

EUROPEAN PARLIAMENT

Working Documents

1983-1984

12 October 1983

DOCUMENT 1-807/83

Report

drawn up on behalf of the Committee on Economic and
Monetary Affairs

on the amended proposal from the Commission of the
European Communities to the Council (Doc. 1-946/81 -
COM(81) 773 final)

for a regulation on the control of concentrations
between undertakings

Rapporteur: Mr Philipp von BISMARCK

By letter of 18 January 1982 the President of the Council of the European Communities consulted the European Parliament on the amended proposal for a Council regulation on the control of concentrations between undertakings.

On 21 January 1982 the President of the European Parliament referred this proposal to the Committee on Economic and Monetary Affairs as the committee responsible and to the Legal Affairs Committee for an opinion.

At its meeting on 24 February 1982 the Committee on Economic and Monetary Affairs appointed Mr von Bismarck rapporteur.

The committee considered the Commission proposal and the draft report at its meeting of 27-28 September 1982, 28-29 April, 14-16 June, and 27-28 September 1983,

At its last meeting the committee decided unopposed with one abstention to recommend that Parliament approve the Commission proposal subject to the following amendments.

The committee then adopted the motion for a resolution unopposed with one abstention.

The following took part in the vote:

Mr MOREAU (Chairman); Mr Von BISMARCK (rapporteur); Mr ALBERS (replacing Mr Schinzel); Mr BEAZLEY; Mr BEUMER (deputizing for Mr Vergeer); Mr BONACCINI; Mr DAMSEAUX (deputizing for Mr Nordmann); Mrs DESOUCHES; Miss FORSTER; Mr FRANZ; Mr PAPANTONIOU; Mr PETERS (present pursuant to Rule 93(2) of the Rules of Procedure); Mr ROGALLA (deputizing for Mr WAGNER); Mr VAN ROMPUY; Mr VETTER (present pursuant to Rule 93(2) of the Rules of Procedure); Mr WALTER; Mr WEDEKIND (deputizing for Mr Schnitker).

The report was tabled on 4 October 1983.

The opinion of the Legal Affairs Committee is attached.

C O N T E N T S

	Page
Amendments to the Commission proposal	5
A. MOTION FOR A RESOLUTION	10
B. EXPLANATORY STATEMENT	13
OPINION OF THE LEGAL AFFAIRS COMMITTEE	

The Committee on Economic and Monetary Affairs hereby submits to the European Parliament the following amendments to the Commission proposal and the following motion for a resolution together with explanatory statement :

Amended proposal for a Council regulation on the control of concentrations between undertakings (Doc. 1-946/81)

Amendments tabled by the Committee on Economic and Monetary Affairs

Text proposed by the Commission

Article 1

Article 1

Basic provisions

Basic provisions

Unchanged

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.

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 international competition, 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 or in a substantial part thereof for less than 20% of the turnover in identical goods or services or 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 or with a substantial part of it.

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

this threshold is nonetheless incompatible with the common market.

2. Paragraph 1 shall not apply where the aggregate turnover of the undertakings participating in the concentration is less than 750 million ECU
2. Paragraph 1 shall not apply where the aggregate turnover of the undertakings participating in the concentration is less than 500 million ECU.
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 Community.
3. Paragraph 1 may, however, be declared inapplicable to concentrations which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community.

Article 4

Prior notifications of concentrations

1. Paragraph 1 unchanged.
2. Where concentrations proposed by an undertaking or a group of undertakings have already reached or exceeded the amounts referred to in paragraph 1, they shall be exempted from the obligation of prior notification, if the turnover of one of the undertakings concerned is less than 30 million units of account.

Article 4

Prior notifications of concentrations

1. Concentrations shall be notified to the Commission before they are put into effect where the aggregate turnover of the undertakings concerned is not less than one thousand million units of account.
2. Where concentrations proposed by an undertaking or a group of undertakings have already reached or exceeded the amounts referred to in paragraph 1, they shall be exempted from the obligation of prior notification, if the turnover of the undertaking, the control of which they propose to acquire is less than 30 million units of account.
3. The obligation to notify shall be discharged by the person or undertaking or the group of persons or undertakings which proposes to acquire control within the meaning of Article 2.
4. Concentrations which are not caught by paragraph 1 may nevertheless be notified to the Commission before they are put into effect.

Article 6

Commencement of proceedings

1. Where the Commission considers that a concentration is likely to become the subject of a decision under Article 1 (1) or (3), it shall commence proceedings immediately and so inform the undertakings in question and the competent authorities in the Member States.
2. As regards concentrations notified to it, the Commission shall commence proceedings within a period not exceeding 3 months unless the relevant undertakings agree to extend that period. The period of 3 months shall commence on the day following receipt of the notification, or if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information.
3. The Commission may commence proceedings after the expiry of the 3 months period where the information supplied by the undertakings in the notification is false or misleading.

Paragraph 4 unchanged.

Article 8

Communications of matters under investigation and hearings

1. Before taking decisions as provided for in Articles 3, 7, 13, and 14, the Commission shall give the undertakings concerned the opportunity of being heard on the matters which are under investigation by the Commission. The same opportunity shall be given to associations of undertakings concerned before decisions before being taken as provided for in Articles 13 and 14.

Article 6

Commencement of proceedings

1. Where the Commission considers that a concentration is likely to become the subject of a decision under Article 1 (1) or (3), it shall commence proceedings and so inform the undertakings in question and the competent authorities in the Member States.
2. As regards concentrations notified to it, the Commission shall commence proceedings within a period not exceeding 3 months unless the relevant undertakings agree to extend that period. The period of 3 months shall commence on the day following receipt of the notification, or if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information.
3. The Commission may commence proceedings after the expiry of the 3 months period where the information supplied by the undertakings in the notification is false or misleading.

4. Without prejudice to paragraph 3 a concentration notified to the Commission shall be presumed to be compatible with the common market if the Commission does not commence proceedings before expiration of the period specified in paragraph 2.

Article 8

Communications of objections and hearings

1. Before taking decisions as provided for in Articles 3, 7, 13 and 14, the Commission shall give the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection. The same opportunity shall be given to associations of undertakings concerned before decisions before being taken as provided for in Articles 13 and 14.

Paragraph 2 unchanged.

2. If the Commission or the competent authorities of the Member States consider it necessary, the Commission may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.

Paragraph 3 unchanged.

3. Articles 2, 3, 4, 7, 8, 9, 10 and 11 of Regulation No. 99/63/EEC shall be applied.

Article 19

Liaison with the authorities of the Member States

Paragraph 1 unchanged.

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 Dominant Positions 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 dominant positions. Each Member State shall appoint an official to represent it; he may be replaced by another official where he is unable to act.

2. Paragraph 2 unchanged.

Paragraph 3 unchanged.

Paragraph 4 unchanged.

Paragraph 5 unchanged.

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.

Paragraph 6 unchanged.

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.

Delete paragraph 7.

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.

Delete paragraph 8.

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.

New Article 23

The Commission may publish from time to time rules providing guidance to undertakings on the circumstances in which mergers or concentrations will be subjected to examination or review by the Commission.

MOTION FOR A RESOLUTION

closing the procedure for consultation of the European Parliament on the amended proposal from the Commission of the European Communities to the Council for a regulation on the control of concentrations between undertakings

The European Parliament

- having regard to the proposal from the Commission to the Council (COM(81) 773 final)¹,
 - having been consulted by the Council (Doc. 1-946/81),
 - having regard to the resolution adopted by the European Parliament on 12 February 1974²,
 - having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Legal Affairs Committee (Doc. 1-807/83),
 - having regard to the result of the vote on the Commission proposal,
1. Acknowledges the contribution of fair, undistorted competition to the control and regulation of economic processes, to the dynamism of the economy as a whole and to technical and economic progress;

reaffirms its conviction that a market economy without competition also raises social problems and that for this reason Community competition policy is of great importance for the social objectives laid down in the Rome Treaties (Article 117 et seq.), for the integration of the Member States and for the further development of the common market towards conditions similar to those of an internal market;
 2. Stresses the need for undertakings in the Community to have a broad scope for action, as free as possible from unjustified State intervention, to permit development of their productive capacities;

considers that it is essential that competition should be afforded institutional support by appropriate framework legislation;

¹ OJ No. C 23 of 8.3.1974, p.19

2

3. Perceives the danger of the restriction or destruction of competition as a result of a concentration of economic and financial power and therefore recognizes that the control of concentrations is an important priority;

Emphasizes the special importance of Articles 85 and 86 of the EEC Treaty for the maintenance of competition but takes the view that there have not hitherto been within the Community any effective means of intervention to control transfrontier concentrations between undertakings; inter alia because of the limited means available to employees and their organizations and to consumers for such intervention;

therefore welcomes the Commission's intention to create appropriate means of intervention in respect of transfrontier concentrations of undertakings;

4. Notes that because of the growing integration of international markets, based on the division of labour, the extensive economic interdependence of many undertakings internationally and thus the pressure on the Member States of the Community to adapt to changes in the balance of world trade and to adjustments in the structure of demand and in cost and price structures, it is necessary as part of competition policy also to assess concentrations of undertakings from the point of view of the competitiveness of the European Community as a whole;

recommends, therefore, that international competition should be taken into consideration in assessing the probable disadvantages of a concentration;

5. Stresses that effective cartel legislation, if it is to be workable and consistent with economic requirements, presupposes a high degree of legal certainty and, furthermore, a guarantee of prompt enforcement. Proposes, with this in mind, that the Commission from time to time publish guidelines laying down the circumstances in which proposed mergers or concentrations may be authorized;

6. Rejects the duplication of control on transfrontier concentrations at both national and Community level; recommends, therefore, that the powers of the Commission and Member States should be clearly laid down in the regulation to prevent duplication of control and conflict over jurisdiction;

7. Recommends that the applicability criterion of the volume of turnover laid down in Article 1(2) should be increased to 750 million ECUs so as, first,

to give the Commission of the European Communities an opportunity to gather experience during the initial period with a restricted number of cases and, at the same time, to give Member States time to adapt their legislation;

8. Stresses the need to provide the Commission with sufficient qualified staff, before the entry into force of the regulation, to enable it to carry out its tasks in pursuance of the regulation with the necessary speed and efficiency;
9. Instructs its President to forward the text of the Commission's proposal as adopted by Parliament, together with the corresponding resolution, to the Council and the Commission as Parliament's opinion.

EXPLANATORY STATEMENT

1. The function of competition policy is to safeguard the central role played by competition in the Community's internal market.

In view of the present economic crisis and its effects on European integration, this policy is especially important as regards the near future. Only unrestricted, undistorted competition maintains the full dynamism of the economy, stimulates technical and economic progress sufficiently and ensures the optimum regulation of all the economic processes taken as a whole.

One of the main prerequisites for this is the existence of a sufficient number of market operators independent of one another on both the supply and the demand side. A policy aimed at ensuring this must, in addition to its first task of promoting an increase in the number of suppliers (the setting-up of new undertakings) by means of appropriate framework conditions, also ensure that competition is not hampered by too many or too large concentrations of undertakings.

2. Whilst too many concentrations of undertakings would diminish the strength of competition by restricting the choice of buyers and sellers, oversized concentrations may lead to an agglomeration of market power which would restrict the freedom of action of buyers and sellers as regards both demand and supply, to the disadvantage of consumers. Only a large number of independent undertakings ensures that the productive capacities of our economy are employed to the optimum. Only independent undertakings can compel competitors to put the common interest before their own, in other words to offer at the right time goods and services of the best possible quality in sufficient quantities and at the lowest possible prices.
3. Although sufficient rights and duties are laid down in Articles 85 and 86 of the EEC Treaty for the maintenance of competition having regard to existing structures, there have hitherto been no effective means of intervention within the Community as a whole to prevent concentrations of undertakings which are capable of restricting or even partially eliminating competition.

As regards the arrangements for the control of mergers at Community level it should be borne in mind that not only do the current economic structures in the Member States still vary to a great extent, but views as to the utility or harmfulness of concentrations of undertakings are divergent and the existing legal instruments to control them take very different forms.

The Commission's second attempt to create appropriate means of intervention in respect of transnational concentrations of undertakings must therefore be welcomed in principle.

4. As regards both the objectives of competition policy and the procedures applied and criteria to be observed in this connection, it should be borne in mind that the European market at the same time forms part of the world market and that the competitiveness of undertakings must therefore also be evaluated in each case on an international scale.

European law on the control of mergers must therefore contain rules enabling the probable disadvantages of a concentration for buyers and sellers within the Community to be weighed in each case against possible advantages for the international competitiveness of the European economy.

5. Legal certainty is very important for the full employment of the dynamism of undertakings in competition. Legal certainty as to the application of the criteria being put into effect, predetermined procedures and a clear distribution of powers must be ensured where the controlling authorities intervene, in the interests of the flexibility of undertakings prerequisite for international competitiveness.

The Commission's proposal has not so far satisfied this condition. A corresponding amendment is therefore necessary. This means in particular:

- (a) preventing duplication of control by European and national authorities;
- (b) eliminating conflicts of jurisdiction between the authorities mentioned in (a) above;
- (c) ensuring that the Community's jurisdiction cannot be prejudiced by national activities.

6. The length of time taken by an investigation is of great importance for the ability of the undertakings concerned to operate. It is recommended that the periods laid down by the Commission in Article 6 (1), (2) and (3) should be reduced.

7. The applicability criterion of the volume of turnover laid down in Article 1(2) is an important and indispensable component of the proposal for a directive. It should however be recommended that the turnover threshold at which concentrations are caught should be increased to 1,000 million ECU so as to give the Commission an opportunity to gather experience during the initial period with a restricted number of cases and, at the same time, to give Member States time to adapt their legislation.

8. Since control of mergers is intended to be 'in the common interests of the Community', the responsibility for intervention (investigation of a case) and for taking action (a prohibition for example) should be reserved to the Commission exclusively. Otherwise there is a danger that competition and protection of competition will be subject to national interests. The rights reserved to Member States in the last half of Article 19(2) and in Article 19(8) should not be granted.

OPINION OF THE LEGAL AFFAIRS COMMITTEE

Letter of 4 November 1982 from the Chairman of the Legal Affairs Committee to Mr MOREAU, Chairman of the Committee on Economic and Monetary Affairs.

Subject: Amended proposal for a regulation on the control of concentrations between undertakings
(Doc. 1-946/81)

Dear Mr Chairman,

At its meetings of 12 and 13 July and 19 and 20 October 1982, the Legal Affairs Committee considered the abovementioned amended proposal and the draft opinion on this subject (PE 79.312) drawn up by Mr VETTER.

After having concluded its discussion of this matter, the Legal Affairs Committee (1) adopted the first two amendments (PE 79.312/Am.) tabled by Mr DALZIEL to the document drawn up by Mr VETTER and instructed me to forward to you the text of those amendments, which constitutes its opinion for your committee. This opinion reads as follows:

'The Legal Affairs Committee, asked for an opinion on the amended proposal from the Commission of the European Communities to the Council (Doc. 1-946/81) for a regulation on the control of concentrations between undertakings, takes the view that:

1. Control of certain concentrations having a Community dimension is a desirable element of competition policy;
(adopted by 9 votes to 6)
2. In view of the age and nature of the original proposals, the Commission should withdraw them and draft fresh proposals following the most thorough scrutiny and review of the topic. The current amended proposals, dealing only with some contentious issues are inadequate to provide a proper framework in which such control could be exercised. They do not satisfy many of the valid and fundamental criticisms of the original proposals.'
(adopted unanimously)

Mr VETTER, draftsman of the opinion, has been asked to explain orally the circumstances in which the Legal Affairs Committee reached the above conclusions.

Yours sincerely,

(sgd) Simone VEIL

(1) Present: Mr Chambeiron, Vice-Chairman and acting Chairman; Mr Vetter, draftsman, Mrs Baduel Glorioso (deputizing for Mrs Cinciari Rodano), Mr Cariglia (deputizing for Mr Craxi), Mr Dalziel, Mrs Duport (deputizing for Mr Alfonsi), Mr Ercini, Mr Geurtsen, Mr Goppel, Mr Malangre, Mr Megahy, Mr van Minnen (deputizing for Mr Ferri), Mr Poniridis, Mr Prout, Mr Sieglerschmidt, Mr Tyrrell, Mrs Vayssade, Mr Vie and Mr Wurtz (deputizing for Mr D'Angelosante).

