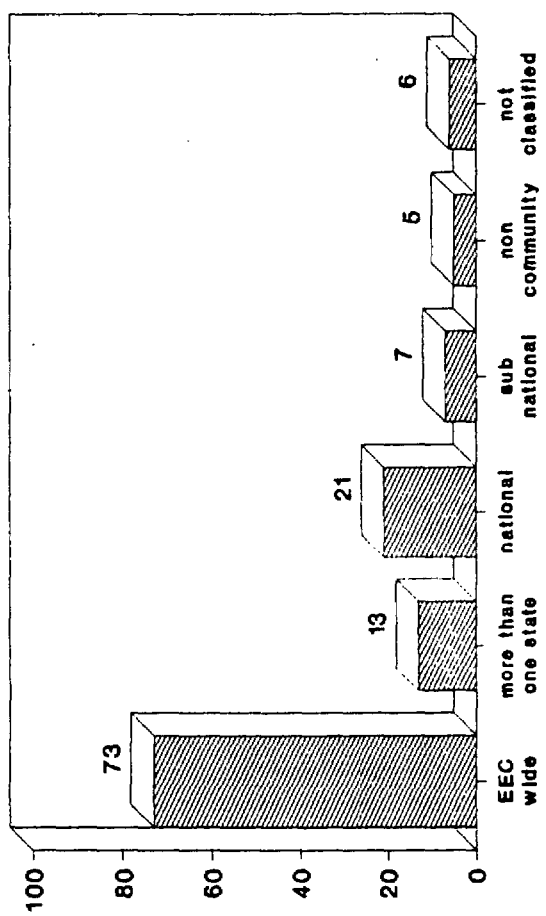
This list is not, and indeed cannot be considered as being, exhaustive. It intends only to illustrate cases of concentrations with a clear cross-border effect having an impact on markets in several Member States.

It should be seen as a supplement to the results of the survey and a number of the cases identified below are in fact included in the survey results.

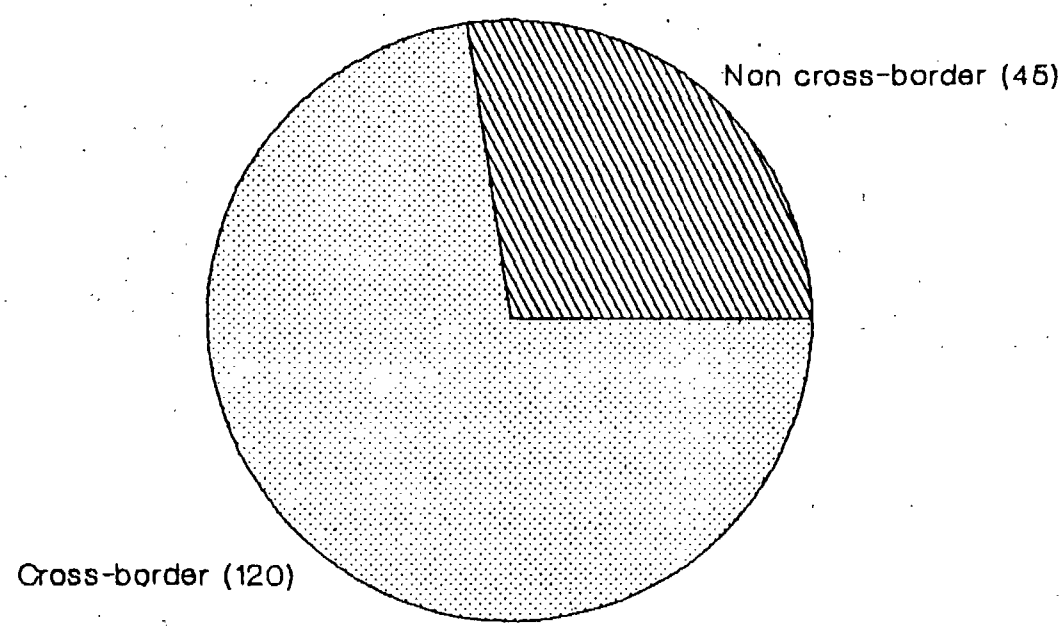
..*

* Deleted on grounds of confidentiality

Geographical market definition
(as set out in the decisions)



Cross-border cases
(all countries)



NOTIFICATION THRESHOLDS IN THE COMMUNITY	THRESHOLDS
EC CONCENTRATIONS	5000 MECU > 250 MECU 2/3 RULE
FRANCE	AGGREGATED TURNOVER =~ 1000 MECU (7000 MIO FF) DE MINIMIS = 2 BILLION FF (25% MARKET SHARE)
GERMANY	AGGREGATED TURNOVER =~ 250 MECU (500 MIO DM) DE MINIMIS = 50 MIO DM (4 MIO DM, IF BUYER > 1000 MIO DM)
UNITED KINGDOM	ASSETS ACQUIRED =~ 40 MIO ECU (30 MIO UKL) (25% MARKET SHARE)
ITALY	AGGREGATED TURNOVER =~ 250 MIO ECU (500 BILLION LIT) OR TARGET COMPANY =~ 25 MIO ECU (50 BILLION LIT)
PORTUGAL	AGGREGATED TURNOVER =~ 25 MIO ECU (5000 MIO ESCUDOS)
IRELAND	2 COMPANIES EACH OF THEM AT LEAST =~ 4 MIO ECU (5 MIO IRL) ASSETS OR TURNOVER 10 MIO IRL
BELGIUM	AGGREGATED TURNOVER =~ 25 MIO ECU (1000 MIO FB) AND 20% MARKET SHARE
GREECE	AGGREGATED TURNOVER =~ 75 MIO ECU
SPAIN	AGGREGATED TURNOVER=~150 MIO ECU (20000 MIO PTA) OR 25% MARKET SHARE
USA	1 PARTY:TURNOVER OR ASSETS=~75MIO ECU (100 MIO $) 2 PARTY: 10 MIO $

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