

II

(Preparatory Acts)

COMMISSION

Amended proposal for a Council Regulation on the control of concentrations between undertakings (merger control Regulation) ⁽¹⁾*(Submitted by the Commission to the Council, pursuant to the second paragraph of Article 149 of the EEC Treaty, on 16 December 1981)***I. Background**

On 20 July 1973 the Commission submitted to the Council a proposal for a Council Regulation on the control of concentrations between undertakings (merger control Regulation).

The European Parliament ⁽²⁾ and the Economic and Social Committee ⁽³⁾ were consulted by the Council, and both approved the Commission proposal by large majorities.

Discussions in the Council revealed significant differences of opinion, relating mainly to the scope of the Regulation and to the division of decision-making power between the Commission and the Council.

In its resolution on the ninth report on competition policy, Parliament deplored the fact that the Council had still not adopted the merger control Regulation, which would give the Commission the means to take effective action at Community level against any irreversible structural evolution which could seriously jeopardize competition ⁽⁴⁾.

A policy designed to strengthen effective competition plays a significant role in achieving more flexible structural adjustment and maintaining the

competitiveness of our industries and, in so doing, also contributes to overcoming the current crisis.

It goes without saying that in applying the merger control rules, account must be taken of the differences in economic situations (particularly how open markets are) and, where appropriate, of exigencies stemming from other Community policies.

The amended proposal attempts to confine the control measures to mergers with a Community dimension and to involve the Member States more in the decision-making process.

II. Proposals on the assessment criteria*(Article 1 (1))*

- (a) *Taking into account of the international competitive situation*

(Second subparagraph of Article 1 (1))

This subparagraph has been added in response to a request made by Parliament. Its purpose is to make it clear that account must be taken of the competitive situation and the development of trade at international level.

- (b) *Reference to the Community dimension of the merger*

(Second subparagraph of Article 1 (1))

Such reference is intended to make it clearer that, as was the intention with the original Commission proposal, the Regulation is to apply to mergers

⁽¹⁾ OJ No C 92, 31. 10. 1973, p. 1.

⁽²⁾ OJ No C 23, 8. 3. 1974.

⁽³⁾ OJ No C 88, 26. 7. 1974.

⁽⁴⁾ OJ No C 144, 15. 6. 1981.

which are of a scale that transcend the national context and produce effects at Community level.

(c) *Introduction of a market share criterion*

(Third subparagraph of Article 1 (1) — *new*)

In its original proposal, the Commission applied a market share criterion, in addition to turnover, as a quantitative threshold below which Community merger control would not apply. It set the threshold at 25 % of the relevant market in a member country.

Should it be envisaged, in view of the unity of the common market, to relate this criterion to the common market as a whole, the Commission must underline that it would be difficult to apply and be inappropriate for determining the scope of the Regulation.

The reason is that, if it is difficult to determine a market share with precision at national level, as is shown by experience in the Federal Republic of Germany and the United Kingdom, the difficulty is even greater at common market level, both for the undertakings concerned and for the Commission, creating legal uncertainty for undertakings.

However, market share, used as an indicator of market structure, is without any doubt an important element in assessing whether a merger threatens to eliminate effective competition. It is therefore proposed that the market share criterion be retained as an assessment criterion.

As regards the definition of the geographical market to be taken into account, it is proposed that, in order to make it clear that the Community control applies only to mergers with effects on competition at common market level, reference be made to the market share in the common market as a whole.

As far as the threshold is concerned, it is proposed that this be fixed at 20 %: taking the common market as a whole, a market share of 20 % may represent a critical threshold for the working of competition, regardless of the market shares held by competitors. This is because, in a market with a low level of concentration, acquiring a 20 % market share may result in the creation of a dominant position. On the other hand, if the market already has a high level of concentration, there is a danger of strengthening an oligopolistic structure. Economic research

findings have suggested that this is the case. It is not possible to envisage a higher market share threshold if the creation or strengthening of regional monopolies is to be avoided.

However, market share is only one assessment factor among others, though the others cannot be quantified (see the second subparagraph of Article 1 (1)).

Market share may nevertheless be used to make it clear to undertakings and the appropriate national authorities that, except in specific cases, the Commission considers that, below the critical threshold envisaged, mergers are not normally likely to have significant repercussions on the maintenance of effective competition.

However, the Commission will still be able to determine that, below the critical threshold, a merger does nevertheless have repercussions that would be harmful to the maintenance of effective competition because of other assessment factors; for example, in the event of a conglomerate merger, because of the size and the financial resources of the undertakings concerned.

It goes without saying that, even if a merger gives the undertakings concerned a market share that is equal to or above the critical threshold, it will always be up to the Commission, in the light of the other assessment criteria (second subparagraph of Article 1 (1)), to determine that the merger gives the undertaking concerned the power to hinder effective competition.

III. Proposals on the thresholds for determining applicability of the Regulation

(Article 1 (2))

So as to ensure that mergers of lesser significance were not subject to Community merger control, the Commission's original proposal provided for market share and turnover thresholds, to be used on an alternative basis.

(a) *Market share*

For the reasons set out at II (c), it is proposed that market share should now be used as one of the criteria allowing the effects of a merger on the working of effective competition to be assessed (assessment criterion), and not as a

criterion indicating the limits below which the Regulation would not apply (applicability criterion).

(b) *Turnover*

As a criterion for defining the scope of the Regulation, turnover has the advantage of being easier to determine and to verify; it also reflects the economic and financial strength of the undertakings concerned, particularly in view of the thresholds envisaged. However, the level originally proposed (200 million ECU) must be raised (500 million ECU) to take account of economic developments that have taken place.

IV. Proposal on decision-making procedures

The underlying idea is that in the fields where common policies do not exist, Member States may be concerned by the effects which the prohibition of a given merger might have on the implementation of their national policies. Account should be taken of such circumstances, provided that the attainment of a priority objective of the Community is not thereby endangered. The proposed solution is based on Article 17 of Council Regulation (EEC) No 1017/68⁽¹⁾ which gives the Member States a right to convene the Council.

⁽¹⁾ OJ No L 175, 23. 7. 1968.

ANNEX

Amendments to the proposal for a Regulation on the control of concentrations between undertakings (merger control Regulation)

ORIGINAL PROPOSAL

NEW PROPOSAL

Article 1

Article 1

Basic provisions

Basic provisions

1. Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings or groups of undertakings, at least one of which is established in the common market, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, is incompatible with the common market in so far as the concentration may affect trade between Member States.

1. First subparagraph unchanged.

The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods or services.

The power to hinder effective competition shall be appraised at Community level and by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, to the effects of international competition, and to supply and demand trends for the relevant goods or services.

A concentration shall be presumed to be compatible with the common market where the market share of the goods or services concerned accounts in the common market for less than 20 % of the turnover in

ORIGINAL PROPOSAL

NEW PROPOSAL

2. Paragraph 1 shall not apply where:
- the aggregate turnover of the undertakings participating in the concentration is less than 200 million units of account and
 - the goods or services concerned by the concentration do not account in any Member State for more than 25 % of the turnover in identical goods or services or in goods or services which, by reason of their characteristics, their price and the use for which they are intended, may be regarded as similar by the consumer.
3. Paragraph 1 may, however, be declared inapplicable to concentrations which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community.

*Article 5***Detailed rules for calculating turnover and market shares**

1. (a) The aggregate turnover specified in Articles 1 (2) and 4 (1) shall be obtained by adding together the turnover for the last financial year for all goods and services of:
- (i) the undertakings participating in the concentration;
 - (ii) the undertakings and groups of undertakings which control the undertakings participating in the concentration within the meaning of Article 2;
 - (iii) the undertakings or groups of undertakings controlled within the meaning of Article 2 by the undertakings participating in the concentration.
- (b) The market shares referred to in Article 1 (2) near those held in the last financial year by all the undertakings listed in subparagraph (a) above.

identical goods or services of in goods or services which, by reason of their characteristics, their price and their use are regarded as similar by the consumer. The presumption of compatibility with the common market can be rebutted if the Commission establishes that a concentration giving a market share below this threshold is nonetheless incompatible with the common market.

2. Paragraph 1 shall not apply where the aggregate turnover of the undertakings participating in the concentration is less than 500 million ECU.

Deleted.

3. Unchanged.

*Article 5***Calculation of turnover and market shares**

1. (a) Unchanged.
- (b) **The market shares referred to in Article 1 (1) shall be those . . . (rest unchanged).**

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2. In place of turnover as specified in Articles 1 (2) and 4 (1) and in paragraph 1 of this Article, the following shall be used:

- for banking and financial institutions: one tenth of their assets;
- for insurance companies: the value of the premiums received by them.

*Article 19***Liaison with the authorities of the Member States**

1. The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the notifications together with the most important documents lodged with the Commission pursuant to this Regulation.

2. The Commission shall carry out the procedure set out in this Regulation in close and constant cooperation with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure, and in particular to request the Commission to commence proceedings under Article 6.

3. The Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision under Articles 3, 13 and 14.

4. The Advisory Committee shall consist of officials having responsibility for restrictive practices and monopolies. Each Member State shall appoint an official to represent it; he may be replaced by another official where he is unable to act.

5. Consultation shall take place, at a meeting convened at the invitation of the Commission, not earlier than fourteen days following dispatch of the invitation. A summary of the facts together with the most important documents and a preliminary draft of the decision to be taken, shall be sent with the invitation.

6. The Committee may deliver an opinion even if certain members are absent and unrepresented. The outcome of the consultation shall be annexed to the draft decision. The minutes shall not be published.

2. Unchanged.

*Article 19***Liaison with the authorities of the Member States**

1 and 2: Unchanged.

3. **The Advisory Committee on Restrictive Practices and Dominant Positions shall ... (rest unchanged).**

4. **The Advisory Committee shall consist of officials having responsibility for restrictive practices and dominant positions. Each ... (rest unchanged).**

5 and 6: Unchanged.

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NEW PROPOSAL

7. If a majority of the members of the Advisory Committee opposes the draft Decision under Article 3 (1), the Commission shall not adopt a decision until a period of 20 days has elapsed from the date on which the Advisory Committee was consulted.

8. If, within the period laid down in the preceding paragraph, A Member State raises in the Council an objective which in its opinion should be considered as having priority, within the meaning of Article 1 (3), the Council shall meet within 30 days of the date of the request made by the Member State concerned. In that case the Commission shall take no decision until after the Council meeting, and shall take account of the policy guidelines which emerged in the course of the Council's deliberations.

Proposal for a Council Decision on the collection of information concerning the activities of road hauliers participating in the carriage of goods to and from certain non-member countries

(Submitted by the Commission to the Council on 15 January 1982)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 213 thereof,

Having regard to the draft Decision submitted by the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the Communities' economic and trading interests require an international road haulage situation in which efficient Community hauliers can compete under normal commercial conditions with road hauliers of non-member countries;

Whereas this is in the interest of shippers' ability to choose and the freedom of international trade;

Whereas, however, the existence of distortions of competitive conditions between hauliers based in the Community and those of State-trading countries creates disadvantages for the former;

Whereas in particular State-trading countries apply in road haulage trade practices such as prices which do not reflect costs as established in accordance with normal market rules, control of terms of trade, and the imposition of administrative and other barriers;

Whereas the means of overcoming these difficulties should be examined;

Whereas it is appropriate to establish the exchange of information enabling the institutions of the Community to be informed of developments in road transport relations with State-trading countries,