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Geographic Allocation of Turnover under the EC Merger Regulation

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I. INTRODUCTION

In order for the European Commission to have jurisdiction to vet a concentration under the Merger Regulation¹ the concentration must have a “Community dimension”. The Regulation defines Community dimension in Article 1(2) on the basis of three turnover thresholds:

“For the purposes of this Regulation, a concentration has a Community dimension where: (a) the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 5,000 million; and (b) the aggregate *Community-wide* turnover of each of at least two of the undertakings concerned is more than ECU 250 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover with *one and the same Member State.*” (emphasis added).

Whereas the ECU 5,000 million threshold does not require a geographic allocation, the ECU 250 million threshold requires an allocation of turnover to the Community, while the two-thirds threshold requires an allocation of turnover to a single Member State. In most cases it will be obvious whether or not the concentration has a Community dimension and for those the Commission will simply rely on the accounts of the parties.² But sometimes this is not so, and in these cases the method applied when allocating the turnover geographically, may be decisive for whether or not the concentration has a Community dimension, which in turn may prove decisive for whether or not the concentration is successful. This article shall therefore examine how to make the geographic allocation, and, in particular, provide solutions to those

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¹ Council Regulation (EEC) No. 4064/89 of 21 December 1989, on the control of concentrations between undertakings O.J. L 395, 30 December 1989; corrected version: O.J. L 257, 21 September 1990.

² However, often the company accounts are not well suited for making the calculations required under the Regulation. For instance D. Livingston, *Competition Law and Practice*, FT Law & Tax., 1995, at p. 732, notes that “many English and Scottish companies’ accounts divide their world-wide turnover by reference to their activities in three or four areas, the United Kingdom, Europe and the rest (giving North America separate treatment if they have significant business there). They frequently do not distinguish between European Community and EFTA [European Free Trade Association] turnover. Turnover in the Republic of Ireland is often treated as if it were generated in the United Kingdom. In the case of a hostile takeover, the result may be that a bidder has no way of knowing whether to notify the Commission or national merger control authorities and has to make fail-safe notifications to both.”

problems which the allocation most often gives rise to. It is important to be aware that in high-profile borderline cases it may be necessary to make a detailed analysis of all sales to decide whether the Commission has jurisdiction to vet the concentration. This article will be based on a number of illustrative examples, some of which may appear to concern insignificant cases, such as the purchase of a car. The examples are intended to illustrate a principle which must be applied, not only to the one car sold in the example, but to all those thousands of cars and other products which are sold in the Community.

It is also important to emphasize that neither the Merger Regulation nor the Commission's notice on calculation of turnover provide any substantial guidance with regard to the geographic allocation of turnover. Moreover, even though the Commission's merger decisions and the legal literature frequently touch upon the issue, it is often difficult to draw any clear guidelines from these sources. Hence, by analysing the available sources, endeavour will be made to identify the law in this field. In the majority of the situations the law has not yet been clarified, and in these situations workable solutions will instead be identified within the framework provided by the Merger Regulation. These solutions, however, shall only be considered to be proposals for solutions and shall not be considered to reflect binding law.

In order to allocate turnover geographically, it is necessary to identify the sale which is to be "allocated geographically". Accordingly, I will first identify this sale. Allocating turnover generated by the sale of tangible products and turnover generated by the provision of services create different problems. Therefore, I will first examine the allocation of turnover with regard to tangible products and, following this, turn to the difficult problems which services create.³ Particular problems arise where the geographic territory of the Community changes. In the final part, I will therefore explain how these problems are best solved with regard to allocation of turnover.

II. THE RELEVANT SALE

1. *Sales out of the Group*

Article 5 of the Merger Regulation provides detailed provisions on the calculation of the three turnover-based thresholds. Thus, the turnover which must be allocated geographically must be calculated in accordance with Article 5, meaning that the relevant sale must be the one identified by Article 5.

According to Article 5 the relevant turnover of a party to a merger is the turnover of the full group to which this party belongs, not just the turnover of the party itself. Article 5(1), first subparagraph, *in fine* therefore explicitly provides that the relevant turnover "shall not include the sale of products or the provision of services between any" undertakings belonging to the same group as the one to which the party to the

³ Even though, for instance, computer software may be classified as a service rather than as a product, a sale of a computer game or of a word processing program is normally more akin to the sale of a tangible product and in such case it shall be treated like a product.

merger belongs. This means that the relevant sale is the first sale to an undertaking which does not form part of the group as defined in Article 5(4).⁴

Example: The computer manufacturer JCN produces computer hard disks in New York State and ships all of its production to Ireland. Eighty percent of the hard disks are sent to an Irish company in the JCN group assembling computers, whilst the last 20 percent are sold to an Irish company that is not a member of the JCN group. Even if the hard disk manufacturer registers all sales as sales to Europe, under the Merger Regulation only the 20 percent sold to a non-member company of the JCN group will be calculated as a European sale. If the Irish JCN assembly plant sells all its computers to a South American distributor not part of the JCN group, this sale must be calculated towards the JCN sale and the turnover hereby generated will not be attributed to the Community or any Member State therein.

2. *Sales through Agents*

A sale may be effected in many different ways. A company may distribute its products through sales subsidiaries (the sale to the subsidiary is an intra-group sale) or through independent distributors (the sale to the distributor is a sale out of the group). However, a third possibility exists, namely the sale through an agent. Agents neither form part of the group nor do they purchase the products. The agent simply provides the producer with a service in that the agent assists the producer with the sale. In return, the agent will normally receive a commission.⁵ Accordingly, the fact that the producer delivers a product to the agent will not be seen as a relevant sale. Only the sale to a third-party (via the agent) shall be calculated as a relevant sale.

Example: Matahari, a Japanese producer of widgets, channels its sales to the Scandinavian market through Sol A/B, an agent based in Sweden. Of the Scandinavian sales, 40 percent goes to Sweden whereas 30 percent goes to Norway and Denmark respectively. Even though all of Matahari's Scandinavian sales are channelled through its Swedish agent, only the 40 percent which is sold to Swedish customers shall be counted as Swedish sales.

III. TANGIBLE PRODUCTS

1. *Place of Purchaser, Place of Delivery*

Article 5(1), second subparagraph, provides:

⁴ With regard to the definition of the group as laid down in Article 5(4), see M.P. Broberg, *The European Commission's Jurisdiction under the Merger Control Regulation*, Nordic Journal of International Law, Vol. 63, pp. 17–108, at pp. 58–97.

⁵ When calculating the turnover of an agent the products sold shall not be counted as earned turnover, only the commission received constitutes such turnover. In *Péchiney World Trade/Minemet* (Case No. IV/M473) Commission Decision of 20 July 1994, the Commission appears to have taken the same approach; see further para. 10 of this Decision.

“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.”

This provision shows that the geographic allocation is made with reference to the place of the purchaser of the product in question.

The place of the purchaser is, however, not an unambiguous concept. A British national may go to Italy to buy a brand new Ferrari which he thereupon drives back home.⁶ Or an Anglo-French company may take delivery of some goods in Le Havre, whilst the billing is made to the company's Irish subsidiary and the company's headquarters is in London.

The Commission, in its notice on calculation of turnover,⁷ simply notes that:

“...turnover should be attributed to the place where the customer is located because that is, in most circumstances, where a deal was made, where the turnover for the supplier in question was generated and where competition with alternative suppliers took place.”

Unfortunately, the Commission does not go on to provide any substantive guidance on how to decide the location of the customer. It therefore appears doubtful whether the quoted statement provides any real help in the allocation of turnover under the Merger Regulation.

P. Bos, J. Stuyck and P. Wytinck,⁸ write that:

“...as an instrument used to measure economic achievement and thereby economic power, turnover should be linked to market share, if it is to have any relevance, while market share is, of course, linked to the relevant geographic market in which the undertaking in question is competing for the preference of the consumer.”

It seems that, essentially, these authors only say the same as the Commission; namely, that the relevant location is where the seller competed to make the sale. These authors go on to note that this location must be “where the recipient of goods has acquired these and not where he will use these.” The authors also find that the:

“...basic assumption is that turnover should be allocated to the territory where the underlying economic transaction has had its incidence on competition. Normally, this will be the territory where the customer has directly or indirectly elicited competition by being active on the demand side of a relevant geographic market, and not where the undertaking, selling the product, or providing the service is established.”

This seems to be in full conformity with the Commission's view that the relevant location is where competition with alternative suppliers took place. On the other hand, it is not clear whether it provides any further guidance to this.

To allocate the turnover according to the domicile of the purchaser can provide an

⁶ Example adapted from Commission *Notice on calculation of turnover* under Council Regulation (EEC) No. 4064/89 of 21 December 1989, on the control of concentrations between undertakings, para. 46.

⁷ *Id.*

⁸ *Concentration Control in the European Economic Community*, Graham & Trotman Ltd., London, 1992, at p. 136.

incomplete reflection of the purchase.⁹ This is obvious with regard to the previous example concerning the purchase of a Ferrari where the car is purchased in Italy, but the purchaser is domiciled in Britain. Likewise, to let the place where, in legal terms, the sale of the good or the provision of the service was concluded be decisive, also appears to inadequately reflect the place of purchase.¹⁰ The better approach appears to be to hold the place of the purchaser to be where the product is physically delivered.¹¹ This approach has the great merit of clarity with regard to tangible products as, in principle, these can only be in one place at a time, making the application of the rule fairly straightforward. Thus, where the aforementioned British national goes to Italy to buy a Ferrari, the sale should be allocated to Italy rather than Britain. And where an Anglo-French company takes delivery of some goods in Le Havre, the sale of these goods should be allocated to France.¹²

2. *Place where the Product is used*

Whether or not the sale is to an end user is immaterial, just like it is immaterial whether or not the purchaser intends to use the product in the country where it has been delivered.¹³

Example: A Canadian producer of car engine warmers delivers twenty containers to a European car-parts wholesaler. The containers are delivered in Rotterdam in the Netherlands and thereupon the engine warmers are distributed to the wholesaler's European outlets; half of them go to Norway, the other half to Sweden. Even though half of the engine warmers end up in Norway, i.e. outside the Community, the sale will be classified as a Community sale.

The situation would be different if instead the producer had delivered ten containers directly to Norway and ten containers to Sweden. In this case only the ten containers delivered in Sweden will be counted towards the Canadian company's Community-wide turnover.

3. *Three Guiding Rules*

To require that the parties to a concentration examine the geographic allocation of every single sale will, in almost all cases, be wholly disproportionate, both because it will often be so obvious that the thresholds have or have not been met, so that such

⁹ S. O'Keefe, *Merger Regulation Thresholds: An Analysis of the Community-Dimension Thresholds in Regulations 4064/89*, ECLR, 1994, pp. 21–31, at p. 22, apparently finds that "Article 5(1) states...that [the geographic allocation of turnover] is based on the domicile of the recipient of the goods or services."

¹⁰ D. Berlin, *Contrôle Communautaire des Concentrations*, Éditions A. Pedone, Paris, 1992, at p. 110, appears to be in preference of this approach.

¹¹ This may not be the same place as where, in legal terms, delivery has taken place.

¹² In Commission *Notice on calculation of turnover*, *supra*, footnote 6, at para. 46, note 9, the Commission explicitly notes that "where the place where the customer was located when purchasing the goods or service and the place where the billing was subsequently made are different, turnover should be allocated to the former."

¹³ See *ibid.*, para. 47.

examination will be superfluous, and because such examination may be very costly for the parties. It is therefore submitted that three guiding rules or presumptions shall apply.

Firstly, where an agent or a sales subsidiary has been assigned a given geographic sales area, it seems fair to presume that all sales made by this agent or subsidiary shall be allocated to this area. Thus, if a sales subsidiary is assigned the sales to South America, it is fair to presume that none of the sales effected by this subsidiary shall be counted as Community-wide turnover. On the other hand, if a sales subsidiary is assigned the sales to the Nordic countries, this presumption is not of much help as these countries include both Community Member States (Denmark, Finland and Sweden) and non-Community States (Iceland and Norway). Hence, in this latter case, it may be necessary to make a thorough investigation into the sales subsidiary's division of sales between Nordic Community Member States and Nordic non-Community Member States.¹⁴

Secondly, in the case of direct exports, the relevant country must be presumed to be the one to which the goods are shipped, even though this country may differ from the one where the purchaser is resident and from the place where the performance takes place.^{15,16}

Example: An Austrian-based chain of computer retailers purchases a container of laptops from an Irish producer. The container is shipped to Germany for sale in the chain's German outlets and the contract is performed when the container leaves the Irish plant. Even though the purchaser is situated in Austria, the turnover derived from this sale must be allocated to Germany, as this is the country where the laptops are delivered.

Thirdly, in the case of indirect exports, i.e. where a sale is made to a purchaser situated in the same country as the seller and this purchaser re-sells the goods to someone in another country, the place of the first purchaser is decisive. This means that, in the case of indirect exports, the sale must be categorized as domestic.

Example: A Spanish wine producer sells all of its production to a Spanish wine merchant. The wine merchant exports 99 percent of the wine so that almost all of the producer's wine ends up outside Spain. Nevertheless, all of the producer's turnover must be allocated to Spain.¹⁷

¹⁴ For a concordant view, see C. Jones and F. Enrique González-Díaz, *The EEC Merger Regulation*, Sweet & Maxwell, London, 1992, at p. 18.

¹⁵ See also Commission *Notice on calculation of turnover*, *supra*, footnote 6, para. 47; and Jones and González-Díaz, *id.*

¹⁶ In this regard it does not matter whether the seller itself carries the transport to the purchaser or whether the transport is carried out by an independent shipper. For the same view, see P. Stockenhuber, *Die Europäische Fusionskontrolle—Das materielle Recht*, Nomos Verlagsgesellschaft, Baden-Baden, 1995, at p. 166.

¹⁷ M. Clough, *EC Merger Regulation—A Practical Guide to the EC Merger and Acquisition Rules*, Financial Times Management Report, 1994, at p. 142, notes that "where Japanese companies sold to export houses in Japan on free on board (f.o.b.) terms even if the goods are then exported to the EC" this situation would, presumably, be treated as a domestic sale. See, in support of this, Jones and González-Díaz, *supra*, footnote 14, at p. 18. The situation is, of course, different if the Japanese company sells directly to the EC on terms. In this case the goods are shipped directly to the Community and must be considered to be a sale thereto, although in legal terms the goods are delivered when on board the ship and although the purchaser pays for the freight. See in partial support of this, Bos *et al.*, *supra*, footnote 8, note 36, at page 136, and more doubtful, T. Soames, *The "Community Dimension" in the EEC Merger Regulation: The Calculation of the Turnover Criteria*, *European Competition Law Review*, 1990, pp. 213–225, at p. 217.

4. *Sale of Rights to Tangible Products*

In some situations a tangible product is sold without this meaning that the seller will direct the goods to the purchaser.

Example: An American company owns a cargo of crude oil which is on its way from Saudi Arabia to Rotterdam in the Netherlands. The American company sells the cargo to a Dutch company, which in turn sells the cargo to a Swiss company. The Swiss sells the cargo to a trader in Milan, Italy, who sells it to another company in Milan.

While all these deals have taken place, the cargo has been on its way to the Netherlands where delivery will take place. Nevertheless, even though the sale from the Dutch to the Swiss companies concerned a tangible product which would be delivered in the Netherlands, it would be misleading to hold this to be a domestic Dutch sale. Likewise, when the Milanese trader sells the cargo to another Milanese company, this cargo is to be delivered in the Netherlands, but it seems rather misleading to hold this to be a sale from Milan to the Netherlands.

Essentially the sale concerns an intangible right to a tangible product, rather than a sale of the tangible product itself. This has obvious parallels to the provision of a service. Accordingly, the place of the purchaser should not be considered to be the place of delivery but rather the place of residence. This means that even if the Milanese trader bought the cargo from the Swiss company over his mobile phone while driving through the Netherlands, the sale should still be allocated to Italy.¹⁸

IV. SERVICES

1. *The Main Rule*

Services create special problems because they do not move like a tangible good. If a German goes to Denmark to buy a car, he purchases the good in Denmark, and as Denmark is the place of delivery, the sale must be allocated thereto. The fact that the German subsequently drives his new BMW back to Munich is immaterial in this respect. But what if a Swedish company asks a London-based firm of solicitors to provide advice in a competition case before the European Commission? Part of the advice may be given in meetings in London, in Stockholm and in Brussels. Another part may be given over the phone, by fax, or by mail. And the London solicitors may also contact the Commission in Brussels directly. Really, there can hardly be any doubt that the service is going from London to Sweden, and accordingly the turnover should be allocated to Sweden.

We might, however, complicate the situation a little more. Again the London-based firm of solicitors provide advice. This time it is to the London-based subsidiary of a Japanese company, which is considering acquiring a Germany company. Should the

¹⁸ This approach is similar to the one which applies when allocating turnover generated through the provision of services.

turnover generated in this case be allocated to Britain, to Japan, or perhaps to Germany? Strong arguments may be put forward for any of them.

It is clear that a workable main rule must be construed. Christopher Jones and F. Enrique González-Díaz have proposed that in the case of services the turnover shall “be attributed to the country in which the consumer receives the benefit of the service in question.”¹⁹ This presumption will work well in most cases, such as where the service is a stay in a hotel or the provision of office-cleaning. With regard to the above given examples it may, however, be difficult to determine precisely where the benefit is received. Perhaps this is why the Commission, in its Notice, explicitly provides that “the second subparagraph of Article 5(1) does not focus on where a good or service is enjoyed or the benefit of the good or service derived.”²⁰

Article 5(1) focuses on the place of the consumer of the service.²¹ With regard to certain types of services the consumer must go to the place of the seller to obtain the service. This is, for instance, the case with regard to hotels and casinos. In other situations the service is provided at the place of the purchaser. This is, for example, the case with regard to level advice and office cleaning.

Generally, this means that where the purchaser obtains the service at the place of the service provider, the sale must be allocated to this place. However, where the purchaser may stay at home while obtaining the service, the sale should be allocated to the place of the purchaser, which, in practice, may be interpreted to mean the residence of the purchaser.

Example: If a British national buys a British Airways flight to Greece in his local travel agency and thereupon in Greece buys a number of stays with small Greek hotels, British Airways would have to allocate the sale of the flight in accordance with those rules which apply to international transport,²² whereas the Greek hotels would have to allocate the sales of the hotel stays to Greece. However, if instead the British national had bought a package holiday to Greece in the local travel agency, the travel agency would be the one who had purchased the flights and the hotel rooms and thereupon sold them on. It seems rather obvious that the travel agency is providing a service to Britain, not to Greece. Indeed, if the travel agency was the one to arrange the package holidays it would have purchased the hotel rooms from Greece in order to resell them to British nationals and it would therefore seem illogical that the sales derived from these sales should be allocated to Greece. Hence, it seems that the better view is to apply a residence criterion to the package holiday situation.

Whilst the above main rule may solve most of the situations involving services, some types of services may still create particular problems. These services will be given special attention below.

¹⁹ Jones and González-Díaz, *supra*, footnote 14, at p. 19.

²⁰ Commission Notice on calculation of turnover, *supra*, footnote 6, para. 46.

²¹ Bos *et al.*, *supra*, footnote 8, at p. 136, appear to focus more on the place where a particular service causes impact on competition than on the place of the consumer of the service.

²² See below, Section IV.2(b).

2. *Transport and Courier Services*

(a) *Transport of goods*

International transport and courier services pose particular jurisdictional problems.²³ With regard to courier services and transport of goods, the main rule set out just above provides that the residence of the purchaser must be decisive. Thus, if a company from Munich asks a courier service to take a parcel to Vienna in Austria, the turnover generated by the service must be allocated to Germany. This, however, is not likely to make a great difference as the courier service is likely to take a more or less equal number of mailings back from Austria in order to exploit as fully as possible the transport capacity. Thus the main rule appears to provide a satisfactory solution in this case.²⁴

Where, for instance, the lorries of a Danish hauler go to Italy full of goods but return empty, all of this hauler's turnover is likely to be generated exclusively from clients resident in Denmark. Consequently, all turnover may be allocated to Denmark whereby the international dimension of the transaction is not reflected. On the other hand, the fact that all lorries return empty presumably indicates that the hauler is only aiming his sales at the Danish market and that he is not competing with alternative suppliers in the Italian market. Allocating all turnover to Denmark may therefore be the best reflection of the hauler's activities.²⁵

The national postal monopolies present a particular case. When British residents deliver letters, bound for France, to their local post office, Royal Mail of Britain will receive the payment from the purchaser and will thereupon forward the letter to *La Poste* in France, which will deliver the letter. According to the rule set out above, the turnover so generated must be allocated to Britain. While at first glance this may not appear to be a good reflection of the obvious international dimension of the transaction, a closer look may convey a different view. Royal Mail only takes the letter to the French border from where *La Poste* takes over. Hence Royal Mail only provides a service in Britain. Moreover, when *La Poste* takes over, it provides a service to Royal Mail for which Royal Mail pays and the turnover so generated must be allocated to Britain as this is the residence of Royal Mail. When a letter goes from France to Britain, Royal Mail will obtain payment from *La Poste* for delivering the letter in Britain. This turnover

²³ See for instance A.D. Neale and M.L. Stephens, *International Business and National Jurisdiction*, Clarendon Press, Oxford, 1988, at p. 102.

²⁴ According to G. Drauz and D. Schroeder, *Praxis der europäischen Fusionskontrolle*, 3. auflage, RWS-Skript 232, Verlag Kommunikationsforum GmbH, Köln, 1995, at p. 17 in the case *TNT/GD Net* (Case No. IV/M102) Commission Decision of 2 December 1991, concerning the setting up of a joint venture in the international express delivery business between TNT, which is involved in transport services, and five national postal administrations, the Commission accepted that turnover should be allocated to the country of the respective sender because the transport service is usually paid by the sender.

²⁵ For a concordant view, see the Commission *Notice on calculation of turnover*, *supra*, footnote 6, at para. 46, which emphasizes the place where competition with alternative suppliers takes place. Other kinds of transport of goods include transport by sea, inland waterways, rail and air and through pipelines.

will be allocated to France (residence of *La Poste*). It therefore seems that the rule based on residence of the purchaser of the service provides an adequate solution.²⁶

(b) *Transport of persons*

Transport of persons differs from transport of goods in that the service is provided at the place of the service provider. Thus, according to the rule set out above in Section IV.1, the turnover shall be allocated to the place where the service is provided. On the face of it, this creates problems with regard to international transport.

Example: In 1991, the U.S. carrier Delta Air Lines acquired the North Atlantic air transport business of Pan Am, also of the United States. In examining whether the concentration had a Community dimension, the Commission first noticed that the two undertakings had a world-wide turnover which clearly exceeded ECU 5,000 million. However, with regard to the geographic allocation of the turnover, the Commission found that:

“...the following three methods of allocating turnover could reasonably be considered: one possibility would be to attribute the operating revenues deriving from transatlantic air transportation services to the country of destination, this being the final destination point outside the home country of the airline (for example, in the case of a flight New York/Paris/New York by a U.S. carrier the turnover would be allocated to France). A second option could be to allocate the revenues in a fifty-fifty ratio to the country of origin and the country of final destination, so as to take into account the cross-border character of the service provided. A third alternative would be to attribute the air transport revenues to the Member State where the ticket sale occurred.”²⁷

In the *Delta Air Lines/Pan Am* case the thresholds would have been met irrespective of which calculation method was chosen, and the Commission therefore left the question open.

In *Air France/Sabena*,²⁸ the Commission reiterated the three possible ways of allocating turnover set out in the *Delta Air Lines/Pan Am* case. This time also, the Commission found that the thresholds would have been fulfilled irrespective of which of the three methods were to be applied.²⁹ However, it went on to note that the second method, according to which turnover is allocated fifty-fifty between the country of

²⁶ If the British and the French postal authorities decide to merge, this counting method may lead to double counting as, for example, the revenue from the letter going from Britain to France will first be counted as domestic turnover generated by Royal Mail, whereupon *La Poste* will count Royal Mail's payment for delivering the letter in France as British turnover, thus partly counting the payment twice. However, it has been argued that according to a literal reading of the Regulation, sales between the different business groups to which the parties to the concentration belong must be excluded from the calculation of the turnover. This means that *La Poste* shall not count the turnover achieved by sales to Royal Mail and vice versa. See further M.P. Broberg, *Merger Control in the European Community—A Summary of the Five Years since the Introduction of the Merger Regulation*, World Competition, Vol. 19, No. 1, pp. 5–24, at p. 11.

²⁷ *Delta Air Lines/Pan Am* (Case No. IV/M130) Commission Decision of 13 September 1991, at para. 9.

²⁸ *Air France/Sabena* (Case No. IV/M157) Commission Decision of 5 October 1992.

²⁹ Again in *British Airways/TAT* (Case No. IV/M259) Commission Decision of 27 November 1992, the Commission, in para. 14 of the Decision, refers to the three possible methods of calculation, and again it simply notes that the thresholds will have been met irrespective of which of the three methods is used.

origin and the country of final destination, “seems to be closest to the spirit of Article 5, paragraph 1, since it takes into account the two points between which the air transport service is rendered, thus reflecting the cross-border character of the service provided.”³⁰

F. Enrique González-Díaz, in a case note to *Air France/Sabena*, has criticized the Commission for showing a preference for the fifty-fifty method. In particular he noted that this method:

“...seems unsatisfactory since the analysis of the financial strength of an airline company should be carried out on the basis of its ability to create business in a particular area, irrespective of the places visited during the journey. In the case of air transport it seems artificial to say that the service is rendered in the various countries crossed in order to reflect the economic reality underlying the commercial activity of airlines. The point-of-sale criterion, however, seems to reflect more accurately the ability of an airline company to create business in a particular geographical area, apart from being an easier criterion to apply from an accountancy point of view.”³¹

This view must be endorsed.³² For example on the routes between Europe and Japan a number of different carriers compete, and it would be wrong to say that the competition for customers is only carried out on the ground and not in the air. Nevertheless, it must be equally true that turnover, generated by sales of tickets in Frankfurt for flights between Frankfurt and Tokyo, is really achieved in Germany only. It is not so that only half of the turnover is achieved in Germany and the other half in Japan, or that a minor percentage is achieved in Germany, a correspondingly small percentage in Japan and the rest is achieved in those countries through whose air territory the plane flies. It is equally obvious that the purchase of Lufthansa tickets in Frankfurt cannot be allocated 100 percent to Japan. Whether or not the purchase in Germany concerns one-way or return tickets, the same arguments are valid. Thus, the point-of-sale criterion appears to be the better approach.

Applying the point-of-sale criterion does not necessarily mean that the international aspects of international air transport will not be reflected in the allocation

³⁰ Quotation taken from para. 20 of the (unofficial) English translation of the *Air France/Sabena* case provided in *EEC Merger Control Reporter*, Kluwer Law International, The Hague, 1991, and later (loose-leaf work), p. 932.7.

³¹ F. Enrique González-Díaz, *Case Note: Air France/Sabena*, in *EEC Merger Control Reporter*, *ibid.*, p. 932.18.

³² Likewise, Drauz and Schroeder, *supra*, footnote 24, at p. 17.

of turnover under the Merger Regulation.³³ When Lufthansa sells tickets in Japan, the turnover so generated will, of course, be allocated to Japan. Only where an international carrier does not sell tickets abroad, but only domestically, will the international aspect not be reflected. But in such a case it seems that this carrier's market is a purely domestic one, making the point-of-sale criterion a fine reflection of the actual situation. The Commission now appears to support the point-of-sale criterion, though it appears to leave the door open for the fifty-fifty method.³⁴

It is submitted that the point-of-sale criterion should be applied to all forms of international transport of persons. Ferries,³⁵ trains and buses present problems very similar to the ones presented by air transport. Hence, if a train goes from Germany to the Netherlands the German and the Dutch railways must co-operate much in the same way as the postal authorities co-operate.³⁶ Accordingly, the same rule should apply so that where the German *Bundesbahn* sells a ticket in Hamburg, the full revenue should be

³³ According to A.D. Chronas, *Legal Constraints in the Liberalization of the European Air Transport Sector: With Special Reference to the External Aviation Relations of the Community and the Extraterritorial Application of EEC Competition Law to Foreign-Based Airlines*, LL.M. thesis submitted at the European University Institute, Florence, 1991, at p. 115, the threshold criteria mean that only concentrations involving "at least one of the major European airlines, i.e. BA or Air France" will fall under the Regulation. Moreover, "only national airlines, like Alitalia or Lufthansa, will have an aggregate Community turnover of ECU 250 [million]. Small private carriers, like Air UK or British Midland, could not have, at least for the foreseeable future, such a high turnover." With regard to the two-thirds threshold, this author notes that the Regulation would not have "applied in the cases of the takeovers of BCal by BA and of UTA and Inter Air by Air France. This also means that concentrations between carriers registered in the same Member State will not be subject to the rigours of the [Regulation] in the future." Chronas partly bases these views on J. Balfour's article, *Airline Mergers and Acquisitions: What Controls does EEC Law Provide?* *Air Law*, Vol. XV, Nos. 5/6, 1990, at p. 241. Balfour is, however, much more cautious in his statements at pp. 241–242 and 250–251. See also C. Stanbrook and K. Adamantopoulos, *Comments on the Proposed Second Air Transport Liberalization Package of the Commission of the European Communities*, in *Air Transport and the European Community—Recent Developments*, P.D. Dagtoglou (ed.), European Air Law Association Conference Papers 1, Kluwer Law and Taxation Publishers, Deventer, 1990, at p. 111. The above view submitted by Chronas does not appear to be fully consistent with the case-law of the Commission. Thus the first merger in the air transport sector falling under the Regulation, *Delta Airlines/Pan Am*, *supra*, footnote 27, did not involve either British Airways or Air France. Moreover British Airways' takeover of the private British carrier Dan Air in 1992 only escaped the scope of the Regulation due to a novel interpretation of the Merger Regulation: see in this regard M.P. Broberg, *Case-note to Case T-3/93. Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v. Commission of the European Communities* [1994] ECR II-121, *Common Market Law Review*, 1995, pp. 1295–1307. However, British Airways' 1992 acquisition of the French airline TAT, which is not a national airline "like Alitalia or Lufthansa", was vetted by the Commission under the Regulation in the case *British Airways/TAT*, *supra*, footnote 29. Lastly, in the case *Swissair/Sabena* (Case No. IV/M616) Commission Decision of 20 July 1995, the concentration was found to meet all three thresholds even though only one of the parties is based in the Community and this carrier is even a medium-sized one. Hence, it appears that the Merger Regulation catches more concentrations in the air transport sector than Chronas had foreseen.

³⁴ Cf. Commission *Notice on calculation of turnover*, *supra*, footnote 6, para. 46, read in conjunction with note 7 in the Commission Decision of 20 July 1995, in the *Swissair/Sabena* case, *id.* Note, however, that it seems unlikely that the fifty-fifty method has been applied in the calculation of Lufthansa's turnover in the case *EDS/Lufthansa* (Case No. IV/M560) Commission Decision of 11 May 1995, para. 14, with note 3, thus supporting the view that the place-of-sale criterion must now be applied. Jones and González-Díaz, *supra*, footnote 14, at p. 32, propose a very different method of calculation: world-wide turnover shall be the total turnover figure of the airline. EC turnover shall be the turnover generated by all flights in which a Member State is the country of destination. Turnover within one Member State shall be the turnover generated by flights which have that country as destination. Whilst the authors note that this method of calculation will have the advantage that it parallels the accounting practice already adopted by Community carriers, they also rightly identify a number of anomalies produced by the method. It is submitted that the point-of-sale criterion presents a better solution to the problem.

³⁵ Cruises are similar to package holidays so that the turnover must be allocated to point of sale. If a passenger only purchases the cruise on board the ship the turnover must be allocated to the point of embarkation.

³⁶ See above Section IV.2(a). Note also that the same question concerning double counting which arises with respect to postal operations also arises with regard to train operations.

allocated to Germany. The Germans, however, must pay the Dutch a part of this revenue for the distance from the Dutch border to the final destination; and the Dutch railways must allocate the turnover so generated to Germany.

3. *Telecommunications*

Basically, the allocation of turnover generated by telecom operators is very similar to that which applies to postal undertakings.³⁷ Thus, in the case of telephone calls made from Belgium to Britain, the callers must pay the Belgian telecom operator, but this operator must in turn pay the British telecom operator for the use of capacity on the British telephone network. Likewise, where British callers make calls to Belgium, the callers must pay the British telecom operator for the call, and the British operator must in turn pay the Belgian operator for the use of capacity on the Belgian network. The Belgian telecom operator must count calls from Belgium to Britain as domestic whilst the British operator must count the payment from the Belgian operator for use of the line, as turnover from Belgium. Where the calls have been made from Britain to Belgium, the Belgian operator must count the payment from the British operator as British, while the British operator must count the turnover as domestic.³⁸

In the case of transit calls for instance, where the French telecom operator provides capacity for telephone calls from Belgium to Italy, the turnover generated by the provider of transit capacity must be allocated to the country of the telecom undertaking paying for the capacity.³⁹

Mobile telephony seems to create a particular situation. If, for instance, a subscriber to Danish TeleDanmark, Mobil's GSM system, makes a call from Florence, Italy, to Rome, he will be invoiced by TeleDanmark, which will count this revenue as turnover. TeleDanmark will then pay the Italian telecom operator for the use of the Italian net. It will not be any major problem for TeleDanmark to calculate how much turnover has been derived from calls made from outside Denmark, from Community Member States and non-Member States. Thus it is possible for TeleDanmark to allocate the turnover so generated to Italy and it seems that this will provide the best reflection of the actual situation. With regard to the Italian telecom operator, the transmission from Florence to Rome was provided to TeleDanmark rather than to the Danish subscriber and the payment was made by TeleDanmark. Accordingly, it appears that the Italian telecom operator must allocate this turnover to Denmark.

³⁷ Note also that the same question concerning double counting which arises with respect to postal operations also arises with regard to telecom operations.

³⁸ Earlier, the Commission had been doubtful as to whether to apply a method based on a fifty-fifty approach, or whether the turnover should be allocated to the place of the caller. Apparently, the Commission has decided in favour of the latter so that the Commission's approach is in conformity with the one proposed here.

³⁹ Another type of transit call is where, for instance, a Danish professor uses his American freephone card to make a call from France to Denmark. Here the call will be directed via the United States and the professor will be billed as if he had made the call from the United States to Denmark. Nevertheless, it is clear that the American telecom operator has provided a service to a customer in France and the turnover should, therefore, be allocated to that country.

Long-distance cables (often submarine systems) and satellite systems are often constructed by a contractor who sells the capacity to a consortium of telecom operators. In the unusual case where the contractor retains ownership of the equipment, the turnover generated must be allocated in accordance with the geographic allocation of the consortium members.

Example: In *Alcatel/STC*,⁴⁰ the French company Alcatel was to acquire STC, a British telecommunications equipment supplier. According to the notifying parties the concentration had a Community dimension; in particular they had found that STC generated a Community-wide turnover of ECU 272 million. The parties had found that ECU 244 million of the Community-wide turnover could be justified on the basis that STC generated this amount "from contracts for submarine systems having at least one landfall in the EC, i.e. a direct physical link with the Community."⁴¹ The Commission rejected this approach and stated that rather than the physical link, it is the geographic location of the purchasers of the capacity on the submarine cables which is decisive. Therefore the Commission found that the turnover was significantly smaller than the parties had stated in their notification and the concentration did not have a Community dimension.⁴²

In other words, turnover generated through telecom operations must be allocated in accordance with the main rule, i.e. to the residence of the purchaser. The only exception to this rule is mobile telephony where the turnover is allocated to the actual place of the caller.

4. *Banking and Insurance*

Article 5(3) of the Merger Regulation provides special rules for calculating turnover with regard to credit institutions and other financial institutions and with regard to insurance undertakings.⁴³ As concerns the geographic allocation of turnover Article 5(3) explicitly refers to residents.

Credit institutions and other financial institutions cover a broad spectrum of undertakings including banks, merchant banks, leasing companies and holding companies. According to Article 5(3)(a), when examining whether the thresholds have been met in respect of these institutions, turnover must be replaced by one-tenth of assets.

In order to calculate the ECU 250 million threshold, one must multiply one-tenth

⁴⁰ *Alcatel/STC* (Case No. IV/M366) Commission Decision of 13 September 1993.

⁴¹ Cf. para. 8 of the Commission Decision, *ibid.*

⁴² See also C. Jones, *Case Note: Alcatel/STC in EEC Merger Control Reporter*, *supra*, footnote 30, p. 1180.1; and J. Zachmann, *Le contrôle communautaire des concentrations*, L.G.D.J., Paris, 1994, at p. 88.

⁴³ See in this regard M.P. Broberg, *The Commission's Jurisdiction over Mergers in the Financial Sector*, Legal Issues of European Integration, forthcoming. The Commission is presently carrying out a review of the Merger Regulation which includes a review of Article 5(3). It is therefore possible that the rules laid down in this Article may undergo changes. See further M.P. Broberg, *The EC Commission's Green Paper on the Review of the Merger Regulation*, *European Competition Law Review*, Vol. 17, No. 5, 1966, pp. 289-294; and E. Cuziat, *La révision du règlement sur le contrôle des concentrations—La proposition de la Commission*, *Competition Policy Newsletter*, 1996, forthcoming.

of the total assets of the financial institution in question with the ratio between loans and advances to credit institutions and customers resident in the Community, and the total sum of those loans and advances to customers and credit institutions.⁴⁴ This calculation can be shown as follows:

$$\text{(one-tenth of total assets)} \times \frac{\text{loans and advances to credit institutions and customers resident in the Community}}{\text{total loans and advances to all credit institutions and customers}}$$

In order to meet the threshold, the result must be ECU 250 million or more in the case of at least two of the undertakings concerned.

The two-thirds threshold figure is found by multiplying one-tenth of the total assets by the ratio between loans and advances to credit institutions and customers in transactions with residents of Member State *NN* and the total sum of those loans and advances.

The figure thus found is the turnover substitute for the turnover within one Member State. In order to ascertain whether the two-thirds threshold has been met, this figure must be set against the turnover substitute figure for the Community-wide turnover.

This calculation may be shown as follows:

$$\text{(one-tenth of total assets)} \times \frac{\text{loans and advances to credit institutions and customers resident in Member State } NN}{\text{total loans and advances to all credit institutions and customers}}$$

$$\text{(one-tenth of total assets)} \times \frac{\text{loans and advances to credit institutions and customers resident in the Community}}{\text{total loans and advances to all credit institutions and customers}}$$

A clearer way of illustrating this calculation is simply to divide the loans and advances to credit institutions and customers resident in Member State *NN* with the loans and advances to credit institutions and customers resident in the Community. This calculation may be shown as follows:

$$\frac{\text{loans and advances to credit institutions and customers resident in Member State } NN}{\text{total sum of loans and advances to credit institutions and customers resident in the Community}}$$

Where the figure found is less than two-thirds, the threshold has been met. Otherwise the threshold has not been met and the concentration does not possess a Community dimension.

Making the above calculations runs up against the difficulty that banks do not

⁴⁴ Jones and González-Díaz, *supra*, footnote 14, p. 33, seem to take a slightly different view on this.

normally emphasize—the residence of the borrower.⁴⁵ What they register is the branch lending the money. Therefore, it seems justified to apply a presumption according to which the residence of natural persons is the same as the place of the lender.⁴⁶

Example: If the Italian branch of a German bank provides a loan to a Greek national, Italy will be presumed to be the place of residence of the borrower.

However, in particular in borderline cases, it may prove necessary to require a bank to show the actual allocation of loans according to the actual residence of the borrower.

Normally, the residence of a legal person is the place of incorporation. One problem arising from this definition is that if, for instance, a London branch of a Swedish bank borrowed money from a British bank, this loan would be allocated to Sweden as the Swedish bank is incorporated there. In order to more accurately reflect the real geographic allocation, the Commission has made an exception. Therefore, the Commission finds it more “rational” that, in the case of loans and advances provided to “a branch or division of a company or bank”, the place of this branch or division shall be decisive when making the geographic allocation, even if the company or bank to which the branch or division belongs, is incorporated in another country.⁴⁷ Even though this rule has its origin in the problems which apply to certain inter-bank loans, the Commission now applies it generally so that turnover is allocated to the place where the branch or division is established rather than to the place of incorporation with regard to “undertakings...operating on a lasting basis but not having a legal personality.”⁴⁸

Not all financial institutions provide loans and advances. In the case of a concentration between two financial institutions, neither of which provides loans and advances, it is clearly impossible to make the allocation of turnover as provided in Article 5(3)(a) of the Regulation. In order to remedy this problem the Commission has been prepared to replace the one-tenth-of-assets figure with a figure based on banking income calculated in accordance with the Bank Accounts Directive.⁴⁹ The geographic allocation of banking income follows the rule laid down in paragraph 67 of Commission *Notice on calculation of turnover*⁵⁰ and, therefore, is identical to the one set out just above with regard to financial institutions which do provide loans and advances.

With regard to insurance undertakings, the Merger Regulation provides that in place of turnover, the examination of whether the thresholds have been met must be based on the value of gross premiums written.

According to Article 5(3)(b) the geographical allocation of gross premiums written must be made according to the gross premiums received from Community residents and

⁴⁵ In my opinion there can hardly be any doubt that the Merger Regulation provides that the geographical allocation must be made according to the residence of the borrower, not the residence of the lender. The Commission has taken the same stance in the Decision *Hong Kong and Shanghai Bank/Midland* (Case No. IV/M213) Commission Decision of 21 May 1992, at para. 9.

⁴⁶ This presumption is also applied by the Commission.

⁴⁷ Cf. para. 66 of the Commission's *Notice on calculation of turnover*, *supra*, footnote 6.

⁴⁸ Cf. para. 67, *ibid.*

⁴⁹ Council Directive of 8 December 1986, on the *Annual accounts and consolidated accounts of banks and other financial institutions*, Directive 86/635/EEC, O.J. L372 of 31 December 1986, pp. 1–17.

⁵⁰ *Supra*, footnote 6.

from residents of one Member State respectively. With regard to natural persons, a rebuttable presumption is put up that the insurance taker is resident in the place of the insurer.⁵¹ With regard to legal persons the same rule as the one applicable to banks applies. This means that the insurance taker's place of incorporation is considered to be its place of residence. However, with regard to insurance takers "operating on a lasting basis but not having a legal personality" the place of establishment is decisive.⁵²

5. *Radio and Television*

Radio and television may be produced in one country, transmitted from another, the commercials may come from a third country, and the audience may be in a fourth. The effects of a concentration may be felt in all four countries and it seems doubtful to what degree the turnover thresholds will provide a true reflection of whether or not a concentration has a Community-dimension.

Example: Scandinavian Broadcasting Company (SBC) is a purely commercial station which broadcasts to the Scandinavian countries via satellite. The programmes are mostly recorded in Scandinavia, the station broadcasts from London and most of the commercials revenue, amounting to ECU 400 million per year, is paid by American-based multinationals.

If a major multinational media group, such as U.S.-based Time-Warner, acquires SBC, the acquisition will not be notifiable under the Merger Regulation as less than half of SBC's turnover of ECU 400 million is generated from Community-based undertakings, so that it will not have a Community-wide turnover of ECU 250 million.

Thus even larger mergers in the media sector may escape the jurisdiction of the Commission under the Merger Regulation.⁵³ However, this is not due to the rules on allocating turnover geographically, but rather to the basic definition of Community dimension.

⁵¹ In most cases of insurance contracts underwritten with natural persons, the insurance taker is likely to be resident in the country where the underwriting insurer is established. See also G. Dickinson, *Insurance* in P. Buigues, F. Ilzkovitz, J.-F. Lebrun and A. Sapir (eds.), *European Economy: Market Services and European Integration—The Challenges for the 1990s*, No. 3, 1993, p. 193. If, however, a U.K. insurance company sells a property insurance policy to a French national, resident in Paris, for a Spanish holiday villa, the insurance company must treat these premiums as turnover earned in France. As Article 5(3)(b) explicitly refers to the residence of the person paying the insurance premium there can be no doubt that the turnover cannot be considered as earned in the United Kingdom. Example taken from C.J. Cook and C.S. Kerse, *EEC Merger Control Regulation 4064/89*, Sweet & Maxwell, London, 1991, p.45.

⁵² Para. 67 of the Commission *Notice on calculation of turnover*, *supra*, footnote 6, provides that "The current practice of the Commission is to consider, for banking and insurance undertakings, that branches, divisions and other undertakings operating on a lasting basis, but not having a legal personality, should be considered as residents in the countries in which they have been established." When reading para. 67 in conjunction with para. 66, one may interpret this to mean that para. 67 only concerns the allocation of loans and advances under Article 5(3)(a) of the Merger Regulation. However, paras. 65 and 66 shall only be read as introductions to para. 67 so that the latter shall be read alone. Thereby it will be clear that, in the view of the Commission, the "place-of-establishment" rule laid down in para. 67 applies to credit institutions, other financial institutions and insurance undertakings.

⁵³ Note, though, that the number of concentrations in the media sector is on the increase and that the majority of the Commission's prohibitions have concerned media concentrations. See in this regard European Commission, *European Community Competition Policy—1995*, Luxembourg, Office for Official Publications of the European Communities, 1996, at paras. 132–134.

Moreover, it seems doubtful whether it is really a problem that the Commission cannot vet the merger set out in the above example. Firstly, the purchasers of air-time for commercials on the station are mostly American, so that the problems caused by a concentration presumably will be most felt in the United States. Secondly, as the concentration does not have a Community dimension, Member States may apply their own merger laws where applicable. Lastly, irrespective of whether or not the Merger Regulation applies, Member States may intervene to protect their legitimate interests such as the plurality of the media.⁵⁴ In other words, it seems doubtful whether such a concentration should give rise to worries in the Community.⁵⁵

6. *The Internet*

Sales via the Internet (Net) are not so very common, yet.⁵⁶ However, it seems likely that in the near future they will reach a substantial level. Such sales may be divided into two different groups. Firstly, there are those situations where products are ordered via the Net, (essentially mail order shopping). Secondly, there are those situations where the service is provided on the screen, e.g. information from a database. This latter type may cause considerable problems concerning the geographic allocation.

Example: An American company sells information via the Net. A purchaser may download the information after making a computer-transfer of money to the seller's account. This means that during a trip to Japan an English businessman may transfer money from his Swiss bank account to download this information on his laptop from the American company's Canadian database. To which country must the American company allocate the turnover so generated?

In the near future, it is highly likely that it will be possible to make money transfers on the Internet absolutely anonymously⁵⁷ and in such case the seller has no possibility of allocating the revenue on a geographic basis. At present, however, in most cases the seller will know at least from where the money was transferred, whilst it is less likely that the seller will know to which country the information is transferred.⁵⁸ This means that a likely way to allocate turnover will be on the basis of the place of the bank from which

⁵⁴ Cf. Article 21(3) of the Merger Regulation.

⁵⁵ See also *Pluralism and Media Concentration in the Internal Market—An Assessment of the Need for Community Action*, Commission of the European Communities, COM(92) 480 final, Brussels, 23 December 1992, at pp. 78–79 and 81–88, in particular p. 86.

⁵⁶ When the two database service providers DataStar and DIALOG merged in 1993, a reference to the Commission was discussed. However, apparently the transaction fell outside the Commission's jurisdiction, cf. B. Mahon, *Barry Mahon looks at the Background to the DIALOG/Data-Star linkup—What did you Expect?* Information World Review, May 1993, pp. 5–6, at p. 5. According to the legal counsel to the parent company of the merged entity "The reason why the Commission was not competent was probably simply because the relevant turnover did not occur in the EU, but in Switzerland and in the United States, where the databases were located, where the customer access took place and where the legal owners were domiciled." This allocation of turnover is not in full conformity with that laid down in the Regulation.

⁵⁷ Cf. Bird and Bird, *Internet Law and Regulation*, G.J.H. Smith, (ed.), F.T. Law & Tax, London, 1996, at p. 118.

⁵⁸ *Ibid.*, pp. 106 and 123–124.

payment was made. As is clear from the above example, this may not be a good reflection of the actual place to which the service is delivered.

The fact that transactions via the Internet may be partly or fully anonymous, creates considerable problems when making the geographic allocation of turnover; problems which it does not appear possible to solve satisfactorily.⁵⁹

V. CHANGES IN THE COMMUNITY TERRITORY

Over the years the EC territory has been expanded several times and it seems likely that more expansions may occur in the years to come as new Member States accede to the Community. Likewise, it may be that a Member State or a region leaves the Community,⁶⁰ that a non-Community State or region becomes part of a Community Member State,⁶¹ or that a region changes from being part of one Member State to being part of another; and it may happen that one Member State splits to become several Member States.⁶²

Where a change of the Community territory occurs the questions arises as to how this affects the calculation of turnover under the Merger Regulation. The starting point in answering this question must be taken in the very purpose of the Merger Regulation. Hence, concentration control is concerned with the future competitive structure of the market.⁶³ This means that where the borderlines have been altered between the time when the turnover for the calculation of the thresholds was generated and the time when the concentration is made, it must be the new borderlines, not the old, which apply. Turnover generated in a State which has left the Community before the merger transaction must be calculated as non-Community turnover, whereas turnover generated in a State which has joined the Community before the cutoff day must be counted as Community turnover.

Example: In 1991 the French company Paribas and the German company MTH notified an agreement with the Commission pursuant to which these parties jointly would

⁵⁹ Problems with regard to the identification of the correct jurisdiction in connection with commercial activities over the Internet also arise with regard to ordinary contract law: cf. L. Davies and C. Reed, *The Trouble with Bits—First Steps in Internet Law*, *Journal of Business Law*, July 1996, pp. 416–430, at p. 424.

⁶⁰ So far, a withdrawal from the Community has only occurred once, namely when in 1985 Greenland, part of the Kingdom of Denmark, was excluded from the Community at its own request. Greenland is now treated as one of the overseas countries and territories under Articles 131–136A of the Treaty: cf. O.J. L 29, 1985, at p. 1. See also F. Harhoff, *Greenland's Withdrawal from the European Communities*, *CML Rev.*, Vol. 20, 1983, pp. 13–33.

⁶¹ This happened when the then German Democratic Republic joined the then Federal Republic of Germany.

⁶² A number of Central and Eastern European countries are hoping to join the Community within the foreseeable future. However, it may be that some of these will first join the EFTA before joining the Community. Three of the four EFTA States and the Community have entered into an agreement—the EEA Agreement—which includes control of major concentrations in the EEA territory. This scheme very closely follows that set up under the Merger Regulation, and allocation of jurisdiction is made according to turnover thresholds. Thus, an inclusion of new States under the EEA Agreement will have an effect on this scheme more or less parallel to the one an expansion of the Community will have on the Merger Regulation. See also M.P. Broberg, *The Delimitation of Jurisdiction with regard to Concentration Control under the EEA Agreement*, *European Competition Law Review*, No. 1, 1995, pp. 30–39.

⁶³ In contrast, Articles 85 and 86 of the EC Treaty concern behaviour which has already occurred.

acquire control over *MBH Maschinenbau- und Technikhandel AG*, a former State-owned East German company which had been transformed into a private company in order to be sold to private investors.

Paribas achieved a turnover of more than ECU 250 million in the Community. *MBH Maschinenbau- und Technikhandel AG* also achieved a turnover of more than ECU 250 million. This turnover had mostly been achieved in the former Eastern Germany, but, as the transaction was to occur shortly after the German reunification, at the time of the concentration this area had become part of the Community. Therefore, the question was whether this turnover could be aggregated towards the Community-wide turnover or whether it would have to be counted as non-Community turnover.

The Commission answered this question in the following way:

“*MBH* achieved most of its turnover in a territory that for part of 1990 did not belong to the European Community. As to the question of determining the size of the Community-wide activities of an undertaking for which, according to Article 1(2) of the Merger Control Regulation, the turnover is the decisive criterion, one has to look at the time when the concentration was carried out, not the financial year preceding the concentration. Article 5(1) of the Merger Control Regulation determines only the reference period for the calculation of the turnover. This provision does not contain any stipulation as to which territorial part of the European Community should be taken into account when considering the Community-wide activities of undertakings. With respect to this question, the general rules, regarding the assessment of the legal-technical characteristics of the undertakings participating in the concentration, such as whether or not they belong to the same group (Article 5(4)) apply. According to this provision, one should look at the situation at the time of the concentration.”⁶⁴

It thus appears that the Commission’s answer to the question is very similar, and perhaps even identical, to the answer submitted here.⁶⁵

VI. CONCLUSION

In short, the findings of this article may be summed up as follows:

Turnover must be allocated to the place of the purchaser. With regard to tangible goods it is submitted that the better approach is to hold the place of the purchaser to be where the product is delivered. This approach has the great merit of clarity.

⁶⁴ Quotation taken from para. 9 of the translation in the *EEC Merger Control Reporter*, *supra*, footnote 30, pp. 458–459. The original decision provides: “*Allerdings erzielte MBH diesen Umsatz in wesentlichen auf einem Gebiet, das in einem Teil des Jahres 1990 noch nicht zur Europäischen Gemeinschaft gehörte. Für die Frage der Bestimmung des Gewichts der gemeinschaftsbezogenen Aktivitäten eines Unternehmens, für das nach Art. 1 Abs. 2 lit.b der Fusionskontrollverordnung der Umsatz den Größenmaßstab bildet, ist jedoch auf den Zeitpunkt des Vollzuges des Zusammenschlusses abzustellen, nicht aber auf das vor dem Zusammenschluß liegende abgeschlossene Geschäftsjahr. Art. 5 Abs. 1 der Fusionskontrollverordnung legt nur die Referenzperiode für die Umsatzberechnung fest; diese Vorschrift trifft keine Bestimmung darüber auf welches territoriale Gebiet der Europäischen Gemeinschaft bei der Frage nach den gemeinschaftsbezogenen Aktivitäten der Unternehmen abzustellen ist. Für diese Frage gelten die allgemeinen Regeln für die Bewertung von formalen Eigenschaften der am Zusammenschluß beteiligten Unternehmen, wie z.B. Konzernzugehörigkeit (Art. 5 Abs. 4). Danach ist auf die Situation zum Zeitpunkt des Zusammenschlusses abzustellen.*”

⁶⁵ See also Drauz and Schroeder, *supra*, footnote 24, at p. 10.

Services create difficult problems when making the geographical allocation of turnover. It is submitted that, as a general rule, where the purchaser obtains the service at the place of the service provider, the sale must be allocated to this place. If, however, the purchaser may stay at home while obtaining the service, the sale should be allocated to the residence of the purchaser. With regard to international transport of persons, it is submitted that turnover should be allocated according to the point of sale.

The Merger Regulation provides for special rules for calculating the thresholds with regard to financial institutions and insurance undertakings. Moreover, in both cases, the Regulation explicitly provides that turnover must be allocated geographically according to residence. In the case of financial institutions, allocation is made according to the residence of the borrowers. It is submitted that in the case of a natural person, one may presume this residence to be the place of the branch lending the money. In the case of legal persons, the place of incorporation is the place of residence. However, with regard to branches or divisions of banking and insurance undertakings operating on a lasting basis, but not having a legal personality, the Commission applies a rule according to which loans and advances must be allocated to the place of establishment. Where the Commission replaces the special rule for financial institutions with a calculation of banking income, the allocation of turnover is made in a way that is identical to the one for financial institutions providing loans. In the case of insurance companies, turnover is replaced with gross premiums written, which are allocated in accordance with the residence of the insurance taker. Here, again, the definition of residence is identical to the one which applies to financial institutions providing loans.

Lastly, it is argued that where the Community territory is altered between the time when the turnover was generated and the time when the concentration is notified, it is the situation at the latter time which must be decisive.

When the Council adopted the Merger Regulation, the definition of Community dimension was chosen because it was hoped that it would provide a clear and easily applicable way of deciding whether or not a concentration came within the Commission's jurisdiction. There is hardly any doubt that the present system does provide a clearer delimitation of allocation than would a definition similar to the one laid down in Articles 85 and 86 of the EC Treaty. However, as this article shows, the present system is far from ideal and one may wonder whether it is not possible to improve it.