The Notification of Mergers Under the New EEC Merger Control Regulation†

Since September 21, 1990, all transactions meeting the conditions set by the recently adopted EEC Regulation on the Control of Concentrations Between Undertakings (Merger Control Regulation)1 must be notified to the Commission of the European Communities2 and cleared by the Commission before they can

---

†Editor's Note: A more general article on the new EEC Merger Control Regulation will appear in the Winter 1991 issue of THE INTERNATIONAL LAWYER.

1. Council Regulation No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 32 O.J. EUR. COMM. (No. L 395) 1 (1989) [hereinafter the Merger Control Regulation]. A corrigendum to this Council Regulation has been published in 33 O.J. EUR. COMM. (No. L 257) 13 (1990). Note that the term "mergers" is not the term of art used in the European Community (EC) legal vocabulary, but rather the economic word "concentration." Likewise, the EC uses the word "undertakings," probably derived from French, as the equivalent of the economic concepts of "firm" or "company." These terms are used interchangeably in this article.


2. The European Economic Community (EEC) is one of three separate communities which were established by three separate treaties. Treaty Establishing the European Coal and Steel Com-
be put into effect. Under the Merger Control Regulation, the Commission has the power to oppose, modify, or approve large-scale mergers, acquisitions, or joint ventures likely to have an impact on the EC market, both within and beyond the EC territory. In view of the growing pace of European integration, the simultaneous increase in corporate restructurings, and the resulting interventions of the Commission in the field of mergers, the Merger Control Regulation provides the Commission with new powers to handle many, but clearly not all, of the merger and acquisition activity in the Community.

The EC’s antitrust policy is at the core of the integration process underway in Europe. Long before the international business community and public had heard of the “1992” program and even before the United States had proposed its own Hart-Scott-Rodino premerger notification legislation, the Commission had been at work on merger control legislation. Economically, the need for such legislation has grown in proportion to the surge of merger activity within the Community in anticipation of 1992. Legally, it has long been apparent that the previously existing national and EC competition provisions—mainly, articles 85 and 86 of the EEC Treaty—were increasingly inadequate. It is, however, only

---


The EEC relies for its operation on a number of bodies, such as the Council and the Commission of the European Communities, which are granted the power to issue legislation of both direct and indirect effect on Member States. The EEC is designed to create a single European market through the elimination of physical, fiscal, and technical barriers between Member States. The Commission is the Communities’ executive, charged with implementing and, in many cases, proposing Community legislation. EEC Treaty, supra, art. 155. In competition matters, the Commission is charged with enforcement duties. EEC Treaty, supra, art. 89. The Council is the legislative arm of the Community, making major decisions on policy and adopting legislation. EEC Treaty, supra, arts. 145-54. Its rulings are granted “supremacy” treatment by the European Community Member States. Case 6/64 Costa v. E.N.E.L., [1964] E.C.R. 593; Common Mkt. Rep. (CCH) $8023 (1964). The Court of Justice of the European Communities has the duty of interpreting and applying the Treaties and derived legislation. EEC Treaty, supra, arts. 164-88.

That is to say, the combination of the SEA and the White Paper on Completing the Internal Market. The latter commission document is Completing the Internal Market, White Paper from the Commission to the European Council, COM (85) 310 Final; see 2 INT’L Q. 97 (1990).


In 1989 alone, $51.7 billion in European Community mergers and acquisitions were reported. See Financial Times, Feb. 5, 1990, at 16; see also Cross-border Mergers Rose by 8% in 1989, Study Says, Wall St. J., Jan. 29, 1990, at A5G, col. 4, which states that cross-border mergers and acquisitions have risen to $50 billion in 1989 from $31.6 billion the year before.

The Commission’s original position was that the EEC Treaty’s provisions on competition could not apply to mergers. Article 86, which prohibits the abuse of a dominant position, a provision
after more than sixteen years of deadlock that the Council unanimously adopted
the Merger Control Regulation on December 21, 1989.

Perhaps a reflection of the great anticipation for the implementation of the
Merger Control Regulation is the fact that six transactions were notified within
the first two months following its coming into force. As early as October 4,
1990, Renault and Volvo sent notification of their agreement pursuant to which
each would acquire equity in the other, and both would cooperate in their re-
search and development, as well as manufacturing and purchasing activities. 8
By April 10, 1990, twenty-five mergers had been notified to the Commission, of
which twenty have been considered compatible with the Common Market. The
appendix to this article provides an overview of the cases dealt with or still
pending on April 10, 1991. 9

The Merger Control Regulation expressly empowered the Commission to
adopt implementing provisions concerning the form, content, and other proce-
dural issues dealing with merger notification and its subsequent procedure. 10
The Commission did just that on July 25, 1990, in a specific Commission Regula-
tion 11 on the Notifications, Time Limits, and Hearings Provided for in the
Merger Control Regulation (Commission Regulation on Notifications). On the
same day, the Commission also published two sets of guidelines, 12 one on
“restrictions ancillary to concentrations” (Ancillary Restrictions Notice) 13 and
the other on “concentrative and cooperative operations” (Notice on Concentra-

8. Notification préalable d’une opération de Concentration (Affaire No. IV/M 004-Renault/
9. Notification préalable d’une opération de Concentration (Affaire No. IV/M/018), 33 O.J.
10. Merger Control Regulation, supra note 1 art. 23. EEC Treaty, supra note 2, art. 189 grants
to the Commission the power to issue Regulations which shall have general application and shall be
binding in their entirety and directly applicable in all Member States.
11. Commission Regulation No. 2367/90 on the Notifications, Time Limits, and Hearings pro-
vided for in Council Regulation (EEC) No. 4064/89 on the Control of Concentrations between
Undertakings, 33 O.J. EUR. COMM. (No. L 219) 5 (1990) [hereinafter Commission Regulation on
Notifications]. Attached to this Notice as Annex I is Form CO Relating to the Notification of a
Form].
12. Note that Notices of the European Commission only provide general guidelines and do not
lay down definitive principles. The Commission and Court of Justice are not bound by such notices,
but it is arguable that the Commission might be estopped from imposing fines on agreements clearly
approved by a notice. See C. BELLAMY & G. CHILD, COMMON MARKET LAW OF COMPETITION
§ 1-065 (1987).
13. Commission Notice Regarding Restrictions Ancillary to Concentrations, 33 O.J. EUR.
COMM. (No. C 203) 5 (1990) [hereinafter Notice on Ancillary Restraints].

FALL 1991
tive and Cooperative Operation). The interplay of the Merger Control Regulation with the Commission’s recent regulations and notices creates a new procedure, intended for immediate application with minimal ambiguity.

Ironically, although the new procedure is by no means flawless, it is expected that larger-scale mergers subject to it will ultimately be processed by the Commission more rapidly than smaller deals or other transactions not within the scope of the Merger Control Regulation. This is due to a major redeeming feature of this notification: unlike under the preexisting competition law procedures, the Merger Control Regulation holds the Commission to a strict timetable, the application of which is better specified by the Commission Regulation on Notifications. Despite the onerous documentary requirements of the Regulation, the strict time limits it imposes offer significant benefits to parties whose activities fall within its scope. The parties required to notify must provide the Commission with notice within one week from the conclusion of the agreement, announcement of the public bid, or acquisition of a controlling interest. Procedurally, the Commission’s subsequent examination of a concentration is broken into two steps.

The first step of the process commences on receipt of a notification whereupon the Commission must “within one month at most” decide whether the concentration falls within the scope of the Regulation and if so, whether doubts are raised as to its compatibility with the Common Market. In the event that the Commission does not raise such doubts, it must decide within this period of time to initiate proceedings, or if not, by way of consequence, declare it compatible with the Common Market—in other words, clear it. Most of the agreements so far notified to the Commission have not triggered the second step of the Commission’s determination. Indeed, of the twenty-five transactions so far notified, the Commission has engaged in full-scale investigations with regard to Alcatel’s


15. Merger Control Regulation, supra note 1, art. 10. Notifications are generally effective upon receipt, Commission Regulation on Notifications, supra note 11, art. 4(1) and the periods of time begin running the following day. Id. art. 6. See also id. art. 8 provision regarding the addition of holidays).

16. Merger Control Regulation, supra note 1, art. 4(1).

17. Id. art. 10(1). This period begins on the day following receipt of a notification or, if the information to be supplied with the notification is incomplete, the period begins on the day following the receipt of the complete information.

18. Id. art. 6(1)(a). Note that art. 10(2) increases the period to six weeks when the Commission receives a request from a Member State pursuant to art. 9(2).

19. Id. art. 6(1)(b).

20. Id. art. 6(1)(a).

21. See appendix.
acquisition of Telettra, Magneti-Marelli’s acquisition of CEAC, and Tetra-pak’s acquisition of Alfa Laval. If the Commission initiates proceedings, step two occurs whereby a decision as to the merger must be rendered no more than four months from the initiation thereof. Where the Commission fails to meet either of these time limits the concentration shall be deemed to be declared compatible with the Common Market.

Both the Merger Control Regulation and the Commission Regulation on Notifications provide parties to the merger and certain third parties with various opportunities to present their positions vis-à-vis the merger to the Commission. As in the case of notifications made pursuant to Regulation No. 17, the implementing provision for the procedures conducted by the Commission under the preexisting EC provisions on competition, articles 85 and 86 of the EEC Treaty, once the Commission has determined that a notified concentration falls within the scope of the Merger Control Regulation, it must publish notice of the notification, indicating the names of the parties, the nature of the concentration, and the economic sectors involved. The Merger Control Regulation also allows third parties “showing a sufficient interest or management organs of the undertakings involved or legally recognized workers representatives” the right to request an opportunity to present their viewpoints. The Commission Regulation on Notifications specifies that such third parties may be allowed to present their arguments orally or in writing, following a procedure fashioned by the Commission on a case-by-case basis and notified to them. During the period in which the Commission analyzes the compatibility of the concentration, the Commission is also required to grant to “all concerned persons, undertakings and associations of undertakings,” as it must at every stage of the procedure, the opportunity to make known their views or objections against proposed decisions (i) extending the stay of the merger pending investigation, (ii) dispensing of the said stay, (iii) on conditions and charges imposed on the parties to ensure their compliance with the modifications they made to the proposed merger in order to

22. Agence Europe, No. 5414, Jan. 21, 22, 1991, at 7; see appendix item 10.
23. Agence Europe, No. 5414, Jan. 21, 22, 1991, at 7; see appendix item 11.
25. Merger Control Regulation, supra note 1, art. 10(2), (3).
26. Id. art. 10(6). In the cases where Member States’ action is warranted, art. 10(6) makes available a reservation to art. 9.
28. Merger Control Regulation, supra note 1, art. 4(3).
29. Id. art. 18(4).
30. Commission Regulation on Notifications, supra note 11, art. 15.
31. Merger Control Regulation, supra note 1, art. 18(1). Note that an advisory committee consisting of representatives of Member State authorities chaired by the Commission reviews the Commission’s draft decision and renders an advisory opinion thereupon which the Commission must consider before rendering its final decision concerning a concentration.
make it acceptable to the Commission, (iv) rejecting the merger, (v) ordering that it be undone, (vi) overturning a clearance decision, or (vii) assessing monetary sanctions.32

The notification in itself, however, will be the first significant step of the process to retain the parties' attention. That the notification deserves such attention is manifest, as it will normally be the first formal act in the process, whatever preliminary informal contacts have been taken with the Commission. It will also trigger the Commission's involvement and, as mentioned above, mark the commencement of the time periods instituted by the Merger Control Regulation. This article focuses on some of the Merger Control Regulation's practical aspects that have been significantly affected by the three sets of documents recently issued by the Commission. First, this article discusses what type of transactions should be notified. Both the Notice on Concentrative and Cooperative Operations and the Ancillary Restrictions Notice provide the Commission's views on the Merger Control Regulation's provisions in this respect. Second, the article focuses on how the transaction should be notified, an area significantly affected by the Commission Regulation on Notifications. Third, the article turns to what sanctions will be implemented.

I. Scope of the Notification Requirement

The Merger Control Regulation applies to all "concentrations" with a "community dimension."33 Both these concepts are sufficiently sophisticated to raise a number of issues.

A. Type of Mergers to be Notified:
The Concept of Concentrations

The Merger Control Regulation defines a concentration as situations where:

(a) two or more previously independent undertakings merge, or
(b) one or more persons controlling at least one undertaking, or
(c) one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.34

From this definition it is clear that a merger is not only deemed to take place when two or more corporations merge, but also when direct or indirect corporate control is acquired through stock or asset purchases, contractual relationships, or other means. Control is defined quite practically as any means that "confer the
NOTIFICATION OF MERGERS IN EEC 621

possibility of exercising decisive influence on an undertaking." A merger subject to notification may thus be found to occur in a number of situations.

1. Joint Ventures

Certain forms of joint ventures are explicitly within the scope of the regulation, namely those that do not give rise to coordination of the competitive behavior of the parties among themselves or between them and the joint venture. Those that fail this requirement remain subject to existing competition law provisions, particularly articles 85 and 86 of the Treaty of Rome as implemented by Regulation No. 17. In Nestlé and Baxter’s proposed acquisition of joint control of the activities of Salvia Werk GmbH through the creation of a new corporate entity, the Commission determined that the transaction did not constitute a concentration within the meaning of article 3 of the regulation, but that article 85 could still be applied. For the purposes of the Merger Control Regulation, the distinction between situations of concentration and cooperation is quite complex. Because of this complexity the Commission has drafted the Notice on Concentrative and Cooperative Operations, which is designed to assist in the interpretation of this subject.

A joint venture requires notice when it has been established on a lasting basis to perform all the functions of an autonomous economic entity, and, as such, acts as an independent supplier and buyer on the market. With respect to

35. *Id.* art. 3(3) states two particular examples of such controls, which are "(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."

36. *Id.* art. 3(2).


38. Notice on Concentrative and Cooperative Operations, *supra* note 14, §§ 11-14. For there to be a joint venture, according to the Commission, an operation must be jointly controlled by several other undertakings. Such control can be predicated on legal, contractual, or other bases such as ownership or the right to use all or some of the joint venture’s assets; influence over the composition, voting or the decision making of the managing or supervisory bodies within the joint venture; voting rights in the managing or supervisory bodies; or contracts concerning the running of the joint venture business. *Id.*

Joint control exists in every case where the parent companies must agree on decisions concerning the joint venture’s activities. Joint control is presumed not to exist where one of the parent companies for example, has the right to appoint more than half of the managing or supervisory bodies, or more than half of the votes in one of those bodies, or has the sole right to manage the undertaking’s business. *Id.* A joint venture, however, can be controlled by a considerable number of other undertakings that can, together, muster a majority of the capital or the voting power of a joint venture’s decision-making bodies. In such cases, the Commission notes that joint control can be presumed when factual and legal circumstances support the notion of a deliberate common policy of the parent companies in relation to the joint venture. *Id.*


40. Notice on Concentrative and Cooperative Operations, *supra* note 14, § 16. The Commission notes that joint ventures that take over from their parents only specific partial responsibilities such as research and development, obtaining or granting licenses, purchasing, production or distribution, are
the requirement of a long-term existence, the human and material resources committed to the joint venture are a key element as they must ensure the joint venture’s existence and independence in the long-term. As such, where parent companies fail to invest substantial financial means in the joint venture or to transfer existing businesses or to grant substantial technical or commercial know-how to it, such that the venture remains economically integrated with the parent company, it is less likely that the joint venture will meet the definition. Likewise, a joint venture falling within the scope of regulation must exercise its own commercial policy such that it plans, decides, and acts independently, without regard to the market-related interests of the parent companies.

For joint ventures to be considered within the scope of the Merger Control Regulation, the Commission requires that they should not be accompanied by any coordination with the competitive behavior of the parent companies, which must remain independent of one another, or between all of the parents on one side and the joint venture on the other. The Commission notes that not every form of cooperation between parent companies with regard to their joint ventures will render the joint venture beyond the scope of the regulation because concentrative joint ventures, like others, can represent a regular means for the parent companies to pursue common or mutually complementary interests. However, such cooperation will be accepted by the Commission only as long as the competitive behavior of the parent companies and that of the joint ventures are left uninfluenced by it.

In distinguishing between the permissible pursuit of common interests between joint venturers and the coordination of competitive behavior that would render a venture beyond the Merger Control Regulation’s scope, the Commission distinguishes several scenarios. In certain situations, the joint venture will clearly be subject to notification. In the event that the joint venture incorporates the preexisting activities of the parent companies while the parent companies merely pursuing activities that are auxiliaries to the commercial activities of the parents. Therefore, they are outside the scope of article 3(2) of the Merger Control Regulation. Id.

41. In an earlier draft of the notice, the Commission noted that this period should not normally be less than twenty years because a life expectancy of an “appreciably less” period of time does not anticipate a long-term change in the structures of the parent companies. Draft Commission Notice of 27 March 1990 on the Definition of Concentrations and Cooperation under Council Regulation No. 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, EUR. COM. Doc. No. IV/197/90 § II (b)(1)(d) (1990).

42. Notice on Concentrative and Cooperative Operations, supra note 14, § 17.

43. Id. § 19. The Commission, however, notes that the economic independence of a joint venture will not be contested merely because its commercial policy as a whole is examined by the parent company or in the event that the parent companies reserve the rights to make certain decisions that are important for the development of the joint venture, such as those concerning alterations of the objectives of the company, increases or reductions of capital, or the application of profits.

44. Merger Control Regulation, supra note 1, art. 3(2); Notice on Concentrative and Cooperative Operations, supra note 14, §§ 20-30.

withdraw permanently, as suppliers or as customers, from the joint venture’s market and either transfer their entire business assets to the joint venture, henceforth acting as holding companies (a complete merger), or transfer to the joint venture activities that the parent formerly carried on independently and only in certain commercial sectors (partial merger), the operation requires notice.46

An example of such an arrangement can be seen in AG and AMEV’s creation of two joint enterprises that would carry out all of the activities of the parent companies, leaving the parents as mere holding companies.47 Also illustrating this are Aérospatiale and MBB’s joint control of the new holding company, Eurocopter,48 which would undertake the parent’s activities in the helicopter market, as well as Varta Batteries A.G. and Robert Bosch GmbH’s creation of a new enterprise49 in which the activities of the parent with respect to auto batteries would be transferred.

Another scenario envisaged by the Commission concerns joint ventures that undertake new activities on behalf of parent companies. The Commission considers such arrangements to be within the scope of the Merger Control Regulation if the joint ventures’ market was neither upstream nor downstream of, nor horizontally close to, that of the parent companies, as the risk of coordination would seem unlikely in such a case.50

The Commission, on the other hand, deems beyond the scope of the Merger Control Regulation the situation where one or both of the parent companies remained active on the joint venture’s market, unless the presumption of coordination of competitive behavior is rebutted.51 Furthermore, while the Commission does not presume anticompetitive cooperation, it is indeed wary of such a relationship where the joint venture operates in a market that is vertically or horizontally close to those of its parents.52 Thus, where the parents are not competitors, the Commission normally finds a coordination of competitive behavior where the joint venture makes sales or purchases in substantial measure with the parents. Additionally, where the joint venture and parent companies operate in horizontally close markets, the Commission treats the joint venture as within the scope of the Merger Control Regulation only if there exists “no concrete opportunities for competitive interaction.”53 As such, they examine whether the products of the parent and joint venture are technically or econom-

46. Id. §§ 24-26. The Commission does, however, contemplate that joint ventures where parent companies remain permanently active on the joint ventures’ product or service market, while withdrawing from the joint ventures’ geographic market (taking into account the nature of the goods or services concerned) may also fall within the scope of the Merger Control Regulation. Id. § 29.
47. See appendix item 2.
48. See appendix item 17.
49. See appendix item 21.
51. Id. § 33.
52. Id. § 35.
53. Id. § 36.
ically linked, whether they are both components of a complex product or otherwise mutually complementary, and whether it is economical for the parent companies to enter the joint venture’s market.54

2. Other Transactions Submitted to Notification

Apart from joint ventures, the Commission has also considered the inclusion of other associations between undertakings and forms of joint operation that may meet the definitional requirements of the Merger Control Regulation. The Commission notes for example that the acquisition of a minority shareholding in an undertaking can be subject to notification only if the new shareholder acquires the means of exercising a decisive influence on the undertaking’s activity.55 Like the acquisition of shares in a business in which a competitor also has an interest, it remains fully subject to articles 85 and 86 of the EEC Treaty. The Commission also may consider within the scope of the Merger Control Regulation the exchange of shareholdings of separate companies as a means of establishing either a “single economic entity” or a combined group.56 In order for such mergers by combination to fall within the coverage of the Regulation, the parties involved must be subject to permanent and single economic management such that they are amalgamated into a genuine economic unit sharing joint liability as well as profit and loss compensation between the various members.57

An illustration of this situation can be seen in Renault and Volvo’s transaction whereby these companies would create joint management committees for research and development, manufacturing, purchasing, and cooperation with third parties.58 That transaction would also involve Renault’s taking 25 percent of the shares of Volvo Cars Corporation and 45 percent of the shares of Volvo Trucks Corporation, while Volvo would purchase 20 percent of Renault’s shares as well as 45 percent of Renault Vehicules Industriels. Similarly, Mitsubishi’s acquisition of 50 percent of the shares of Ucar Carbon, a subsidiary of Union-Carbide, would operate to render Mitsubishi and Union-Carbide a common enterprise pursuant to the merger control regulation.59

According to the Commission, representation of one undertaking on the decision-making body of another, whether or not accompanied by shareholdings, may, depending on the circumstances, serve as a vehicle for either coordination of competitive behavior or as a concentration covered by the Merger Control

54. Id. § 36.
55. Id. §§ 37-38.
56. Id. § 40. It is interesting that the Commission considers that two or more undertakings may merge without setting up a parent-subsidiary relationship and without losing their legal personality. Id. § 41.
57. Id. § 41.
58. See appendix item 1.
59. See appendix item 7.
Obviously, a transfer of assets or shares may also constitute a merger subject to notification when the transfer results in the acquisition of control of all or part of one or more undertakings. For example, Alcatel, by virtue of its holding 61.5 percent of the shares of CGE, triggered a full-scale investigation by the Commission due to CGE's acquisition of 69.2 percent of the capital of Telettra SpA from Fiat, which was to remain holding 25.4 percent of Telettra SpA's capital. The Commission suggests that the unilateral acquisition of assets creates a strong presumption that the Merger Control Regulation shall apply. As such, various tender offers have been notified to the Commission, including Matsushita's bid for MCA, AT&T's bid for NCR, and Tetrapak's bid for Alfa Laval. However, this presumption may be rebutted by objective evidence of the parties' competitive behavior. Reciprocal arrangements, on the other hand, will most likely result in a coordination of behaviors to which the Merger Control Regulation is not applicable and that therefore remain covered by articles 85 and 86. Finally, the Commission notes that the joint acquisition of an undertaking with a view to its division may also be deemed a concentration, unless it is designed to coordinate the competitive behavior of the parties involved, thereby triggering the application of existing EC competition provisions.

3. Ancillary Restrictions

The Merger Control Regulation does not exclude from its scope mergers involving restrictions deemed "directly related and necessary to the accomplishment of the concentration." Furthermore, it provides that a decision declaring a merger compatible with the EEC Treaty, that is to say a cleared merger, shall also cover restrictions meeting this criteria. Since in this situation the Regulation excludes the application of other EC competition provisions, there is "no danger of parallel proceedings," as noted by the Commission in the Notice on Ancillary Restraints it recently published in an effort to clarify the application of the Merger Control Regulation to such ancillary restrictions. According to the Commission, the Merger Control Regulation contemplates only those restrictions that are "agreed on between the parties . . . which limit their own freedom of action in the market." With regards to the requirement

61. Id. § 46.
62. See appendix item 10.
63. See appendix items 8, 9, 19.
64. Notice on Concentrative and Cooperative Operations, supra note 14, § 47.
65. Id. § 48.
66. Merger Control Regulation, supra note 1, preamble.
67. Id. art. 8(2).
68. Id. art. 22(1)-(2).
69. Notice on Ancillary Restraints, supra note 13, § 1.
70. Id. § 3. It does not apply to restrictive "effects" on third parties resulting from the merger.
that restrictions be "directly related" to the merger, the Commission excludes those that are integral parts of the merger itself, such as restrictions designed to organize the common control or establish economic unity between two previously independent businesses.\textsuperscript{71} It also excludes agreements that have no economic link to it, although executed in the context of the merger.

The Commission appears to apply its most stringent analysis to the Regulation's requirement that ancillary restrictions be necessary to the implementation of the concentration. Not only is it necessary that the absence of restrictions render the merger impossible or impracticable, but their duration, subject matter, and geographic field of application must not exceed what is reasonably required for the implementation of the merger.\textsuperscript{72}

\textsuperscript{71} Id. § 4. Thus, for example, where a merger is carried out in stages the Commission excludes those interim agreements from the scope of the Regulation.

\textsuperscript{72} Although the Commission concedes that its interpretive guidelines must be applied in line with decisional practice, it does provide the position that the Commission could possibly take with respect to several ancillary restrictions, commonly utilized within the context of total or partial asset transfers, and divisions of corporate entities or the assets pursuant to a joint acquisition, or the creation of a joint venture.

Noncompetition clauses, when utilized in the context of a transfer of both tangible and intangible assets, such as client lists, or know-how, are considered within the scope of the Merger Control Regulation, when such restrictions are necessary to safeguard the value of the assets acquired and their geographic field, and subject matter and duration do not exceed what is reasonably necessary for such purpose. In regard to durational limits, the Commission recognizes as reasonable five-year durations for know-how and two-year durations for goodwill. Longer periods may be permissible as in the case of high-technology products. The Notice provides stricter guidelines on geographic and subject matter restrictions of noncompetition clauses limiting them respectively to "the area where the vendor had established the products or services before the transfer" and to "products and services which form the economic activity of the undertaking transferred." Id. § III(A)(1)-(6).

Intellectual property right and licenses know-how may also fall within the scope of the Merger Control Regulation when such are "necessary" for the completion of the transaction. Simple or exclusive patent licenses, similar rights, or existing know-how may be limited to a certain range of use, such that they correspond to the activities of the undertaking transferred. Licenses may be granted for the whole duration of the patent or similar rights or to the "normal economic life of the know-how." It is unclear how the Commission will treat territorial restrictions in this context as the Notice merely states that such limitations "normally will not be necessary." Also, restrictions in licensing agreements, going beyond what is provided by the Notice, fall outside the Regulation, and may be assessed according to articles 85(1) and 85(3) of the Treaty, unless they benefit from block exemptions such as those provided for in the Regulation on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements, 27 O.J. Eur. Comm. (No. L 219) 15 (1984), and the Regulation on the Application of Article 85(3) of the Treaty to Certain Categories of Know-how Licensing Agreements, 32 O.J. Eur. Comm. (No. L 61) 1 (1989). Notice on Ancillary Restraints, supra note 13, § III(B)(1)-(4).

The Notice also allows for the inclusion of "exclusive supply" agreements meeting the "necessity" requirement. It limits the duration of such arrangements to two years as they view such restrictions as justified merely for transitional purposes. Id. § III(C)(1)-(4). Certain ancillary restrictions may also fall within the scope of the Merger Control Regulation when utilized in the context of a joint venture. So long as restrictions do not lead to coordination of the competitive behavior of the parent entities, arrangements to abstain from launching separate offers, as well as those designed to divide production facilities, distribution networks or transfer intellectual property rights or other assets may all be allowed. Id. §§ IV-V.
B. The Thresholds: The Concept of Community Dimension

Not all deals that fall within the Merger Control Regulation’s definition of a concentration must be notified due to the requirement of community dimension. Arjomari-Prioux’s acquisition of Wiggins, Teape, Appleton was deemed not to have met the Regulation’s threshold on December 10, 1990. The Merger Control Regulation distinguishes between transactions with an impact that transcends the national borders of any one Member State, to which it grants the Commission exclusive jurisdiction, and those transactions that do not have such impact, and are left within the jurisdiction of national authorities. Therefore, if each of the involved undertakings achieve more than two-thirds of its aggregate Community-wide turnover within one and the same Member State, the Regulation states that Community dimension will not be deemed to exist. The Commission provides an example of the application of this two-thirds rule in an appendix to the Commission Regulation on Notifications.

Community dimension exists where the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 billion (roughly $6 billion) and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million ($300 million). Article 5 of the Merger Control Regulation defines aggregate turnover to “comprise the amounts derived by the undertakings concerned in the preceding financial year for the sale of products and the provision of services falling within the undertakings’ ordinary activities after deduction of sales rebates, VAT and of other taxes directly related to turnover.” Sales by related entities are included, while intragroup sales are not included. Special rules apply with regard to the aggregate turnover of banks and financial institutions, and as these special rules cause some problems of interpretation, the Commission also provides some examples of how they should apply.

A special rule also applies to acquisitions of a part or parts of businesses. In this case only the turnover of the acquired part or parts is taken into account in the computation, insofar as the seller is concerned. To prevent any abuse of this rule, it is further provided that two or more similar operations taking place within a period of two years will constitute a single such operation.

73. Merger Control Regulation, supra note 1, arts. 1(1) and 1(2).
74. See appendix item 4.
75. Merger Control Regulation, supra note 1, preamble, para. 13, states that “it should apply to significant structural changes, the impact of which goes beyond the national borders of any one Member State.”
76. Id. art. 1(2).
77. Commission Regulation on Notifications, supra note 11, ann. I, Guidance Note IV.
78. Id. art. 1(2)(A)-(B). This threshold will be reviewed before the end of the fourth year following the adoption of the Regulation. Id. art. 1(2)(C).
79. Merger Control Regulation, supra note 1, art. 5(3).
80. Commission Regulation on Notifications, supra note 11, ann. I, Guidance Notes I & II.
81. Merger Control Regulation, supra note 1, art. 5(2).
II. Contents of the Notification

Perhaps the most significant offering of the Merger Control Regulation is the institution of mandatory notification of mergers to the Commission. A detailed list of materials required for submission is set forth by the Commission Regulation on Notifications.

Parties may be faced with the prospect of having to decide whether to give notice of the agreement to the Commission by seeking either negative clearance or individual exemption under article 85 of the EEC Treaty or whether to notify pursuant to the Merger Control Regulation’s procedures. Informal preliminary discussions with the Commission may be somewhat helpful in making this decision. In the event that a merger is nevertheless notified pursuant to the procedures of the Merger Control Regulation, but is ultimately deemed to fall beyond the Regulation’s scope, the Commission, upon the written request of the parties, shall treat the application as one for exemption or negative clearance pursuant to the provisions of article 85, subsections (1) and (3) of the EEC Treaty.

All mergers falling within the scope of the Merger Control Regulation must be notified on the mandatory form annexed to the Commission Regulation on Notifications. According to the Commission, the Form is designed to “simplify and expedite examination of the notification” procedures. While experience may confirm or deny the truth of this, the information to be gathered, developed, and submitted by parties is quite extensive; it has been compared not to an initial filing under the Hart-Scott-Rodino Act, but rather to a response to a second request thereunder for additional documents and information. However, some attempt to limit this burden has been made by the Commission. The final text of the Commission Regulation on Notifications provides that: “The Commission may dispense with the obligation to provide any particular information requested

82. It is not obligatory to notify agreements falling within articles 85 and 86 of the EEC Treaty (see supra note 2). Nonetheless, formal notification is essential for obtaining protection from fines and exemption from prohibition. Regulation No. 17, supra note 27, art. 15(5).

83. Negative clearance is a Commission determination that an agreement does not fall within article 85(1) or 86 of the Treaty. An individual exemption is not available as to article 86, but allows the Commission to exempt agreements falling within article 85(1) on the grounds of article 85(3) if: it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and affords such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. EEC Treaty, supra note 2, art. 85(3). Unlike applications for individual exemptions, those for negative clearance alone do not protect notifying parties from fines. In practice, both are notified simultaneously on the same form. See supra C. Bellamy & G. Child, supra note 11, §§ 11-001 to 11-022.

84. Commission Regulation on Notifications, supra note 11, art. 5.

85. Form, supra note 11, part (A).

86. Commission Regulation on Notifications, supra note 11, ¶ 4.

by form CO where the Commission considers that such information is not necessary for the examination of the case.”

Mergers *stricto sensu* or acquisitions of joint control must be notified jointly by the parties to the merger or the acquirers of joint control. In all other cases, notifications are effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings. Twenty copies of each notification and fifteen copies of all supporting documentation must be submitted to the Directorate General for Competition. The copies must be in one of the official languages of the Community, the language being that of the proceeding as it concerns the parties.

A. GENERAL INFORMATION ON THE PARTIES

The parties may specify an address for service in Brussels, “if available”; where notification is made by representatives of the parties, they must produce written proof of their authority. In addition, a joint representative must be appointed by the parties in the case of joint notifications. The Commission Regulation on Notifications requires that all information requested in the Form be supplied.

The parties must give a brief description of the nature of the concentration stating, among other things, whether the proposed concentration is a full legal merger, an acquisition, a joint venture or another means conferring direct or indirect control. In describing the nature of the concentration, the notice also requires a description of whether whole or parts of concerned parties are subject to it. Furthermore, the parties must state whether any public offer for the securities of one party by another has the support of the corporate bodies representing the target. The parties must also note the economic sectors involved.

---

88. Commission Regulation on Notifications, *supra* note 11, art. 4(3).
89. *Id.* part B(2).
90. *Id.* part B(2).
91. Commission Regulation on Notifications, *supra* note 11, art. 2(2). See also Form, *supra* note 11, part (D)(6). Note that these may be either original or certified copies.
94. Form, *supra* note 11, part (D), § 1(3).
95. Commission Regulation on Notifications, *supra* note 11, art. 1(2); Form, *supra* note 11, § 1(4).
96. Commission Regulation on Notifications, *supra* note 11, art. 1(3).
97. *Id.* art. 3.
98. Form, *supra* note 11, § 2(1).
99. *Id.* § 2(1). As noted above, this may be determinant with respect to the applicable thresholds. See also Merger Control Regulation, *supra* note 1, art. 5(2).
100. Form, *supra* note 11, § 2(1).
101. *Id.* § 2(2).
The Form also requires the submission of a brief explanation of the economic and financial details of the merger. The parties must provide information with regard to any financial or other support from whatever source by any of the parties; the nature and amount of this support; the proposed or expected date of any major events designed to bring about the completion of the concentration, and the proposed structure of ownership and control after completion of the concentration. As to the financial positions of the parties, data must be furnished for each of the parties over the past three financial years with regard to worldwide turnover, Community-wide turnover, turnover in each Member State, profits before tax worldwide, number of employees, and the Member State in which more than two-thirds of Community-wide turnover is achieved before taxable profits and employees' salaries.

The direct and indirect ownership and control of the parties involved in the concentration is another focus of the Form. It therefore requires the parties to provide a list of all companies or persons controlling the parties, or controlled by them directly or indirectly, which together are characterized as a group. The notion of control is defined by the Merger Control Regulation, to which the Form refers, as the possibility to exert a material influence on another business's activity. Notifying parties must also provide details of all acquisitions made by controlled or controlling entities within the past three years within affected markets. The "personal and financial links" between each member of the group, including those deemed to be controlled or controlling entities of the actual parties to the merger themselves, together with other businesses in which they hold 10 percent or more of the voting rights, or which hold 10 percent or more of their voting rights, must also be disclosed if said businesses "are active on affected markets." Furthermore, a complete list of their directors who are also directors of other corporations "active on affected markets" is required.

102. Id. § 2(3).
103. Id. § 2(3). In an earlier draft of the Form, the Commission required the submission of detailed information concerning the value and form of consideration offered or agreed upon, as well as the means of raising such consideration pursuant to the formation of a concentration.
104. Id. § 2(3).
105. Id. § 2(4). It is immediately apparent that the Commission will use this information in appreciating whether the merger meets the triggering mechanism of article 1(2) of the Merger Control Regulation.
106. Merger Control Regulation, supra note 1, art. 3(3).
107. Form, supra note 11, § 3. Note that all responses may include charts or diagrams that illustrate the preconcentration structure of ownership and control. This information is relevant not only for determining whether the merger falls within the scope of the Merger Control Regulation pursuant to article 1(2), (3), and (4), but also for substantively assessing the merger itself, as the competitive situation on the relevant market is obviously its focus. Merger Control Regulation, supra note 1, art. 2. See, e.g., Thieffry, supra note 1, at 549.
108. Form, supra note 11, § 4(1)-(2).
109. Form, supra note 11, § 4(3). The phrases used by the Form are "board of management" and "board of supervision." They reflect the internal organization of most corporations in Europe.
110. Id. § 4(3). Note that here too charts and diagrams may be submitted.
The notifying parties are also obliged to accompany the notification with the following: (a) copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties concerned, acquisition of a controlling interest, or a public bid; (b) in a public bid, a copy of the offer document; if unavailable on notification, it should be submitted as soon as possible and not later than when it is sent to shareholders; (c) copies of the most recent annual reports of all the parties to the concentration.\textsuperscript{111}

\section*{B. Specific Information on the "Affected Markets"}

Section Five of the Form defines "affected markets" as well as "product markets" and the "relevant geographic market." Product markets comprise: "all products and/or services that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use."\textsuperscript{112} The Form further specifies that a "relevant product market" may be composed of several "individual product groups," that is to say of groups of products "which present largely identical physical or technical characteristics and are fully interchangeable."\textsuperscript{113} The Commission, however, fails to give any clue whatsoever as to which criteria are to be applied in determining the interchangeability or substitutability of the products. The notifying parties will thus candidly retain the widest margin of appreciation in making their evaluations and cannot be criticized if they rely on first impressions favorable to their positions. The Commission, on the other hand, is obviously not bound by the parties' statements in these respects and is free to apply more sophisticated analyses such as those based on cross-elasticities. As to the "relevant geographic market," it is quite simply defined in the Form as: "the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because, in particular, conditions of competition are appreciably different in those areas."\textsuperscript{114}

The focus of the Form's queries is neither the product market or individual product group nor the relevant geographic market, but rather their intersection, referred to by the Commission as the "affected market." As a result, the bulk of the substantive information required\textsuperscript{115} for the notification relates only to the relevant product markets or individual product groups in the relevant geographic

\begin{footnotesize}
\begin{itemize}
  \item[111.] Id. part (C).
  \item[112.] Id. § 5.
  \item[113.] Id.
  \item[114.] Id.
  \item[115.] Based on an earlier draft of the Form, the requirements of which were subsequently somewhat reduced, a task force of the ABA Section of Antitrust Law estimated that the cost of developing the information necessary for a notification amounted to several hundreds of thousands of U.S. dollars because it will require the parties to engage in extensive consulting with competent experts. See Reasoner, supra note 74, at 263.
\end{itemize}
\end{footnotesize}
market or markets where any of the parties, or any of the members of the groups to which they belong, hold market shares of 10 percent or more (i) together in the case of a horizontal relationship,116 or (ii) on any of the concerned markets in the case of a vertical relationship.117

The Form mandates that data be provided as to the concentrations' market aspects based on the above described concepts and on what appear to be de facto triggers. Notifying parties must describe the products or services constituting the relevant product market and explain why these are included in the definition while others are excluded by reason of their characteristics, prices, and intended uses.118 The following information is required for each of the last three fiscal years, for the Community as a whole and individually for each Member State, and where different, for any relevant geographical market. With respect to each affected market the required information is: an estimate of the value of the market and volume where appropriate,119 the turnover120 and the estimated market share of each of the groups to which the parties belong;121 an estimate of the market share of all competitors having at least 10 percent of the geographic market under consideration,122 a comparison of prices charged by the groups to which the parties belong in each of the Member States, and a similar comparison to such price levels between the Community and its major trading partners;123 an estimate of the value and source of imports to the relevant geographic market, and the proportion of such imports that derive from undertakings belonging to the same group;124 and the extent such imports are governed by any tariffs or nontariff barriers to trade.125

Section Five of the Annex contains a special provision for "conglomerates."126 Under this provision, if any of the parties or members of their groups, in the absence of vertical or horizontal relationships, hold a market share of 25 percent or more of any product market or individual product group, then the regulation requires the submission of a description of each relevant product market and a list describing the individual product groups thereof. In addition,

116. Consider, for example, the situation where two or more parties are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 10 percent or more.

117. A vertical relationship exists where any of the concerned parties is engaged in business activities in a product market which is upstream or downstream of a product market in which any other concerned party is engaged and any of their market shares is 10 percent or more, regardless of whether there is or is not an existing supplier/customer relationship between the concerned parties.

118. Form, supra note 11, § 5(1).

119. Id. § 5(3).

120. Id. § 5(4).

121. Id. § 5(5).

122. Id. § 5(6).

123. Id. § 5(6).

124. Id. § 5(8) & (9).

125. Id. § 5(10).

126. Id. § 5(11)-(13).
such parties must submit an estimate of the market value and share of each of the
groups to which the parties belong for each affected relevant product market over
the last financial year for the Community as a whole, individually for each
Member State where the groups to which the parties belong do business, and
where different, for any relevant geographic market.

Section Six of the Annex relates to the state of the market itself and may be
the single most important section, as most of the information above relates to
issues of jurisdiction and scope. In addition, it may be the market for which
existing Community provisions are the most inadequate. Section Six requires
information concerning general conditions in the affected markets. The Com-
mission seeks an opportunity to examine the degree of market entry, by requiring
the delivery of information on significant entries into the affected markets in the
Community over the prior five-year period, including the entrants’ market
shares, as well as the parties’ opinions as to the possibility of potential new
market entrants.\footnote{127} Parties are also obliged to describe various factors that in-
fluence entry into affected markets, taking into account the total costs of entry
and the extent to which entry is influenced by factors such as governmental
authorization or regulation, the availability of raw materials, the length of con-
tracts between an undertaking and its suppliers, its customers or both, and the
licensing of patents, know-how, and other rights.\footnote{128}

Not surprisingly, detailed information must be supplied regarding the degree of
vertical integration between the parties,\footnote{129} as well as the extent of research and
development,\footnote{130} cooperative agreements,\footnote{131} and the existing distribution chan-
nels and service networks’ impact upon the relevant markets.\footnote{132} The Annex also
requires a description of the competitive environment of the affected market,
including the phases of the markets,\footnote{133} the structure of demand\footnote{134} and supply,\footnote{135}
a profile of the typical supplier and customer of each group, and details on the
ten largest customers\footnote{136} and suppliers of the notifying parties.\footnote{137} The notifying
party is also required to give its opinion on the role of public authorities, gov-
ernment agencies, and state enterprises as sources of supply and demand.\footnote{138} The
parties must explain the total Community-wide capacity for the past three years

\footnote{127. Id. § 6(1)-(2).}
\footnote{128. Id. § 6(4).}
\footnote{129. Id. § 6(5).}
\footnote{130. Id. § 6(6).}
\footnote{131. Id. § 6(11).}
\footnote{132. Id. § 6(7).}
\footnote{133. Id. § 6(10). This subsection states that parties must express market phases in terms of
take-off, expansion, maturity, and decline.}
\footnote{134. Id.}
\footnote{135. Id.}
\footnote{136. Id. § 6(9). This subsection requires the giving of names, addresses and contacts.}
\footnote{137. Id. § 6(8).}
\footnote{138. Id. § 6(10).}
in relation to the parties' capacity utilization and describe the worldwide context of proposed concentration, indicating the position of the parties in this market. The notifying parties are also obliged to accompany the notification with copies of reports or analyses, which have been prepared for the purposes of the concentration and from which information has been taken in order to provide the information requested in Sections Five and Six.

C. ANTICIPATED EFFECT OF THE MERGER

Section Seven allows the parties to describe how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress. The notifying parties are also obliged to accompany the notification with a list and short description of the contents of all analyses, reports, studies, and surveys prepared by or for any of the notifying parties for the purpose of assessing or analyzing the proposed concentration with respect to competitive conditions, competitors (actual and potential), and market conditions. Each item in the list must include the name and position of the author.

Under the final provisions of the draft Annex the parties would have been afforded the opportunity, not unlike that provided in the A/B Form used to notify the Commission of other European competition matters, to state the factors they believed should be considered in assessing the concentration in terms of the achievement of the fundamental objectives of the European Community, including those of strengthening the Community’s economic and social cohesion. Although frequently and thoroughly used, this opportunity was withheld from the final version of the Form. The parties’ arguments in favor of the merger are therefore developed only at a later stage, as discussed below.

III. Consequences of Non-Compliance with the Regulation’s Requirements

Among the premises of the Merger Control Regulation is that the Commission should have “the task of taking all decisions necessary to establish whether or

---

139. Id.
140. Id. § 6(14).
141. Id. part (C).
142. Id. § 7(1).
143. Id. part (C).
144. The Form A/B, as revised on January 1, 1986, copies of which are obtainable from the Commission’s information offices, may be used both as an application for negative clearance or as a notification for the purpose of obtaining an exemption from the application of the Community’s competition rules. The Form requires only the identity of the parties, the purpose of the application, the full details of the agreement, a description of the relevant market, information about the business, turnover and market share of the parties, the arguments relied on, and other relevant information. See C. BELLAMY & G. CHILD, supra note 12, § 11-062.
not concentrations of Community dimension are compatible with the Common Market, as well as decisions designed to restore effective competition.\textsuperscript{145} The Commission may also attach to its decisions conditions and obligations intended to ensure that parties comply with modifications they undertook to make to the proposed merger during their discussions with the Commission.\textsuperscript{146} To this end, the Council considered that the Commission must be empowered to "require information to be given and to carry out the necessary investigations."\textsuperscript{147} It also granted the Commission the sanctioning power necessary for the effectiveness thereof, subject to the principle that enforcement must be by means of fines and periodic penalty payments comparable to those imposed for civil contempt (\textit{astreintes}),\textsuperscript{148} with the Court of Justice having exclusive jurisdiction thereupon.\textsuperscript{149} The Regulation provides some safeguards as to the rights of the parties by providing the right to a hearing in the event that a decision is to be considered regarding fines and periodic penalty payments.\textsuperscript{150} Having unlimited jurisdiction, the Court of First Instance and the Court of Justice may cancel, reduce, or increase the fine or periodic payment imposed.\textsuperscript{151}

The extent of the Commission's powers pursuant to the other EC provisions on competition have in recent years given rise to a significant body of case law that should more or less readily apply to proceedings conducted pursuant to the Merger Control Regulation in view of the similarity of its provisions with those of Regulation 17. In the context of the investigation procedure the Court of Justice has ruled that in the case where a party fails to provide requested information, the Commission may not render a decision fixing the amount of a fine or periodic penalty payment until after the party is given the opportunity to be heard on the matter.\textsuperscript{152} Since the Commission's power to fine entails two stages—the decision to impose the fine and the decision fixing the amount thereof—interested parties should be wary of the Commission's power to decide to fine without granting a right to a hearing or consulting with the advisory committee.\textsuperscript{153} Companies nevertheless do enjoy certain fundamental rights. For example, in

\textsuperscript{145} Merger Control Regulation, \textit{supra} note 1, preamble \S 20.
\textsuperscript{146} \textit{Id.} art. 8(2). This procedure is also followed by the Commission with respect to its conduct concerning article 85(3) of the EEC Treaty (\textit{see supra} note 2).
\textsuperscript{147} \textit{Id.} preamble \S 25.
\textsuperscript{148} Merger Control Regulation, \textit{supra} note 1, art. 15(3). As an incentive for compliance, and following the Civil Law practice of \textit{astreintes}, the Regulation states that the total amount of periodic penalty payments may be set at a lower figure than that arising under the original agreement when the concerned undertakings have satisfied the obligations to which the periodic penalty applied.
\textsuperscript{149} \textit{Id.} preamble \S 26.
\textsuperscript{150} Merger Control Regulation, \textit{supra} note 1, art. 18 (1).
\textsuperscript{151} \textit{Id.} art. 16. Where a judgment is rendered annulling whole or part of a Commission decision, the time periods laid down shall start again from the dates of the judgment. \textit{Id.} art. 10(5).
\textsuperscript{152} Case 374/87 Orkem (previously CdF Chimie) v. Commission of the European Communities \S 26 (not yet reported) [hereinafter Orkem].
\textsuperscript{153} Cases 46/87 and 227/88 Hoechst A.G. v. Commission of the European Communities (not yet reported) [hereinafter Hoechst].

FALL 1991
cases where the validity of Commission decisions ordering verification investigations has successfully been challenged before the Court of Justice, resulting in the decisions being set aside, the Commission is denied the right to use documents obtained in violation of a company’s fundamental rights in subsequent investigations.

A. FAILURE TO NOTIFY

Mergers may not be put into effect either until the notification is filed or within the first three weeks following such filing. In addition, the Commission may decide to extend this period of suspension for the entire duration of its investigation. Public bids, which must be notified by the day of its announcement, may be realized within this time period on the condition that the acquirer does not exercise the voting power attached to the acquired shares.

The possible effects of the injunctive power of the Commission are remarkable. The Commission has the power to require of implemented concentrations the bringing together or separation of assets, the cessation of joint control, or any other action that may be appropriate to restore the conditions of effective competition. In addition, the validity of the legal acts that effectuated the merger is destroyed unless the merger is ultimately notified and cleared. Although the validity of transactions in securities traded in regulated exchanges is excepted, the impact of this exception on the concerned overall merger is not specified. Moreover, this exception does not apply in cases where the buyer and seller have knowledge or imputed knowledge of the irregularity of the transaction.

The failure to notify of a merger falling within the scope of the Merger Control Regulation, whether conscious or negligent, can also be punished by fines assessed by the Commission. The Commission’s sanctioning power, similar to that provided in Regulation No. 17, accompanies the full array of Commission pow-

154. Id.; Case 85/87 Dow Benelux v. Commission of the European Communities (not yet reported) [hereinafter Dow Benelux]. Cases 97/87, 98/87 and 99/87 Dow Chemical Iberica v. Commission of the European Communities (not yet reported) [hereinafter Dow Chemical].

155. Dow Chemical, supra note 154.

156. Merger Control Regulation, supra note 1, art. 7(1). It is noteworthy that under an earlier draft of the Commission Regulation, absent force majeure, notifications submitted beyond the specified time limit or the extension periods would not bind the Commission to the one-month preliminary review, and four-month investigatory time limits set forth in the Regulation. See Draft Commission Regulation on Notifications, Time Limits and Hearings provided for by Council Regulation (EEC) No. 4064/89 on the Control of Concentrations Between Undertakings, EUR. COMM. DOC. No. IV/156/90, art. 3(4) (1990).

157. Merger Control Regulation, supra note 1, art. 7(2).

158. Id. art. 7(3). The Commission may grant a derogation from such a suspension when voting rights are exercised in an effort to maintain the value of shares acquired.

159. Id. art. 8(4).

160. Id. art. 7(5).

161. Id.
The Commission has two categories of fines. The failure to notify a merger within the scope of the Merger Control Regulation can be punished in amounts varying between ECU 1,000 and ECU 50,000. Under Regulation No. 17, no fines are imposed for the mere failure to notify agreements or practices falling within the scope of article 85 of the EEC Treaty; the only sanction is the inability to obtain an individual exemption, and the lack of a defense to the subsequent imposition of fines upon a later Commission determination. The Commission may also impose fines of up to 10 percent of the aggregate turnover of the undertakings concerned where, either intentionally or negligently: the parties proceed with the merger during the initial three-week period following the notification, or thereafter if the stay is extended by the Commission pending its investigation; or after the merger has been declared incompatible with the Common Market; or if the parties fail to take the measures ordered by the Commission designed to undo an already implemented concentration in order to bring it into line with conditions of effective competition. The most powerful instrument of coercion available to the Commission is its ability to impose penalties of up to ECU 100,000 for each day parties delay in complying with Commission decisions, as calculated from the date set therein ordering parties to comply with measures designed to bring already implemented concentrations into line with conditions of effective competition or undo them.

B. INCOMPLETE OR INACCURATE NOTIFICATIONS

The Merger Control Regulation allows the Commission to obtain all necessary information from the governments and competent authorities of Member States, from all persons controlling the concerned businesses, and from the businesses themselves. This possibility exists in all circumstances and is not limited to incomplete notifications. Similar to the provisions of Regulation No. 17, the Merger Control Regulation provides a two-step process whereby the Commission is required to send a simple request for information to the parties, stating the legal basis, purpose, and penalties for supplying incorrect information as per the Merger Control Regulation while simultaneously submitting a copy to the competent authority of the Member State wherein the party resides.

The case law developed in relation to other competition provisions should equally govern in construing the power of the Commission to obtain information.

162. Id. art. 14. As with Regulation No. 17, the Commission, in setting the amounts of fine, shall regard "the nature and gravity of infringement." Id. art. 14(3). It should be noted that fines are not of a criminal nature. Id. art. 14(4).
163. Id. art. 14(1)(a).
164. Id. art. 14(2)(b)-(c).
165. Id. art. 15(2)(b).
166. Id. art. 11(1).
167. Id. art. 11(3).
168. Id. art. 11(2).
in the context of the Merger Control Regulation. The use of the Commission's power of investigation must be justified by a showing of necessity. Of course, the Commission is granted wide discretion in the determination of whether such necessity has been shown. In the ruling of AM & S, the Court of Justice noted that the Commission may demand those documents it deems necessary to reveal a violation of competition rules. The Court further ruled that the determination of whether documents should or should not be presented is for the Commission itself and not for interested parties or a third party or referee. The determination as to whether the information requested or verification investigation sought is indeed necessary cannot be left entirely to the discretion of the Commission. The Court of Justice is therefore empowered to verify whether the measures of investigation decided upon by the Commission are excessive or disproportionate.

The Court of Justice has recently clarified that the exercise of investigative powers by the Commission must be such that they do not violate the fundamental rights of the concerned party.

The Court of Justice also recently ruled that while the Commission may require a company to furnish it with all necessary information pertaining to competition matters, and to supply it with any documents in its possession relating to those matters, even if they may ultimately show the existence of anticompetitive behavior on the part of the company or of another company, the Commission may not oblige a company to provide it with answers by which it might be led to admit its own violation of competition provisions, as such is for the Commission to prove. Simply stated, the Commission may ask for facts and documents, but cannot require a company to answer leading questions. While this list is not exhaustive of the fundamental rights guaranteed to parties subject to Commission investigation, it is clear that the Commission has a large degree of power in competition matters and parties are generally subject to the obligation of cooperating with investigatory measures.

If the recipient does not respond to the Commission's initial request for information, a fine is imposed similar to that which applies for failure to notify,

---

171. Orkem, supra note 152; Case 27/88 Solvay v. Commission of the European Economic Communities ¶ 66 (not yet reported) [hereinafter Solvay].
172. It is interesting to note that one commentator has suggested that while such fundamental rights have operated to overturn several Commission competition decisions, the Court of Justice seems more impressed by arguments that allow a balance to be struck between the effective enforcement of competition law and elemental procedural fairness, than by appeals to unassailable and all-embracing "constitutional rights." Edward, Constitutional Rules of Community Law in EEC Competition Cases, 13 FORDHAM INT'L L.J. 111, 137 (1990).
173. Orkem, supra note 152; Solvay, supra note 171.
174. Edward, supra note 172, at 137.
ECU 1,000 to ECU 50,000. In the event that a party thereafter fails to comply within the period fixed by the Commission, a formal decision specifying the information requested, containing a fixed time for response, the penalties in the event of noncompliance, and the right to review by the Court of Justice, is to be issued to that party as well as to the competent authority of the party's place of residence. In this formal decision, the Commission is not only again required to recite the above mentioned possibility of fines but also that of periodic penalty payments—designed to coerce the production of the information sought—of up to ECU 25,000 per day.

The Commission may undertake all investigations it deems necessary "in carrying out the duties assigned to it." However, the above requests for information, which are made pursuant to article 11 of the Merger Control Regulation, may be addressed not only to "undertakings and associations of undertakings," but also to the parties to the merger, whether businesses or individuals. Conversely, investigations, provided for by article 13, may not be directed against the latter. Commission officials may themselves conduct these investigations pursuant to a warrant specifying their subject matter, purpose, and the applicable penalties. The competent authorities of the relevant Member States are to be notified in "good time" of the investigation and the identities of the authorized Commission officials. In the alternative, the Commission may be assisted by local officials or request the competent authorities of the Member States to undertake investigations that it deemed necessary or ordered by formal decision.

When conducting competition investigations local authorities must act on the basis of a warrant issued by the local authority with jurisdiction, which must state the subject matter and purpose of the investigation. Agents of the Commission may in this case assist the local authorities in their investigation. If the Commission issues a formal decision authorizing an investigation, then the Merger Control Regulation provides that it is mandatory for "undertakings and associations of undertakings" to submit themselves thereto. Failing such submission, the Member State with jurisdiction must assist the Commission in enforcing

175. Merger Control Regulation, supra note 1, art. 14(1).
176. Id. art. 11(5).
177. Id. art. 11(6).
178. Id. art. 13(1).
179. Id. art. 13(1). The Commission's officials are granted the same powers granted them under Regulation No. 17.
180. Id. art. 13(2).
181. Id. art. 13(2).
182. Id. art. 13(5).
183. Id. art. 12. Note that this provision is similar to that contained in Regulation No. 17 (see note 23).
184. Id. art. 12(1).
185. Id. art. 12(20).
186. Id. art. 13(3).
its decision. As such, the agents in charge of the investigation may examine books and other business records and take or demand copies of all extracts from them. They may also "ask for oral explanations on the spot" and "enter any premises, land and means of transport of undertakings."

Here again, preexisting caselaw provides an idea of the safeguards available to the parties. For example, it has been held that the Commission must provide justification for its decisions in this area, such that the objectives and goals of the verification procedure must be made known to the parties subject thereto. The agents of the Commission at the time of a verification investigation may not force access to a locale or to the personal property thereupon. Furthermore, Commission officials may not compel the personnel of a company to furnish them with such access, nor attempt to search the premises without the authorization of those accountable for the company.

In cases where measures of verification are not conducted with the collaboration of the concerned company, the Commission must respect procedural guarantees provided for in this regard, by its national corporate law. By way of clarification, businesses have a positive legal obligation to submit to an investigation, to open files or cabinets, and to produce for inspection any document the Commission wishes to see. But, if businesses refuse to cooperate, the Commission may have to rely on national authorities to force companies into compliance. Thus, while the Commission need not specify precisely what it seeks to examine, it does not have active powers of search. Information gathered in the course of a verification investigation may not be used for any purposes other than those indicated within the mandate or decision of verification. The rights of defense or procedural safeguards would be severely compromised if the Commission could use evidence obtained in the course of a verification against individuals who were strangers to the object and goal thereof.

The Merger Control Regulation and the Commission Regulation on Notifications contain a limited number of provisions dealing specifically with incomplete or inaccurate notifications, as opposed to the general investigative powers discussed above. Fines ranging from ECU 1,000 to ECU 50,000 may be assessed

187. Id. art. 13(6). The Member States must adopt the provisions necessary therefor within one year from the coming into force of the Merger Control Regulation, that is to say by September 21, 1991.
188. Id. art. 13(1)(a).
189. Id. art. 13(1)(b).
190. Id. art. 13(1)(c).
191. Id. art. 13(1)(d).
193. Id. consideration 31.
194. Id. consideration 24.
195. Id.; see also Edward, supra note 172, at 137.
196. Dow Benelux, supra note 152, consideration 18.
where the parties supply incorrect or misleading information in a notification, just as in the above-mentioned cases when parties fail to notify or comply with a request for information or investigation. Perhaps a stronger deterrent is that the time periods imposed on the Commission to start and complete the procedure begin to run only when the information filed is complete. Because incorrect or "misleading" information is deemed to constitute incomplete information, it appears that a notification could be deemed not to have occurred until all the required information is filed, thereby extending the time periods exacted by the regulations. For example, the Commission will stay the four-month time period, during which it must issue its final decision on the merger, if it is compelled to request information or proceed to an investigation, as discussed above, because of circumstances for which one of the parties to the merger is responsible.

Apparently, the Commission chose not to avail itself of the full extent of this provision. In the Commission Regulation on Notifications suspension is limited to specific instances in which it must take a formal decision due to a concerned party’s failure to comply with a request for information or investigation. In those cases the period of time will be suspended between the end of the time limit granted within which to supply the requested information, or the unsuccessful attempt to carry out the investigation, and the moment in time when such failures are remedied. In addition, the parties are required to inform the Commission without delay of “material changes” in the facts specified in the notification. The failure to comply with this requirement will similarly extend the deadline for the Commission’s work until the execution of the formal decision it is required to take by virtue of the material change in positions of the parties.

It is important to distinguish situations where the Commission dispenses with the time limitations as opposed to merely suspending or tolling them, as in the above instances where the Commission Regulation on Notifications specifies the time limit of such suspensions as generally spanning the time from the moment the Commission is denied its request for information, or an investigation or a change in circumstances occurs, to the moment that compliance is had by the Commission. However, where parties have either breached an obligation attached to a decision of the Commission, or a Commission decision was based on

---

197. Merger Control Regulation, supra note 1, art. 14(1)(b).
198. Id. art. 10(1).
199. Commission Regulation on Notifications, supra note 11, art. 3(3).
200. Merger Control Regulation, supra note 1, art. 10(4).
201. Commission Regulation on Notifications, supra note 11, art. 9(1)(a)-(b).
202. Id. art. 9(2)(a).
203. Id. art. 9(2)(b).
204. Id. art. 9(3).
205. Id. art. 3(3).
206. Id. art. 9(2)(c).
incorrect information, these time limits are dispensed with and do not bar the Commission from overturning a prior decision. Yet, the fact that a clearance decision may be repealed is the real deterrent and should be taken most seriously by parties, despite the temptation of not drawing to the Commission's attention those unfavorable aspects of their project that may exist. In addition to its power to impose fines, the Commission may, by decision, force concerned parties to make penalty payments of up to ECU 25,000 for each day of delay computed from the day set by the decision, thereby compelling them to supply complete and correct information requested by a Commission decision or to submit to an investigation ordered by Commission decision.

IV. Conclusion

Concentrations falling within the scope of the Merger Control Regulation are evaluated in terms of their compatibility with the Common Market. The Merger Control Regulation provides several criteria for such appraisal that have not been clarified by Commission notices, as have other aspects of the regulation, and thus leaves a wide margin for the interpretation of these criteria to the discretion of the Commission. Concentrations creating or strengthening dominant positions, significantly impeding effective competition in the Common Market, or in a substantial part of it, are always incompatible with the Common Market. On the other hand, mergers that do not create or strengthen a dominant position because of their limited market share must be declared compatible with the Common Market. In this respect it is interesting to note that one of the nonbinding interpretive provisions preceding the Regulation states that concentrations whose limited market share does not exceed 25 percent either in the Common Market or in a substantial part of it may be presumed to be compatible with the Common Market. In making its determination as to compatibility, the Commission takes into account the following criteria: market structure, real and potential competition from within and beyond the Community,

207. Merger Control Regulation, supra note 1, art. 8(6).
208. Id. art. 15(1)(a).
209. Id. art. 15(1)(b).
210. Id. art. 2(1).
211. Id. art. 2(3). This provision is vague, in that it fails to clearly define what is meant by "a substantial part" of the Common Market. It is conceivable for example that a single German "land" could be deemed as such while one of the smaller of the Member States might not. Recently, it was reported that a controversy exists within the Commission as to whether a dominant position within the Dutch coffee market, acquired by Douwe Egberts N.V., constitutes a dominant position within a substantial part of the Common Market. Commission Dispute over Benelux Coffee Merger, Common Mkt. Rep. (CCH) ¶ 662 (1990).
212. Merger Control Regulation, art. 2(2).
213. Id. preamble ¶ 19.
214. Note that the implementing regulations of the EC's Competition provisions do not consider elements beyond the Community. See Regulation No. 17, supra note 27.
market position of the concerned parties, barriers to entry, consumer interests, and economic/technical progress. The time limits imposed on the Commission to process a notification will obviously demand great effort on its part to respect them.

Deals that fail to constitute a merger as defined by the Merger Control Regulation and interpreted by the Commission, fall within the concurrent jurisdiction of both EC and Member State review. Conversely, deals that do constitute a "concentration" under the Regulation, but fail to have a Community dimension, are left to the sole supervision of Member State authorities and are excluded from the application of EC competition rules, unless a Member State authority expressly requests Commission intervention for a matter that does affect intra-Community trade. As discussed above, these transactions will not benefit from the redeeming features of the Merger Control Regulation since they will remain subject to provisions whose application are not subject to strict time limits. Some may even wonder if the increased pressure put on the Commission by the Merger Control Regulation's strict time limits will cause the pace of its other procedures to slow down.

The Commission's Directorate General on Competition has been reorganizing and adding to its staff with a view toward preparing for this new instrument of EC competition policy. Clearly, it offers a higher degree of legal certainty for both companies within and beyond the EC that contemplate large-scale acquisitions, mergers, and joint ventures. It will also, if followed, accelerate the regulatory process surrounding large corporate restructurings. The notification requirements alone are demanding, as failure to adhere strictly will most likely result in delays or even fines. Ironically, the complicated nature of the notification form and the corresponding exceptions granted the Commission as to the time limits in the event of delay or incomplete filings may operate ultimately to undermine one of the Merger Control Regulation's purposes, that being the quickening of the Merger Control process. It remains to be seen, however, how the Commission, the Court of First Instance and the Court of Justice will balance the interest of enforcement against that of expediting commercial transactions. It might appear that the documentary production requirements of the Merger Control Regulation could operate in a repressive manner with respect to those

215. Merger Control Regulation, supra note 1, art. 2(2).

216. Id. art. 22(2). This provision states that Regulation No. 17 "shall not apply" to concentrations as defined in article 3 of the Merger Control Regulation. Id.

217. Note that the Regulation provides for other derogations from the principle of one-stop merger control, e.g., Merger Control Regulation. For example, Member States may request that mergers be referred back to national competition authorities even when Community dimension exists when such a concentration threatens to significantly impede effective competition "on a market within the Member States which presents all the characteristics of a distinct market." Id. art. 9. Member States may also take appropriate measures to protect legitimate interests, other than those taken into consideration by the Commission and as such may allow Member States to block a merger cleared by the Commission based on the grounds of public security, plurality of media ownership, or prudential rules for financial institutions. Id. art. 21.
companies whose activities it was intended to facilitate. Another possibility is that the Commission itself is not prepared to handle the vast amounts of documentary analysis and tracking that the new Regulation promises to generate. However, European companies are much less prolific than their American counterparts in the generation and filing of internal corporate files. While it is also true that they are generally more reluctant to part with what few documents they do possess, it is possible that intra-European transactions might not create the bureaucratic confusion that many commentators foresee. In addition, one could also defend the Commission's position in this regard by simply considering that the demanding information requirements of the Regulation will, if met, save concerned parties much time because the Commission, as a general rule, ultimately pursues information until it acquires it. In simple terms, if the Commission is not in possession of the required information at the outset of an investigation, it will prolong such an investigation until it acquires it.

The mandatory notification requirement, while providing more certainty to parties, will also operate to deny them the option existing under Regulation No. 17 of not notifying certain agreements, thereby maintaining absolute confidentiality and avoiding the drawing of the Commission's attention to deals hovering in the grey areas of competition law. Obviously, the vast amount of sensitive information required for notification, which clearly exceeds that required under preexisting procedures, would have created an incentive for "non-notification" had this option been opened. The improvements of legal certainty as to the status of particular deals may also be questioned due to the wide array of transactions that may fall within the definition of a merger.

Concerns have been expressed over what may have been perceived as insufficient safeguards as to the confidentiality of the information disclosed during the process. Article 17 of the Merger Control Regulation provides for the confidentiality of the said information. Nevertheless, business circles fear too many opportunities for sensitive information to be divulged. Such information will be available not only to Commission officials, but also to outside persons, such as Member States' authorities to which a merger can be referred under certain circumstances or who may be involved in investigations, as well as those sitting on the special Committee who must be consulted before the Commission makes major decisions. Likewise, although it is specified that the Commission must take into account the interest of the parties that their business secrets not be divulged when it publishes a notification, which it is required to do when it engages into a merger's assessment, the very fact of such a notification may

218. See, e.g., Reasoner, supra note 87.
219. Merger Control Regulation, supra note 1, art. 9.
220. Id. arts. 12, 13.
221. Id. art. 19(3).
222. Id. art. 4(3).
under certain circumstances be inappropriate from a business viewpoint. Hear-
ings, on the other hand, will not be public, and the Commission has committed
to take the parties' interest for confidentiality into account when ruling on the
presence of persons summoned at hearings.223

These comments aside, the EC's new Merger Control Regulation has been
anxiously awaited and promises to offer parties a procedure for expediting large-
scale transactions that were previously governed by ill-suited and awkward pro-
visions. As such, it offers to parties more security and perhaps an incentive for
further economic growth in the emerging integration of Europe.

223. Commission Regulation on Notifications, supra note 11, art. 15(4).
## APPENDIX

**Notified Concentrations Pursuant to**

**Council Regulation (EEC) No. 4064/89 of December 21, 1989,**

**on the Control of Concentrations Between Undertakings**

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Parties (Sector Concerned)</th>
<th>Nature of the Concentration</th>
<th>Date of the Notification</th>
<th>Declaration of Nonopposition</th>
<th>Declaration of Inapplicability of the Regulation</th>
<th>In-depth Examination</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Renault/Volvo motor vehicles</td>
<td>Reciprocal acquisition of shares</td>
<td>October 4, 1990</td>
<td>November 6, 1990</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>2</td>
<td>AG/Amex insurance</td>
<td>Joint ventures</td>
<td>October 19, 1990</td>
<td>November 21, 1990</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>3</td>
<td>ICI/Tioxide chemical products</td>
<td>Acquisition of shares</td>
<td>October 30, 1990</td>
<td>November 28, 1990</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>4</td>
<td>Arjomari-Prioux/Wiggins Teape Appleton paper</td>
<td>Acquisition of control</td>
<td>November 8, 1990</td>
<td>None</td>
<td>December 10, 1990 (it does not meet the thresholds)</td>
<td>None</td>
</tr>
<tr>
<td>5</td>
<td>Promodes/Dirsa distribution</td>
<td>Acquisition of shares</td>
<td>November 15, 1990</td>
<td>December 17, 1990</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>6</td>
<td>Cargill/Unilever agricultural products and agro-chemicals</td>
<td>Acquisition of shares</td>
<td>November 20, 1990</td>
<td>December 20, 1990</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>7</td>
<td>Mitsubishi/UCAR carbon and graphite products</td>
<td>Joint venture</td>
<td>November 26, 1990</td>
<td>January 4, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>8</td>
<td>Matsushita/MCA; 1—communication equipment; 2—broadcasting, cable</td>
<td>Purchase of shares through a public bid</td>
<td>December 3, 1990</td>
<td>January 10, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>9</td>
<td>AT&amp;T/NCR; 1—telecommunication products; 2—business information processing systems</td>
<td>Public bid</td>
<td>December 7, 1990</td>
<td>January 18, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>10</td>
<td>Alcatel/Telefetra telecommunications equipment</td>
<td>Acquisition of controlling interest</td>
<td>December 10, 1990</td>
<td>April 11, 1991 (after having obtained guarantees)</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>11</td>
<td>Magneti Marelli/CEAC; 1—automobiles; 2—batteries</td>
<td>Acquisition of shares</td>
<td>December 10, 1990</td>
<td>April 11, 1991 (after having obtained guarantees)</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>12</td>
<td>BNP/Dresdner Bank credit transactions</td>
<td>Joint venture</td>
<td>December 21, 1990</td>
<td>February 4, 1991</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>
### APPENDIX
Notified Concentrations Pursuant to Council Regulation (EEC) No. 4064/89 of December 21, 1989, on the Control of Concentrations Between Undertakings

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Parties (Sector Concerned)</th>
<th>Nature of the Concentration</th>
<th>Date of the Notification</th>
<th>Declaration of Nonopposition</th>
<th>Declaration of Inapplicability of the Regulation</th>
<th>In-depth Examination</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>Baxter(^1)/Nestlé(^2)/Salvia(^3); 1—health care; 2—food products; 3—clinical nutrition</td>
<td>Joint control by Nestlé and Baxter</td>
<td>January 4, 1991</td>
<td>None</td>
<td>February 6, 1991</td>
<td>None</td>
</tr>
<tr>
<td>14</td>
<td>Fiat/Ford New Holland agricultural machinery</td>
<td>Acquisition of shares</td>
<td>January 7, 1991</td>
<td>February 12, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>15</td>
<td>ASKO/OMNI personnel services insurance</td>
<td>Acquisition of shares</td>
<td>January 21, 1991</td>
<td>February 21, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>16</td>
<td>Digital/Kiezle software products</td>
<td>Acquisition of business</td>
<td>January 22, 1991</td>
<td>February 22, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>17</td>
<td>Aérospatiale/MBB helicopters</td>
<td>Joint venture</td>
<td>January 23, 1991</td>
<td>February 25, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>18</td>
<td>Kyowa/Saitama financial services</td>
<td>Transfer of assets</td>
<td>February 6, 1991</td>
<td>March 7, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>19</td>
<td>Tetra Pak(^1)/Alfa Lava(^2); 1—packaging systems; 2—automation process lines</td>
<td>Formal public bid</td>
<td>February 6, 1991</td>
<td>Not yet</td>
<td>Not yet</td>
<td>Inquiry in progress</td>
</tr>
<tr>
<td>20</td>
<td>Otto/Grattan nonfood retailing mail order</td>
<td>Acquisition of shares</td>
<td>February 22, 1991</td>
<td>March 21, 1991</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>21</td>
<td>Varta/Bosch batteries</td>
<td>Joint venture</td>
<td>February 25, 1991</td>
<td>Not yet</td>
<td>Not yet</td>
<td>Inquiry in progress</td>
</tr>
<tr>
<td>22</td>
<td>Elf/Ertoil petroleum products</td>
<td>Acquisition of shares</td>
<td>March 22, 1991</td>
<td>Not yet</td>
<td>Not yet</td>
<td>None</td>
</tr>
<tr>
<td>23</td>
<td>Usinor Sacilor/ASD steel</td>
<td>Public bid</td>
<td>March 22, 1991</td>
<td>Not yet</td>
<td>Not yet</td>
<td>None</td>
</tr>
<tr>
<td>24</td>
<td>La Redoute/Empire nonfood retailing mail order</td>
<td>Acquisition of shares and public bid</td>
<td>March 25, 1991</td>
<td>Not yet</td>
<td>Not yet</td>
<td>None</td>
</tr>
<tr>
<td>25</td>
<td>ASKO/Jacobs/ADIA distribution and services</td>
<td>Joint control of ADIA by ASKO and Jacobs</td>
<td>April 9, 1991</td>
<td>Not yet</td>
<td>Not yet</td>
<td>None</td>
</tr>
</tbody>
</table>