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COMMUNICATION FROM THE COMMISSION
TO THE COUNCIL AND TO THE EUROPEAN PARLIAMENT
REGARDING THE REVISION OF THE MERGER REGULATION

Proposal for a

COUNCIL REGULATION (EC)

amending Council Regulation (EEC) No 4064/89 of 21 December 1989
on the control of concentrations between undertakings

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on the control of concentrations between undertakings
Articles 87 and 235

(presented by the Commission)

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I. Introduction

1. Council Regulation 4064/89 on the control of concentrations between undertakings ("the Merger Regulation") was adopted on 21 December 1989 and entered into force on 21 September 1990. The Merger Regulation applies to all concentrations having a Community dimension defined on the basis of the annual turnover of the companies concerned.
2. The Commission first examined the functioning of the Merger Regulation in 1993. That exercise was prompted by the legal obligation to review the turnover thresholds under Article 1 and the case referral rules under Articles 9 and 22. In addition, the Commission took the opportunity to examine the operation of the Regulation as a whole, in order to identify other areas in which improvements could be made.
3. The result of the 1993 exercise was a Report from the Commission to the Council¹ which concluded that there were strong arguments in favour of a threshold reduction. However, the Commission considered that it would be prudent to gain further experience of the operation of the Merger Regulation and of the impact of national merger control policies before making any formal proposal for revision. It therefore invited the Council to postpone the review of the thresholds until the end of 1996 at the latest. The Council endorsed these conclusions in September 1993.
4. Pursuant to the commitment made to the Council in 1993, the Commission carried out an extensive review of the Merger Regulation in the light of the experience gained from the application of the Regulation and on the basis of economic and other relevant data and information. The Commission also conducted a survey of Member States, companies, industry associations and advisers during the summer and autumn of 1995, to seek their views as to a revision of the Regulation. Finally the European Parliament and the Economic and Social Committee were invited to express their opinion.
5. Based on the results of the survey, the Commission adopted a Green Paper on the Review of the Regulation on 31 January of this year². The Green Paper principally examined whether the turnover thresholds, above which concentrations are notifiable to the Commission, should be revised. It also identified other areas where improvements could be made and presented a series of options for discussion.
6. Following the adoption of the Green Paper, the Commission launched a consultation of Member States, industry associations, companies and other interested parties. The Council, the European Parliament and the Economic and Social Committee and the Committee of the Regions were also invited to express their opinion.

¹ COM (93) 385 final, 28 July 1993.

² COM (96) 19 Final.

7 The review showed that Community merger control is widely regarded as a success. Nevertheless, it identified a number of weaknesses in the present system, not only in relation to thresholds, but also in relation to some other aspects of the Merger Regulation.

11. The main issues to be addressed

8 As the Commission already stated in the Green Paper, in line with the notion of subsidiarity, concentrations with significant cross-border effects within the Community should be examined at Community level, in view of the objectives to be attained and the means available to the Community and the Member States. The application of the "one-stop shop" principle of the Merger Regulation to such concentrations simplifies administrative procedures and creates a level playing field by ensuring that the same notification requirements, procedure and legal standard apply.

9 At present, in order for the Merger Regulation to apply, the combined turnover of the companies involved in a concentration must exceed ECU 5 billion worldwide and the Community turnover of each of at least two of those companies must exceed ECU 250 million. However, an important number of concentrations with significant cross-border effects covering a variety of economic sectors currently fall below these high levels. This situation is not in line with subsidiarity, it distorts the level playing field and deprives companies that are involved in cross-border merger activities from the advantages of the "one-stop shop".

10 The review also addressed the issue of multiple notification of concentrations below the thresholds. Since 1989, when the Merger Regulation was adopted, many Member States have introduced national systems of merger control. As a result, the total number of potential jurisdictions within the EEA is now thirteen - fourteen, when the Dutch legislation comes into force -, in eight of which notification is obligatory. This proliferation of national systems means that cross-border mergers and acquisitions falling outside the scope of the Merger Regulation are now likely to qualify for examination by a number of national authorities. Each of these national authorities will apply its own different procedure and criteria for the appreciation of the transaction. Multiple national filings thus increase uncertainty, effort and cost for business, and may lead to conflicting decisions.

11 In some cases, concentrations with significant cross-border effects may be excluded from the Merger Regulation, because the companies involved realise more than two-thirds of their Community-wide turnover within one and the same Member State. However, the Commission considers that on balance the two-thirds rule is appropriate, because, if it were to be deleted or modified, cases with mainly national impact would likely be caught.

12 Apart from the thresholds, the main other areas where improvements should be made are the following:

- (i) The treatment of concentrative and cooperative full-function joint ventures under different regimes is considered unsatisfactory, especially to the extent that it leads to differences in the deadlines for assessment and the degree of

legal certainty afforded to companies.

- (ii) Although the current system for the referral of concentrations to and from Member States under Articles 9 and 22 of the Regulation is on the whole regarded as satisfactory, it is considered that some aspects of the referral procedures could be improved or clarified.
- (iii) Banking income as the basis for calculating turnover for credit and financial institutions would more accurately reflect the realities of the banking sector than an assets-based criterion.
- (iv) A number of "house-keeping" amendments should be made to perfect or clarify the text of the Regulation.

III. Proposed amendments

13. The Commission considers that it is now appropriate to propose amendments that will address the above-mentioned shortcomings and will thus improve the operation of merger control in the European Community.
14. The proposed amendments fall within one of the following categories:
 - modifications giving effect to the principles set out in Articles 85 and 86 of the Treaty (Article 87 of the Treaty);
 - modifications necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and for which the Treaty has not provided the necessary powers (Article 235 of the Treaty),
 - an appropriate adaptation of the turnover thresholds, in the light of the experience gained in the application of the Merger Regulation (Article 1, paragraph 3 of the Merger Regulation).
15. Article 1, paragraph 3 of the Merger Regulation provides that the thresholds will be reviewed by the Council acting by a qualified majority on a proposal from the Commission. A different procedure is envisaged by Articles 235 and 87 of the Treaty, on which all other proposed amendments will be based - for instance, under Article 235 of the Treaty, the Council must act unanimously.
16. In view of these differences, the Commission has decided to make two separate proposals: the first proposal relates to the threshold reduction, including the mechanism for multiple national filings, and is based exclusively on Article 1 (3) of the Merger Regulation; the second proposal relates to other aspects of the Merger Regulation and is based on Articles 235 and 87 of the Treaty. The present document relating to both proposals is transmitted to the Council and to the European Parliament, with a view to their consideration as a whole.

A. The Commission proposal based on Article 1 (3) of the Merger Regulation

17. The Commission concluded in the Green Paper that the current levels of the world-wide and the Community thresholds should be reduced in order to ensure that concentrations with significant cross-border effects would be controlled at Community level, in accordance with subsidiarity. Although it was difficult to establish the precise levels of such lower thresholds, it appeared that, on the basis of the information available at that time, a world-wide threshold of ECU 2 billion and a Community threshold of ECU 100 million would allow most concentrations with significant cross-border effects to come under single Community jurisdiction. In any case, it appeared necessary to address the problem of multiple notification of concentrations below the current thresholds.
18. Following the consultation on the Green Paper, and in making concrete proposals that would appropriately address the jurisdictional issues under review, the Commission decided to adopt a combined approach. This consists in a proposed threshold reduction to intermediate threshold levels of ECU 3 billion and ECU 150 million. It appears that there is broader agreement that these levels would cover most concentrations with significant cross-border effects. Between these levels and the initially mentioned thresholds of ECU 2 billion and 100 million, it is still important to address the issue of multiple national filings. This would increase administrative efficiency in the application of the merger rules and would bring within the scope of the Regulation, in line with subsidiarity, operations which would, as a general rule, likely impact market structure over a geographic area exceeding the borders of a single Member State.
19. In line with the above, the Commission proposes a reduction of the current world-wide and Community thresholds to ECU 3 billion and ECU 150 million, while, for the reasons explained above, the 2/3 rule remains unchanged (Article 1, paragraph 2). Between these thresholds and lower thresholds of ECU 2 billion and ECU 100 million, only concentrations that qualify for examination in at least three Member States of the Community would also come within the exclusive competence of the Commission.

The mechanism for multiple national filings

20. The proposed mechanism for dealing with multiple national filings is based on the following elements:
 - It would apply to all concentrations that: (i) fall between the above-mentioned intermediate and lower thresholds and do not meet the two-thirds rule; and (ii) qualify for examination, whether on an obligatory or a voluntary basis, in at least 3 Member States of the European Community. The inclusion of voluntary systems of merger control is justified, because: (i) the cross-border character of a transaction that is indicated, as a general rule, by the application of three or more national provisions does not depend on the obligatory or voluntary character of notification; and (ii) even where notification is voluntary, the transaction can still be controlled by the national authority, with the result that in practice the parties tend to notify, for reasons of legal certainty. As to the number of national laws that must be applicable, although a transaction coming within the jurisdiction of two national systems is, generally speaking, likely to have cross-border elements, bilateral co-ordination between the national authorities concerned should alleviate to a large extent the complexities of

multiple notification. In contrast, where three or more national systems are involved, coordination is clearly not an effective solution.

- If these requirements are met, a concentration would fall within the exclusive competence of the European Commission.
 - The concentration would be deemed to qualify for examination under the national systems mentioned by the parties in the notification, unless the Member States concerned inform the Commission that this is not the case within two weeks from receipt of all relevant facts. The Commission would only verify whether and how the Member States concerned have reacted within the two weeks, and would not check itself whether the national thresholds have actually been met. Phase 1 would be extended by two weeks.
21. In order to introduce the new procedure for multiple national filings, the following Articles of the Regulation will be amended: Article 1 (new paragraphs 3 and 4 extending the notion of a concentration with a Community dimension to those concentrations qualifying for examination in at least 3 Member States of the European Community); new article 6a (non-opposition procedure relating to the application of the national merger control provisions); Article 9 (2) (extension of the period within which a Member State may make a request for referral by two weeks); Article 10 (new paragraph providing for an extension of Phase 1 by two weeks).
22. Following the adoption of the Commission proposal by the Council, certain changes would also have to be made to the current Implementing Regulation (Commission Regulation No. 3384/94). For instance, the procedural details of notification would have to be specified, including the circumstances in which the Commission can declare a notification incomplete, where the information supplied by the parties is insufficient for the Member States to determine the application of their national merger control provisions.

B. The Commission proposal based on Articles 235 and 87 of the Treaty

Review of the thresholds

23. In order to ensure that concentrations with significant cross-border effects continue to be covered by Community merger control, it is provided that the thresholds establishing the Community dimension of concentrations can be adjusted by the Council acting by a qualified majority on a proposal by the Commission (new Article 1, paragraph 5).

Referral provisions

24. Article 9 is modified, so as to provide that where a distinct market within the territory of a Member State does not constitute a substantial part of the common market, the request for referral by this Member State must only demonstrate that the concentration affects such a market. In contrast, no proof of threat to create or strengthen dominance will be required. This change is justified by the fact that the Commission can prohibit a concentration only if it creates or strengthens dominance in a substantial part of the

common market. In addition, it is made clear in the text of Article 9 that a referral may concern the whole or part of a case, depending on the extent to which the case affects a distinct market, be it a substantial part of the common market or not.

25. As to Article 22, two main changes are proposed: (i) the suspension provisions of Article 7 will apply to concentrations that form the object of an Article 22 request, to the extent that they have not been put into effect on the day the parties are informed by the Commission that such a request has been made; and (ii) it is made clear that two or more Member States can make a joint referral where appropriate, for instance in cases where dominance would be created or strengthened in an area extending over their territories.

Joint ventures

26. In order to improve the treatment of cooperative full-function joint ventures, the concept of concentration under Article 3 of the Merger Regulation is enlarged so as to include all full-function joint ventures. Cooperative full-function joint ventures are thus brought within the scope and procedure of the Regulation. In substantive terms, since cooperative full-function joint ventures are treated as concentrations, the dominance test of Article 2 of the Regulation will, in principle, apply. In addition, Article 2 will be modified so as to give the Commission the possibility to apply, within the procedure of the Merger Regulation, the criteria of Article 85 (1) and (3) of the Treaty, where necessary, that is to the extent that the joint venture leads to the coordination of the competitive behaviour of companies that remain independent. This may be the case, for instance where two or more parent companies remain active in the market of the joint venture, or where the creation of the joint venture gives rise to the coordination of the parents' activities in upstream, downstream or neighbouring markets.

27. This solution presents clear advantages compared to the current situation, because:
- all full-function joint ventures will be examined within the procedure and deadlines of the Merger Regulation;
 - only one final decision will be adopted based on a global assessment of the all aspects of the case;
 - the complexities inherent in the distinction between cooperative full-function and concentrative joint ventures will be eliminated.

28. Under the proposal, the assessment of the concentrative and coordination aspects of all full-function joint ventures above the Regulation thresholds would fall within the exclusive competence of the Commission. The concentrative aspects of full-function joint ventures below the thresholds would fall within the competence of the Member States. As to the coordination aspects of such joint ventures, the status quo would be maintained. Regulation No. 17 would remain applicable - Article 22, paragraph 2 of the Regulation is amended accordingly - and would give the Commission the possibility to apply Article 85 (1) and (3), while Member States would be able to apply their relevant national laws and/or 85 (1) -but not 85 (3). In this context, the Commission will declare that it will not actively seek to apply Regulation No. 17 to the coordination aspects of such joint ventures, but would leave, to the extent possible, the assessment of those elements to the Member States.

29. As stated above, a single decision will be adopted in all cases declaring the concentration compatible or incompatible with the common market. To the extent that Article 85 (1) and (3) apply to a full-function joint venture, the Commission decision will grant an exemption for the lifetime of the joint venture. However, it is provided that the Commission will have the possibility to revoke its decision, as far as, in exceptional cases, over time the market position of the parent companies is strengthened in a way that the coordination of their competitive behaviour no longer complies with the basic requirement of Article 85 (3)b, i.e. no possibility of eliminating competition. This is done by inserting an additional ground for revocation under Articles 6 and 8 (5) of the Regulation.

Banking income and "house keeping" amendments

30. Article 5 (3) a is modified, so as to provide that banking income as defined in Directive 86/635/EEC will be used as a basis for calculating the turnover of credit and financial institutions. This definition, which corresponds to gross as opposed to net banking income, is consistent with the Commission's general approach for calculating turnover. Moreover, in order to simplify the Commission's approach, it has been considered appropriate to provide that the geographic allocation of turnover should be based on the location of the branch or division making the loan or providing the service.
31. The "house keeping" amendments are intended to perfect or clarify the text of the Regulation. These are the following:
- It has been considered appropriate to clarify the situation with regard to first phase commitments. Article 6 is thus modified to provide the Commission with an express legal basis for accepting (new paragraph 2) and enforcing (new paragraph 3) commitments in the first phase of proceedings. Article 10 extends the first phase to six weeks in cases where commitments are offered by the parties, in order to allow effective consultation of Member States and third parties. The possibility to adopt implementing provisions relating to phase 1 commitments is provided in Article 23³.
 - Ancillary restrictions in first phase: by analogy to phase 2, an express provision for such restraints is made by adding a second indent to Article 6 (1) (b).
 - Suspension of concentrations: in order to harmonise the duration of suspension of concentrations with the duration of the first phase, Article 7 (1) is modified so as to extend the duration of suspension up to the adoption of a final decision. Paragraph 4 is modified to give the Commission more flexibility in deciding whether or not to grant a derogation from the suspension obligations in appropriate cases.
 - Article 10(4) is modified so as to provide that first phase proceedings can be

³ The Commission for instance proposes to introduce a time-limit of three weeks from the date of receipt of the notification for the acceptance of first phase commitments, so as to allow time for consultation of Member States and third parties.

suspended in the same exceptional circumstances in which second phase proceedings are suspended.

- A number of areas where the adoption of implementing provisions by the Commission is required are added to Article 23, namely time limits pursuant to Articles 7, 9 and 22, as well as the procedure and time limits for submitting modifications to the original concentration plan.

IV. Impact on Commission resources

32. The Commission has stated in its Green Paper that the increase in workload resulting from a threshold reduction and other proposed amendments to the Regulation should not reduce quality and efficiency. In order to meet these concerns, an estimate of the additional resources needed under each of the two proposals has been made.

V. Impact of the Commission proposals on small and medium-sized enterprises (SMEs)

33. SMEs, as defined by the Commission Recommendation of 3 April 1996⁴, would not meet the proposed lower thresholds. As a result, they would not be affected by the proposed amendments, except in the rather exceptional case where a joint venture is jointly controlled by a number of companies, one of which is a SME. In such cases, SMEs would benefit from the advantages of the Community "one-stop shop".

⁴ OJ No L 107, 30.4.1996, p. 4.

proposal for a
COUNCIL REGULATION (EC)

no. ... of

amending Council Regulation (EEC) No 4064/89 of 21 December 1989
on the control of concentrations between undertakings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Article 1 (3) of Council Regulation (EEC) No 4064/89,

Having regard to the proposal from the Commission,

Whereas Council Regulation (EEC) No 4064/89 provides that the Council acting by a qualified majority on a proposal from the Commission must review the thresholds establishing the Community dimension of a concentration, in the light of the experience gained from the application of the Regulation;

Whereas, in accordance with the principle of subsidiarity, the thresholds triggering Community merger control should be set at a level at which concentrations are more likely to have significant cross-border effects than a mainly national impact; whereas leaving to Member States the competence to control concentrations having significant cross-border effects would not ensure a "one-stop shop" system and would not allow for an appreciation of the competition impact of concentrations on the Community as a whole;

Whereas, concentrations with significant cross-border effects below the thresholds may qualify for examination under a number of national jurisdictions; whereas national merger control systems within the Community are not sufficiently harmonized at present;

Whereas as a general rule, the impact of a concentration subject to multiple national control would go beyond the borders of any one Member State; whereas, in addition, multiple notification of the same transaction increases legal uncertainty, effort and cost for companies and may lead to conflicting assessments; whereas in these cases the exclusive application of Community merger control would increase administrative efficiency and would contribute to the creation of a level playing field across the Community;

Whereas, the thresholds for the application of Community merger control should be adjusted in order to meet the above-mentioned objectives; whereas the current levels of the world-wide and Community thresholds should therefore be reduced; whereas, in addition, between these lower levels and certain base levels, the Community merger rules should also apply to concentrations that would otherwise be subject to multiple national control within the Community,

HAS ADOPTED THIS REGULATION:

ARTICLE 1¹

Council Regulation (EEC) No 4064/89 is hereby amended as follows.

1. Article 1

- a) Paragraph 1 is amended as follows:

"Without prejudice to Article 22 this Regulation shall apply to all concentrations with a Community dimension as defined in paragraphs 2-4."

- b) Paragraph 2 is amended as follows:

"For the purposes of this Regulation, a concentration has a Community dimension where :

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 3000 million; and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 150 million;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

- c) Paragraph 3 is replaced by the following:

"For the purposes of this Regulation, a concentration within the meaning of Article 3 that does not meet the thresholds laid down in paragraph 2 has a Community dimension, where:

- (a) the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2 000 million;
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million; and
- (c) the concentration is deemed to qualify for examination in at least three Member States of the European Community, according to the thresholds and/or other criteria laid down by the relevant national merger control provisions;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

¹ When this proposal makes reference to Articles of Council Regulation (EEC) No 4064/89 of 21 December 1989, it should be read in conjunction not only with the current text of this Regulation, but also with Commission proposal no... of

- d) A new paragraph 4 is added after paragraph 3 reading:
- "For the purposes of paragraph 3 (c):
- (a) a concentration is deemed to qualify for examination under national merger control provisions, whether such examination can be initiated on the basis of a notification by the parties, on the Member State's initiative or by other means;
 - (b) in cases where national merger control provisions contain different thresholds for pre-merger and post-merger control, only the thresholds triggering pre-merger control will be taken into account.
2. A new Article 6a entitled "Procedure for multiple national filings" is inserted after Article 6 reading:
- "1. For the purposes of Article 1, paragraph 3 (c), the information required to determine the application of national merger control provisions must be contained in the notification pursuant to Article 4. The Commission shall, without delay, transmit such information to the competent authorities of the Member States concerned.
2. Where a Member State referred to in the notification has not opposed the application of its national merger control provisions within two weeks from the date it receives all necessary information, the concentration shall be deemed to qualify for examination in this Member State. Any such opposition must be reasoned and in writing."
3. In Article 9, the following text is added at the end of paragraph 2:
- "That period shall be increased to five weeks where the Community dimension of a concentration is determined in accordance with Article 1, paragraph 3."
4. In Article 10, a new sub-paragraph is inserted at the end of paragraph 1 reading:
- "The periods referred to in this paragraph shall be extended by two weeks where the Community dimension of a concentration is determined in accordance with Article 1, paragraph 3."
5. In Article 23, the phrase "the procedure applicable to cases where the Community dimension of a concentration is determined in accordance with Article 1, paragraph 3," is inserted after the phrase "and other details of notifications pursuant to Article 4,".

ARTICLE 2

This Regulation shall enter into force on...

ARTICLE 3

This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

FINANCIAL STATEMENT
(Proposal 1)

A financial statement, the model for which follows, must accompany any Commission proposal or communication to the Council that is likely to have implications for the budget, including implications in terms of the number of posts (Article 3 of the Financial Regulation). At least ten working days must normally be allowed for DG XIX's opinion and for the opinion of DG IX (on section 10 "Administrative expenditure"). An opinion will be given only if all the questions are answered.

The same information, updated for operations already under way, must be supplied in support of requests for appropriations when the preliminary draft budget is being prepared. The information to be supplied may vary in certain cases. The particular financial statement to be used in such cases is specified in the annual budgetary circular.

The numbered sections must be completed. The notes in italics suggest various possible answers. It is up to the department to present as clearly and fully as possible the information it is submitting in support of its request for appropriations or estimate of future requirements. The notes in italics should therefore be deleted when the department's text is inserted.

Financial statement

1. **TITLE OF OPERATION:** Review of Council Regulation No 4064/89 on the control of concentrations between undertakings

2. **BUDGET HEADING(S) INVOLVED**

Part A (see section 10)

3. **LEGAL BASIS:** Article 1(3) of Council Regulation No 4064/89 on the control of concentrations between undertakings

4. **DESCRIPTION OF OPERATION:**

4.1 General objective: to extend the scope of merger control applying to undertakings having a Community dimension

4.2 Period covered and arrangements for renewal.
No time-limit

5. **CLASSIFICATION OF EXPENDITURE OR REVENUE**

5.1 Non-compulsory expenditure

5.2 Non-differentiated appropriations

5.3 Type of revenue involved

6. **TYPE OF EXPENDITURE OR REVENUE**

Administrative expenditure (see section 10)

- Will the proposed operation cause any change in the level of revenue? If so, what sort of change and what type of revenue is involved?

In contrast to some Member States (Germany, the United Kingdom), the Commission has not hitherto charged any registration fee or levied any other type of charge for notifications lodged by firms. By way of comparison, such fees and charges amount to DM 12 000-15 000 (ECU 6 400-8 020) in Germany and UKL 5 000-15 000 (ECU 6 100-18 200) in the United Kingdom. In amending the implementing Regulation, the Commission will consider the possible charging of such registration fees. On the basis of some 200 notifications a year, potential revenue would be ECU 1 200 000 (assuming a charge of ECU 6 000 per notification).

7. **FINANCIAL IMPACT**

on operating appropriations (Part B)

NONE

8. FRAUD PREVENTION MEASURES

- Specific control measures envisaged

9. ELEMENTS OF COST-EFFECTIVENESS ANALYSIS

- I Mergers that do not have a Community dimension because they do not meet the current threshold criteria fall outside the scope of the Commission's responsibility and of the one-stop-shop which operates under it. Control of such mergers is the responsibility of the Member States. Of the fifteen Member States, eleven (soon twelve with the Netherlands) have domestic merger control legislation. Eight of the domestic merger control legislations have a system of mandatory prior notification. In virtually all the Member States (except Austria and the Netherlands), two public institutions are involved in the decision-making process.
- II It should be emphasized that a merger may be subject to control by several national control authorities. In its Green Paper, the Commission identified, over a 36-month period, 100 or so cases in which there were multiple notifications involving at least two Member States, i.e. 33 cases a year.
- III On the basis of the estimates of additional cases which the Commission believes would have to be dealt with if the thresholds were lowered, and which may be regarded as currently coming under national responsibility, it may be seen that:
- 30 cases of so involve a notification in one Member State (two authorities)
 - 20 cases or so involve a notification in two Member States (two authorities)
 - 10 cases or so involve a notification in at least three Member States (two authorities)

i.e. a total annual workload for the Member States of
 $(30 \times 2) + (20 \times 4) + (10 \times 6) = 200$ cases a year.

Assuming a national case-officer/notification ratio of six cases a year per case officer, which is identical to the Community ratio indicated in section 10.1.III.12 of the financial statement, this workload accounts for 33 case officers throughout the Union.

Consequently, a combined reduction in thresholds and in multiple notifications will bring about a reduction in the workload within the Union: 33 case officers would be relieved of their tasks in the Member States; 18 case officers would be used for the same tasks by the Commission. The cost-effectiveness analysis thus shows that the overall result would be positive.

IV Lastly, even if a lowering of the thresholds would mean that the national authorities would have to be involved in a larger number of cases having a Community dimension so as to ensure "close and constant liaison" between them and the Commission, it should be noted that, in 90% of cases, all that will be required is that they monitor the case and, at the very most, express their comments.

10. ADMINISTRATIVE EXPENDITURE (part A of Section III of the general budget)

The actual mobilization of the necessary administrative resources will be a matter for the Commission's annual decision on the allocation of resources, taking account in particular of any additional staff and amounts granted by the budgetary authority. Additional requirements will at all events be without prejudice to the decision which the Commission will actually take on: (a) requests for new posts within the framework of the preliminary draft budget, (b) allocation of resources.

10.1 Impact on the number of posts

Type of posts	Staff to be allocated to administering the operation		of which		duration	
	permanent posts	temporary posts	through use of existing resources within the DG or department concerned	from additional resources	indefinite	
Officials or temporary agents	A	42	1	32	11	
	B	9		8	1	
	C	28		24	4	
Other resources		16	13	3		
Total		79	17	77	19	

In the case of additional resources, indicate the rate at which they would have to be made available.

Immediately after the adoption of the amendments to the Merger Control Regulation

Assessment of resources required

Introductory remark

The Commission's proposals on revising the Merger Control Regulation will increase the scope of Community control by lowering the thresholds above which control applies and by introducing a specific procedure for mergers notified to several national control authorities.

Assessment of the number of additional cases

Under the proposal, the Commission would be responsible for cases above the ECU 3 billion and ECU 150 million thresholds, and below those thresholds but above lower thresholds of ECU 2 billion and ECU 100 million where the merger is notifiable to three national authorities. The proposed thresholds are thus one third higher than the thresholds specified in the Green Paper, which would mean a corresponding reduction in the number of cases, i.e. 43 to 53 cases a year. To this should be added, within the ECU 3 to 2 billion and ECU 150 to 100 million range, mergers notifiable to three national authorities, which would amount to only one third of the estimates given in the Green Paper, i.e. seven to ten cases a year.

Consequently, under the proposal, the number of additional cases would amount to 50 to 63 cases a year.

Additional staff requirements

On the basis of the above, additional staff requirements may be estimated as follows.

The method used involves the establishment of a case-officer/notification ratio on the basis of the situation in 1995, when the parameters were as follows: 114 notifications, seven second-stage cases and 28 case officers. The ratio assumes that a first-stage case needs two case officers to work on it for one month and that a second-stage case requires four case officers for five months. This gives the following calculation formula:

$$[107 \times 1 = 107] + [(7 \times 5) \times 2 = 70] \div 28 = 6.32$$

Consequently, a case officer is able to handle six cases a year (stage II included), under present working conditions, which involve a very sustained pace of work.

This gives the following estimates:

Proposal	Additional cases	Additional case officers
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Thresholds	50/63	8/11

On the basis of these estimates, requirements may be put at: 10 A case officers, 1 B assistant, 4 C. Provision must be made for one additional Head of Unit post to be responsible for the additional staff. Account must also be taken of the additional requirements of the associated departments (DG II, DG III, Legal Service), with provision being made for a further three A posts. The total number of additional staff is estimated at 19.

10.2 Overall financial impact of the additional staff resources

(ECU)

	Amounts	Calculation method
Officials/temporary agents	1 600 000	ECU 100 000 per person per year on the basis of recruitment of officials only
Other resources (indicate budget heading) A-1520 Seconded national experts (SNE)	120 000	SNE: ECU 40 000 x 3
Total	<u>1 720 000</u>	

These amounts give the total cost of the additional posts for the total duration of the operation if it is for a specified period, and for 12 months if it is for an indefinite period.

10.3 Increase in other operating expenditure resulting from the operation

(ECU)

Budget heading (n - and heading)	Amounts	Calculation method
Total		

The annual amount of other operating expenditure, which will be covered by the redeployment of existing resources, is estimated at ECU 300 000, broken down as follows:

AO 2 500 (meetings in general)	ECU 100 000	5 additional meetings
AO 2 510 (committee meetings)	ECU 100 000	5 additional meetings
AO 352 (studies)	ECU 100 000	

proposal for a
COUNCIL REGULATION (EC)

96/ 0224(CNS)

no. ... of

amending Council Regulation (EEC) No 4064/89 of 21 December 1989
on the control of concentrations between undertakings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 87 and 235 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

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

Whereas it should be possible for the Council acting in accordance with Article 145 of the Treaty to adjust the thresholds establishing the Community dimension of a concentration in order to ensure that concentrations with significant cross-border effects continue to be covered by Community merger control;

Whereas the rules governing the referral of concentrations to and from the Member States must be reviewed at the same time as the thresholds establishing the Community dimension of a concentration; whereas these rules protect the competition interests of the Member States in an adequate manner and take due account of legal security and the "one-stop shop" principle; whereas, however, certain aspects of the referral procedures should be improved or clarified;

Whereas, in particular, the Commission can declare a concentration incompatible with the common market only if it impedes effective competition in a substantial part thereof; whereas, the application of national competition law is, therefore, particularly appropriate where a concentration affects competition on a distinct market within a Member State that does not constitute a substantial part of the common market; whereas in this case it should not be necessary to demonstrate, in the request for referral, that the concentration threatens to create or to strengthen a dominant position on this distinct market;

Whereas it should be expressly provided that two or more Member States may make a joint request pursuant to Article 22; whereas to ensure effective control, provision should be made for the suspension of concentrations referred to the Commission by one or more Member States;

Whereas it is appropriate to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the structure of the undertakings concerned;

whereas in the specific case of joint ventures, it is appropriate to include within the scope and procedure of Council Regulation (EEC) No 4064/89 all full-function joint ventures; whereas, in addition to the dominance test, it must be provided that the Commission shall apply the criteria of Article 85 (1) and (3) of the Treaty to such joint ventures, to the extent that their creation results in an appreciable restriction of competition between undertakings that remain independent; whereas, if the effects of such joint ventures are primarily structural, it can be presumed that Article 85 (1) does not apply; whereas, Article 85 (1) may apply if two or more parent companies remain active in the market of the joint venture, or, if the creation of the joint venture gives rise to the coordination of the parents' activities in upstream, downstream or neighbouring markets; whereas, in this context, the appraisal of all competition aspects of the creation of the joint venture must be made within the same procedure;

Whereas, for the purposes of calculating the turnover of credit and financial institutions, banking income is a better criterion than a proportion of assets, because it reflects more accurately the economic reality of the whole banking sector;

Whereas the Commission may declare a concentration compatible with the common market in the second phase of the procedure, following modifications to the original concentration plan that are proportional to and would entirely eliminate the competition problem; whereas, it is also appropriate to accept modifications to the concentration plan in the first phase of the procedure where the competition problem is readily identifiable and can easily be remedied; whereas, it should be expressly provided that in these cases the Commission may attach to its decision conditions and obligations; whereas transparency and effective consultation of Member States and interested third parties should be ensured in both phases of the procedure;

Whereas to ensure effective control, concentrations should be suspended until a final decision has been taken; whereas, on the other hand, it should be possible to waive a suspension, where appropriate; whereas, in deciding whether or not to grant a waiver, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration;

Whereas it should be expressly provided that decisions taken at the end of the first phase of the procedure cover restrictions directly related and necessary for the implementation of a concentration;

Whereas it should be possible to suspend exceptionally the period within which the Commission must take a decision within the first phase of the procedure;

Whereas the Commission should be given the power to adopt implementing provisions where necessary,

HAS ADOPTED THIS REGULATION:

ARTICLE 1¹

Council Regulation (EEC) No 4064/89 is hereby amended as follows.

1. In Article 1, a new paragraph 5 is inserted reading:

"The thresholds laid down in paragraphs 2 and 3 may be adjusted by the Council acting by a qualified majority on a proposal from the Commission, in order to ensure that concentrations with significant cross-border effects continue to be covered by this Regulation."

2. In Article 2, a new paragraph 4 is inserted after paragraph 3 reading:

"To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85 (1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market."

3. In Article 3, paragraph 2 is amended as follows:

- a) The first subparagraph is deleted.
- b) The phrase "which does not give rise to the coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture" is deleted from the second subparagraph.

4. In Article 5, paragraph 3 (a) is replaced by the following:

"(a) for credit institutions and other financial institutions, as regards Articles 1(2)(a), 1(2)(b), 1(3)a, 1(3)b and the final parts of Article 1, paragraphs 2 and 3, the sum of the following income items as defined in Directive 86/635/EEC:

- i. interest income and similar income;
- ii. income from securities:
 - income from shares and other variable yield securities;
 - income from participating interests;
 - income from shares in affiliated undertakings;
- iii. commissions receivable;
- iv. net profit on financial operations;
- v. other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are

¹ When this proposal makes reference to Articles of Council Regulation (EEC) No 4064/89 of 21 December 1989, it should be read in conjunction not only with the current text of this Regulation, but also with Commission proposal no... of

received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be."

5. Article 6

- a) In paragraph 1, a new sub-paragraph is inserted after point (b) reading:

"The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration."

- b) Paragraph 1 (c) is amended as follows:

"Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings".

- c) Paragraph 2 is replaced by the following:

"Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1 (c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1 (b).

It may attach to its decision under paragraph 1 (b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to modifying the original concentration plan."

- d) A new paragraph 3 is inserted reading:

"The Commission may revoke the decision it has taken pursuant to paragraph 1 (a) or (b) where:

- (a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or
- (b) the undertakings concerned commit a breach of an obligation attached to the decision; or
- (c) the coordination of the competitive behaviour of undertakings that remain independent, within the meaning of Article 2(4), affords such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

- e) A new paragraph 4 is inserted reading:

"In the cases referred to in paragraph 3, the Commission may take a decision

under paragraph 1, without being bound by the deadlines referred to in Article 10(1). "

f) Former paragraph 2 becomes paragraph 5.

6. Article 7

a) Paragraph 1 is amended as follows:

"For the purposes of paragraph 2 a concentration as defined in Article 1 shall not be put into effect either before its notification or until it has been declared compatible with the common market pursuant to a decision under Article 6 (1) (b) or Article 8 (2) or on the basis of a presumption according to Article 10 (6)."

b) Paragraph 2 is deleted

c) Former paragraph 3 becomes paragraph 2 and is amended as follows:

The phrases "Paragraphs 1 and 2" at the beginning of the paragraph and "under paragraph 4" at the end of the paragraph are replaced by the phrases "Paragraph 1" and "under paragraph 3" respectively.

d) Former paragraph 4 becomes paragraph 3 and is amended as follows:

"The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by a concentration or to a third party and the threat to competition posed by the concentration. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction."

e) Former paragraph 5 becomes paragraph 4 and is amended as follows:

The phrase "or 2" is deleted from the first and the last sentence of the paragraph.

7. In Article 8, paragraph 5, the following text is inserted after point (b):

"or;

(c) the coordination of the competitive behaviour of undertakings that remain independent, within the meaning of Article 2(4), affords such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

8. Article 9

- a) Paragraph 2 is amended as follows:

"Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that

- (a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market; or
- (b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market".

- b) In paragraph 3, point (b) is amended as follows:

"(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law."

- c) A new sub-paragraph is added at the end of paragraph 3 reading:

"In cases where a Member State informs the Commission that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected."

- d) Paragraph 10 is replaced by the following:

"This Article will be reviewed at the same time as the thresholds referred to in Article 1."

9. Article 10

- a) In paragraph 1, the following text is added at the end of the second sub-paragraph:

"or where, after notification of a concentration, the undertakings concerned propose modifications to the original concentration plan pursuant to Article 6 (2), which are intended by the parties to form the basis for a decision pursuant to Article 6 (1) b. "

- b) The phrase "The period set by paragraph 3" at the beginning of paragraph 4

is replaced by the phrase "The periods set by paragraphs 1 and 3_".

10. Article 22

- a) Paragraph 2 is amended as follows:
"Regulations No 17, (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall not apply to concentrations as defined in Article 3, with the exception of joint ventures that do not have a Community dimension and have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent."
- b) Paragraph 3 is amended as follows:
"If the Commission finds, at the request of a Member State or at the joint request of two or more Member States, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State or the States making the joint request, it may, in so far as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4)."
- c) Paragraph 4 is amended as follows:
"Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply. Article 7 shall apply to the extent that the concentration has not been put into effect on the date on which the Commission informs the parties that a request has been made.

The period within which proceedings may be initiated pursuant to Article 10 (1) shall begin on the day following that of the receipt of the request from the Member State or States concerned. The request must be made within one month at most of the date on which the concentration was made known to the Member State or to all Member States making a joint request or effected. This period shall begin on the date of the first of those events."
- d) In paragraph 5, the phrase "or States" is inserted after the phrase "within the territory of the Member State".
- e) Paragraph 6 is deleted.

11. In Article 23:

- a) The phrase "fees for" is inserted after the phrase "concerning the form, content,".
- b) The phrase "time limits pursuant to Article 10" is replaced by the phrase "time

limits pursuant to Articles 7, 9, 10 and 22, paragraphs 3-5".

- c) A new subparagraph is inserted reading:

"The Commission shall have the power to lay down the procedure and time limits for submitting modifications to a notified concentration plan pursuant to Articles 6 (2) and 8(2)."

ARTICLE 2

This Regulation shall enter into force on...

ARTICLE 3

This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

FINANCIAL STATEMENT
(Proposal 2)

A financial statement, the model for which follows, must accompany any Commission proposal or communication to the Council that is likely to have implications for the budget, including implications in terms of the number of posts (Article 3 of the Financial Regulation). At least ten working days must normally be allowed for DG XIX's opinion and for the opinion of DG IX (on section 10 "Administrative expenditure"). An opinion will be given only if all the questions are answered.

The same information, updated for operations already under way, must be supplied in support of requests for appropriations when the preliminary draft budget is being prepared. The information to be supplied may vary in certain cases. The particular financial statement to be used in such cases is specified in the annual budgetary circular.

The numbered sections must be completed. The notes in italics suggest various possible answers. It is up to the department to present as clearly and fully as possible the information it is submitting in support of its request for appropriations or estimate of future requirements. The notes in italics should therefore be deleted when the department's text is inserted.

Financial statement

1. **TITLE OF OPERATION:** Review of Council Regulation No 4064/89 on the control of concentrations between undertakings

2. **BUDGET HEADING(S) INVOLVED**
Part A (see section 10)

3. **LEGAL BASIS:** Articles 87 and 235 of the Treaty on European Union

4. **DESCRIPTION OF OPERATION:**

4.1 General objective: to extend the scope of merger control applying to undertakings having a Community dimension

4.2 Period covered and arrangements for renewal.
No time-limit

5. **CLASSIFICATION OF EXPENDITURE OR REVENUE**

5.1 Non-compulsory expenditure

5.2 Non-differentiated appropriations

5.3 Type of revenue involved.

6. **TYPE OF EXPENDITURE OR REVENUE**

Administrative expenditure (see section 10)

- Will the proposed operation cause any change in the level of revenue? If so, what sort of change and what type of revenue is involved?

In contrast to some Member States (Germany, the United Kingdom), the Commission has not hitherto charged any registration fee or levied any other type of charge for notifications lodged by firms. By way of comparison, such fees and charges amount to DM 12 000-15 000 (ECU 6 400-8 020) in Germany and UKL 5 000-15 000 (ECU 6 100-18 200) in the United Kingdom. In amending the implementing Regulation, the Commission will consider the possible charging of such registration fees. On the basis of some 200 notifications a year, potential revenue would be ECU 1 200 000 (assuming a charge of ECU 6 000 per notification).

7. **FINANCIAL IMPACT**

on operating appropriations (Part B)
NONE

8. FRAUD PREVENTION MEASURES

- Specific control measures envisaged

9. ELEMENTS OF COST-EFFECTIVENESS ANALYSIS

10. ADMINISTRATIVE EXPENDITURE (part A of Section III of the general budget)

The actual mobilization of the necessary administrative resources will be a matter for the Commission's annual decision on the allocation of resources, taking account in particular of any additional staff and amounts granted by the budgetary authority. Additional requirements will at all events be without prejudice to the decision which the Commission will actually take on: (a) requests for new posts within the framework of the preliminary draft budget, (b) allocation of resources.

10.1 Impact on the number of posts

Type of posts		Staff to be allocated to administering the operation		of which		duration
		permanent posts	temporary posts	through use of existing resources within the DG or department concerned	from additional resources	indefinite
Officials or temporary agents	A	35	1	32	4	
	B	9		8	1	
	C	26		24	2	
Other resources			15	13	2	
Total		70	16	77	9	

In the case of additional resources, indicate the rate at which they would have to be made available.

Immediately after the adoption of the amendments to the Merger Control Regulation.

Assessment of resources required

Introductory remark

The draft redefinition of the term "concentration" as applicable to joint ventures would have the effect of extending the scope of the Regulation to include a number of operations which at present are not covered by it.

Assessment of the number of additional cases

The Green Paper does not contain any statistics on the impact of amending the definition of concentrative joint venture. On the basis of the statistics available to DG IV, i.e. the number of structural cooperative joint ventures currently, notified under Regulation No 17/62 (accelerated procedure) which would fall within the scope of the amended Merger Regulation, the number of additional cases may be put at between 20 and 30 a year.

Additional staff requirements

On the basis of the above, additional staff requirements may be estimated as follows.

The method used involves the establishment of a case-officer/notification ratio on the basis of the situation in 1995, when the parameters were as follows: 114 notifications, seven second-stage cases and 28 case officers. The ratio assumes that a first-stage case needs two case officers to work on it for one month and that a second-stage case requires four case officers for five months. This gives the following calculation formula:

$$[107 \times 1 = 107] + [(7 \times 5) \times 2 = 70] \div 28 = 6.32$$

Consequently, a case officer is able to handle six cases a year (stage II included), under present working conditions, which involve a very sustained pace of work.

This gives the following estimates:

Proposal	Additional cases	Additional case officers
Concentrative JVs	20/30	4/5

On the basis of these estimates, requirements may be put at: 4 A case officers, 1 B assistant, 2 C. Provision must be made for one additional Head of Unit post to be responsible for the additional staff. Account must also be taken of the additional requirements of the associated departments (DG II, DG III, Legal Service), with provision being made for one further A post. The total number of additional staff is estimated at 9.

10.2 Overall financial impact of the additional staff resources

(ECU)

	Amounts	Calculation method
Officials/temporary agents	700 000	ECU 100 000 per person per year on the basis of recruitment of officials only
Other resources (indicate budget heading) A-1520 Seconded national experts (SNE)	80 000	SNE: ECU 40 000 x 2
Total	780 000	

These amounts give the total cost of the additional posts for the total duration of the operation if it is for a specified period, and for 12 months if it is for an indefinite period.

10.3 Increase in other operating expenditure resulting from the operation

(ECU)

Budget heading (n - and heading)	Amounts	Calculation method
Total		

The annual amount of other operating expenditure, which will be covered by the redeployment of existing resources, is estimated at ECU 300 000, broken down as follows:

AO 2 500 (meetings in general) ECU 100 000 5 additional meetings
 AO 2 510 (committee meetings) ECU 100 000 5 additional meetings
 AO 352 (studies) ECU 100 000

RESULTS OF THE CONSULTATION ON THE COMMISSION'S GREEN PAPER ON THE REVIEW OF THE MERGER REGULATION

INTRODUCTION

On 31 January, after having consulted the Community institutions, the Member States, industry and the legal profession, the Commission published a Green Paper on the review of the Merger Regulation (Council Regulation (EEC) No 4064/89 of 21 December 1989) and put forward, for discussion by the parties concerned, an overall assessment of the application of the Merger Regulation and a range of proposals or amendment options.

In the Green Paper, the Commission asked all interested parties to submit their observations and comments by 31 March.

The Commission has received contributions from the Member States (15),¹ industry federations or associations (30), law firms (16) and, to a very limited extent, individual companies (10), the latter having already been involved in the preliminary survey in 1995 which preceded the drafting of the Green Paper.

Such contributions were the subject of further discussion and were taken into account in the Commission's work.

This document summarizes the results of the consultation on the Green Paper and concentrates on a number of main points: threshold reduction, multiple notifications, joint ventures and the turnover of banks. It reports only on the opinions put forward by the industry federations or associations and by Member States. The limited number of replies from law firms or individual companies does not allow sufficiently representative conclusions to be drawn as far as they are concerned.

1. THRESHOLD REDUCTION

As far as the level of thresholds is concerned, a majority (63%) of the industry federations and associations was in favour of the current level being lowered, and half of them backed the thresholds proposed in the Green Paper. The federations or associations that were in favour of maintaining, or indeed raising, the thresholds were in a clear minority (26%) and were mostly from the financial sector or the distributive trades.

¹ The Member States have so far expressed preliminary views through their national merger control authorities, at the multilateral meeting between national and Community experts.

The Member States were divided in their views on this point. Seven Member States were in favour of lowering the thresholds (B-GR-FI-NL-IT-P-LUX), while, amongst the eight others, three were firmly opposed and five expressed varying degrees of reservation.

A very large majority (70%) of the industry federations and associations did not express any direct view on the two-thirds rule. Of those which did express a view, opinions were fairly evenly divided (16.6% for maintaining the rule, 13.3% against maintaining it).

By contrast, virtually all the Member States were in favour of maintaining the two-thirds rule, which they considered satisfactory as regards the principle of the sharing of powers between the Commission and the Member States.

2. MULTIPLE NOTIFICATIONS

As regards notifications to the national supervisory authorities, the majority (73%) of the federations and associations took the view that multiple notifications posed a problem which should be solved by extending the Commission's exclusive powers, on the basis of a simple and practical procedure. The comments made by the industry federations and associations vary as to the details of the arrangements to be introduced. However, six of them were in favour of introducing an optional system for firms, while eight expressed their view on the number of national authorities that should be involved, with six of them (i.e. 75% of the relevant replies) considering that the minimum number required should be three.

Amongst the Member States, the great majority (86%) considered that multiple notifications posed a real difficulty for firms and that a simple and practical solution should be sought. Amongst the Member States expressing a view on the number of authorities that should be involved, three (or more) was the figure most frequently suggested. Similarly, most of the Member States consider that this new procedure should be compulsory for firms. Some Member States identified a number of practical or procedural difficulties, notably where one of the merger control thresholds is established on the basis of market shares.

3. JOINT VENTURES

The majority of the industry federations and associations (70%) were sharply critical of the differential treatment of joint ventures and called for a rapid solution to be found for this problem. Of the 21 federations which commented, nine (42%) chose group I procedural solutions, without any marked preference emerging between the three options. A total of 12 federations chose group II options combining procedural and substantive solutions. Of those which expressed a preference, five were in favour of option IIa and four in favour of option IIb.

Amongst the Member States, views on the options presented are divided. Four Member States did not express any definitive preference. Of the eleven others, six were in favour of the procedural solutions, with a clear preference for option Ib, and four were in favour of the procedural and substantive solutions.

4. TURNOVER CALCULATION FOR CREDIT AND FINANCIAL INSTITUTIONS

Given the highly specific nature of the question asked, there were few reactions.

Amongst the seven federations or associations which replied, six were in favour of changing the current calculation method and of referring to banking income. A majority was in favour of net banking income.

Of the Member States which, at this stage, have expressed a view on the subject, three were in favour of switching to banking income, while three others argued that the present system should be maintained.

5. OTHER ASPECTS OF THE REGULATION

There is very broad agreement amongst the business federations and associations that an express legal basis should be established for the acceptance of Phase I commitments. Of the 15 federations which replied on this point, 14 were in favour of such a provision.

The Member States were all in favour of introducing an express legal basis for accepting Phase I commitments, particularly if provision is made for consultation of the Member States and third parties. Several Member States emphasized that the acceptance of Phase I commitments should remain limited to the present conditions.

As far as the referral arrangements are concerned, the federations or associations showed limited interest (nine explicit replies). The great majority (88%) of those which did express a view on this question supported the maintenance of the present system, subject to the slight amendments proposed in the Green Paper. Only one reply argued that, if the thresholds were lowered, Article 9 should be broadened.

The great majority of the Member States, with the notable exception of Germany, stated that they were satisfied with the current provisions and practice regarding referral. They therefore welcomed the comments in the Green Paper on this point, as regards both Article 9 and Article 22, for which a number of procedural adjustments were proposed.

MERGER REVIEW

COMMENTS ON THE GREEN PAPER BY ASSOCIATIONS

1. Thresholds
2. Multiple national filings
3. Joint ventures
4. Other issues

Confederation of Finnish Industry and Employers

1. In favour of lowering thresholds as suggested by the Commission.
2. Supports a practical solution for multiple national filings.

Industriellenvereinigung Österreichs

1. In favour of the proposed threshold reduction.
2. The 2/3-rule should be dropped in cases, where multiple notification in more than 2 member states is necessary. In cases of multiple notifications it should always be possible to apply for the Commission's competence, even if the proposed thresholds are not met (except for de minimis-cases).
3. Joint ventures: Extend Article 3 (2) of MR to all joint ventures, whether full function or not, except shams (cartels dressed up as joint ventures) (=option IIb).
4. In favour of an express legal basis for the acceptance of commitments in first phase. In favour of the proposal for ancillary restraints in the first phase and for more flexibility in the application of Article 7. Agrees that Article 9 should not be enlarged in a manner that endangers the one-stop shop principle. In favour of proposed amendments of Article 22, except for the proposed suspension of concentrations examined under this Article.

British Retail Consortium

1. Against a reduction of thresholds, as far as the retail sector is concerned. Would instead like to raise thresholds in the retail sector.
2. Under system for multiple national filings, application to the Commission should be voluntary.
3. Not aware of problems arising from current practice on Joint Ventures, but in favour of option Ic.

4. In favour of an express legal basis for the acceptance of commitments in first phase.

Irish Business and Employers Association

1. Supports the Commission's proposal to lower thresholds.
2. Also supports proposal that multiple national filings for mergers below thresholds should come within the exclusive competence of the Commission.
3. Supports procedural improvements in the treatment of joint ventures.
4. Supports acceptance of commitments in the first phase of investigation.

Fédération bancaire de l'Union Européenne

1. Against a threshold reduction.
2. Would favour a proposal extending Community competence for mergers :
 - above lower thresholds of ECU 2 b and 100 m;
 - involving three or more national authorities.
4. In favour of net banking income as the basis for the calculation of turnover for banks.

Wirtschaftskammer Österreich

1. In favour of a threshold reduction, except for banks and assurances. The 2/3-rule should be kept.
2. Not every concentration subject to two multiple national filings has automatically a Community-wide dimension. The national systems should be harmonised.
3. Joint ventures: improve the procedure applicable to cooperative full-function joint ventures.
4. In favour of net banking income as the basis for calculating the turnover of credit and financial institutions.

Bundesverband der Deutschen Industrie

1. In favour of the proposed threshold reduction. Moreover, the 2/3-rule should be dropped.

2. As a "second best" solution, concentrations subject to multiple national filings should be dealt with at Community level. Member States should decide as to the application of their national law; if there is no opposition within a specified time period, the national law should be deemed to apply.
3. Joint ventures: Apply the procedure and substantive test of the MR to all joint ventures, whether full function or not, except shams (cartels dressed up as joint ventures) (=option IIb). However, a solution must be found so that cooperative joint ventures below the thresholds can benefit from the "one-stop shop"
4. In favour of express legal basis for the acceptance of commitments in first phase. In favour of proposed amendment of Article 9, no further changes should be made to the referral rules under this Article.

Centre Européen des Entreprises à participation publique

1. A lowering of the current thresholds is not justified; the 2/3-rule should be maintained.
2. Would favour a procedure whereby companies would be able to choose between the Community "one-stop shop" and the different national authorities. This possibility could be provided by Article 22.
3. Considers that the best approach is a procedural one and prefers options Ia and Ib.
4. Expresses some doubts about the proposal concerning the simplification of Article 9 for cases affecting a non substantial part of the common market.

Expresses doubts about the acceptance of commitments in the first phase of examination. Is against the harmonization of the suspension period. Asks for the introduction of new criteria for the assessment of cases.

Fédération des Entreprises de Belgique

1. Proposes an alternative solution: between ECU 5 b and 2 b and 250 m and 100 m., companies would have the choice to notify either to the Commission or to one or several national authorities.
3. Prefers the "substantive and procedural" options IIa or IIb.
4. Favours an express legal basis for the acceptance of commitments in the first phase (maximum extension of first phase by two weeks).

Confederation of British Industry

1. In favour of the reduction suggested by the Commission, and maintenance of the 2/3-rule.
2. In the event that the thresholds are not lowered, the CBI supports a solution for multiple national notifications as suggested by the Commission. A special procedure for multiple national filings should be triggered when two or more national authorities are involved. Voluntary notification systems should be included. Prefers an optional system for multiple national filings.
3. The majority of the respondents supports Option IIa..
4. Supports the Commission proposals relating to Articles 9 and 22. In favour of giving the Commission express powers to accept and enforce commitments in first phase. In favour of the other "housekeeping amendments". Supports the banking income criterion.

European Public Telecommunications Network Operators' Association

1. Supports reduction of thresholds.
2. If overall thresholds are not reduced, ETNO is in favour of extending exclusive Community competence at least for multiple national filings.
3. Supports the proposal to harmonise the assessment procedures of cooperative and concentrative joint ventures. In favour of extending the scope of the Merger Regulation to all cases of structural cooperative joint ventures.
4. Regrets the absence of an automatic exemption for "de minimis" cases. Favours express legal basis for commitments in first phase (maximum extension of first phase by two weeks). Asks for the introduction of new criteria for the assessment of cases.

Centre National du Patronat Français

1. The majority is not in favour of a lowering of the current thresholds.
2. The majority is in favour of giving the Commission exclusive competence for mergers :
 - above lower thresholds of 2 b and 100 m
 - where at least three national authorities are involved
 - a two week period for Member States to decide on the application of national law
 - an opposition procedure for Member States.

3. Thinks that the best option would be option IIa of the Green Paper. In addition, it is in favour of a new implementing regulation for partial-function cooperative joint-ventures in order to ensure legal certainty and speed of decision making.
4. Wants Articles 9 and 22 to be maintained in their current form. Favours an express legal basis for commitments in first phase proceedings (no extension of the one month period). Supports the net banking income criterion. Regrets the absence of a specific proposal for "de minimis" operations.

Deutscher Industrie- und Handelstag

1. In favour of the proposed threshold reduction to ECU 2 billion and ECU 100 million. The 2/3-rule should be dropped or replaced by a 3/4-rule.
2. As a "second best," concentrations subject to multiple filings should be dealt with at Community level, provided that a workable system can be found.
3. Joint ventures: Create new procedures for the treatment of cooperative full-function joint ventures by means of a new Regulation, in order to simplify procedures and provide for fast decisions and legal certainty (=option Ia) or make cooperative full-function joint ventures subject to procedures of the MR, leaving the two substantive tests separate (=option Ib).
4. In favour of express legal basis for the acceptance of commitments in first phase and of the proposed improvements in the referral procedures (Articles 9 and 22).

Association des Grandes Entreprises Françaises

1. The majority of the AGREF members is in favour of a lowering of the thresholds to ECU 2 b and 100 m.
2. A possible solution for AGREF would be the following :
 - lower threshold levels of 2 b and 100 m
 - voluntary notification to the Commission between the current thresholds and these lower thresholds.

Another solution could be found by means of Article 22.

3. AGREF thinks that the best option would be IIa.
4. Article 9 should be maintained in its current form. Agrees with the Commission's proposal concerning a joint request under Article 22. Favours an express legal basis for commitments in first phase. Favours the net banking income criterion.

International Chamber of Commerce

1. The great majority of ICC members supports the reduction of the thresholds as suggested by the Commission.
2. Supports the Commission's proposal regarding multiple notifications when two national authorities, based either on mandatory or on voluntary notification, have jurisdiction over a concentration. Agrees with lower thresholds of 2b and 100m.
3. The ICC supports option IIb. As a second best choice option IIa.
4. The ICC suggests that "de minimis" operations should be excluded from the scope of the EMCR. Favours an express legal basis for commitments in first phase.

Verband der Versicherungsunternehmen Österreichs

1. In favour of the proposed threshold reduction. The 2/3-rule should be kept.
2. Concentrations subject to multiple filings should be dealt with a Community level, at the request of the undertakings involved.
3. Joint ventures: In favour of harmonized treatment, in particular with regard to the procedural aspects.
4. In favour of express legal basis for the acceptance of commitments in first phase.

Union Espanola de Entidades Aseguradoras

1. The UNESPA members favour either a status quo or a reduction of the thresholds to 3b and 200m. The majority of UNESPA ask for a 3/4-rule.

Fédération Française des Sociétés d'Assurances

1. Not in favour of a lowering of the current thresholds.
2. In favour of giving the Commission exclusive competence for mergers below the current thresholds where at least three national authorities involved. It would like the introduction of a pre-notification procedure to determine the Commission's competence.
4. It wants Article 9 to be maintained in its current form. Asks for special

provisions for "de minimis" joint ventures. Asks for clarification concerning Article 5, especially for the insurance sector.

Associazione Nazionale fra le Imprese Assicuratrici

1. Supports an extension of the Commission's exclusive competence in line with the one-stop shop principle, either by means of a reduction of the thresholds or by means of a procedure for multiple notifications.

British Insurers' International Committee

1. In favour of a reduction of thresholds in the context of mergers involving more than one country.
2. In favour of giving the Commission jurisdiction over mergers involving multiple national filings.
3. Concerning joint ventures, it supports either option IIa or IIb.

Confindustria

1. Favourable to the Commission's proposal to reduce the current thresholds. As an alternative it suggests a progressive lowering of the thresholds.
2. Concerning joint ventures, supports option Ia.

Chambre de Commerce et d'Industrie de Paris

1. Wishes to maintain the current thresholds. At the same time, however, asks for a harmonization of the concept of control under national legislation by means of a directive.
4. Supports the introduction of a legal basis for commitments in first phase. Asks for the introduction of new criteria in the assessment of cases.

The Dutch Employers' Association

1. Favours a reduction of the thresholds.
2. Considers multiple national notification as a problem. Supports the following solutions:
 - two national authorities involved
 - compulsory notification to the Commission only if the two national authorities involved have a compulsory system of notification. Otherwise

companies should be able to choose.

3. Favours option IIa.

Conseil Europeen de l'industrie Chimique

1. Supports the Commission's proposal to lower thresholds.
2. Concerning joint ventures, supports any proposal which would bring about similar conditions and procedures for all kinds of joint ventures.

Confederacion Espanola de Organizaciones Empresariales (views of 1995)

1. Favours a reduction of the thresholds as suggested by the Commission.

UNICE

1. A clear majority of UNICE's member federations supports a reduction of the thresholds to ECU 2b and 100 m. Nearly all member federations support maintenance of the 2/3-rule. Moreover, UNICE fully agrees with the Commission on the benefits to business of the one-stop shop.
2. In the event that the thresholds are not lowered, the majority of UNICE's member federations believe that a special procedure for dealing with multiple notification should be triggered when notification is required in two or more Member States. Voluntary systems should be included. Member States should have one week to decide on their jurisdiction.

The companies involved should have the option of notifying either the Commission or the relevant national authorities.
3. The majority of UNICE's member federations supports option Ib. However, there is also a significant support for option IIa. Urgent need to improve the current situation.
4. Requests a simplified procedure for "de minimis" cases. Supports an express legal basis for commitments in first phase.

The Chamber of Commerce and Industry of Athens

1. Wishes to maintain the current thresholds and to establish specific higher thresholds for commercial companies. However, should a reduction be necessary, then Article 9 should be enlarged. As to the solution for multiple national filings, it must be ensured that it will not raise practical difficulties.

3. Prefers option 1b for the treatment of joint ventures..

The American Chamber of Commerce in Belgium (The EU Committee)

1. Supports lowering of the thresholds (2 b and 100 m).
2. Supports EC jurisdiction in case of two or more national filings. As an alternative solution, it proposes a threshold reduction to ECU 2b and 100 m, combined with a change of the two-thirds rule into a rule based on some lower percentage.
3. In favour of option 11a.
4. Supports the proposal to use gross banking income.

FEMGED (Fédération Européenne des Moyennes et Grandes Entreprises de Distribution)

1. Against the lowering of the thresholds.

Groupement Européen des Caisses d'Epargne

1. Expresses an interest in the lowering of thresholds as a means for avoiding the need for multiple national filings. Harmonisation of national systems of control would also be desirable
2. The Commission's "second best" solution would also avoid the need for multiple national filings, but should be considered whether when a minimum of three Member States must be affected before the Community-wide significance of a merger can be affirmed.
4. Wants the current criterion for the calculation of turnover for banks to be maintained.

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