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REPORT

on the proposal for a Council regulation on the control of concentrations
between undertakings: 'The EC Merger Regulation'
(COM(2002) 711 – C5-0005/2003 – 2002/0296(CNS))

Committee on Economic and Monetary Affairs

Rapporteur: Benedetto Della Vedova

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 14 January 2003 the Council consulted Parliament, pursuant to Articles 83 and 308 of the EC Treaty, on the proposal for a Council regulation on the control of concentrations between undertakings: 'The EC Merger Regulation' (COM(2002) 711 – 2002/0296(CNS)).

At the sitting of 16 January 2003 the President of Parliament announced that he had referred the proposal to the Committee on Economic and Monetary Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for its opinion (C5-0005/2003).

The Committee on Economic and Monetary Affairs appointed Benedetto Della Vedova rapporteur at its meeting of 17 February 2003.

The committee considered the Commission proposal and draft report at its meetings of 25 March, 20 May, 12 June, 17 June, 7 July and 8 July 2003.

At the last meeting it adopted the draft legislative resolution by 22 votes to 17, with 0 abstention.

The following were present for the vote Christa Randzio-Plath (chairwoman), José Manuel García-Margallo y Marfil, Philippe A.R. Herzog, John Purvis (vice-chairmen), Benedetto Della Vedova (rapporteur), Generoso Andria, Roberto Felice Bigliardo, Hans Blokland, Jean-Louis Bourlanges (for Brice Hortefeux), Hans Udo Bullmann, Bert Doorn (for Ingo Friedrich), Jonathan Evans, Harald Ettl (for Helena Torres Marques), Carles-Alfred Gasòliba i Böhm, Robert Goebbels, Lisbeth Grönfeldt Bergman, Mary Honeyball, Christopher Huhne, Pierre Jonckheer (for Alain Lipietz), Othmar Karas, Giorgos Katiforis, Piia-Noora Kauppi, Christoph Werner Konrad, Wilfried Kuckelkorn (for a Member to be nominated), Werner Langen (for Astrid Lulling), Thomas Mann (for Mónica Ridruejo), Ioannis Marinos, David W. Martin, Hans-Peter Mayer, Miquel Mayol i Raynal, Fernando Pérez Royo, Alexander Radwan, Bernhard Rapkay, Herman Schmid (for Armonia Bordes), Olle Schmidt, Peter William Skinner, Bruno Trentin, Ieke van den Burg (for Pervenche Berès), Theresa Villiers, Amalia Sartori (for Renato Brunetta pursuant to Rule 153(2)).

The opinion of the Committee on Legal Affairs and the Internal Market is attached.

The report was tabled on 9 July 2003.

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council regulation on the control of concentrations between undertakings: 'The EC Merger Regulation'
(COM(2002) 711 – C5-0005/2003 – 2002/0296(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the Commission proposal to the Council (COM(2002) 711)¹,
 - having regard to Articles 83 and 308 of the EC Treaty, pursuant to which the Council consulted Parliament (C5-0005/2003),
 - having regard to its resolution of 4 June 2002 on the Commission Green Paper on the review of Council Regulation (EEC) No 4064/89²
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0257/2003),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Asks the Council to consult Parliament again if it intends to amend the Commission proposal substantially;
 5. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1 Recital 12

(12) The Commission should be able to refer to a Member State concentrations which significantly affect competition on a market within that Member State presenting all the characteristics of a

(12) The Commission should be able to refer to a Member State concentrations which significantly affect competition on a market within that Member State presenting all the characteristics of a

¹ OJ C 20E., 28.1.2003, p. 4.

² P5_TA(2002)0369, 4.7.2002

distinct market. Where the concentration affects such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer ***the whole or part of*** the case to the Member State concerned.

distinct market. Where the concentration affects such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the case to the Member State concerned.

If a merger is referred to a Member State, in order to make the control of concentrations work more homogeneously and effectively, in cases originally notified to the Commission, application of national legislation on the control of mergers should not entail solutions which are blatantly at odds with the decisions which would be reached in accordance with the Regulation.

Justification

In practice partial referrals have caused a series of problems, because of the uncertainty arising from the fragmentation of a case being dealt with by several national jurisdictions. This is a serious departure from the principle of the 'one-stop shop'.

Furthermore, the rules governing the control of concentrations must be applied uniformly and homogeneously, in order to ensure legal certainty and avoid conflicting decisions. Hence, even when a case is referred to the national authorities, they should use the same criteria for judgment as those laid down in the Community system for the control of concentrations and reach decisions which are not dissimilar to those which would have been reached if the Regulation had been applied.

Amendment 2 Recital 20

(20) ***In order to ensure a system of undistorted competition in the common market operating in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community. It should therefore*** establish the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which

(20) ***This*** Regulation must establish the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market.

effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market.

Irrespective of the structure of the relevant markets affected by a concentration or of the manner in which economic power is manifested or exercised, dominance should be defined in such a way as to reflect a considerable level of economic power held by one or more undertakings.

Justification

Changing the definitions creates uncertainties, risks nullifying part of the Court of Justice's case law and may even lead to a harsher system of merger control. It is also superfluous, in that the Court of Justice has not deprived the concept of dominant position of its actual effect.

Amendment 3

Recital 21

(21) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, the elimination of important competitive constraints that the merging parties exerted on each other, as well as the reduction of competitive pressure on the remaining competitors, may, particularly in these markets, be detrimental to competition unless these effects would be constrained by the reaction of competitors, customers or consumers. For that purpose, the notion of dominance within the meaning of this Regulation should, therefore, encompass situations in which, because of the oligopolistic structure of the relevant market and the resulting interdependence of the various undertakings active on that market, one or more undertakings would hold the economic power to influence appreciably and sustainably the parameters of competition, in particular,

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prices, production, quality of output, distribution or innovation, even without coordination by the members of the oligopoly. In making this appraisal, account should be taken of the specific features of the markets under examination, such as the level of capacity constraints, the degree of product differentiation, or the functioning of the bidding process. Consideration should also be given to, inter alia, the likely reactions of actual and potential competitors, as well as of customers, and any efficiencies brought about by the merger.

Justification

One of the purposes of this revision of the regulation is to increase legal certainty. However, the draftsman considers that if the concept of the 'dominant position' is broadened in the way proposed by the Commission, this is more likely to have the opposite effect. Any merger which confers a certain advantage over competitors would fall within the new definition. All parties concerned are used to applying the existing definition, on which ample case law now exists. A change in the definition, clearly inspired by a desire to move towards the American SLC test, would obscure the situation and lead to unnecessary legal uncertainty. Moreover, there is a danger that the dynamism of the market may be impaired if concentration processes are interfered with on a far bigger scale than at present. The draftsman accordingly believes that it would be better not to expand the definition of 'dominance' in the way proposed by the Commission.

Amendment 4 Recital 27

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

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

decisions are proportionate to the anti-competitive effect of the concentration.

Justification

In order to implement the provisions of the Regulation fairly, it should be ensured that the merger control measures taken by the Commission respect a principle of reasonableness as regards the seriousness of the damage to competition which has been or may be caused.

Amendment 5

Recital 34

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

(34) In order to properly appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. *However, communications between undertakings and associations of undertakings and outside or in-house counsel containing or seeking legal advice shall be privileged, provided that the legal counsel is properly qualified and is subject to adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional association to which the legal counsel belongs. The Commission can ask any representative of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers provided that they have been informed that they are not obliged to provide an answer and that they can have a lawyer present.*

authorisation; the case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

Justification

Fairness and due process should be ensured and the rights of the defence must be guaranteed. When the outside or in-house counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his valuable legal advice should be privileged. When consulting their own outside or in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed. Questioning all members of staff can put these employees under disproportionate pressure and therefore only designated representatives should be questioned.

Amendment 6 Recital 35

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

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

Justification

As it stands, the proposal for a regulation encroaches upon the principle that no one should be required to incriminate himself. Yet the rule of law requires this principle to be fully respected. Businesses should not be compelled to assist actively in their own conviction of an offence they have committed. The right to require information to be provided is limited by the right to silence. Considerations purely of practicability, which have been adduced by the European courts as an argument in favour of restricting the right in connection with the application of the cartel procedure regulation (Regulation 1/2003) cannot be allowed to play

any part in merger control, because here the concern is not to improve the practical applicability of the procedural provisions relating to cartels and the purpose is not to exact penalties for breaches of the law on competition or cartels.

Amendment 7
Article 2, paragraph 2

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

One of the purposes of this revision of the regulation is to increase legal certainty. However, the draftsman considers that if the concept of the 'dominant position' is broadened in the way proposed by the Commission, this is more likely to have the opposite effect. Any merger which confers a certain advantage over competitors would fall within the new definition. All parties concerned are used to applying the existing definition, on which ample case law now exists. A change in the definition, clearly inspired by a desire to move towards the American SLC test, would obscure the situation and lead to unnecessary legal uncertainty. Moreover, there is a danger that the dynamism of the market may be impaired if concentration processes are interfered with on a far bigger scale than at present. The draftsman accordingly believes that it would be better not to expand the definition of 'dominance' in the way proposed by the Commission.

Amendment 8
Article 3, paragraph 4

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

Justification

The new wording extends the control of concentrations excessively, increasing the legal uncertainty for the undertakings involved, since it would increase the risk of control proceedings, which would cost more in terms of time and money.

Amendment 9 Article 4, paragraph 4

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

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

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

The decision whether or not to refer the case shall be taken within 20 working days

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

The Commission shall transmit this submission to all Member States without delay. The Member State concerned shall, within **5** working days of receiving the submission, express its agreement or disagreement as regards the request to refer the concentration. Where the Member State concerned takes no such decision within that period, it shall be deemed to have agreed.

Unless the Member State concerned disagrees, the Commission, where it considers that such a distinct market exists, and **that the concentration will have significant effects on competition in that distinct market**, may decide to refer the case to the competent authorities of that Member State with a view to the application of that State's national legislation on competition.

The decision whether or not to refer the case shall be taken within 20 working days

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

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

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

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

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

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

Justification

It is important that the undertakings concerned can also make a request for a pre-notification referral when the concentration has significant effects on competition and not only when competition is negatively affected. Significant effects can also be positive or neutral (related to assets, turnover or personnel, etc.). To avoid delays and increase certainty, the time period for the Member State to react should be five working days.

In practice partial referrals have caused a series of problems, because of the uncertainty arising from the fragmentation of a case being dealt with by several national jurisdictions. This is a serious departure from the principle of the 'one-stop shop'.

In cases of pre-notification referrals too, national laws should be applied without contradicting the Community regulation.

Amendment 10 Article 4, paragraph 5

5. With regard to a concentration which would not have a Community dimension within the meaning of Article 1, the persons or undertakings concerned may, prior to its notification to the competent authorities of one or more Member States, inform the Commission by means of a reasoned submission that the concentration

5. With regard to a concentration which would not have a Community dimension within the meaning of Article 1, the persons or undertakings concerned may, prior to its notification to the competent authorities of one or more Member States, inform the Commission by means of a reasoned submission that *in at least three*

has significant cross-border effects and should therefore be examined by the Commission.

Member States the combined aggregate turnover of all undertakings concerned is more than 10% of the combined aggregate Community-wide turnover of all undertakings concerned, or that the concentration is subject to national merger control rules of several Member States, or that the concentration for other reasons has significant cross-border effects and should therefore be examined by the Commission.

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

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

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

The Member State or States concerned shall decide, within **5** working days of receiving the submission, whether or not to request the Commission to examine the concentration. Where a Member State takes no such decision within the aforementioned period of **5** working days, it shall be deemed to have adopted a decision to make such a request to the Commission. No notification of the concentration shall be submitted to the Member State or States concerned before the decision whether or not to request has been adopted.

Justification

It should be easy to establish, preferably on the basis of available objective information, that a concentration has significant cross-border effects. This should e.g. be the case when in at least three Member States the combined aggregate turnover of all undertakings concerned is more than 10% of the combined aggregate Community-wide turnover of all undertakings concerned, without excluding other possible reasons. A test that is based on the turnover of the concentrated enterprises in the countries concerned would also allow easy and objective identification of the Member States involved in the application of this paragraph. To avoid delays and increase certainty, the time period for the Member State to react should be five working days.

Amendment 11 Article 4, paragraph 5 a (new)

5a. Articles 9 (1) and 22 (1) will not apply to concentrations when the undertakings

concerned have made a request for a pre-notification referral pursuant to this Article.

Justification

It is important that concentrations will not be referred again to the Member States or the Commission after the undertakings concerned have used their right of initiative at the pre-notifications stage and it was agreed that the Commission or a Member State would review the case.

Amendment 12
Article 6, paragraph 1, point (b)

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

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

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

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

Justification

The current wording ought to be retained, given that in its ruling of 20 November 2002 (LAGARDERE case) the Court of First Instance stated that the Commission's reasoning in the grounds of the decision of approval with regard to such restrictions are in the nature of a decision in the same way as the approval of the concentration, and are not merely of a declaratory nature.

Amendment 13
Article 7, paragraph 4

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

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***lead to a combination of market positions
giving rise to competition concerns.***

Justification

There is no need for this as individual derogations may be granted pursuant to Article 7, paragraph 3 of the Regulation - even before notification - and this system works perfectly well. The risk of abuse and difficulties of distinguishing between categories is clearly greater than the supposed benefit.

Amendment 14
Article 8, paragraph 4

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

4. The Commission may order any appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision
provided that this is proportionate to the anti-competitive effect of the concentration.

Justification

In order to implement the provisions of the Regulation fairly, it should be ensured that the merger control measures taken by the Commission respect a principle of reasonableness as regards the seriousness of the damage to competition which has been or may be caused.

Amendment 15
Article 9, paragraph 2 (a)

(a) a concentration significantly affects competition on a market within that Member State, which presents all the characteristics of a distinct market, or

(a) a concentration ***is in danger of creating or reinforcing a dominant position as a result of which actual competition will be significantly hampered*** on a market within that Member State, which presents all the characteristics of a distinct market, or

Justification

In the light of the major differences which still persist in national provisions and the consequent danger of legal uncertainty, delays in procedures and additional administrative burdens, it is not desirable that the number of referrals by the Commission to Member States

should increase. The old text of Article 9(2)(a) should therefore be retained.

Amendment 16

Article 9, paragraph 2a (new)

2a. Notification of Member States pursuant to Article 9, paragraph 2 shall be accompanied by a statement setting out which national provisions on mergers give grounds for assuming that the concentration would significantly affect competition on a market in that Member State and which effective measures the competition authorities of that Member State intend to take in the event of a referral.

Justification

Since the criterion of market domination has been dropped in the case of a referral by the Commission to applicant Member States, the situation may arise where, although a Member State has requested a referral back, it does not manage the process in accordance with its own national merger procedure and the merger control therefore becomes void. The provision should give the Commission more information concerning the assessment criteria of the national authorities and their intended course of action following referral. In addition, it prevents overhasty requests for referral from the national authorities and aims for uniform assessment criteria.

Amendment 17

Article 9, paragraph 3

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

- (a) it shall itself deal with the case in accordance with this Regulation; or
- (b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national legislation on competition.

If, however, the Commission considers that such a distinct market does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned,

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

- (a) it shall itself deal with the case in accordance with this Regulation; or
- (b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national legislation on competition.

If, however, the Commission considers that such a distinct market ***or threat*** does not exist it shall adopt a decision to that effect which it shall address to the Member State

and shall itself deal with the case in accordance with this Regulation.

concerned, and shall itself deal with the case in accordance with this Regulation.

Justification

In the absence of a request by the parties pursuant to Article 4 (4), the Commission should only refer the whole or part of a case to the competent authorities of a requesting Member State when it considers that there exists a threat that a concentration will create or strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State which presents all the characteristics of a distinct market. Changes to the criteria for referrals to Member States which facilitate such referrals in the absence of a request pursuant to Article 4 (4) are undesirable and unnecessary. National authorities apply their national legislation on competition, and referrals to national authorities increase uncertainty and cause procedural difficulties and delays which generally should be avoided in the absence of an explicit request pursuant to Article 4 (4).

Amendment 18 Article 9, paragraph 3, point (b)

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

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

In cases where a Member State informs the Commission pursuant to paragraph 2 (b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the ***whole or part of the case relating to the distinct market concerned***, if it considers that such a distinct market is affected.

(b) it shall refer the case to the competent authorities of the Member State concerned with a view to the application of that State's national legislation on competition. ***However, there shall be possibility of referral in cases where the concentration is subject to the simplified procedure.***

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

In cases where a Member State informs the Commission pursuant to paragraph 2 (b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the case if it considers that such a distinct market is affected.

Justification

In practice partial referrals have caused a series of problems, because of the uncertainty arising from the fragmentation of a case being dealt with by several national jurisdictions. This is a serious departure from the principle of the 'one-stop shop'.

Amendment 19 Article 9, paragraphs 4, 5 and 8

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken :

(a) as a general rule within *the period provided for in Article 10 (1), second subparagraph*, where the Commission, pursuant to Article 6 (1) (b), has not initiated proceedings; or

(b) within **65** working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures under Article 8 (2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the **65** working days referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken :

(a) as a general rule within **15 days at most of the notification of the concentration concerned**, where the Commission, pursuant to Article 6 (1) (b), has not initiated proceedings; or

(b) within **30** working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures under Article 8 (2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the **30** working days referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned **and it shall ensure consistency of any such measures with any such measures of the Commission or another Member State.**

Justification

To avoid delays and increase certainty, the time period for the Commission to make a referral decision should be reduced. It is important that national authorities to which the whole or part of a concentration has been referred do not take decisions which conflict with decisions taken by the Commission or another national authority.

Amendment 20

Article 9, paragraph 9a (new)

9a. If the undertakings concerned have already submitted a pre-notification referral request in accordance with Article 4, the decision to refer or not to refer pursuant to paragraph 3 of this article shall be taken:

(a) within 15 days from the date of notification of the transaction in question, if the Commission, within the meaning of Article 6, paragraph 1(b) has not initiated proceedings.

(b) within 30 working days from the date of notification of the transaction in question, under the conditions laid down in paragraph 4(b) of this article.

Once the deadline laid down in subparagraph (b) has expired, the provisions of paragraph 5 shall apply.

Justification

It is important that, if the undertakings have already referred the case prior to notification, subsequent referral to the Member States or the Commission should be faster than normal. Furthermore, the concentration requires less thorough analysis, since it will already have been examined when referral was requested at the pre-notification stage.

Amendment 21

Article 9, paragraph 9b (new)

9b. The application of national legislation on competition by a Member

State in accordance with this article shall not lead to decisions which blatantly conflict with the provisions of this regulation, notwithstanding the provisions of Article 21(3).

Justification

The Community merger control system should entail uniform and homogeneous application of competition law, even when applied by the individual national authorities. Whilst the autonomy of national authorities must be respected, an inconsistency should not result from a departure from the principles and guidelines laid down in this regulation.

Amendment 22 Article 10, paragraph 3

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

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

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

At any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the consent of the notifying parties. The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days ***or 5 working days where the undertakings concerned offer commitments pursuant to Article 8 (2),***

second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

Justification

To avoid long delays, the request of which may be in fact difficult to resist for the parties when asked for by the Commission, the optional extension should not exceed five working days if in Phase II the automatic extension of 15 working days has already been triggered.

Amendment 23 Article 11, paragraph 7

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

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

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any ***persons authorised by the management of an undertaking who agree to be interviewed to enable information to be collected*** relating to the subject-matter of an investigation, ***provided that they are informed in advance of their right to refuse to divulge information and the right to be assisted by a lawyer.***

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

Justification

Particularly in the case of those who provide information without having been specially authorised by an undertaking's management to do so, there is a substantial danger of incorrect information being provided or misleading statements being made by staff who are

not themselves properly informed. This may lead to exorbitant fines, including enforcement fines.

Amendment 24
Article 11, paragraph 7a (new)

7a. With regard to the information requested by the Commission for the purposes of investigation pursuant to this article, the natural or legal persons concerned shall be informed beforehand of their right not to reply or make statements which may incriminate them.

Should a person make statements which could be used to establish against him the existence of an infringement, he shall have the acknowledged right to receive legal assistance.

Justification

The regulation ought to contain a rule concerning ‘due process’, to ensure that any person asked for information of any kind has the right not to incriminate himself. This should happen not only at the investigation stage, but provision should be made for a debate between the parties concerned and the right of defence should be ensured for the persons involved. Anyone who makes self-incriminating statements should be entitled to legal assistance.

Amendment 25
Article 13, paragraph 1

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

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings. ***Communications between undertakings and associations of undertakings and outside or in-house counsel containing or seeking legal advice shall be privileged, provided that the legal counsel is properly qualified and is subject to adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional association to which the legal***

counsel belongs.

Justification

Fairness and due process should be ensured and the rights of the defence must be guaranteed. When the outside or in-house counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his valuable legal advice should be privileged. When consulting their own outside or in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed.

Amendment 26

Article 13, paragraph 2, point (b)

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

(b) to ***check*** the books and other ***business*** records, irrespective of the medium on which they are stored, ***if necessary keeping them for a maximum of five days***;

Justification

Strengthening of the rights of defence should be counterbalanced by more effective exercise of powers by the Commission.

Amendment 27

Article 13, paragraph 2, point (d)

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

Deleted

Justification

It is important that the undertakings concerned can also make a request for a pre-notification referral when the concentration has significant effects on competition and not only when competition is negatively affected. Significant effects can also be positive or neutral (related to assets, turnover or personnel, etc.). To avoid delays and increase certainty, the time period for the Member State to react should be five working days.

In practice partial referrals have caused a series of problems, because of the uncertainty arising from the fragmentation of a case being dealt with by several national jurisdictions. This is a serious departure from the principle of the 'one-stop shop'.

In cases of pre-notification referrals too, national laws should be applied without

contradicting the Community regulation.

Amendment 28
Article 13, paragraph 2, point (e)

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

The notification procedure employed in the control of concentrations is entirely different from that applicable to control in the antitrust area.

It follows, therefore, that the Commission does not require the same powers as those conferred on it by new Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

Amendment 29
Article 14, paragraph 1, point (b)

(b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2) or in an interview pursuant to Article 11(7);	(b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2) or in an interview pursuant to Article 11(7) <i>provided that the provisions of Article 11, (7a) are observed;</i>
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Justification

The Commission's power to impose fines should not prejudice respect for the principle whereby nobody may be forced to make statements or to incriminate themselves.

Amendment 30
Article 14, paragraph 1 (e)

(e) in response to a question asked in accordance with Article 13(2)(e), – they give an incorrect or misleading answer, – <i>they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or</i>	(e) in response to a question asked in accordance with Article 13(2)(e), – they give an incorrect or misleading answer, <i>Deleted</i>
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– they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);

Deleted

Justification

There is an essential difference between the aim of merger control and combating violations of cartel rules. When investigating a concentration, unlike in the case of a cartel violation, it is not assumed that the intentions of the parties to the merger are unlawful: rather, the aim is purely to ensure that free competition prevails. The Commission's proposal that its investigative resources under this Regulation be increased does not seem appropriate, therefore.

Amendment 31
Article 14, paragraph 1, point (f)

(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

Deleted

Justification

See justification for amendment 27.

Amendment 32
Article 22, paragraph 3

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

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

Justification

It seems appropriate to specify that the request for referral should be explicitly formulated by the Member States and not be based merely on silence on the part of the national jurisdictions asked for an opinion by the Commission. Otherwise the Commission's exclusive competence might simply depend on the inertia of national authorities, who are sometimes unable to take

a decision within 20 working days.

Amendment 33
Article 22, paragraph 4, subparagraph 3

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

The Member States shall not continue to apply their national legislation on competition to the concentration.

Justification

In terms of the one-stop-shop principle it would be problematic to deny only those Member States which have requested a referral the option of applying their national competition law to the concentration. Article 22, paragraph 3 also states that the concentration acquires a Community dimension if all the competent Member States, or at least three of them, have agreed to a review by the Commission. As soon as the Commission becomes competent, it is no longer a question of a national procedure but always a procedure with a Community dimension.

Amendment 34
Article 22, paragraph 6a (new)

6a. The provisions of Article 9, paragraph 9b shall be observed.

Justification

See the justification for amendment 21.

EXPLANATORY STATEMENT

Over the past three years the Commission has been involved in a thorough review of the Community antitrust system, which started with the new regulation on Articles 81 and 82, replacing old Regulation 17/62.

On 11 December 2002 the Commission adopted the proposal for a new regulation on concentrations between undertakings, which follows on from the consultation launched by the Green Paper of December 2001, on which Parliament had the opportunity to give its opinion in the Berenguer Fuster report. The regulation in question (No 4064/89) became all the more central to the EU's competition policy. It had considerable merits, offering the undertakings involved in mergers a 'one-stop shop' and preset deadlines.

However, the growing integration of markets brought the existing rules to a 'critical point' which required their reexamination, as demonstrated by the recent Court of Justice judgments rejecting certain decisions by the Commission.

We can say that both the courts and the business community are stressing the need to take account of the requirements of a free and dynamic market, which should not be excessively burdened by long and cumbersome procedures. This applies all the more to mergers, i.e. transactions which are in no way illicit, but are part of the normal functioning of a free market.

Jurisdictional issues

We should appreciate the effort made by the Commission to initiate a debate on the possible alternatives for improving the allocation of merger cases between the Commission and national authorities. In the Green Paper the Commission seemed inclined to consider a scenario whereby it would be competent when a case had to be notified to three or more national authorities (the '3+' system). This solution was also advocated by Parliament in the Berenguer Fuster report. Although he has considered the reasons prompting the Commission to abandon this solution, your rapporteur considers that Parliament should uphold its own views.

Firstly, the elimination of the legal uncertainties caused by the problem of multiple notifications seems to more than compensate for any 'imprecision' in assessing Community interest. Furthermore, since the '3+' system is compatible with maintaining the current thresholds laid down in Article 1, a case of Community dimension notified, for example, in only two States could nevertheless, on the basis of these thresholds, come under Community jurisdiction.

Secondly, an 'optional 3+' system allows undertakings, faced with the uncertainties of the various national legal systems to decide whether to notify the Commission or several national authorities; furthermore, any distortions could be corrected by the system of referrals, in particular by recourse to Article 9.

It is also proposed to establish a new threshold, commensurate with the GDP of the Member States involved, for notifying a case to the Commission, in accordance with the provisions of Article 4, paragraph 5 (pre-notification referral). Not least in view of enlargement, the setting of thresholds at a fixed rate seems totally incongruous. The adoption of a '3+' system

definitely seems more consistent with the principle of the 'one-stop shop' within the single market than generalised recourse to the referral system, which was recently also criticised by the Court of First Instance (SEB-Moulinex judgment).

Furthermore, the '3+' criterion is compatible with the rationalisation of the referral system proposed by the Commission. In particular, referral at the pre-notification stage, envisaged in Article 4, paragraph 4 and 5 of the proposal for a regulation, will allow undertakings to shorten the deadlines for assigning jurisdiction.

Particular attention was also devoted to the aim of making the application of national legislation on competition homogeneous. Respect for the sovereignty of national legal systems must be reconciled with the need to persuade competition authorities not to take decisions which conflict with the principles governing the implementation of the Community regulation in the context of the single market.

For this purpose, in Articles 9 and 22 the rapporteur has proposed laying down a principle whereby the decisions of different national authorities should not clash with one another nor with the principles of the Merger Regulation, as was also envisaged in Regulation 1/2003. Accordingly, it is proposed to eliminate the concept of partial referrals, which has led to harmful fragmentation of some merger cases.

Substantive issues

Whilst bearing in mind and to some extent agreeing with the arguments put forward by those who consider that the EU should adopt the SLC (substantial lessening of competition) test in order to bring the assessment criteria into line with those of other legal systems, in particular the USA, your rapporteur agrees with the Commission that it is inappropriate to abandon the dominance test.

Furthermore, a large proportion of the business community has expressed strong reservations and concerns about the idea of adopting a new test. It also seems doubtful whether such a change is needed since, as the Commission emphasises, the dominance test has worked well.

However, the Commission felt it necessary to specify, in the new paragraph 2 of Article 2, the definition of the concept of dominant position for the purposes of the regulation, considering that the existing one is not sufficiently clear in some respects. However, your rapporteur considers that the proposed wording of the new paragraph 2 is likely to broaden rather than clarify the concept of dominance and thereby increase legal uncertainty. Different wording is therefore proposed, which takes into account the opinions of the courts, especially as regards the burden of proof, specifying that the creation or strengthening of a dominant position must be a direct and obvious consequence of a merger.

The concept of transactions closely connected with one another, contained in Article 3, paragraph 4 has therefore been eliminated. Whilst we agree with the aim of introducing a definition of concentration appropriate to cover the phenomenon of 'multiple transactions', the parenthesis in the text proposed by the Commission is not sufficiently clear.

Procedural issues

The Commission text introduces some very positive innovations. The increased flexibility of the timeframe is of great help to undertakings, which can notify a merger before the agreement is signed and extend the deadlines for 'Phase II' of the procedure.

On the other hand, it does not seem appropriate to put the Commission's powers of investigation as regards mergers on the same level as the strengthened powers recently envisaged in the regulation on cartels, since the areas concerned are completely different. The rapporteur takes the view that the legitimate nature of a merger does not justify, according to a criterion of proportionality, some of the envisaged increases in the Commission's powers, including forcing all the members of staff of an undertaking to make statements during inspections.

First and foremost, your rapporteur considers it appropriate that the regulation should specify that people asked to make statements during investigations are entitled not to reply or incriminate themselves. They must be informed about this beforehand. Furthermore, it would seem appropriate to specify that during the inspections the right not to incriminate oneself should be granted to the undertaking's representatives, the only people empowered to provide explanations. The rapporteur considers that Parliament, as in the case of the regulation on cartels, should rule out the possibility of extending the obligation to provide explanations to all members of staff of an undertaking. Consequently, we consider that the sanctions cannot be imposed if they violate the principles of fairness and respect for the rights of those under investigation.

17 June 2003

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Economic and Monetary Affairs

on the proposal for a Council regulation on the control of concentrations between undertakings: 'The EC Merger Regulation'
(COM(2002) 711 – C5-0005/2003 – 2002/0296(CNS))

Draftsman: Bert Doorn

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Bert Doorn draftsman at its meeting of 20 February 2003.

It considered the draft opinion at its meetings of 28 April and 17 June 2003.

At the last meeting it adopted the following conclusions unanimously.

The following were present for the vote: Paolo Bartolozzi, Luis Berenguer Fuster, Maria Berger, Michael Cashman, Bert Doorn, Francesco Fiori, Pernille Frahm, Marie-Françoise Garaud, Giuseppe Gargani, Evelyne Gebhardt, Fiorella Ghilardotti, José María Gil-Robles Gil-Delgado, Malcolm Harbour, The Lord Inglewood, Ioannis Koukiadis, Kurt Lechner, Klaus-Heiner Lehne, Neil MacCormick, Toine Manders, Arlene McCarthy, Manuel Medina Ortega, Bill Miller, Hartmut Nassauer, Angelika Niebler, Willi Rothley, Anne-Marie Schaffner, Marianne L.P. Thyssen, Diana Wallis and Stefano Zappalà.

SHORT JUSTIFICATION

The Merger Regulation is an effective part of the edifice of European competition legislation. On that there is general consensus. The Commission's proposals for revising the Merger Regulation have been well received within Parliament. The draftsman supports the objective of promoting clarity and legal certainty and creating quicker procedures. The following points require further attention from the legal point of view:

Competence

- Referral from the Member States to the Commission and vice versa

The EP welcomed the Green Paper's proposals for a 'one-stop-shop' system in Brussels for multiple filings in more than two Member States. The draftsman therefore regrets the fact that the Commission has not incorporated this principle in the present proposal despite the recent judgment given by the Court of First Instance (SEB-Moulinex) which stresses the importance of this principle. With the forthcoming enlargement, the number of multiple filings will increase substantially, always assuming that policy remains unchanged.

To date, the lack of mutual coordination among Member States has led to bureaucratic, costly and time-consuming procedures. In this connection the draftsman would draw attention to the need for coordination and harmonisation of national procedures. A single procedure in Brussels will not only cost less but will also significantly improve legal certainty for businesses and ensure that the procedure can be completed more quickly.

The Commission proposal does create some scope for promoting central processing in Brussels by means of the referral procedure. However, in the draftsman's opinion this does not go far enough. If a merger clearly has a cross-border impact, it ought to be considered by the Commission wherever possible. It should be made possible for cases to be referred to the Commission on the basis of objective criteria and at the request of the merging parties.

For the same reasons, the idea of referring concentrations to Member States needs to be treated with caution. Partial referral by the Commission to NMAs should be limited to a minimum, while consistency of rulings should be ensured. Concentrations which comply with the requirements for a simplified procedure ought not, in principle, to be referred to NMAs either.

Substantive legal aspects

- Definition of the concept of the 'dominant position'

One of the purposes of this revision of the regulation is to increase legal certainty. However, the draftsman considers that if the concept of the 'dominant position' is broadened in the way proposed by the Commission, this is more likely to have the opposite effect. Any merger which confers a certain advantage over competitors would fall within the new definition. All parties concerned are used to applying the existing definition, on which ample case law now exists. A change in the definition, clearly inspired by a desire to move towards the American SLC test, would obscure the situation and lead to unnecessary legal uncertainty. Moreover, there is a danger that the dynamism of the market may be impaired if concentration processes are interfered with on a far bigger scale than at present. The draftsman argues that the Regulation should be left unaltered in this respect.

- Advantages in terms of efficiency

The draftsman agrees with the proposal to leave Article 2(1) unchanged. However, the requirements applicable to evidence of the existence of efficiencies must not become excessive. It is future advantages which would have to be demonstrated, and these cannot possibly be guaranteed 100%. There is a need to clarify exactly when relevant information about efficiencies would have to be provided.

Procedural aspects

- Information and powers of investigation

The Commission calls for a substantial expansion of its powers of investigation, in line with those relating to cartel procedures under Regulation 1/2003. However, there is an essential difference between the aim of merger control and combating violations of cartel rules. When investigating a concentration, unlike in the case of a cartel violation, it is not assumed that the law has been broken. The draftsman accordingly considers the Commission's proposal for increasing its investigative resources under this Regulation very excessive, particularly if viewed in the context of the enormous fines which the Commission can impose for non-compliance with the provisions of the Regulation.

No one can be compelled to give evidence against himself. It is therefore well worth laying down in the Regulation that, when carrying out an investigation, the Commission should respect the rights of the parties concerned. This particularly applies to the right to silence for company lawyers, and also indeed for other employees whom the Commission may question.

Lastly, the draftsman would draw attention to the lack of internal and external monitoring of the Commission's decision-making. As things stand at present, there is no separation between the investigating authority and that which takes the decision. This is difficult to reconcile with the requirement of legal certainty and independence.

The legitimacy of decision-making could be further promoted by setting up a specialised chamber for competition at the Court of First Instance. This could also speed up the procedure and improve the quality of the administration of justice.

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

¹ JO C20E, 28.1.2003

Amendment 1
Recital 20

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

(20) This regulation should establish the principle that a concentration with a Community dimension which creates or strengthens a position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market.

Justification

Changing definitions creates uncertainties and risks nullifying some of the Court of Justice's case law. It could also lead to a more stringent merger control regime. It is also unnecessary given that the Court of Justice has not deprived the notion of dominance of its effet utile.

Deleted

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

Justification

One of the purposes of this revision of the regulation is to increase legal certainty. However, the draftsman considers that if the concept of the 'dominant position' is broadened in the way proposed by the Commission, this is more likely to have the opposite effect. Any merger which confers a certain advantage over competitors would fall within the new definition. All parties concerned are used to applying the existing definition, on which ample case law now exists. A change in the definition, clearly inspired by a desire to move towards the American SLC test, would obscure the situation and lead to unnecessary legal uncertainty. Moreover, there is a danger that the dynamism of the market may be impaired if concentration processes are interfered with on a far bigger scale than at present. The draftsman accordingly believes that it would be better not to expand the definition of 'dominance' in the way proposed by the Commission.

Amendment 3 Recital 34

(34) In order to properly appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. ***To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should in particular have the right to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should have the right to affix seals for the period of time necessary for the inspection, normally not for more than 72 hours, and to ask for any information relevant to the subject matter and purpose of the inspection. Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking***

(34) In order to properly appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. ***However, communications between undertakings and associations of undertakings and outside or in-house counsel containing or seeking legal advice shall be privileged, provided that the legal counsel is properly qualified and is subject to adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional association to which the legal counsel belongs. The Commission can ask any representative of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers provided that they have been informed that they are not obliged to provide an answer and that they can have a lawyer present.***

against an inspection ordered by Commission decision; it results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation; the case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

Justification

Fairness and due process should be ensured and the rights of the defence must be guaranteed. When the outside or in-house counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his valuable legal advice should be privileged. When consulting their own outside or in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed. Questioning all members of staff can put these employees under disproportionate pressure and therefore only designated representatives should be questioned.

Amendment 4 Recital 35

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

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

Justification

As it stands, the proposal for a regulation encroaches upon the principle that no one should

be required to incriminate himself. Yet the rule of law requires this principle to be fully respected. Businesses should not be compelled to assist actively in their own conviction of an offence they have committed. The right to require information to be provided is limited by the right to silence. Considerations purely of practicability, which have been adduced by the European courts as an argument in favour of restricting the right in connection with the application of the cartel procedure regulation (Regulation 1/2003) cannot be allowed to play any part in merger control, because here the concern is not to improve the practical applicability of the procedural provisions relating to cartels and the purpose is not to exact penalties for breaches of the law on competition or cartels.

Amendment 5
Article 2, paragraph 2

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

One of the purposes of this revision of the regulation is to increase legal certainty. However, the draftsman considers that if the concept of the 'dominant position' is broadened in the way proposed by the Commission, this is more likely to have the opposite effect. Any merger which confers a certain advantage over competitors would fall within the new definition. All parties concerned are used to applying the existing definition, on which ample case law now exists. A change in the definition, clearly inspired by a desire to move towards the American SLC test, would obscure the situation and lead to unnecessary legal uncertainty. Moreover, there is a danger that the dynamism of the market may be impaired if concentration processes are interfered with on a far bigger scale than at present. The draftsman accordingly believes that it would be better not to expand the definition of 'dominance' in the way proposed by the Commission.

Amendment 6
Article 4, paragraph 4, 1st, 2nd and 3rd subparagraphs

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

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

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

referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration **has significant effects on** competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State concerned shall, within **5** working days of receiving the submission, express its agreement or disagreement as regards the request to refer the concentration. Where the Member State concerned takes no such decision within that period, it shall be deemed to have agreed.

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

Justification

It is important that the undertakings concerned can also make a request for a pre-notification referral when the concentration has significant effects on competition and not only when competition is negatively affected. Significant effects can also be positive or neutral (related to assets, turnover or personnel, etc.). To avoid delays and increase certainty, the time period for the Member State to react should be five working days.

Amendment 7 Article 4, paragraph 5

5. With regard to a concentration which would not have a Community dimension within the meaning of Article 1, the persons or undertakings concerned may,

5. With regard to a concentration which would not have a Community dimension within the meaning of Article 1, the persons or undertakings concerned may,

prior to its notification to the competent authorities of one or more Member States, inform the Commission by means of a reasoned submission that the concentration has significant cross-border effects and should therefore be examined by the Commission.

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

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

prior to its notification to the competent authorities of one or more Member States, inform the Commission by means of a reasoned submission that ***in at least three Member States the combined aggregate turnover of all undertakings concerned is more than 10% of the combined aggregate Community-wide turnover of all undertakings concerned, or that the concentration is subject to national merger control rules of several Member States, or that the concentration for other reasons*** has significant cross-border effects and should therefore be examined by the Commission.

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

The Member State or States concerned shall decide, within **5** working days of receiving the submission, whether or not to request the Commission to examine the concentration. Where a Member State takes no such decision within the aforementioned period of **5** working days, it shall be deemed to have adopted a decision to make such a request to the Commission. No notification of the concentration shall be submitted to the Member State or States concerned before the decision whether or not to request has been adopted.

Justification

It should be easy to establish, preferably on the basis of available objective information, that a concentration has significant cross-border effects. This should e.g. be the case when in at least three Member States the combined aggregate turnover of all undertakings concerned is more than 10% of the combined aggregate Community-wide turnover of all undertakings concerned, without excluding other possible reasons. A test that is based on the turnover of the concentrated enterprises in the countries concerned would also allow easy and objective identification of the Member States involved in the application of this paragraph. To avoid delays and increase certainty, the time period for the Member State to react should be five working days.

Amendment 8
Article 4, paragraph 5 a (new)

5a. Articles 9 (1) and 22 (1) will not apply to concentrations when the undertakings concerned have made a request for a pre-notification referral pursuant to this Article.

Justification

It is important that concentrations will not be referred again to the Member States or the Commission after the undertakings concerned have used their right of initiative at the pre-notifications stage and it was agreed that the Commission or a Member State would review the case.

Amendment 9
Article 9, paragraph 2 (a)

(a) a concentration significantly affects competition on a market within that Member State, which presents all the characteristics of a distinct market, or

(a) a concentration ***is in danger of creating or reinforcing a dominant position as a result of which actual competition will be significantly hampered*** on a market within that Member State, which presents all the characteristics of a distinct market, or

Justification

In the light of the major differences which still persist in national provisions and the consequent danger of legal uncertainty, delays in procedures and additional administrative burdens, it is not desirable that the number of referrals by the Commission to Member States should increase. The old text of Article 9(2)(a) should therefore be retained.

Amendment 10
Article 9, paragraph 3

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

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

either:

- (a) it shall itself deal with the case in accordance with this Regulation; or
- (b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national legislation on competition.

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

and that such a threat exists, either:

- (a) it shall itself deal with the case in accordance with this Regulation; or
- (b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national legislation on competition.

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

Justification

In the absence of a request by the parties pursuant to Article 4 (4), the Commission should only refer the whole or part of a case to the competent authorities of a requesting Member State when it considers that there exists a threat that a concentration will create or strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State which presents all the characteristics of a distinct market. Changes to the criteria for referrals to Member States which facilitate such referrals in the absence of a request pursuant to Article 4 (4) are undesirable and unnecessary. National authorities apply their national legislation on competition, and referrals to national authorities increase uncertainty and cause procedural difficulties and delays which generally should be avoided in the absence of an explicit request pursuant to Article 4 (4).

Amendment 11 Article 9, paragraphs 4, 5 and 8

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken :

- (a) as a general rule within ***the period provided for in Article 10 (1), second subparagraph***, where the Commission, pursuant to Article 6 (1) (b), has not initiated proceedings; or
- (b) within **65** working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures under Article

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken :

- (a) as a general rule within ***15 days at most of the notification of the concentration concerned***, where the Commission, pursuant to Article 6 (1) (b), has not initiated proceedings; or
- (b) within **30** working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures under Article

8 (2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the **65** working days referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

8 (2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the **30** working days referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned ***and it shall ensure consistency of any such measures with any such measures of the Commission or another Member State.***

Justification

To avoid delays and increase certainty, the time period for the Commission to make a referral decision should be reduced. It is important that national authorities to which the whole or part of a concentration has been referred do not take decisions which conflict with decisions taken by the Commission or another national authority.

Amendment 12 Article 10, paragraph 3

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

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

55 working days after the initiation of proceedings.

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

55 working days after the initiation of proceedings.

At any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the consent of the notifying parties. The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days ***or 5 working days where the undertakings concerned offer commitments pursuant to Article 8 (2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.***

Justification

To avoid long delays, the request of which may be in fact difficult to resist for the parties when asked for by the Commission, the optional extension should not exceed five working days if in Phase II the automatic extension of 15 working days has already been triggered.

Amendment 13 Article 11, paragraph 7

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

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any ***persons authorised by the management of an undertaking who agree to be interviewed to enable information to be collected*** relating to the subject-matter of an investigation, ***provided that they are informed in advance of their right to refuse to divulge information and the right to be assisted by a lawyer.***

interview and indicate the penalties provided for in Article 14 for supplying incorrect or misleading information.

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

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

Justification

Particularly in the case of those who provide information without having been specially authorised by an undertaking's management to do so, there is a substantial danger of incorrect information being provided or misleading statements being made by staff who are not themselves properly informed. This may lead to exorbitant fines, including enforcement fines.

Amendment 14
Article 13, paragraph 1

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

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings. ***Communications between undertakings and associations of undertakings and outside or in-house counsel containing or seeking legal advice shall be privileged, provided that the legal counsel is properly qualified and is subject to adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional association to which the legal counsel belongs.***

Justification

Fairness and due process should be ensured and the rights of the defence must be guaranteed. When the outside or in-house counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his valuable legal advice should be privileged. When consulting their own outside or in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed.

Amendment 15 Article 13, paragraph 2 (d) and (e)

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

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

Deleted

(e) to ask persons authorised by the management of the undertaking for explanations on for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers, ***provided that they are informed in advance of their right to refuse to divulge information and the right to be assisted by a lawyer.***

Justification

Particularly in the case of those who provide information without having been specially authorised by an undertaking's management to do so, there is a substantial danger of incorrect information being provided or misleading statements being made by staff who are not themselves properly informed. This may lead to exorbitant fines, including enforcement fines. Sealing is a drastic measure and should not be the general rule. Otherwise, the principle of proportionality would be breached, and since such vital fundamental rights would be curtailed in the process, it would be necessary to lay down rules on the special justification applicable and to weigh up the legal interests at stake.

Amendment 16 Article 14, paragraph 1 (e)

(e) in response to a question asked in

(e) in response to a question asked in

accordance with Article 13(2)(e),
– they give an incorrect or misleading answer,
– *they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or*
– *they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);*

accordance with Article 13(2)(e),
– they give an incorrect or misleading answer,
Deleted

Deleted

Justification

There is an essential difference between the aim of merger control and combating violations of cartel rules. When investigating a concentration, unlike in the case of a cartel violation, it is not assumed that the intentions of the parties to the merger are unlawful: rather, the aim is purely to ensure that free competition prevails. The Commission's proposal that its investigative resources under this Regulation be increased does not seem appropriate, therefore.

Amendment 17 Article 14, paragraph 1 (f)

(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

Deleted

Justification

See justification to Amendment 16, Article 14, paragraph 1 (e).