1997 EUROPEAN COMMUNITY STUDIES ASSOCIATION
BIENNIAL INTERNATIONAL CONFERENCE

Seattle, Washington, USA

29 May - 1 June

SUBSIDIARITY AND THE EUROPEAN MERGER REGULATION: RETROSPECT AND PROSPECT

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Abstract: *This paper examines the EU Merger Regulation, which came into force in September 1990, as an example of supranational merger control. Soon after its introduction, the Regulation was said to be an "excellent example of how subsidiarity can be put into practice" (Brittan, 1992a). Yet the paper shows the difficulties involved in specifying the division of jurisdiction over mergers between the EU and Member States and in revising its provisions in the light of experience. The paper provides a critical evaluation of the main proposals for change following the Green Paper of January 1996. It focuses in particular on the moves to widen the Regulation's coverage of joint ventures and to revise the current thresholds.*

1. Introduction

With the growth of international business, there has been much discussion about the appropriate level of government competition policy. In designing suitable institutional structures, the costs of excessive decentralisation which arise from national competition authorities concentrating on purely domestic effects have to be weighed against the possible additional difficulties with central management of supranational policies in terms of arriving at agreed standards and ensuring accountability (see Neven and Siotis, 1993).

In the recent debate about the institutional development of the EU, attention has focused on the principle of 'subsidiarity' as a means of determining the division of jurisdiction between the Community and the Member States (see McCrone, 1992 and Bernard, 1997). Article 3(b) of the Maastricht Treaty states that:

> "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".

This paper investigates the division of powers between the Commission and the Member States under EU Merger Regulation, the first example of a general supranational merger control.[1,2] Introduced in September 1990, it provides an interesting case; the new Regulation, which was designed before the principle of subsidiarity was enshrined in legislation, has been described as "an excellent example of how subsidiarity can be put into practice" (Brittan, 1992a). Yet the final division of jurisdiction was the result of political compromise whereby the Commission accepted a reduction in its proposed powers in order to obtain agreement from the Member States. Following the 1996 review of the Regulation, the second review carried out since its introduction, the Commission tabled proposals to revise the Regulation and extend its scope but at the time of writing has only secured partial acceptance. The paper provides a critical evaluation of two main aspects of the proposed reforms, both of which affect the division of jurisdiction, and comments on the Commission's difficulties in securing the extension of its competence it had advocated for some years.

Section 2 contains an overview of the Regulation's provisions and introduces the recent moves to revise its scope. Section 3 examines the treatment of different types of transactions with particular reference to the extension of the legislation to all "full function" joint ventures. Section 4 discusses the operation of the jurisdictional divide resulting from the current size thresholds and referral provisions, the rationale for change and proposals for amendment. Section 5 concludes by highlighting the obstacles to the extension of powers proposed by the Commission and comments on the likely outcome.

2. Overview of the Regulation

The Merger Regulation is based on a system of exclusive competence whereby the Commission has sole responsibility for mergers and merger-like transactions which fall within the scope of the Regulation and the Member States have responsibility for such transactions outside its scope. The aims of this allocation of tasks included the reduction of the transactions costs involved in merging by providing a "one stop shop", the establishment of a "level playing field" for large Community-level mergers which would otherwise face the prospect of gaining approval under a patchwork of different national measures and the prevention of an excessively nationalistic focus in the control of mergers (see, for example, Seabright, 1994).

The provisions of the Regulation have been usefully detailed elsewhere (see, for example, Bishop, 1990, Jones et al., 1992 and Neven et al., 1993). Figure 1 provides a schematic overview of the Commission's present powers under the Regulation. Concentrations with a community dimension have to be prenotified to the Commission, which then establishes whether the notified transaction falls within the Regulation's scope. There are two jurisdictional tests. First the transaction is assessed to see whether it is a "concentration", defined to include mergers, takeovers and certain types of joint venture. If not, it may be considered, if appropriate, under Article 85 or 86 and/or national laws. Next, it determines whether the transaction has a "Community dimension" in terms of size thresholds which form the second jurisdictional divide, this time between the Regulation and national controls.

If the transaction falls within the scope of the Regulation, the Commission investigates whether it is compatible with the "common market" (now defined as the EEA) in terms of a competition test. This is assessed in terms of whether it would create or strengthen a dominant position.[3] An efficiency defence was explicitly ruled out in the appraisal criteria specified in the Regulation; industrial and regional policy concerns were relegated to the recitals to the regulation and notes in the minutes of Council.

Stage one screening can take up to one month and a further four months' investigation is allowed for full proceedings which are opened if there are serious doubts about the merger's effects on competition. If the transaction is found to be incompatible with the common market, the Commission may block it entirely or conditions may be agreed with the parties so that it can be accepted in a modified form. The opinion of an Advisory Committee, made up of representatives from the Member States, has to be taken into account in reaching its final decision which may be appealed before the European Court. The Commission's powers are backed by an ability to impose large fines for non-compliance.

There is a danger that wherever the size thresholds dividing jurisdiction are set, some mergers with effects in only one country which might be best considered nationally will be included within the Community control and some mergers which have effects going beyond a single country excluded. The Regulation addressed the first of these problems through the referral provision of Article 9. Introduced in response to pressure from the German authorities, this allows the Commission to refer transactions which raise serious doubts about effects on competition in a distinct market to the relevant national authority on request. The Commission was not, however, given powers to claim a merger with cross border effects below the threshold levels.

Two other referral provisions were included in the Regulation as a result of the negotiations to secure acceptance. Article 22(3), introduced at the request of the Dutch, allows a Member State to decide to refer concentrations below the thresholds to the Commission. It was envisaged that this would be used primarily as a transitional arrangement for states which had not developed any merger control of their own. In addition, Article 21(3), the so called 'English clause', allows Member States to intervene to protect legitimate non-competition interests such as public security, plurality of the media and prudential rules which are not scrutinised under the provisions of the Regulation.

It was estimated that the Mergers Task Force, set up to handle the notification and investigation of the cases, would have to deal with about 50 notifications a year. In practice, as Table 1 shows, 553 mergers had been notified by 31st March 1997 and 516 final decisions had been adopted, a rather larger workload than anticipated, especially recently. 36 transactions (7%) were found to be outside the scope of the Regulation and the 81% of those investigated were cleared after initial screening. Of those proceeding to full investigation, six were banned and 24 were cleared, 16 with conditions and eight unconditionally.

A Commission Regulation published in 1990 detailed certain aspects of procedure, including the information which companies were required to provide to notify a concentration.[4] This was recently replaced by a new implementing Regulation dealing with procedural aspects.[5] Other developments in procedure have been codified in "soft law" through the issue of Commission notices (as discussed in Bulmer, 1994). The evolution of policy through case law and the various Commission notices has resulted in shifts in the jurisdictional divides, particularly as regards the notion of a "concentration", without any legislative changes.

Provision was made in the Regulation for a review of the thresholds after three years of operation, with any decision to alter these dependent on a qualified majority vote, an exception to the unanimous decision required to alter other aspects of the Regulation. The Commission decided not to table formal proposals to increase the scope of the Regulation after the 1993 review (CEC, 1993) as a result of strong opposition from some of the Member States. Instead, following a report from the Commission to Council, it was agreed that a further review would take place by the end of 1996 at the latest.

A Green Paper was published in January 1996 (CEC, 1996a) in a fresh attempt to revise the Regulation. Although the necessary support from the Member States for a threshold reduction again seemed to be lacking, the Commission brought forward formal proposals in its White Paper of

September 1996.[6] Apart from some "housekeeping" changes and specific alterations in the treatment of financial institutions, this contained two distinct parts - changes in the treatment of joint ventures (requiring unanimity under Articles 87 and 235 of the Treaty of Rome) and threshold reductions (requiring a qualified majority vote). The White Paper proposals were considered by Council in November 1996 when the suggested threshold reduction was the main stumbling block to obtaining agreement to the package of measures proposed. Further consultations are now in progress with a view to modifying and simplifying the suggested revisions and finding an acceptable way of extending the "one stop shop" offered by the Regulation[7]

3. Defining a "Concentration"

(1) the notion of a "concentration"

The Commission's first task in examining a notified transaction is to determine whether it is a "concentration" within the scope of the Regulation. Concentrations are defined as covering transactions which bring about a lasting change in the structure of the undertakings concerned through the acquisition of sole or joint control. This definition has been interpreted liberally in practice and the case law, recently codified in "soft law" through the issue of new guidelines, has increased the scope of the merger control compared with the boundaries which appeared to exist when the Regulation was first introduced.

One area where the jurisdictional boundaries have shifted is in the interpretation of the "decisive influence" criterion for establishing sole or joint control. The possibility of exercising decisive influence is a prerequisite for a transaction to be considered concentrative. A detailed examination of the decisions over the first three years led Hawk and Huser (1994) to conclude that the Commission:

> "has expanded the concepts of sole and, especially, joint control that are deemed to constitute a "decisive influence" under the EEC Merger Regulation. These concepts have been expanded to reach progressively smaller minority shareholdings and more modest governance rights. As a result, a substantial number of minority shareholding transactions have been shifted from potential review under Articles 85 and 86 of the EEC Treaty to the jurisdiction of the Merger Regulation or member state merger control laws".

This move is a natural response to the new possibilities for investigating minority shareholdings provided by the Merger Regulation. Before it was introduced, the Commission had an incentive to find that the acquisition of a minority shareholding only allowed influence. This was because a finding of decisive influence or no influence limited the Commission's ability to investigate the transaction under Article 85 and 86.

The recent Commission notice on the notion of a concentration (reprinted in CEC, 1995) outlined the factors which may be used to determine whether an operation results in an acquisition of sole or joint control.[8] These guidelines reflect the developments in case law over the preceding years and provide a very wide interpretation of the requirements for decisive control. Detailed investigation is still necessary to establish the applicability of the guidelines and it is at least arguable that a test purely based on a quantitative shareholding criteria, as in some other merger control regimes, would reduce the costs of investigation and the legal uncertainty compared with the purely qualitative notion of control (see Hawk and Huser, ibid). This aspect of the Regulation was not reviewed in the Green Paper, however, and has not featured in the recent proposals.

(2) The treatment of joint ventures

"Concentrative" joint ventures fall within the scope of the Regulation whereas joint ventures which are regarded as "co-operative" fall outside its scope. This distinction has been difficult to make in practice. It is an important distinction because of the differences in treatment concentrative joint ventures receive under the Merger Regulation compared with the treatment of co-operative ones, which can be considered under other parts of EU competition law, particularly Article 85 and/or national competition law. Article 85, which deals with restrictive practices, operates to different deadlines, with a different substantive test, a different burden of proof and a different degree of legal certainty and does not preclude simultaneous investigation under national laws (see Burnside and Mackensie, 1995).

The differences in treatment of "full function" co-operative joint ventures are particularly difficult to justify on economic grounds as these joint ventures have similar effects on market structure to those caused by concentrative joint ventures. In 1993 the Commission addressed one aspect of discriminatory treatment in such cases, the relative length of Article 85 proceedings, by introducing special "accelerated procedures" to ensure speedier treatment of structural joint ventures under Article 85.[9] According to the 1995 Report on Competition Policy, however, only two of the 15 joint ventures notified under these provisions were cleared within the initial two month assessment period. The notifications were incomplete in two cases; three were found ineligible for the accelerated procedures; one case was suspended; two cases suffered "administrative delay" and the remaining five received warning letters within the two month period (CEC, 1996b). Other differences in treatment also remain.

Just as the arguments for decisive influence have been reinterpreted first through case law and then through new guidelines, so the distinction between co-operative and concentrative joint ventures has been redefined since the initial distinction was drawn, extending the scope of the Regulation in the absence of legislative changes. This policy expansionism has been well received by the business community, conscious of the relative procedural advantages of speed, legal certainty and the "one stop

shop" offered by the Regulation, as well as its more permissive appraisal regime compared to Article 85.

Initially if one parent remained active in the joint venture's market, the joint venture was classed as co-operative. Then the "industrial leadership" doctrine was introduced, allowing market overlap between one parent and the joint venture without the joint venture being classed as concentrative. A further widening of the concentrative joint venture category was introduced in 1995 with the publication of a new notice (reprinted in CEC 1995) which abandoned the requirement for industrial leadership; all lasting full-function joint ventures are now considered concentrative provided there is no risk of co-ordination between the parents which is likely to be regarded as restrictive under Article 85.

The Green Paper outlined various options for reform in the treatment of joint ventures ranging from further pragmatic changes to internal methods to simplify procedures and allow faster decisions under Article 85 to more radical proposals either to extend the procedures and appraisal criteria to all co-operative full function joint ventures or even to all joint ventures except "sham" cartel-like ones. Rather than settling for minor procedural changes, which would have been comparatively easy to introduce, the Commission opted for a substantive solution. It proposed that the "risk of co-ordination" should no longer considered as a criterion to distinguish different types of joint venture. In addition, the Commission proposed that any restriction on competition between parties to the transaction which remained independent and raised issues under Article 85 should be dealt with at the same time, using the same procedures and timetable as the Merger Regulation.

This proposal, which was accepted in principle by Council in November 1996, will result in all lasting, full function joint ventures being treated as concentrative and so within the scope of the Regulation. Like earlier changes in the treatment of joint ventures, this will shift the boundary between concentrative and co-operative joint ventures again bringing more joint ventures under the Merger

Regulation than previously. The Green Paper did not provide any estimates of the likely increase in the Merger Task Force's case load resulting from this change but the Commission has since estimated the number of additional cases at between 20 and 30 a year.[10]

There will still be significant costs of investigation and legal uncertainty surrounding the "full function" criterion. To meet this requirement, the joint venture must (i) operate in a market performing all the functions normally carried out by other companies operating on the same market and (ii) have sufficient financial and other resources to carry out its activity on a lasting basis. The existing interpretative notice gives detailed guidance on this issue but the evidence shows it is difficult to apply in individual cases.[11] *Generali/Unicredito* was particularly contentious in this regard. It involved a joint venture between the insurance company Assicurazioni Generali and a financial investment company belonging to Unicredito, a banking group. The parties are appealing against the Commission's decision that the joint venture was co-operative and so outside the scope of the Regulation. The Commission's conclusion rests primarily on its view that the joint venture was not a full function joint venture given its reliance on the facilities of the parent company.

Other recent cases where the application of the full function criterion has raised questions of interpretation include *Saudi Aramco/MOH*; *Siemens/Lagardére*; *Bayer/Huls*, and *BP/Mobil* The case evidence suggests that the Commission's policy has already moved on since the 1994 guidelines were published. For example, the joint venture in *Saudi Aramo/MOH* was considered full function despite its supply link with a parent on the grounds that it had been full function prior to the proposed changes.

It has been argued previously that the more radical proposal of bringing all joint ventures (except sham cartel-like ones) under the Regulation would be preferable. For example, Hawk and Huser, (199x) have suggested that this would result in a simpler and more predictable jurisdictional test and would reduce the incentives for firms to deliberately structure their transactions to fall within the Regulation.

In addition, they queried why any cooperative joint ventures, other than sham cartels, should be subject to the stricter treatment of Article 85. Certainly, from an economic standpoint, it is not clear why all "partial" joint ventures should receive less favourable treatment than full function ones. For example, why should production joint ventures, which are not, by definition, full function, receive less favourable treatment than joint ventures involving both production and sales, which may reduce competition at the sales stage, unlike the former type of arrangement? The radical option of treating all such structural cooperative joint ventures under the Regulation would, however, result in the notification of many transactions with no adverse competition effect which currently do not need to be notified to any competition authority.

The treatment of joint ventures has been one of the most complex aspects of the Regulation's operation and is of great importance in practice, given the large proportion of notifications involving joint ventures. Despite the reservations noted above, the proposal to bring all full function joint ventures under the same legislative umbrella appears to be a useful response to the existing discrimination in the treatment of different types of structural joint ventures. Differences in treatment which do not appear to be justified from an economic standpoint would still remain, however, and it is likely that the debate about the demarcation between different types of joint venture will not be completely settled by this reform.

4. Establishing a "Community dimension"

The Commission has exclusive jurisdiction under the Regulation over concentrations "with a Community dimension". Eleven of the Member States now have merger controls of their own and, in the absence of the Regulation, the majority of cases considered by the Commission would have been open to the possibility of investigation under the patchwork of national measures. In terms of the

nationality of operations concerned, 74% of the transactions notified by the end of 1995 related to either undertakings from different Member States (38%) or operations concerning both Community and extra Community companies (36%). Only 26% involved firms of the same nationality alone (see Table 2).

Another way of assessing the geographical breakdown of operations is in terms of the geographical market definition used in the appraisal of competition, although difficulties of assessment mean that market definitions have often been left open. Nevertheless, this type of analysis shows a high proportion of cases had cross border influence and involved the assessment of competitive effects going beyond national boundaries, even when firms of the same nationality were involved.

Although the case for a Community control is illustrated by these figures, the question remains as to whether the allocation of jurisdiction established in the Regulation has been appropriate or is in need of revision. The second jurisdictional divide, this time to determine whether or not the transaction has a "Community dimension", is based on turnover thresholds. These require that the combined aggregate world-wide turnover of all the undertakings concerned is at least ECU 5 billion and that at least two of the undertakings concerned each have a turnover of ECU 250 million or more in the Community. If each of the undertakings has more than two-thirds of Community-wide turnover in one and the same Member State, the Regulation does not apply. The world-wide turnover criterion is designed to reflect the "aggregate economic and financial power" of firms. The Community-wide turnover threshold is to ensure significance at Community level and the two-thirds rule is said to exclude those mergers with a mainly national impact.

These thresholds are meant to serve two purposes - to define jurisdiction so that mergers with European significance are included within the Community control and to identify mergers which are likely to be significant enough to require screening for potential anti-competitive effects. While turnover thresholds

may provide a relatively clear cut determinant of jurisdiction, they were regarded from the outset as "a necessarily arbitrary way of defining concentrations which have sufficient impact upon the Community as a whole to merit decision by the Commission rather than by Member States" (Brittan, 1991, p33)[12]. Thresholds based on absolute size will not by themselves be a good indicator of likely effects on competition. As the Green Paper shows, they result in firms operating in larger markets and conglomerates being more likely to be screened under the Regulation than small, specialist enterprises which may have higher market shares in smaller markets.

From an economic standpoint, a market share indicator seems needed, in addition to the existing size thresholds, to identify mergers which are likely to have some effect on competition. Such an indicator would also have the advantage of not being affected by inflation or by the increasing absolute size of large firms and EU enlargement, all of which have tended to alter the application of the Regulation's present thresholds over time.

Market share criteria are included in other merger control regimes such as the US and UK. Previous versions of the Regulation as late as the 1986 draft included an additional market share threshold. This was eventually dropped in the interests of simplicity and legal certainty, so eliminating the need to tackle the complexities of market definition (a necessary first step to calculating market share) prior to first stage screening.

Market definition has two aspects - the product (or service) market and the geographical market; the more narrowly the relevant market boundaries are drawn, the higher the apparent market shares. The delineation of the relevant product market is usually the more difficult issue. Product market definitions have a been contentious in some cases, most notably perhaps in *ATR/De Havilland*, the first case to be banned, where the parties and Member States involved, as well as many commentators, believed that if the market had been "correctly" defined, the merger would have been allowed to

proceed. The appropriate geographical boundaries have sometimes been difficult to determine also. With the moves to market integration, relevant markets for some products and services have been changing rapidly and, unlike some national authorities (e.g. the UK which focuses on national market shares and only include wider aspects later in the analysis, see Office of Fair Trading, 1993), the Commission has aimed to define markets at the relevant level, from sub-national to world-wide, based on the realities of competition.

Many of the early merger cases contained little justification of the market boundaries chosen, but some recent market definitions have been based on more sophisticated economic analysis - for example, see the approach to defining the product market in *Nestlé/Perrier* and the derivation of the geographical market definition in *Procter and Gamble/VP Schickencanz -II.* The Commission's approach, however, is not standardised and other cases still suggest insufficient use of consumer surveys, price behaviour and other economic data in defining markets (see *Krupp/Thyssen/Rive/Falck/Tedfin/AST).* The Commission now has more than six years experience in defining markets in the context of merger investigations and the adoption of a more consistent methodology could perhaps be expected (Crowther, 1996). This would certainly help towards the possible eventual inclusion of market share as a jurisdictional test as well as assisting in the assessment of competition.

Although market share is not used in the Regulation as a jurisdictional criterion, Recital 15 of the Regulation states that mergers with a post merger share of 25% or less "on the common market or in a substantial part of it" can be assumed not to be anti-competitive. On the basis of the Commission's merger appraisals, market shares above 70% seem to provide a strong signal of dominance, a finding of dominance may occur with shares of between 40-69%; shares between 25-39% have rarely been associated with a finding of dominance but this possibility cannot be ruled out (see, for example, Jones and Gonzalez Diaz, 1992). This type of analysis suggests a 25% market share might be appropriate both as an indicator of the possibility of a threat to competition and as an additional jurisdictional test.

However, if the Regulation is to be used to check oligopolistic or collective dominance and not single firm dominance alone, even a share of less than 25% may cause concerns in the context of its impact on oligopoly behaviour.[13] The use of a concentration measure such as the Herfindahl-Hirschmann index, rather than the share of the merged entity alone, would be preferable to capture these effects. (Morgan, 1996).

The limitations of using turnover size thresholds were recognised in the Green Paper but, like the 1993 review, it still focused on the case for lowering the turnover thresholds. Note that the possibilities for fine tuning the allocation of jurisdiction within the existing thresholds are limited; there is no mechanism for the Commission to claim a case from a Member State which is below the thresholds but appears to have a Community dimension; only a Member State can decide to refer concentrations below the thresholds to the Commission (under Article 22(3)). This rarely invoked clause was envisaged primarily as a transitional arrangement for states which had not developed any merger control of their own. While this may be seen as a useful transitional step, it is questionable whether it really is in line with the principle of subsidiarity (see Seabright, 1994). Amendments to this clause proposed in the White Paper would both extend it, by allowing joint referrals by Member States acting together, as well as strengthening it by giving the Commission powers to suspend transactions pending investigation if they have not already taken place.

The Commission has long argued that the thresholds were set too high and should be lowered from ECU 5 billion to ECU 2 billion world-wide and from ECU 250 million to ECU 100 million Community wide, together with a possible relaxation of the two-thirds rule (see for instance, Brittan, 1991 and CEC, 1993). Looking first at the two-thirds rule, it is clear that this acts as an imperfect indicator of the likely extent of the effects of a transaction going beyond a single Member State. By being specified in proportional terms, the assessment of the importance of international spillovers is dependent on their size relative to the transaction rather than their absolute size. It also means that any reduction in the

aggregate turnover threshold might tend to increase the likelihood of an inappropriate allocation of a Community level merger between the EU and Member States.

The removal of the two-thirds rule would bring many essentially national mergers within the scope of the Regulation, as the 1993 review showed, and a three-quarters rule was suggested at that stage as a better dividing point. The Green Paper suggested the retention of the two-thirds rule and no change to this was included in the recent proposal to Council. The possibility of respecifying this test of Community dimension in absolute terms has not been addressed.

The Green Paper made a strong economic case for lowering the thresholds to these levels based, for example, on its analysis of the proportion of European companies falling below current world-wide thresholds and the number of mergers with cross border effects below the current thresholds. The resistance to extending the Regulation's scope from some of the Member States, notably France, Germany and the UK, meant that the Commission did not present a formal proposal after the 1993 review. It again faced resistance in 1996 but, this time, decided to proceed with formal proposals to Council. Although the Commission lowered its sights somewhat in the White Paper by proposing a world-wide turnover threshold of 3 billion and a Community threshold of 150 million, this initiative was still blocked with seven countries reportedly voting against it (Tucker, 1996).

A "second best" alternative to outright threshold reduction was suggested in the Green Paper, namely that the Commission would be given jurisdiction over any concentrations below the thresholds which would otherwise be notified to more than one national jurisdiction. The White Paper included a "multiple filings" mechanism as part of a hybrid solution whereby notifications to three or more authorities between its modified threshold levels and its desired levels of ECU 2 billion and ECU 1 million respectively would be brought within the Commission's jurisdiction. The debate appears now to focus on this mechanism and alternatives to it, primarily as a means of extending the benefits of the

"one stop shop". Only mergers with a Community significance would be caught under such a provision as shown by the fact that they would otherwise attract multiple national controls. However this mechanism would not be as effective in ensuring mergers with cross border effects are dealt with under the Regulation as the threshold reductions proposed.

Most Member States recognised the position of firms involved in multiple notifications is unsatisfactory but were not convinced that the Commission's suggested way of dealing with this problem offered the best solution. The mechanism as proposed does seem to raise more difficulties than it solves. There are two main problems: the likely difficulty of identifying mergers subject to notification to three or more Member States speedily and accurately and the additional scope for "forum shopping" - the deliberate structuring of transactions so they fall within the firms' chosen merger regime.

The crucial problem of how to establish whether a particular concentration would be eligible for investigation under multiple national merger controls was not dealt with in the Green Paper. The procedure outlined in the proposal to Council was that the parties, in notifying the Commission of the transaction would include their view of whether it would be eligible for consideration under national merger provisions. Member States would have two weeks to contest this view and non-opposition would be taken as agreement to the firms' views, so conferring jurisdiction to the Commission.

This suggested procedure has the merit that national competition authorities, rather than the Commission, would rule on the applicability of their own national systems. It is doubtful, however, that two weeks will be long enough for national authorities to decide on jurisdiction (especially in regimes with a market share test) although firms are likely to seek prenotification guidance and this extension of the deadline is an erosion of one of the Regulation's perceived advantages, namely speed of operation. More importantly, it is questionable what incentive there is for Member States to contest the parties' contention that their transaction falls within the Member State's laws. This is because if they

disagree with the firms, they are disempowering themselves in any case; if they agree, they are assisting the case for national controls not to apply!

The procedure would have advantages for the parties involved. Without a multiple filings system, they might have to consult a number of national authorities in any case, but if the merger is brought within the scope of the Regulation, they would have all the benefits of appraisal under the "one stop shop" system. On the margin, this is likely to encourage firms to structure their transactions to be notifiable in sufficient countries to qualify for Community control. Consultations on a suitable procedure are continuing at the Commission to try to refine and simplify the proposal sufficiently to gain acceptance from Council.

As discussed above, the Regulation's current thresholds do not spread the net widely enough to catch all mergers with a Community dimension. The Regulation may still, however, catch transactions which are either of little economic significance or might have been more appropriately investigated at national level. Insignificant transactions may be caught partly because the thresholds are based on the size of the companies involved rather than the size of the assets for which ownership has been transferred. The Commission has already reduced the notification requirements for "minor" joint ventures but any merger which meets the thresholds must still be notified.

Article 9 was built into the Regulation as a safeguard to allow cases within the thresholds better considered at national level to be referred back at the Commission's discretion.[14] There has been some controversy about the cases which would be best considered under this provision, resulting partly from apparent ambiguities in the actual wording. The Commission has interpreted it as a mechanism for dividing jurisdiction in accordance with subsidiarity where the two-thirds rule has failed to weed out mergers of purely national concern, only applying it in circumstances where there is likelihood of a threat to competition in a distinct market but no significant spillover effects between Member States.

Only four cases affecting competition in a distinct market have been dealt with in this way, in whole or part, under this provision, viz. *Steetley/Tarmac* and *Gehe/Lloyds Chemists* (UK), *Holdercim/Cedest* (France), and *RWE Energie/Bayernwerk* (Germany). A number of other cases affecting distinct markets arguably would have been better investigated at national level, even though no request was made to the Commission (Brittan, 1992b). A request was made to consider *Assicurazioni Generali/Unicredito* in Italy but this proved unnecessary as the transaction was deemed outside the scope of the Regulation in any case. Several formal Article 9 requests by Germany have been refused: *Alcatel/AEG Kabel*, where there were, according to the Commission, no serious doubts about the effect on competition and other cases where the Commission itself opened full proceedings arguing that the competitive effects were likely to extend beyond a national market: *Varta/Bosch*, *Mannesmann/Hoesch*, *Siemens/Philips* and *MSG Media Services*. It seems likely that the German request to examine *CPL-McCormick Rabo/Ostmann* would also have received the same response but this reverted to Germany by default, as the Commission missed the deadline for opening proceedings itself.

One of the reasons for the German negotiators pressing for the inclusion of Article 9 was the fear that the Commission would approve mergers with more detrimental effects on market power than the German authorities would allow. It is likely that *Alcatel/AEG Kabel* would have led to a full investigation on oligopoly grounds under German law and it seems unlikely that the Germans would have cleared *Varta/Bosch* as did the Commission. The original wording of the Regulation required that such referrals were limited to cases where Commission judged there were grounds for "serious doubts" about the effect on competition in a distinct market. The White Paper proposal whereby referral would only require an effect on competition without a need for the Commission to decide on the presence of a competitive threat before a request can be granted seems to strike a better balance in terms of relative jurisdictional powers. It is interesting to note that in recent consultations on possible changes to Article 9, the German view was that referral should be automatic if the "economic centre of gravity of the

operation" is in a single Member State; this reflects their frustrations at the way in which previous requests have been treated (see Annex to 1996 Green Paper).

5. Conclusion - prospects for reform

The provisions of the EU Merger Regulation were the product of compromises between the Commission and the various Member States. Although the Regulation has been described as "an excellent example" of subsidiarity in practice, there have been difficulties in allocating responsibility both in drawing up the legal limits of power in this, the newest part of EU competition policy, and in revising them in the light of experience.

It is not surprising that one of the two main planks of the recent proposed revision of the Regulation - the move to introduce lower thresholds - was not agreed in principle by Council in its November 1996 debate, despite the apparently strong case for threshold reduction and the need only to obtain a qualified majority to secure acceptance. As Bulmer (1994) argued in his new institutional analysis of the way in which the thresholds were originally set, the decisions:

> "were by no means the product of a debate aimed at rational identification of the best definition of a "European " merger. They were, by contrast, the product of institutional dynamics in the Council"
>
> (Bulmer, 1994:431)

These reflected the difficulties of trying to agree on the nature of a single set of rules to apply at EU level against an existing background of different national provision, as well as different concerns about how the Commission might define and exercise its powers.

After more than six years of the Regulation's operation, the context of the debate about the relative powers of the Commission has changed but its fundamental nature remains unaltered. The EU has been enlarged and more Member States have merger controls of their own. There is increased concern about the degree of centralisation of power in Brussels; indeed, the emphasis in other major parts of EU competition policy is now on the decentralisation of certain powers (Wesseling, 1997).

The Commission's powers over mergers are tried and tested and it is generally agreed that the procedures have been speedy and efficient, only exceptionally falling outside the agreed time limits. Other aspects both of procedure and substantive appraisal have raised a variety of questions and concerns. Views on these have influenced the individual Member State's willingness to grant the Commission further powers. For example, has the speed of decision-making, while appreciated by business, been at the expense of sufficiently detailed and systematic analysis? Have the factors entering into the appraisals been treated consistently in different cases? Have the standards applied been based entirely on the competition criteria within the Regulation or has the Commission tried to extend its competence beyond these in its treatment, for example, of oligopoly cases? Have political and industrial policy concerns played an appropriate role? Has there been evidence of "regulatory capture" by business or national interests? The extent of disquiet about a number of aspects of the Commission's performance was most clearly reflected in the German proposal for an independent competition authority, as discussed at the recent Inter-governmental Conference.

Against this background, it is not surprising that there have been strong pressures to limit the Commission's ambitions for further power over mergers through threshold reduction and to focus the debate on finding a suitable mechanism for extending the one stop shop principle. Although a "multiple filings" arrangement may yet be adopted, it appears to have a number of obvious drawbacks, making it very much a "second best" option to some form of threshold change. It is to be hoped that the current round of consultations will allow the Commission to arrive at a more workable solution. The

Commission is, however, to be congratulated for gaining acceptance in principle to the other main amendments contained in its White Paper, particularly the extension of the Regulation to all full function joint ventures. Formal approval of these awaits the outcome of consultations on mechanisms for a "one stop shop" extension.

It remains to be seen how far the jurisdictional problems highlighted in the Green Paper will be resolved in the next phase of the Commission's evolving policy towards mergers and, indeed, how the concept of "subsidiarity" itself will fare in a Community context. Looking further into the future, as markets become increasingly global and spillover effects from country to county more widespread, the debate about the appropriate institutional design of competition policy in terms of the division of jurisdiction can be expected to assume greater importance beyond the boundaries of the EU.

TABLE 1 EU Merger Regulation - distribution of cases by outcome

Sept 1990- end March 1997)

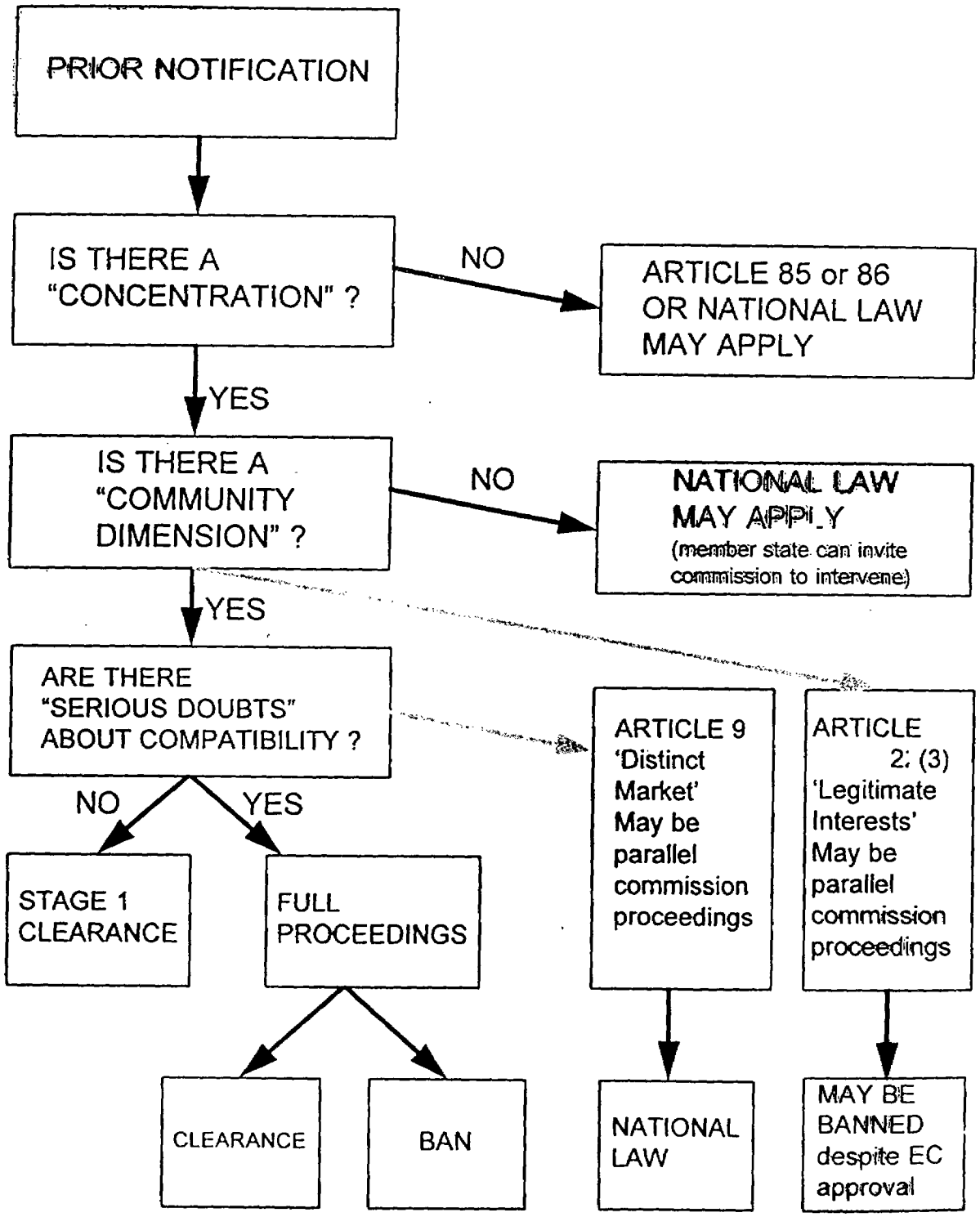
Total cases notified to Commission	553
Found to be outside Regulation	36
Withdrawn during stage 1	16
Cleared at stage 1	450
Repatriated (Article 9)	4
Decision pending at first stage	11
Stage 2 investigation opened	47
Withdrawn at stage 2	2
Cleared at stage 2	24
Prohibited	6
Decision pending at stage 2	11

TABLE 2 Geographical distribution of notified transactions (to end December 1995)

Direction	No. of notifications	Percentage of total
National operations	80	28
Community transactions - cross border between EU firms only	108	37
International - cross border involving firms outside EU	101	35
Total	289	100

Source: European Economy, 1996

Figure 1 - THE EC MERGER CONTROL



Source : Adapted from Linklaters and Paine

ACKNOWLEDGEMENTS

I wish to acknowledge the help kindly provided in the course of this work by DG IV in Brussels, the Mergers Secretariat of the Office of Fair Trading and the Consumer Affairs and Competition Policy Directorate of the Department of Trade and Industry, London. As always, the author is responsible for the views expressed and for any errors or omissions.

FOOTNOTES

[1] Council Regulation (EEC) No 4069/89 of 21 December 1989, OJ L 395/1 1989. Strictly this is the EEC Merger Regulation but is termed the EU Regulation throughout this article for simplicity.
[2] The first supranational merger control was sectoral, and applied to the Common Market's coal and steel industry under the Treaty of Paris.
[3] Under the Economic Area Agreement, signed on 02.05.92, the scope of the EC Merger Regulation did not change in assessing the thresholds for investigation, but the situation in the EFTA states must be taken into consideration in assessing compatibility.
[4] Commission Regulation EEC No 2367/90.
[5] Commission Regulation EC No 3384/94.
[6] COM (96) 313 Final
[7] OJ C 376/8 12.12.96
[8] Commission notice 94/C 385/02.
[9] These include cooperative full function joint ventures and certain partial function joint ventures without access to the market, especially production or R&D joint ventures.
[10] Estimates given in the White Paper, based on the number of structural cooperative joint ventures notified under the accelerated procedures provision which would fall within the scope of an amended Merger Regulation.
[11] See supra, note 9.
[12] Note that even the calculation of turnover has proved problematic in some cases, particularly in regard to the special provisions for banks and other financial institutions.
[13] The legality of interpreting the Regulation to include collective dominance currently awaits judgement after an appeal to the Court in *Kali und Salz*. According to the recent opinion of the Advocat General, the Regulation should not be interpreted in this way but the Court decision is still awaited.
[14] See 6 supra.

POSTSCRIPT

At the end of April 1997, the Council agreed unanimously (subject to a UK parliamentary scrutiny reservation) to a package of amendments to the Merger Regulation. The main change to the White Paper proposals is that the Commission's powers are extended to merger cases satisfying the following criteria:

(a) the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2.5 billion;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertaking concerned is more than ECU 100 million;

(c) in each of at least three Member States included for the purpose of (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million, and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million.

This compromise solution effectively halves the world-wide turnover threshold (a figure of ECU 2 billion was originally sought by the Commission and the White Paper proposed ECU 3 billion) and reduces the Community-wide threshold from ECU 250 million to the Commission's preferred ECU 100 million. The inclusion of (b) and (c) modify the effect of these reductions, however, by including criteria based on turnover in three Member States. This avoids the complexities of the multiple filings mechanism discussed in the paper. The main practical problem seems likely to be in determining the applicability of (c), especially with the combined figure set at the relatively low level of ECU 25 million.

The revisions to the Merger Regulation are expected to be finally adopted by Council in June without further debate. It is likely that the package of changes will then be introduced by the beginning of 1998.

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