COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 9 December 1981

Amended proposal for a Council regulation on the control of concentrations between undertakings (merger control regulation). Presented by the Commission to the Council, pursuant to the second paragraph of Article 149 of the EEC Treaty.

COM(81) 773 final

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Amended proposal for a Regulation on the control of concentrations between undertakings (merger control regulation)

I. Background

On 20 July 1973 the Commission submitted to the Council a proposal for a Council Regulation on the control of concentrations between undertakings[1] (merger control regulation).

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

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

In its Resolution on the Ninth Report on Competition Policy, Parliament deplored the fact that the Council had still not adopted the merger control regulation, which would give the Commission the means to take effective action at Community level against any irreversible structural evolution which could seriously jeopardize competition[4].

Although present political circumstances are not very favourable the Commission cannot remain inactive with regard to the Council. With support from Parliament it must seek a way out of the present impasse in order to be able to preserve competitive structures within the common market.

Moreover, a policy designed to strengthen effective competition plays a significant role in achieving more flexible structural adjustment and maintaining the competitiveness of our industries, and, in so doing, also contributes to overcoming the current crisis.

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[1] OJ C 92, 31.10.1973.
[2] OJ C 23, 8. 3.1974.
[3] OJ C 88, 26. 7.1974.
[4] OJ C 144, 15.6.1981.

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

A fresh attempt should therefore be made to confine the control measures to mergers with a Community dimension and to involve the Member States more in the decision-making process, while at the same time ensuring that the Commission's own powers in its conduct of competition policy are not endangered.

II. Present position of discussion in the Council

1. The Italian Government has entered a general reservation on the whole of the proposal, on political grounds.

2. Scope of the regulation

   The Commission proposal establishes two alternative criteria for the applicability of the regulation:

   (i) the aggregate turnover of the undertakings participating in the merger must not be less than 200 million ECU, or

   (ii) the share of the market in the goods or services concerned must be more than 25 % in at least one Member State.

   The Council now seems to be moving towards:

   (i) requiring that the merger satisfies both criteria cumulatively;

   (ii) raising the turnover threshold to between 500 million and 1 000 million ECU, and

   (iii) relating the market share (between 20 and 25 %) to the common market as a whole.

3. Undertakings excluded

   The Commission proposal does not exclude any categories of undertakings from the scope of the regulation, but the exclusion of certain categories has been discussed in the Council.

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Public undertakings: only Italy favours their exclusion.

Banks and insurance companies: there is agreement in principle that these should be included, although the Benelux countries could accept this only if the relevant implementing provisions were incorporated in a separate regulation.

Purely financial holding companies: only Luxembourg has requested their exclusion.

4. Exemption from principle of incompatibility

Article 1(3) of the Commission proposal allows the prohibition to be declared inapplicable to mergers "which are indispensable to the attainment of an objective which is given priority treatment in the general interest of the Community".

France, the United Kingdrom, Italy and Ireland have requested that exemption should also be possible on grounds of national industrial, regional or social policies. Germany and Denmark oppose this idea.

5. Compulsory prior notification

Only Italy is opposed to this.

6. Division of decision-making power between Commission and Council

The Commission proposal takes over the mechanism of Regulation No 17 (consultation of the Advisory Committee and decision by the Commission).

To take account of reservations entered by all delegations, various working hypotheses have been advanced based on the mechanism of Article 17 of Regulation No 1017/68 applying the rules of competition to transport by rail, road and inland waterway: the Council to examine general policy questions relating to the assessment of an individual case where a qualified majority of the Advisory Committee opposed the Commission proposal; the Commission to adopt the final decision which "takes account" of the Council's opinion.

France, Italy and the United Kingdom want the final decision in such cases to lie with the Council. The Commission, Germany and the Benelux countries want the final decision to rest with the Commission.

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In the present state of discussion in the Council, the search for solutions should therefore concentrate on:

(i) criteria that would allow a planned merger to be assessed in the light of its effects on the maintenance of effective competition.

(ii) threshold below which the regulation would not apply,

(iii) decision-making procedures.

III. Proposals on the assessment criteria (Article 1(1))

(a) Taking into account of the international competitive situation (Second subparagraph of Article 1(1))

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

(b) Reference to the Community dimension of the merger (Second subparagraph of Article 1(1))

Such reference is intended to make it clearer that, as was the intention with the original Commission proposal, the regulation is to apply to mergers which are of a scale that transcend the national context and produce effects at Community level.

(c) Introduction of a market share criterion (Third subparagraph of Article 1(1) - new)

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

As pointed out above (last sentence of paragraph 2, point II, page 2), the Council seems to be moving towards the view that this quantitative criterion, as the threshold below which the regulation would not apply, should be between 20 % and 25 % of the common market as a whole.

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The market share criterion would then be one that would be difficult to apply and would be inappropriate for determining the scope of the regulation.

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

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

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

As far as the threshold is concerned, it is proposed that this be fixed at 20 %: taking the common market as a whole, a market share of 20 % may represent a critical threshold for the working of competition, regardless of the market shares held by competitors. This is because, in a market with a low level of concentration, acquiring a 20 % market share may result in the creation of a dominant position. On the other hand, if the market already has a high level of concentration, there is a danger of strengthening an oligopolistic structure. Economic research findings have suggested that this is the case. It is not possible to envisage a higher market share threshold if the creation or strengthening of regional monopolies is to be avoided.

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

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

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

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

IV. Proposals on the thresholds for determining applicability of the regulation (Article 1(2))

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

(a) Market share

For the reasons set out at III (c), it is proposed that market share should now be used as one of the criteria allowing the effects of a merger on the working of effective competition to be assessed (assessment criterion), and not as a criterion indicating the limits below which the regulation would not apply (applicability criterion).

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This solution would also avoid the difficulties that would result from the emerging tendency in the Council to move towards cumulative application of the market share and turnover criteria. Such combined application would in particular have the effect of excluding from the scope of the regulation those mergers which would create monopoly positions at common market level but which occurred in sectors in which the turnover threshold was not reached.

(b) Turnover

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

V. Proposal on decision-making procedures

As indicated in the second paragraph of II.6, a possible amendment to the Commission proposal has been considered as working hypothesis.

The underlying idea is that in the fields where common policies do not exist, Member States may not like to see their national policies jeopardized by the prohibition of a given merger. Account should be taken of such circumstances, provided that the attainment of a priority objective of the Community is not thereby endangered.

This solution would avoid giving the Council decision-making power in individual cases since the Council's deliberations on the general policy issues raised by an individual case would not be formally binding on the Commission.

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The Commission could therefore propose amending the decision-making procedure in this way.

VI. Proposal

The Commission is asked to approve the proposed amendments contained in the annexed text and to formally submit them to the Council pursuant to Article 149, paragraph 2, of the EEC Treaty.

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ANNEX

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

Original proposal	New proposal
Basic provisions	Basic provisions
Article 1	Article 1
1. Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings or groups of undertakings, at least one of which is established in the common market, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, is incompatible with the common market in so far as the concentration may affect trade between Member States.	1. First subparagraph unchanged.
The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods or services.	The power to hinder effective competition shall be appraised at Community level and by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, to the effects of international competition, and to supply and demand trends for the relevant goods or services.
	A concentration shall be presumed to be compatible with the common market where the market share of the goods or services concerned accounts in the common market for less than 20 % of the turnover in identical goods or services of in goods or services which, by reason of their characteristics, their price and their use are regarded as similar by the consumer. The presumption of compatibility with the common market can be rebutted if the Commission establishes that a concentration giving a market share below this threshold is nonetheless incompatible with the common market.

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ANNEX

Original proposal	New proposal
2. Paragraph 1 shall not apply where:	2. Paragraph 1 shall not apply where:
— the aggregate turnover of the undertakings participating in the concentration is less than 200 million units of account and	- the aggregate turnover of the undertakings participating in the concentration is less than 500 million ECU.
— the goods or services concerned by the concentration do not account in any Member State for more than 25 % of the turnover in identical goods or services or in goods or services which, by reason of their characteristics, their price and the use for which they are intended, may be regarded as similar by the consumer.	Deleted.
3. Paragraph 1 may, however, be declared inapplicable to concentrations which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community.	3. Unchanged.

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Orig. FR

ANNEX

Original proposal	New proposal
Article 5	Article 5
Detailed rules for calculating turnover and market shares	Calculation of turnover and market shares
1. (a) The aggregate turnover specified in Articles 1 (2) and 4 (1) shall be obtained by adding together the turnover for the last financial year for all goods and services of: (i) the undertakings participating in the concentration; (ii) the undertakings and groups of undertakings which control the undertakings participating in the concentration within the meaning of Article 2; (iii) the undertakings or groups of undertakings controlled within the meaning of Article 2 by the undertakings participating in the concentration.	1. (a) Unchanged.
(b) The market shares referred to in Article 1 (2) near those held in the last financial year by all the undertakings listed in subparagraph (a) above.	(b) The market shares referred to in Article 1(1) shall be those ... (rest unchanged).
2. In place of turnover as specified in Articles 1 (2) and 4 (1) and in paragraph 1 of this Article, the following shall be used: — for banking and financial institutions: one tenth of their assets; — for insurance companies: the value of the premiums received by them.	2. Unchanged.

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ANNEX

Original proposal

Article 19

Liaison with the authorities of the Member States

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

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

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

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

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

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

New proposal

Article 19

Liaison with the authorities of the Member States

1. and 2.: Unchanged.

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

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

5. and 6.: Unchanged.

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

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