

**COMMUNITY MERGER CONTROL**

**GREEN PAPER**

**ON THE REVIEW OF THE MERGER REGULATION**

### Executive summary

The Merger Regulation adopted by the Council in 1989 provided the Community for the first time with an adequate instrument for the control of cross-border concentrations. European merger control has been heralded as a success. Within the EEA, mergers falling within the Regulation have all been subject to the same rules and assessed by a single authority, the Commission. This was done rapidly and efficiently, on the basis of transparent procedures.

Since the Regulation entered into force in 1990, more than 350 final decisions have been adopted by the Commission. In a large number of cases the notified transactions did not raise competition problems and were therefore cleared within one month. Where, however, the merger would create or reinforce dominance, measures were taken to prevent a deterioration in the competitive structure of the market. Four operations were thus prohibited and 24 other transactions were substantially altered so as to take account of the Commission's competition concerns.

After nearly five years of European merger control, the Commission is bound, in light of its 1993 commitment to the Council, to examine the workings of the Merger Regulation. This requirement covers mainly the level of the turnover thresholds, above which concentrations are notifiable to the Commission, but also the means by which transactions are referred between the Commission and the Member States. The Commission is, in addition, taking this opportunity to respond to shortcomings of the Regulation and to criticisms of its operation to date.

The Green Paper which follows details the existing regulatory framework for mergers at both the Community and Member State level. It then presents a series of options for discussion. These may be summarised as follows:

- Thresholds: at present the turnover of the companies involved in a concentration must exceed ECU 5 billion on a worldwide basis and, for at least two of those companies, ECU 250 million in the Community. A considerable number of mergers likely to affect market structure in more than one Member State fall below these high levels. The information available to the Commission suggests that thresholds of ECU 2 billion and ECU 100 million respectively would be more appropriate.
- Multiple notifications: companies whose turnovers do not reach the present high levels of turnover, are faced with 13 different national merger control systems in the EEA. Multiple national filings increase uncertainty, effort and cost for business and may lead to conflicting decisions. A threshold reduction would solve this problem to a large extent. As a "second best solution", it could be provided that cases of multiple notification below the current thresholds would only be controlled by the Commission.
- Joint ventures: two main approaches for improving the treatment of joint ventures within the framework of Community competition law are presented. These two approaches are detailed by reference to various options for implementation.
- A number of other, mainly procedural improvements are proposed concerning the acceptance of commitments in the first phase of investigation and other aspects of the Regulation.

-Banking income: proposals to simplify the method of calculating turnover for credit and financial institutions and the geographic allocation of this turnover are made.

The purpose of this Green Paper is to stimulate a far-reaching debate. Its preparation has drawn upon the opinions expressed by other Community institutions, the Member States, and the industry and legal profession during the Commission survey carried out last year. However, the options presented in this Green Paper should not be considered to be either complete or exhaustive.

The Commission believes that the Regulation's scope should be extended to cover a larger number of mergers with a Community dimension. Furthermore, current practice can be improved in the ways mentioned in the Paper. The opinion of all interested parties is sought to allow a full discussion of these issues.

## **GREEN PAPER**

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## **I. INTRODUCTION**

1. Council Regulation 4064/89 on the control of concentrations between undertakings ("the Merger Regulation") was adopted on 21 December 1989 and entered into force on 21 September 1990. The Merger Regulation applies to all concentrations having a Community dimension defined on the basis of the annual turnover of the companies concerned.
2. The Commission first examined the functioning of the Merger Regulation in 1993. That exercise was prompted by the legal obligation to review the turnover thresholds under Article 1 and the case referral rules under Articles 9 and 22. In addition, the Commission took the opportunity to examine the operation of the Regulation as a whole, in order to identify other areas in which improvements could be made.
3. The result of the 1993 exercise was a Report from the Commission to the Council<sup>1</sup> which concluded that there were strong arguments in favour of a threshold reduction. However, the Commission considered that it would be prudent to gain further experience of the operation of the Merger Regulation and of the impact of national merger control policies before making any formal proposal for revision. It therefore invited the Council to postpone the review of the thresholds until the end of 1996 at the latest. The Council endorsed these conclusions in September 1993.
4. In the two years that have elapsed since the 1993 exercise, there have been significant changes in the legal, political and economic environment. As a result of the enlargement of the Union, but also of regulatory developments in the old Member States, there has been an increase in the number of national merger control systems in the Community. At the Community level, merger control has entered into a phase of consolidation, exemplified by the adoption of a new Implementing Regulation<sup>2</sup> and a new set of guidelines at the end of 1994<sup>3</sup>. In addition, the practical applications of the subsidiarity principle were developed in more detail by the Community institutions and the Member States. Finally, in the context of an ever-increasing market integration in the Community and the recent economic upturn, trans-national merger activity has intensified<sup>4</sup>. Against this background, a review of the Regulation is necessary in order to establish how the benefits of the internal market can best be ensured by an effective European merger control policy.
5. In the context of the current merger review, the Commission services conducted a survey of Member States, companies, industry associations and advisers to seek their views as to a revision of the Regulation (see Annex 1). The European Parliament and the Economic and Social Committee were also invited to express their opinion.

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<sup>1</sup>COM (93) 385 final, 28 July 1993.

<sup>2</sup>Commission Regulation (EC) No 3384/94 of 21 December 1994, OJ No L 377, 31.12.94, p.1.

<sup>3</sup>Commission Notices of 21 December 1994, OJ No C 385, 31.12.1994, p. 1, 5, 12 and 21.

<sup>4</sup>After reaching its peak in 1990, cross-border M & A activity diminished in 1991 to stabilise in the following years at about 1350 operations per year. 1994 was, however, characterized by an increase of M & A activity, both in terms of the number of operations and in terms of value, European Economy (March 1995), Supplement A.

6. The Green Paper is published as a basis for further discussion of specific changes that may be made to the Regulation. It has the following objectives:

- to provide an analysis of the current situation;
- to examine, pursuant to the commitment made by the Commission to the Council in 1993, whether the current thresholds should be revised;
- to identify other areas where improvements could be made and to present possible solutions.

7. The Commission will consult the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions on the content of this Green Paper. It also invites all interested parties to submit comments. In order to respect the timetable of the review exercise, such comments should be communicated to the Commission by no later than 31 March 1996<sup>5</sup>. The Commission then intends to examine the results of the consultation process and make a proposal to the Council within 1996.

## **II. THE EXISTING REGULATORY FRAMEWORK**

### **A. MERGER CONTROL AT THE COMMUNITY LEVEL**

#### **1. The Merger Regulation**

8. The Merger Regulation gave the European Commission specific powers for the assessment of all concentrations with a Community dimension. These are mergers, acquisitions or concentrative joint ventures in which: (i) the world-wide turnover of all the companies involved exceeds ECU 5 billion; (ii) the Community turnover of at least two of the companies involved exceeds ECU 250 million (this means a minimum of ECU 500 million combined Community turnover); and (iii) all companies involved do not realize more than two-thirds of their Community turnover in one and the same Member State (Article 1 of the Regulation).

9. The Regulation is based on the "one-stop shop" principle. This means that the Commission has exclusive competence to assess concentrations with a Community dimension and that, as a result, the companies concerned need only make one notification within the European Union. Below the thresholds, concentrations are subject to national merger control if that exists. Following the entry into force of the 1994 Agreement on the European Economic Area (EEA), the European Commission's exclusive competence for concentrations meeting the thresholds has been extended to cover the whole EEA territory.

10. The allocation of cases between the Commission and the Member States under Article 1 is complemented by the provisions of Articles 9, 21, paragraph 3 and 22. Article 9 enables the Commission to refer to a Member State cases raising competition issues limited to a distinct

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<sup>5</sup> Observations can be sent to by fax (fax no. 32-2-296 43 01) or by post to the following address: Commission of the European Communities, Directorate- General for Competition (DG IV), Directorate B-Merger Task Force, Avenue de Cortenberg 150, B-1049, Brussels, Belgium.

market within its territory. Article 22, paragraphs 3-5, allows a Member State to request the Commission to apply the Merger Regulation to operations below the thresholds creating or strengthening dominance within that Member State's territory. Article 21, paragraph 3, allows Member States to take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation, including public security, plurality of the media and prudential rules. Moreover, in the course of its investigation and assessment of notified concentrations, the Commission acts in close and constant liaison with the competent authorities of the Member States (Article 19 of the Merger Regulation) as well as the EFTA Surveillance authority (Article 58 of the EEA Agreement).

11. The Merger Regulation set up a system of mandatory prior notification for all concentrations of Community dimension. Notified concentrations are assessed from the point of view of their effect on the structure of competition in the common market. The basic concept is that of "creation or strengthening of a dominant position". There are two phases of examination whose duration is determined by legal deadlines. After an initial one-month phase, the Commission must decide whether or not the case raises serious doubts as to its compatibility with the common market and, in the affirmative, initiate an in-depth investigation. Four months after the initiation of phase 2 proceedings, the Commission must take the final decision on the concentration.

12. As of 30 October 1995, 376 concentrations had been notified to the Commission under the Merger Regulation. The Commission has adopted 357 final decisions:

- 31 decisions under Article 6(1)a of the Regulation (declaring that the operation falls outside the scope of the Regulation);
- 303 decisions under Article 6(1)b of the Regulation (declaring the concentration compatible with the common market at the end of the first phase of investigation);
- 19 decisions under Article 8(2) of the Regulation (declaring the concentration compatible with the common market at the end of a phase 2 in-depth investigation);
- and 4 decisions under Article 8(3) of the Regulation (prohibiting a concentration).

Twelve cases under Article 6(1)b and twelve cases under Article 8(2) were cleared subject to conditions and/or obligations to ensure compliance with commitments given by the parties. Three cases were referred to Member States following a request under Article 9 and two requests were made by Member States under Article 22 (3). In three cases Article 21 (3) was applied.

## 2. Article 66 of the European Coal and Steel Treaty (ECSC)

13. The ECSC Treaty provides that all concentrations involving at least one undertaking engaged in the production or distribution of coal or steel and established in the Community are subject to prior authorization by the Commission. With the assent of the Council, the Commission has set minimum levels, based on the companies' volumes of production, below which concentrations are exempted from the requirement of prior notification. For crude steel or finished products, for example, there is a minimum level of 6 million tons per year, which corresponds to approximately ECU 2.5 billion.

## **B. MERGER CONTROL AT MEMBER STATE LEVEL**

14. There are currently eleven national merger control systems in the Community<sup>6</sup>, of which eight are mandatory. Out of the remaining four Member States, the Netherlands is in the process of adopting a system of mandatory pre-merger control and it is not excluded that the other three may also introduce national legislation in the future. A table setting out the main features of the existing national systems and the proposed Dutch system is included in Annex 2.
15. A comparative analysis of the different national systems shows that there is a great variety in the notification requirements, procedures used and legal standards applied. Formal cooperation between the national authorities that may be involved in the same case is mainly limited to some bilateral contacts, generally for information purposes.
16. As regards the authority competent to deal with mergers within each Member State, in most countries more than one separate authority plays a role in the decision-making process. Out of the eleven countries, in five the final decision is taken by an administrative/ministerial body, in four by an independent competition authority, in one by a judicial authority, and in one either by a judicial authority (prohibition decision) or by a competition authority (clearance). Finally, in two countries the decision of the independent competition authority may be overruled by an administrative/ministerial body on grounds of public interest.
17. The thresholds triggering an obligatory or voluntary notification also vary to a large extent in terms of the criteria used (i.e. turnover, either in the country concerned or world-wide, world-wide assets or market share in the country concerned) and the level at which intervention is set (the required world-wide turnover of each of at least two companies concerned is, for example, ECU 0,36 million in Austria, ECU 25,2 million in Ireland and ECU 520 million in Germany, the total world-wide turnover is, for example, ECU 430 million in Sweden and ECU 1,04 billion in Germany, and the required total turnover in the country concerned is, for example, ECU 125 million in Spain, ECU 180 million in Portugal and ECU 300 million in Italy or more than ECU 1 billion in France)<sup>7</sup>. To the extent that the different levels of intervention do not fully correspond to differences in the respective sizes of the national economies, they may lead to varying degrees of control for companies of comparable size.
18. As regards the duration of proceedings in the different Member States, the preliminary phase of investigation is generally short and does not in any case exceed two and a half months. The duration of in-depth investigations is more varied, especially because in some cases there are no statutory deadlines, while in others the legal deadlines can be extended, for instance for the receipt of additional information. Moreover, a number of systems provide for control after the implementation of a concentration within a period ranging from one month to an unlimited period.
19. In terms of assessment, all Member States use competition criteria in their analysis of notified mergers. The possibility to take account of public or general interest criteria is also provided in most cases. The precise impact of these other criteria in the final assessment of the case is difficult to establish and may differ from one Member State to the other.

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<sup>6</sup>There are two additional systems of voluntary notification in the EEA, namely in Iceland and in Norway.

<sup>7</sup>These thresholds were converted into Ecu on the basis of the average rates for 1994.



20. The number of cases examined under each of the eleven Member State systems varies considerably. In the countries that have a system of mandatory notification, the average number of cases ranged from 25 per year in the case of Portugal to about 1540 a year in the case of Germany<sup>8</sup>. Of the three countries with a system of voluntary notification, France and Spain received on average about 24 cases per year, while the United Kingdom received 150-200 cases per year.
21. There are differences among Member States with regard to the manner of publication of their decisions and the amount of information contained therein. In some cases the whole text of the decision, including the competitive assessment of the case, is published. In other cases only certain decisions (e.g. prohibitions or most important decisions) are published, while for the rest an announcement is made.

### **III. CRITERIA DETERMINING THE COMMISSION'S JURISDICTION**

#### **A. THE PRESENT SITUATION**

22. This section examines what would be the optimum allocation of merger cases between the Commission and Member States in the light of two fundamental community objectives: the principle of subsidiarity and the objective of sustaining market integration through a rapid and uniform assessment of mergers with significant cross-border effects. It then assesses whether, on the basis of the information available, the Regulation thresholds should be maintained at their current level.

##### **1. Basic principles**

###### *Subsidiarity and merger control*

23. The Merger Regulation was intended to apply to significant structural changes "the impact of which on the market goes beyond the national borders of any one Member State" (Recital 9). Concentrations with significant cross-border effects were considered to have a Community dimension. It was therefore decided that the Commission should have exclusive competence to deal with them, while Member State merger laws should apply to concentrations with mainly national impact.
24. The allocation of cases between the Community and the Member States in the area of merger control was thus inspired by the same principles that underpin the notion of subsidiarity. According to this notion, action should be taken at the most appropriate level of jurisdiction, in view of the objectives to be attained and the means available to the Community and the Member States<sup>9</sup>.

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<sup>8</sup>In the remaining countries the average number of notifications per year was: 35 in Belgium, 55 in Ireland, 132 in Sweden, 238 in Italy and 310 in Austria (informal and formal). These figures represent an average of the notifications made in 1993 and 1994. In Greece about 25 notifications were received per year under the previous regime of voluntary notification.

<sup>9</sup>See *Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle*, COM (93) 545 final, 24.11.1993.

25. A concentration has significant cross-border effects if its impact on the structure of competition extends over a geographic area exceeding the borders of a single Member State. This is, for instance, the case when the merging parties have significant activities in several Member States or their activities in a single Member State may have significant competitive repercussions in other parts of the Community, for example when the concentration may impede entry by competitors from other Member States, thus creating obstacles to further European integration, or when the entrenchment of a national position may have spillover effects in the rest of the Community.
26. For concentrations with significant cross-border effects, action at Community level is justified given the objectives of merger control and the means available to the Commission and to Member States. Within the Community, the powers of investigation as well as of remedial and enforcement action of the Commission extend beyond national boundaries and are therefore wider than those of a single Member State. Moreover, in the context of increasingly global or at least inter-dependent economies, control at the Community level facilitates the assessment of the effects of these mergers in a uniform manner and in their totality.

#### *Market integration and the "one-stop shop" principle*

27. Cross-border mergers and acquisitions are one of the most important ways in which industry can successfully adapt to the new challenges of a European single market. They are therefore a positive consequence of market integration, to the extent that they do not result in lasting damage to competition (Recitals 3-5 of the Merger Regulation).
28. It is important that the extent and the manner in which concentrations with significant cross-border effects are controlled should be uniform throughout the Community. It is also desirable that their assessment under the competition rules does not unduly delay their implementation or create legal uncertainty.
29. Accordingly, the Merger Regulation has two goals: first, to prevent anti-competitive transactions and, second, to provide a single framework within which concentrations with a Community dimension are assessed within a definite and foreseeable timetable. The "one-stop shop" principle, whereby concentrations with a Community dimension are only controlled at Community level, facilitates the accomplishment of the second goal.
30. The application of the "one-stop shop" principle to concentrations with a Community dimension is related to the notion of subsidiarity: exclusive control at Community level is justified in view of the scale and effects of such transactions. It is also based on efficiency considerations. As an alternative to multiple national controls, the single "stop" of the Regulation simplifies administrative procedures and enables businesses to minimize the costs of restructuring in a single market. It creates a level playing field by ensuring that the same notification requirements, procedure and legal standard apply to all concentrations with significant cross-border effects.

#### 2. The current thresholds

31. In accordance with the above, the Community dimension of a concentration should ideally be defined on the basis of its effects on the market. For reasons of practicability and legal

certainty, however, the Merger Regulation uses quantitative criteria to identify operations with cross-border effects. These are the aggregate turnover of the undertakings concerned world-wide and in the Community.

32. When the Regulation was adopted, it was generally understood that the level of the turnover thresholds had been set by way of political compromise. For this reason the Council considered that after an initial phase they should be reviewed in the light of the experience gained (Recital 10). The Commission and the Council also declared that they would be ready to consider taking other factors into account in addition to turnover when the thresholds were revised.

33. In its above-mentioned 1993 Report, the Commission stated that, with progressive market integration in the Community, cross-border merger activity had substantially increased, but only a small number of those cases fell within the scope of the Regulation. The Report gave specific examples of concentrations that fell outside the Regulation, although they were likely to affect competitive conditions throughout the Community. On this basis, the Commission concluded that the Regulation thresholds should be reduced.

34. The results of the present review tend to suggest that the reasons for which a threshold reduction appeared to be appropriate in 1993 are still valid today. While, with continuing market integration, cross-border merger activity has further increased in size and importance<sup>10</sup>, there are indications that a considerable number of concentrations with significant cross-border effects fall below the current thresholds. This is due to the size and/or characteristics of sectors where cross-border merger activity takes place, and to the size of the companies involved. Moreover, it appears that concentrations with significant cross-border effects falling below the thresholds are likely to be subject to multiple national filings that increase uncertainty and cost and may lead to conflicting decisions.

#### *Sectoral coverage of the Regulation*

35. The Commission competence depends on the level of the aggregate turnover that the companies concerned realize world-wide and in the Community. The Merger Regulation is therefore more likely to apply to concentrations involving companies active in markets with very large total turnover and/or conglomerate enterprises. By contrast, concentrations in which the acquirer and/or the target are specialized companies, active in smaller but still economically important markets, are less likely to meet the thresholds.

36. The Commission has carried out two separate assessments in order to ascertain the sectoral coverage of the Regulation. These are set out below together with an appreciation of their results.

37. The first analysis involves the comparison of the number of notifications under the Merger Regulation by economic sector with the number of concentrations listed by AMDATA<sup>11</sup> in the corresponding sector. This has identified a number of sectors whose coverage by the

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<sup>10</sup> See fn. 4.

<sup>11</sup> A database providing information on mergers and acquisitions compiled by *Acquisitions Monthly*.

Regulation is below or just above 10%<sup>12</sup>. Examples of such sectors include mechanical engineering, electrical and electronic engineering, computer manufacturing, rubber and plastic products, textiles, manufacture of food products and beverages, metal products, manufacture of wood, manufacture of medical instruments, construction, energy supply, printing and publishing, hotels and catering, computer and related services, banking and finance. The coverage of some other sectors is also limited. For instance, chemicals, the sector where the largest number of notifications are made under the Regulation, has a coverage of only some 16%.

38. The second analysis aims at the identification of specific concentrations with significant cross-border effects falling below the current thresholds<sup>13</sup>. These concentrations cover a wide variety of sectors, some of which were also identified under the above exercise. Examples of these sectors are: chemical products including base chemicals, specialty chemicals and downstream applications; pharmaceuticals; components for the automotive industry; mechanical and electrical engineering; biotechnology; construction materials; computer software; paper products; publishing; aircraft leasing; tourist services and catering.
39. These concentrations were excluded from the Merger Regulation either because all companies involved taken together did not meet the world-wide threshold or because the Community-wide threshold was not met by each of at least two of those companies. With regard to the Community-wide threshold in particular, it must be noted that even if a very large company acquires a smaller company having a high Community market share, the fact that the latter company has a Community turnover below 250 million ECU will mean that the operation falls outside the scope of the Merger Regulation. Similarly, even operations involving two large companies may fail to meet the Community threshold, if they concern a swap or acquisition of specific parts or businesses. In such cases, as far as the seller is concerned, only the turnover of the acquired part can be taken into account, and even if this corresponds to a high Community market share, it may still fall short of the Regulation threshold.
40. Restructuring operations in most of the above-mentioned sectors often have a trans-national dimension, since company activity extends over several Member States. Their weak coverage therefore indicates that a considerable number of cross-border operations are excluded from the scope of the Regulation. In some other sectors, such as banking and finance or energy supply, the market players tend to have a strong national presence. However, even in these sectors it appears that operations are increasingly being structured on cross-border lines. With the existing thresholds, such concentrations remain outside the scope of Community jurisdiction.

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<sup>12</sup>By way of comparison, the coverage of certain other sectors such as air transport and telecoms is more than 50%. The reasons for these differences are due to the characteristics of each sector explained in the present section.

<sup>13</sup>The Commission has compiled two lists of specific examples of such cases, the first covering the period up to 1993 and the second covering the period 1993-95. These lists have been communicated to the Member States, but are not annexed to this paper for reasons of confidentiality. Most of these cases would have come within the scope of the Regulation under lower thresholds of ECU 2 billion (world-wide) and ECU 100 million (Community-wide).

41. There are various reasons why concentrations with a Community dimension within the above-mentioned sectors are excluded from the Regulation. These reasons are linked to the specific characteristics of each sector.
42. First, in some sectors such as textiles, printing and publishing or hotels and catering, the total turnover achieved by even the largest companies is below the current world-wide threshold<sup>14</sup>. This does not mean that the sector as such is of minor importance. To give one example, in 1993, European production in the textiles sector amounted to ECU 106 billion and consumption to ECU 110 billion. The three largest EU textile companies are among the ten largest in the world<sup>15</sup>.
43. Second, in a number of diversified sectors, there is company specialization in segments of relatively small total turnover. In these sectors, acquisitions of specialized companies with significant market presence or transfers of businesses/divisions of larger groups can be excluded from the Merger Regulation. For instance, in the vehicle spare parts and components sector, despite the presence of some large international companies, there is a considerable degree of fragmentation due to a large number of small to medium-sized specialized producers.
44. The sector of mechanical engineering is another interesting example. This important sector - in 1992 it occupied the fifth place in the EC industrial production ranking - includes a wide range of diversified products. The industry has a polarized structure, with a high degree of concentration at the top end of the industry, a limited number of very large players and a large number of small and medium-sized enterprises.
45. In the chemicals and pharmaceuticals sector, about 16% of all concentrations are notified to the Commission. For such an industry of transnational dimension, this coverage can be regarded as relatively weak. The main explanation for this appears to be the great diversity of chemical products and the trend towards specialization via restructuring. This strategy results in a number of swaps or acquisitions falling outside the Regulation because of the small turnover of the acquired/divested business.

#### *Company coverage of the Regulation*

46. The current thresholds catch only a small percentage of European companies. Out of the largest 2200 European companies included in the 1995 *DABLE Synopsis of European Enterprises*<sup>16</sup>, only 152 companies in the EU and EFTA States (7% of all DABLE companies) had in 1993 a world-wide turnover in excess of ECU 5 billion. A total of 293 companies (13% of all DABLE companies) had a world-wide turnover in excess of ECU 2.5 billion and would thus come under Community control in a concentration involving companies of equal size.
47. Although these figures do not include all companies covered by the Regulation, notably non-European companies, they indicate that the company coverage of the Regulation is relatively limited. This is all the more significant, because market globalisation and increasing

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<sup>14</sup>The data used are included in the 1995 *DABLE Synopsis of European Enterprises*

<sup>15</sup>*Panorama of EC Industry*, Ch. 14, Office for Official Publications of the European Communities (1994).

<sup>16</sup>The European Commission's Database on Large Enterprises.

integration within the Community are expected to lead to the involvement of a larger number of companies, including medium-sized enterprises, in cross-border merger activity in the future. Medium-sized enterprises that do not benefit from the "one-stop shop principle" would probably come within the jurisdiction of several Member States and thus be subject to multiple national filings.

#### *The two-thirds rule*

48. Data concerning the extent of the application of the two-thirds rule to European companies are not generally available. The Commission is, however, aware of some large European groups, such as Siemens, that meet the two-thirds rule and yet have substantial activities in the Community outside their home market. Concentrations between two or more such groups of the same nationality would fall outside the Regulation, although they could have substantial repercussions across the Community.

#### *Geographic markets affected by concentrations below the thresholds*

49. The Commission has requested the Member States to specify in how many cases notified to them in the last two years the relevant geographic market was defined as being larger than national or more than one national geographic market was affected.

50. Based on these replies, the Commission has tried to make an estimate of the number of cases with significant cross-border effects below the thresholds. However, the information required was in many cases to a greater or lesser extent unavailable. Even in those cases where data were available, only some concentrations likely to have significant cross-border effects could be identified, namely those in which the geographic market was defined as being larger than national<sup>17</sup>. According to these data, at least about 10% of the cases notified in Italy, about 20% in France, Spain, Belgium and Portugal, more than 30% in Austria and more than 50% in Germany<sup>18</sup> would appear likely to have significant cross-border effects.

#### *Multiple national filings*

51. Concentrations with significant cross-border effects falling below the thresholds are subject to national merger laws. Because of their trans-national character, these operations are likely to meet the notification requirements of more than one national system.

52. Multiple national filings are a direct consequence of the high level of the current Community thresholds and of the multiplication of national merger control systems in the European Union. As a general rule, the existence of multiple national filings is indicative of the cross-border effects of an operation. Such concentrations should therefore be dealt with at Community level.

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<sup>17</sup> Concentrations affecting one or several national geographic markets can also have significant effects going beyond the borders of a single Member State, but this information is not readily available.

<sup>18</sup> The German data relate to operations in which at least one non-German company was involved. Although not all cases in which companies of different nationalities are involved have effects going beyond the boundaries of a single Member State, these data can be used as an indication of the number of operations with cross-border effects.

53. According to the survey, the overwhelming majority of companies, industry associations and advisers believe that the "single stop" of the Regulation is a benefit to business. When a concentration is notified in several Member States, deadlines for decision-making may differ and completion of the deal will be dependent on the decision of the last authority. Differences in approach between the national systems involved, for instance with regard to the application of public interest criteria, may affect the predictability of the final outcome. In this respect, the greatest advantages of the "one-stop shop" appear to be legal certainty and speed of decision-making.
54. In practical terms, dealing with a plurality of different authorities requires the coordination of information to be provided with regard to timing and argumentation. The facts contained in the notification and the manner they are presented needs to be adapted to the particularities of each national market and procedure. Moreover, familiarity with different legal systems and the ability to work in different languages is required. For most companies this necessitates recourse to external local experts.
55. Multiple notifications imply additional effort and costs, both external and internal. The cost savings resulting from the application of the "one-stop shop" are very difficult to quantify, because they depend on the size of the company, the complexity of the case and the number of national authorities that would be involved should the Commission not have jurisdiction. According to the survey, it seems, however, that as a general rule and in comparable cases, the application of the Regulation represents a significant cost advantage for business.
56. The "single stop" of the Regulation creates a level playing field for all companies restructuring their operations in Europe. According to the survey, the Commission's trans-national character facilitates the global assessment of cross-border cases and limits the technical difficulties associated with the examination of larger than national markets. Single control eliminates the risk of conflicting decisions. In addition, it is easier and more effective to negotiate remedial action and third parties can intervene more effectively when only one authority is involved.
57. The extent of multiple national filings is only partly related to the mandatory or voluntary character of notification under national law. For reasons of legal certainty, companies may feel that they should notify even if notification is voluntary, at least when their market shares are significant. In any case, the risk involved in non-notification must be assessed, especially since the national authorities may take action after the deal is implemented.

#### *Overall assessment*

58. The information available at the present tends to suggest that the current thresholds should be reduced, in order that the bulk of operations with significant cross-border effects can be dealt with at Community level. This would not only enable the Commission to treat more cross-border cases where dominance could be created or strengthened, but would also speed up and increase consistency in the way such cases are examined, on the basis of a "one-stop shop" principle.

#### **B. PROPOSED OPTIONS**

59. This section states that in order to achieve a better coverage of concentrations with significant cross-border effects, it would be more appropriate to have a combined world-wide threshold of ECU 2 billion and a Community threshold of ECU 100 million for each of at least two companies involved. In order to address the problem of multiple national filings in particular, another more limited solution could consist in extending the Commission competence only to those concentrations below the thresholds that come within the jurisdiction of more than one national system of merger control.

### 1. Threshold reduction

#### *Position of Community Institutions*

60. There is support for a threshold reduction both from the European Parliament and from the Economic and Social Committee. More specifically, in its Resolution on the Twenty-third Report on Competition Policy, adopted on 16 March 1995, the European Parliament renewed its support for a Commission proposal which would substantially reduce the level of turnover at which the Commission was required to act<sup>19</sup>. Similarly, in its Opinion on the Review of the Community Merger Regulation, adopted on 25 October 1995, the Economic and Social Committee urged the Commission to propose a world-wide threshold of ECU 2 billion and a Community threshold of ECU 100 million. It also recommended that the 2/3 rule should be dropped<sup>20</sup>.

#### *The position of Member States*

61. According to the preliminary opinions expressed to date, the views of Member States as to threshold reduction diverge. A number of Member States are strongly in favour of lowering the thresholds, while others wish to maintain the current level. On the other hand, there seems to be more or less general agreement that the Commission should examine the issue of multiple notifications and seek a practical solution to it.

#### *Observations of companies, industry associations and advisers*

62. According to the Commission survey, out of all answers received, the majority of companies and advisers would be in favour of lowering the world-wide and Community thresholds. Views were more divided with regard to the desirability of changing the 2/3 rule.

63. Eleven out of the twenty-four associations that replied to the survey were in favour of a threshold reduction. Some other associations, including UNICE (Union of Industrial and Employers' Confederations of Europe) and ICC (International Chamber of Commerce), had mixed views reflecting the divergent positions of their members. For this reason, they suggested that companies should have the option to notify concentrations below the thresholds either to the Commission or to the national authorities concerned. As to the 2/3 rule, most associations

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<sup>19</sup> See Point 32 of the Resolution of the European Parliament on XXIIIrd Report on Competition Policy, OJ C89/146, 10.4.95.

<sup>20</sup> Opinion on the Review of the Merger Regulation, ECOSOC 1157/95.



suggested that it should be maintained, with the notable exception of the BDI (Bundesverband der Deutschen Industrie), which recommended its deletion.

*The position of the Commission*

64. At the time of the adoption of the Regulation, the Commission stated that the world-wide threshold should be reduced to ECU 2 billion at the end of an initial period of four years. It also considered that the Community-wide turnover should be revised in the light of experience and the trend of the world-wide threshold, which would imply a corresponding reduction to ECU 100 million.

65. It was explained above the current levels of both the world-wide and the Community threshold appear to exclude a considerable number of operations with significant cross-border effects from the Regulation. The results of the present survey tend therefore to suggest that the need for a threshold reduction is at least as compelling today as it was in 1993. The precise level of such lower thresholds is difficult to establish. On the basis of the information available at present, it seems, however, that ECU 2 billion and ECU 100 million would allow most cross-border cases to come within the Regulation, in accordance with subsidiarity. They would also largely solve the problem of multiple national filings to which a number of operations with significant cross-border effects are currently subject. Accordingly, the Commission believes at this stage that these levels would be appropriate. At the same time, it will naturally consider whether these levels should be re-assessed in the light of further information that may be brought to its attention during the consultation period.

66. The Commission accepts that the 2/3 rule can in some cases exclude concentrations with significant cross-border effects from the scope of the Regulation. If a 3/4 rule were to be introduced, a larger number of such cases would come within the Regulation. On the other hand, a substantial number of cases of mainly national impact would likely be caught. Consequently, the Commission considers at this stage that on balance the maintenance of the 2/3 rule would probably be more consistent with the subsidiarity principle.

67. It was suggested to the Commission that a threshold reduction could increase the number of notifications with mainly national impact and therefore the number of requests for referral under Article 9. The implications of a threshold reduction for the application of Article 9 are discussed under IV.A. below.

*Inflation and enlargement of the Union*

68. The Commission has examined the impact of inflation and the enlargement of the Union on the existing thresholds. It seems that this has been rather limited. In particular:

(i) On average within the EU, inflation and currency fluctuation (i.e. devaluation or appreciation) in the period 1989-94 have led to an erosion of the first threshold from ECU 5 billion to ECU 4.3 billion and of the second threshold from ECU 250 million to ECU 216 million. This decrease cannot be ignored, but in the light of the figures mentioned in paragraph 61 above, it is not significant enough to negate the need for reducing the current thresholds.

(ii) It was suggested to the Commission that as a result of the enlargement of the Union, more companies would fall within the Regulation, because their Community turnover would increase and/or the 2/3 rule would no longer apply. However, among the cases notified to the Commission since 1 January 1995 only a limited number met the thresholds because of the additional turnover realized in the new Member States.

*Estimate of extra cases*

69. The precise number of extra cases resulting from a threshold reduction is difficult to predict. An estimate has been made based on information provided by the Member States. The data given relate to the number of national merger notifications in 1993 and 1994 that would fall within the Merger Regulation, if the world-wide and Community thresholds were reduced to ECU 2 billion and ECU 100 million respectively and the 2/3 rule were maintained.

70. On this basis, it is estimated that the Commission workload would increase by an extra 65-80 cases per year. This is comparable to a DG II forecast<sup>21</sup>, which was 65 extra cases per year, or 90 if an estimate for concentrative joint ventures is also included in the calculation.

*Impact on Commission resources*

71. Concern was expressed as to whether the increase in the Commission workload resulting from a threshold reduction would endanger the effectiveness of the existing procedures and the quality of the competition analysis. A threshold reduction proposal should be justified by general policy considerations, but would naturally have to take into account the need for any additional resources so as not to reduce quality and efficiency.

2. Cases of multiple notification

72. Concentrations subject to multiple notification can generally be considered to have significant cross-border effects. In accordance with subsidiarity, they should therefore be dealt with at Community level. Moreover, multiple national filings increase uncertainty, effort and cost for business and may lead to conflicting decisions contrary to the idea of a "level playing field".

73. There is wide-spread concern among industry about concentrations below the thresholds meeting the notification requirements of several national systems. Consequently, companies and associations, including those that would not be in favour of a general threshold reduction, urged the Commission to make a proposal ensuring that such cases are dealt with at Community level.

*Policy options*

74. Merger control systems in the European Union are highly diverse. Their harmonization e.g. by means of a Community directive could alleviate the administrative burden of multiple national filings. The Commission would encourage any efforts towards harmonization,

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<sup>21</sup>"Competition and Integration: Community Merger Control Policy", 57 European Economy (1994), 2.2.3.4, p. 38.

especially with regard to the form of notification and other procedural rules. At the same time harmonization would not be the most appropriate solution to the problem of multiple notifications for the following reasons. Even putting aside the difficulties and time necessary for changing the national laws, companies would still have to notify to several national authorities and provide information relating to the specific features of each national market. More importantly, operations with significant cross-border effects would still have to be examined at Member State level, contrary to the subsidiarity principle.

75. A number of industry associations, including UNICE, ICC, CNPF (Conseil National du Patronat Français) and AGREF (Associations des Grandes Entreprises Françaises), have proposed that in cases of multiple notification falling between the current thresholds and some lower thresholds to be defined - for instance ECU 2 billion and ECU 100 million - the companies concerned could have the option of notifying either to the Commission or to the relevant national authorities. The Commission or the national authorities concerned, as the case may be, would have exclusive competence when notified. It is clear that this solution is desirable from a business perspective, because it allows the greatest degree of flexibility. On the other hand, it would leave the choice of jurisdiction to the discretion of the companies concerned. For this reason, it appears at this stage that, in devising a solution to the problem, it would be more appropriate to find clear and objective criteria for the division of competences between the Commission and the Member States.

*Proposed options*

76. As explained above, it appears that a threshold reduction to ECU 2 billion and ECU 100 million<sup>22</sup> would bring the bulk of cases with significant cross-border effects within the Regulation. At the same time this would largely solve the problem of multiple notifications, to the extent that otherwise a number of these cases would have been notifiable to several national authorities.

77. In order to address the problem of multiple national filings in particular, another more limited solution could consist in extending the Commission's competence only to those concentrations below the thresholds that come within the jurisdiction of more than one national system. Compared with a threshold reduction, this solution would bring some, but not the bulk of concentrations with significant cross-border effects within the Regulation. Because of differences in the notification thresholds used by national laws or the lack of merger control legislation in some Member States, the existence or not of multiple national filings depends on the national markets in which the undertakings concerned mainly operate. The Commission therefore considers this more limited solution to be the minimum required to achieve a division of competences consistent with subsidiarity.

78. In accordance with the above, the Commission competence could be extended to cover concentrations of multiple notification falling between the current thresholds and lower thresholds, for instance ECU 2 billion (world-wide) and 100 million (Community-wide). Article 1 of the Merger Regulation could thus be amended to provide that a concentration within the meaning of the Regulation that does not meet the thresholds laid down in

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<sup>22</sup>See paragraph 65 above.

paragraph 2 has, nevertheless, a Community dimension when it comes within the jurisdiction of a number of Member States.

79. A concentration would be considered to come within the jurisdiction of a number of Member States if it met the national thresholds triggering an obligation to notify in systems of mandatory control or subjecting a concentration to a system of voluntary notification. The Commission considers that voluntary systems are relevant in this respect. A concentration meeting the threshold of more than one system is likely to have significant cross-border effects, regardless of the mandatory or voluntary character of the national systems concerned. If one were to exclude voluntary systems in determining the number of authorities involved, there would be discrimination among companies participating in cross-border transactions, depending on the national markets affected in each case. Finally, for reasons of legal certainty, notification also takes place under voluntary systems, especially when the market share of the parties is significant.

80. As to the number of national laws that must be applicable, the following should be taken into account. In the Commission's view, a concentration coming within the jurisdiction of two national systems is likely to have significant cross-border effects and should in principle be able to benefit from the "one-stop shop" of the Regulation. Such concentrations should thus be dealt with at Community level. It was suggested to the Commission that the Community dimension of a concentration may be more manifest when at least three national jurisdictions are involved. Member States also stated that in cases where only two national authorities are involved, any problems could be more or less adequately solved through bilateral coordination. By contrast, coordination would become too complicated and thus ineffective when three or more systems come into play. The validity of these arguments, which suggest that, at a maximum, the number of national systems involved should be three, needs to be explored during the consultation period.

### *Procedure*

81. The above-mentioned cases will be subject to the same substantive and procedural rules that apply to any other concentration within the meaning of the Merger Regulation, with the following exception: in addition to the normal requirements establishing the Commission's competence, it will be necessary to determine whether the concentration meets the notification thresholds of a number of Member States.

82. Two basic approaches exist: either the Member States concerned confirm the application of their national thresholds and the Commission is bound by this assessment; or the Commission itself decides thereon. The second approach would mean that the Commission would have to interpret the national merger laws. This would be impractical and could lead to divergent interpretations of national laws by the Commission and the Member States. For these reasons, the Commission considers that the first approach is preferable.

83. Two possible ways in which the application of the national laws can be determined are set out below.

(i) As part of the formal notification, the parties include in the form CO (in one of the official Community languages) all information showing that the operation meets the

notification thresholds of a number of Member States. A copy of the form CO is sent to Member States as usual. The Member States concerned must inform the Commission within a set period of time (e.g. within one to two weeks) when the concentration does not meet their thresholds. If the Member States concerned do not oppose the analysis of the parties within the set period, the competence of the Commission will be established.

(ii) At a stage prior to formal notification, the parties notify the fact of the concentration to the Commission. No form CO is required at this stage, only the information showing that the operation is a concentration within the meaning of the Merger Regulation and meets the Member States' notification thresholds. The same procedure as under (i) above is then followed. There are two variations on this scenario:

- the parties have an obligation to notify the fact of the concentration within the time limits provided in Article 4, but the phase 1 deadline starts only after the jurisdictional question has been solved and the full form CO has been submitted; or
- the parties notify the fact of the concentration before the final agreement is concluded or control is acquired.

84. In the course of preliminary contacts with interested parties, it was pointed out to the Commission that these procedures could raise some practical difficulties. In particular, it was argued that it will not always be easy to determine quickly whether a concentration meets the national notification thresholds, especially in cases where market-share thresholds are used.

85. To the extent that the application of some national thresholds is difficult in practice, this situation is not created by the Commission proposals. Companies are already subject to the operation of national laws and must check whether the various notification thresholds apply to their deal. During the consultation period following the adoption of the Green Book, the Commission will have the opportunity to examine this issue, as well as any further practical problems that may be identified.

86. In any event, it is clear that the smaller the number of Member States' laws required for establishing the Commission's competence, the simpler the procedures and the greater the degree of legal certainty for the companies concerned. In the Commission's view, the simplest procedure is where two Member States are involved, while above three Member States the system becomes extremely difficult to manage both from the point of view of the companies concerned and from the point of view of the regulatory authorities involved.

#### *Number of multiple notifications*

87. The Commission is currently aware of about one hundred cases of multiple notification in the last two and half years. About 35% of these cases were notified to more than two and up to ten national authorities.

88. These figures by no means represent the total number of multiple notifications during that period. The Commission does not at this stage have Member State records for 1995, a year with intense merger activity. Existing records for 1993-94 are very difficult to analyse, because the data are not kept on the same basis in each Member State. Moreover, multiple national

filings may become more frequent in the future to the extent that companies' awareness of newly introduced merger control systems increases, new systems come into force in the Community and notification under voluntary systems becomes more common. Market integration and the resulting increase in cross-border merger activity should also lead to an increase of multiple notifications. For these reasons, the additional number of cases to be dealt with by the Commission should be higher than the above-mentioned figures.

#### **IV. OTHER ASPECTS OF THE REGULATION**

89. In addition to thresholds, the Commission survey identified a number of specific areas in which improvements could be made to the Regulation. In order to respond to these concerns, the Green Paper proposes changes that amend or clarify the existing provisions.

90. In addition to these changes, the Commission would also consider examining the ECSC Treaty provisions relating to concentrations, including thresholds. These issues go beyond the scope of the present review and will not be further discussed in this Paper.

91. The proposed changes are mainly procedural. As to substantive matters, the survey identified areas where clarifications would be useful, such as the notion of oligopolistic dominance, the "failing firm" defence and the "efficiencies" defence. These matters are best dealt with by means of interpretative guidelines.

##### **A. Referral of concentrations to and from Member States (Articles 9 and 22)**

###### *Article 9*

92. Concentrations with mainly national impact are better controlled at the national level. It is possible that operations of this kind may fall within the current thresholds. In these cases, and in line with subsidiarity, Article 9 of the Regulation provides for a corrective mechanism of referral to the national authorities. Three concentrations have so far been referred to national authorities: *Steetley/Tarmac* was referred to the UK authorities, *Holdercim/Cedest* to the French and *McCormick/CPC/Rabobank/Ostmann* to the German.

93. The industry and the large majority of Member States have expressed satisfaction with the operation of this Article. At the same time, a number of suggestions aiming at clarifying or improving the referral procedure were made to the Commission. It was also pointed out that, in the event of a threshold reduction, there might be an increase in the number of cases with mainly national impact and, as a result, an increase in requests for referral under Article 9.

94. The Commission considers that, especially if there were not to be a threshold reduction, any amendments to Article 9 should be limited so as not to undermine the delicate balance struck by the current referral provisions or to negate the advantages of the "one-stop shop" principle. Too frequent use of Article 9 could reduce the legal certainty afforded to companies and should probably be linked to a harmonization of the main features of national merger systems.

95. The Commission therefore proposes that Article 9 be maintained in its current form, with the following exception regarding concentrations that affect only a non-substantial part of the

common market. It could be provided that in such cases the Member State making the request for referral must inform the Commission that the concentration affects a distinct market within its territory not constituting a substantial part of the common market. By contrast, it will not need to demonstrate that the concentration threatens to create or strengthen a dominant position on that market.

96. The Commission also proposes to examine whether its practice with regard to the application of Article 9 should be further clarified, for instance by means of an interpretative notice.

#### *Article 22*

97. Use of Article 22(3) has already been made on two occasions<sup>23</sup> and it is generally regarded as a useful tool, especially for those Member States that do not currently have a merger control system. The Commission therefore proposes to maintain it. However, in the light of experience, the following amendments could be made:

-It could be expressly provided that an Article 22 request could also be made by several Member States, acting by common agreement. Such a request would, for instance, be appropriate in cases where a concentration would create or strengthen a dominant position in an area wider than the territory of a single Member State and would enable the Commission to examine the effects of the concentration to a fuller extent.

-It could be stated that the concentration would be suspended from the date of receipt of the Article 22 request, provided that it has not been put into effect prior to that date.

-In order to harmonize the time limits under Article 10 and Article 22, the fourth paragraph of Article 22 should be amended as follows:

"The period within which proceedings may be initiated pursuant to Article 10(1) shall begin on the day following that of the receipt of the request by the Member State".

-The text of Article 23 should also be amended to enable the Commission to adopt implementing provisions concerning time limits pursuant to Article 22.

#### B. The treatment of joint ventures

##### *Present situation*

98. A distinction is made under the EC competition rules between concentrative and cooperative joint ventures. Concentrative joint ventures fall within the scope of the Merger Regulation, while cooperative joint ventures are dealt with under Regulation 17/62 and other Regulations implementing Article 85 of the EC Treaty.

99. According to Article 3 (2) of the Merger Regulation, as interpreted by the 1994 Commission notice<sup>24</sup>, concentrative joint ventures are full-function entities<sup>25</sup> that do not give rise to

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<sup>23</sup>In *British Airways/Dan Air* and *RTL/Veronica/Endemol*.

<sup>24</sup>Commission Notice of 21 December 1994 on the Distinction between Cooperative and Concentrative Joint Ventures, OJ N° C 385, 31.12.1994, p. 1.

coordination of the competitive behaviour of undertakings which remain independent. In order to be relevant, coordination must be likely to result in a restriction of competition within the meaning of Article 85 (1) of the EC Treaty. Joint ventures that do not fall within Article 3 (2) are considered to be cooperative. Cooperative joint ventures encompass a wide variety of arrangements, ranging from operations of a structural nature to cartel-like cooperation.

100. In the Commission survey, a large part of industry as well as a number of Member States expressed considerable concern about the differences in treatment between concentrative joint ventures and cooperative joint ventures of a structural nature. It is said that both kinds of operations are similar in terms of their effects on market structure. They are, however, currently subject to different regimes. This situation is widely regarded as unsatisfactory, especially to the extent that there are differences in the deadlines for assessment and the degree of legal certainty afforded to companies.

101. The Commission has recognised the desirability of harmonization of the regimes applicable to joint ventures by introducing a special accelerated procedure in relation to structural cooperative joint ventures<sup>26</sup>. The Commission set itself a two-month internal deadline, applicable since 1 January 1993, within which it should take an initial view concerning operations of this kind. According to the Commission survey, this procedure is a positive development, but still does not guarantee full equality of treatment.

*Is there a need for change?*

102. Cooperative full-function joint ventures involve a significant change in the structure of the companies concerned. They may have, in this respect, similar effects on market structure to concentrative joint ventures. The main difference between the two types of operations is that, in the case of cooperative full-function joint ventures, the independent presence of their parent companies in the same market as that of the joint venture or in neighbouring markets is regarded as likely to give rise to the coordination of the competitive behaviour of their parent companies. For this reason, a different substantive test has been applied to cooperative full-function joint ventures. Different procedural rules have also been applied, with different treatment in terms of timing and legal certainty. Since cooperative full-function joint ventures may imply a transfer of substantial resources from the parent companies, it should be considered to what extent differences in treatment should be reduced.

103. Under the current rules, most concentrative joint ventures are assessed within one month (phase 1), and the rest within five months (phase 2-in-depth investigation). In all cases the procedure is concluded by a formal clearance or prohibition decision which can only be revoked in exceptional circumstances (see Article 8 (5) of the Merger Regulation). If no decision is taken within these deadlines, the joint ventures is deemed to have been authorized.

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<sup>25</sup>This means that they perform all the functions normally carried out by other companies operating in the same market and have sufficient financial and other resources to carry out their activities on a lasting basis.

<sup>26</sup>These are cooperative full-function joint ventures and certain partial-function joint ventures without access to the market, in particular research and development or production joint ventures.



104. There are no such legal deadlines for cooperative joint ventures of a structural nature. The two-month deadline that applies to certain operations of this kind is only an internal one. Moreover, given the current procedural constraints under Regulation 17/62, it is not possible to adopt a formal decision within two months, but only to issue an administrative letter which does not bind the authorities and the courts of the Member States. There is no legal or internal deadline for the conclusion of the in-depth investigation. Finally, under Regulation 17/62, in cases where an exemption is granted, this must be given for a certain period of time and the decision can be revoked or modified under the circumstances mentioned in Article 8 (3) of that Regulation.

105. The above-mentioned differences have been caused by the different implementing Regulations applicable to cooperative and concentrative joint ventures and on the view that there is a basic difference between restrictions of competition, to be assessed under Article 85, and concentrations which are not subject to the fundamental prohibition of agreements and restrictive practices which distort competition. Reform of the current arrangements would have to remain within the bounds of the Community legal system. To change the substance of Article 85 (1) would exceed the limits of the powers of the Community's institutions.

106. It remains to be seen to what extent the system has given rise to practical problems. Nevertheless, changes may also be justified by general considerations of competition policy, particularly the drive to make the system simpler, more transparent and more effective.

#### *Options to be considered*

107. Apart from the option of making pragmatic improvements in internal procedures so as to speed up the decision-making process (for instance by reducing existing internal deadlines), there are five other options to be considered all of which would require new legislation. These five options can be divided into two groups reflecting two different approaches: the first group deals with procedural matters while maintaining the substantive tests, while the second group would subject structural cooperative joint ventures to both the substantive test and the procedural rules of the Merger Regulation.

#### 108. I. Procedural options

- a. Create new procedures for the treatment of cooperative full-function joint ventures by means of a new Regulation, in order to simplify procedures and provide for fast decisions and legal certainty.
- b. Make cooperative full-function joint ventures subject to procedures of the Merger Regulation, leaving the two substantive tests separate.
- c. Extend the scope of Commission block exemption Regulations dealing with horizontal cooperation (and adopt a new one for areas not covered by the existing Regulations) to cover cooperative full-function joint ventures, with opposition procedures and market share thresholds.

#### 109. II. Substantive and procedural options

- a. Extend Article 3 (2) of the Merger Regulation to all cooperative full-function joint ventures.
  - b. Extend Article 3 (2) of the Merger Regulation to all joint ventures, whether full function or not, except shams (cartels dressed up as joint ventures).
110. All of these options would have a significant impact on priorities and resource allocation within the Commission's services.

*Comments on the options*

111. The option of making pragmatic changes to internal procedures would improve the current situation without any changes in the law. Since only internal procedures have to be adapted, this could be achieved quickly. However, the changes would remain of an internal nature and legal certainty would not be provided within a short period of time.

Procedural options

112. Legal certainty could be obtained more quickly under option a with a new Council procedural regulation which would introduce a procedure for cooperative full-function joint ventures along the lines of the Merger Regulation. The emphasis would be on streamlining procedures, while the current substantive test would be maintained.

113. Under option b, cooperative full-function joint ventures would continue to be subject to the substantive test of Article 85, paragraphs 1 and 3. At the same time, it would be provided that the procedural rules of the Merger Regulation would apply to them, instead of those of Regulation 17/62 and the other implementing Regulations that are currently applicable.

114. Cooperative full-function joint ventures would benefit from the timing and other procedural advantages of the Merger Regulation. They would also be subject to the same notification and other procedural requirements. However, the distinction between cooperative and concentrative joint ventures would still govern the substantive test to be applied: concentrative joint ventures would be subject to the test of Article 2, while cooperative full-function ones would be subject to the test of Article 85, paragraphs 1 and 3. Exemptions under Article 85 (3) would be limited in time and revocable in accordance with current law and practice, which pays particular attention to the competitive relationships between the joint venture's parent companies.

115. Under option c, Article 3 (2) of the Merger Regulation would remain unchanged. The Commission would instead use its legislative powers under Council Regulation (EEC) N° 2821/71 to cover most of the cooperative joint ventures by a group exemption. For this purpose, Regulations (EEC) N° 417/85 and N° 418/85, which both expire at the end of 1997, could be broadened and merged. The advantages of the group exemption would be available up to a certain market share. The threshold should be fixed clearly above the current figures (which are: 10% for full-function joint ventures, 20% for partial function joint ventures). Those not covered by the automatic exemption could be subject to a non-opposition procedure with two deadlines: a first one of two months within which the Commission would take an initial view (corresponding to the existing internal deadline, but legally binding), and

a second one of five months within which the final outcome, be it positive or negative, would have to be reached.

116. Under this option the differences between the relevant substantive test would continue to exist. The rules on individual procedures, although not being harmonized, would be brought closer to each other, thereby accelerating procedures. It is true that the application of a market share criterion may give rise to practical difficulties. However, the opposition procedure would make the Commission responsible in the final analysis for correctly defining the relevant market and the market shares of the interested parties. Cases which meet the requirements for automatic exemption would not have to be notified. The exemption granted under the regulation would last as long as the group exemption.

#### Substantive and procedural options

117. Under option a, Article 3 (2) of the Merger Regulation would be amended to state that "the creation of a joint venture performing all the functions of an autonomous economic entity shall constitute a concentration with the meaning of paragraph 1 (b)". This would mean that, in substantive terms, the dominance test of Article 2 of the Regulation would also apply to the creation of cooperative full-function joint ventures. In respect of the cooperative aspects of the case that are not ancillary, it would be provided that Article 85, paragraphs 1 and 3, would apply to them, either within the same procedure or separately.

118. This option would ensure legal certainty and rapid procedures. Moreover, it would simplify the distinction between cooperative and concentrative joint ventures, because the same procedures and substantive test would apply to all full-function joint ventures, except for clauses which are not ancillary. This option would imply a reassessment of the scope of Article 85 (1) with regard to the Commission's existing and long-standing practice and, in any event, would have to remain within the bounds of Article 85 as interpreted by the Court of Justice.

119. As to the division of jurisdiction between the Commission and the Member States, this option would extend to all full-function joint ventures the jurisdictional allocation provided for in Article 1 of the Merger Regulation. As a result, national law would apply to full-function joint ventures below the thresholds.

120. Finally option b would submit all joint ventures, except hidden cartels, to the Merger Regulation through extending Article 3 (2). As a consequence, both the substantive test and procedure would be changed for all cooperative joint ventures. Legal certainty and rapid procedures would be provided in the same way as currently for concentrative joint ventures. This option would also imply a reassessment of the scope of Article 85 (1) with regard to current and well-established practice and, in any event, would have to remain within the bounds of Article 85 as interpreted by the Court of Justice. It would create the problem of identifying those joint ventures to which Article 85 would remain applicable (hidden cartels).

#### *Concluding remarks*

121. As will already be clear, the Commission is interested to know how seriously the differences in the treatment of co-operative and concentrative joint ventures, in terms of deadlines,

procedures, substantive test and legal certainty, are considered. This will clearly influence the choice between the various options. The above-mentioned procedural options improve procedures, including deadlines, and increase legal certainty. The substantive and procedural options appear to offer the most comprehensive and harmonised treatment of concentrative and cooperative joint ventures from the point of view of the above criteria. The Commission is at this stage open as to the option best suited to address the disparities in the treatment of joint ventures and the desire for simplicity, transparency and an effective competition policy.

### C. Commitments in merger cases

122. Pursuant to Article 8 (2) of the Merger Regulation, a Phase 2 authorisation decision may be subject to conditions and obligations ensuring that the parties comply with the commitments they have entered into *vis-à-vis* the Commission. Commitments must be submitted within three months from the beginning of Phase 2 (Article 18 of Commission Regulation 3384/94). It is not proposed that changes be made in the Commission practice in this area.

123. It is the Commission's practice to accept commitments also in Phase 1 in cases where the competition concern is clear-cut and limited compared with the whole deal, can easily be remedied and where compliance is easily monitored. The authorization of the concentration is based on the fulfilment of these commitments. The Commission considers that such an approach provides a regulatory response proportionate to the size of the competition problem and the remedy already at hand. There is also overall support from industry and advisers to accept commitments in Phase 1, because they avoid the cost and loss of time involved in entering Phase 2 proceedings. It is the Commission's policy to give Member States and interested third parties the opportunity to comment on proposed commitments before an Article 6(1)b decision is adopted.

124. The Commission considers that, under the current regime, it may accept and enforce Phase 1 commitments. However, legal certainty would increase if an express provision to that effect were included in the Regulation. At the same time such commitments must be accepted in a manner ensuring transparency and timely consultation of Member States and interested third parties.

### *Proposed changes*

125. In accordance with the above, Article 6 (1) b of the Merger Regulation could be amended in line with Article 8, paragraphs 2 and 5 (b), so as to give the Commission express powers for accepting and enforcing Phase 1 commitments.

126. In order to ensure transparency and to give Member States and interested third parties adequate time for comment, it is estimated that a period of at least two weeks from the date of the submission of the commitments will be necessary. Consequently, three possible procedural solutions could be envisaged:

-A two-week consultation period from the time of the submission of the commitments will be required. This may lead to an extension of Phase 1 by a maximum of two weeks.

-There would be no extension of the current Phase 1. Companies would have to submit their commitments in time for a two-week consultation to take place within the one-month period. In view of the time constraints of Phase 1, this solution would be possible in practice only if the competition problem and the remedy were identified at a very early stage in the procedure. Otherwise, the parties could withdraw their initial notification and make a new notification containing the proposed commitments. In cases of withdrawal and re-notification, the Commission could, where appropriate, take a decision immediately after the three-week period for an Article 9 request.

-A mechanism comparable to Article 9 would be introduced: commitments would have to be submitted within three weeks from notification and Phase 1 would be extended to six weeks.

#### D. De minimis operations

127. For the purposes of this Green Paper, an operation is defined as *de minimis* if it has no or insignificant effects on the structure of competition in the Community.

128. It is possible that some *de minimis* operations may fall within the scope of the Merger Regulation. For instance, concentrations that do not lead to an overlap between the merged activities in the Community may be notifiable because of the parties' Community turnover in markets other than those affected by the operation (see the Seagram/MCA and JCSAT/SAJAC cases). In the last two years ten concentrations with no or minimum overlap were notified to the Commission.

129. Another example of *de minimis* operations may be joint ventures of very small turnover which may be notifiable because of their parents' turnover. In the last two years there were at least 20 joint ventures with a turnover of less than ECU 100 million. However, not all of these joint ventures were *de minimis* operations, since in a number of cases market shares exceeded 25%.

130. A number of the companies and associations surveyed suggested to the Commission that the notification of *de minimis* operations constitutes an unnecessary burden on business. Such operations should therefore be excluded from the scope of the Regulation or examined under simplified procedures.

131. The Commission does not consider at this stage that *de minimis* concentrations should be excluded from the Merger Regulation for the following reasons. If *de minimis* concentrations were defined on the basis of turnover thresholds, there would be a risk that operations raising competition concerns would also be excluded. Market share thresholds would be more appropriate but would reduce legal certainty. Moreover, if *de minimis* concentrations were excluded from the scope of the Merger Regulation, they would no longer benefit from the "one-stop shop" principle and could be subject to multiple national filings.

132. Because of the above-mentioned definitional problems, the Commission also considers that it would be difficult to lift the suspension under Article 7 of the Merger Regulation for all such concentrations. Consequently, to the extent that the notification of *de minimis* operations constitutes an undue burden, the existing procedure should be simplified as much as possible.

133. Under the current rules, the information required for *de minimis* operations notified to the Commission is limited. The new form CO<sup>27</sup> provides for short-form notification in cases where the turnover of a joint venture and/or the turnover of the contributed activities is less than ECU 100 million in the EEA, and the total value of the transferred assets is less than ECU 100 million in the EEA. As to operations other than joint ventures, no market information is required where the combined market share of the parties does not exceed 15% in the same product market and any individual or combined market share does not exceed 25% in a market upstream or downstream of a product market in which any or more of the parties is active. These provisions already reduce the burden of notification to a considerable extent. In practice, the information required could be further limited if necessary, on the basis of waivers to the form CO.

134. In addition, the Commission could take a short-form decision in *de minimis* cases without having to await the expiry of the legal deadline. These procedural improvements would not require an amendment to the Merger Regulation.

#### E. Turnover calculation for credit and financial institutions

135. In relation to credit and financial institutions, the Merger Regulation, in line with a number of Member States' national merger control laws, uses assets instead of turnover for the purposes of application of Article 1 (2). In order to determine Community-wide turnover and the application of the two-thirds rule, assets are allocated between the Community and Member States in accordance with the ratio between loans and advances to Community and Member States' residents and their total loans and advances.

136. Two problems have been identified with the Commission's current approach :

- (i) a notional turnover figure calculated on the basis of assets excludes certain transactions (eg. foreign exchange and security dealing revenues) from the notional turnover figure;
- (ii) the identification of the residence of a borrower is, in practice, difficult and may vary over the life of the loan. Consequently, the geographic allocation of turnover is onerous for banks.

137. In order to alleviate these problems, the Commission is considering changes in its approach:

#### (i) Turnover

138. The Commission has studied whether the use of assets or gross banking income would significantly change the number or type of banks that would be subject to the Merger Regulation. On the footing of this evaluation, it has been concluded that both bases give broadly similar results. It is, however, admitted that the use of banking income would more properly reflect the economic reality of banks' operations.

139. Gross banking income comprises, at least, the items set out in Article 28 B (1), (2), (3) and (4) of Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other

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<sup>27</sup> Annex to Commission Regulation (EC) No 3384/94, of 21 December 1994, OJ L No 377, 31.12.1995, 1.

financial institutions. Therefore, interest receivable, income from securities, commissions receivable and the net profit on financial operations would be included in such a definition.

140. It could be more appropriate to employ gross as opposed to net banking income as a basis for calculating turnover. This is because net banking income effectively equates to gross profit in, for example, the manufacturing or service industries, and not to sales. Consequently, using such a basis for banks would be inconsistent with the Commission's general approach for calculating turnover. However, it remains to be examined which of the two types of banking income would more accurately reflect the economic reality of the whole banking sector.

#### (ii) Geographic allocation of turnover

141. The Commission appreciates that allocating income by reference to the location of the borrower may be burdensome on banks. Whilst the Commission's notice concerning the calculation of turnover provides that turnover arising from services is, in general, allocated to where the customer is located, the notice also makes an exception to this rule, in respect of inter-bank lending<sup>28</sup>. Accordingly, in order to simplify the Commission's approach it can be considered that the allocation of banking income should be based on the location of the branch of the bank making the loan or providing the service.

#### F. Other amendments or clarifications

##### *Ancillary restrictions in phase 1*

142. In order to have an express legal basis for the acceptance of ancillary restrictions in phase 1 decisions, the following provision should be added to Article 6 (1) b:

"The decision declaring the concentration compatible with the common market shall also cover restrictions directly related and necessary to the implementation of the concentration."

##### *Revocation of Article 6 decisions*

143. In line with Article 8 decisions, it should be expressly provided in the Regulation that the Commission may revoke a decision taken under Article 6 (1) a or 6 (1) b where:

"the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit."

##### *Article 7*

144. In order to harmonize the duration of suspension of concentrations with the duration of Phase 1, the duration of suspension under Article 7 (1) should be extended from three weeks to the adoption of a final decision.

145. It was stated to the Commission that the conditions for granting a derogation from the suspension are too strict. In particular, it was suggested that if a concentration does not raise competition concerns - in the case of *de minimis* operations, for instance - the Commission

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<sup>28</sup> Cf paragraphs 45 and 66 of the above-mentioned Commission notice on the Calculation of Turnover.

should be able to grant a derogation where appropriate, even if there would be no serious damage to the undertakings concerned. In order to allow for this possibility, Article 7 could be amended accordingly.

*Article 10(4)*

146. Article 10(4) provides for the exceptional suspension of the four-month period for taking an Article 8 decision in cases where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13. This provision should be expressly extended to Phase 1 proceedings.

*Calculation of the turnover of joint undertakings*

147. At the time of the adoption of the Merger Regulation, the Commission and the Council considered that the review of the thresholds should be combined with the re-examination of the method of calculation of turnover of joint undertakings as referred in Article 5(5). This has in the meantime been clarified in the above-mentioned Commission Notice on the Calculation of Turnover. It is not considered to be necessary to make any changes in this respect.

*Third party rights*

148. Concern was expressed with regard to the short period of time within which third parties can comment on phase 1 commitments. This matter was discussed under IV.C. above.

149. It was also suggested that the rights of third parties that apply in writing to be heard pursuant to Article 18 (4) of the Merger Regulation should be extended to all third parties that are directly concerned by the Commission's objections. The Commission will examine whether the current situation should be changed in this respect.

*"Undertakings concerned"*

150. The Commission will review the text of the Regulation, in order to remove any ambiguities or inconsistencies regarding the use of the term "undertakings concerned".

**V. CONCLUSIONS**

151. In light of the above, the Green Paper concludes the following:

-In line with subsidiarity, it appears that the current thresholds for the application of the Merger Regulation should be reduced in order to cover a larger number of operations with significant cross-border effects. In this respect, a combined world-wide threshold of ECU 2 billion and a Community-wide threshold of ECU 100 million for each of at least two companies involved would be more appropriate.



-In order to address the problem of multiple national filings in particular, another more limited solution could consist in bringing within the exclusive competence of the Commission only cases of multiple notification below the current thresholds.

-A number of other, mainly procedural, improvements to the Regulation should be considered, including *inter alia* the treatment of joint ventures and the acceptance of commitments in the first phase of investigation.

152. The Commission welcomes a general debate on the Green Paper and invites all interested parties to submit their comments by 31 March 1996.

## ANNEX 1

### **Summary of the survey of the Member States, industry and advisers**

#### The Member States

All Member States were requested to provide information relating to their national merger control legislation, the number and identity of cases treated in 1993 and 1994 and their means of cooperating with other national authorities. In addition, their views about the definition of subsidiarity in merger control, and about amendments to the Regulation, apart from thresholds, were sought. All Member States responded.

#### Industry

A total of 289 companies from the EEA, Switzerland, Japan, the USA and Norway were contacted whose businesses cover both manufacturing and services. The questionnaires related to the companies' experience of national and EC merger control legislation, the benefits of the "one-stop shop" principle and whether they wished for any changes in the current thresholds. A request for examples of multiple national filings was also made. In addition the companies were asked whether any other changes should be made to the Regulation. Total responses amounted to 118.

#### Industry associations.

European representative bodies as well as national industry associations were contacted: in total 40 questionnaires were despatched. The questions asked were the same as those in the questionnaire for companies. Replies were received from 25 associations.

#### Advisers

In total 54 advisers, being either law or consulting firms with experience of EC and national merger control law, were sent questionnaires. These contained questions relating to their attitudes to notification practices, the system of EC merger control, changes in the thresholds and other amendments to the Regulation. A request for examples of multiple notifications was also made. A total of 24 firms responded.

	Questionnaires sent	Replies received	Response rate
Member States	15	15	100%
Industry	289	118	41%
Associations	40	25	63%
Advisers	54	24	44%

**ANNEX 2**  
**National merger control systems**  
**in the EEA**

	<u>Competent body</u> A : administrative/ministerial body CA : independent or autonomous competition authority JA : judicial body	<u>Procedures :</u> a) Compulsory notif. b) Pre-merger control c) Post merger control	<u>Thresholds</u> a) Criteria b) Level	<u>Statutory time limits</u> a) Phase 1 b) Phase 2	<u>Assessment criteria</u> a) Dominance or restriction of competition b) Other	<u>Sectoral regulation</u> a) Sectors excluded from merger control b) Special regulation
IRL	A -> final decision CA -> opinion	a)yes b)yes c) -	a)Gross assets or turnover of each of at least 2 companies <sup>29</sup> .  b)IR£ 10m/IR£ 20m (Ecu 12,6m/Ecu 25,2m) <sup>30</sup>	a)30 days from notif. or receipt of information  b)3 months from notif. or rec. of information	a)yes  b)employment + other common interest criteria	a) -  b)newspapers and magazines: no thresholds
SWEDEN	CA -> clearance JA -> prohibit.	a)yes b)yes c) -	a)Total world-wide turnover  b)SKr 4 b. (Ecu 430m)	a)1 month  b)4 months from notif. for referral to JA No deadline for JA	a)yes  b)public interest	-

<sup>29</sup>The assets and turnover thresholds are not specifically limited to Ireland and may be interpreted as referring to worldwide turnover or assets, provided that at least one of the enterprises involved is carrying on business in Ireland. In practice, the Department of Enterprise and Employment operates a "short-form" notification procedure leading to a "not notifiable" letter to deal with the uncertainties associated with the Act's apparently wide scope.

<sup>30</sup>These thresholds were converted into ECU on the basis of the average rates for 1994.

	<u>Competent body</u> A : administrative/ministerial body CA : independent or autonomous competition authority JA : judicial body	<u>Procedures :</u> a) Compulsory notif. b) Pre-merger control c) Post merger control	<u>Thresholds</u> a) Criteria b) Level	<u>Statutory time limits</u> a) Phase 1 b) Phase 2	<u>Assessment criteria</u> a) Dominance or restriction of competition b) Other	<u>Sectoral regulation</u> a) Sectors excluded from merger control b) Special regulation
SPAIN	A -> final decision CA -> opinion (+ investigation in phase 2)	a) no b) yes c) within 5 years from implement. of concentration	a) Market share in SP <u>or</u> Total turnover in SP  b) 25% 20 b. pesetas (Ecu 125m)	a) 1 month from notification  b) 6 months from notification	a) yes  b) international com- petitiveness, econ. + tech. progress, improv. in distrib.	a)-  b) credit and financial institutions, insurance: special thresholds
PORT	A -> final decision CA -> opinion (for phase 2)	a) yes b) yes c) -	a) Market share in P <u>or</u> Total turnover in P  b) 30%/Esc 30b (Ecu 180m)	a) 50 work.days from notif.  b) 95 work.days from notif.	a) yes  b) Bilan écon. or international compe- titiveness.	a) Credit and financial institutions, insurance
UK	A -> final decision CA -> opinion	a) no b) yes c) referral to the MMC (Monopolies and Mergers Commission) within 6 months after implem. or receipt of inform.	(pre-merger) a) Gross assets world wide taken over <u>or</u> Market share in UK  b) £70 m. (Ecu 90,9m)/25%	(for pre-notification) a) 35 work.days from notif. (for MMC ref)  b) 6 (+3 months) from date of reference No deadline for Secr. of State	a) yes  b) public interest	a)-  b) newspaper transfers, mergers between water companies, media
GR	CA (A may overrule on grounds of public	a) yes b) yes c) notif. within one	(pre-merger) a) Market share in GR <u>or</u>	(pre-merger) a) 1 month from complete notif.	a) yes  b) general econ. gains or	a)-  b) media

	<u>Competent body</u> A : administrative/ministerial body CA : independent or autonomous competition authority JA : judicial body	<u>Procedures :</u> a) Compulsory notif. b) Pre-merger control c) Post merger control	<u>Thresholds</u> a) Criteria b) Level	<u>Statutory time limits</u> a) Phase 1 b) Phase 2	<u>Assessment criteria</u> a) Dominance or restriction of competition b) Other	<u>Sectoral regulation</u> a) Sectors excluded from merger control b) Special regulation
	interest)	month from implem. of concentration	Total turnover world- wide+ Turnover of each of at least 2 companies in GR.  b)25%Ecu 50m/Ecu 5 m.	b) 3 months from complete notif. (+ possibility for extension)	public interest	b2)credit institutions, insurance: special thresholds
BELG.	A -> investigation CA -> decision	a)yes b)yes	a)Market share in Belgium <u>and</u> Total turnover  b)25%/BEF 3 b. (Ecu 70m)	a)1 month from notif.  b)1 month + 75 days from notif. (suspension possible, for receipt of additional infor. etc.)	a)yes b)technical and econ. progress, general econ. importance, international compe- titiveness provided that restrictions are indispensable+ not elimination of competition	a)-  b) banks, credit and financial institutions, insurance: special thresholds
FR.	A -> final decision + investigation CA -> opinion + investigation (for phase 2)	a)no b)yes c)any time after implementation.	a)Total turnover in FR + turnover of at least 2 comp. <u>or</u> market share in France  b)7bFF+2bFF (Ecu1060m+	a)2 months after notification  b)6 months after notification	a)yes  b)bilan économique et social	a-b)press and audio- visual sector

	<u>Competent body</u> A : administrative/ministerial body CA : independent or autonomous competition authority JA : judicial body	<u>Procedures :</u> a) Compulsory notif. b) Pre-merger control c) Post merger control	<u>Thresholds</u> a) Criteria b) Level	<u>Statutory time limits</u> a) Phase 1 b) Phase 2	<u>Assessment criteria</u> a) Dominance or restriction of competition b) Other	<u>Sectoral regulation</u> a) Sectors excluded from merger control b) Special regulation
			300m)/25%			
GER.	CA (A: application for exceptional ministerial authorisation)	a) yes b) yes c) 1 year after complete notification (post- merger control)	Pre-merger control a) World-wide turnover of one company <u>or</u> World- wide turnover of each of at least 2 comp.  b) DM 2 b./1 b. (Ecu 1,04 b. /520 m.)  Post-merger control Combined world-wide turnover of all parties: DM 500 m. (ECU 260 m)	a) 1 month after complete notification  b) + 3 months (can be extended by common agreement)	a) yes (CA)  b) public interest (exceptional cases: A)	a) -  b) credit institutions, insurance: special thresholds  b2) special rules for turnover calculation - in the retail sector - in newspapers and magazines
IT.	CA (general interest criteria can be set by A for application by CA; no such criteria are set at the moment)	a) yes b) yes c) -	a) Total turnover in IT <u>or</u> turnover of target in IT.  b) L 606 b/60,6 b (ECU 300m /30 m)	a) 30 days from receipt of complete notification  b) + 45 days (+30 days except, for addit. inform.)	a) yes  b) general interests of the national economy (see first column)	a)-  b) Film production and distribution: special thresholds

	<u>Competent body</u> A : administrative/ministerial body CA : independent or autonomous competition authority JA : judicial body	<u>Procedures :</u> a) Compulsory notif. b) Pre-merger control c) Post merger control	<u>Thresholds</u> a) Criteria b) Level	<u>Statutory time limits</u> a) Phase 1 b) Phase 2	<u>Assessment criteria</u> a) Dominance or restriction of competition b) Other	<u>Sectoral regulation</u> a) Sectors excluded from merger control b) Special regulation
AUS.	JA	a) yes b) yes c) yes (for smaller concentrations, obligation to inform JA)	(for pre-merger) a) Total turnover <u>and</u> Turnover of each of at least 2 comp. worldwide  b) Sch 3,5b/5m (Ecu 250m0,36m)	a) 4 weeks from complete notification  b) 5 months from complete notification	a) yes  b) Bilan concurr. intern. compet.	a) -  b1) media  b2) banks, insurance: special thresholds
NED. (not yet in force)	A	a) yes  b) yes  c) -	a) Total turnover <u>and</u> turnover of each of at least 2 comp. in NED.  b) GUIL 250m/30m (ECU 116m/14m)	a) 4 weeks from receipt of notification  b) 13 weeks from receipt of notification	a) yes  b) general economic interest	a) banks, insurance
Iceland	CA-> final decision	a) no  b) yes  c) yes	a) assumption of a dominant position or reduction of competition in Iceland  b) none	a) -  b) 2 months after becoming aware of the merger or takeover	a) yes  b) no	a)-  b)-
Norway	CA-> final decision  A-> appeal of CA's	a) no  b) yes	a) creation or strengthening of a significant restriction	a) -  b) 6 months after the	a) yes  b) no	a) none  b) none

	<u>Competent body</u> A : administrative/ministerial body CA : independent or autonomous competition authority JA : judicial body	<u>Procedures :</u> a) Compulsory notif. b) Pre-merger control c) Post merger control	<u>Thresholds</u> a) Criteria b) Level	<u>Statutory time limits</u> a) Phase 1 b) Phase 2	<u>Assessment criteria</u> a) Dominance or restriction of competition b) Other	<u>Sectoral regulation</u> a) Sectors excluded from merger control b) Special regulation
	decision	c) yes	of competition contrary to the achievement of an efficient utilization of society's resources in Norway  b) none	agreement to acquire		