ISSN 1725-2423

Official Journal of the European Union

C 56

Volume 48

English edition

Information and Notices

5 March 2005

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EN

[1] Text with EEA relevance

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(Information)

COMMISSION

Euro exchange rates [1]

4 March 2005

(2005/C 56/01)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,3115	LVL	Latvian lats	0,6964
JPY	Japanese yen	138,33	MTL	Maltese lira	0,4309
DKK	Danish krone	7,4438	PLN	Polish zloty	3,9287
GBP	Pound sterling	0,68760	ROL	Romanian leu	36 497
SEK	Swedish krona	9,0555	SIT	Slovenian tolar	239,69
CHF	Swiss franc	1,5491	SKK	Slovak koruna	37,884
ISK	Iceland króna	79,82	TRY	Turkish lira	1,6732
NOK	Norwegian krone	8,2275	AUD	Australian dollar	1,6715
BGN	Bulgarian lev	1,9559	CAD	Canadian dollar	1,6317
CYP	Cyprus pound	0,5827	HKD	Hong Kong dollar	10,2295
CZK	Czech koruna	29,665	NZD	New Zealand dollar	1,8031
EEK	Estonian kroon	15,6466	SGD	Singapore dollar	2,1375
HUF	Hungarian forint	242,44	KRW	South Korean won	1 322,39
LTL	Lithuanian litas	3,4528	ZAR	South African rand	7,8168

[1] *Source:* reference exchange rate published by the ECB.

Commission Notice on Case Referral in respect of concentrations

(2005/C 56/02)

(Text with EEA relevance)

1. The purpose of this Notice is to describe in a general way the rationale underlying the case referral system in Article 4(4) and (5), Article 9 and Article 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ([1]) (hereinafter 'the Merger Regulation'), including the recent changes made to the system, to catalogue the legal criteria that must be fulfilled in order for referrals to be possible, and to set out the factors which may be taken into consideration when referrals are decided upon. The Notice also provides practical guidance regarding the mechanics of the referral system, in particular regarding the pre-notification referral mechanism provided for in Article 4(4) and (5) of the Merger Regulation. The guidance provided in this notice applies, *mutatis mutandis*, to the referral rules contained in the EEA Agreement ([2]).

I. INTRODUCTION

2. Community jurisdiction in the field of merger control is defined by the application of the turnover-related criteria contained in Articles 1(2) and 1(3) of the Merger Regulation. When dealing with concentrations, the Commission and Member States do not have concurrent jurisdiction. Rather, the Merger Regulation establishes a clear division of competence. Concentrations with a 'Community dimension', i.e. those above the turnover thresholds in Article 1 of the Merger Regulation, fall within the exclusive jurisdiction of the Commission; Member States are precluded from applying national competition law to such concentrations by virtue of Article 21 of the Merger Regulation. Concentrations falling below the thresholds remain within the competence of the Member States; the Commission has no jurisdiction to deal with them under the Merger Regulation.

3. Determining jurisdiction exclusively by reference to fixed turnover-related criteria provides legal certainty for merging companies. While the financial criteria generally serve as effective proxies for the category of transactions for which the Commission is the more appropriate authority, Regulation (EEC) No 4064/89 complemented this 'bright-line' jurisdictional scheme with a possibility for cases to be re-attributed by the Commission to Member States and vice versa, upon request and provided certain criteria were fulfilled.

4. When Regulation (EEC) No 4064/89 was first introduced, it was envisaged by the Council and Commission that case referrals would only be resorted to in 'exceptional circumstances' and where 'the interests in respect of competition of the Member State concerned could not be adequately protected in any other way' ([3]). There have, however, been a number of developments since the adoption of Regulation (EEC) No 4064/89. First, merger control laws have been introduced in almost all

([1]) OJ L 24, 29.1.2004, p. 1. This Regulation has recast Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13).

([2]) See EEA Joint Committee Decision No 78/2004 of 8 June 2004 (OJ L 219, 8.6.2004, p. 13).

([3]) See the Notes on Council Regulation (EEC) No 4064/89 ['Merger Control in the European union', European Commission, Brussels-Luxembourg, 1998, at p. 54]. See also Case T-119/02 *Philips v Commission* [2003] ECR II-1433 (Case M.2621 *SEB/Moulinex*) at paragraph 354.

Member States. Second, the Commission has exercised its discretion to refer a number of cases to Member States pursuant to Article 9 in circumstances where it was felt that the Member State in question was in a better position to carry out the investigation than the Commission ([4]). Likewise, in a number of cases ([5]), several Member States decided to make a joint referral of a case pursuant to Article 22 in circumstances where it was felt that the Commission was the authority in a better position to carry out the investigation ([6]). Third, there has been an increase in the number of transactions not meeting the thresholds in Article 1 of the Merger Regulation which must be filed in multiple Member State jurisdictions, a trend which is likely to continue in line with the Community's growing membership. Many of these transactions affect competition beyond the territories of individual Member States ([7]).

5. The revisions made to the referral system in the Merger Regulation are designed to facilitate the re-attribution of cases between the Commission and Member States, consistent with the principle of subsidiarity, so that the more appropriate authority or authorities for carrying out a particular merger investigation should in principle deal with the case. At the same time, the revisions are intended to preserve the basic features of the Community merger control system introduced in 1989, in particular the provision of a 'one-stop-shop' for the competition scrutiny of mergers with a cross-border impact and an alternative to multiple merger control notifications within the Community ([8]). Such multiple filings often entail considerable cost for competition authorities and businesses alike.

6. The case re-attribution system now provides that a referral may also be triggered before a formal filing has been made in any Member State jurisdiction, thereby affording merging companies the possibility of ascertaining, at as early as possible a stage, where jurisdiction for scrutiny of their transaction will ultimately lie. Such pre-notification referrals have the advantage of alleviating the additional cost, notably in terms of time delay, associated with post-filing referral.

7. The revisions made to the referral system in Regulation (EC) No. 139/2004 were motivated by a desire that it should operate as a jurisdictional mechanism which is flexible ([9]) but which at the same time ensures effective protection of competition and limits the scope for 'forum shopping' to the greatest extent possible. However, having regard in particular to the importance of legal certainty, it should be stressed that referrals remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds. Moreover, the Commission and Member States retain a considerable margin of discretion in deciding whether to refer cases falling within their 'original jurisdiction', or whether to accept to deal with cases not falling within their 'original jurisdiction', pursuant to Article 4(4) and (5), Article 9(2)(a) and Article 22 ([10]). To that extent, the current Notice is intended to provide no more than general guidance regarding the appropriateness of particular cases or categories of cases for referral.

([4]) It is a fact that some concentrations of Community dimension affect competition in national or sub-national markets within one or more Member States.

([5]) M.2698 *Promatech/Sulzer*; M.2738 *GE/Unison*; M.3136 *GE/AGFA*.

([6]) In the same vein, Member States' competition authorities, in the context of the European Competition Authorities' association, have issued a recommendation designed to provide guidance as to the principles upon which national competition authorities should deal with cases eligible for joint referrals under Article 22 of the Merger Regulation — *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*.

([7]) While the introduction of Article 1(3) in 1997 has brought some such cases under the jurisdiction of the Merger Regulation, many are unaffected. See paragraph 21 et seq of the Commission's Green Paper of 11 December 2001 (COM(2001) 745 final).

([8]) See Recitals 11, 12 and 14 to the Merger Regulation.

([9]) See Recital 11 to the Merger Regulation.

([10]) See, however, *infra*, footnote 14. It should moreover be noted that, pursuant to Article 4(5), the Commission has no discretion as to whether or not to accept a case not falling within its original jurisdiction.

II. **REFERRAL OF CASES**

Guiding principles

8. The system of merger control established by the Merger Regulation, including the mechanism for re-attributing cases between the Commission and Member States contained therein, is consistent with the principle of subsidiarity enshrined in the EC Treaty ([11]). Decisions taken with regard to the referral of cases should accordingly take due account of all aspects of the application of the principle of subsidiarity in this context, in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a 'one-stop-shop' system, and the importance of legal certainty with regard to jurisdiction ([12]). These factors are inter-linked and the respective weight placed upon each of them will depend upon the specificities of a particular case. Above all, in considering whether or not to exercise their discretion to make or accede to a referral, the Commission and Member States should bear in mind the need to ensure effective protection of competition in all markets affected by the transaction ([13]).

More appropriate authority

9. In principle, jurisdiction should only be re-attributed to another competition authority in circumstances where the latter is the more appropriate for dealing with a merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority. Particular regard should be had to the likely locus of any impact on competition resulting from the merger. Regard may also be had to the implications, in terms of administrative effort, of any contemplated referral ([14]).

10. The case for re-attributing jurisdiction is likely to be more compelling where it appears that a particular transaction may have a significant impact on competition and thus may deserve careful scrutiny.

One-stop-shop

11. Decisions on the referral of cases should also have regard to the benefits inherent in a 'one-stop-shop', which is at the core of the Merger Regulation ([15]). The provision of a one-stop-shop is beneficial to competition authorities and businesses alike. The handling of a merger by a single competition authority normally increases administrative efficiency, avoiding duplication and fragmentation of enforcement effort as well as potentially incoherent treatment (regarding investigation, assessment and possible remedies) by multiple authorities. It normally also brings advantages to businesses, in particular to merging firms, by reducing the costs and burdens arising from multiple filing obligations and by eliminating the risk of conflicting decisions resulting from the concurrent assessment of the same transaction by a number of competition authorities under diverse legal regimes.

([11]) See Article 5 of the EC Treaty.

([12]) See Recitals 11 and 14 to the Merger Regulation.

([13]) See Article 9(8) of the Merger Regulation; see also *Philips v Commission* (paragraph 343) where the Court of First Instance of the European Communities states that '… although the first subparagraph of Article 9(3) of Regulation (EEC) No 4064/89 confers on the Commission broad discretion as to whether or not to refer a concentration, it cannot decide to make such a referral if, when the Member State's request for referral is examined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard effective competition on the relevant market'; see also T-346/02 and T-347/02 *Cableuropa SA v Commission* of 30 September 2003, case not yet reported (paragraph 215). Circumstances relevant for the purpose of the Commission assessment include, *inter alia*, the fact that a Member State: (i) has specific laws for the control of concentrations on competition grounds and specialised bodies to ensure that these laws are implemented under the supervision of the national courts; (ii) has accurately identified the competition concerns raised by the concentration on the relevant markets in that Member State (see paragraphs 346-347 of *Philips v Commission*, cited above).

([14]) This may involve consideration of the relative cost, time delay, legal uncertainty and the risk of conflicting assessment which may be associated with the investigation, or a part of the investigation, being carried out by multiple authorities.

([15]) See Recital 11 of the Merger Regulation.

12. Fragmentation of cases through referral should therefore be avoided where possible ([16]), unless it appears that multiple authorities would be in a better position to ensure that competition in all markets affected by the transaction is effectively protected. Accordingly, while partial referrals are possible under Article 4(4) and Article 9, it would normally be appropriate for the whole of a case (or at least all connected parts thereof) to be dealt with by a single authority ([17]).

Legal certainty

13. Due account should also be taken of the importance of legal certainty regarding jurisdiction over a particular concentration, from the perspective of all concerned ([18]). Accordingly, referral should normally only be made when there is a compelling reason for departing from 'original jurisdiction' over the case in question, particularly at the post-notification stage. Similarly, if a referral has been made prior to notification, a post-notification referral in the same case should be avoided to the greatest extent possible ([19]).

14. The importance of legal certainty should also be borne in mind with regard to the legal criteria for referral, and particularly — given the tight deadlines — at the pre-notification stage. Accordingly, pre-filing referrals should in principle be confined to those cases where it is relatively straightforward to establish, from the outset, the scope of the geographic market and/or the existence of a possible competitive impact, so as to be able to promptly decide upon such requests

Case referrals: legal requirements and other factors to be considered

Pre-notification referrals

15. The system of pre-notification referrals is triggered by a reasoned submission lodged by the parties to the concentration. When contemplating such a request, the parties to the concentration are required, first, to verify whether the relevant legal requirements set out in the Merger Regulation are fulfilled, and second, whether a pre-notification referral would be consistent with the guiding principles outlined above.

Referral of cases by the Commission to Member States under Article 4(4)

Legal requirements

16. In order for a referral to be made by the Commission to one or more Member States pursuant to Articles 4(4), two legal requirements must be fulfilled:

(i) there must be indications *that the concentration may significantly affect competition* in a market or markets;

(ii) the market(s) in question must be within a Member State and *present all the characteristics of a distinct market*.

([16]) The Court of First Instance in *Philips v Commission* took the view, *obiter dictum*, that 'fragmentation' of cases, while possible as a result of the application of Article 9, is 'undesirable in view of the "one-stop-shop" principle on which Regulation (EEC) No 4064/89 is based'. Moreover, the Court, while recognising that the risk of 'inconsistent, or even irreconcilable' decisions by the Commission and Member States' is inherent in the referral system established by Article 9', made it clear that this is not, in its view, desirable. (See paragraphs 350 and 380).

([17]) This is consistent with the Commission's decision in cases M.2389 *Shell/DEA* and M.2533 *BP/E.ON* to refer to Germany all of the markets for downstream oil products. The Commission retained the parts of the cases involving upstream markets. Likewise, in M.2706 *P&O Princess/Carnival*, the Commission exercised its discretion not to refer a part of the case to the United Kingdom, because it wished to avoid a fragmentation of the case (See Commission press release of 11.4.2002, IP/02/552)

([18]) See Recital 11 of the Merger Regulation.

([19]) See Recital 14 to the Merger Regulation. This is of course subject to the parties having made a full and honest disclosure of all relevant facts in their request for a pre-filing referral.

17. As regards the *first criterion*, the requesting parties are in essence required to demonstrate that the transaction is liable to have a potential impact on competition on a distinct market in a Member State, which may prove to be significant, thus deserving close scrutiny. Such indications may be no more than preliminary in nature, and would be without prejudice to the outcome of the investigation. While the parties are not required to demonstrate that the effect on competition is likely to be an adverse one ([20]), they should point to indicators which are generally suggestive of the existence of some competitive effects stemming from the transaction ([21]).

18. As regards the *second criterion*, the requesting parties are required to show that a geographic market in which competition is affected by the transaction in the manner just described (paragraph 17) is national, or narrower than national in scope ([22]).

Other factors to be considered

19. Other than verification of the legal requirements, in order to anticipate to the greatest extent possible the likely outcome of a referral request, merging parties contemplating a request should also consider whether referral of the case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above (paragraphs 8 to 14), and in particular whether the competition authority or authorities to which they are contemplating requesting the referral of the case is the most appropriate authority for dealing with the case. To this end, consideration should be given in turn both to the likely locus of the competitive effects of the transaction and to how appropriate the national competition authority (NCA) would be for scrutinising the operation.

20. Concentrations with a Community dimension which are likely to affect competition in markets that have a national or narrower than national scope, and the effects of which are likely to be confined to, or have their main economic impact in, a single Member State ([23]), are the most appropriate candidate cases for referral to that Member State. This applies in particular to cases where the impact would occur on a distinct market which does not constitute a substantial part of the common market. To the extent that referral is made to one Member State only, the benefit of a 'one-stop-shop' is also preserved.

21. The extent to which a concentration with a Community dimension which, despite having a potentially significant impact on competition in a nation-wide market, nonetheless potentially engenders substantial cross-border effects (e.g. because the effects of the concentration in one geographic market may have significant repercussions in geographic markets in other Member States, or because it may

([20]) See Recital 16, which states that 'the undertakings concerned should not … be required to demonstrate that the effects of the concentration would be detrimental to competition'.

([21]) The existence of 'affected markets' within the meaning of Form RS would generally be considered sufficient to meet the requirements of Article 4(4). However, the parties can point to any factors which may be relevant for the competitive analysis of the case (market overlap, vertical integration, etc).

([22]) To this end, the requesting parties should consider those factors which are typically suggestive of national or narrower than national markets, such as, primarily, the product characteristics (e.g. low value of the product as opposed to significant costs of transport), specific characteristics of demand (e.g. end consumers sourcing in proximity to their centre of activity) and supply, significant variation of prices and market shares across countries, national consumer habits, different regulatory frameworks, taxation or other legislation. Further guidance can be found in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

([23]) See, for example, the Commission's referral of certain distinct oil storage markets for assessment by the French authorities in Cases M.1021 *Compagnie Nationale de Navigation-SOGELF*, M.1464 *Total/Petrofina*, and Case M.1628 *Totalfina/Elf Aquitaine*, Case M.1030 *Lafarge/Redland*, Case M.1220 *Alliance Unichem/Unifarma*, Case M.2760 *Nehlsen/Rethmann/SWB/Bremerhavener Energiewirtschaft*, and Case M.2154 *C3D/Rhone/Go-ahead*; Case M.2845 *Sogecable/Canal Satelite Digital/Vias Digital*.

involve potential foreclosure effects and consequent fragmentation of the common market ([24])), may be an appropriate candidate for referral will depend on the specific circumstances of the case. As both the Commission and Member States may be equally well equipped or be in an equally good position to deal with such cases, a considerable margin of discretion should be retained in deciding whether or not to refer such cases.

22. The extent to which concentrations with a Community dimension, and potentially affecting competition in a series of national or narrower than national markets in more than one Member State, may be appropriate candidates for referral to Member States will depend on factors specific to each individual case, such as the number of national markets likely to be significantly affected, the prospect of addressing any possible concerns by way of proportionate, non-conflicting remedies, and the investigative efforts that the case may require. To the extent that a case may engender competition concerns in a number of Member States, and require coordinated investigations and remedial action, this may militate in favour of the Commission retaining jurisdiction over the entirety of the case in question ([25]). On the other hand, to the extent that the case gives rise to competition concerns which, despite involving national markets in more than one Member State, do not appear to require coordinated investigation and/or remedial action, a referral may be appropriate. In a limited number of cases ([26]), the Commission has even found it appropriate to refer a concentration to more than one Member State, in view of the significant differences in competitive conditions that characterised the affected markets in the Member States concerned. While fragmentation of the treatment of a case deprives the merging parties of the benefit of a one-stop-shop in such cases, this consideration is less pertinent at the pre-notification stage, given that the referral is triggered by a voluntary request from the merging parties.

23. Consideration should also, to the extent possible, be given to whether the NCA(s) to which referral of the case is contemplated may possess specific expertise concerning local markets ([27]), or be examining, or about to examine, another transaction in the sector concerned ([28]).

([24]) See Case M.580 *ABB/Daimler Benz*, where the Commission did not accede to Germany's request for referral of a case under Article 9 in circumstances where, while the competition concerns were confined to German markets, the operation (which would create the largest supplier of railway equipment in the world) would have significant repercussions throughout Europe. See also Case M.2434 *Hidroelectrica del Cantabrico/EnBW/Grupo Vilar Mir*, where, despite a request by Spain to have the case referred under Article 9, the Commission pursued the investigation and adopted a decision pursuant to Article 8(2).

([25]) For some examples, see M.1383 *Exxon/Mobil*, where the Commission, despite the United Kingdom request to have the part of the concentration relating to the market for motor fuel retailing in North west of Scotland referred to it, pursued the investigation as the case required a single and coherent remedy package designed to address all the problematic issues in the sector concerned; see also M.2706 *P&O Princess/Carnival*, where, despite the fact that the UK authorities were assessing a rival bid by Royal Caribbean, the Commission did not accede to a request for a partial referral, so as to avoid a fragmentation of the case and secure a single investigation of the various national markets affected by the operation.

([26]) See M. 2898, *Le Roy Merlin/Brico*, M.1030, *Redland/Lafarge*, M. 1684, *Carrefour/Promodes*.

([27]) In Case M.330 *MacCormick/CPC/Rabobank/Ostmann*, the Commission referred a case to Germany, because it was better placed to investigate local conditions in 85,000 sales points in Germany; a referral to the Netherlands was made in Case M.1060 *Vendex/KBB*, because it was better placed to assess local consumer tastes and habits; See also Case M.1555 *Heineken/Cruzcampo*, Case M.2621 *SEB/Moulinex* (where consumer preferences and commercial and marketing practice swere specific to the French market); Case M.2639 *Compass/Restorama/Rail Gourmet/Gourmet*, and Case M.2662 *Danish-Crown/Steff-Houlberg*.

([28]) In Case M.716 *Gehe/Lloyds Chemists*, for example, the Commission referred a case because Lloyds was also subject to another bid not falling under ECMR thresholds but being scrutinised by the UK authorities: the referral allowed both bids to be scrutinised by the same authority; in M.1001/M.1019 *Preussag/Hapag-Lloyd/TUI*, a referral was made to Germany of two transactions, which together with a third one notified in Germany, would present competition concerns: the referral ensured that all three operations were dealt with in like manner; in case M.2044 *Interbrew/Bass*, the Commission referred the case to the UK authorities, because they were at the same time assessing Interbrew's acquisition of another brewer, Whitbread, and because of their experience in recent investigations in the same markets; similarly, see also Cases M.2760 *Nehlsen/Rethmann/SWB/Bremerhavener Energiewirtschaft*, M.2234 *Metsalilitto Osuuskunta/Vapo Oy/JV*, M.2495 *Haniel/Fels*, M.2881 *Koninklijke BAM NBM/HBG*, and M.2857/M.3075-3080 *ECS/IEH* and six other acquisitions by Electrabel of local distributors. In M.2706 *P&O Princess/Carnival*, however, despite the fact that the UK authorities were already assessing a rival bid by Royal Caribbean, the Commission did not accede to a request for a partial referral. The Commission had identified preliminary competition concerns in other national markets affected by the merger and thus wished to avoid a fragmentation of the case (See Commission press release of 11.4.2002, IP/02/552).

Referral of cases from Member States to the Commission under Article 4(5)

Legal requirements

24. Under Article 4(5), only two legal requirements must be met in order for the parties to the transaction to request the referral of the case to the Commission: the transaction must be a concentration within the meaning of Article 3 of the Merger Regulation, and the concentration must be *capable of being reviewed under the national competition laws for the control of mergers of at least three Member States* (see also paragraphs 65 et seq and 70 et seq).

Other factors to be considered

25. Other than verification of the legal requirements, in order to anticipate to the greatest extent possible the likely outcome of a referral request, merging parties contemplating a request should also consider whether referral of the case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above, and in particular whether the Commission is the more appropriate authority for dealing with the case.

26. In this regard, Recital 16 to the Merger Regulation states that 'requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State.' Particular consideration should therefore be given to the likely locus of any competitive effects resulting from the transaction, and to how appropriate it would be for the Commission to scrutinise the operation.

27. It should in particular be assessed whether the case is genuinely cross-border in nature, having regard to elements such as its likely effects on competition and the investigative and enforcement powers likely to be required to address any such effects. In this regard, particular consideration should be given to whether the case is liable to have a potential impact on competition in one or more markets affected by the concentration. In any case, indications of possible competitive impact may be no more than preliminary in nature ([29]), and would be without prejudice to the outcome of the investigation. Nor would it be necessary for the parties to demonstrate that the effect on competition is likely to be an adverse one.

28. Cases where the market(s) in which there may be a potential impact on competition is/are wider than national in geographic scope ([30]), or where some of the potentially affected markets are wider than national and the main economic impact of the concentration is connected to such markets, are the most appropriate candidate cases for referral to the Commission. In such cases, as the competitive dynamics extend over territories reaching beyond national boundaries, and may consequently require investigative efforts in several countries as well as appropriate enforcement powers, the Commission is likely to be in the best position to carry out the investigation.

([29]) The existence of 'affected markets' within the meaning of Form RS would generally be considered sufficient. However, the parties can point to any factors which may be relevant for the competitive analysis of the case (market overlap, vertical integration, etc).

([30]) See the joint referral by seven Member States to the Commission of a transaction affecting worldwide markets in M.2738 *GE/Unison,* and the joint referral by seven Member States to the Commission of a transaction affecting a Western European market in M.2698 *Promatech/Sulzer*; See also *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation,* a paper published by the European Competition Authorities (ECA), at paragraph 11.

29. The Commission may be more appropriately placed to treat cases (including investigation, assessment and possible remedial action) that give rise to potential competition concerns in a series of national or narrower than national markets located in a number of different Member States ([31]). The Commission is likely to be in the best position to carry out the investigation in such cases, given the desirability of ensuring consistent and efficient scrutiny across the different countries, of employing appropriate investigative powers, and of addressing any competition concerns by way of coherent remedies.

30. Similarly to what has been said above in relation to Article 4(4), the appropriateness of referring concentrations which, despite having a potentially significant impact on competition in a nation-wide market, nonetheless potentially engender substantial cross-border effects, will depend on the specific circumstances of the case. As both the Commission and Member States may be in an equally good position to deal with such cases, a considerable margin of discretion should be retained in deciding whether or not to refer such cases.

31. Consideration should also, to the extent possible, be given to whether the Commission is particularly well equipped to properly scrutinise the case, in particular having regard to factors such as specific expertise, or past experience in the sector concerned. The greater a merger's potential to affect competition beyond the territory of one Member State, the more likely it is that the Commission will be better equipped to conduct the investigation, particularly in terms of fact finding and enforcement powers.

32. Finally, the parties to the concentration might submit that, despite the apparent absence of an effect on competition, there is a compelling case for having the operation treated by the Commission, having regard in particular to factors such as the cost and time delay involved in submitting multiple Member State filings ([32]).

Post-notification referrals

Referrals from the Commission to Member States pursuant to Article 9

33. Under Article 9 there are two options for a Member State wishing to request referral of a case following its notification to the Commission: Articles 9(2)(a) and 9(2)(b) respectively.

Article 9(2)(a)

Legal requirements

34. In order for a referral to be made to a Member State or States pursuant to Article 9(2)(a), the following legal requirements must be fulfilled:

(i) the concentration must *threaten to affect significantly competition in a market*; and

(ii) the market in question must be *within the requesting Member State, and present all the characteristics of a distinct market*.

35. As regards the *first criterion*, in essence a requesting Member State is required to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

([31]) This may, for example, be the case in relation to operations where the affected markets, while national (or even narrower than national in scope for the purposes of a competition assessment), are nonetheless characterised by common Europe-wide or world-wide brands, by common Europe-wide or world-wide intellectual property rights, or by centralised manufacture or distribution — at least to the extent that such centralised manufacture or distribution would be likely to impact upon any remedial measures.

([32]) See Recitals 12 and 16 of the Merger Regulation.

36. As regards the *second criterion*, the Member State is required to show that a geographic market(s) in which competition is affected by the transaction in the manner just described (paragraph 35) is/are national, or narrower than national in scope ([33]).

Other factors to be considered

37. Other than verification of the legal requirements, other factors should also be considered in assessing whether referral of a case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above, and in particular whether the competition authority or authorities requesting the referral of the case is/are in the best position to deal with the case. To this end, consideration should be given in turn both to the likely locus of the competitive effects of the transaction and to how well equipped the NCA would be to scrutinise the operation (see above at paragraphs 19-23)

Article 9(2)(b)

Legal requirements

38. In order for a referral to be made to a Member State or States pursuant to Article 9(2)(b), the following legal requirements must be fulfilled:

(i) the concentration *must affect competition in a market*; and

(ii) the market in question must be *within the requesting Member State, present all the characteristics of a distinct market, and must not constitute a substantial part of the common market*.

39. As regards the *first criterion*, a requesting Member State is required to show, based on a preliminary analysis, that the concentration is liable to have an impact on competition in a market. Such preliminary indications may be in the nature of *prima facie* evidence of a possible adverse impact, but would be without prejudice to the outcome of a full investigation.

40. As to the *second criterion*, a requesting Member State is required to show not only that the market in which competition is affected by the operation in the manner just described (paragraph 38) constitutes a distinct market within a Member State, but also that the market in question does not constitute a substantial part of the common market. In this respect, based on the past practice and case-law ([34]), it appears that such situations are generally limited to markets with a narrow geographic scope, within a Member State.

([33]) See Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

([34]) See Commission referrals granted under Article 9(2)(b) in: M.2446, *Govia/Connex South Central*, where the operation affected competition on specific railway routes in the London/Gatwick-Brighton area in the United Kingdom; in M.2730, *Connex/DNVBVG*, where the transaction affected competition in local public transport services in the Riesa area (Saxony, Germany); and in M. 3130, *Arla Foods/Express Diaries*, where the transaction affected competition in the market for the supply of bottled milk to doorstep deliverers in the London, Yorkshire and Lancashire regions of the United Kingdom. For the purpose of defining the notion of a non-substantial part of the common market, some guidance can also be found in the case-law relating to the application of Article 82 of EC Treaty. In that context, the Court of Justice has articulated quite a broad notion of what may constitute a substantial part of the common market, resorting *inter alia* to empirical evidence. In the case-law there can be found, for instance, indications essentially based on practical criteria such as 'the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers', see Case 40/73, *Suiker Unie v Commission*, [1975] ECR 1663. See also Case C-179/90, *Porto di Genova* [1991] ECR 5889, where the Port of Genova was considered as constituting a substantial part of the common market. In its case-law the Court has also stated that a series of separate markets may be regarded as together constituting a substantial part of the common market. See, for example, Case C-323/93, *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph. 17, where the Court stated 'In this case, by making the operation of the insemination centres subject to authorization and providing that each centre should have the exclusive right to serve a defined area, the national legislation granted those centres exclusive rights. By thus establishing, in favour of those undertakings, a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, those national provisions create a dominant position, within the meaning of Article 86 of the Treaty, in a substantial part of the common market'.

41. If these conditions are met, the Commission has an obligation to refer the case.

Referrals from Member States to the Commission pursuant to Article 22

Legal requirements

42. In order for a referral to be made by one or more Member States to the Commission pursuant to Article 22, two legal requirements must be fulfilled:

(i) the concentration must *affect trade between Member States*; and

(ii) it must *threaten to significantly affect competition within the territory of the Member State or States making the request*.

43. As to the *first criterion*, a concentration fulfils this requirement to the extent that it is liable to have some discernible influence on the pattern of trade between Member States ([35]).

44. As to the *second criterion*, as under Article 9(2)(a), a referring Member State or States is/are required in essence to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

Other factors to be considered

45. As post-notification referrals to the Commission may entail additional cost and time delay for the merging parties, they should normally be limited to those cases which appear to present a real risk of negative effects on competition and trade between Member States, and where it appears that these would be best addressed at the Community level ([36]). The categories of cases normally most appropriate for referral to the Commission pursuant to Article 22 are accordingly the following:

— cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets,

— cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets.

III. **MECHANICS OF THE REFERRAL SYSTEM**

A. OVERVIEW OF THE REFERRAL SYSTEM

46. The Merger Regulation sets out the relevant legal rules for the functioning of the referral system. The rules contained in Article 4(4) and (5), Article 9 and Article 22 set out in detail the various steps required for a case to be referred from the Commission to Member States and vice versa.

([35]) See also, by analogy, the Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81).

([36]) See the joint referral by seven Member States to the Commission of a transaction affecting worldwide markets in M.2738 *GE/Unison*, and the joint referral by seven Member States to the Commission of a transaction affecting a Western European market in M.2698 *Promatech/Sulzer*; See also *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*, a paper published by the European Competition Authorities (ECA), at paragraph 11.

47. Each of the four relevant referral provisions establishes a self-contained mechanism for the referral of a given category of concentration. The provisions can be categorised in the following way:

(a) Pre-notification referrals:

(i) From the Commission to Member States (Article 4(4))

(ii) From Member States to the Commission (Article 4(5))

(b) Post-notification referrals:

(i) From the Commission to Member States (Article 9)

(ii) From Member States to the Commission (Article 22).

48. The flowcharts in Annex I to this Notice describe in graphical form the various procedural steps to be followed in the referral mechanisms set out in Articles 4(4) and (5), Article 9 and Article 22.

Pre-notification referrals

49. Pre-notification referrals can only be requested by the undertakings concerned ([37]). It is for the undertakings concerned to verify whether the concentration meets the criteria specified in Article 4(4) (that the concentration has a Community dimension but may significantly affect competition in a distinct market within a Member State) or Article 4(5) (that the concentration does not have a Community dimension but is capable of being reviewed under the national competition laws of at least three Member States). The undertakings concerned may then decide to request a referral to or from the Commission by submitting a reasoned request on Form RS. The request is transmitted without delay by the Commission to all Member States. The remainder of the process differs under Article 4(4) and Article 4(5).

— Under Article 4(4), the Member State or States concerned ([38]) have 15 working days from the date they receive the submission to express agreement or disagreement with the request. Silence on the part of a Member State is deemed to constitute agreement ([39]). If the Member State or States concerned agree to the referral, the Commission has an additional period of approximately 10 working days (25 working days from the date the Commission received Form RS) in which it may decide to refer the case. Silence on the part of the Commission is deemed to constitute assent. If the Commission assents, the case (or one or more parts thereof) is referred to the Member States or States as requested by the undertakings concerned. If the referral is made, the Member State or States concerned apply their national law to the referred part of the case ([40]). Articles 9(6) to 9(9) apply.

([37]) The term 'undertakings concerned' includes 'persons' within the meaning of Article 3(1)(b).

([38]) The Member State or States concerned are the ones identified in Form RS to which the case will be referred if the request is granted.

([39]) This mechanism is an essential feature of all referral procedures set out in the Merger Regulation. The mechanism may be termed 'positive silence' or non-opposition: that is to say that failure to take a decision on the part of the Commission or a Member State will be deemed to constitute the taking of a positive decision. This mechanism was already a feature of Regulation (EEC) No 4064/89, in Article 9(5). It is now included in Article 4(4) (second and fourth sub-paragraphs), Article 4(5) (fourth sub-paragraph), Article 9(5) and Article 22(3) (first sub-paragraph, last sentence) of the Merger Regulation. The positive silence mechanism is, however, not applicable with regard to decisions by Member States to join a request under Article 22(2).

([40]) Article 4(4) allows merging parties to request partial or full referrals. The Commission and Member States must either accede to or refuse the request, and may not vary its scope by, for example, referring only a part of case when a referral of the whole of the case had been requested. In the case of a partial referral, the Member State concerned will apply its national competition law to the referred part of the case. For the remainder of the case, the Merger Regulation will continue to apply in the normal way, that is the undertakings concerned will be obliged to make a notification of the non-referred part of the concentration on Form CO pursuant to Article 4(1) of the Merger Regulation. By contrast, if the whole of the case is referred to a Member State, Article 4(4) final sub-paragraph specifies that there will be no obligation to notify the case also to the Commission. The case will thus not be examined by the Commission. The Member State concerned will apply its national law to the whole of the case; no other Member State can apply national competition law to the concentration in question.

— Under Article 4(5), the Member States concerned ([41]) have 15 working days from the date they receive the submission to express agreement or disagreement with the request. At the end of that period, the Commission checks whether any Member State competent to examine the concentration under its national competition law has expressed disagreement. If there is no expression of disagreement by any such competent Member State, the case is deemed to acquire a Community dimension and is thus referred to the Commission which has exclusive jurisdiction over it. It is then for the parties to notify the case to the Commission, using Form CO. On the other hand, if one or more competent Member States have expressed their disagreement, the Commission informs all Member States and the undertakings concerned without delay of any such expression of disagreement and the referral process ends. It is then for the parties to comply with any applicable national notification rules.

Post-notification referrals

50. Pursuant to Article 9(2) and Article 22(1), post-notification referrals are triggered by Member States either on their own initiative or following an invitation by the Commission pursuant to Article 9(2) and Article 22(5) respectively. The procedures differ according to whether the referral is from or to the Commission.

— Under Article 9, a Member State may request that the Commission refer to it a concentration with Community dimension, or a part thereof, which has been notified to the Commission and which threatens to significantly affect competition within a distinct market within that Member State (Article 9(2)(a)), or which affects such a distinct market not constituting a substantial part of the common market (Article 9(2)(b)). The request must be made within 15 working days from the date the Member State received a copy of Form CO. The Commission must first verify whether those legal criteria are met. It may then decide to refer the case, or a part thereof, exercising its administrative discretion. In the case of a referral request made pursuant to Article 9(2)(b), the Commission must (i.e. has no discretion) make the referral if the legal criteria are met. The decision must be taken within 35 working days from notification or, where the Commission has initiated proceedings, within 65 working days ([42]). If the referral is made, the Member State concerned applies its own national competition law, subject only to Article 9(6) and (8).

— Under Article 22, a Member State may request that the Commission examine a concentration which has no Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. The request must be made within 15 working days from the date of national notification or, where no notification is required, the date when the concentration was 'made known' ([43]) to the Member State concerned. The Commission transmits the request to all Member States. Any other Member States can decide to join the request ([44]) within a period of 15 working days from the date they receive a copy of the initial request. All national time limits relating to the concentration are suspended a decision has been taken as to where it will be examined; a Member State can re-start the national time limits before

([41]) That is, those that would be competent to review the case under their national competition law in the absence of a referral. For the concept of 'competent to review the case', see section B5 below.

([42]) As regards cases where the Commission takes preparatory steps within 65 working days, see Article 9(4)(b) and (5).

([43]) The notion of 'made known', derived from the wording of Article 22, should in this context be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request pursuant to Article 22.

([44]) It should be noted that Article 22 enables a Member State to join the initial request even if the concentration has not yet been notified to it. However, Member States may be unable to do so if they have not yet received the necessary information from the merging parties at the time of being informed by the Commission that a referral request has been lodged by another Member State. Notwithstanding the Member State's ability to contact the merging parties in order to verify whether they are competent to review any particular transaction, the notifying parties are therefore strongly encouraged to file, where feasible, their notification to all competent Member States simultaneously.

the expiry of the 15 working day period by informing the Commission and the merging parties that it does not wish to join the request. At the latest 10 working days following the expiry of the 15 working day period, the Commission must decide whether to accept the case from the requesting Member State(s). If the Commission accepts jurisdiction, national proceedings in the referring Member State(s) are terminated and the Commission examines the case pursuant to Article 22(4) of the Merger Regulation on behalf of the requesting State(s) ([45]). Non-requesting States can continue to apply national law.

51. The following section of the Notice focuses on a number of detailed elements of the system with the aim in particular of providing further guidance to undertakings contemplating making requests at the pre-notification stage, or who may be party to transactions subject to the possibility of post-notification referral.

B. DETAILS OF THE REFERRAL MECHANISM

52. This section of this Notice provides guidance regarding certain aspects of the functioning of the referral system set out in Article 4(4) and(5), Article 9 and Article 22 of the Merger Regulation.

1. **The network of competition authorities**

53. Article 19(2) of the Merger Regulation provides that the Commission is to carry out the procedures set out in that Regulation in close and constant liaison with the competent authorities of the Member States (the NCAs). Cooperation and dialogue between the Commission and the NCAs, and between the NCAs themselves, is particularly important in the case of concentrations which are subject to the referral system set out in the Merger Regulation.

54. According to Recital 14 to the Merger Regulation, 'the Commission and the NCAs should form together a network of public authorities, applying their respective competences in close cooperation using efficient arrangements for information sharing and consultation with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity, and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible'.

55. The network should ensure the efficient re-attribution of concentrations according to the principles described in section II above. This involves facilitating the smooth operation of the pre-notification referral mechanism, as well as providing, to the extent foreseeable, a system whereby potential post-notification referral requests are identified as soon as possible ([46]).

([45]) Where the Commission examines a concentration on behalf of one or more Member States pursuant to Article 22, it can adopt all the substantive decisions provided for in Articles 6 and 8 of the Merger Regulation. This is established in Article 22(4) of that Regulation. It is to be noted that the Commission examines the concentration upon the request of and on behalf of the requesting Member States. This provision should therefore be interpreted as requiring the Commission to examine the impact of the concentration within the territory of those Member States. The Commission will not examine the effects of the concentration in the territory of Member States which have not joined the request unless this examination is necessary for the assessment of the effects of the concentration within the territory of the requesting Member States (for example, where the geographic market extends beyond the territory/or territories of the requesting Member State(s).

([46]) Advance knowledge of the possibility of a referral request might, for example, be taken into account by the Commission in deciding not to accede to a request for derogation from the suspensive effect pursuant to Article 7(3) of the Merger Regulation.

56. Pursuant to Article 4(4) and (5), the Commission must transmit reasoned requests made by the undertakings concerned 'without delay' ([47]). The Commission will endeavour to transmit such documents on the working day following that on which they are received or issued. Information within the network will be exchanged by various means, depending on the circumstances: e-mail, surface mail, courier, fax, telephone. It should be noted that for sensitive information or confidential information exchanges will be carried out by secure e-mail or by any other protected means of communication between these contact points.

57. All members of the network, including the Commission and all NCAs, their officials and other servants, and other persons working under the supervision of those authorities as well as officials and civil servants of other authorities of the Member States, will be bound by the professional secrecy obligations set out in Article 17 of the Merger Regulation. They must not disclose non-public information they have acquired through the application of the Merger Regulation, unless the natural or legal person who provided that information has consented to its disclosure.

58. Consultations and exchanges within the network is a matter between public enforcement agencies and do not alter any rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring that due process is observed in the cases it deals with.

2. **Triggering the pre-notification referral system; information to be provided by the requesting parties**

59. For the referral system to work swiftly and smoothly, it is crucial that the requesting parties, provide complete and accurate information, whenever required, in a timely fashion and in the most efficient way possible. Legal requirements concerning the information to be provided and the consequences of providing incorrect, incomplete or misleading information are set out in the Merger Regulation, Regulation (EC) No 802/2004 (hereinafter 'the Merger Implementing Regulation') and Form RS ([48]).

60. Form RS states that all information submitted in a reasoned submission must be correct and complete. If parties submit incorrect or incomplete information, the Commission has the power to either adopt a decision pursuant to Article 6(1)(a) of the Merger Regulation (where failure to fulfil the conditions of Article 4(5) comes to its attention during the course of the investigation), or to revoke any decision it adopts pursuant to Article 6 or Article 8, following an Article 4(5) referral, pursuant to Article 6(3)(a) or 8(6)(a) of the Merger Regulation. Following the adoption of a decision pursuant to Article 6(1)(a) or following revocation, national competition laws would once again be applicable to the transaction. In the case of referrals under Article 4(4) made on the basis of incorrect or incomplete information, the Commission may require a notification pursuant to Article 4(1). In addition, the Commission has the power to impose fines under Article 14(1)(a) of the Merger Regulation. Finally, parties should also be aware that, if a referral is made on the basis of incorrect or incomplete information included in Form RS, the Commission and/or the Member States may consider making a post-notification referral reversing a pre-notification referral based on such incorrect or incomplete information ([49]).

([47]) It should be noted that, as provided for in Article 19(1) of the Merger Regulation, the Commission is also under an obligation to transmit to the NCAs copies of notifications and of the most important documents lodged with or issued by the Commission.

([48]) Form RS is annexed to Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1).

([49]) This would be the appropriate 'remedy' where the requesting parties have submitted incorrect or incomplete information not affecting fulfilment of the conditions of Article 4(5), which comes to the Commission's attention during the course of the investigation.

61. When providing information on Form RS or generally in making a request for a pre-notification referral, it is not envisaged or necessary for the undertakings concerned to show that their concentration will lead to detrimental effects on competition ([50]). They should, however, provide as much information as possible showing clearly in what way the concentration meets the relevant legal criteria set out in Article 4(4) and (5) and why the concentration would be most appropriately dealt with by the competition authority or authorities specified in the request. The Merger Regulation does not require publication of the fact that a Form RS has been lodged, and it is not intended to do so. A non-public transaction can consequently be the subject of a pre-notification referral request.

62. Even though, according to the Merger Implementing Regulation, the Commission will accept Form RS in any official Community language, undertakings concerned providing information which is to be distributed to the network are strongly encouraged to use a language which will be understood by all addressees of the information. This will facilitate Member State treatment of such requests. Moreover, as regards requests for referral to a Member State or States, the requesting parties are strongly encouraged to include a copy of the request in the language(s) of the Member State(s) to which the referral is being requested.

63. Beyond the legal requirements specified in Form RS, the undertakings concerned should be prepared to provide additional information, if required, and to discuss the matter with the Commission and the NCAs in a frank and open manner in order to enable the Commission and the NCAs to assess whether the concentration in question should be the subject of referral.

64. Informal contacts between merging parties contemplating lodging a pre-filing referral request, on the one hand, and the Commission and/or Member State authorities, on the other, are actively encouraged, even following the submission of Form RS. The Commission is committed to providing informal, early guidance to firms wishing to use the pre-notification referrals system set out in Article 4(4) and (5) of the Merger Regulation ([51]).

3. **Concentrations eligible for referral**

65. Only concentrations within the meaning of Article 3 of the Merger Regulation are eligible for referral pursuant to Article 4(5) and Article 22. Only concentrations falling within the ambit of the relevant national competition laws for the control of mergers are eligible for referral pursuant to Article 4(4) and Article 9 ([52]).

66. Pre-filing referral requests pursuant to Article 4(4) and (5) of the Merger Regulation must concern concentrations the plans for which are sufficiently concrete. In that regard, there must at least exist a good faith intention to merge on the part of the undertakings concerned, or, in the case of a public bid, at least a public announcement of an intention to make such a bid ([53]).

4. **The concept of 'prior to notification' under Article 4(4) and (5)**

67. Article 4(4) and (5) only apply at the pre-notification stage.

([50]) See Recital 16 to the Merger Regulation.

([51]) A request for derogation from the suspensive effect pursuant to Article 7(3) of the Merger Regulation would normally be inconsistent with an intention to make a pre-notification referral request pursuant to Article 4(4).

([52]) By contrast, the reference to 'national legislation on competition' in Article 21(3) and Article 22(3) should be understood as referring to all aspects of national competition law.

([53]) See Recital 34 to, and Article 4(1) of, the Merger Regulation.

68. Article 4(4) specifies that the undertakings concerned may make a referral request by means of reasoned submission (Form RS), 'prior to the notification of a concentration within the meaning of paragraph 1'. This means that the request can only be made where no Form CO has been submitted pursuant to Article 4(1).

69. Likewise, Article 4(5) specifies that the request may be made 'before any notification to the competent [national] authorities'. This means that the concentration in question must not have been formally notified in any Member State jurisdiction for that provision to apply. Even one notification anywhere in the Community will preclude the undertakings concerned from triggering the mechanism of Article 4(5). In the Commission's view, no penalty should be imposed for non-notification of a transaction at the national level while a request pursuant to Article 4(5) is pending.

5. **The concept of a '*concentration capable of being reviewed under national competition law*' and the concept of '*competent Member State*' in Article 4(5)**

70. Article 4(5) enables the undertakings concerned to request a pre-notification referral of a concentration which does not have a Community dimension and which is 'capable of being reviewed under the national competition laws of at least three Member States'.

71. 'Capable of being reviewed' or reviewable should be interpreted as meaning a concentration which falls within the jurisdiction of a Member State under its national competition law for the control of mergers. There is no need for a mandatory notification requirement, i.e. it is not necessary for the concentration to be required to be notified under national law ([54]).

72. Pursuant to the third and fourth subparagraphs of Article 4(5), where at least one Member State 'competent to examine the concentration under its national competition law' has expressed its disagreement with the referral, the case must not be referred. A 'competent' Member State is one where the concentration is reviewable and which therefore has the power to examine the concentration under its national competition law.

73. All Member States, and not only those 'competent' to review the case, receive a copy of the Form RS. However, only Member States 'competent' to review the case are counted for the purposes of the third and fourth subparagraphs of Article 4(5). Pursuant to the third subparagraph of Article 4(5), 'competent' Member States have 15 working days from the date they receive the Form RS to express their agreement or disagreement with the referral. If they all agree, the case will be deemed to acquire a Community dimension pursuant to the fifth subparagraph of Article 4(5). According to the fourth subparagraph of Article 4(5), by contrast, if even only one 'competent' Member State disagrees, no referral will take place from any Member State.

74. Given the above mechanism, it is crucial to the smooth operation of Article 4(5) that *all* Member States where the case is reviewable under national competition law, and which are hence 'competent' to examine the case under national competition law, are identified correctly. Form RS therefore requires the undertakings concerned to provide sufficient information to enable each and every Member State to identify whether or not it is competent to review the concentration pursuant to its own national competition law.

([54]) Even in circumstances where a notification is voluntary *de jure*, the parties may in practice wish or be expected to file a notification.

75. In situations where Form RS has been filled in correctly, no complications should arise. The undertakings concerned will have identified correctly all Member States which are competent to review the case. In situations, however, where the undertakings concerned have not filled in Form RS correctly, or where there is a genuine disagreement as to which Member States are 'competent' to review the case, complications may arise.

— Within the period of 15 working days provided for in the third subparagraph of Article 4(5), a Member State which is not identified in Form RS as being competent may inform the Commission that it is competent and may, like any other competent Member State, express its agreement or disagreement with the referral.

— Likewise, within the period of 15 working days provided for in the third subparagraph of Article 4(5), a Member State which has been identified as competent in Form RS may inform the Commission that it is not 'competent'. That Member State would then be disregarded for the purposes of Article 4(5).

76. Once the period of 15 working days has expired without any disagreement having been expressed, the referral, will be considered valid. This ensures the validity of Commission decisions taken under Articles 6 or 8 of the Merger Regulation following an Article 4(5) referral.

77. This is not to say, however, that undertakings concerned can abuse the system by negligently or intentionally providing incorrect information, including as regards the reviewability of the concentration in the Member States, on Form RS. As noted at paragraph 60 above, the Commission may take measures to rectify the situation and to deter such violations. The undertakings concerned should also be aware that, in such circumstances, where a referral has been made on the basis of incorrect or incomplete information, a Member State which believes it was competent to deal with the case but did not have the opportunity to veto the referral due to incorrect information being supplied, may request a post-notification referral.

6. **Notification and Publication of Decisions**

78. According to the fourth subparagraph of Article 4(4), the fourth subparagraph of Article 4(5), Article 9(1) and the second subparagraph of Article 22(3), the Commission is obliged to inform the undertakings or persons concerned and all Member States of any decision taken pursuant to those provisions as to the referral of a concentration.

79. The information will be provided by means of a letter addressed to the undertakings concerned (or for decisions adopted pursuant to Article 9(1) or Article 22(3), a letter addressed to the Member State concerned). All Member States will receive a copy thereof.

80. There is no requirement that such decisions be published in the *Official Journal of the European Union* ([55]). The Commission will, however, give adequate publicity to such decisions on DG Competition's website, subject to confidentiality requirements.

7. **Article 9(6)**

81. Article 9(6) provides that, when the Commission refers a notified concentration to a Member State in accordance with Article 4(4) or Article 9(3), the NCA concerned must deal with the case 'without undue delay'. Accordingly, the competent authority concerned should deal as expeditiously as possible with the case under national law.

([55]) Pursuant to Article 20 of the Merger Regulation this is only required for decisions taken under Article 8(1)-(6) and Articles 14 and 15.

82. In addition, Article 9(6) provides that the competent national authority must, within 45 working days after the Commission's referral or following receipt of a notification at the national level if requested inform the undertakings concerned of the result of the 'preliminary competition assessment' and what 'further action', if any, it proposes to take. Accordingly, within 45 working days after the referral or notification, as appropriate, the merging parties should be provided with sufficient information to enable them to understand the nature of any preliminary competition concerns the authority may have and be informed of the likely extent and duration of the investigation. The Member State concerned may only exceptionally suspend this time limit, where necessary information has not been provided to it by the undertakings concerned as required under its national competition law.

IV. **FINAL REMARKS**

83. This Notice will be the subject of periodic review, in particular following any revision of the referral provisions in the Merger Regulation. In that regard, it should be noted that, according to Article 4(6) of the Merger Regulation, the Commission must report to the Council on the operation of the pre-notification referral provisions in Article 4(4) and (5), by 1 July 2009.

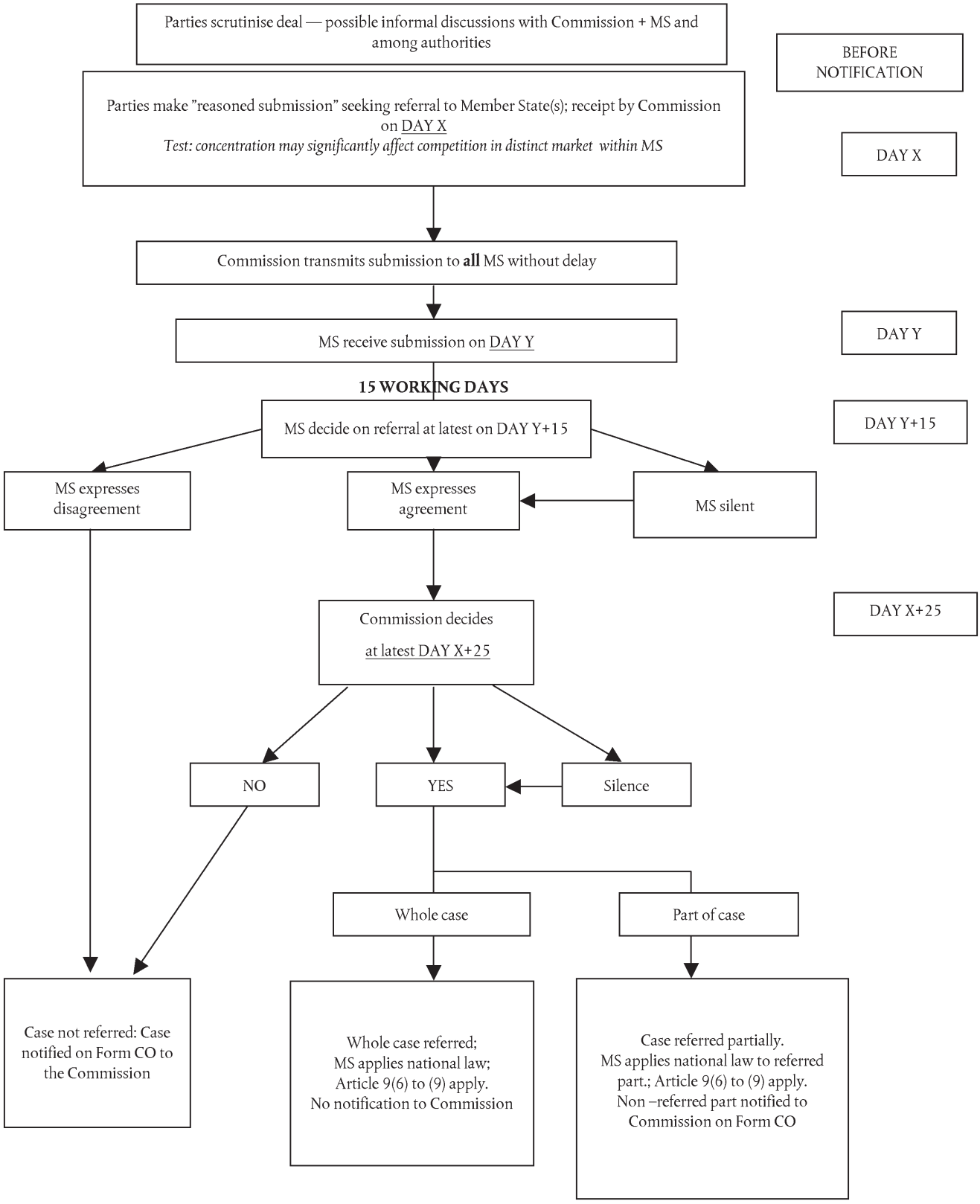
84. This Notice is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Court of First Instance and the Court of Justice of the European Communities.

ANNEXES

REFERRAL CHARTS

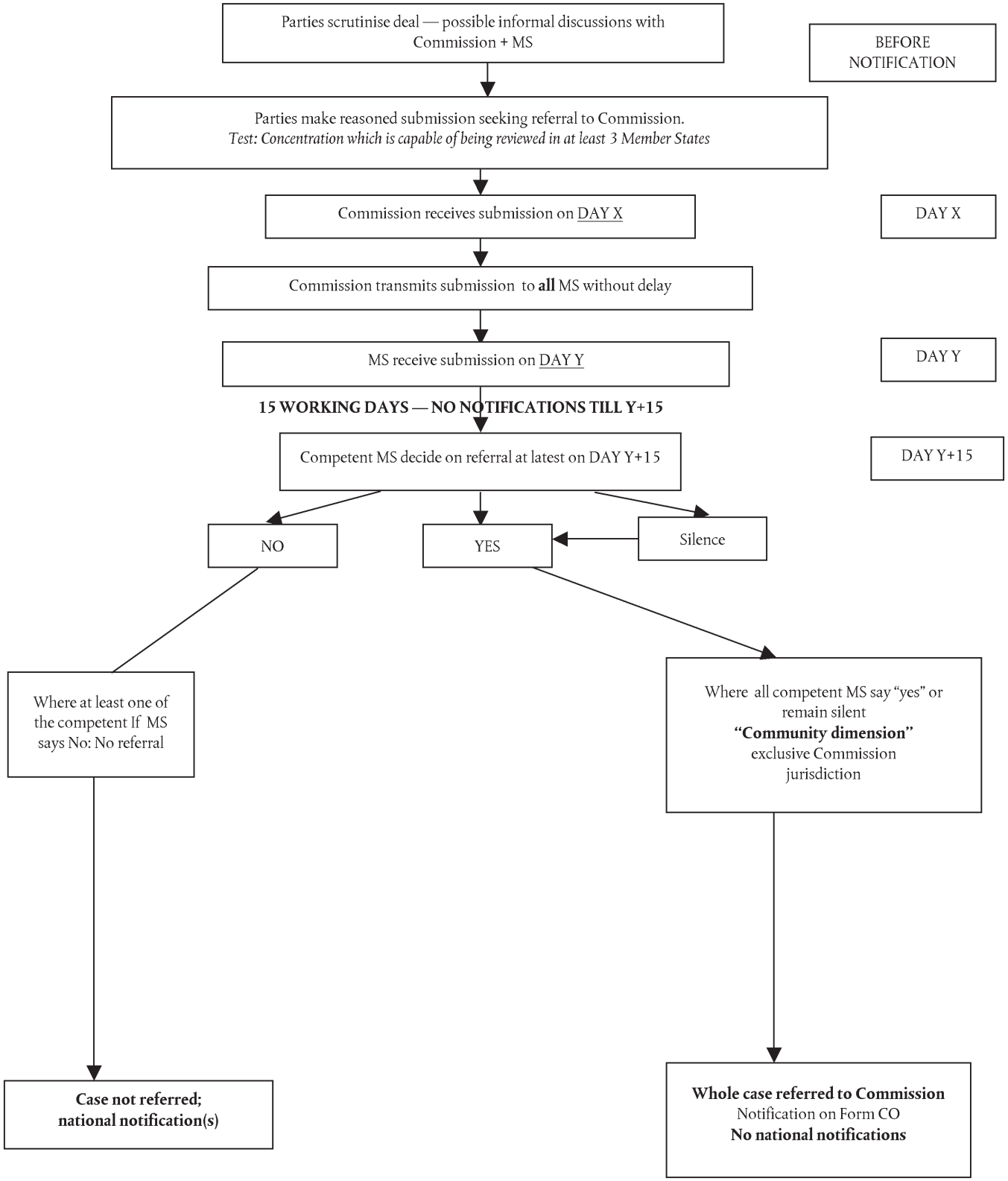
Article 4(4)

Concentration with Community Dimension



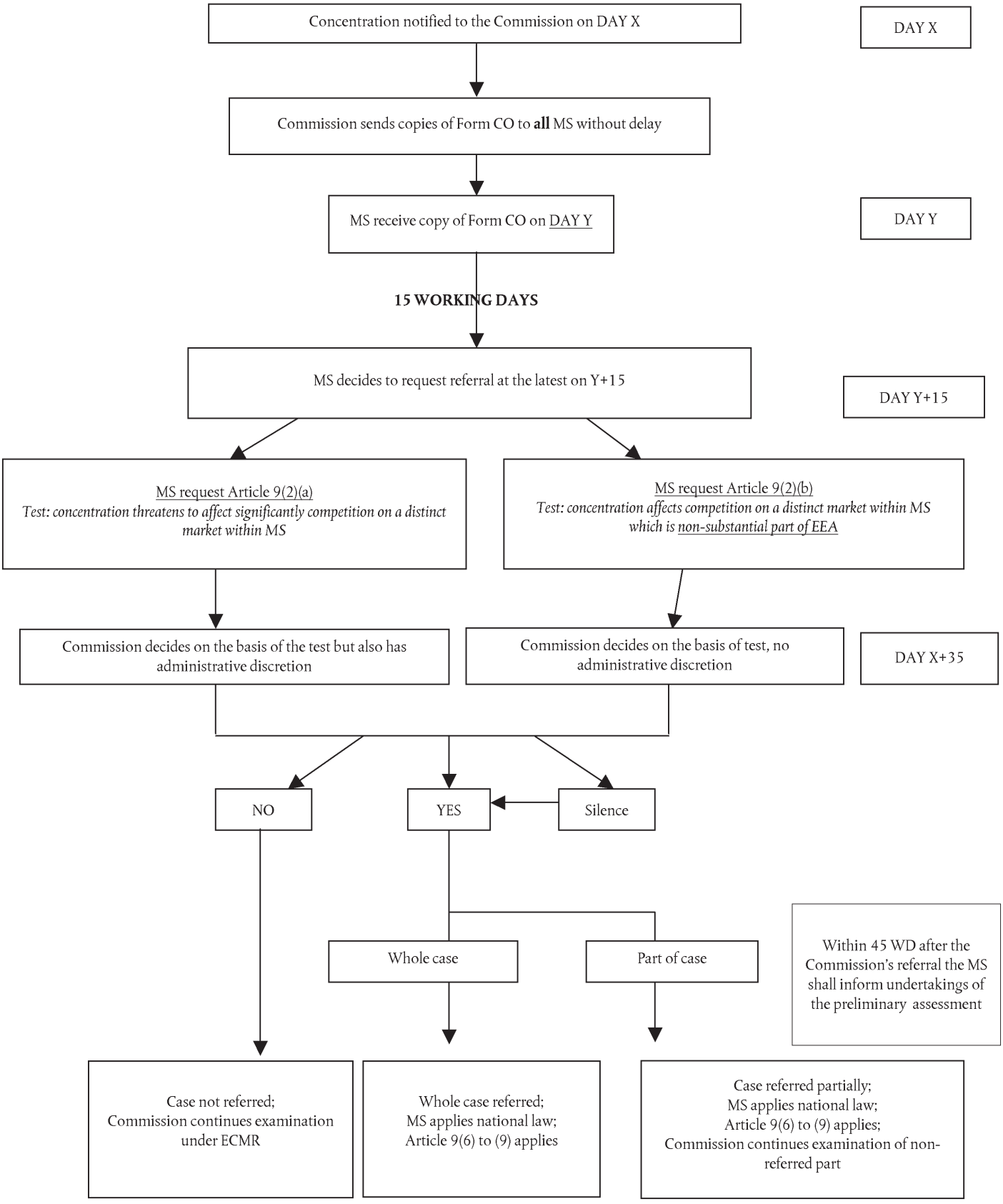
Article 4(5)

Concentration without Community Dimension reviewable in at least three MS under national law



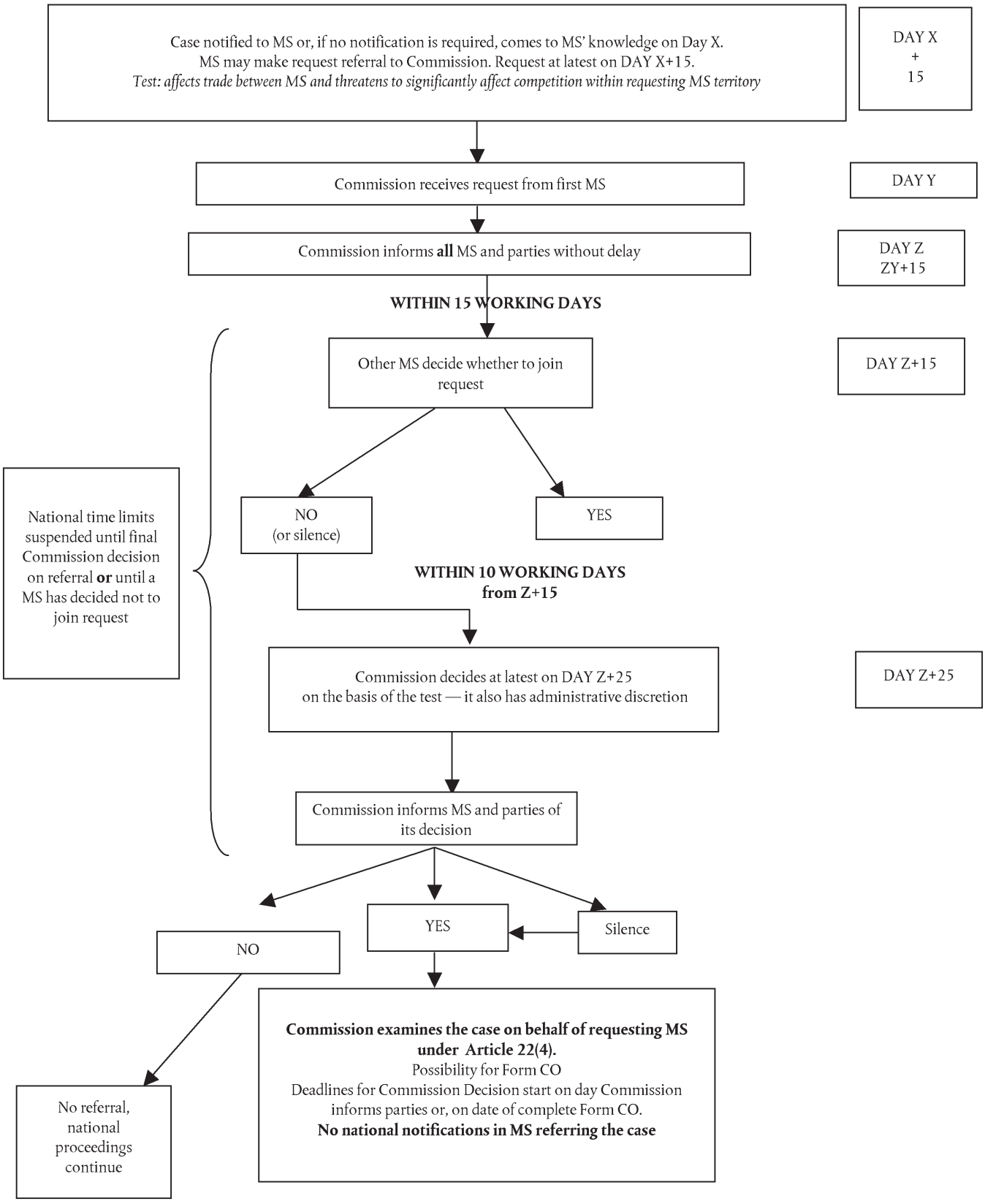
Article 9

Concentration with Community Dimension



Article 22

Concentration without Community dimension



Commission Notice on restrictions directly related and necessary to concentrations

(2005/C 56/03)

(Text with EEA relevance)

I. INTRODUCTION

1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ([1]) provides in Article 6(1)(b), second subparagraph, in Article 8(1), second subparagraph and in Article 8(2), third subparagraph that a decision declaring a concentration compatible with the common market *'shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration'*.

2. The amendment of the rules governing the assessment of restrictions directly related and necessary to the implementation of the concentration (hereinafter also referred to as 'ancillary restraints') introduces a principle of self-assessment of such restrictions. This reflects the intention of the legislature not to oblige the Commission to assess and individually address ancillary restraints. The treatment of ancillary restraints under the EC Merger Regulation is further explained in recital 21 in the preamble to the EC Merger Regulation, which states that *'Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases'*. While the Recital envisages that the Commission will exercise a residual function with regard to specific novel or unresolved issues giving rise to genuine uncertainty, it is in all other scenarios the task of the undertakings concerned to assess for themselves whether and to what extent their agreements can be regarded as ancillary to a transaction. Disputes as to whether restrictions are directly related and necessary to the implementation of the concentration, and thus automatically covered by the Commission's clearance decision, may be resolved before national courts.

3. The Commission's residual function is addressed in recital 21 of the Merger Regulation, where it is stated that the Commission should, at the request of the undertakings concerned, expressly assess the ancillary character of restrictions if a case presents *'novel and unresolved questions giving rise to genuine uncertainty'*. The Recital subsequently defines a 'novel or unresolved question giving rise to genuine uncertainty' as a question that is *'not covered by the relevant Commission notice in force or a published Commission decision.'*

4. In order to provide legal certainty to the undertakings concerned, this Notice provides guidance on the interpretation of the notion of ancillary restraints. The guidance given in the following sections reflects the essence of the Commission's practice, and sets out principles for assessing whether and to what extent the most common types of agreements are deemed to be ancillary restraints.

5. However, cases involving exceptional circumstances that are not covered by this Notice may justify departing from these principles. Parties may find further guidance in published Commission decisions ([2]) as to whether their agreements can be regarded as ancillary restraints or not. To the extent that cases involving exceptional circumstances have been previously addressed by the Commission in its published decisions ([3]), they do not constitute 'novel or unresolved questions' within the meaning of recital 21) of the Merger Regulation.

([1]) OJ L 24, 29.1.2004, p. 1.

([2]) For the purpose of this Notice, a decision is considered to be published when it is published in the *Official Journal of the European Union* or when it is made available to the public on the Commission's web site.

([3]) See for example Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.*, paragraph 56) - *high degree of customer loyalty*; Commission Decision of 23 October 1998 (IV/M.1298 – *Kodak/Imation*, paragraph 73) - *long product life cycle*; Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem*, paragraph 99) – *limited number of alternative producers*; Commission Decision of 30 April 1992 (IV/M.197 – *Solvay-Laporte/Interox*, paragraph 50) – *longer protection of know-how required*.

6. Accordingly, a case presents a 'novel and unresolved question giving rise to genuine uncertainty' if those restrictions are not covered by this Notice and have not been previously addressed by the Commission in its published decisions. As envisaged in recital 21 of the Merger Regulation, the Commission will, at the request of the parties, expressly assess such restrictions in these cases. Subject to confidentiality requirements, the Commission will provide adequate publicity as regards such assessments that further develop the principles set out in this Notice.

7. To the extent that restrictions are directly related and necessary to the implementation of the concentration, Article 21(1) of the Merger Regulation provides that this Regulation alone applies, to the exclusion of Council Regulations (EC) No 1/2003 ([1]), (EEC) No 1017/68 ([2]) and (EEC) No 4056/86 ([3]). By contrast, for restrictions that cannot be regarded as directly related and necessary to the implementation of the concentration, Articles 81 and 82 of the EC Treaty remain potentially applicable. However, the mere fact that an agreement or arrangement is not deemed to be ancillary to a concentration is not, as such, prejudicial to the legal status thereof. Such agreements or arrangements are to be assessed in accordance with Article 81 and 82 of the EC Treaty and the related regulatory texts and notices ([4]). They may also be subject to any applicable national competition rules. Hence, agreements which contain a restriction on competition, but are not considered directly related and necessary to the implementation of the concentration pursuant to this notice, may nevertheless be covered by those provisions.

8. The Commission's interpretation of Article 6(1)(b), second subparagraph, and Article 8(1), second subparagraph, and (2), third subparagraph, of the Merger Regulation is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

9. This Notice replaces the Commission's previous Notice regarding restrictions directly related and necessary to concentrations ([5]).

II. **GENERAL PRINCIPLES**

10. A concentration consists of contractual arrangements and agreements establishing control within the meaning of Article 3(2) of the Merger Regulation. All agreements which carry out the main object of the concentration ([6]), such as those relating to the sale of shares or assets of an undertaking, are integral parts of the concentration. In addition to these arrangements and agreements, the parties to the concentration may enter into other agreements which do not form an integral part of the concentration but can restrict the parties' freedom of action in the market. If such agreements contain ancillary restraints, these are automatically covered by the decision declaring the concentration compatible with the Common Market.

([1]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p 1; Regulation as last amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

([2]) Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, OJ L 175, 23.7.1968, p. 1; Regulation as last amended by Regulation (EC) No 1/2003 .

([3]) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport, OJ L 378, 31.12.1986, p. 4; Regulation as last amended by Regulation (EC) No 1/2003.

([4]) See, for example, for licence agreements Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.4.2004, p. 11; see for supply and purchase agreements e.g. Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21.

([5]) OJ C 188, 4.7.2001, p. 5.

([6]) See e.g. Commission Decision of 10 August 1992 (IV/M.206 – *Rhône-Poulenc/SNIA*, paragraph 8.3); Commission Decision of 19 December 1991 (IV/M.113 – *Courtaulds/SNIA*, paragraph 35); Commission Decision of 2 December 1991 (IV/M.102 – *TNT/Canada Post/DBP Postdienst/La Poste/PTT Poste & Sweden Post*, paragraph 46).

11. The criteria of direct relation and necessity are objective in nature. Restrictions are not directly related and necessary to the implementation of a concentration simply because the parties regard them as such.

12. For restrictions to be considered 'directly related to the implementation of the concentration', they must be closely linked to the concentration itself. It is not sufficient that an agreement has been entered into in the same context or at the same time as the concentration ([1]). Restrictions which are directly related to the concentration are economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the concentration.

13. Agreements must be 'necessary to the implementation of the concentration' ([2]), which means that, in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty ([3]). Agreements necessary to the implementation of a concentration are typically aimed at protecting the value transferred ([4]), maintaining the continuity of supply after the break-up of a former economic entity ([5]), or enabling the start-up of a new entity ([6]). In determining whether a restriction is necessary, it is appropriate not only to take account of its nature, but also to ensure that its duration, subject matter and geographical field of application does not exceed what the implementation of the concentration reasonably requires. If equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.

14. For concentrations which are carried out in stages, the contractual arrangements relating to the stages before the establishment of control within the meaning of Article 3(1) and (2) of the Merger Regulation cannot normally be considered directly related and necessary to the implementation of the concentration. However, an agreement to abstain from material changes in the target's business until completion is considered directly related and necessary to the implementation of the joint bid ([7]). The same applies, in the context of a joint bid, to an agreement by the joint purchasers of an undertaking to abstain from making separate competing offers for the same undertaking, or otherwise acquiring control.

15. Agreements which serve to facilitate the joint acquisition of control are to be considered directly related and necessary to the implementation of the concentration. This will apply to arrangements between the parties for the joint acquisition of control aimed at implementing the division of assets in order to divide the production facilities or distribution networks among themselves, together with the existing trademarks of the undertaking acquired jointly.

16. To the extent that such a division involves the break-up of a pre-existing economic entity, arrangements that make the break-up possible under reasonable conditions are to be considered directly related and necessary to the implementation of the concentration, under the principles set out below.

([1]) Likewise, a restriction could, if all other requirements are fulfilled, be 'directly related' even if it has not been entered into at the same time as the agreement carrying out the main object of the concentration.

([2]) See European Court of Justice, Case 42/84 (*Remia*), [1985] ECR 2545, paragraph 20; Court of First Instance, Case T-112/99 (*Métropole Télévision – M6*), [2001] ECR II-2459, paragraph 106.

([3]) Commission Decision of 18 December 2000 (COMP/M.1863 – *Vodafone/BT/Airtel JV*, paragraph 20).

([4]) Commission Decision of 30 July 1998 (IV/M.1245 – *VALEO/ITT Industries*, paragraph 59); Commission Decision of 3 March 1999 (IV/M.1442 – *MMP/AFP*, paragraph 17); Commission Decision of 9 March 2001 (COMP/M.2330 – *Cargill/Banks*, paragraph 30); Commission Decision of 20 March 2001 (COMP/M.2227 – *Goldman Sachs/Messer Griesheim*, paragraph 11).

([5]) Commission Decision of 25 February 2000 (COMP/M.1841 – *Celestica/IBM*, paragraph 21).

([6]) Commission Decision of 30 March 1999 (IV/JV.15 – *BT/AT&T*, paragraphs 207-214); Commission Decision of 22 December 2000 (COMP/M.2243 – *Stora Enso/Assidoman/JV*, paragraphs 49, 56 and 57).

([7]) Commission Decision of 27 July 1998 (IV/M.1226 – *GEC/GPTH*, paragraph 22); Commission Decision of 2 October 1997 (IV/M.984 – *Dupont/ICI*, paragraph 55); Commission Decision of 19 December 1997 (IV/M.1057 – *Terra Industries/ICI*, paragraph 16); Commission Decision of 18 December 1996 (IV/M.861 – *Textron/Kautex*, paragraphs 19 and 22); Commission Decision of 7 August 1996 (IV/M.727 - *BP/Mobil*, paragraph 50).

III. PRINCIPLES APPLICABLE TO COMMONLY ENCOUNTERED RESTRICTIONS IN CASES OF ACQUISITION OF AN UNDERTAKING

17. Restrictions agreed between the parties in the context of a transfer of an undertaking may be to the benefit of the purchaser or of the vendor. In general terms, the need for the purchaser to benefit from certain protection is more compelling than the corresponding need for the vendor. It is the purchaser who needs to be assured that she/he will be able to acquire the full value of the acquired business. Thus, as a general rule, restrictions which benefit the vendor are either not directly related and necessary to the implementation of the concentration at all ([1]), or their scope and/or duration need to be more limited than that of clauses which benefit the purchaser ([2]).

A. Non-competition clauses

18. Non-competition obligations which are imposed on the vendor in the context of the transfer of an undertaking or of part of it can be directly related and necessary to the implementation of the concentration. In order to obtain the full value of the assets transferred, the purchaser must be able to benefit from some protection against competition from the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such non-competition clauses guarantee the transfer to the purchaser of the full value of the assets transferred, which in general include both physical assets and intangible assets, such as the goodwill accumulated or the know-how ([3]) developed by the vendor. These are not only directly related to the concentration but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the undertaking or of part of it could not be accomplished.

19. However, such non-competition clauses are only justified by the legitimate objective of implementing the concentration when their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve that end ([4]).

20. Non-competition clauses are justified for periods of up to three years ([5]), when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how ([6]). When only goodwill is included, they are justified for periods of up to two years ([7]).

21. By contrast, non-competition clauses cannot be considered necessary when the transfer is in fact limited to physical assets (such as land, buildings or machinery) or to exclusive industrial and commercial property rights (the holders of which could immediately take action against infringements by the transferor of such rights).

22. The geographical scope of a non-competition clause must be limited to the area in which the vendor has offered the relevant products or services before the transfer, since the purchaser does not need to be protected against competition from the vendor in territories not previously penetrated by the vendor ([8]). That geographical scope can be extended to territories which the vendor was planning to enter at the time of the transaction, provided that he had already invested in preparing this move.

([1]) Commission Decision of 27 July 1998 (IV/M.1226 – *GEC/GPTH,* paragraph 24).

([2]) See, for example, for a clause aiming at the protection of a part of the business remaining with the vendor: Commission Decision of 30 August 1993 (IV/M.319 - *BHF/CCF/Charterhouse,* paragraph 16).

([3]) As defined in Article 1(1)(i) of Regulation (EC) No 772/2004 .

([4]) See European Court of Justice, Case 42/84 (*Remia*), [1985] ECR 2545, paragraph 20; Court of First Instance, Case T-112/99 (*Métropole Télévision – M6*), [2001] ECR II-2459, paragraph 106.

([5]) See for exceptional cases in which longer periods may be justified e.g. Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.,* paragraph 56); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta,* paragraph 37); Commission decision of 23 October 1998 (IV/M.1298 – *Kodak/Imation,* paragraph 74).

([6]) Commission Decision of 2 April 1998 (IV/M.1127 – *Nestlé/Dalgety,* paragraph 33); Commission Decision of 1 September 2000 (COMP/M.2077 – *Clayton Dubilier & Rice/Iteltel,* paragraph 15); Commission Decision of 2 March 2001 (COMP/M.2305 – *Vodafone Group PLC/EIRCELL,* paragraphs 21 and 22).

([7]) Commission Decision of 12 April 1999 (IV/M.1482 – *KingFisher/Grosslabor,* paragraph 26); Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler,* paragraph 17).

([8]) Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler,* paragraph 17); Commission Decision of 12 April 1999 (IV/M.1482 – *KingFisher/Grosslabor,* paragraph 27); Commission Decision of 6 April 2001 (COMP/M.2355 – *Dow/Enichem Polyurethane,* paragraph 28); Commission Decision of 4 August 2000 (COMP/M.1979 – *CDC/Banco Urquijo/JV,* paragraph 18).

23. Similarly, non-competition clauses must remain limited to products (including improved versions or updates of products as well as successor models) and services forming the economic activity of the undertaking transferred. This can include products and services at an advanced stage of development at the time of the transaction, or products which are fully developed but not yet marketed. Protection against competition from the vendor in product or service markets in which the transferred undertaking was not active before the transfer is not considered necessary ([1]).

24. The vendor may bind herself/himself, her/his subsidiaries and commercial agents. However, an obligation to impose similar restrictions on others would not be regarded as directly related and necessary to the implementation of the concentration. This applies, in particular, to clauses which would restrict the freedom of resellers or users to import or export.

25. Clauses which limit the vendor's right to purchase or hold shares in a company competing with the business transferred shall be considered directly related and necessary to the implementation of the concentration under the same conditions as outlined above for non-competition clauses, unless they prevent the vendor from purchasing or holding shares purely for financial investment purposes, without granting him/her, directly or indirectly, management functions or any material influence in the competing company ([2]).

26. Non-solicitation and confidentiality clauses have a comparable effect and are therefore evaluated in a similar way to non-competition clauses ([3]).

B. **Licence agreements**

27. The transfer of an undertaking or of part of it can include the transfer to the purchaser, with a view to the full exploitation of the assets transferred, of intellectual property rights or know-how. However, the vendor may remain the owner of the rights in order to exploit them for activities other than those transferred. In these cases, the usual means for ensuring that the purchaser will have the full use of the assets transferred is to conclude licensing agreements in his/her favour. Likewise, where the vendor has transferred intellectual property rights with the business, she/he may still want to continue using some or all of these rights for activities other than those transferred; in such a case the purchaser will grant a licence to the vendor.

28. Licences of patents ([4]), of similar rights, or of know-how ([5]), can be considered necessary to the implementation of the concentration. They may equally be considered an integral part of the concentration and, in any event, need not be limited in time. These licences can be simple or exclusive and may be limited to certain fields of use, to the extent that they correspond to the activities of the undertaking transferred.

([1]) Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*, paragraph 17); Commission Decision of 2 March 2001 (COMP/M.2305 – *Vodafone Group PLC/EIRCELL*, paragraph 22); Commission Decision of 6 April 2001 (COMP/M.2355 – *Dow/Enichem Polyurethane*, paragraph 28); Commission Decision of 4 August 2000 (COMP/M.1979 – *CDC/Banco Urquijo/JV*, paragraph 18).

([2]) Commission Decision of 4 February 1993 (IV/M.301 – *Tesco/Catteau*, paragraph 14); Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*, paragraph 19); Commission Decision of 12 April 1999 (IV/M.1482 – *Kingfisher/Grosslabor*, paragraph 27); Commission Decision of 6 April 2000 (COMP/M.1832 – *Ahold/ICA Förbundet/Canica*, paragraph 26).

([3]) Accordingly, confidentiality clauses on customer details, prices and quantities cannot be extended. By contrast, confidentiality clauses concerning technical know-how may exceptionally be justified for longer periods, see Commission Decision of 29 April 1998 (IV/M.1167 – *ICI/Williams*, paragraph 22); Commission Decision of 30 April 1992 (IV/M.197 – *Solvay-Laporte/Interox*, paragraph 50).

([4]) Including patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates (as referred to in Article 1(1)(h) of Regulation (EC) No 772/2004.

([5]) As defined in Article 1(1)(i) of Regulation (EC) No 772/2004.

29. However, territorial limitations on manufacture reflecting the territory of the transferred activity are not necessary to the implementation of the operation. As regards licences granted by the seller of a business to the buyer, the seller can be made subject to territorial restrictions in the licence agreement under the same conditions as laid down for non-competition clauses in the context of the sale of a business.

30. Restrictions in licence agreements going beyond the above provisions, such as those which protect the licensor rather than the licensee, are not necessary to the implementation of the concentration ([1]).

31. Similarly, in the case of licences of trademarks, business names, design rights, copyrights or similar rights, there may be situations in which the vendor wishes to remain the owner of such rights in relation to activities retained, but the purchaser needs those rights in order to market the goods or services produced by the undertaking or part of the undertaking transferred. Here, the same considerations as above apply ([2]).

C. **Purchase and supply obligations**

32. In many cases, the transfer of an undertaking or of part of it can entail the disruption of traditional lines of purchase and supply which have existed as a result of the previous integration of activities within the economic unity of the vendor. In order to enable the break-up of the economic unity of the vendor and the partial transfer of the assets to the purchaser under reasonable conditions, it is often necessary to maintain, for a transitional period, the existing or similar links between the vendor and the purchaser. This objective is normally attained by purchase and supply obligations for the vendor and/or the purchaser of the undertaking or of part of it. Taking into account the particular situation resulting from the break-up of the economic unity of the vendor, such obligations can be recognised as directly related and necessary to the implementation of the concentration. They may be in favour of the vendor as well as the purchaser, depending on the particular circumstances of the case.

33. The aim of such obligations may be to ensure the continuity of supply to either of the parties of products necessary for carrying out the activities retained by the vendor or taken over by the purchaser. However, the duration of purchase and supply obligations must be limited to a period necessary for the replacement of the relationship of dependency by autonomy in the market. Thus, purchase or supply obligations aimed at guaranteeing the quantities previously supplied can be justified for a transitional period of up to five years ([3]).

34. Both supply and purchase obligations providing for fixed quantities, possibly with a variation clause, are recognised as directly related and necessary to the implementation of the concentration. However, obligations providing for unlimited quantities ([4]), exclusivity or conferring preferred-supplier or preferred-purchaser status ([5]), are not necessary to the implementation of the concentration.

35. Service and distribution agreements are equivalent in their effect to supply arrangements; consequently the same considerations as above shall apply.

([1]) To the extent that they fall within Article 81(1) of the EC Treaty, such agreements may nevertheless fall under Regulation (EC) No 772/2004, or other Community legislation.

([2]) Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.*, paragraph 54).

([3]) Commission Decision of 5 February 1996 (IV/M.651 – *AT&T/Philips*, VII.); Commission Decision of 30 March 1999 (IV/JV.15 – *BT/AT&T*, paragraph 209; see for exceptional cases Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem*, paragraph 99); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta*, paragraph 45).

([4]) In line with the principle of proportionality, obligations providing for fixed quantities with a variation clause are, in these cases, less restrictive on competition, see e.g. Commission Decision of 18 September 1998 (IV/M.1292 – *Continental/ITT*, paragraph 19).

([5]) Commission Decision of 30 July 1998 (IV/M.1245 – *VALEO/ITT Industries*, paragraph 64); see for exceptional cases (e.g. absence of a market) Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem*, paragraphs 92 to 96); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta*, paragraphs 38 et seq.).

IV. PRINCIPLES APPLICABLE TO COMMONLY ENCOUNTERED RESTRICTIONS IN CASES OF JOINT VENTURES WITHIN THE MEANING OF ARTICLE 3(4) OF THE MERGER REGULATION

A. Non-competition obligations

36. A non-competition obligation between the parent undertakings and a joint venture may be considered directly related and necessary to the implementation of the concentration where such obligations correspond to the products, services and territories covered by the joint venture agreement or its by-laws. Such non-competition clauses reflect, *inter alia*, the need to ensure good faith during negotiations; they may also reflect the need to fully utilise the joint venture's assets or to enable the joint venture to assimilate know-how and goodwill provided by its parents; or the need to protect the parents' interests in the joint venture against competitive acts facilitated, *inter alia*, by the parents' privileged access to the know-how and goodwill transferred to or developed by the joint venture. Such non-competition obligations between the parent undertakings and a joint venture can be regarded as directly related and necessary to the implementation of the concentration for the lifetime of the joint venture ([1]).

37. The geographical scope of a non-competition clause must be limited to the area in which the parents offered the relevant products or services before establishing the joint venture ([2]). That geographical scope can be extended to territories which the parent companies were planning to enter at the time of the transaction, provided that they had already invested in preparing this move.

38. Similarly, non-competition clauses must be limited to products and services constituting the economic activity of the joint venture. This may include products and services at an advanced stage of development at the time of the transaction, as well as products and services which are fully developed but not yet marketed.

39. If the joint venture is set up to enter a new market, reference will be made to the products, services and territories in which it is to operate under the joint venture agreement or by-laws. However, the presumption is that one parent's interest in the joint venture does not need to be protected against competition from the other parent in markets other than those in which the joint venture will be active from the outset.

40. Additionally, non-competition obligations between non-controlling parents and a joint venture are not directly related and necessary to the implementation of the concentration.

41. The same principles as for non-competition clauses apply to non-solicitation and confidentiality clauses.

B. Licence agreements

42. A licence granted by the parent undertakings to the joint venture may be considered directly related and necessary to the implementation of the concentration. This applies regardless of whether or not the licence is an exclusive one and whether or not it is limited in time. The licence may be restricted to a particular field of use which corresponds to the activities of the joint venture.

([1]) Commission Decision of 15 January 1998 (IV/M.1042 - *Eastman Kodak/Sun Chemical*, paragraph 40); Commission Decision of 7 August 1996 (IV/M.727 - *BP/Mobil*, paragraph 51); Commission Decision of 3 July 1996 (IV/M.751 - *Bayer/Hüls*, paragraph 31); Commission Decision of 6 April 2000 (COMP/M.1832 - *Ahold/ICA Förbundet/Canica*, paragraph 26).

([2]) Commission Decision of 29 August 2000 (COMP/M.1913 - *Lufthansa/Menzies/LGS/JV*; paragraph 18); Commission Decision of 22 December 2000 (COMP/M.2243 - *Stora Enso/Assidoman/JV*, paragraph 49, last sentence).

43. Licences granted by the joint venture to one of its parents, or cross-licence agreements, can be regarded as directly related and necessary to the implementation of the concentration under the same conditions as in the case of the acquisition of an undertaking. Licence agreements between the parents are not considered directly related and necessary to the implementation of a joint venture.

C. **Purchase and supply obligations**

44. If the parent undertakings remain present in a market upstream or downstream of that of the joint venture, any purchase and supply agreements, including service and distribution agreements are subject to the principles applicable in the case of the transfer of an undertaking.

Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004

(2005/C 56/04)

(Text with EEA relevance)

I. INTRODUCTION

1. This Notice sets out a simplified procedure under which the Commission intends to treat certain concentrations pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings (the EC Merger Regulation) ([1]) on the basis that they do not raise competition concerns. This Notice replaces the Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 ([2]). The Commission's experience gained in applying Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ([3]) has shown that certain categories of notified concentrations are normally cleared without having raised any substantive doubts, provided that there were no special circumstances.

2. The purpose of this Notice is to set out the conditions under which the Commission usually adopts a short-form decision declaring a concentration compatible with the common market pursuant to the simplified procedure and to provide guidance in respect of the procedure itself. When all necessary conditions set forth at point 5 of this Notice are met and provided there are no special circumstances, the Commission adopts a short-form clearance decision within 25 working days from the date of notification, pursuant to Article 6(1)(b) of the EC Merger Regulation ([4]).

3. However, if the safeguards or exclusions set forth at points 6 to 11 of this Notice are applicable, the Commission may launch an investigation and/or adopt a full decision under the EC Merger Regulation.

4. By following the procedure outlined in the following sections, the Commission aims to make Community merger control more focused and effective.

([1]) OJ L 24, 29.1.2004, p. 1.
([2]) OJ C 217, 29.7.2000, p. 32.
([3]) OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.
([4]) The notification requirements are set out in Annexes I and II to Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

II. CATEGORIES OF CONCENTRATIONS SUITABLE FOR TREATMENT UNDER THE SIMPLIFIED PROCEDURE

Eligible concentrations

5. The Commission will apply the simplified procedure to the following categories of concentrations:

(a) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:

(i) the turnover ([5]) of the joint venture and/or the turnover of the contributed activities ([6]) is less than EUR 100 million in the EEA territory; and

(ii) the total value of assets ([7]) transferred to the joint venture is less than EUR 100 million in the EEA territory ([8]);

([5]) The turnover of the joint venture should be determined according to the most recent audited accounts of the parent companies, or the joint venture itself, depending upon the availability of separate accounts for the resources combined in the joint venture.
([6]) The expression 'and/or' refers to the variety of situations covered; for example:
— in the case of a joint acquisition of a target company, the turnover to be taken into account is the turnover of this target (the joint venture),
— in the case of the creation of a joint venture to which the parent companies contribute their activities, the turnover to be taken into account is that of the contributed activities,
— in the case of entry of a new controlling party into an existing joint venture, the turnover of the joint venture and the turnover of the activities contributed by the new parent company (if any) must be taken into account.
([7]) The total value of assets of the joint venture should be determined according to the last prepared and approved balance sheet of each parent company. The term 'assets' includes: (1) all tangible and intangible assets that will be transferred to the joint venture (examples of tangible assets include production plants, wholesale or retail outlets, and inventory of goods; examples of intangible assets include intellectual property, goodwill, etc.), and (2) any amount of credit or any obligations of the joint venture which any parent company of the joint venture has agreed to extend or guarantee.
([8]) Where the assets transferred generate turnover, then neither the value of the assets nor that of the turnover may exceed EUR 100 million.

(b) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged ([9]);

(c) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and:

(i) two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships) provided that their combined market share is less than 15 %; or

(ii) one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships) ([10]), provided that none of their individual or combined market shares is at either level 25 % or more ([11]);

(d) a party is to acquire sole control of an undertaking over which it already has joint control.

Safeguards and exclusions

6. In assessing whether a concentration falls into one of the categories referred to in point 5, the Commission will ensure that all relevant circumstances are established with sufficient clarity. Given that market definitions are likely to be a key element in this assessment, the parties should provide information on all plausible alternative market definitions during the pre-notification phase (see point 15). Notifying parties are responsible for describing all alternative relevant product and geographic markets on which the notified concentration could have an impact and for providing data and information relating to the definition of such markets ([12]). The Commission retains the discretion to take the ultimate decision on market definition, basing its decision on an analysis of the facts of the case. Where it is difficult to define the relevant markets or to determine the parties' market shares, the Commission will not apply the simplified procedure. In addition, to the extent that concentrations involve novel legal issues of a general interest, the Commission would normally abstain from adopting short-form decisions, and would normally revert to a normal first phase merger procedure.

7. While it can normally be assumed that concentrations falling into the categories referred to in point 5 will not raise serious doubts as to their compatibility with the common market, there may nonetheless be certain situations, which exceptionally require a closer investigation and/or a full decision. In such cases, the Commission may revert to a normal first phase merger procedure.

8. The following are indicative examples of types of cases which may be excluded from the simplified procedure. Certain types of concentrations may increase the parties' market power, for instance by combining technological, financial or other resources, even if the parties to the concentration do not operate in the same market. Concentrations where at least two parties to the concentration are present in closely related neighbouring markets ([13]) may also be unsuitable for the simplified procedure, in particular, where one or more of the parties to the concentration holds individually a market share of 25 % or more in any product market in which there is no horizontal or vertical relationship between the parties but which is a neighbouring market to a market where another party is active. In other cases, it may not be possible to determine the parties' precise market shares. This is often the case when the parties operate in new or little developed markets. Concentrations in markets with high entry barriers, with a high degree of concentration ([14]) or other known competition problems may also be unsuitable.

([9]) See Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

([10]) See footnote 6.

([11]) This means that only concentrations, which do not lead to affected markets, as defined in Section 6 III of Form CO, fall into this category. The thresholds for horizontal and vertical relationships apply to market shares both at national and at EEA levels and to any plausible alternative product market definition that may have to be considered in a given case. It is important that the underlying market definitions set out in the notification are precise enough to justify the assessment that these thresholds are not met, and that all plausible alternative market definitions are mentioned (including geographic markets narrower than national).

([12]) As with all other notifications, the Commission may revoke the short-form decision if it is based on incorrect information for which one of the undertakings concerned is responsible (Article 6(3)(a), of the EC Merger Regulation).

([13]) Product markets are closely related neighbouring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use.

([14]) See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C 31, 5.2.2004, p. 5, points 14-21.

9. The Commission's experience to date has shown that a change from joint to sole control may exceptionally require closer investigation and/or a full decision. A particular competition concern could arise in circumstances where the former joint venture is integrated into the group or network of its remaining single controlling shareholder, whereby the disciplining constraints exercised by the potentially diverging incentives of the different controlling shareholders are removed and its strategic market position could be strengthened. For example, in a scenario in which undertaking A and undertaking B jointly control a joint venture C, a concentration pursuant to which A acquires sole control of C may give rise to competition concerns in circumstances in which C is a direct competitor of A and where C and A will hold a substantial combined market position and where this removes a degree of independence previously held by C ([15]). In cases where such scenarios require a closer analysis, the Commission may revert to a normal first phase merger procedure ([16]).

10. The Commission may also revert to a normal first phase merger procedure where neither the Commission nor the competent authorities of Member States have reviewed the prior acquisition of joint control of the joint venture in question.

11. Furthermore, the Commission may revert to a normal first phase merger procedure where an issue of coordination as referred to in Article 2(4) of the EC Merger Regulation arises.

12. If a Member State expresses substantiated concerns about the notified concentration within 15 working days of receipt of the copy of the notification, or if a third party expresses substantiated concerns within the time-limit laid down for such comments, the Commission will adopt a full decision. The time-limits set out in Article 10(1) of the EC Merger Regulation apply.

Referral requests

13. The simplified procedure will not be applied if a Member State requests the referral of a notified concentration pursuant to Article 9 of the EC Merger Regulation or if the Commission accepts a request from one or more Member States for referral of a notified concentration pursuant to Article 22 of the EC Merger Regulation.

Pre-notification referrals at the request of the notifying parties

14. Subject to the safeguards and exclusions set out in this Notice, the Commission may apply the simplified procedure to concentrations where:

(i) following a reasoned submission pursuant to Article 4(4) of the EC Merger Regulation, the Commission decides not to refer the case to a Member State; or

(ii) following a reasoned submission pursuant to Article 4(5) of the EC Merger Regulation the case is referred to the Commission.

III. **PROCEDURAL PROVISIONS**

Pre-notification contacts

15. The Commission has found pre-notification contacts between notifying parties and the Commission beneficial even in seemingly unproblematic cases ([17]). The Commission's experience of the simplified procedure has shown that candidate cases for the simplified procedure may raise complex issues for instance, of market definition (see point 6) which should preferably be resolved prior to notification. Such contacts allow the Commission and the notifying parties to determine the precise amount of information to be provided in a notification. Pre-notification contacts should be initiated at least two weeks prior to the expected date of notification. Notifying parties are therefore advised to engage in pre-notification contacts, particularly where they request the Commission to waive full-form notification in accordance with Article 3(1) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ([18]) on the grounds that the operation to be notified will not raise competition concerns.

([15]) Case No. IV/M.1328 *KLM/Martinair,* XXIXth Report on Competition Policy 1999 – SEC(2000) 720 final, points 165-166.

([16]) Case No COMP/M.2908 *Deutsche Post/DHL (II),* Decision of 18.9.2002.

([17]) See DG Competition Best Practices on the conduct of EC merger control proceedings available at: http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf

([18]) OJ L 133, 30.4.2004, p. 1.

Publication of the fact of notification

16. The information to be published in the *Official Journal of the European Union* upon receipt of a notification ([19]) will include the names of the parties to the concentration, their country of origin, the nature of the concentration and the economic sectors involved, as well as an indication that, on the basis of the information provided by the notifying party, the concentration may qualify for a simplified procedure. Interested parties will then have the opportunity to submit observations, in particular on circumstances which might require an investigation.

Short-form decision

17. If the Commission is satisfied that the concentration fulfils the criteria for the simplified procedure (see point 5), it will normally issue a short-form decision. This includes appropriate cases not giving rise to any competition concerns where it receives a full form notification. The concentration will thus be declared compatible with the common market, within 25 working days from the date of notification, pursuant to Article 10(1) and (6) of the EC Merger Regulation. The Commission will endeavour to issue a short-form decision as soon as practicable following expiry of the 15 working day period during which Member States may request referral of a notified concentration pursuant to Article 9 of the EC Merger Regulation. However, in the period leading up to the 25 working day deadline, the option of reverting to a normal first phase merger procedure and thus launching investigations and/or adopting a full decision remains open to the Commission, should it judge such action appropriate in the case in question.

Publication of the short-form decision

18. The Commission will publish a notice of the fact of the decision in the *Official Journal of the European Union* as it does for full clearance decisions. The public version of the decision will be made available on DG Competition's Internet website for a limited period. The short-form decision will contain the information about the notified concentration published in the Official Journal at the time of notification (names of the parties, their country of origin, nature of the concentration and economic sectors concerned) and a statement that the concentration is declared compatible with the common market because it falls within one or more of the categories described in this Notice, with the applicable category(ies) being explicitly identified.

IV. **ANCILLARY RESTRICTIONS**

19. The simplified procedure is not suited to cases in which the undertakings concerned request an express assessment of restrictions which are directly related to, and necessary for, the implementation of the concentration.

([19]) Article 4(3) of the EC Merger Regulation.

Revised explanatory notes concerning Annex III — Definition of the concept of originating products and methods of administrative cooperation — to the Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part

(2005/C 56/05)

Article 17 — Technical reasons

A movement certificate EUR.1 may be rejected for 'technical reasons' because it was not made out in the prescribed manner. These are the cases which may give rise to subsequent presentation of a retrospectively-endorsed certificate and they include, by way of example, the following:

— the movement certificate EUR.1 has been made out on a form other than the prescribed one (e.g. no guilloche background, differs significantly from the model in size or colour, no serial number, not printed in one of the officially-prescribed languages),

— one of the mandatory boxes (e.g. Box 4 on the EUR.1) has not been filled in, except for box 8,

— the movement certificate EUR.1 has not been stamped and signed (i.e. in Box 11),

— the movement certificate EUR.1 is endorsed by a non-authorised authority,

— the stamp used is a new one which has not yet been notified,

— the movement certificate EUR.1 presented is a copy or photocopy rather than the original,

— the entry in Box 5 refers to a country that does not belong to the Agreement (e.g. Israel or Cuba).

Action to be taken:

The document should be marked 'DOCUMENT NOT ACCEPTED', stating the reason(s), and then returned to the importer in order to enable him to get a new document issued retrospectively. The customs authorities, however, may keep a photocopy of the rejected document for the purposes of post-clearance verification or if they have grounds for suspecting fraud.

Article 31 — Refusal of preferential treatment without verification

This covers cases in which the proof of origin is considered inapplicable, *inter alia*, for the following reasons:

— the goods description box (Box 8 on EUR.1) is not filled in or refers to goods other than those presented;

— the proof of origin has been issued by a country which does not belong to the Agreement even if the goods originate in the Community or in Chile (e.g. EUR.1 issued in Israel for products originating in Chile);

— one of the mandatory boxes on the movement certificate EUR.1 bears traces of non-authenticated erasures or alterations (e.g. the boxes describing the goods or stating the number of packages, the country of destination or the country of origin);

— the time limit on the movement certificate EUR.1 has expired for reasons other than those covered by the regulations (e.g. exceptional circumstances), except where the goods were presented before expiry of the time limit;

— the proof of origin is produced subsequently for goods that were initially imported fraudulently;

— Box 4 on the movement certificate EUR.1 names a country not party to the agreement under which preferential treatment is being sought.

Action to be taken:

The proof of origin should be marked 'INAPPLICABLE' and retained by the customs authorities to which it was presented in order to prevent any further attempt to use it. Without prejudice to legal actions initiated according to internal legislation, the customs authorities of the importing country shall inform, where it is appropriate to do so, the customs or competent governmental authorities of the country of exportation about the refusal without delay.

Mentions used in the explanatory notes to Articles 17 and 31

CZ	DOKUMENT NEAKCEPTOVÁN	NEPOUŽITELNÝ
DA	AFVIST DOKUMENT	UANVENDELIGT
DE	DOKUMENT NICHT ANGENOMMEN	NICHT ANWENDBAR
EE	DOKUMENTI EI AKTSEPTEERITUD	AKTSEPTEERIMATA
EL	ΑΠΟΡΡΙΠΤΕΤΑΙ	ΜΗ ΑΠΟΔΕΚΤΟ
EN	DOCUMENT NOT ACCEPTED	INAPPLICABLE
ES	DOCUMENTO RECHAZADO	INAPLICABLE
HU	NEM ELFOGADOTT OKMÁNY	ALKALMATLAN
FI	ASIAKIRJA HYLÄTTY	EI VOIDA KÄYTTÄÄ
FR	DOCUMENT REFUSÉ	INAPPLICABLE
IT	DOCUMENTO RESPINTO	INAPPLICABILE
NL	DOCUMENT GEWEIGERD	NIET VAN TOEPASSING
LT	DOKUMENTAS NEPRIIMTAS	NETINKAMAS
LV	DOKUMENTS NAV AKCEPTÉTS	NEDERIGS
MT	DOKUMENT MHUX AĊĊETTAT	MHUX APPLIKABBLI
PL	DOKUMENT NIEZAAKCEPTOWANY	NIESTOSOWANY
PT	DOCUMENTO RECUSADO	NÃO APLICÁVEL
SE	EJ GODTAGET DOKUMENT	OANVÄNDBART
SI	DOKUMENT NI SPREJET	NEUSTREZNO
SK	DOKUMENT NEPRIJATÝ	NEPOUŽITEĽNÝ

STATE AID — UNITED KINGDOM

State aid No C 42/2004 (ex N 350/2004) — 'Business Premises Renovation Allowances (BPRA)'

Invitation to submit comments pursuant to Article 88(2) of the EC Treaty

(2005/C 56/06)

(Text with EEA relevance)

By means of the letter dated 1 December 2004 reproduced in the authentic language on the pages following this summary, the Commission notified the United Kingdom of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning the abovementioned aid scheme.

Interested parties may submit their comments on the measure in respect of which the Commission is initiating the procedure within one month of the date of publication of this summary and the following letter, to:

European Commission
Directorate-General for Competition
State Aid Greffe
B-1049 Brussels
Fax (32-2) 296 12 42

These comments will be communicated to the United Kingdom. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

TEXT OF SUMMARY

By letter dated 6 August 2004, registered by the Commission on 10 August 2004, the UK authorities notified the Business Premises Renovation Allowances scheme.

Description of the scheme

The scheme would provide qualifying businesses (owners/occupiers) with capital allowances in respect of the capital costs they actually incur in renovating or converting business premises that have been vacant for a year or longer and that are situated in one of the 2,000 designated disadvantaged areas of the UK, in order to bring those premises back into productive use.

State aid character of the scheme

The Commission considers, at this stage of the procedure, that the measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

Procedural considerations

The UK has complied with the procedural requirements of Article 88(3) EC by notifying the abovementioned aid scheme before putting it into effect.

Assessment of the compatibility of the aid measure

The capital allowances are granted in relation to the capital costs occurred for renovating or converting into productive use qualifying business premises in the designated disadvantaged areas. The notified scheme is primarily focussed on investment. According to the regional aid guidelines, aid for investment in disadvantaged areas may be compatible with the common market, but only if certain conditions are satisfied.

On the basis of a preliminary assessment, the Commission concludes that the proposed scheme does not fall within the scope and field of application of the existing guidelines, frameworks or regulations. The Business premises renovation allowances scheme is focused on deprived areas for which, at present, no guidelines or frameworks exist.

Accordingly, it is necessary to examine if the notified scheme could qualify for one of the exemptions laid down in Article 87(3) of the EC Treaty. In order to do so, the Commission has assessed whether the measure proposed by the UK is necessary and proportionate to the stated objective and does not distort competition to an extent contrary to the common interest.

In the past, the Commission has expressed the opinion that the rehabilitation of brownfield sites contributes to important Community objectives. The Commission believes that the renovation or conversion of empty business premises in order to bring them back into productive use as proposed by the UK by means of the notified measure could also be considered as a rehabilitation measure and would therefore, in general, contribute to Community objectives.

However, the Commission believes that, at this stage, further analysis is required in order to judge the appropriateness and proportionality of the Business Premises Renovation Capital Allowances. This is underlined by the following facts:

— According to the data provided by the UK authorities, 85 % of all relevant expenditure in the UK is undertaken by larger businesses and only 15 % by SMEs. Although the scheme is open for all enterprises regardless of their size, the main beneficiaries of the BPRA will mainly be large businesses.

— However, the UK authorities have stated that even in those cases where large companies own the business premises, SMEs would nevertheless be able to benefit from the measure indirectly as they are often renting business outlets from large enterprises. This is underlined by data provided by the UK indicating that of new leases taken out on premises vacant for more than one year, 31 % are by large businesses and 69 % by SMEs. For the most deprived areas according to the definition of the UK, the respective figures are 26 % for large enterprises and 74 % for SMEs.

— The Commission notes that the notified measure is not restricted to small and medium-sized companies within the Commission definition. Furthermore, the Commission also notes that the scheme is not restricted to assisted areas pursuant to Article 87(3)(a) or Article 87(3)(c) of the EC Treaty.

— The use of the 2 000 designated most deprived areas of the UK as target area of the notified measure raises the same issues as already in the case of the Stamp duty exemption scheme. It deviates from the standard practice of the Commission when dealing with regional aid. The Commission continues to believe that such a deviation needs to be justified in order to avoid that beneficiaries in areas which are not designated as assisted areas according to Article 87(3)(a) areas and/or Article 87(3)(c) areas receive a disproportionate economic advantage adversely affecting trading conditions to an extent contrary to the common interest.

— Furthermore, in approving the Stamp duty exemption scheme on the basis of the specific merits of this scheme, the Commission imposed a number of conditions. Amongst others, the Commission decided that monitoring needed to be ensured and that the beneficial effects of the scheme on physical regeneration and notably on brownfield sites needed to be demonstrated. The Commission so far has not received any ex-post analysis enabling it to assess the beneficial effects of the scheme.

— Although the UK authorities state that the average aid intensity would be between 9 % and 10 % net, maximum aid intensities under the notified measure can reach up to 40 % net in case of unincorporated businesses and up to 30 % net in case of companies, respectively.

The Commission, after a first preliminary assessment of the measure, therefore has doubts whether the measure proposed by the UK is proportionate to the objective and does not distort competition to an extent contrary to the common interest. The Commission is of the opinion that a more thorough analysis of this complex question is necessary. The Commission wishes to collect information from other interested parties. To do so, the Commission must, for legal reasons, open the procedure provided for in Article 88(2) of the EC Treaty. It is only with the help of such observations that the Commission can decide whether such aid is necessary and does not adversely affect trading conditions to an extent contrary to the common interest.

TEXT OF LETTER

'The Commission wishes to inform the United Kingdom that, having examined the information supplied by your authorities on the aid measure referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

1. PROCEDURE

1. By letter dated 6 August 2004, registered by the Commission on 10 August 2004, the UK authorities notified a scheme providing qualifying businesses with favourable depreciation allowances (called "capital allowances") in respect of the capital costs the owners or occupiers actually incur in renovating or converting business premises that have been vacant for a year or longer and that are situated in designated disadvantaged areas. A request for information aiming at clarifying some points of the notification was sent on 2 September 2004 (D/56282). The UK authorities replied by letter dated 4 October 2004. The latter was registered by the Commission on 18 October 2004 (A/37971).

2. DESCRIPTION OF THE AID MEASURE

2. Aim of the measure

The aim of the measure is to foster physical, economic and social regeneration of so-called pockets of deprivation ([1]), to support the redevelopment of brownfield sites, to increase private investment, enterprise and employment in the UK's most deprived communities by means of bringing empty for a year or longer-term derelict shops or business property back into productive use. Such scheme is part of the UK Government's integrated approach to tackling the range of regeneration market failures that its most deprived communities face.

([1]) The expression "pockets of deprivation" refers to the incidence of deprived communities, often close to prosperous areas.

3. **The form and nature of the aid**

The notified aid takes the form of capital allowances. Capital allowances enable the capital costs, which a business actually incurs in the renovation or the conversion of empty or derelict for a year or longer business premises in order to bring them back into productive use, to be written off against a business's taxable profits. They take the place of depreciation charged in the commercial accounts, which is not allowed for tax purposes. The notified measure would provide the 100 % first year allowance (FYA) and 25 % writing-down allowance (WDA) for capital expenditure on renovating vacant commercial buildings, so the relief would be available for:

(a) expenditure that already qualifies for allowances under the plant and machinery regime (at 25 % WDAs *per annum* or 40 % FYAs [2]) or under the industrial building regime (at 4 % WDAs *per annum*); and

(b) expenditure that does not currently qualify for any relief, for example, expenditure on alterations to the fabric of non-industrial, commercial buildings (shops, offices).

In the case of expenditure falling under head (b), the notified measure would therefore constitute a *new* relief (at 100 % FYAs and 25 % WDAs *per annum*), as currently commercial buildings do not qualify for capital allowances. In the case of expenditure falling under head (a), the effect of the measure would be the increased rate of allowance.

The new relief, according to the UK authorities, would operate mainly as a tax deferment benefit and only partly as a potential new relief against a business's taxable profits.

4. **Eligible costs and aid intensity**

To be eligible for the BPRA scheme, the empty premises would have to have lain unused for a year or longer and must be situated in one of the 2 000 designated most deprived areas of the UK — the so-called "designated disadvantaged areas".

5. **Geographical coverage of the scheme**

The "designated disadvantaged areas in the UK", on which the notified BPRA is targeted, have been selected on the basis of the "indices of multiple deprivation (IMD)" developed for each of four regions of the UK. This is a combined index covering six domains of deprivation (income, employment, health, education, housing and access to services). The analysis has been applied at a very low geographical level (i.e. at the level of electoral wards, divisions or postcodes). The present list of eligible areas has been set out in "The Stamp Duty (Disadvantaged Areas) Regulations 2001".

6. **Beneficiaries**

The scheme applies to undertakings of any size and operating in any sector of the economy.

7. **Budget of the scheme**

The estimated overall revenue losses, due to tax concessions for the five year period of the scheme, are about GBP 135 million (ca. EUR 205 million).

8. **Legal basis of the scheme**

Primary legislation:

— Capital allowances: renovation of business premises in disadvantaged areas ("Business Premises Renovation Allowances (BPRA)") — when enacted, this legislation will be inserted into Capital Allowances Act 2001.

Secondary legislation:

— SI 3747/2001 The Stamp Duty (Disadvantaged Areas) Regulations.

9. **Duration of the scheme**

2005 — 2010

3. ASSESSMENT OF THE AID MEASURE

10. In accordance with Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999, the decision to initiate proceedings shall summarise the relevant issues of fact and law, shall include a preliminary assessment from the Commission as to the aid character of the proposed measure, and shall set out the doubts as to its compatibility with the common market.

11. **Procedure**

The UK authorities have complied with the procedural requirements of Article 88(3) of the EC Treaty by notifying the abovementioned aid scheme before putting it into effect.

12. **The existence of aid**

The Commission considers, at this stage of the procedure, that the measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty, and this for the following reasons:

— State resources are involved because tax is foregone.

— The measure is selective because it is targeted upon particular geographical areas.

— The measure will reduce the costs for companies investing in the renovation or the conversion into productive use of empty or derelict business premises in the eligible areas. It will therefore provide an advantage to such companies over other companies investing in other areas, and therefore not receiving the exemption.

[2] A 40 % rate FYA is available to small and medium sized enterprises (SMEs), but not to large business.

— Because capital allowances apply to all business premises which have been renovated or converted into productive use in the designated areas it will, among others, inevitably benefit undertakings which are engaged in inter-State trade, or in a business sector in which there is inter-State trade. Furthermore, the scheme does not provide that the limits laid down in Council Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid will be respected. Accordingly, the new exemption may give rise to aid which affects competition in inter-State trade.

13. **Exemption grounds**

(a) Article 87(2) of the EC Treaty lists certain types of aid that are compatible with the EC Treaty. In view of the nature and purpose of the aid, and the geographical coverage of the scheme, the Commission considers, at this stage of the analysis, that the subparagraphs (a), (b) and (c) are not applicable to the measure in question.

(b) Article 87(3) of the EC Treaty specifies other forms of aid, which may be regarded as compatible with the common market. In view of the nature and purpose of the aid measure and its geographical scope, the Commission considers, at this stage of the investigation, that the subparagraphs (a), (b), (d) and (e) of Article 87(3) are not applicable either.

(c) In the notification the UK authorities appear to agree with the above analysis and suggest that the question is whether the aid measure is compatible with the common market on the basis that it will facilitate the development of certain economic areas and it will not adversely affect trading conditions to an extent contrary to the common interest (Article 87(3)(c) of the EC Treaty).

(d) The coverage of the notified measure is not limited to small and medium-sized enterprises (SMEs), nor to firms in difficulty, nor to any one of the following activities: R&D, environmental protection, training, the creation or maintenance of employment. Therefore, the Commission considers, at this stage of the analysis, that the notified measure can not be declared compatible with the common market on the basis of its conformity with any of the following regulations, frameworks or guidelines:

— Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2);

— Community framework for State aid for research and development (OJ C 45, 17.2.1996, p. 5 and OJ C 111, 8.5.2002, p. 3);

— Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20) and Commission Regulation (EC) No 363/2004 of 25 February 2004 amending Regulation (EC) No 68/2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 63, 28.2.2004, p. 20);

— Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ L 337, 13.12.2002, p. 3).

(e) The notified scheme could not be declared compatible with Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33) and Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) either. In order for the aid to be in line with the provisions of the latter Regulations, it should be directed exclusively to SMEs respecting the foreseen maximum aid intensity. The scheme is not restricted to SMEs. Moreover, according to the data provided by the UK authorities, 85 % of all capital expenditure in the UK is undertaken by larger businesses and 15 % by SMEs. Thus, although the scheme would be open for all enterprises, regardless of their size, it seems that the real immediate beneficiaries of the BPRA will mainly be large businesses.

(f) In the notification the UK authorities indicate that the aim of the measure is twofold: to promote the regional development and the environmental protection of disadvantaged areas in the UK. With regards to the environmental protection objective, the scheme cannot be assessed on the basis of the Community guidelines on State aid for environmental protection (OJ C 37, 3.2.2001, p. 3):

— The measures cannot be qualified as any action designed to remedy or to prevent damage or to encourage the efficient use of the resources as defined in point 6 of the abovementioned guidelines.

— The investments concerned cannot be qualified as strictly necessary in order to meet environmental objectives intended to reduce or eliminate pollution and nuisances or for the rehabilitation of polluted industrial sites as defined respectively in points 36 and in 38 of the environmental protection guidelines.

— The measures cannot satisfy the rules applicable to operating aid in the form of tax reductions as defined in point E.3.2.

(g) The primary objective of the measure, as indicated by the UK authorities, is to promote the regional development. Therefore, the Commission has examined the compatibility of the measure on the basis of the Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9), hereinafter referred to as the "regional aid guidelines". The results of this analysis are presented below.

14. **Conformity with the regional aid guidelines**

The capital allowances are granted in relation to the capital costs occurred for renovating or converting into productive use qualifying business premises in the designated disadvantaged areas. In its notification the UK authorities argue correctly that the notified scheme is therefore primarily focussed on investment. According to the regional aid guidelines, aid for investment in disadvantaged areas may be compatible with the common market, but only if certain conditions are satisfied. At this stage of the examination, the Commission has doubts whether the notified scheme respects the conditions set out in these guidelines:

14(1) By letter No SG(2000) D/106293 of 17 August 2000, the Commission approved the UK regional aid map for the period 2000 to 2006 (N 265/2000). The map defines the areas eligible for national regional aid under the derogations of Article 87(3)(a) and (c) of the EC Treaty. The Article 87(3)(a) EC Treaty regions included in the map were defined on the basis of EU-wide criteria (NUTS level II regions with a GDP per capita in PPS lower than 75 % of the Community average). The Article 87(3)(c) EC Treaty areas were selected on the basis of geographical units and social and economic indicators, proposed by the UK authorities themselves. The business premises capital allowances will apply to costs qualifying as capital assets occurred for renovation or conversion into productive use of business premises situated in the so-called "designated disadvantaged areas", which have been defined on the basis of different geographical units and indicators (see point 5 above). The result of this approach is that a number of areas eligible under the notified measure does not fall within the areas eligible for regional aid as defined in the present UK regional aid map.

14(2) Although the Commission has already dealt with this issue in the State aid *C 13/2002 Stamp duty exemption for non-residential property in disadvantaged areas* ([3]), being the latter scheme targeted precisely on the same disadvantaged areas, doubts whether the geographical coverage of the business premises capital allowances is compatible with the regional aid guidelines persist. The concern is still based on the fact that the approval of the scheme, including the list of "designated disadvantaged areas" would in effect lead to a widening of the UK regional aid map. In turn, this would undermine the concentration of regional aid areas, which is a leading principle of the Community's regional aid policy ([4]).

14(3) In order for the aid to be acceptable in assisted areas, it has to promote the development of the less-favoured regions by supporting either initial investment to establishments located in regions eligible for regional aid or job creation that is linked to investment ([5]). Initial investment is defined in point 4.4 of the guidelines as "an investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation)." The UK authorities were not able to remove the Commission's doubts as to whether expenditure incurred under the BPRA would constitute *"initial investment"* in all circumstances within the meaning of point 4.4 of the regional aid guidelines.

14(4) Section 360B of the draft Schedule 1 "Capital allowances: renovation of business premises in disadvantaged areas" allows the application of the notified depreciation rules in relation to:

(a) the conversion of a qualifying building into qualifying business premises,

(b) the renovation of qualifying building if it is or will be qualifying business premises,

(c) or repairs to a qualifying building or, where the qualifying building is part of a building, to the building of which the qualifying buildings forms part, to an extent that the repairs are incidental to expenditure within paragraph (a) or (b).

The Commission is not able, at this stage of the analysis, to conclude that work for conversion and renovation falls without a doubt under the definition of initial investment as given above. Especially the words repair and renovation linguistically point out the direction of replacement investment, which, for the Commission falls under the definition of operating aid. According to point 4.15 of the regional aid guidelines operating aid is aimed at reducing a firm's current expenses. Cases in point as given by the regional aid guidelines are replacement investments ([6]).

14(5) Point 5.4. of the regional aid guidelines provides that regional aid schemes are approved by the Commission, subject to the aid intensity ceilings and the duration defined in the regional aid map. The scheme intends to operate until 2010 and the UK authorities do not plan to modify it to fit the regional aid rules that come into force on 1 January 2007.

14(6) Point 4.18 specifies that the total amount of regional investment aid should respect the aid intensity ceilings set out in the regional aid map. In the notification, the UK argues that the intensity of the scheme is estimated around 9-10 % NGE ([7]). According to the UK authorities, this would be the most likely case based on experience gained in tax offices in the UK, assuming that about 50 % of all expenditure on renovation will go to integral plant and machinery, 40 % to commercial buildings and the remaining 10 % will be on industrial buildings. However, the maximum aid intensity up to 40 % NGE could be reached in case of unincorporated business and up to 30 % NGE in case of companies. The UK authorities claim that the likelihood of such maximum aid intensities is very slim, as this would assume that all the company's expenditure should be on the commercial building, i.e. on renovations for which no allowances are currently available, with no expenditure on integral plant and machinery which all qualify for capital allowances under the current regime for plant and machinery.

([3]) L 149, 17.6.2003, p. 18.

([4]) In this context the Guidelines on national regional aid point out that regional aid "… is conceivable in the European Union only if it is used sparingly and remains concentrated on the most disadvantaged regions. If aid were to become generalised and, as it were, the norm, it would lose all its incentive quality and its economic impact would be nullified. At the same time, the aid would interfere with the normal interplay of market forces and reduce the efficacy of the Community economy as a whole".

([5]) Point 4.1 of the regional aid guidelines.

([6]) Footnote 21 of the regional aid guidelines, p. 14.

([7]) NGE: Net Grant Equivalent.

14(7) The Commission has doubts as to whether the "theoretical" maximum aid intensities would rarely apply in practice. The definition of refurbishment is based on fiscal rules on capital expenditures as well as on the associated accountancy rules and it does not seem that plants that become an integral part of the buildings, such as lifts, heating systems, water and waste water services, alarm and security systems, fire fighting/prevention systems and wiring associated with or ancillary to any of the foregoing could be kept separately from a building. In view of the more used general accountancy rules this kind of plants should become part of the building and, therefore, all the capital costs will qualify for capital allowances under the notified business premises renovation allowances scheme.

14(8) Point 2 of the regional aid guidelines provides that the granting of (regional) State aid in certain sectors (transport, shipbuilding, fisheries and coal) is subject to specific restrictions. The Guidelines on national regional aid excludes specifically from its scope the production, processing and marketing of Annex I products. Therefore any aid granted to undertakings operating in the production, processing and marketing of Annex I products is to be assessed according to the Community Guidelines for State aid in the agriculture sector ([8]). In addition, pursuant to the provisions of the Multisectoral Framework (MSF 2002) ([9]), no regional aid may be granted in the synthetic fibres and steel sectors, and a maximum aid intensity of 30 % of the regional aid ceiling applies for an investment in the motor vehicle sector that exceeds an aid amount above EUR 5 million. According to the notification, sensitive sectors are not excluded from the scope of the BPRA scheme. It is unclear though how the UK authorities will ensure that the aid granted under the notified scheme to companies engaged in the abovementioned specific sectors will comply with the applicable special State aid rules.

14(9) Finally, the incentive of the measure can be questioned, as businesses might deliberately keep premises vacant for a year and forgo the income that could be generated by making use of these premises in order to benefit from BPRA.

15. In the light of what has been said above, the Commission concludes that the proposed scheme does not fall within the scope and field of application of the existing guidelines, frameworks or regulations. The Business premises renovation allowances scheme is focused on deprived areas for which, at present, no guidelines or frameworks exist.

16. The former Guidelines on State aid for undertakings in deprived urban areas ([10]), which expired in 2002, would not have covered this kind of measure either. However, the Commission Notice on the expiry of the guidelines on State aid for undertakings in deprived urban areas ([11]) provides that the non-prolongation of the guidelines does not imply that state aid for deprived areas would no longer be possible and, depending on specific circumstances of the proposed aid in question, it may be approved directly upon the basis of Article 87(3) of the EC Treaty.

17. Accordingly, it is necessary to examine if the notified scheme could qualify for one of the exemptions laid down in Article 87(3) of the EC Treaty. In order to do so, the Commission has assessed whether the measure proposed by the UK is necessary and proportionate to the stated objective and does not distort competition to an extent contrary to the common interest.

18. **Compatibility with Article 87(3) of the EC Treaty**

18(1) In the past, the Commission has expressed the opinion that the rehabilitation of brownfield sites contributes to important Community objectives ([12]). Brownfield has been defined as land and/or buildings in urban or rural areas that have previously been developed, but that are not currently in use ([13]). The Commission believes that the renovation or conversion of empty business premises in order to bring them back into productive use as proposed by the UK by means of the notified measure could also be considered as a rehabilitation measure and would therefore, in general, contribute to Community objectives.

18(2) However, the Commission believes that at this stage further analysis is required in order to judge the appropriateness and proportionality of the Business Premises Renovation Capital Allowances. This is underlined by the following facts:

— According to the data provided by the UK authorities, 85 % of all relevant expenditure in the UK is undertaken by larger businesses and only 15 % by SMEs. Although the scheme is open for all enterprises regardless of their size, the main beneficiaries of the BPRA will mainly be large businesses.

— However, the UK authorities have stated that even in those cases where large companies own the business premises, SMEs would nevertheless be able to benefit from the measure indirectly as they are often renting business outlets from large enterprises. This is underlined by data provided by the UK indicating that of new leases taken out on premises vacant for more than one year, 31 % are by large businesses and 69 % by SMEs. For the most deprived areas according to the definition of the UK, the respective figures are 26 % for large enterprises and 74 % for SMEs.

([8]) OJ C 28 of 1.2.2000, p. 2.

([9]) Multisectoral Framework on regional aid for large investment projects, OJ C 70 of 19 March 2002, p. 8, as amended by the "Commission communication on the modification of the Multisectoral Framework on regional aid for large investment projects (2002) with regard to the establishment of a list of sectors facing structural problems and on a proposal of appropriate measures pursuant to Article 88(1) of the EC Treaty, concerning the motor vehicle sector and the synthetic fibres sector", OJ C 263 of 1 November 2003, p. 3.

([10]) OJ C 146, 14.5.1997, p. 6.

([11]) The Commission Notice on the expiry of the Guidelines for undertakings in deprived urban areas was published in OJ C 119, 22.5.2002, p. 21.

([12]) See Commission decision on Land remediation (State aid N 385/2002).

([13]) See Commission decision on stamp duty exemption L 149, 17.6.2003, p. 18.

— The Commission notes that the notified measure is not restricted to small and medium-sized companies within the Commission definition. Furthermore, the Commission also notes that the scheme is not restricted to assisted areas pursuant to Article 87(3)(a) or Article 87(3)(c) of the EC Treaty.

— The use of the 2 000 designated most deprived areas of the UK as target area of the notified measure raises the same issues as already in the case of the Stamp duty exemption scheme. It deviates from the standard practice of the Commission when dealing with regional aid. The Commission continues to believe that such a deviation needs to be justified in order to avoid that beneficiaries in areas which are not designated as assisted areas according to Article 87(3)(a) areas and/or Article 87(3)(c) areas receive a disproportionate economic advantage adversely affecting trading conditions to an extent contrary to the common interest.

— Furthermore, in approving the Stamp duty exemption scheme on the basis of the specific merits of this scheme, the Commission imposed a number of conditions. Amongst others, the Commission decided that monitoring needed to be ensured and that the beneficial effects of the scheme on physical regeneration and notably on brownfield sites needed to be demonstrated. The Commission so far has not received any ex-post analysis enabling it to assess the beneficial effects of the scheme.

— Although the UK authorities state that the average aid intensity would be between 9 % and 10 % net, maximum aid intensities under the notified measure can reach up to 40 % net in case of unincorporated businesses and up to 30 % net in case of companies, respectively.

18(3) The Commission, after a first preliminary assessment of the measure, therefore has doubts whether the measure proposed by the UK is proportionate to the objective and does not distort competition to an extent contrary to the common interest. The Commission is of the opinion that a more thorough analysis of this complex question is necessary. The Commission wishes to collect information from other interested parties. To do so, the Commission must, for legal reasons, open the procedure provided for in Article 88(2) of the EC Treaty. It is only with the help of such observations that the Commission can decide whether such aid is necessary and does not adversely affect trading conditions to an extent contrary to the common interest.

4. **DECISION**

19. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests the United Kingdom to submit its comments and to provide all such information as may help to assess the aid scheme "Business Premises Renovation Allowances", within one month of the date of receipt of this letter.

20. The Commission wishes to remind the United Kingdom that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipients.

21. The Commission warns the United Kingdom that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.'

Prior notification of a concentration

(Case COMP/M.3678 — Goldman Sachs/Cerberus/TET/JV)

Candidate case for simplified procedure

(2005/C 56/07)

(Text with EEA relevance)

1. On 24 February 2005, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 [1] by which the undertakings Goldman Sachs Mortgage Company ('GSMC', USA) controlled by Goldman Sachs Group, Inc. ('Goldman Sachs', USA) and The Cerberus Group ('Cerberus', USA) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of part of the undertaking Transamerica European Trailers ('TET', UK) by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— for Goldman Sachs: investment banking and securities,

— for Cerberus: Investment in personal property,

— for TET: leasing of commercial road trailers.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of Regulation (EC) No 139/2004. However, the final decision on this point is reserved. Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 [2] it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (No (32-2) 296 43 01 or 296 72 44) or by post, under reference number COMP/M.3678 — Goldman Sachs/ Cerberus/TET/JV, to the following address:

European Commission
Directorate-General for Competition,
Merger Registry
J-70
B-1049 Brussels

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[1] OJ L 24, 29.1.2004, p. 1.

[2] Available on DG COMP website:
http://europa.eu.int/comm/competition/mergers/legislation/consultation/simplified_tru.pdf.

CORRIGENDA

Corrigendum to the Protocol established in accordance with Article 34 of the Treaty on European Union, amending, as regards the creation of a customs files identification database, the Convention on the use of information technology for customs purposes

(Official Journal of the European Union C 139 of 13 June 2003)

(2005/C 56/08)

Page 3, Article 1 (Chapter V A, Article 12 A, paragraph 3, second subparagraph)

For: 'This list shall comprise only infringements that are punishable:

— by deprivation of liberty or a detention order for at least 12 months, or

— by a fine of at least EUR 15 000.',

read: 'This list shall comprise only infringements that are punishable:

— by deprivation of liberty or a detention order for a maximum period of at least 12 months, or

— by a fine of at least EUR 15 000.'.