

II

(Preparatory Acts)

COMMISSION

Proposal for a Council Regulation on the control of concentrations between undertakings

⇒('The EC Merger Regulation')⇐

COM(2002) 711 *final* — 2002/0296(CNS)

(2003/C 20/06)

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

I. INTRODUCTION

1. Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings ('the Merger Regulation')⁽¹⁾ was adopted on 21 December 1989 and entered into force on 21 September 1990. It was amended by the Act of Accession of Austria, Finland and Sweden⁽²⁾ and by Council Regulation (EC) No 1310/97 of 30 June 1997 ('the amending Regulation')⁽³⁾. The Merger Regulation applies to all concentrations having a Community dimension, as defined on the basis of the annual turnover of the companies concerned, and confers exclusive jurisdiction to the Commission for such cases. The Merger Regulation thus provides a 'one-stop shop' within the European Union for the examination and control of concentrations having a Community dimension.
2. The current proposal for review of the Merger Regulation was prompted by the legal obligation to review the turnover thresholds under Article 1 and the case referral rules under Article 9⁽⁴⁾. 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 (mainly substantive and procedural issues).
3. On 11 December 2001, the Commission adopted a Green Paper on the Review of Regulation (EEC) No 4064/89 ('the Green Paper')⁽⁵⁾. That Green Paper invited comments mainly on three areas: (i) the operation of the turnover thresholds and case referral mechanisms (so-called jurisdictional issues), (ii) the substantive test to be applied for the review of concentrations by the Commission (so-called substantive issues), and (iii) procedural issues. Views were also sought on the effectiveness of the due process guarantees built into the EU merger control regime and of judicial review in merger cases.
4. Following the adoption of the Green Paper, the Commission launched a consultation of Member States, the business and legal community and other interested parties. The Council, the European Parliament and the Economic and Social Committee were also invited to express their opinions.
5. 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 turnover thresholds, but also in relation to some other aspects of the Merger Regulation. The Commission considers that it is now appropriate to propose amendments that will address these shortcomings and will thus improve the operation of merger control in the European Community.
6. In the light of the objective set by the European Council to make Community legislation more accessible and comprehensible⁽⁶⁾, and given that the proposed amendments concern various Articles of the Merger Regulation, it is proposed to replace both the current Merger Regulation and the amending Regulation by a new EC Merger Regulation, using the recasting technique⁽⁷⁾.

⁽¹⁾ OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.

⁽²⁾ Act concerning the conditions for accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden; OJ C 241, 29.8.1994, p. 57.

⁽³⁾ OJ L 180, 9.7.1997, p. 1; corrigendum in OJ L 40, 13.2.1998, p. 17.

⁽⁴⁾ See Article 1(4) and (5) and Article 9(10) of the Merger Regulation.

⁽⁵⁾ COM(2001) 745 *final*.

⁽⁶⁾ European Council meeting in Edinburgh in December 1992.

⁽⁷⁾ See the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28.3.2002, p. 1.

7. As compared with the text of the current Merger Regulation, the amendments contained in the proposed new EC Merger Regulation can be categorised as follows:

- jurisdictional issues (see section II.A below),
- substantive issues (see section II.B below),
- procedural issues (see section II.C below),
- other proposed amendments (see section II.D below).

II. OVERVIEW OF THE MOST IMPORTANT AMENDMENTS

A. Jurisdictional issues

(1) Community dimension

8. One of the aims of the proposed amendments to the Merger Regulation, as set out in the Commission's Green Paper, is an optimisation of the allocation of merger cases between the Commission and national competition authorities, in line with the principle of subsidiarity.
9. In this context, it is the Commission's stated objective to ensure that the Commission can deal with cases having a significant cross-border impact, but which are not currently caught by the turnover thresholds of Article 1(2) and 1(3) of the Merger Regulation, whilst ensuring that Member States deal with cases whose impact is mainly national or local. This would also benefit the business community by reducing legal uncertainty and costs, which have been reported to be significant in post-notification referrals. As set out in further detail below, the proposal places the exclusive right of initiative with the notifying parties at the pre-notification stage.
10. In line with the principle of subsidiarity, and in order to preserve administrative efficiency and the 'one-stop shop' concept — one of the main assets of the current system —, the Community legislator should at the same time seek to reduce the significant number of multiple filings, i.e. mergers requiring notifications in several Member States.
11. The Commission's review of the functioning of the Merger Regulation has revealed that the threshold levels in Article 1(2) as well as the two-thirds rule ⁽⁸⁾ continue to function effectively as proxies for those cases that are most appropriately dealt with at the Community level.
12. Article 1(3) has fallen short of achieving its underlying objective, i.e. to confer Commission competence over cases that affect three or more Member States ⁽⁹⁾. Given these findings, the Commission looked at various possibilities aimed at improving the functioning of Article 1(3) as set out in the Green Paper.

(a) The Green Paper proposal

13. The main suggestion set out in the Green Paper was for a so-called 'mandatory 3+ system', the perceived advantage of which would have been to automatically confer Community dimension on concentrations notifiable under clearly established national laws. Closer examination shows however that the system does not provide the initially perceived advantage of being simple, clear and legally certain.

⁽⁸⁾ It follows from Article 1(2)(b) of the Merger Regulation that a concentration does not have a Community dimension and does not therefore fall within the jurisdiction of the Commission if each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State (so-called 'two-thirds rule').

⁽⁹⁾ As set out in the Green Paper, in 2000, only about one in five cases known to be subject to multiple notifications to three or more Member States were caught by the provision. In addition, a trend was observed according to which multiple notifications involving three or more Member States are steadily increasing, and the approaching enlargement of the Community to 25 Member States as from 2004 is likely to further accentuate the negative effects of multiple filings involving a significant number of Member States.

14. The requirement to notify in three or more Member States is not a sufficient indication of the existence of a Community interest. This may be due to the existence of low jurisdictional thresholds in some Member States and applicant countries, or even due to the lack of sufficient nexus to a specific national jurisdiction.
15. The mandatory 3+ system would also introduce unacceptable legal uncertainty. Different jurisdictional tests or concepts of concentration in various Member and applicant States could lead to diverging interpretations. It seems inappropriate to base Community jurisdiction on criteria about which the merging parties, the relevant Member State and, possibly, the Commission could adopt differing views. This is particularly true for Member State jurisdictions that base their notification requirements on market share thresholds.
16. Based on the comments received, the Commission has also given serious consideration to proposals for an 'optional 3+ system', possibly combined with a veto right for the Member States concerned. Under such a system the 3+ rule would remain intact, that is the test would be whether a transaction below the Article 1(2) and 1(3) thresholds was notifiable in 3 or more Member States. The parties would first check whether the 3+ rule was met. If this were the case, the parties would have a choice: either to notify to the national jurisdictions, or to make a request that the case ought to be deemed to have a Community dimension and hence notified to the Commission. The Member States concerned could be given a right to veto the merging companies' choice to notify to the Commission instead of submitting three or more notifications to national competition authorities.
17. However, even such an improved optional 3+ system would retain many of the disadvantages of the original 3+ proposal whilst also being more complex. First, an optional 3+ system would remain a relatively crude test for 'catching' or 'missing' cross-border cases. The fact that a transaction would be notifiable in three or more Member States would not necessarily mean that the transaction had significant cross-border effects. At the same time, some cases notifiable in only one or two Member States might have significant cross-border effects and would not be caught. Second, by giving the parties the right to choose where to notify and hence the right to determine jurisdiction, there would be a risk of 'forum shopping' (or at the very least a perception thereof). A right for the Member States concerned to veto the submission of notifications to the Commission would not eliminate such problems and could create uncertainty.

(b) The Commission's proposal — a system of streamlined referrals

18. In the light of the above and taking into account the results of the public consultation the Commission has concluded that the most effective way of meeting the two main objectives outlined above, that is optimal allocation of cases and reduction in the incidence of multiple filings, could be achieved through a more streamlined system of referrals. Such a system would be based on an enhanced recourse to the Merger Regulation's referral mechanisms under Articles 9 and 22 ECMR, including their improvement and use at a pre-notification stage, so as to provide for an effective means of fine-tuning the allocation of cases brought about by the turnover thresholds of Article 1(2) and 1(3) ECMR.

19. The main elements of the proposed system are the following:

- improvement of the criteria for referrals, including a closer 'mirroring' of the criteria for referral in both directions,
- applicability of Articles 9 and 22 at the pre-notification stage. Given their superior knowledge of the circumstances of the case, the notifying parties should be given an exclusive right of initiative at this stage of the procedure. In relevant cases, this would enable them to make a reasoned request for a pre-notification referral of the case in either direction. For the sake of efficiency, the request would be deemed to be accepted if not expressly opposed within given deadlines. The relevant authorities and the Commission would be organised in an informal 'network' so as to enhance the efficiency and effectiveness of the process, an approach supported by the current level of experience in the Member States regarding merger control. The proposed changes for the pre-notification referrals have been incorporated into the proposed new Article 4(4) and 4(5),

- conferring exclusive jurisdiction on the Commission if all the Member States concerned, or a minimum number of three such Member States, agree to a case being referred under Article 22,
- possibility for the Commission to invite Member States to make referrals under Article 22, or to request the Commission to refer cases to them under Article 9; currently the Commission has no such formal 'right of initiative';

(i) Improvement of the substantive criteria in Articles 9 and 22

20. First of all, the substantive criteria for the application of both provisions are being simplified and improved ⁽¹⁰⁾. As regards Article 9, the current wording of its paragraph 2(a) requires Member States to assess whether or not the proposed concentration threatens to create or strengthen a dominant position. The Commission proposes to delete this wording so as to allow referral requests on the basis that competition would be significantly affected on a distinct market within a given Member State. National authorities would thus not be obliged to present elaborate preliminary conclusions with regard to the competitive assessment of the case. This would facilitate a speedier use of Article 9.
21. Conversely, Article 22 would be applied mainly in those cases which have a significant impact on competition beyond a single Member State. One of the initial purposes of Article 22 was to provide a possibility for Member States which do not have national merger control legislation to refer cases with an impact on trade between Member States to the Commission; today, only Luxembourg falls into this category. Nevertheless, the possibility for a single Member State to refer cases to the Commission should not be completely excluded.

(ii) Application of Articles 9 and 22 at a pre-notification stage at the request of the parties

22. The consultation showed that the main weakness is that the current referral provisions can only be used after a merger has been notified to either the Commission or the national competition authorities, as the case may be. This inevitably brings about a significant loss of time and administrative efficiency and imposes unnecessary costs and burdens on the merging companies. In Article 22 cases, experience has shown that the delay can easily amount to several months.
23. In order to address these drawbacks, it is therefore proposed in a new Article 4 paragraphs 4 and 5 to render Articles 9 and 22 applicable at a pre-notification stage, at the request of the merging parties.
24. As regards cases fulfilling the turnover thresholds of Article 1(2) or 1(3), it could be determined at an early stage whether a transaction would be better dealt with at the Member State level and referred in advance of notification. Conversely, in early application of Article 22, Member States could refer to the Commission cases remaining below the turnover thresholds of Article 1(2) and 1(3) EECMR but which are likely to have a significant cross-border impact.
25. Such referrals would be made on the basis of a request and information provided by the merging parties. As is generally the case with referrals under Articles 9 and 22 of the Merger Regulation, the competition authorities involved would retain certain discretion as to whether or not to request, grant or accept a referral.

(iii) Exclusive Community jurisdiction where all, or at least three, Member States concerned make a referral request; streamlining of Article 22 procedure

26. In order to make Article 22 an efficient mechanism for the review of cases with significant cross-border effects, and to reduce legal uncertainty, it is proposed that, where all, or at least three, Member States with jurisdiction under their national rules decide to refer a case to the Commission, the Commission should acquire exclusive jurisdiction over the case throughout the EEA (see proposed Articles 22(3) and 4(5), fourth subparagraph of the proposed new Regulation).

⁽¹⁰⁾ In part, this issue had already been set out in the Commission's Green Paper.

27. It is also proposed to clarify and streamline the procedural rules relating to joint referrals under Article 22, in light of the experience gained in the Promatech/Sulzer⁽¹⁾ and GEES/Unison⁽²⁾ cases (see Article 22(1), (2), and (4) of the proposed new Regulation). To that end, the new Regulation introduces deadlines for Member States to make referral requests and for other Member States to join such requests. For the sake of efficiency, Article 22 provides for a non-opposition procedure⁽³⁾.

(iv) Referrals at the request of the Commission

28. For both Article 9 and Article 22 of the Merger Regulation, it is proposed to expressly provide the possibility for the Commission to invite Member States to make a referral request, after the case has been notified. At a pre-notification stage, however, the Commission would simply transmit the request of the merging parties, in line with the underlying basic concept that the pre-notification referrals mechanism should only be triggered by the merging parties themselves, as is laid down in the proposed Article 4(4) and 4(5).

(v) Implications of a system of streamlined referrals

Advantages and disadvantages

29. The main advantage of this system would be its precision. Unlike relatively crude turnover or '3+' type tests, this test would form a basis for focusing on cases that have a significant cross-border impact at the Community level. The system would also have the advantage of striking a balance between Community and national interests by providing a 'two-way approach': it would allow for streamlined referrals both from and to the Commission. Last but not least, this system would also deal with the issue of case allocation in a short timeframe if triggered by the parties at the pre-notification stage. A transaction would be notified to the 'right' authority from the start, reducing legal uncertainty and cost for the merging parties.

30. As regards the business and legal communities, it should be acknowledged that they have expressed some scepticism about a more extensive use of the referral mechanism. Their criticism, however, mainly relates to the fact that the prospect of referrals *after* notification of a case to a given authority creates additional costs and legal uncertainties for the parties as their case will be dealt with by an authority different from the one to which they have initially turned. The Commission considers that the proposed amendments to the referral provisions, in particular their applicability at a pre-notification stage and the right of initiative granted to the merging parties, address most of the concerns voiced by the business and legal communities with regard to referrals.

Comparison with the modernisation of Regulation No 17

31. The EC Merger Regulation is based on the concept of exclusive jurisdiction, that is to say, a merger is to be reviewed either at the Community level or at the national level. A parallelism of jurisdiction does not exist (see Article 21(1), (2) and recital 29 of Regulation (EEC) No 4064/89).

32. Moreover, the Commission and national competition authorities do not apply the same substantive and procedural rules. Whilst the Commission reviews mergers falling within its own jurisdiction on the basis of the Merger Regulation, the national competition authorities apply their respective national legislation to mergers falling within their jurisdiction; they do not apply the Merger Regulation (see Article 21(1), (2) of the current Merger Regulation). The same basic rule also applies in a referral scenario: Referrals under Article 9 of the Merger Regulation are made with a view to the application of the national competition law of the Member State concerned, whilst cases referred to the Commission under Article 22 are reviewed on the basis of the Merger Regulation.

33. Given that cases do not qualify, a priori, for review by both the Commission and national authorities, and given that the Commission and national authorities do not apply the same substantive rules, it is not necessary to provide for mechanisms ensuring the uniform application of competition law.

⁽¹⁾ COMP/M.2698 — Promatech/Sulzer Textil, Commission Decision of 24 July 2002.

⁽²⁾ COMP/M.2738 — GEES/Unison, Commission Decision of 17 April 2002.

⁽³⁾ The same applies for the proposed Article 4(5).

(2) *Definition of a concentration*

34. Article 3 defines what is considered to be a concentration under the Merger Regulation.

(a) Change of control on a lasting basis

(i) Article 3 paragraph 1

35. The general definition in Article 3(1) has been amended so as to explicitly include the criteria according to which a concentration requires a change in control and that this control has to take place on a lasting basis. These criteria were in the past applied as unwritten criteria when determining whether an operation constituted a concentration in the sense of the Merger Regulation.

36. The criterion for a change in control is currently only detailed in the Commission notice on the concept of a concentration⁽¹⁴⁾. The way the proposed Article is formulated, the term is used in a wide sense so as to cover mergers and acquisitions, which both continue to be explicitly referred to in Article 3(1).

37. The criterion of a lasting change is currently only included in recital 23 of Regulation (EEC) No 4064/89, and is taken up in the Commission notice on the concept of a concentration.

38. It seems appropriate to complete the text of the Merger Regulation by incorporating all the major criteria that define a concentration into the definition of Article 3(1).

(ii) Article 3 paragraph 5

39. Article 3(5) remains unchanged. The provision describes certain narrowly defined situations when a concentration shall not be deemed to exist. Experience has shown that the limitations in this provision (in terms of non-voting rights and as regards the maximum period for holding on to the securities) mean that it is rarely applicable. At the same time, restrictions of this type are intended to discourage circumvention of the Merger Regulation, and thus to safeguard its effectiveness as well as the level playing field for companies in the internal market. The Green Paper therefore mooted the possibility of extending this provision so as to give it a larger field of application.

40. In the light of the changes proposed to the wording of Article 3(1), which clarify that the change of control has to take place on a lasting basis, it is not necessary to amend the specific cases laid down in Article 3(6).

41. The new wording of Article 3(1) on the other hand makes it clear, that it is not excluded that other operations, even if they do not meet the narrow criteria laid down in Article 3(6), can be considered not to constitute a concentration if it is shown that the operation in question does not constitute a change of control on a lasting basis.

(b) Multiple transactions

(i) Article 3 paragraph 4

42. The proposed new Article 3(4) now explicitly states that multiple transactions which are conditional on one another or are so closely connected that their economic rationale justifies their treatment as a single concentration shall be deemed to constitute a single concentration.

43. In the past, the Commission has had to decide on a number of occasions whether a number of transactions, which are linked in a variety of respects, should be considered as constituting a single concentration.

⁽¹⁴⁾ Commission notice on the concept of a concentration under Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ C 66, 2.3.1998, p. 5.

44. The question is relevant in determining the jurisdiction of the Commission. A transaction that by itself might not have a Community dimension because it does not meet the thresholds set out in the Merger Regulation, might nevertheless fall within the scope of the Merger Regulation as part of a concentration that is made up of more than one transaction.
45. Article 3 applies to the acquisition of 'direct or indirect control of the whole or parts of one or more other undertakings'. Apart from this general and wide definition, the only other provision directly concerned with the situation of two or more transactions constituting a single concentration is Article 5(2), second subparagraph. This provision was designed primarily to prevent circumvention of the Merger Regulation by separating one concentration into numerous transactions. The Merger Regulation has established a legal presumption that all transactions meeting the requirements of Article 5(2), second subparagraph, are to be considered as one concentration.
46. In conformity with the 'one-stop shop' system, there is no reason in principle why other multiple transactions, which are not covered by the present Merger Regulation, should not be assessed as a whole if they involve an economic link revealing economic unity between the transactions in a manner that is equivalent to a single concentration. In order to avoid artificial separation in the treatment of multiple transactions, which, from the perspective of the parties and/or of the market, are characterised by economic unity, it appears appropriate to further specify the circumstances in which multiple transactions should be considered as constituting a whole for the purpose of the Merger Regulation.
47. The Green Paper ⁽¹⁵⁾ had identified a number of specific categories for which the application of the 'one-stop shop' principle would better serve the overall aim of maintaining effective competition, as it would ensure that the totality of effects of such concentrations are subject to one coherent assessment.
48. The reactions to categorising the scenarios presented in the Green Paper as one concentration were generally positive. These scenarios are summarised in the proposed recital 16. As a matter of legislative technique, however, it is proposed to introduce a clause of general application. These criteria not only cover the scenarios that have been discussed in the Green Paper but also other scenarios which might arise in individual cases and merit an equivalent treatment.
49. The wording of this clause has been guided by the purpose of covering those cases that are so closely connected that their treatment as a single concentration is justified. At the same time the wording has to be stringent enough as not to compromise predictability in its application. Further guidance on this principle could be provided during the revision of the Commission's notice on the concept of a concentration ⁽¹⁶⁾.

(ii) Article 5 paragraph 2 second subparagraph

50. It is proposed to retain the one circumstance that had already been provided for in the Merger Regulation since its inception, i.e. Article 5(2), second subparagraph. This provision was designed primarily to prevent the circumvention of the Merger Regulation by separating one concentration into numerous transactions.
51. The wording of this provision has been tightened, however, so that transactions that are linked merely by the time criterion and the identity of the parties, but lack any economic connection, would no longer be considered as one single concentration in the future. Therefore, in future, concentrations meeting the criteria of Article 5(2), second subparagraph will not be considered to constitute one concentration, if they concern unrelated economic sectors.

⁽¹⁵⁾ Green Paper, paragraph 106 et seq.

⁽¹⁶⁾ OJ C 66, 2.3.1998, p. 5.

B. Substantive issues

52. On the substantive side, the Green Paper sought to launch a debate on two main policy questions. First, it proposed to review the respective merits of the 'dominance test', which is used in the Merger Regulation as the substantive standard to review mergers, and the 'substantial lessening of competition test' ('SLC'), which is used in certain other jurisdictions such as the United States and, since relatively recently, also the United Kingdom and Ireland. Second, it proposed to review and, if necessary, clarify the role in merger investigations of efficiency claims made by the merging parties.

(1) *The substantive test*

53. The Green Paper invited views on the effectiveness of the substantive test contained in Article 2 of the Merger Regulation, and in particular sought views on how its effectiveness compares with the 'substantial lessening of competition' (SLC) standard used in some other jurisdictions. Two principal points of view have informed the debate on the substantive test. On the one hand, the consultation revealed a certain concern as to whether the current dominance test could provide effective control in some specific situations of oligopoly, in particular in cases where the merging firms would be in a position to raise prices, and thus exercise market power, without resorting to co-ordination and without necessarily holding the largest market share in the market. The economic community seems to agree that such cases should indeed be covered. The main argument for changing to SLC would be the clarity provided by the test in these cases.

54. On the other hand, many comments in response to the Green Paper have pointed out that what matters is how the applicable legal test should be interpreted. The dominance test and SLC have produced broadly convergent outcomes and the dominance test is proving to be an instrument capable of being adapted to a wide variety of situations where market power exists. It should also be noted that the Court of Justice has not explicitly ruled on, and therefore not explicitly excluded, the possibility of addressing the effect of mergers in (non-collusive) oligopolies with no single firm being significantly larger than the others under the current dominance test⁽¹⁷⁾.

55. The Commission considers that the aim of improving legal certainty on the scope of the Merger Regulation is best served by clarifying the Regulation itself. The Commission thus proposes to insert a new Article 2(2) into the Merger Regulation, which aims to clarify the concept of dominance under the Merger Regulation.

56. The proposed definition of the dominance criterion closely follows the characterisation of a dominant position given by the Court of Justice⁽¹⁸⁾. It thereby seeks to maintain the sizeable body of case law and case practice which has been built up over the years. The proposed recital 21 has the purpose of making it clear that specific situations of oligopoly are also covered by Article 2.

57. This approach has the additional advantage of not linking the definition of dominance under the Merger Regulation to any future interpretations given by the ECJ to the concept of dominance under Article 82 of the Treaty.

58. Alongside these proposals, a draft Notice on the appraisal of horizontal mergers under Regulation (EEC) No 4064/89 will be published for public consultation. It is further proposed to amend Article 23 of the ECMR in order to establish that, for the purpose of merger control, guidance shall be given regarding the notion of dominance by a Notice issued by the Commission⁽¹⁹⁾.

⁽¹⁷⁾ In the past, the Court has shown a willingness to adopt a teleological interpretation of the notion of dominance in order not to deprive it of its *effet utile*. Such a teleological interpretation has been particularly applied in the context of the ECMR where the Court has held that it applies 'to all concentrations with a Community dimension insofar as they are likely, because of their effect on the structure of competition within the Community, to prove incompatible with the system of undistorted competition envisaged by the Treaty'. Case C-68/94, *France et al./Commission — Kali & Salz* [1998] ECR I-1375, paragraph 170.

⁽¹⁸⁾ The clarification proposed is consistent with how the European Court of Justice has defined dominance in merger cases, but is intended to more closely focus on the economic impact of concentrations. See Case T-102/96, *Gencor/Commission*, T-102/96, [1999] ECR II-753, paragraph 200.

⁽¹⁹⁾ At present, Article 23 of the ECMR confers on the Commission the power to adopt implementing provisions, but only in respect of procedural matters (notifications, time limits, and hearings as well as, since the last merger review of 1997, the procedure and time limits for the submission of commitments).

(2) *The consideration of efficiencies in merger control*

59. The Green Paper also invited views as to the proper role and scope of efficiency considerations in merger control. Many respondents to the consultation on the Green Paper were in favour of treating efficiency claims made by parties explicitly in the merger review process.
60. The Commission is of the opinion that it is legally possible to deal explicitly with the issue of efficiencies under the present substantive test and with the present and proposed wording of the Merger Regulation. This view was also shared by many respondents to the Green Paper. Article 2(1)(b) of the Merger Regulation provides a legal basis in that respect by stating that the Commission shall take account, *inter alia*, of 'the development of technical and economic progress provided it is to consumers' advantage and does not form an obstacle to competition'.

C. Procedural issues

(1) *Obligation to notify a concentration before its implementation, Article 4(1)*

61. The obligation to notify a concentration with a Community dimension to the Commission before it is put into effect is an expression of the principle of *ex-ante* merger control. Practice over the last 12 years has shown that a strict enforcement of the one-week deadline for submitting notifications (Article 4(1) of the current Merger Regulation) is neither realistic nor necessary. Given the suspensive effect of Article 7(1), it is in the undertakings' own commercial interest to obtain regulatory clearance from the Commission as soon as possible, so as to be able to complete their concentration.
62. Experience has also shown that on many occasions, the notifying parties would have preferred to submit notifications earlier than the present wording of Article 4(1) permits; the 'triggering event' currently required by the Merger Regulation is, as a general rule, the conclusion of a binding agreement between the merging parties.
63. The comments received in response to the Green Paper show broad support for a flexibilisation of both the timing of notifications and the 'triggering event' for notifying a merger. Such a flexibilisation would also bring the Community's merger control law in line with what is current practice in many other jurisdictions and recommended by the International Competition Network⁽²⁰⁾ with a view, *inter alia*, to enhancing international cooperation.
64. Accordingly, Article 4(1), first sentence, of the proposed new Regulation abandons the one-week deadline for submitting notifications but clearly spells out that the Community's system of merger review is based on *ex-ante* control ('Concentrations [. . .] shall be notified to the Commission prior to their implementation [. . .]'). Article 4(1), second subparagraph, allows notifications where the undertakings concerned demonstrate to the Commission a good faith intention to conclude a (binding) agreement and thus flexibilises the 'triggering event'.

(2) *Suspension of concentrations*

65. The obligation to suspend the implementation of a notified concentration, i.e. the prohibition to implement it pending a clearance decision of the Commission, as provided for by Article 7 of the Merger Regulation, is an expression of the system of *ex-ante* merger control.

⁽²⁰⁾ See, in particular, Section III. of the International Competition Network's Recommended Practices for Merger Notification Procedures, available at the following Internet website: <http://www.internationalcompetitionnetwork.org/practices.pdf>
Section III.A of these recommended practices reads as follows: 'Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction'.
Section III.B states: 'Jurisdictions that prohibit closing while the competition agency reviews the transaction or for a specified time period following notification should not impose deadlines for pre-merger notification'.

(i) Automatic derogation for acquisitions through the stock market

66. In line with what had been proposed in the Green Paper ⁽²¹⁾, it is proposed to enlarge the scope of application of the automatic derogation in Article 7(2) (ex-Article 7(3)) beyond public bids, so as to cover all acquisitions made from various sellers through the stock market, e.g. the so-called 'creeping take-overs', and thereby remove any legal uncertainty caused by Article 7(1) in relation to such acquisitions.

(ii) Automatic derogation for simplified procedure cases

67. As regards cases which, in general, do not lead to a combination of market positions giving rise to competition concerns, the obligation to suspend the implementation of a concentration is not an absolute requirement to ensure the effectiveness of *ex-ante* merger control. Certain types of concentrations, such as, for instance, venture capital investments, are often dependent on the parties' ability to react quickly and close their transactions before the expiry of the one-month deadline for a Phase I decision.

68. In Article 7(4) of the draft Regulation, it is therefore proposed to enable the Commission to disapply the suspensive effect laid down in Article 7(1) for categories of cases which, in general, do not lead to a combination of market positions giving rise to competition concerns. The intended categories would mainly correspond to the ones set out in the Commission notice on a simplified procedure for treatment of certain concentrations under Regulation (EEC) No 4064/89 ⁽²²⁾.

(3) Calculation of deadlines

69. The calculation of the time limits laid down in the Merger Regulation and in the Implementing Regulation should be simplified and rendered more transparent by expressing all deadlines in terms of working days ('WD', with one week generally having five working days, except if it includes official Commission holidays). This approach was also proposed by the Commission in its Green Paper ⁽²³⁾, and has received a generally positive feedback. Accordingly, the deadlines set by the Merger Regulation have been expressed in working days throughout the proposed new Regulation.

(4) A more flexible time-frame

(i) The current problem: time constraints both in Phase I and in Phase II

70. One of the most frequently reported procedural difficulties encountered under the current system is the 'time squeeze' which can occur in complex cases, and in particular (but not only) in cases involving remedies.

71. As regards Phase I, the short deadline for submission of remedies (currently three weeks from the date of notification ⁽²⁴⁾) does not always allow the Commission to identify the areas in which serious doubts may arise, to receive input from the Member States, and to discuss with the parties and market test any remedies that they may propose at that stage.

72. As regards Phase II, time constraints may already occur in the first half which is the investigation period and for which not more than six weeks can normally be allowed. This average investigation time can indeed be insufficient if a case raises a series of competition concerns or requires complex economic analysis (such as an econometric study or the evaluation of alleged efficiency gains) or where the parties want to take issue with so called 'complaints' by competitors before the Statement of Objections is issued.

⁽²¹⁾ See also Green Paper, paragraph 42.

⁽²²⁾ OJ C 217, 29.7.2000, p. 32.

⁽²³⁾ Green Paper, paragraphs 190-193.

⁽²⁴⁾ Article 18(1) of the Implementing Regulation (Regulation (EC) No 447/98 of 1 March 1998, OJ L 61, 2.3.1998, p. 1).

73. In addition, in almost every Phase II case, a 'time squeeze' is felt towards the second half of the four-month period. In particular it should be noted that the preparation of the parties' reply to the Commission's Statement of Objections (SO), the possibility for them to analyse the Commission's file (after being granted access to the file), the discussion of possible remedies with the Commission, and the preparation of the draft decision, often coincide. Moreover, Member States have repeatedly commented that the Commission does not provide the Advisory Committee with all relevant documents in time for a full discussion to take place at the meeting.

(ii) The proposed solution: more flexibility while preserving the general benefits of deadlines

74. Whilst it should be recognised that the benefits of the time limits provided for in the Merger Regulation should certainly be preserved (the speediness of the investigation and the predictability of the timeframe are widely regarded as major assets of the current system), it seems necessary to ease to a certain extent the time constraints in complex cases. That is why the Green Paper proposed the introduction of a 'stop the clock' provision, i.e. a provision allowing for an extension of the legal deadlines within which a final Commission decision must be adopted⁽²⁵⁾. The feedback received in response to the Green Paper has shown almost unanimous support for such a 'stop the clock' idea.

(iii) The proposed changes: an overview

75. Given the above, it is proposed to introduce several elements of flexibility into the timeframe of merger control procedure. The existing automatic extension of the deadline in Phase I remedy cases has been enlarged — Phase I decisions in remedy cases must be adopted after 35 working days (seven weeks) instead of the current six weeks (see Article 10(1), second subparagraph). Conversely, an automatic extension of the deadline in Phase II (which does not yet exist) should be introduced, accommodating the time constraints in typical Phase II remedy cases (see Article 10(3) first subparagraph). In order to encourage the submission of remedies at an early stage, however, this extension of the Phase II deadline should only apply if Phase II remedies are submitted on or after the 55th working day, counting from the initiation of proceedings (Article 6(1)(c) decision).

76. *In addition*, there should be an *optional* possibility to extend the deadline in complex Phase II cases (see Article 10(3), second subparagraph) by up to 20 working days. Indeed, the time constraints in complex Phase II cases (complex market investigation, possibly involving econometric studies or the analysis of alleged efficiency gains; thorough examination of the arguments put forward by the parties) can be significant even if no remedies are offered. Additional time for the investigation of complex Phase II cases is normally in the interest not only of the Commission but also of the merging companies. The parties would have the option to use the additional time to convince the Commission that all or part of the objections, which would most likely be raised in an upcoming Statement of Objections, are not well founded and should be dropped. In order to allow for sufficient planning of the various procedural steps in a Phase II investigation, it is proposed that the parties should only be able to extend the Phase II time limit once, and that they should request this within 15 working days of the beginning of Phase II, i.e. three weeks into Phase II. This allows for sufficient time for the Commission and the undertakings concerned to engage in informal discussions about the possible timing of Phase II proceedings.

77. All extensions of the timeframe should normally be triggered by the merging parties (either by means of a specific request for an optional extension or by submitting remedies and thus triggering the automatic prolongation), without the Commission having discretion to grant or refuse them. The proposal nevertheless foresees that the Commission, with the consent of the parties, could trigger the extension referred to in the preceding paragraph. The maximum extension should however not exceed 20 working days (see Article 10(3), second subparagraph).

78. The proposed key elements of a more flexible timeframe (expressed in working days) can be summarised as follows.

— automatic extension of the Phase I deadline by 10 WD to 35 WD if remedies are proposed,

⁽²⁵⁾ Green Paper, paragraphs 203-221.

- optional extension of the Phase II deadline by up to 20 WD in complex Phase II cases (at the request, or with the agreement, of the parties, to be made at the latest 15 WD after the initiation of Phase II proceedings),
- automatic extension of the Phase II deadline by 15 WD in remedy cases (unless remedies have been submitted sufficiently in advance of the deadline for commitment offers — before the 55th working day) in order to allow for better consultation of Member States.

(5) *Procedure following annulment by the European Courts*

79. Article 10(5) of the Regulation is proposed to be clarified to reflect current practice as to the procedure to be followed where the Court gives a judgment which annuls the whole or part of a Commission decision. Under the proposal, such an annulment will, if it relates to a decision that was subject to a time limit under Article 10, lead to the re-examination by the Commission with a view to adopting a new decision pursuant to Article 6(1). The new examination will be made in the light of current market conditions. In such cases, the parties will have to submit a new notification or supplement the original notification, where the original notification has become incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, a certification of this fact will suffice.

(6) *Enforcement provisions*

80. The investigative powers of the Commission in merger cases and the penalties provided for non-respect of certain rules set by the Regulation (so-called enforcement provisions) are laid down in Articles 11 to 15 of the Merger Regulation.

(i) *General principle: keeping the enforcement provisions in line with antitrust*

81. The initial text of these enforcement provisions, as introduced by Regulation (EEC) No 4064/89, was largely identical to that of the corresponding provisions in the antitrust area (Articles 11 to 16 of Council Regulation No 17). It is appropriate to bring the enforcement provisions of the new Merger Regulation in line with the corresponding provisions of the new Regulation implementing Articles 81 and 82 of the Treaty (Articles 18 to 20 and 22 to 23 thereof) with a view to rendering them more effective.

(ii) *Increase of the ceilings for fines and periodic penalty payments related to 'fact-finding'*

82. In particular, it is appropriate to raise the possible amounts of the fines and periodic penalty payments which are aimed at protecting the Commission's fact-finding through notifications and market investigations (Articles 14(1), 15(1)(a) and 15(1)(b) of the proposed new Merger Regulation). The establishment of the facts of a case forms the basis for a successful analysis of a concentration's possible impacts on competition, and it may not be falsified by misleading or incorrect information.

- The current ceiling for fines under Article 14(1), which is set at EUR 50 000, has not been changed for the last 12 years and no longer has a deterrent effect. It is proposed to raise this ceiling to 1 % of the turnover of the undertaking or association of undertakings concerned, in line with what had already been the case under the ECSC Treaty (see Article 47(3) thereof) and will now apply in the antitrust area (see Article 22 of the new Regulation implementing Articles 81 and 82 of the Treaty).
- As regards periodic penalty payments, the maximum daily amount is currently set at EUR 25 000 under Article 15(1). This amount has not been changed for the last 12 years and no longer has a sufficiently coercive effect. It is proposed to raise it to 5 % of the aggregate average daily turnover of the undertaking or association of undertakings concerned, in line with what had already been the case under the ECSC Treaty (see Article 47(3) thereof) and will now apply for the antitrust area (see Article 23 of the new Regulation implementing Articles 81 and 82 of the Treaty).

(iii) Increase of the ceilings for periodic penalty payments related to the enforcement of certain types of Commission decisions

83. The same principles as set out for fact-finding should apply to the periodic penalty payments enforcing remedy decisions (Article 15(1)(c)) or decisions ordering a de-merger (Article 15(1)(d)). They are aimed at ensuring the continued effectiveness of the Community's system of *ex-ante* merger control and the amounts chosen should have a sufficiently coercive effect. It is therefore proposed to treat these provisions the same way as the ones relating to market investigations (Articles 15(1)(a) and 15(1)(b)) and to allow for periodic penalty payments of up to 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned.

(iv) Power to take statements

84. Given the need for speed which characterises the general scheme of the Merger Regulation ⁽²⁶⁾, it is furthermore expedient to provide a possibility for the Commission to conduct interviews with natural persons. The proposed provision (Article 11(7)) fills a gap in the Commission's current powers in merger investigations by allowing for oral submissions to be recorded and used as evidence in proceedings where the interviewee consents. It also foresees the possibility to impose fines for incorrect or misleading information given in interviews (Article 14(1)(b)).

(v) No power to conduct sector inquiries or search private homes

85. Unlike the new Regulation implementing Articles 81 and 82 of the Treaty (see in particular Articles 17 and 20a thereof), however, the proposed new Merger Regulation does not provide for sector inquiries or home searches. These far-reaching powers are specific to the area of antitrust policy where the detection and prosecution of infringements pursuant to Articles 81 and 82 of the Treaty is central.

D. Other proposed amendments

(1) Article 1 paragraph 4

86. Under Article 1(4), the Commission is obliged to report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 of Article 1. The purpose is to enable the Council to decide on a possible review of the thresholds according to Article 1(5).

87. The current deadline has been renewed in the proposal in order to oblige the Commission to report again to the Council on the thresholds by 1 July 2007.

88. In order to better enable the Commission to comply with its reporting obligation, the member States will in future be held explicitly by the Regulation to provide the Commission with the necessary statistical data.

(2) Article 4 paragraph 6

89. In order to enable the Council to decide with a qualified majority about possible amendments to Article 4, in particular with a view to the proposed new referral procedures before a concentration is notified, a review clause similar to Article 1(5) is being proposed in Article 4(6). Its deadline is linked to that in Article 1(4) and 1(5).

⁽²⁶⁾ See, for instance, the judgments of the Court of First Instance of 27 November 1997 in Case T-290/94 — *Kaysersberg/Commission* [1997] ECR II-2137 (at paragraphs 113-115), of 28 April 1999 in Case T-221/95 — *Endemol/Commission* [1999] ECR II-1299 (at paragraph 68), and of 25 October 2002 in Case T-5/02 — *Tetra Laval/Commission*, not yet reported in the ECR (at paragraph 91).

(3) *The Commission's powers under Article 8 paragraph 4*

90. Article 8(4) of the current Merger Regulation deals with situations in which mergers that have already been implemented are subsequently prohibited by the Commission. That Article allows the Commission to require the separation of assets brought together, the cessation of joint control or any other action that may be appropriate to restore conditions of effective competition.
91. It has been suggested that Article 8(1), by stating that all proceedings initiated pursuant to Article 6(1)(c) shall be closed by means of a decision as provided in Article 8(2) to (5), would limit the applicability of these provisions to cases where the concentration has been notified and a second phase proceeding has been initiated. Whilst the Commission does not share this interpretation⁽²⁷⁾, it is expedient to clarify the powers conferred to it by the Regulation with regard to mergers that have already been implemented. The proposed amendments to Article 8, in particular the deletion of its current paragraph 1 (which is added to Article 6(1)(c)), remove any possible doubts as to the scope of application of Article 8(4). The new wording of Article 8(4) clarifies that the scope of application does not exclude mergers implemented without prior notification to the Commission.
92. As regards the powers conferred to the Commission, the wording of the present Article 8(4) is proposed to be modified in order to emphasise the overriding principle underlying this provision: The situation prevailing prior to the implementation of the concentration (*status quo ante*) should be restored. The Court of First Instance has supported this interpretation in its recent judgment in case *Tetra Laval v Commission* (28). Where such restoration is not fully possible through dissolution of the concentration, the second sentence of the proposed Article 8(4) provides the necessary powers for the Commission to restore the *status quo ante* as far as possible.
93. In addition to the overriding principle of restoration of the *status quo ante*, the proposed new wording is intended to express that the Commission may order any appropriate measure to ensure that conditions of effective competition are not distorted in the interim, i.e. for the transitional period until the *status quo ante* is restored. Such measures could include, *inter alia*, a requirement to hold separate the undertakings or assets brought together until they are legally separated, the cessation of the exercise of joint control or similar interim measures.

(4) *The Commission's power to enforce conditions attached to previous decisions, new Article 8 paragraph 5*

94. As regards Article 8(5) of the proposed Regulation, a specific provision is introduced which enables the Commission to take any appropriate measure to restore or maintain conditions of effective competition where a concentration has been implemented in contravention of Article 7 or of a condition attached to a Commission decision under Articles 6(1)(b) or 8(2). With the exception of interim measures, the provision will require that the criterion laid down in Article 2(4) is fulfilled. In the cases referred to in Article 2(5), the provision will require that the criteria laid down in Article 81(3) of the Treaty are not fulfilled.
95. This provision is aimed at enabling the Commission to enforce conditions attached to its decisions, in particular conditions intended to ensure that the parties comply with the commitments ('remedies') they have entered into with a view to obtaining a conditional clearance decision (see Article 8(2), second subparagraph, and Article 6(1)(b) in connection with 6(2)).

⁽²⁷⁾ Such an interpretation would run counter to the very purpose and wording of Article 8, in particular of Article 8(4), which refers to 'a concentration', without limiting the powers of the Commission to cases of 'notified' concentrations (language used elsewhere in the Merger Regulation; see for instance Articles 6, 8(2), 9(1), etc.).

⁽²⁸⁾ Judgment of the Court of First Instance of 25 October 2002 in Case T-80/02 — *Tetra Laval v Commission*, not yet reported in the ECR. The CFI held (at paragraph 36) 'first of all, that the scheme of the Regulation, and particularly the 16th recital, show that the objective of Article 8(4) is to allow the Commission to adopt all the decisions necessary for the restoration of conditions of effective competition. When, as in the present case, the concentration has been implemented pursuant to Article 7(3) of the Regulation, the separation of the undertakings involved in the concentration is the logical consequence of the decision declaring the concentration incompatible with the common market'. (NB: The text of recital 16 of Regulation (EEC) No 4064/89 is now incorporated in recital 27 of the proposed Regulation.)

96. The legal consequence of the non-compliance with a condition is that the decision no longer stands. This may not in all cases suffice to ensure compliance. Furthermore, the current enforcement powers of the Commission, i.e. fines pursuant to Article 14(3)(c) or (d), may not be sufficient in all cases to achieve the objective of restoring or maintaining conditions of effective competition.

97. With a related amendment, it is proposed to extend Article 18(2) to the provisional measures which are newly foreseen in the proposed Article 8(5).

(5) *Clearance decisions in Phase II merger cases — Article 8 paragraphs 1 and 2*

98. It is proposed to provide for a specific legal basis for unconditional clearance decisions in Phase II cases in the amended Article 8(1) of the Merger Regulation. Article 8(2) would thus be limited to the specific situation of a Phase II clearance based on remedies (commitments) submitted by the undertakings concerned.

(6) *Decisions to end Phase I — Article 6*

99. Article 6(1)(b), in conjunction with Article 6(2), provides for the possibility to clear a concentration on the basis of commitments submitted by the parties with a view to rendering the concentration compatible with the common market. The textual amendment aims to clarify the text with regard to this criterion.

100. The present text of Article 8(1) has been moved to the end of Article 6(1)(c) for the reasons set out in paragraph set out above. In this context, this wording also specifies that after the adoption of an Article 6(1)(c) decision the Commission is obliged to adopt a decision under Article 8(1) to (4), unless the concentration has been definitely abandoned. Therefore a notification may not be withdrawn by the notifying parties in Phase II, as long as the parties intend to put the deal into effect. Conversely, in Phase I the withdrawal of the notification remains possible as long as an Article 6(1)(c) has not been adopted, because Article 4(1) no longer specifies at what point in time before implementation a notification has to be submitted to the Commission.

(7) *'Ancillary restraints'*

101. As regards the treatment of restrictions directly related and necessary to the implementation of concentrations (ancillary restraints), the present text of Articles 6(1)(b), second subparagraph, and 8(2), second subparagraph, last sentence, does not appear to provide for sufficient legal clarity.

102. In its recent notice on the treatment of ancillary restraints⁽²⁹⁾, the Commission took the view that the assessment of such clauses in merger decisions is of a purely declaratory nature. Moreover, the Commission announced the abandonment of its previous practice of individually assessing and formally addressing ancillary restraints in each of its merger decisions. This new policy was intended to simplify the Commission's practice in the field of mergers and to bring it in line with the modernisation of the Community's antitrust rules (rules implementing Articles 81 and 82 of the EC Treaty).

103. It should, however, be noted that it does not clearly result from the present text of the Merger Regulation that there is no obligation for the Commission to assess and address, in its decisions, ancillary restraints if the notifying party so requests⁽³⁰⁾.

104. It is therefore proposed to modify the text of the Merger Regulation in such a way as to clearly state that the Commission's clearance decision in a merger case *shall be deemed to cover* restrictions directly related and necessary to the implementation of the concentration (see Articles 6(1)(b), 8(1) and 8(2) of the proposal, as well as recital 17).

⁽²⁹⁾ Commission notice on restrictions directly related and necessary to concentrations, OJ C 188, 4.7.2001, p. 5 (see, in particular, paragraph 2 of that notice).

⁽³⁰⁾ Judgment of the Court of First Instance of 20 November 2002 in Case T-251/00 — *Lagardère et al./Commission*, not yet reported in the ECR (see in particular paragraphs 90 and 108 of that judgment).

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

Proposal for a
COUNCIL REGULATION ~~(EEC)~~ ~~(EC)~~ No 4064/89
of 21 December 1989
on the control of concentrations between undertakings
⇒('The EC Merger Regulation') ⇐

2002/0296(CNS)

⇒(Text with EEA relevance) ⇐

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European ~~Economic~~ Community, and in particular Articles ~~83~~ and ~~308~~ thereof,

Having regard to the proposal from the Commission ⁽³¹⁾,

Having regard to the opinion of the European Parliament ⁽³²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³³⁾,

WHEREAS:

↓ new

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽³⁴⁾ has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
→₁ 1310/97 recital 4
→₂ 1310/97, recital 10
⇒ new

~~(2)~~ ~~(1)~~ Whereas For the achievement of the aims of the Treaty establishing the European ~~Economic~~ Community, ~~Article 3(1)(g)~~ gives the Community the objective of instituting 'a system ensuring that competition in the ~~common~~ ~~internal~~ market is not distorted'. ⇒Article 4(1) of the Treaty provides that the activities of the Member States and the Community shall be conducted in accordance with the principle of an open market economy with free competition. ⇐ ~~(2)~~ ⇒These principles are essential for the further development of the internal market. ⇐

⁽³¹⁾ OJ ...

⁽³²⁾ OJ ...

⁽³³⁾ OJ ...

⁽³⁴⁾ OJ L 395, 30.12.1989, p. 1; corrected version in OJ L 257, 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p. 1, corrigendum in OJ L 40, 13.2.1998, p. 17.

(3) ~~Whereas~~ The \Rightarrow completion of the internal market and of the economic and monetary union, the enlargement of the European Union, and the lowering of international barriers to trade and investment \Leftarrow will continue to result in major corporate reorganisations ~~in the Community~~, particularly in the form of concentrations.

(4) ~~Whereas~~ Such a ~~development~~ \boxtimes reorganisations \boxtimes must be welcomed \Rightarrow to the extent that they are \Leftarrow in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.

(5) ~~Whereas~~, However, it must be ensured that the process of reorganisation does not result in lasting damage to competition; ~~whereas~~ Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6)(7) ~~Whereas~~ A \Rightarrow specific legal instrument is therefore necessary \Leftarrow to permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. \Rightarrow Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and proportionality set out in Article 5 of the Treaty, this Regulation confines itself to the minimum required in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition, and does not go beyond what is necessary for that purpose. \Leftarrow

(7)(6) ~~Whereas~~ Articles \boxtimes 81 \boxtimes and \boxtimes 82 \boxtimes , while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, ~~however~~, sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. ~~(8) whereas~~ This Regulation should therefore be based not only on Article \boxtimes 83 \boxtimes but, principally, on Article \boxtimes 308 \boxtimes of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, ~~including~~ \boxtimes and also \boxtimes with regard to concentrations on the markets for agricultural products listed in \boxtimes Annex I \boxtimes to the Treaty.

(8)(9) ~~Whereas~~ The provisions to be adopted in this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State \boxtimes . \boxtimes ; ~~whereas~~ \Rightarrow Such concentrations should, as a general rule, be reviewed exclusively at the Community level, in application of a 'one-stop-shop' system and in compliance with the principle of subsidiarity. \Leftarrow ~~(29) Whereas~~ Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9)(10) ~~Whereas~~ The scope of application of this Regulation should ~~therefore~~ be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. \rightarrow_1 ~~whereas~~, \Rightarrow The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article ~~145~~ \boxtimes 202 \boxtimes of the Treaty, is in a position regularly to review them, as well as the rules regarding pre-notification referral, in the light of the experience gained; \Leftarrow \Leftarrow \Rightarrow this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. \Leftarrow

(10)(11) ~~Whereas~~ A concentration with a Community dimension \Rightarrow should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there. \Leftarrow

(11) ~~Whereas~~ The rules governing the referral of concentrations \Rightarrow from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity \Leftarrow ; \rightarrow_2 ~~whereas~~ these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the 'one-stop-shop' principle \Leftarrow .

↓ new

(12) The Commission should be able to refer to a Member State concentrations which significantly affect competition on a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned.

↓ 1310/97, recital 1 (adapted)
⇒ new

(13) ~~Whereas~~ Concentrations with a ⇒ significant cross-border effect, a concept which is distinct from that of effects on trade between Member States contained in Articles 81 and 82 of the Treaty, ⇐ may qualify for examination under a number of national merger control systems ⇐ if they fall below the turnover thresholds referred to in this Regulation. ⇐ ~~whereas~~ Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. ⇐ The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed. Such concentrations should be deemed to have a Community dimension if at least three Member States concerned request the Commission to review them. ⇐

↓ new

(14) The undertakings concerned should be granted the possibility to request referrals to or from the Commission before a concentration is notified so as to improve further the efficiency of the system for the control of concentrations within the Community.

↓ 1310/97, recital 5 (adapted)
⇒ new

(15) ~~Whereas~~ It is ~~appropriate~~ ☒ expedient ☒ to define the concept of concentration in such a manner as to cover operations bringing about a lasting change ⇐ in the control of the undertakings concerned and therefore ⇐ in the structure of the market. ~~Whereas in the specific case of joint ventures~~ It is ☒ therefore ☒ appropriate ☒ also ☒ to include within the scope and procedure of Regulation (EEC) No 4064/89 ☒ this Regulation ☒ all full-function joint ventures ☒ performing on a lasting basis all the functions of an autonomous economic entity. ☒

↓ new

(16) It is appropriate to treat as one and the same concentration two or more transactions which are conditional on one another or are so closely connected that their economic rationale justifies their treatment as a single transaction. This can be the case, in particular, for transactions involving the acquisition of joint control of one part and sole control of another part of an undertaking; transactions where two or more undertakings exchange assets, regardless of whether these constitute legal entities or not; or transactions by which control is acquired either through a public bid or from various sellers through a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

~~(17)~~~~(25)~~ ~~Whereas~~ This Regulation should still apply where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration. ⇒ The Commission should not be obliged to assess such restrictions in individual cases when applying this Regulation. The extent to which restrictions are directly related and necessary to the implementation of the concentration should be determined by the competent judicial or other authority after the concentration has been declared compatible with the common market. ⇐

~~(18)~~~~(12)~~ ~~Whereas~~ The arrangements to be introduced for the control of concentrations should, without prejudice to Article ~~86~~~~(2)~~ of the Treaty, respect the principle of non-discrimination between the public and the private sectors. ~~whereas~~, In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.

~~(19)~~~~(13)~~ ~~Whereas~~ It is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to maintain and develop effective competition in the common market. ~~whereas~~, In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty ~~establishing the European Community~~ ⇒ and Article 2 of the Treaty on European Union. ⇐

~~(20)~~~~(14)~~ ~~Whereas~~ ⇒ In order to ensure a system of undistorted competition in the common market operating in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community. ⇐ ~~this Regulation~~ It ~~should~~ therefore establish the principle that a concentration with a Community dimension which creates or strengthens a ~~dominant~~ position as ~~a~~ result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market. ⇒ Irrespective of the structure of the relevant markets affected by a concentration or of the manner in which economic power is manifested or exercised, dominance should be defined in such a way as to reflect a considerable level of economic power held by one or more undertakings. ⇐

↓ new

(21) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, the elimination of important competitive constraints that the merging parties exerted on each other, as well as the reduction of competitive pressure on the remaining competitors, may, particularly in these markets, be detrimental to competition unless these effects would be constrained by the reaction of competitors, customers or consumers. For that purpose, the notion of dominance within the meaning of this Regulation should, therefore, encompass situations in which, because of the oligopolistic structure of the relevant market and the resulting interdependence of the various undertakings active on that market, one or more undertakings would hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, even without coordination by the members of the oligopoly. In making this appraisal, account should be taken of the specific features of the markets under examination, such as the level of capacity constraints, the degree of product differentiation, or the functioning of the bidding process. Consideration should also be given to, *inter alia*, the likely reactions of actual and potential competitors, as well as of customers, and any efficiencies brought about by the merger.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)

→₁ 1310/97, recital 5

~~(22)~~ →₁ whereas In addition, to the dominance test set out in Article 2 of that Regulation, it should be provided that the Commission apply the criteria of Article ~~81~~ (1) and (3) of the Treaty should be applied to such joint ventures performing on a lasting basis all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent. ←

↓ new

(23) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.

↓ new

(24) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.

↓ 1310/97, recital 8 (adapted)

⇒ new

~~(25)~~ ⇒ Where the undertakings concerned modify a notified concentration in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. The Commission should have at its disposal appropriate instruments to ensure the enforcement of these commitments and to deal with situations where they are not fulfilled. ~~whereas~~ Transparency and effective consultation of Member States and as well as of interested third parties should be ensured in both phases of the procedure.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)

→ ₁ 1310/97, recital 9

⇒ new

~~(26)~~~~(15)~~ ~~Whereas~~ Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. ~~whereas~~, Without prejudice to Articles ~~81~~ and ~~82~~ of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.

~~(27)~~~~(16)~~ ~~Whereas~~ The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore ~~the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.~~

~~(28)~~~~(17)~~ ~~Whereas to~~ ~~To~~ ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension ~~following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement, for instance on the basis of an agreement in principle or a letter of intent, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.~~ ~~The implementation of concentrations~~ should be suspended until a final decision ~~of the Commission~~ has been taken. ~~whereas~~, ~~However~~, it should be possible to ~~derogate from this suspension at the request of the undertakings concerned,~~ where appropriate. ~~whereas~~, In deciding whether or not to grant a ~~derogation~~, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned ~~by a concentration~~ or to third parties, and the threat to competition posed by the concentration. ~~provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary;~~ ~~whereas~~ In the interests of legal certainty, the validity of transactions must nevertheless be protected as much as necessary. ~~The Commission should have the power to adopt regulations granting a full derogation by operation of law for certain categories of concentrations which, in general, do not lead to a combination of market positions giving rise to competition concerns.~~

~~(29)~~~~(18)~~ ~~Whereas~~ A period within which the Commission must initiate proceedings in respect of a notified concentration and ~~periods~~ a period within which it must ~~give~~ ~~take~~ a final decision on the compatibility or incompatibility with the common market of a ~~notified~~ ~~that~~ concentration should be laid down. ~~These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.~~

~~(30)~~~~(20)~~ ~~Whereas~~ The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

↓ new

(31) The Commission and the competent authorities of the Member States should form together a network of public authorities, applying their respective competencies in close cooperation with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. For that purpose it is necessary to set up efficient arrangements for information and consultation. Further modalities for cooperation within the network should be laid down and revised by the Commission, in close cooperation with the Member States.

↓ new

(32) The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ⁽³⁵⁾. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

~~(33)~~~~(19)~~ ~~Whereas~~ The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; ~~whereas~~ the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and ~~interested~~ ~~third parties~~, must also be given the opportunity to be heard.

~~(34)~~~~(21)~~ ~~Whereas~~, ⇒ In order to properly appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should in particular have the right to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should have the right to affix seals for the period of time necessary for the inspection, normally not for more than 72 hours, and to ask for any information relevant to the subject matter and purpose of the inspection. Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection ordered by Commission decision; it results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation; the case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers. ⇐

↓ new

(35) When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against themselves or against others the existence of such infringements.

⁽³⁵⁾ OJ C 364, 18.12.2000, p. 1.

↓ new

(36) For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of the rights of defence of the undertakings concerned, in particular the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network and with the competent authorities of third countries should likewise be safeguarded.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)

⇒ new

(37) ~~(22)~~ Whereas Compliance with this Regulation ~~should be enforceable, as appropriate,~~ by means of fines and periodic penalty payments, ~~whereas~~ The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article ~~229~~ of the Treaty.

(38) ~~(26)~~ Whereas The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.

(39) ~~(27)~~ Whereas The Member States ~~may~~ ~~should~~ not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. ~~whereas~~ The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. ~~whereas~~ The Member States concerned must act promptly in such cases; ~~whereas~~ this Regulation cannot, because of the diversity of national law, fix a single ~~deadline~~ ~~time limit~~ for the adoption of ~~remedies~~ final decisions under national law.

(40) ~~(28)~~ Whereas, Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article ~~296~~ of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.

(41) ~~(30)~~ Whereas The conditions in which concentrations involving ~~Community~~ undertakings having their seat or their principal fields of activity in the Community are carried out in ~~non-member~~ ~~third~~ countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for ~~Community~~ such undertakings.

(42) ~~(31)~~ Whereas This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned: ~~⇒~~, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law. ~~⇐~~

↓ 1310/97, recital 14 (adapted)

(43) ~~Whereas~~ The Commission should be given the power to adopt implementing provisions where necessary,

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13

HAS ADOPTED THIS REGULATION:

Article 1

Scope

↓ 1310/97 Article 1, point 1(a) (adapted)

1. Without prejudice to ~~Article~~ Articles 4(5) and 22, this Regulation shall apply to all concentrations with a Community dimension as defined in paragraphs 2 and 3 of this Article ~~paragraphs 2 and 3.~~

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)

2. ~~For the purposes of this Regulation, a~~ A concentration has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ~~ECU~~ EUR 5 000 million; and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ~~ECU~~ EUR 250 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.

↓ 1310/97 Article 1, point 1(b) (adapted)

3. ~~For the purposes of this Regulation, a~~ A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ~~ECU~~ EUR 2 500 million;
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ~~ECU~~ EUR 100 million;
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ~~ECU~~ EUR 25 million; and
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ~~ECU~~ EUR 100 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.

↓ 1310/97 Article 1, point 1(c)
⇒ new

4. Before 1 July ⇒2007⇐ the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3. ⇒Member States shall regularly provide the Commission with the statistical data necessary to prepare this report and possible proposals pursuant to paragraph 5.⇐

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

- (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;
- (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

↓ new

2. For the purpose of this Regulation, one or more undertakings shall be deemed to be in a dominant position if, with or without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)

⊗ 3. ⊗ 2- A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

⊗ 4. ⊗ 3- A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

↓ 1310/97 Article 1, point 2 (adapted)

~~5.4.~~ 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~~ ~~81~~(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

In making this appraisal, the Commission shall take into account in particular:

- whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,
- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where ⇒a change of control on a lasting basis results from⇐

- (a) ~~the merger of~~ two or more previously independent undertakings ⇒or parts of undertakings⇐
~~merge, or~~
- (b) ~~the acquisition,~~ by one or more persons already controlling at least one undertaking, or ~~by~~ one or more undertakings ~~acquire,~~ whether by purchase of securities or assets, by contract or by any other means, ~~of~~ direct or indirect control of the whole or parts of one or more other undertakings.

~~2. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).~~

~~3. For the purposes of this Regulation, control~~ ~~Control~~ shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- (a) ownership or the right to use all or part of the assets of an undertaking;
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

~~3.4.~~ Control is acquired by persons or undertakings which:

- (a) are holders of the rights or entitled to rights under the contracts concerned; or
- (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

↓ new

4. Two or more transactions which are conditional on one another or are so closely connected that their economic rationale justifies their treatment as a single transaction shall be deemed to constitute one and the same concentration arising on the date of the last transaction, provided that the transactions taken as a whole satisfy the requirements of paragraph 1.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

⊗ 5. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b). ⊗

⊗ 6. ⊗ 5. A concentration shall not be deemed to arise where:

- (a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;
- (b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
- (c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of the ~~Fourth Council Directive 78/660/EEC⁽³⁶⁾ of 25 July 1978 on the annual accounts of certain types of companies, as last amended by Directive 84/569/EEC⁽³⁷⁾~~, provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations ⇒ and pre-notification referral at the request of the notifying parties ⇐

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission ⇒ prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

⁽³⁶⁾ OJ L 222, 14.8.1978, p. 11 ⊗, as last amended by Directive 2001/65/EC of the European Parliament and of the Council of 27 September 2001, OJ L 283, 27.10.2001, p. 28 ⊗.

⁽³⁷⁾ ~~OJ L 314, 4.12.1984, p. 28.~~

For the purposes of this Regulation, the term 'notified concentration' shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term 'concentration' includes intended concentrations within the meaning of the second subparagraph.↵

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties ↗ undertakings concerned ↘, ↗ their country of origin, ↘ the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

↓ new

4. Prior to the notification of a concentration within the meaning of paragraph 1, the undertakings or persons referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration affects competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State concerned shall, within 10 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the concentration. Where the Member State concerned takes no such decision within that period, it shall be deemed to have agreed.

Unless the Member State concerned disagrees, the Commission, where it considers that such a distinct market exists, and will be affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national legislation on competition.

The decision whether or not to refer the case shall be taken within 20 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides to refer the whole of the case to the competent authorities of the Member State concerned, no notification shall be made pursuant to paragraph 1.

Article 9(6) to (10) shall apply *mutatis mutandis*.

5. With regard to a concentration which would not have a Community dimension within the meaning of Article 1, the persons or undertakings concerned may, prior to its notification to the competent authorities of one or more Member States, inform the Commission by means of a reasoned submission that the concentration has significant cross-border effects and should therefore be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

The Member State or States concerned shall decide, within 10 working days of receiving the submission, whether or not to request the Commission to examine the concentration. Where a Member State takes no such decision within the aforementioned period of 10 working days, it shall be deemed to have adopted a decision to make such a request to the Commission. No notification of the concentration shall be submitted to the Member State or States concerned before the decision whether or not to request has been adopted.

Where all the Member States concerned, or at least three such Member States, have requested the Commission to examine the concentration, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2 of this Article.

In all other cases, the Commission may, at the latest 10 working days after the expiry of the period set in the third subparagraph, decide to examine, in accordance with a request received pursuant to this paragraph, any concentration which it regards as having significant cross-border effects. The Commission shall inform the Member States and the undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration.

Where the Commission decides to examine the concentration, it may request the submission of a notification pursuant to paragraphs 1 and 2. The Member States or States having made the request to the Commission shall not apply their national legislation on competition to the concentration.

Article 22(5) shall apply *mutatis mutandis*.

6. Following the report referred to in Article 1(4) and on a proposal from the Commission, the Council, acting by a qualified majority, may revise this Article.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of ~~Article 1(2)~~ this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the ~~transaction~~ concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall, unless they concern unrelated economic sectors, be treated as one and the same concentration arising on the date of the last transaction.

↓ 1310/97 Article 1, point 4, first indent
(adapted)

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, ~~as regards Article 1(2) and (3), the sum of the following income items as defined in Council Directive 86/635/EEC⁽³⁸⁾ of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions~~, after deduction of value added tax and other taxes directly related to those items, where appropriate:

- (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 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;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and para-fiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

↓ 1310/97 Article 1, point 4, second indent
(adapted)

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of ~~Article 1(2) and (3)~~ this Regulation shall be calculated by adding together the respective turnovers of the following:

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13

- (a) the undertaking concerned;
- (b) those undertakings in which the undertaking concerned, directly or indirectly:
 - (i) owns more than half the capital or business assets, or

⁽³⁸⁾ OJ L 372, 31.12.1986, p. 1.

- (ii) has the power to exercise more than half the voting rights, or
 - (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
 - (iv) has the right to manage the undertakings' affairs;
- (c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);
 - (d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
 - (e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

↓ 1310/97 Article 1, point 4 (adapted)

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of ~~Article 1(2) and (3)~~ this Regulation .

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13

- (a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);
- (b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.
 - (a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.
 - (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

↓ 1310/97 Article 1, point 5(a), first indent (adapted)
⇒ new

The A decision declaring the a concentration compatible shall be deemed to also cover restrictions directly related and necessary to the implementation of the concentration.

↓ 1310/97 Article 1, point 5(a), second indent (adapted)
 →₁ Corrigendum, OJ L 40, 13.2.1998, p. 17
 ⇒ new

- (c) →₁ 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. ☒ Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), ☒ unless the undertakings concerned have abandoned the concentration.←

↓ 1310/97 Article 1, point 5(b) (adapted)
 →₁ Corrigendum, OJ L 40, 13.2.1998, p. 17

- ₁2. 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 ☒ shall ☒ declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission 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 rendering the concentration compatible with the common market.

- ₁3. 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.

- ₁4. In the cases referred to in paragraph 3, the Commission← may take a decision under paragraph 1, without being bound by the ~~deadlines~~ ☒ time limits☒ referred to in Article 10(1).

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
 →₁ 1310/97, Article 1, point 5(c)
 →₂ Corrigendum, OJ L 40, 13.2.1998, p. 17

- ₁→₂5.←← The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

↓ 1310/97 Article 1, point 6(a) (adapted)
⇒ new

1. A concentration ~~with~~ a Community dimension ~~as defined in Article 1,~~ ~~or which is to be examined by the Commission pursuant to Article 4(5),~~ shall not be ~~put into effect~~ ~~implemented~~ either before its notification or until it has been declared compatible with the common market pursuant to a decision under ~~Article~~ ~~Articles~~ 6(1)(b), 8(1) or ~~Article~~ 8(2), ~~or~~ on the basis of a presumption according to Article 10(6).

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)
→₁ 1310/97 Article 1, point 6(c)
⇒ new

~~2. 3.~~ →₁ Paragraph 1 ~~shall not prevent the implementation of a public bid~~ ~~or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers,~~ ~~which has been notified to the Commission in accordance with Article 4(1) provided that~~

⇒(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

⇒(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 4 ~~3~~.

↓ 1310/97 Article 1, point 6(d) (adapted)

~~3. 4.~~ The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or ~~3~~ ~~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~~ ~~the~~ concentration or on a third party and the threat to competition posed by the concentration. ~~That~~ ~~Such a~~ 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~~ ~~be it~~ before notification or after the transaction.

↓ new

4. The Commission may, by regulation, define categories of concentrations for which a derogation within the meaning of paragraph 3 from the obligations imposed in paragraphs 1 and 2 shall be deemed to have been granted subject to the concentration being notified and to any other requirements defined in such a regulation. Such categories may only cover concentrations which, in general, do not lead to a combination of market positions giving rise to competition concerns.

↓ 1310/97 Article 1, point 6(e) (adapted)
⇒ new

5. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market ~~⇒ such as a stock exchange ⇐~~, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

Article 8

Powers of decision of the Commission

1. ~~Where~~ Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(3) and, in the cases referred to in Article 2(5), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market. ~~Without prejudice to Article 9, all proceedings initiated pursuant to Article 6(1)(c) shall be closed by means of a decision as provided for in paragraphs 2 to 5.~~

The ~~A~~ decision declaring the ~~a~~ concentration compatible shall ~~be deemed to~~ also cover restrictions directly related and necessary to the implementation of the concentration.

↓ 1310/97 Article 1, point 7(a) (adapted)
⇒ new

2. Where the Commission finds that, following modification by the undertakings concerned ~~if necessary~~, a notified concentration fulfils the criterion laid down in Article 2(3) ~~(2)~~ and, in the cases referred to in Article 2(4) ~~(5)~~, the criteria laid down in Article ~~85~~ 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

~~The~~ The Commission ~~may~~ may attach to its decision 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 rendering the concentration compatible with the common market.

The ~~A~~ decision declaring the ~~a~~ concentration compatible shall ~~be deemed to~~ also cover restrictions directly related and necessary to the implementation of the concentration.

↓ 1310/97 Article 1, point 7(b) (adapted)

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(4) ~~(3)~~ or, in the cases referred to in Article 2(4) ~~(5)~~, does not fulfil the criteria laid down in Article ~~85~~ 81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
⇒ new

4. Where a concentration has already been implemented and is declared incompatible with the common market, the Commission may, in a decision pursuant to paragraph 3 or by separate decision, require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration. In circumstances where restoration of the situation prevailing prior to the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible.

↓ new

The Commission may order any appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

The Commission may adopt interim measures to ensure that conditions of effective competition are not distorted.

↓ new

5. Where a concentration has been implemented in contravention of Article 7, or of a condition attached to a decision under Articles 6(1)(b) or 8(2), the Commission may take any measure appropriate to restore or maintain conditions of effective competition, including interim measures. A decision requiring the undertakings concerned to dissolve the concentration or imposing any other measures, with the exception of interim measures, may only be taken where the criterion laid down in Article 2(4) is fulfilled, and in the cases referred to in Article 2(5), where the criteria laid down in Article 81(3) of the Treaty are not fulfilled.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

~~5.~~~~6.~~ 6. The Commission may revoke the decision it has taken pursuant to ~~paragraph~~ paragraphs 1 or 2 where:

- (a) the declaration of compatibility 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.

~~6.~~~~7.~~ 7. In the cases referred to in paragraph ~~5~~ 6, the Commission may take a decision pursuant to paragraphs 1 to 4, ~~3, without being~~ It shall not be bound by the ~~deadline~~ time limits referred to in Article 10(3).

↓ new

8. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

↓ 1310/97 Article 1, point 8(a)
⇒ new

2. Within ⇒10 working days⇐ of the date of receipt of the copy of the notification a Member State, ⇐on its own initiative or upon the invitation of the Commission,⇐ may inform the Commission, which shall inform the undertakings concerned, that:

↓ 1310/97 Article 1, point 8(a)
⇒ new

(a) a concentration significantly ⇐affects competition⇐ 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.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market ~~and that such a threat exists~~, either:

(a) it shall itself deal with the case in accordance with this Regulation ~~in order to maintain or restore effective competition on the market concerned~~; or

↓ 1310/97 Article 1, point 8(b) (adapted)

(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~~ legislation on competition .

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)

If, however, the Commission considers that such a distinct market ~~or threat~~ does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned, ~~and~~ and shall itself deal with the case in accordance with this Regulation ~~and~~.

↓ 1310/97 Article 1, point 8(b) (adapted)

In cases where a Member State informs the Commission ~~and~~ pursuant to paragraph 2(b) ~~and~~ 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.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
→₁ Corrigendum, OJ L 3, 7.1.1998, p. 16
⇒ new

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:
 - (a) as a general rule within the ~~six-week~~ period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or
 - (b) within ⇒65 working days⇐ at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), ~~second subparagraph~~, (3) or (4) to maintain or restore effective competition on the market concerned.
5. If within the ⇒65 working days⇐ referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).
6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than ⇒90 working days⇐ after the Commission's referral.
7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of →₁ the existence of entry barriers or of consumer preferences⇐, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.
8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186 ~~243~~ of the Treaty, for the purpose of applying its national ~~competition law~~ legislation on competition.

↓ 1310/97 Article 1, point 8(c)

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)
 →₁ 1310/97 Article 1, point 9(a)
 →₂ Corrigendum, OJ L 40, 13.2.1998, p. 17
 ⇒ new

Article 10

Time limits for initiating proceedings and for decisions

1. ~~Without prejudice to Article 6(4),~~ The ~~the~~ decisions referred to in Article 6(1) must be taken within ~~25 working days~~ at most. That period shall begin on the ~~working~~ day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the ~~working~~ day following that of the receipt of the complete information.

That period shall be increased to ~~35 working days~~ ~~where~~ if the Commission receives a request from a Member State in accordance with Article 9(2)₁ or where, ₂ the undertakings concerned ~~offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.~~

2. Decisions ~~taken~~ pursuant to Article 8~~(1)~~ or ~~(2)~~ concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the ~~deadline~~ ~~time limit~~ laid down in paragraph 3.

3. Without prejudice to Article 8~~(6)~~ ~~(7)~~, ~~(8)~~ decisions ~~taken~~ pursuant to Article 8~~(1)~~ to ~~(3)~~ concerning notified concentrations must be taken within not more than ~~90 working days~~ of the date on which the proceedings are initiated. ~~That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.~~

↓ new

At any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the consent of the notifying parties. The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
→₁ 1310/97 Article 1, point 9(b)
⇒ new

4. →₁ The periods set by paragraphs 1 and 3 ← shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an ~~investigation~~ ~~inspection~~ ~~by decision pursuant to Article 13~~.

5. Where the Court of Justice gives a ~~Judgement~~ ~~judgment~~ which annuls the whole or part of a Commission decision ~~taken under this Regulation~~ which is subject to a time limit set by this Article, ⇒ the concentration shall be re-examined by the Commission in the light of current market conditions with a view to adopting a decision pursuant to Article 6(1). ←

↓ new

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification has become incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the second subparagraph.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)

6. Where the Commission has not taken a decision in accordance with ~~Article~~ ~~Articles~~ 6(1)(b), ~~or~~ ~~6(1)(c)~~ ~~or Article~~ 8(1), 8(2) or 8(3) within the ~~deadlines~~ ~~time limits~~ set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

Article 11

Requests for information

1. In ~~carrying~~ ~~order to carry~~ out the duties assigned to it by this Regulation, the Commission may, ⇒ by simple request or by decision, ← ~~obtain all necessary information from the Governments and competent authorities of the Member States, from~~ ~~require~~ the persons referred to in Article 3(1)(b), ~~and from~~ ~~as well as~~ undertakings and associations of undertakings, ~~to provide all necessary information~~.

2. When sending a ~~simple~~ request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, ~~specify what information is required and fix the time limit within which the information is to be provided, as well as~~ the penalties provided for in Article 14~~(1)(e)~~ for supplying incorrect ~~or misleading~~ information.

↓ new

3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authority of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected.

6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview and indicate the penalties provided for in Article 14 for supplying incorrect or misleading information.

Where an interview is conducted in the premises of an undertaking, the Commission shall inform the competent authority of the Member State in whose territory the interview takes place. If so requested by the competent authority of that Member State, its officials may assist the officials and other persons authorised by the Commission to conduct the interview.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

Article 12

~~Investigations~~ ~~Inspections~~ by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the ~~investigations~~ ~~inspections~~ which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13~~(3)~~ ~~(4)~~. The officials of the competent authorities of the Member States ~~who are~~ responsible for conducting ~~those investigations~~ ~~these inspections~~ ~~as well as those authorised or appointed by them~~ shall exercise their powers ~~in accordance with their national law~~.

2. If so requested by the Commission or by the competent authority of the Member State within the ~~whose~~ territory of which the investigation ~~the inspection~~ is to be carried out ~~conducted~~, ~~officials of~~ ~~and other accompanying persons authorised by~~ the Commission may assist the officials of ~~that~~ the authority in carrying out their duties concerned.

Article 13

~~Investigative powers of the Commission~~ The Commission's powers of inspection

1. In carrying order to carry out the duties assigned to it by this Regulation, the Commission may ~~undertake all necessary investigations into~~ conduct all necessary inspections of undertakings and associations of undertakings.

2. ~~To that end the~~ The officials ~~and other accompanying persons~~ authorised by the Commission ~~shall be empowered~~ to conduct an inspection shall have the power:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other business records related to the business, ~~irrespective of the medium on which they are stored~~;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

3. ~~2.~~ The officials ~~of the Commission~~ ~~and other accompanying persons~~ authorised by the Commission ~~authorised to carry out the investigations~~ to conduct an inspection shall exercise their powers ~~on~~ upon production of ~~an~~ a written authorisation in writing specifying the subject matter and purpose of the investigation ~~inspection~~ and the penalties provided for in Article 14(1)(d) in ~~cases where~~ case the production of the required books or other business records related to the business is incomplete ~~or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading~~. In good time before the investigation ~~inspection~~, the Commission shall ~~inform, in writing~~ give notice of the inspection to the competent authority of the Member State ~~within the~~ in whose territory of which the inspection is to be carried out ~~conducted~~ and ~~of the identities of the authorised officials~~.

4. ~~3.~~ Undertakings and associations of undertakings shall ~~be~~ are required to submit to investigations ~~inspections~~ ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation ~~inspection~~, appoint the date on which it shall ~~be~~ is to begin and ~~state~~ indicate the penalties provided for in Articles 14(1)(d) and 15(1)(b) and the right to have the decision reviewed by the Court of Justice. ~~The~~ Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

4. ~~The Commission shall in good time and in writing inform the competent authority of the Member State within the territory of which the investigation is to be carried out of its intention of taking a decision pursuant to paragraph 3. It shall hear the competent authority before taking its decision.~~

5. Officials of ~~as well as those authorised or appointed by~~ the competent authority of the Member State ~~within the~~ in whose ~~territory of which the investigation~~ inspection ~~is to be carried out~~ conducted ~~shall~~, at the request of that authority or of the Commission, ~~actively~~ assist the officials ~~of~~ and other accompanying persons authorised by ~~the Commission in carrying out their~~ duties. ~~To this end, they shall enjoy the powers specified in paragraph 2.~~

↓ new

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13

↓ new

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

Article 14

Fines

1. The Commission may by decision impose on ~~the persons referred to in Article 3(1)(b),~~ undertakings or associations of undertakings fines ~~not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5~~ where, intentionally or negligently:

- (a) ~~they fail to notify a concentration in accordance with Article 4;~~
- ~~(a)~~ (b) they supply incorrect or misleading information in a ~~submission, certification,~~ notification ~~or supplement thereto,~~ pursuant to ~~Article~~ ~~Articles~~ ~~4,~~ ~~or~~ ~~10(5), 22(3) or 22(4);~~
- ~~(b)~~ (c) they supply incorrect ~~or misleading~~ information in response to a request made pursuant to Article 11~~(2)~~ or ~~in an interview pursuant to Article 11(7);~~
- ~~(c)~~ in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;
- (d) they produce the required books or other ~~business~~ records ~~related to the business~~ in incomplete form during ~~investigations~~ ~~inspections~~ under Article 12 or 13, or refuse to submit to an ~~investigation~~ ~~inspection~~ ordered by decision taken pursuant to Article 13 ~~(4).~~

↓ new

- (e) in response to a question asked in accordance with Article 13(2)(e),
- they give an incorrect or misleading answer,
 - they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
 - they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);
- (f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. Under the conditions set out in paragraph 1, the Commission may by decision impose fines of from EUR 1 000 to 50 000 on the persons referred to in Article 3(1)(b).

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)
 →₁ Corrigendum, OJ L 3, 7.1.1998, p. 16
 ⇒ new

~~3.~~ ~~2.~~ The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they:

- (a) ~~fail to comply with an obligation imposed by decision pursuant to Article 7(4) or 8(2), second subparagraph;~~
- (a) fail to notify a concentration in accordance with ~~Article~~ ~~Articles~~ ~~4,~~ ~~22(3) or 22(4)~~ prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);

- (b) ~~put into effect~~ implement a concentration in breach of Article 7; ~~(1) or disregard a decision taken pursuant to Article 7(2);~~
- (c) ~~put into effect~~ implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not ~~take the~~ comply with any measures ordered by decision pursuant to Article 8(4) or (5)
- (d) (a) fail to comply with a condition or an obligation imposed by decision pursuant to ~~Article~~ Articles 6(1)(b), 7(4) (3) or 8(2), second subparagraph.
4. 3. In ~~setting~~ fixing the amount of a ~~the~~ fine, regard shall be had to the nature , and gravity and duration of the infringement.
5. 4. Decisions taken pursuant to paragraphs 1, ~~and~~ 2 and 3 shall not be of a criminal law nature.

Article 15

Periodic penalty payments

1. The Commission may by decision impose on ~~the persons referred to in Article 3(1)(b),~~ undertakings or associations of undertakings ~~concerned~~ periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:

- (a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11 (3)
- (b) to submit to an ~~investigation~~ inspection which it has ordered by decision taken pursuant to Article 13 (4)
- (c) (a) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), 7(4) 7(3) or 8(2), second subparagraph, or
- (d) (b) ~~to apply the~~ to comply with any measures ordered by decision pursuant to Article 8(4) or (5)

2. For the purposes laid down in paragraph 1, 1 The the Commission may by decision impose on the persons referred to in Article 3(1)(b) periodic penalty payments of up to ~~ECU~~ EUR 100 000 for each working day of delay calculated from the date set in the decision. ~~in order to compel them:~~

- (a) ~~to comply with an obligation imposed by decision pursuant to Article 7(4) or 8(2), second subparagraph, or~~
- (b) ~~to apply the measures ordered by decision pursuant to Article 8(4).~~

3. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which ~~it was the purpose of~~ the periodic penalty payment was intended to enforce, the Commission may ~~set~~ fix the ~~total~~ definitive amount of the periodic penalty payments at a ~~lower~~ figure lower than that which would arise under the original decision.

Article 16

Review by the Court of Justice

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)
 →₁ 1310/97 Article 1, point 10(a)
 ⇒ new

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 ~~229~~ of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of ~~this Regulation~~ shall be used only for the purposes of the relevant request, investigation or hearing.
2. Without prejudice to Articles 4(3), 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in ~~Article 6(3)~~ ~~Article 7(4)~~ ~~Article 8(2) to (6)~~ and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

↓ 1310/97 Article 1, point 10(b) (adapted)
 ⇒ new

2. By way of derogation from paragraph 1, a decision ~~to grant a derogation from suspension as referred to in~~ ~~Article 7(4)~~ ~~Article 8(4) or (5)~~ may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
 (adapted)
 →₁ 1310/97 Article 1, point 11
 ⇒ new

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within ~~three~~ 3 working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. →₁ Such documents shall include commitments ~~which are intended by the parties to form the basis for a decision~~ offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Articles 6(1)(b) (2) or 8(2), second subparagraph ←.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Articles 8 (1) to (6) , 14 or 15, or any provisions are adopted pursuant to Article 23.

4. The Advisory Committee shall consist of representatives of the competent authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than ~~14 days~~ 10 working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. ⇒The Commission shall publish the opinion of the Advisory Committee in the *Official Journal of the European Communities*, having regard to⇨ the legitimate interest of undertakings in the protection of their business secrets.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8⇨(1) to (6), 14 and 15⇨ in the *Official Journal of the European Communities*.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

⊗Application of the Regulation and⊗ Jurisdiction

↓ 1310/97 Article 1, point 12(a) (adapted)

⊗1. This Regulation alone shall apply to concentrations as defined in Article 3, and Regulations No 17⁽³⁹⁾, (EEC) No 1017/68⁽⁴⁰⁾, (EEC) No 4056/86⁽⁴¹⁾ and (EEC) No 3975/87⁽⁴²⁾ shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.⊗

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

⊗2.⊗1- Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

⊗3.⊗2- No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of ⇨Articles 4(4),⇨ 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or (5), to take the measures strictly necessary for the application of Article 9(8).

⊗4.⊗3- Notwithstanding paragraphs 1 and 2 ⊗2 and 3,⊗ Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

⁽³⁹⁾ OJ 13, 21.2.1962, p. 204/62.

⁽⁴⁰⁾ OJ L 175, 23.7.1968, p. 1.

⁽⁴¹⁾ OJ L 378, 31.12.1986, p. 4.

⁽⁴²⁾ OJ L 374, 31.12.1987, p. 1.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within \Rightarrow 25 working days \Leftarrow of that communication.

Article 22

~~Application of the Regulation~~ Referral to the Commission

↓ 1310/97 Article 1, point 12(a) (adapted)

~~1. This Regulation alone shall apply to concentrations as defined in Article 3, and Regulations No 17 ^(*), (EEC) No 1017/68 ^(**), (EEC) No 4056/86 ^(**) and (EEC) No 3975/87 ^(**) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have their object or effect the coordination of the competitive behaviour of undertakings that remain independent.~~

↓ new

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects competition within the territory of the Member State or States making the request and trade between Member States.

Such a request shall be made at most within 20 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 20 working days from the date of its receipt by the Commission, during which time all national procedures relating to the concentration shall be suspended.

Where a Member State concerned takes no decision as to whether or not to join the request within the aforementioned period of 20 working days, it shall be deemed to have adopted a decision to join the request.

3. Where all the Member States which would be competent to review the concentration under their national legislation on competition, or at least three such Member States, have requested the Commission to examine a concentration, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with Article 4.

4. In all other cases, the Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, in accordance with a request received pursuant to paragraphs 1 or 2, any concentration which it regards as having significant cross-border effects. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration.

^(*) OJ L 13, 21.2.1962, p. 204/62.

^(**) OJ L 175, 23.7.1968, p. 1.

^(**) OJ L 378, 31.12.1986, p. 4.

^(**) OJ L 374, 31.12.1987, p. 1.

The Commission shall inform the Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall not continue to apply their national legislation on competition to the concentration.

↓ 1310/97 Article 1, point 12(b) (adapted)

↓ 1310/97 Article 1, point 12(c) (adapted)
⇒ new

⊗5.⊗4. Articles 2 ⇒, 4(2) to (3)⇐, 5, 6, ⇒and 8 to 21⇐ shall apply ⇒where the Commission examines a concentration pursuant to paragraphs 3 or 4.⇐ Article 7 shall apply to the extent that the concentration has not been put into effect ⊗implemented⊗ on the date on which the Commission informs the parties ⊗undertakings concerned⊗ that a request has been made.

↓ new

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 4.

↓ 1310/97 Article 1, point 12(c)

↓ new

6. The Commission may inform one or several Member States that it considers a concentration within the meaning of paragraph 1 to have significant cross-border effects. In that case, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)
→₁ 1310/97 Article 1, point 13(a)
⇒ new

Article 23

Implementing provisions

⊗1.⊗ The Commission shall have the power to adopt ⊗lay down⊗:

⊗(a)⊗ implementing provisions concerning the form, content and other details of notifications ⇒and submissions⇐ pursuant to Article 4, →₁,

⊗(b) implementing provisions concerning ⊗ Articles ⇒4(4), 4(5)⇐ 7, 9, 10 and 22⇐, and hearings pursuant to Article 18,

↓ 1310/97 Article 1, point 13(b) (adapted)
 →₁ Corrigendum, OJ L 40, 13.2.1998, p. 17
 ⇒ new

⊗(c)⊗ The Commission shall have the power to lay down the procedure →₁ and time limits for the submission ⇒and implementation⇐ of commitments pursuant to Articles 6(2) and 8(2),⇐

⊗(d) implementing provisions concerning hearings pursuant to Article 18,⊗

↓ new

(e) administrative fees for submission of notifications pursuant to Article 4(1).

2. The Commission shall publish guidance on the principles governing the assessment of concentrations pursuant to Article 2.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13 (adapted)

Article 24

Relations with ~~non-member~~ ⊗third⊗ countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a ~~non-member~~ ⊗third⊗ country.

2. Initially not more than one year after the entry into force of this Regulation and thereafter periodically the Commission shall draw up a report examining the treatment accorded to ~~Community~~ undertakings ⊗having their seat or their principal fields of activity in the Community,⊗ in the terms referred to in paragraphs 3 and 4, as regards concentrations in ~~non-member~~ ⊗third⊗ countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a ~~non-member~~ ⊗third⊗ country does not grant ~~Community~~ undertakings ⊗having their seat or their principal fields of activity in the Community,⊗ treatment comparable to that granted by the Community to undertakings from that ~~non-member~~ country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for ~~Community~~ undertakings ⊗having their seat or their principal fields of activity in the Community⊗.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 234 ⊗307⊗ of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

↓ new

Repeal

1. Without prejudice to Article 26(3), Council Regulations (EEC) No 4064/89 and (EC) No 1310/97 are repealed with effect from 1 May 2004.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13
(adapted)
⇒ new

⊗ Article 26 ⊗

Entry into force ⊗ and transitional provisions ⊗

1. This Regulation shall enter into force on ⇒ the twentieth day following that of the publication of this Regulation in the *Official Journal of the European Communities* ⇐.

↓ new

2. This Regulation shall be applicable from 1 May 2004.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13

↓ new

3. Regulation (EEC) No 4064/89 shall continue to 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) of that Regulation before the date of application of this Regulation, subject, in particular, to the provisions governing applicability set out in Article 25(2) and (3) of Regulation (EEC) No 4064/89 and Article 2 of Regulation (EEC) No 1310/97.

↓ Act of Accession of A, S and FIN Article 29
(adapted)

⊗ 4. ⊗ 3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of entry into force ⊗ application ⊗ of this Regulation. The provision of paragraph 2, second alternative, applies in the same way to proceedings initiated by a competition authority of the new Member States or by the EFTA Surveillance Authority.

↓ Corrigendum, OJ L 257, 21.9.1990, p. 13

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

Done at Brussels, [. . .]

For the Council

The President

...

↑

ANNEX

Correlation table

Regulation (EEC) No 4064/89	This Regulation
Article 1(1), (2) and (3)	Article 1(1), (2) and (3)
Article 1(4)	Article 1(4), first sentence
—	Article 1(4), second sentence
Article 1(5)	Article 1(5)
Article 2(1)	Article 2(1)
—	Article 2(2)
Article 2(2)	Article 2(3)
Article 2(3)	Article 2(4)
Article 2(4)	Article 2(5)
Article 3(1)	Article 3(1)
Article 3(2)	Article 3(5)
Article 3(3)	Article 3(2)
Article 3(4)	Article 3(3)
—	Article 3(4)
Article 3(5)	Article 3(6)
Article 4(1), first sentence	Article 4(1), first subparagraph
Article 4(1), second sentence	—
—	Article 4(1), second and third subparagraphs
Article 4(2) and (3)	Article 4(2) and (3)
—	Article 4(4) to (6)
Article 5	Article 5
Article 6(1)(a) and (b)	Article 6(1)(a) and (b)
Article 6(1)(c)	Article 6(1)(c), first sentence
Article 6(2) to (5)	Article 6(2) to (5)

Regulation (EEC) No 4064/89	This Regulation
Article 7(1)	Article 7(1)
Article 7(3)	Article 7(2)
Article 7(4)	Article 7(3)
—	Article 7(4)
Article 7(5)	Article 7(5)
Article 8(1)	Article 6(1)(c), second sentence
—	Article 8(1)
Article 8(2), (3) and (4)	Article 8(2), (3) and (4)
—	Article 8(5)
Article 8(5)	Article 8(6)
Article 8(6)	Article 8(7)
—	Article 8(8)
Article 9(1) to (9)	Article 9(1) to (9)
Article 9(10)	—
Article 10(1) and (2)	Article 10(1) and (2)
Article 10(3)	Article 10(3), first subparagraph, first sentence
—	Article 10(3), first subparagraph, second sentence
—	Article 10(3), second subparagraph
Article 10(4), (5) and (6)	Article 10(4), (5) and (6)
Article 11(1)	Article 11(1)
Article 11(2)	—
Article 11(3)	Article 11(2)
Article 11(4)	Article 11(4), first sentence
—	Article 11(4), second and third sentences
Article 11(5), first sentence	—
Article 11(5), second sentence	Article 11(3)
Article 11(6)	Article 11(5)
—	Article 11(6) and (7)
Article 12	Article 12
Article 13(1), first subparagraph	Article 13(1)
Article 13(1), second subparagraph, introductory words	Article 13(2), introductory words
Article 13(1), second subparagraph, point (a)	Article 13(2)(b)
Article 13(1), second subparagraph, point (b)	Article 13(2)(c)
Article 13(1), second subparagraph, point (c)	Article 13(2)(e)
Article 13(1), second subparagraph, point (d)	Article 13(2)(a)
—	Article 13(2)(d)
Article 13(2)	Article 13(3)
Article 13(3)	Article 13(4), first and second sentences
Article 13(4)	Article 13(4) third sentence
Article 13(5)	Article 13(5)
Article 13(6), first sentence	Article 13(6)
Article 13(6), second sentence	—
—	Article 13(7) and (8)

Regulation (EEC) No 4064/89	This Regulation
Article 14(1) introductory words	Article 14(2)
—	Article 14(1) introductory words
Article 14(1)(a)	—
Article 14(1)(b)	Article 14(1)(a)
Article 14(1)(c)	Article 14(1)(b) and (c)
Article 14(1)(d)	Article 14(1)(d)
—	Article 14(1)(e) and (f)
Article 14(2), introductory words	Article 14(3), introductory words
Article 14(2)(a)	Article 14(3)(d)
—	Article 14(3)(a)
Article 14(2)(b) and (c)	Article 14(3)(b) and (c)
Article 14(3)	Article 14(4)
Article 14(4)	Article 14(5)
Article 15(1), introductory words	Article 15(1), introductory words
Article 15(1)(a) and (b)	Article 15(1)(a) and (b)
Article 15(2), introductory words	Article 15(2)
Article 15(2)(a)	Article 15(1)(c)
Article 15(2)(b)	Article 15(1)(d)
Article 15(3)	Article 15(3)
Articles 16 to 20	Articles 16 to 20
Article 21(1)	Article 21(2)
Article 21(2)	Article 21(3)
Article 21(3)	Article 21(4)
Article 22(1)	Article 21(1)
Article 22(3)	—
—	Article 22(1) to (4)
Article 22(4)	Article 22(5)
Article 22(5)	—
—	Article 22(6)
Article 23	Article 23(1)
—	Article 23(2)
Article 24	Article 24
—	Article 25
Article 25(1)	Article 26(1)
—	Article 26(2)
Article 25(2)	Article 26(3)
Article 25(3)	Article 26(4)
—	Annex