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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL**

**Report on the functioning of Regulation No 139/2004**

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## **1. INTRODUCTION**

### **1.1. Background**

1. Council Regulation (EEC) No 4064/89, the "EC Merger Regulation", entered into force on 21 September 1990. One of the main principles of the EC Merger Regulation is the exclusive jurisdiction of the Commission to review concentrations which fall within its scope. According to its Article 1, the EC Merger Regulation thus applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 3 of the EC Merger Regulation. Secondly, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 and which thus have a Community dimension in the sense of the EC Merger Regulation.
2. The concept that the Commission should have sole competence to review mergers with a Community dimension follows from the principle of subsidiarity. From the viewpoint of the European business community, the Commission's exclusive jurisdiction also provides a "one-stop-shop" advantage, which is widely regarded as an essential part of keeping the regulatory costs associated with cross-border transactions at a reasonable level. In addition, the Commission's exclusive jurisdiction to vet such mergers is an important element in providing a "level playing field" for the concentrations that were bound to result from the completion of the internal market. This principle is widely accepted as the most efficient way of ensuring that all mergers with a significant cross-border impact would be subject to a uniform set of rules.
3. In 1998, after a careful review of the experience gained, the EC Merger Regulation was amended through Council Regulation No 1310/97. The amendments concerned a large number of areas. In relation to Article 1, a new sub-paragraph - Article 1(3) - was introduced. The intention was to provide a solution to the problem whereby a significant number of cases failed to meet the turnover requirements of Article 1(2) and therefore had to be notified in several Member States ("multiple filings"). Many such concentrations had a significant cross-border impact but did not benefit from the "one-stop-shop" principle and therefore, the EC Merger Regulation had not fully succeeded in creating a level playing field and the application of coherent rules for this category of cases. Council Regulation No 1310/97 therefore introduced a new set of lower turnover thresholds in Article 1(3) with a view to capturing transactions which were of a Community dimension.
4. The adoption of the recast EC Merger Regulation on 20 January 2004<sup>1</sup> (also referred to as the "EC Merger Regulation") was the result of a far-reaching review and a broad debate with all concerned parties which was launched in 2001 with the Commission Green Paper.<sup>2</sup> The discussion covered a wide range of jurisdictional, procedural and substantive aspects of the Regulation. The new EC Merger Regulation introduced a number of substantive and procedural changes. While the turnover thresholds set out in Articles 1(2) and 1(3) were left unchanged, a set of

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<sup>1</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings Official Journal L 24, 29.01.2004, p. 1-22.

<sup>2</sup> COM(2001) 745/6 – 11.12.2001.

voluntary pre-notification referral mechanisms was introduced in order to *"further improve the efficiency of the system for the control of concentrations within the Community."*<sup>3</sup>

5. The Commission Notice on Case Referral in respect of concentrations<sup>4</sup> sets out the guiding principles of the referral system. It specifies that decisions taken with regard to the referral of cases should take due account of all aspects of the application of the principle of subsidiarity, *"in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a 'one-stop-shop' system, and the importance of legal certainty with regard to jurisdiction. It also emphasises that 'these factors are inter-linked and the respective weight placed upon each of them will depend upon the specificities of a particular case. Above all, in considering whether or not to exercise their discretion to make or accede to a referral, the Commission and Member States should bear in mind the need to ensure effective protection of competition in all markets affected by the transaction.'"*<sup>5</sup>
6. On 10 July 2007, the Commission adopted a Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.<sup>6</sup> The Consolidated Jurisdictional Notice replaces the previous four jurisdictional Notices, all adopted by the Commission in 1998 under the previous EC Merger Regulation.<sup>7</sup> The Consolidated Jurisdictional Notice covers all issues of jurisdiction relevant for establishing the Commission's competence under the new EC Merger Regulation, including in particular, the concept of a concentration, the notion of control, the concept of full-function joint ventures and the calculation of turnover.<sup>8</sup>
7. It is in the context of the above instruments that the notification thresholds and the referral mechanisms are analysed and discussed in this staff working paper.

## **1.2. Objective of the analysis**

8. Article 1(4) of the EC Merger Regulation requires the Commission to report to the Council on the operation of the thresholds and criteria set out in paragraph 1(2) and 1(3) by 1 July 2009.<sup>9</sup> Article 4(6) of the EC Merger Regulation stipulates that the Commission shall report to the Council on the operation of the pre-notification referral mechanisms under Article 4 by 1 July 2009.

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<sup>3</sup> Recital 16 of the EC Merger Regulation.

<sup>4</sup> Commission Notice on Case Referral in respect of concentrations, Official Journal C 56, 05.03.2005, p. 2-23.

<sup>5</sup> Ibid, at para. 8.

<sup>6</sup> Corrected French and German versions of the Commission Consolidated Jurisdictional Notice and the remaining languages versions of the Notice were adopted by the Commission on 17/03/2008.

<sup>7</sup> These are: (i) the Notice on the concept of concentration (OJ C 66, 02.03.1998, p. 5), (ii) the Notice on the concept of full-function joint ventures (OJ C 66, 02.03.1998, p.1), (iii) the Notice on the concept of undertakings concerned (OJ C 66, 02.03.1998, p.14) and (iv) the Notice on calculation of turnover (OJ C 66, 02.03.1998, p.25).

<sup>8</sup> Referrals are only dealt with in the Commission Notice on Case Referrals mentioned before.

<sup>9</sup> Article 1(4) of the EC Merger Regulation stipulates that *"[o]n the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5."*

9. The main purpose of the report is therefore, firstly, to discuss the operation of these thresholds in allocating cases between the Community level and the national level pursuant to the objectives of a "one-stop-shop", the "more appropriate authority", and ultimately the need to achieve a "level playing field". Secondly, to report on the operation of the pre- and post-notification referral mechanisms provided for by Articles 4, 9 and 22.
10. The division of competence between the Commission and the competition authorities of the Member States ("NCAs"), which is based on the concept of "concentration" in the EC Merger Regulation and the mechanical application of the turnover thresholds, includes three corrective mechanisms. The first corrective mechanism is the so-called "two-thirds rule" which applies to both Articles 1(2) and 1(3). The objective of this rule is to exclude from the Commission's jurisdiction certain cases which contain a clear national nexus to one Member State.
11. The second corrective mechanism is the pre-notification referral system introduced under the new EC Merger Regulation in May 2004. This allows for the re-allocation of jurisdiction at the initiative of the parties prior to notification and subject to approval by the Member States and/or the Commission.
12. The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assesses mergers that fall below the thresholds of the EC Merger Regulation under certain conditions (Article 22). Conversely, a Member State may, in cases that have been notified under the EC Merger Regulation, request the transfer of competence to its NCA if certain conditions are fulfilled (Article 9).
13. The analysis of this Staff Working Paper covers the turnover thresholds in conjunction with these corrective mechanisms with the aim of developing a comprehensive overview of the system of allocation and re-allocation of merger cases between the Commission and the Member States.

### **1.3. Methodology and structure**

14. On 26 June 2008, DG COMP launched a consultation with the Member States' national competition authorities ("NCAs"). All NCAs replied and the Commission received a substantial amount of statistical data which was necessary for the analysis of the quantitative aspects of the report. Data were compiled on multiple filings, the operation of the two-thirds rule and the pre- and post-notification referral mechanisms. The NCAs were also invited to offer their views and share their experience in respect of the operation of the thresholds and the referral mechanisms as well as with regard to the operation of the EC Merger Regulation more generally. The questionnaire for NCA consultation is attached as Annex 1.
15. On 28 October 2008, DG COMP also launched a public consultation. This consultation was primarily designed to collect further information concerning the application of the thresholds in Article 1 and the referral mechanisms set out in Article 4. Furthermore, the respondents were invited to forward any comments or suggestions in relation to the functioning of the EC Merger Regulation more generally. Of the 30 replies received, 16 were from major law firms frequently involved in EU merger notifications. In addition, 13 commercial entities including

companies and industry organisations replied, as well as a think tank. The replies are published on DG COMP's website.<sup>10</sup> The questionnaire for the public consultation is attached as Annex 2.

16. In addition to these consultations, DG COMP reviewed its own experience with the application of the jurisdictional thresholds and the referral mechanisms since the entry into force of the new EC Merger Regulation and the adoption of the Commission Notices on case Referrals and Jurisdictional issues.
17. PART I of this staff working paper will first analyse the functioning of the turnover thresholds set out in Article 1 of the EC Merger Regulation in the light of the comments received from NCAs and the respondents to the public consultation. The operation of the two-thirds rule will also be discussed in the light of the statistical data received from the NCAs and the experience of the Commission. PART II will examine the operation of the pre-notification referral system pursuant to Article 4 EC Merger Regulation. It also includes an examination of the operation of the post-notification referral mechanisms of Articles 9 and 22. PART III then presents some general conclusions.

## **PART I - JURISDICTIONAL THRESHOLDS**

### **2. THE THRESHOLDS UNDER ARTICLE 1**

#### **2.1. Introduction**

18. Article 1(2) of the EC Merger Regulation stipulates:

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

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5000 million; and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

19. Article 1(3), which entered into force in 1998, extends the Commission's sole competence to assess certain transactions where the parties have less turnover but requiring notification in three or more Member States ("multiple filings"). Article 1(3) stipulates:

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

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2500 million;

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<sup>10</sup> [http://ec.europa.eu/competition/consultations/2008\\_merger\\_regulation/index.html](http://ec.europa.eu/competition/consultations/2008_merger_regulation/index.html)

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million;

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

20. Article 1(3) tests whether significant turnover is achieved in three or more Member States. In principle, this means that the Article applies a test of cross-border effects. In this respect the intention of Article 1(3) could be interpreted as providing companies recourse to the "one-stop-shop" principle in situations where the cost of multiple notifications would otherwise be too high. In the discussions that led to the adoption of this amendment it was felt that the Community dimension would be more manifest in cases involving three or more Member States and that, as long as only two Member States were involved, potential conflicts could be avoided through bilateral contacts.

21. The turnover thresholds provided in Article 1(2) and 1(3) of the EC Merger Regulation have not been altered since their entry into force in 1990 and in 1998 respectively.

## **2.2. Views expressed by the NCAs**

22. NCAs have consistently expressed the view that, as a whole, the system of both the turnover thresholds and the referral provisions functions well and appropriately assign jurisdiction. It is also the general perception that the pre-notification referral system has enhanced the jurisdictional flexibility of merger control in the EU, thus fine-tuning possible any shortcomings of the thresholds.

23. One respondent pointed out that while the system of thresholds and corrective mechanisms works well overall, the level of the thresholds should be adjusted for price inflation and should take into account the EU enlargement. One NCA also suggested that the need for such adjustments might be further explored. One NCA considered that such adjustment is not appropriate at this stage but should be considered in the future.

24. As regards specifically the operation of the thresholds of Article 1(3) the NCAs have made only a few comments. One NCA wondered whether these thresholds would contribute to a more effective enforcement of merger control in the EU and suggested abolishing Article 1(3) in the interest of simplification and transparency. One NCA pointed out that the threshold under Article 1(3) is quite complicated.

25. With regard to specific markets or economic sectors, most NCAs took the view that the thresholds of Article 1(2) and (3) function well as an effective means of properly identifying mergers of a Community dimension. However, one NCA noted that more guidance as to how the relevant turnover of the parties concerned should be



calculated for the purposes of the jurisdictional assessment might be appropriate for some economic sectors. Another NCA remarked that the current rules could lead to an ineffective allocation of cases in the retail trade sector as such cases would be of a national or of a local dimension and therefore the NCAs would be the appropriate authorities for considering cases of this kind. Several Member States pointed out that in any event, the referral mechanism allows for effective fine tuning wherever appropriate.

### 2.3. Views expressed by the stakeholders

26. The public consultation raised the following questions:

A. Functioning of the turnover thresholds in Article 1(2) and (3) EC Merger Regulation

Question 1: Do you believe that Article 1(2) and (3) of the EC Merger Regulation is functioning as an effective means of distinguishing between those transactions which are most appropriately the subject to merger control at the Community level from those which are not? [...]

Question 2: Are there any specific sectors or markets where, in your view, the turnover thresholds in Article 1(2) and (3) are not functioning in the manner intended, namely in identifying those transactions which are most appropriately the subject to merger control at the Community level?

27. Table 1 below gives a quantitative overview of the number of replies given on these questions.

Table 1: Overview of replies to the public consultation on the issue of thresholds

Questions	Total*		Commercial entities		Law firms		Association	
	Yes	No	Yes	No	Yes	No	Yes	No
<b><u>Question 1:</u></b> Is Art 1(2) and (3) appropriate instruments to determine Community dimension?	12	3	4	2	8	1	-	-
<b><u>Question 2:</u></b> Should there be special rules for specific economic sectors?	7	5	5	2	3	3	-	-

\*All data refer to number of replies.

28. With regard to the system of jurisdictional thresholds under Article 1 generally, most respondents took the view that they provide a reasonably good proxy for which cases have a Community dimension. Considering that the turnover thresholds provide a simple and objective mechanism that can be handled directly by the companies involved in a merger in order to determine if their transaction has a Community dimension, respondents saw no need to change the turnover threshold system. However, many respondents underlined the importance of efficient referral mechanisms in order to be able to request the re-allocation of cases where appropriate.<sup>11</sup>
29. As regards the level of the thresholds in Article 1, whilst most respondents considered the thresholds appropriate, some suggested lowering them. A few respondents instead suggested that the thresholds should be raised to adjust for inflation.
30. Regarding the criteria in Article 1(3), a few respondents considered that this threshold is somewhat complex and captures few cases. Therefore, they question whether it is still necessary in its present form. In the same vein, some respondents went further and proposed to abolish Article 1(3) altogether while others welcomed a reopening of the debate regarding the introduction of a simpler "3+" rule. Various options of a "3+" rule have been proposed. Such suggestions could mean that a notification to the Commission would be compulsory or voluntary where a concentration is notifiable in at least three Member States, with more or less far-reaching Member States' powers to retain cases.
31. Several law firms and commercial entities pointed out that from their perspective the pre-notification referral mechanism under Article 4(5)<sup>12</sup> would obviate the need for the turnover threshold under Article 1(3).
32. Concerning particular rules for specific sectors, some respondents mentioned one or several possible sectors where this could be beneficial, including banking and financial services, investment funds, insurance, reinsurance, travel, airlines, energy, and defence. A few respondents merely proposed clarifications of the rules while a few respondents saw no need for sector-specific rules and advised against, arguing that such rules would make the thresholds too complicated.
33. Finally, most respondents consider that the current regime imposes excessive notification requirements with regard to JVs with limited or no activities and therefore little or no effect within the EU.<sup>13</sup> The review of such JVs is considered to be unjustified due to their limited nexus within the EU or somewhat disproportionate to their potential effects. Various proposals have been made as to how to address this perceived problem, ranging from explicitly excluding such JVs from review under

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<sup>11</sup> In particular the length of the referral procedures and the reporting requirements were the subject of many observations from industry representatives, as will be discussed in more detail in PART II.

<sup>12</sup> See discussion in PART II.

<sup>13</sup> Under Article 1, a concentration can only have a Community dimension where at least two of the undertakings concerned have turnover in the EU. However, as regards JVs, this can have the result that Community dimension is at hand where both parents to the JV meet the threshold but the actual JV has limited or no activities within the EU.

the EC Merger Regulation to at least further simplifying the review process as regards scope, timing and stand-still obligation.

## **2.4. Commission assessment of the thresholds under Article 1(2)**

34. Article 1(2) constitutes the legal basis for the great majority of all notifications under the EC Merger Regulation and has in the Commission's view operated in the way intended. This conclusion is generally shared by the NCAs and stakeholders alike. Furthermore, as will be discussed in more detail in the following sections, the limited use of referral mechanisms in the direction of the Member States supports this conclusion. In fact, these mechanisms provide for the possibility to refer for review by the NCAs concentrations which significantly affect competition in a market within a Member State, which presents all the characteristics of a distinct market.<sup>14</sup> The limited use of these mechanisms indicates that there are few concentrations where referral is deemed necessary.<sup>15</sup>
35. However, Article 1(2) does not catch a significant number of cases, which, in spite of their cross-border impact, are still dealt with by the Member States NCAs. This is particularly true in some industries where transactions involving companies with limited turnover may nevertheless affect the Common Market or a significant part of it. In fact, this was acknowledged already in the reform process leading up to the adoption of the additional thresholds under Article 1(3).

## **2.5. Commission assessment of the thresholds under Article 1(3)**

36. The objectives of the adoption of Article 1(3) were first to address the problem that a significant number of cases failed to meet the turnover requirements of Article 1(2) and which therefore had to be notified in several Member States. Secondly, many such concentrations had a significant cross-border impact but did not benefit from the "one-stop-shop" principle and therefore, the EC Merger Regulation had not fully succeeded in creating a level playing field and the application of coherent rules for this category of cases. A discussion follows below as to what extent these objectives have been achieved by first examining cases that fell within this threshold and then those that fell outside Community jurisdiction.

### *2.5.1. Cases falling under Article 1(3)*

37. In recent years, the number of notifications received under Article 1(3) was in the order of 20 to 50 per year, representing 5-15% of the total number of all notifications.<sup>16</sup> By their very nature, these cases would in most cases have been subject to multiple notifications in view of the way the threshold in Article 1(3) is designed. Thus, the threshold in Article 1(3) has decreased the number of potential

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<sup>14</sup> See Articles 4(4) and 9.

<sup>15</sup> It is instructive that only 43 pre-notification referral requests and 25 post-notification referral requests were made between 2004 and 2008 compared to the total number of about 1,530 own jurisdiction cases dealt with by the Commission over the same reference period.

<sup>16</sup> For 2007, the total number of notifications is 402, of which 7 were subsequently withdrawn. Out of these we identified 48 decisions where the notification was based on Article 1(3) = 12%. In 2008 out of a total of 347 notifications (minus 13 withdrawals) only 24 decisions were identified to have been notified on the base of Article 1(3) = 7%

multiple filings and has thus significantly decreased unnecessary parallel reviews of transactions with a potential impact within or across several Member States.

38. With a view to assessing the cross-border effects and impact on competition of cases notified under Article 1(3), a statistical comparison with cases notified under Article 1(2) was carried out. First, it was compared whether cases notified under Article 1(3) are more likely to be of national character with respect to their geographic impact. Secondly, it was assessed whether cases notified under Articles 1(2) and 1(3) may present differences as to their likelihood of raising competition concerns.
39. First, as far as the geographic impact of cases under Article 1(3) is concerned, this element can be said to provide one indication as to which competition authority is well placed to assess any given merger and to take remedial action when necessary. One element among others to consider when assessing their geographic impact is to look at the geographic market(s) affected by these mergers. In this exercise it first has to be stressed that this is only an approximation to be used in the absence of other readily available indicators. Furthermore, the Commission often leaves the question of geographic definition open if the merger in question does not raise any competition concern under any conceivable alternative market definitions.
40. Nevertheless, it is instructive that in about a third of cases notified under Article 1(3) the proposed concentration clearly affected a relevant geographic market which was EU wide or wider than the EU (albeit the definition of the geographic scope was left open in most of these cases). More specifically, in 17 of 72 cases notified under Article 1(3) in 2007 and 2008 the affected geographic markets were EU wide or wider, and in 5 cases the geographic market was possibly world-wide.<sup>17</sup> A number of cases with national markets affected more than one national market.<sup>18</sup>
41. Consequently, based on the Commission's experience there are no indications that cases notified under Article 1(3) generally affect only a limited geographic area. On the contrary, these cases generally tend to affect markets broader than national or more than one national market.
42. Second, from a substantive viewpoint, for the years 2007 and 2008 it should be noted that competition concerns were found in four of the cases notified under Article 1(3). Three of these cases were cleared in the first phase by way of a decision under Article 6(2). One case was cleared by way of an Article 8(2) decision with commitments after a full second-phase investigation. Consequently, over the period in question, about 5 % of the transactions notified under Article 1(3) raised competition concerns. This is comparable to cases which were notified under Article 1(2), where competition concerns were also found in some 5 % of the cases.<sup>19</sup>

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<sup>17</sup> In 48 of the 72 cases notified under Article 1(3) in the two years 2007 and 2008 the Commission took a simplified decision which makes no reference to the geographic scope of the market.

<sup>18</sup> The fact that a concentration affects markets in more than one Member State is an indication that a case may benefit from a "one-stop-shop" treatment. However, this must be balanced against the advantages of allowing the most appropriate authority dealing with the case taking into account factors such as the NCAs knowledge of particular sectors and geographic proximity.

<sup>19</sup> Out of about 650 cases notified under Article 1(2), more than 31 cases were closed with conditional clearances or were withdrawn/ aborted following a finding by DG COMP that there were competition problems (22 after Phase 1, 4 after phase 2, and between 5 to 10 cases aborted for reasons of competition concerns).

43. In conclusion, based on the available information, Article 1(3) has significantly contributed to a proper allocation of cases which are better dealt with at the European level. This is first due to the fact that it avoids multiple filings in a large number of cases which had a potential impact within or across several Member States. In addition, it appears that many mergers notified under Article 1(3) affect markets that are wider than national, which makes it even more likely that they have a Community dimension. Statistics also show that cases notified under Article 1(3) are as likely to raise competition concerns as those notified under Article 1(2).

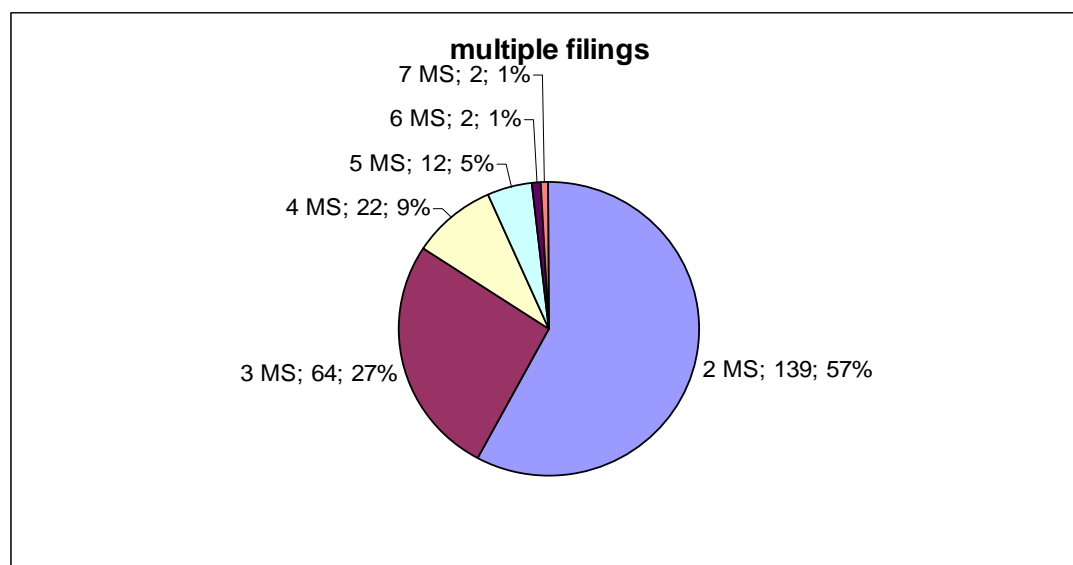
#### 2.5.2. *Cases falling outside the scope of the EC Merger Regulation*

44. As noted, one important aspect of analysing the operation of the turnover thresholds is to analyse cases that remain outside the scope of the EC Merger Regulation. The following section will examine the cases which are still notified in more than one Member State.

##### 2.5.2.1. General statistics on multiple filings

45. NCAs were asked to indicate how many of the concentrations which were reviewed under their relevant national merger control laws during the year 2007 were also reviewed in at least one other EU jurisdiction. Information received from the NCAs shows that at least 241 transactions were reviewed by more than one NCA.<sup>20</sup> Filings were made in three or more Member States with regard to 102 (42%) of these transactions whilst the remaining transactions were reviewed in two Member States. The exact breakdown is shown in the chart below.

Chart 1: Breakdown of multiple filing transactions by the number of Member States involved



<sup>20</sup> Member States reported a total of 935 cases that in their view were reviewed in at least one other EU jurisdiction. However, only for 663 of them was it possible to find a corresponding matching case in at least one other MS. These 663 cases formed part of a total of 241 transactions filed in more than one MS (multiple filings). The remaining 272 reported cases could not be matched with any case from another Member State and therefore were not considered as part of a transaction involving multiple filings. More than half of these unrelated cases (149) were reported by Austria.

46. When comparing the numbers of multiple filings to the total number of cases reviewed by NCAs it appears that only 5% of all cases were reviewed by more than one NCA.<sup>21</sup>

#### 2.5.2.2. Geographic scope of multiple filings

47. As regards the geographic scope of multiple filing cases, the following statistics (based on data provided by the NCAs) are indicative only, as the geographic scope of markets was often not reported or was left undefined. Of the 102 identified transactions reviewed by three or more NCAs, as many as 54 transactions (53%) involved markets which were wider than national or European-wide markets and 22 transactions (22%) involved worldwide markets.<sup>22</sup> By contrast, only 26 transactions were limited in their geographic scope to national markets (25%).

#### 2.5.2.3. Substantive issues

48. The NCAs reported few competition problems with regard to multiple filing transactions. Indeed, of the 241 transactions (which gave rise to a total of 663 national cases) 10 transactions gave rise to competition concerns:

- One transaction was prohibited in one Member State after an in-depth investigation (a case reviewed by three NCAs);
- Three transactions led to a clearance conditional on remedies after phase 1 investigations (two of these cases were reviewed by three NCAs and one reviewed by two NCAs);
- Two transactions were abandoned;
- Four cases underwent an in-depth investigation leading to a clearance decision.

49. Of the in-depth cases, one involved five NCAs, one involved four NCAs, and the other two involved three NCAs. Hence, overall six out of the 102 transactions involving the review by three or more NCAs seemed to have presented competition concerns.

#### 2.5.2.4. Views expressed by stakeholders regarding multiple filings

50. In the public consultation, interested parties were asked to indicate any concerns with respect to multiple filings. Many respondents pointed out that the issue of multiple filings must be assessed against the background of diverging jurisdictional, procedural and sometimes substantive rules in different Member States. In their view

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<sup>21</sup> For the year 2007, NCAs reported a total of 5,129 cases notified or reviewed by their authority. Considering that 663 of them formed part of 241 multiple filing transaction, we calculated on the basis of:  $5,129 - 663 + 241 = 4,707$  cases. The original data of 5129 cases is heterogeneous in the sense that data for Belgium and for the Slovak Republic refer to the number of decisions, while data for Austria, Cyprus, and Ireland refer to the number of notifications. The numbers for the Czech Republic were not reported for 2007 and are assumed at equivalent levels of the earlier three years that were reported.

<sup>22</sup> The respective numbers for all 241 multiple filing transactions are: 69 transactions were limited in their geographic scope to national markets (29%). 104 transactions (43%) involved wider than national and/or European-wide markets, and 42 transactions (17%) involved even worldwide markets. For the remaining 26 transactions (11%) the geographic scope of the markets was not defined or not indicated.

these divergences cause significant additional legal uncertainty, cost and delay when multiple filings are required. Some respondents also consider that there is not always a harmonious coexistence of national rules and EC rules. They would therefore welcome further measures to reduce the number of multiple filings and, to the very least, further initiatives by the Commission to foster harmonisation or further "soft law convergence" of national merger control laws to alleviate the negative consequences of parallel proceedings. Some pointed to the successful initiatives towards further convergence in the area of the application of Article 81 and 82 which resulted in the adoption of Regulation 1/2003 and the Commission's leniency model program as good role models.<sup>23</sup>

#### 2.5.2.5. Commission assessment of multiple filings

51. While NCAs may be the "more appropriately" placed authorities to assess individual national markets, this is not necessarily the case where multiple filings are required. In fact, cases where the markets are national in scope may nevertheless have a Community relevance in view of the fact that the Commission may be well placed to make a comprehensive assessment of competition problems within several markets and, where necessary, take remedial action. Also, where the geographic scope of affected markets is wider than national, the likelihood of a case having a Community relevance is even greater.
52. In the year 2007, there were 241 concentrations that were reviewed under the competition laws of more than one Member State. 102 of these concentrations were reviewed by three or more NCAs (giving rise to about 360 parallel proceedings). The number of multiple filings clearly exceeded the number of cases notified to the Commission under Article 1(3) during the same period (i.e. 49 cases). This begs the question whether some of these transactions would have been better assessed exclusively by the Commission because of their potential competition impact within or across several Member States or simply because of the advantages of a "one-stop-shop". For the business community, the costs of engaging in diverging parallel proceedings (with their different procedural frameworks, different time schedules and multiple languages, and, at times, potentially diverging substantive rules) must be a consideration.
53. Indeed, the vast majority of these cases included at least one market that was wider than national and often markets which were EEA-wide or worldwide in geographic scope. If only 25% of the 102 transactions that were reviewed in three or more Member States were limited to national markets, then clearly a significant number of transactions with cross-border effects remain outside the scope of the EC Merger Regulation.
54. Furthermore, about 5-6% of transactions notified in more than one Member State presented competition problems (10 out of 241 concentrations, or 6 out of 102 concentrations). The need for to avoid parallel procedures and to take a common

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<sup>23</sup> Many stakeholders consider divergences with regard to the following parameters to be particularly problematic and potential sources of legal uncertainty: jurisdictional thresholds (turnover vs. market share), the definition of concentration (e.g. control vs. minority shareholdings), hold-separate obligation, derogations from hold-separate obligation, appeal, filing fees and review periods.

approach in enforcement is even more compelling in such cases, especially if remedies are required.<sup>24</sup>

55. In conclusion, in its current form, Article 1(3) has not entirely removed the need for multiple filings.

## 2.6. The application of the two-thirds rule

### 2.6.1. Introduction

56. Article 1 provides that transactions that fulfil the general turnover thresholds set out in paragraphs 2 and 3, are notifiable under the EC Merger Regulation unless each of at least two of the parties to the transaction achieve more than two thirds of their aggregate Community wide turnover within one and the same Member State. Below is an analysis of to what extent this provision has distinguished between cases of a Community relevance and those with a clear national nexus only.

### 2.6.2. General statistics

57. The number of cases that fell under the two-thirds rule for the period between 2001 and 2007 are provided in the table below.<sup>25</sup>

Table 2 Merger cases by Member State during the reference period 2001-2007<sup>26</sup>

Merger Cases Reviewed by NCAs						
	2001 -			Total No. of Cases Reviewed	No. of 2/3 Rule Cases	2/3 Rule Cases as % of Total
	2005	2006	2007			
<b>Austria</b>	<b>1,500</b>	<b>274</b>	<b>341</b>	<b>2,115</b>	<b>2</b>	<b>0.1</b>
<b>Belgium</b>	<b>285</b>	<b>15</b>	<b>19</b>	<b>319</b>	<b>1</b>	<b>0.3</b>
<b>Bulgaria***</b>	<b>Na</b>	<b>Na</b>	<b>79</b>	<b>79</b>	<b>0</b>	<b>0.0</b>
<b>Cyprus*</b>	<b>14</b>	<b>25</b>	<b>29</b>	<b>68</b>	<b>0</b>	<b>0.0</b>

<sup>24</sup> While this is comparable to the percentage of cases with competition concerns that were notified under the EC Merger Regulation, which is in the order of 7%, no firm conclusions can be drawn from such comparison in light of the fact that some national merger control regimes have very low notification thresholds and a definition of concentration which is wider than the one used in the EC Merger Regulation. For reference, in 2007, 402 notifications resulted in 1 prohibition, 4 conditional clearances after phase 2, 18 conditional clearances after phase 1, and 7 withdrawals. Furthermore, there were 5 full referrals to a MS under Article 4(4), 1 under Article 9, and 50 referrals to the Commission under Article 4(5) and 2 full referrals under Article 22.

<sup>25</sup> The reference period for this assessment has been extended back to 2001 in order to have a comprehensive view on the operation of this threshold.

<sup>26</sup> This table contains the number of concentrations reviewed, except for Belgium and the Slovak Republic where data refer to the number of decisions taken, while data for Austria, Cyprus, and Ireland refer to the number of notifications received.



Merger Cases Reviewed by NCAs						
	2001 - 2005	2006	2007	Total No. of Cases Reviewed	No. of 2/3 Rule Cases	2/3 Rule Cases as % of Total
Czech Republic****	104	61	60	225	0	0.0
Denmark	70	6	13	89	0	0.0
Estonia*	68	34	34	136	0	0.0
Finland	406	39	35	480	5	1.0
France	708	142	160	1010	27	2.7
Germany	6,250	1,829	2,240	1,0319	17	0.2
Greece	76	13	17	106	2	1.9
Hungary*	351	43	46	440	0	0.0
Ireland	212	98	72	382	0	0.0
Italy	3,053	717	864	4,634	34	0.7
Latvia*	22	27	78	127	0	0.0
Lithuania*	97	61	78	236	0	0.0
Luxemburg*****	Na	Na	Na	Na	Na	Na
Malta*	13	12	5	30	0	0.0
Netherland**	300	135	108	543	11	2.0
Poland*	574	265	263	1,102	2	0.2
Portugal	325	67	91	483	0	0.0
Romania***	280	106	45	431	0	0.0
Slovak Republic*	107	42	49	198	0	0.0
Slovenia*	252	47	50	349	0	0.0
Spain	464	132	127	723	14	1.9
Sweden	385	113	110	608	4	0.7
United Kingdom	1,000	155	116	1,271	7	0.6

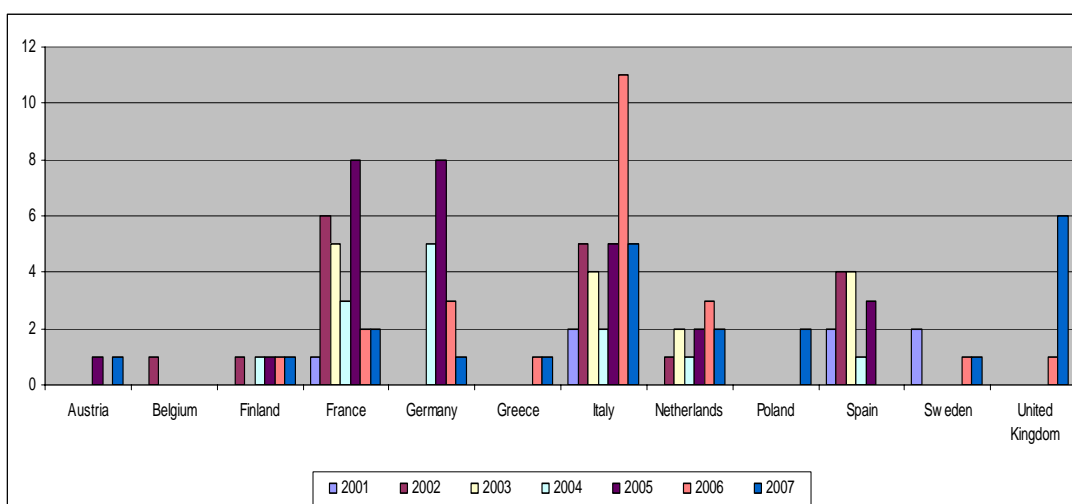
Merger Cases Reviewed by NCAs						
	2001			Total No. of Cases Reviewed	No. of 2/3 Rule Cases	2/3 Rule Cases as % of Total
	-					
	2005	2006	2007			
<b>Total</b>	<b>16,916</b>	<b>4,458</b>	<b>5,129</b>	<b>26,503</b>	<b>126</b>	<b>0.5%</b>

\* 01.05.2004 – 31.12.2007  
 \*\* 01.01.2002 – 31.12.2007  
 \*\*\* year 2007 only  
 \*\*\*\* number of cases in 2007 based on extrapolation of previous years  
 \*\*\*\*\* no merger control regime

58. As can be seen from the above table, there were at least 126 cases that qualified under the two-thirds rule threshold during the reference period. These cases therefore represent a very small proportion (at least around 0.5%) of the total case load at the Member State level of about 26,500 cases. These statistics should be viewed with some caution. In fact, many Member States did not keep record of the number of two-thirds rule cases prior to 2004. Given the incomplete data available prior to 2004,<sup>27</sup> it is difficult to be precise about the exact number of cases falling into this category. If anything, the data underestimates the total number of two-thirds rule cases. For the same reason, it is difficult to draw any firm conclusions as to trends over time with respect to the number of two-thirds rule cases. Nevertheless, since 2005 more than 20 cases per annum have been reported. An overview of all two-thirds rule cases reported between 2001 and 2007 is provided in Annex 3.

Chart 2: Annual overview two-thirds rule cases per Member State

<sup>27</sup> Prior to 2005, data with regard to the number of two-thirds rule cases are incomplete or non-existent for Austria, the Czech Republic, Ireland, Italy, Germany, Poland and the UK. Several Member States, Czech Republic, Cyprus, Denmark, Estonia, Greece, Hungary, Ireland, Lithuania, Malta, Poland, Slovakia and Slovenia, had no two-thirds cases prior to 2005. Latvia, did not provide information. As from 2005 all Member States notification forms request all information necessary for the assessment as to whether the two-thirds rule is fulfilled.

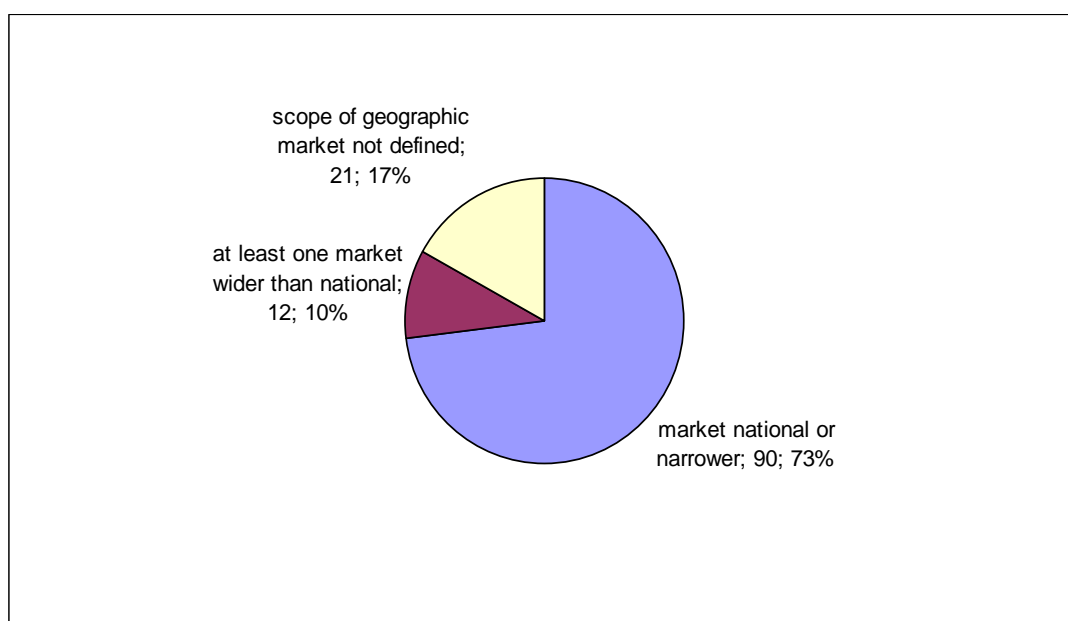


59. As can be seen from the above chart, the number of two-thirds rule cases varies significantly by year and by Member State. Nevertheless, these data clearly show that as a whole, and with few exceptions, the two-thirds rule is mainly applicable with regard to the larger Member States. In fact, over the six year period, France, Germany, Italy and Spain are the Member States with the largest number of such cases.<sup>28</sup> This is a result of the design of this threshold. It is generally unlikely that two of the parties to the transaction would meet the general thresholds provided for by Article 1 while still having two thirds of their turnover in a small Member State. As regards the economic sectors where this rule applied, the most important are financial services (33 %), followed by energy (10 %) and telecommunications (6 %).
60. Concerning the geographic scope of the markets analysed, as seen from the chart below, in most of the 126 cases the relevant market was defined as national or narrower. In only 12 cases (i.e. 10%), the geographic market was defined as wider than national or EEA-wide. Five of these cases involved mergers in the financial services sector and three concerned mergers in the energy sector. The other cases concerned mergers in various sectors such as e-commerce, the air-transport supporting services sector, chemicals and automotive.

<sup>28</sup>

Data with regard to the UK prior to 2006 is not available.

Chart 3: Geographic scope of two-thirds rule cases



61. Out of total reported two-thirds rule cases, only 13 (around 10 %) are reported to have involved filings in one or more additional Member States.<sup>29</sup> Half of these cases related to the financial services sector while the remaining cases were evenly spread across different sectors.

#### 2.6.3. Procedure and outcome

62. As regards procedures and outcome of the review, the table below shows that 17 cases (about 13%) were subject to in-depth investigation between 2001 and 2007. As regards regulatory intervention, one concentration was prohibited and 11 were conditionally cleared (about 10% of total cases).

Table 4: Two-thirds rule cases: Procedures and outcome

Investigation		Outcome				
first phase	in-depth	clearance	clearance with remedies	prohibition	withdrawal	other
109	17	107	11	1	3	4
83%	13%	82%	8%	1%	2%	3%

#### 2.6.4. Comments by the NCAs

63. Most NCAs express satisfaction with the way the two-thirds rule has operated. However, a few respondents consider that the two-thirds rule may not always appropriately allocate cases between the EU level and the Member State level. In particular, one respondent acknowledged that the current regime of case allocation

<sup>29</sup> In some case, the number of total filings could not be confirmed given that data was not on record.

could (in particular circumstances and in certain sectors) prevent the Commission from accomplishing its obligations in the construction of the single market. Therefore, it would not oppose the adoption of additional jurisdictional safeguards to ensure that the internal market is not compromised, in particular in relation to mergers within recently liberalised sectors (e.g. the energy sector), some of where favouring of national champions has been an issue.

#### 2.6.5. *Comments by the stakeholders*

64. The majority of respondents did not express concerns about the two-thirds rule. A few respondents consider it to be a useful tool to single out transactions that do not have a Community relevance.<sup>30</sup>
65. Nevertheless, some respondents consider that as a result of increased market integration this provision is outdated. In fact, it is seen as capturing cases which, although having a focus in a particular Member State, have potentially important effects within the Common Market. For example in the energy sector (which they note is becoming increasingly integrated and liberalised) there could be an important risk of foreclosure of markets if two major energy providers in already highly concentrated markets are allowed to merge. In the view of some respondents, the Commission would therefore be better placed to review such cases. A few respondents also expressed the concern that, in some circumstances, national merger control laws have been applied in potential conflict with competition law objectives with regard to mergers of strategic importance that fell under this threshold.
66. Some respondents would therefore be in favour of abolishing this provision. Many of them pointed to the availability of referral mechanisms, which in their view provide a more suitable mechanism for adjusting the allocation of cases when it is clear that a case has a purely national nexus. Finally, a few respondents consider that the two-thirds provision serves its purpose but that it could be modified to allow for a better calibration in the selection of cases that do not have a Community relevance.<sup>31</sup>

#### 2.6.6. *Assessment of the operation of the two-thirds rule*

67. Having regard to the small number of cases involving multiple filings and their likely impact based on geographic scope, one can conclude that, in most cases the two-thirds rule appears to have served as a reasonably effective proxy for identifying the "more appropriate" jurisdiction.
68. However, there is a small number of important merger cases having a potentially significant cross-border impact (even in some cases where the market was defined as national in scope) which, as a consequence of the application of the two-thirds rule were examined by the NCAs. In addition, the jurisdictional aspects of the two-thirds

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<sup>30</sup> One respondent noted that, absent the two-thirds rule, many cases with their centre of gravity in one Member State would anyway be referred back to that Member State and took the view that, as referral processes can be time-consuming and cumbersome it is preferable for the jurisdiction to be established at the outset.

<sup>31</sup> For example, it has been suggested that an additional threshold should be added to pre-empt cases with effects outside the territory to be reviewed at the national level. Thus in addition to the existing thresholds, it should also be required that neither party to the transaction achieves more than 250 million Euros elsewhere in the EU.

rule, i.e. the way it has allocated cases between the Community level and the Member State level, cannot be assessed in isolation from how the cases that fall under this threshold are liable to be handled in a substantive respect.

69. It is unavoidable that some of the transactions between large firms falling under the two-thirds rule are capable of having a significant impact on market structures and on competition beyond the confines of a single Member State. In fact, mergers involving national markets but which, due in particular to high concentration levels as well as entry barriers, may result in increased foreclosure effects, clearly have a cross-border impact. Cases with cross-border effects are of particular importance from a Community perspective if they concern markets which are in the process of Community-driven liberalisation or where intra-EU barriers are being eroded. The geographic scope of such markets may be in the process of evolving towards a dimension which is wider than national, or Community-wide, in scope. Furthermore, mergers giving rise to possible competition concerns in a series of national or regional markets or being subject to multiple filings may also be considered cross-border in their impact.
70. These considerations are well illustrated by some recent cases in the energy sector (which represents the second largest portion of two-thirds rule cases). In cases such as Eon/Ruhrgas,<sup>32</sup> Gas Natural/Endesa,<sup>33</sup> Gas Natural/Iberdrola<sup>34</sup> and a recent transaction involving around 10 electricity producers and distributors in Poland,<sup>35</sup> the competition structure of the whole national market was substantially affected. In these types of cases potential effects on cross-border trade cannot be excluded. These examples also indicate that the two-thirds rule has sometimes functioned in a way to allocate jurisdiction to the NCAs in cases of domestic energy mergers within the larger Member States. In fact, it appears somewhat paradoxical that in the same sector and over the same time period, similar operations (but taking place in other parts of the EU) did not fall under the two-thirds rule and were assessed by the Commission. Significant examples are the EDP/ENI/GDP,<sup>36</sup> EON/MOL,<sup>37</sup> DONG/Elsam/Energi E2,<sup>38</sup> and the GDF/Suez cases.<sup>39</sup>
71. It goes beyond the scope and purpose of the report to examine the merits of these cases or whether it would be necessary, appropriate or possible to take measures at Community level. In any case, for future reference it may be a useful exercise to analyse the need for and the possibilities of introducing more efficient and flexible mechanisms for the re-allocation of certain two-thirds rule cases than those currently provided by the EC Merger Regulation.

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<sup>32</sup> Case B8 - 109/01.

<sup>33</sup> N-05082 GAS NATURAL / ENDESA.

<sup>34</sup> N-03012 GAS NATURAL / IBERDROLA.

<sup>35</sup> Case DOK-163/2006 dated 22.12.2007.

<sup>36</sup> Case M.3440, Commission decision of 9 December 2004.

<sup>37</sup> Case M.3696, Commission decision of 21 December 2005.

<sup>38</sup> Case M.3868, Commission decision of 14 March 2006.

<sup>39</sup> Case M.4180 Commission decision of 14 November 2006

2.6.7. *Some recent developments with regard to cases falling or potentially falling within the scope of the two-thirds rule*

72. Some recent developments at the national level deserve particular attention. For instance, it appears that in the above-mentioned Polish energy case, the NCA found that the transaction would lead to dominance in several markets (both with regard to the supply and wholesale of electricity). However, for reasons notably of ensuring security of supply of energy, the transaction was eventually approved. While mostly involving national or narrower markets, the impact of such mergers would appear to have effects beyond the territory of that Member State as a result of maintained or reinforced entry barriers in the energy sector across national borders.
73. Similar considerations applied in the Lloyds TSB/HBOS-case,<sup>40</sup> where the OFT reviewed the transaction and recommended its referral to the UK Competition Commission in view of the potential competition concerns raised. This concentration appeared to have its main effects in the UK retail banking sector, but there may be a risk of foreclosure effects in the supply of retail banking services generally because of the very significant concentration level that resulted from the transaction along with the potential increase of entry barriers. However, the UK Secretary of State exercised statutory powers<sup>41</sup> to intervene and decided, on the basis of financial stability considerations, not to refer the concentration to the Competition Commission.
74. There have also been situations where the NCA may not have been in a position to carry out an effective review. In the CAI/Alitalia/AirOne-case, which concerned a proposed restructuring of Alitalia's and AirOne's air transportation activities, the Italian NCA was barred by decree from carrying out a review of the case under the normal procedure provided for by the relevant legislation. The only remedial powers left with the NCA were those of imposing behavioural commitments in case competition concern should arise.<sup>42</sup>
75. Finally, in some Member States, specific legislation introduced to deal with the financial crisis has excluded certain State rescue measures within the financial services industry from the scope of application of national merger regimes. In certain instances the applicability of antitrust law has also been limited. The following examples bear mention.
76. In Germany, national merger control is suspended for operations within the scope of the Financial Market Stabilisation Act<sup>43</sup> which covers financial institutions.

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<sup>40</sup> Decision by the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds TSB Group plc and HBOS plc under Section 45 of the Enterprise Act 2002 dated 31 October 2008.

<sup>41</sup> Changes were introduced in the Competition Act to allow the Secretary of State to overrule any recommendation to refer a case to the Competition Commission on financial stability grounds, thus effectively giving the Government the final say on any merger matter in this area.

<sup>42</sup> Only if the entity would still enjoy a "monopoly" position by 2011, the NCA will be in a position to impose structural remedies.

<sup>43</sup> Gesetz zur Umsetzung eines Maßnahmenpaketes zur Stabilisierung des Finanzmarktes (Finanzmarktstabilisierungsgesetz – "FMStG"), Bundesgesetzblatt Jahrgang 2008 Teil I Nr. 46 vom 17. Oktober 2008; The application of national merger control to operations within the scope of the Financial Market Stabilisation Act is excluded by Art. 2 § 17 FMStG.

However, this does not exclude merger control being applied to operations by the Federal states and by foreign states, as those measures do not fall under this Act.

77. Similar initiatives were reported in Ireland, under the Anglo Irish Bank Corporation Act.<sup>44</sup> Also in Portugal, national merger control has been rendered inapplicable on a temporary basis in respect of nationalisations of financial institutions, and onward sale by the State of the same undertakings is also exempt from the standstill obligation under national merger control law.<sup>45</sup>
78. It is desirable that, independently of which authority is the reviewing agency, merger control across the EU ensures the protection of undistorted competition.

## **2.7. Conclusion on the operation of the thresholds**

79. In conclusion, it appears that the threshold criteria in Article 1(2) and 1(3), seen in conjunction with the various referral mechanisms, operate in a satisfactory way in allocating jurisdiction. In fact, based on the Commission's own experience and the views expressed by NCAs and stakeholders there appears to be a consensus that the right cases are generally being reviewed at the Community level. The low degree of referrals in the direction of the Member States also supports this conclusion.
80. However, the analysis of data on multiple filings provided by the NCAs indicates that in the year 2007, some 102 multiple filing cases had to be notified in three or more Member States. The analysis of the geographic scope of these cases indicates that a large majority of them include markets which are wider than national.
81. One can therefore conclude that a number of transactions with significant cross-border effects (and therefore having Community relevance) would appear to remain outside the scope of the EC Merger Regulation. As has been pointed out in numerous ways by the respondents to the public consultation, any perceived need to change or amend the current turnover thresholds must be assessed in the context of the corrective mechanisms provided for by the EC Merger Regulation. As will be discussed in Part II, in many stakeholders view, although the turnover thresholds do not always distinguish cases that have Community relevance from those that do not, this could be alleviated by the existence of efficient pre-notification referral mechanisms between the national level and the Community level.
82. The two-thirds rule has, in most cases appropriately distinguished between concentrations having Community relevance and those that do not. However, there are a small number of cases with potential cross-border effects in the Community. More generally, it is desirable that, independently of which authority is the reviewing agency, merger control across the EU ensures the protection of undistorted competition.

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<sup>44</sup> Section 15, §1 explicitly disapplies Parts 2 and 3 of the Competition Act 2002 to the acquisition by the Minister, or the transfer by the Minister to the Minister's nominee, of shares in Anglo Irish Bank under the Act.

<sup>45</sup> Lei n° 63-A/2008 of 24 of November published in DR 1ª série-N°228-24 de Novembro de 2008. Article 20 (1) renders merger control inapplicable to nationalizations of the type defined in Article 2.1, which is applicable only until 31<sup>st</sup> December 2009. Article 20 (3) provides that the sell on by the State of financial institutions nationalized in order to ensure that the legal requirements on solvability and liquidity are met is not subject to the stand still obligation provided for in national merger legislation.



83. Finally, the majority of stakeholders have indicated that, generally, increased convergence of merger control rules at the national level and between the EU level and the national level of the like achieved in the antitrust field would be an important way to improve the effectiveness of the merger control system across the EU.

## **PART II - REFERRAL MECHANISMS**

### **3. PRE-NOTIFICATION REFERRALS**

84. With the adoption of the revised EC Merger Regulation in 2004, a set of voluntary pre-notification referral mechanisms were introduced in order to *"further improve the efficiency of the system for the control of concentrations within the Community."*<sup>46</sup> The principles guiding the system where those that decisions taken with regard to the referral of cases should take due account *"in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a "one-stop-shop" system, and the importance of legal certainty with regard to jurisdiction."*<sup>47</sup> In the following, the operation of the pre-notification referral mechanisms after five years of application will be examined considering these guiding principles.

#### **3.1. Referrals under Article 4(4)**

85. Article 4(4) of the EC Merger Regulation provides a mechanism allowing concentrations that are notifiable under the EC Merger Regulation to be referred to the Member States at the request of the parties if certain conditions are fulfilled. Namely, unless the Member State disagrees, the Commission, when it considers that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a 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 competition law. The application of this provision is examined in the following on the basis of quantitative and qualitative elements.

##### *3.1.1. Statistics of a general nature*

##### *3.1.1.1. Cases referred – geographic and sectorial scope*

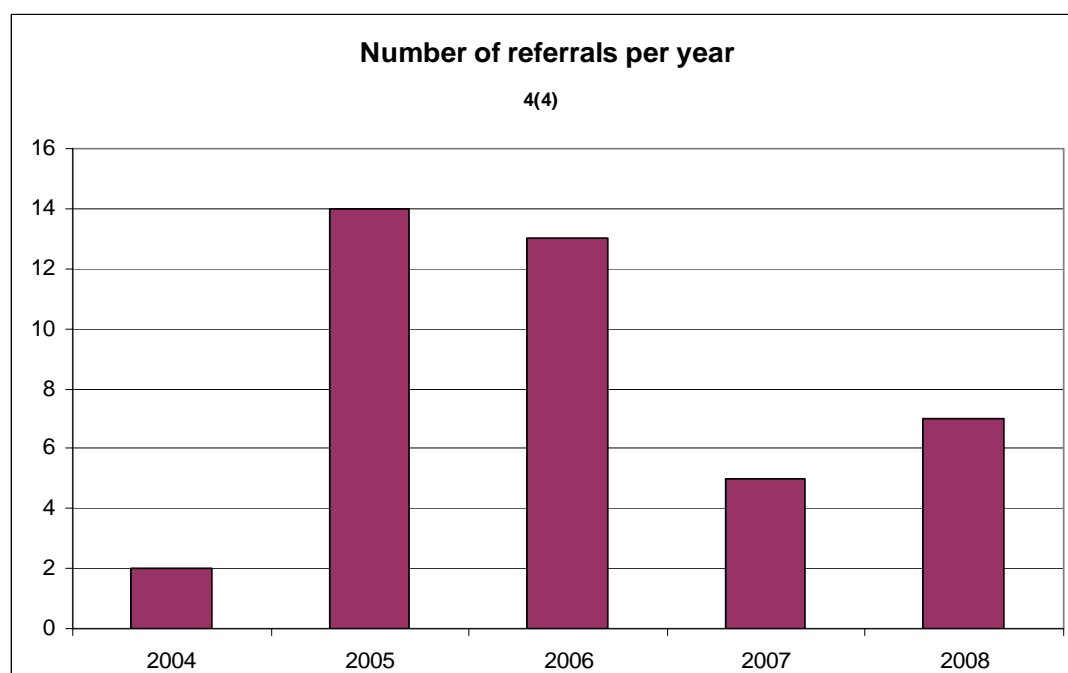
86. The number of referrals on the basis of this provision is illustrated by the chart below.

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<sup>46</sup> Recital 16 of the EC Merger Regulation.

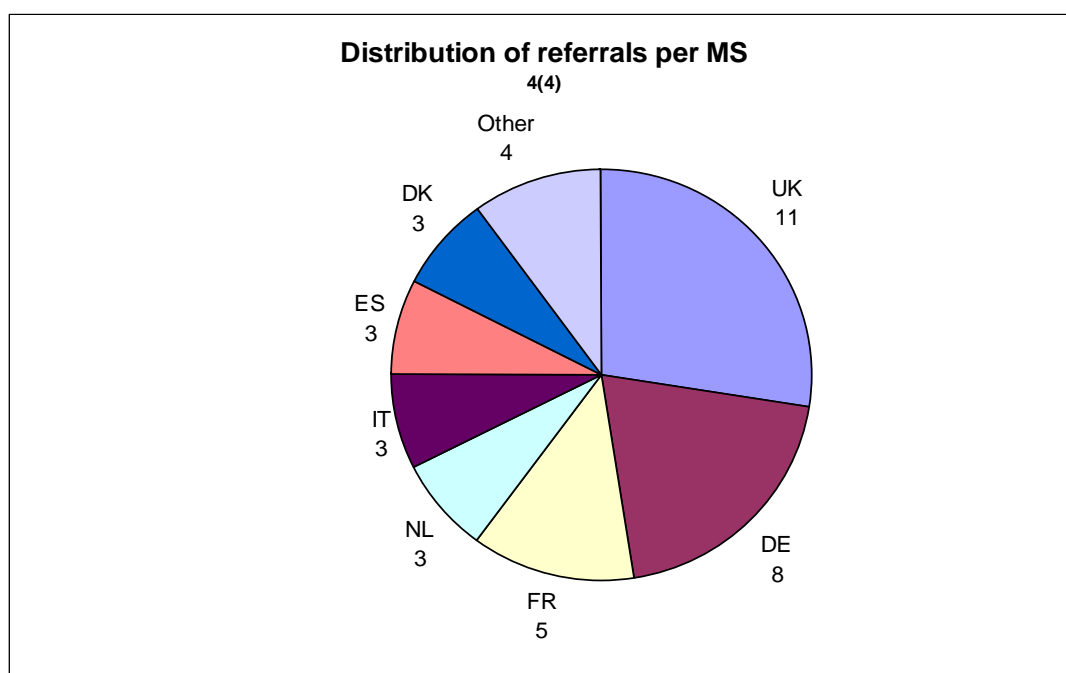
<sup>47</sup> Commission Notice on Case Referral in respect of concentrations, Official Journal C 56, 05.03.2005, p. 2-23, paragraph 8.

Chart 4: Article 4(4) referrals per year (2004-2008)



87. The above chart serves to illustrate that between 2004 and 2008, 43 Article 4(4) referrals were requested of which one was refused and two were withdrawn. Apart from one partial referral, in all the 40 cases the entire case was referred to one or exceptionally two Member States. The flow of referrals over the period has been volatile, with only two referrals in 2004 while reaching a peak in 2006 with 13 referrals. The major recipients of Article 4(4) referrals cases were the UK, followed by Germany and France. An overview of referrals by country is provided in the chart below.

Chart 5: Article 4(4) referrals per Member State (2004-2008)



88. With respect to the geographic scope, the overwhelming majority of referral cases involve markets that are clearly national in scope. In fact, between 2004 and 2007, all cases involved at least one or more local or national markets. Conversely, only three cases (or less than 10%) involved at least one market broader than national or EEA-wide. These statistics provide a good indication that from the point of view of geographic scope of the markets involved, the appropriate kind of cases are being referred to the Member States.<sup>48</sup> In fact, it is clear from these cases that their locus was essentially within individual Member States.

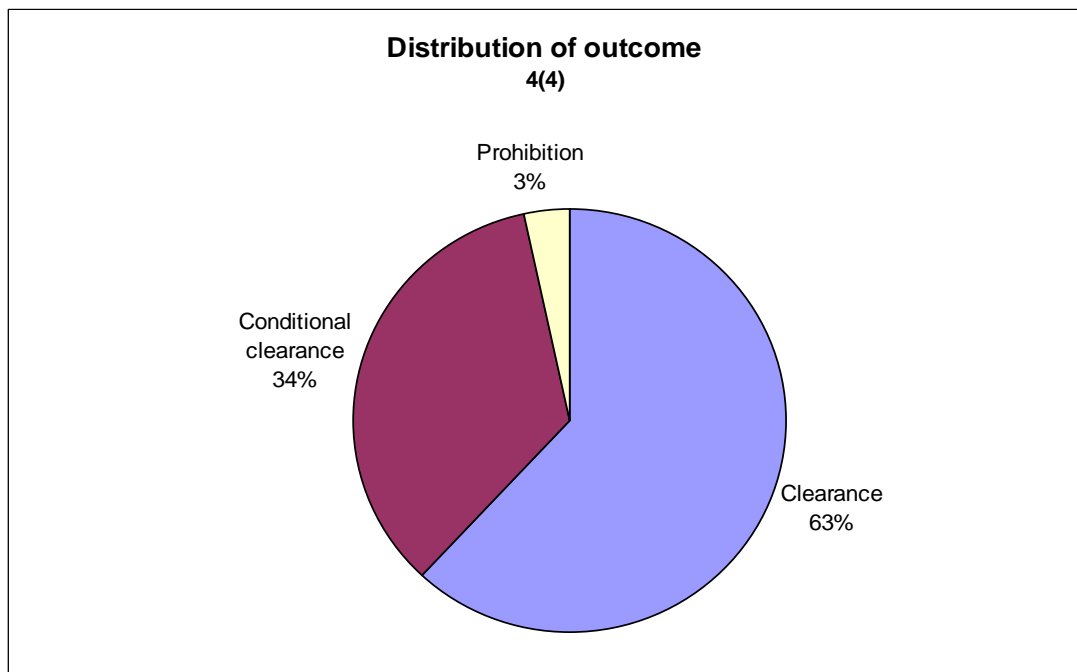
89. As regards the sectors involved, no particular sector can be singled out as being particularly prone to referral cases. There is a wide spectrum of industries where the parties have chosen this mechanism, notably in relation to consumer goods, food and drink and pharmaceuticals.

#### 3.1.1.2. Procedure, outcome and review periods

90. Over the period between 2004 and 2007, about a third of the decisions were taken after an in-depth procedure and the remaining decisions were adopted in phase I. As illustrated by the chart below, only one case led to a prohibition decision, whereas about a third of the cases led to conditional clearances.

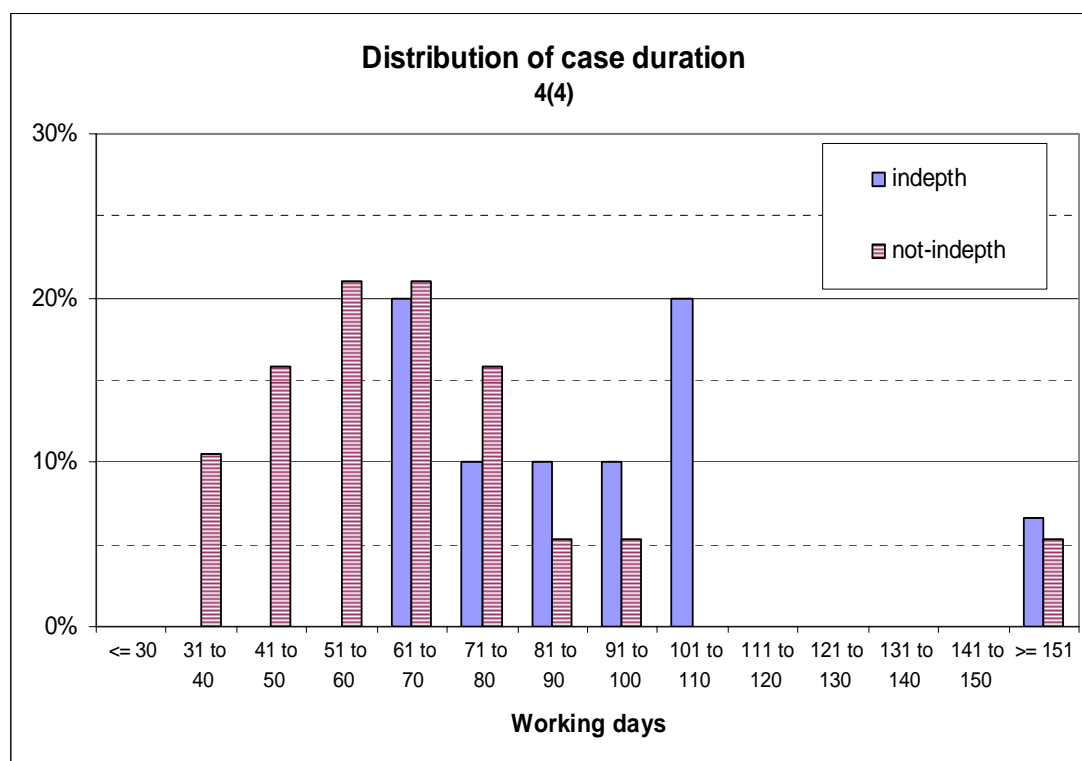
<sup>48</sup> Geographic scope of market being one among other factors in assessing the competitive impact within any given jurisdiction of any given concentration, and the competition authority's ability to assess such impact and, where necessary, impose remedies.

Chart 6: Outcome of Article 4(4) referral decisions (2004-2008)



91. Statistics with regard to the duration of review periods is set out in the chart below. Based on a study of cases between 2004 and 2007, the median review period for referral cases subject to first phase proceedings was 61 to 70 working days from the submission of the Form RS to the adoption of a decision. For in-depth cases, the equivalent time period was 101 to 110 days. These statistics do not take into account pre-notification discussions prior to submission of the Form RS. Many factors will influence the total length of the review period, for example the time it takes between receipt of the submission by the Member States and the moment when referral is decided upon as well as when a complete filing is submitted before the NCA.

Chart 7: Case duration of Article 4(4) referrals (2004-2007)



### 3.1.2. Assessment of the functioning of the referral system under Article 4(4)

92. The NCAs of the Member States and stake holders were invited to express their views generally on the functioning of Article 4(4) (see questionnaires in [Annexes 1-2](#)). Their answers and general comments are summarised in the following.

### 3.1.3. Views expressed by the NCAs

93. Among the NCAs, there appears to be a consensus that the referral system provided by Article 4(4) generally functions effectively as a means of re-allocating "original" jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction. The objection was however raised by one respondent that the conditions for when referral is available could be clarified by reference to their impact on any given market. No respondent rejected the proposition that the right kind of cases are being referred to the Member States in terms of their likely impact on competition and in terms of the likely geographic scope of any such impact.

94. Most NCAs consider that the current referral system under Article 4(4) is functioning as effectively as it could in a procedural respect. A few respondents however expressed the view that there is scope for shortening the deadlines at least as regards the Commission while one respondent would not oppose such shortening. Nevertheless, the general view is that the time periods attributed to the member States are necessary for an examination of the submission and an internal consultation within the competent competition agency and government bodies.

#### 3.1.4. Views expressed by the stakeholders

95. Virtually all respondents consider that the introduction of a pre-notification referral system, both as regards referrals to and from the Commission, is a welcome mechanism that has considerably enhanced the flexibility of merger control within the Community.
96. Nevertheless, there are a number of issues which are cause for concern. According to some respondents, the wording of the condition that a referral to the Member States is available when a transaction is likely to "*significantly affect competition*" within one Member State provided for by Article 4(4) acts as a disincentive to making such a request. Notwithstanding the fact that the effect on competition must not be adverse as clarified in the referral notice, it may be perceived as somewhat "self incriminating" giving rise, therefore, to a presumption that a transaction is harmful to competition. It has been suggested that this may be a factor contributing to the limited flow of cases to the Member States compared to the opposite direction. Therefore, some would welcome that this part of the test is abolished or that at least a more neutral language is used. For example, some propose that it should be sufficient to establish that the concentration "has effects" in a distinct market within a Member State.
97. Many respondents would also welcome more guidance as regards the motives for either the Member States or the Commission accepting or refusing a referral. In fact, the set of indicative factors for when a referral is appropriate as set out in the referral notice are in many respondents' view not put into practice. Also, since the Member State's decision whether to accept or to refuse a referral are neither reasoned nor published there is a perceived lack of transparency which makes it difficult to predict whether a referral will take place or not. This uncertainty surrounding whether a referral will eventually be accepted is therefore a source of legal uncertainty.
98. As regards the procedure, most respondents expressed the view that the length of the process and the amount of information requested in the Form RS, are an important disincentive for the parties to request referrals. Many respondents consider it unfortunate and unjustified that it takes the same time to decide on a referral as it takes to decide on the substance in first phase case with the Commission. Therefore, it has been suggested that the parties often chose to remain with the Commission even though the concentration would be more appropriately reviewed at a national level. Thus virtually all respondents would welcome a shortening of the 15 working days available to the Member States and the 10 working days available to the Commission.
99. Furthermore, many respondents consider that the starting date of the 25 working days period within which a referral decision must be taken is unclear. It starts only from the moment when the Member States receive the referral request. However, there is no clearly defined timeframe within which the Commission must transfer the request to the Member States (the Commission must do so "*without delay*"). As a result, the overall timing of the review process is unpredictable. It has therefore been proposed that this provision be modified to specify the time limit within which the Commission must send the referral request to the Member States, or alternatively, that the time period should start running from the moment the Commission receives the Form RS.

100. An additional cause for concern relates to the scope of the information requested for the referral assessment. Virtually all respondents consider that the amount of information requested in the Form RS (according to some respondents, fully comparable to the volume of information requested in a full Form CO) is disproportionate for the purpose of the jurisdictional assessment. Various proposals have been presented in order to address this. Some respondents would be in favour of decreasing the amount of information requested in the Form RS. Others have proposed that the Form RS should be considered sufficient to comply with national notification requirements, in order to avoid losing time when converting it into a national filing.
101. It has been suggested that such measures would make referrals a more attractive option and that the principle of "more appropriate authority" would be better fulfilled.

### **3.2. Referrals under Article 4(5)**

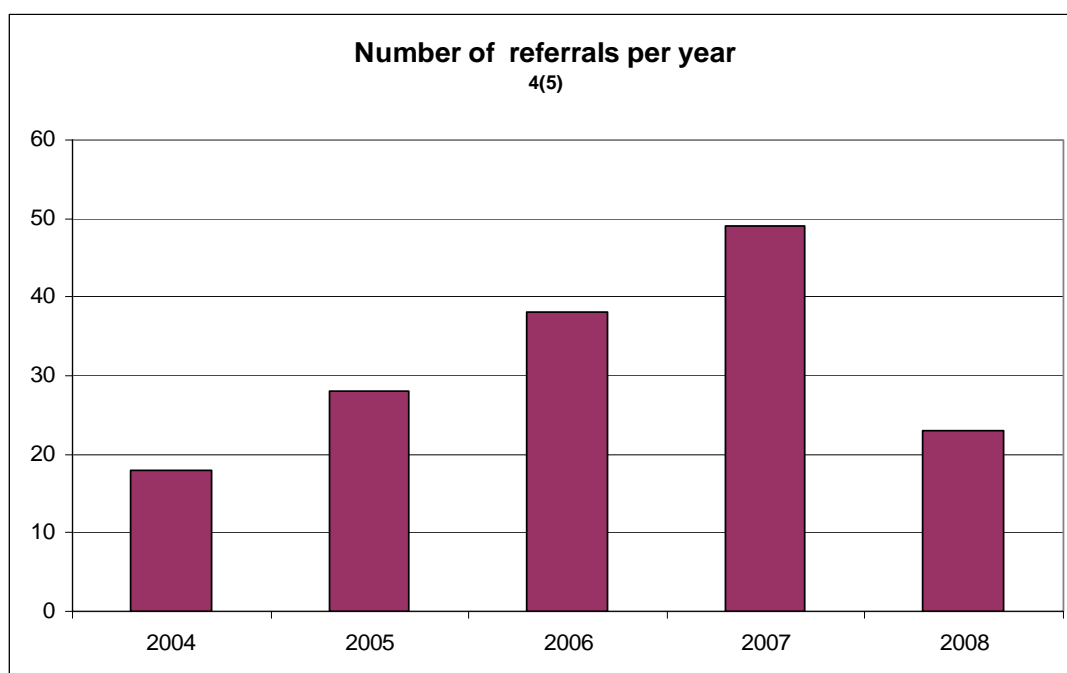
102. Article 4(5) of the EC Merger Regulation provides a voluntary mechanism in the hands of the parties which allows for concentrations which do not meet the thresholds under Article 1 and which are capable of being reviewed under the national competition laws of at least three Member States to be referred to the Commission unless any Member State competent to examine the concentration under its national competition law expresses its disagreement. In the absence of such disagreement the concentration is deemed to have a Community relevance and is thus referred to the Commission. The application of this provision is examined in the following on the basis of quantitative and qualitative elements.

#### *3.2.1. Statistics of a general nature*

##### **3.2.1.1. Cases referred – geographic and sectorial scope**

103. The number of referrals made on the basis of this provision is illustrated by the chart below.

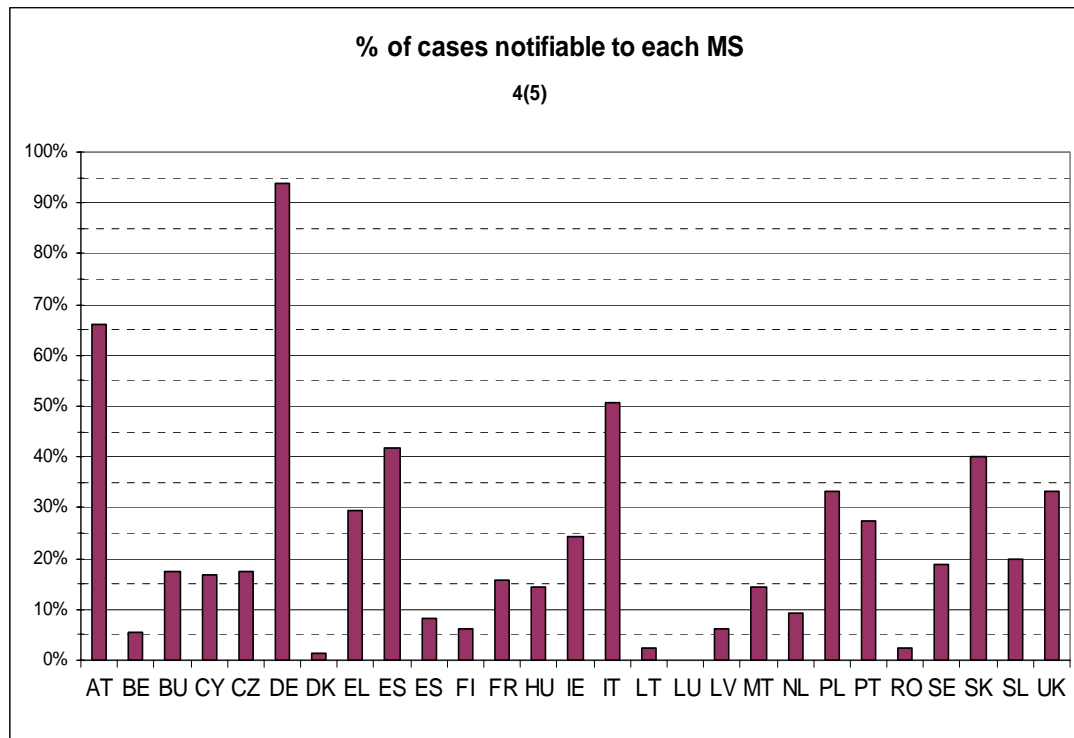
Chart 8: Article 4(5) referrals per year (2004-2008)



104. The chart below serves to illustrate that between 2004 and 2008, 160 Article 4(5) referrals were requested of which 151 were granted, five were withdrawn and four were refused. The trend over the reference period has also been towards the increasing use of this mechanism in line with increased merger activity in general: from only 24 referrals in 2005 to 39 in 2006 and 50 in 2007. However, there has been an important decrease in 2008 with only 22 referrals (again in line with the general decrease of merger activity). Overall, Article 4(5) cases represented almost 10% of the Commission's total merger case load over the reference period.

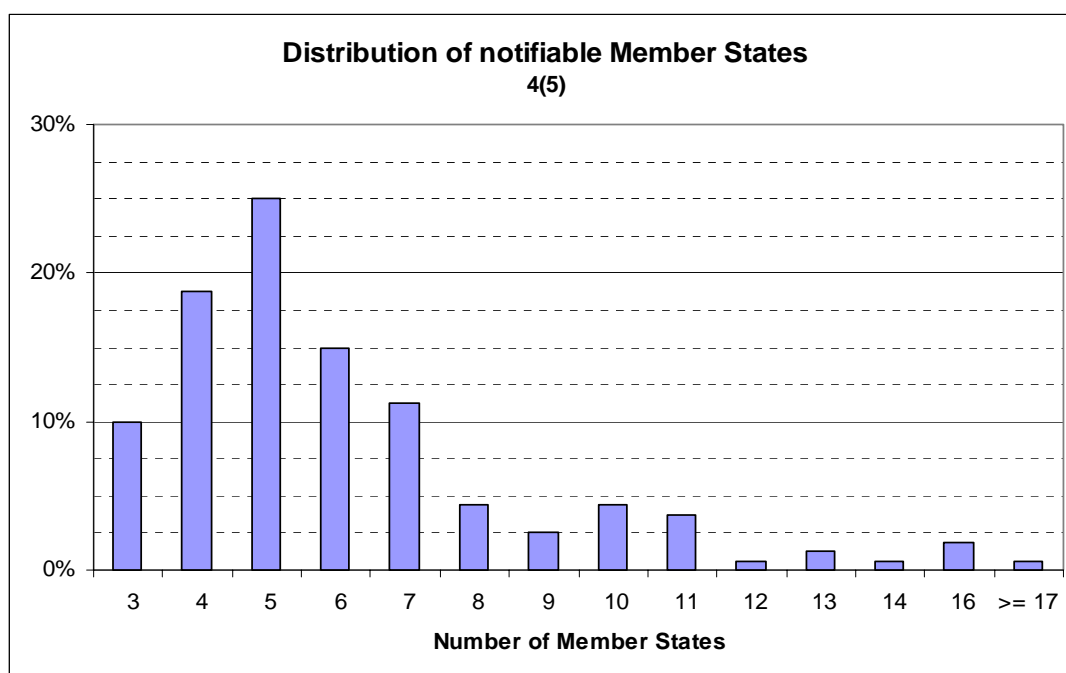


Chart 9: Article 4(5) referrals: Notification requirements per Member State (2004-2008)



105. As can be seen from the figure above, the countries which is the largest source of referrals under Article 4(5) is Germany which between 2004 and 2008 was among the referring jurisdictions in 94% of the cases followed by Austria (66%) and Italy (51%). As regards the number of jurisdictions in which the thresholds were met, the median transaction was notifiable in five countries. There is however a large variation between transactions. Notification was required in five Member States in 25% of cases and in 10 or more Member States in 10% of the cases as illustrated by the below chart.

Chart 10: Article 4(5) referrals: Notification requirements per transaction (2004-2008)



106. As noted, only four referrals were refused during the reference period. The significance of the low number of refusals should be treated with some caution. In fact, it may be the case that the parties to a transaction whose centre of gravity is in a certain Member State may choose not to use the Article 4(5) route unless they are sure that the competent authorities of that Member State would not oppose the referral. Also, anecdotal evidence suggests that there are cases where the Member States manifested their disapproval on an informal basis in pre-notification discussions. Therefore, it is likely that the total number of effective refusals exceeds those arising formally under Article 4(5). The precise extent of this practice is unknown.
107. As regards the geographic scope, the overwhelming majority of referral cases involve markets which are broader than national. In 2007, 30 cases involved markets that were broader than national (i.e. possibly EEA-wide or Global). Conversely, only 4% of the cases involved markets that are national or narrower in scope (the remaining cases being national or broader in scope). These statistics provide a good indication that from the point of view of the geographic scope of markets involved, the appropriate kind of cases have been referred to the Commission.<sup>49</sup>
108. As regards sectors involved, no particular economic sector can be singled out as being particularly prone to referral cases. There is a wide spectrum of industries where the parties have often chosen this mechanism most notably in areas such as telecommunications, chemicals, consumer electronics, financial services and packaging.

<sup>49</sup> Geographic scope of market being one among other factors in assessing the competitive impact within any given jurisdiction of any given concentration, and the competition authority's ability to assess such impact and, where necessary, impose remedies.

### 3.2.1.2. Procedure, review periods and outcome

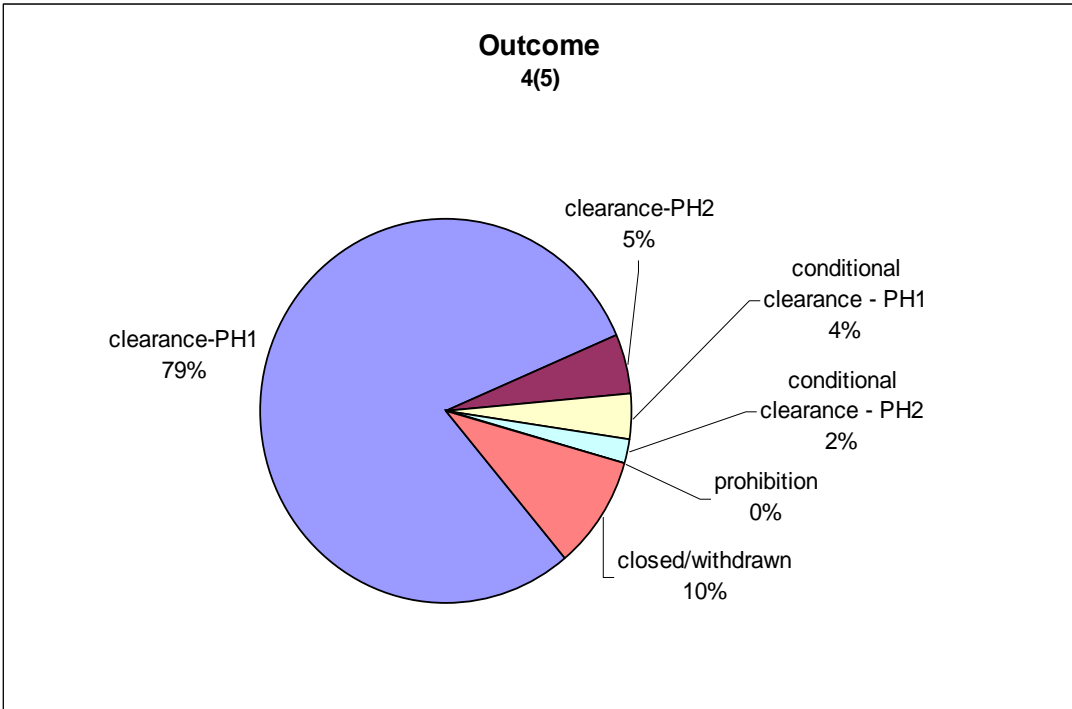
109. Based on available statistics with regard to the 151 cases referred to the Commission under Article 4(5) between 2004 and 2008, around 7% were subject to an in-depth assessment, about 50% were reviewed under a first phase procedure and a third qualified for the simplified procedure (the remaining cases were withdrawn). While a large number of cases are simplified under Article 4(5) it is still lower than for the Commission case load as a whole (which is about 60% of cases). Furthermore, the proportion of in-depth cases is much higher for cases referred under 4(5) compared to the Commission caseload as a whole where the corresponding number for the same period was about 3%. Out of 14 Article 8 decisions adopted in 2008, six were referred under Article 4(5). For 2007, the corresponding number was four out of a total of nine decisions.
110. Indeed, among the most prominent examples of complex cases referred under Article 4(5) during 2008 were: *Google/DoubleClick*, *Tomtom/TeleAtlas* and *IBM/Telelogic*. These Phase II cases each involved high tech markets, most of which have not been assessed by the Commission before.<sup>50</sup> In these cases, extensive market investigations were conducted in in-depth proceedings leading to unconditional clearance.<sup>51</sup>
111. The chart below (which covers the period between 2004 and 2008) shows the outcome of cases referred under Article 4(5). Four *percent* of the cases led to conditional clearance decisions and almost 85% to unconditional clearance decisions (whether in Phase I or in Phase II). The remaining cases were withdrawn or were pending. So far no Article 4(5) case has led to a prohibition decision.

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<sup>50</sup> Case M.4731 Google/DoubleClick concerned the markets for advertising space and ad serving technology; Case M.4854 Tomtom/TeleAtlas concerned markets for digital navigable maps as well as the corresponding hardware, namely PNDs; Case M.4747 IBM/Telelogic concerned overlaps which occurred in the markets for modelling and requirements management tools which is software used for the development of software.

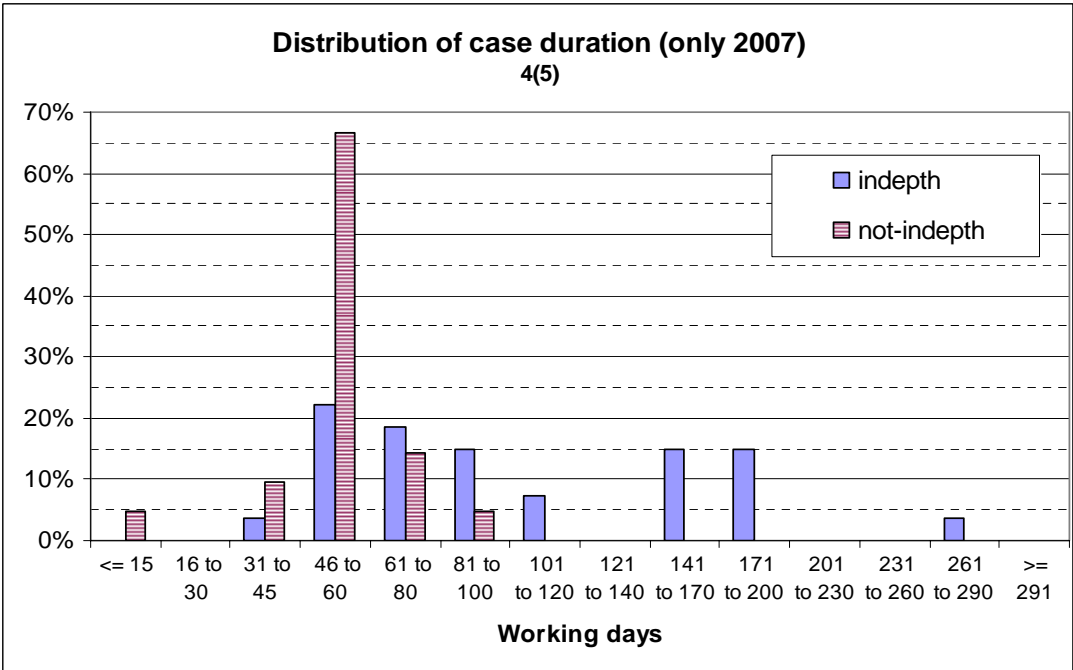
<sup>51</sup> The remaining cases are M.4187 Metso/Aker Kvaerner Commission decision of 12 December 2006, M.4647 AEE/Lentjes, Commission decision of 3 August 2007, M.4523 Travelsport/Worldspan, Commission decision of 21 August 2007, M.4525 Kronospan/Constania, Commission decision of 19 September 2007, M.4662 Syniverse/BSG (wireless business), Commission decision of 4 December 2007, M.4513 Arjowiggins/M-Real Zanders Reflex, Commission decision of 13 June 2008, M.4942 Nokia/Navteq, Commission decision of 2 July 2008, M.4874 Itema Holding/Barcovision Division, Commission decision of 4 August 2008.

Chart 11: Outcome of Article 4(5) referrals (2004-2008)



112. As can be seen from the chart below the median review period for referral cases subject to first phase proceedings in 2007 was 46 to 60 working days between date of submission of the Form RS to issuance of the decision. For in-depth (i.e. Phase II) cases the equivalent time period was 81 to 100 days. These statistics do not take into account pre-notification discussions prior to submission of the Form RS.

Chart 12: Duration of Article 4(5) referral cases (2007)



### 3.2.2. *Assessment of the functioning of the referral system under Article 4(5)*

113. The Member State's competition authorities and stakeholders were invited to express their views on the functioning of Article 4(5) generally (see the questionnaires in Annexes 1-2). Their answers and their general comments are summarised in the following sections.

#### 3.2.2.1. Views expressed by the NCAs

114. Among the NCAs of the Member States, there appears to be a consensus that the referral system provided by Article 4(5) is in general functioning effectively as a means of re-allocating jurisdiction from the national level to the Community level on the basis that a case is more appropriately dealt with by the Commission. Two NCAs however regretted that there are still a significant number of multiple filing cases despite the availability of this mechanism. Virtually all the respondents agreed that the right kind of cases are being referred to the Commission bearing in mind their likely impact on competition and the likely geographic scope involved.

115. As regards procedural aspects, most NCAs consider that the current referral system under Article 4(5) is functioning as effectively as it could. A few respondents expressed the view that there is scope for shortening the deadline of 15 working days in Article 4(5). However, the general view appears to be that such duration is necessary in order to carry out the thorough examination and internal consultation which, at times, also involves discussions with competent government bodies.

#### 3.2.2.2. Views expressed by the stakeholders

116. Similar to the opinions expressed with regard to referrals under Article 4(4), virtually all respondents take issue with what they consider to be lengthy review periods and cumbersome information requirements for referrals under Article 4(5). Some respondents also consider that the scope of the information requested is even more disproportionate given that the test for when referral is possible is simply that the transaction is notifiable in at least three Member States. Thus, some of the information requested in the Form RS (for example with regard to the affected markets) appears to be of little relevance for establishing jurisdiction. Therefore, they conclude that the Form RS should be reduced. Only the minimum amount of information of a substantive nature should be required and should also be limited only to those Member States where a filing is required. At the very least, a "short form" RS should be introduced for cases which clearly do not raise competition issues and whose notification is therefore, more of an administrative matter.

117. Some respondents expressed concerns (apart from the general length of the formal procedure) that a practice has arisen which entails what is referred to as a "*double consultation*". In other words, the Commission often engages the parties in pre-notification discussions regarding the completeness and scope of both the Form RS and the Form CO with the risk of duplication and an unnecessarily long time lag.

118. Many respondents also consider that the discretionary refusal powers in the hands of the Member States are not exercised in a clear way. In fact, since the Member State's decision whether to accept or refuse a referral is neither reasoned nor published, there is a lack of transparency which makes it difficult to predict whether a referral will take place. The uncertainty surrounding whether or not a referral will eventually

be accepted is therefore a source of legal uncertainty. Together with the timing issue, this unpredictable risk is an additional disincentive to refer. Although the possibility of refusal is not high for most cases, the significant amount of time that would be lost if indeed it were to be exercised dissuades the parties from using this mechanism.

119. A recurrent view is therefore that, having regard to these factors, the parties often prefer to file in multiple jurisdictions unless a very significant number of filings are required. A few respondents even provided examples where as much as eight or even ten national filings were the preferred option.
120. Some respondents therefore proposed that the existence of or at least the scope of the Member States' refusal right should be revisited. Some consider that due to the small number of refusal rights exercised during the reference period, one could question whether the refusal process is indeed warranted. Some respondents would welcome the complete abolition of the referral system and introduce an outright "3+" jurisdictional threshold providing for a mandatory or voluntary notification when a transaction is notifiable in at least three Member States (with or without a Member State right to have a case referred back to it). Various intermediate suggestions have also been made by a few respondents. For example, a system whereby referral would be automatically available unless one or a majority of Member States oppose it or making the referral automatic in case the transaction is reviewable in five or more Member States.
121. A few respondents also pointed out that the diverging national merger control regimes is a source of legal uncertainty in the context of the referral process. In particular, it is argued that the very low notification thresholds in some Member States - which catch a large number of transactions - give these countries a disproportionate influence on the referral process. These respondents argue that, as a result, the relative influence of some Member States on the referral process may not necessarily be a reflection of the effects of the transaction in their jurisdiction. A solution proposed to this problem would be to limit the refusal right not only to those Member States that are competent to review the case but also require that the transaction gives rise to affected markets in those Member States.

### **3.3. Conclusion on the operation of the pre-notification referral system**

122. In conclusion, the available statistics, the Commission's own experience as well as the reactions from the NCAs and stakeholders clearly support the view that the referral mechanisms introduced in 2004 have considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU. They have substantially improved the allocation of cases between the Commission and the Member States taking into account the principles of "one-stop-shop" and "more appropriate authority". In fact, available information clearly supports the view that these mechanisms have allowed the appropriate authority to handle cases whilst also avoiding unnecessary parallel procedures and inconsistent enforcement efforts. In fact, it is estimated that the mechanism under Article 4(5) has allowed for the reduction of the number of proceedings to around 150 from around 970 parallel proceedings in the period between 2004 and 2008. Furthermore, the mechanism under Article 4(4) has allowed for the re-allocation of 40 cases from the Commission to the Member States over the same period. Referrals were refused only in four cases under Article 4(5) and in one case under Article 4(4).

123. Nevertheless, some problems have been highlighted, in particular with regard to the procedure. Stakeholders have expressed concerns with regard to the overall timing and cumbersomeness of the referral process. These factors have been identified as the main cause of the parties' decision not to request referral in a large number of cases.
124. In this regard and in order to quantify to what extent this mechanism is effectively used, it is necessary to measure the number of effective referrals against the total number of cases that meet the conditions under Articles 4(4) and 4(5). As regards referrals to the Member States, data with regard to concentrations which meet the conditions in Article 4(4) are not readily available. Concerning referrals to the Commission, as noted in part I, available data for 2007 indicate that there were about 102 transactions which were notifiable in at least three Member States. It can be estimated that these concentrations together required more than 360 parallel investigations by the NCAs in one year. Available data also suggest that a large number of these cases would be appropriate for referral. Among the 102 transactions which meet the three Member State notification test, the majority involve markets with a geographic scope that is broader than national and as many as 20% involved global markets.
125. While the geographic scope of the case is only one relevant factor amongst others for the referral assessment,<sup>52</sup> this is an indication that a large number of additional concentrations are appropriate candidates for referral to the Commission not only from the point of view of a "one-stop-shop" but also when considering the principle of the "more appropriate authority". This is particularly relevant for those cases which raise substantive competition issues. In fact, the negative consequences of duplication and the potential of a contradictory outcome in different Member States is particularly important in such cases. As noted in Part I, available data suggest that around 6% of the cases notifiable in at least three Member States gave rise to competition concerns. Against this background, one can conclude that there is further scope for a "one-stop-shop" review of cases that fulfil the three Member State condition.
126. As noted, data is not readily available as regards further potential use of the referral mechanism under 4(4). One cannot, however, exclude that there is further potential to also use this mechanism and therefore further scope for reinforcing the principle of the "more appropriate authority," considering for example several stakeholders' concern that the criteria for referrals under this provision may in fact be a disincentive for referral. Indeed, it may be useful to further examine more generally what measures could be envisaged to ensure an improved case re-allocation to the Member States.
127. Against this background, the appropriateness of measures to improve the current pre-notification referral system would merit further examination. While such analysis goes beyond the scope of the report, a few preliminary remarks bear mention and should be considered for future reference.

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<sup>52</sup> Key factors to take into account are necessarily the competitive impact within any given jurisdiction of any given concentration, and the competition authority's ability to assess such impact and, where necessary, impose remedies.

128. In the context of assessing the need or possibilities for improvements of the system in order to further reduce multiple filings one could also envisage to examine to what extent any perceived problem linked to multiple filings could be partially addressed by Member States reviewing the applicable jurisdictional thresholds under their national laws<sup>53</sup> rather than by simply increasing the number of cases reviewed by the Commission.
129. Furthermore, it must be recalled that the Member States' refusal powers under article 4(5) have been rarely used whilst stakeholders have pointed to cumbersome, time consuming and therefore costly referral processes. Many stakeholders therefore consider, having regard to the experience they acquired over the past years, that one should re-examine the possibilities of shifting to a system of automatic notification under the EC Merger Regulation when the three Member State criterion is met (or other intermediary solutions) as was initially proposed in the process leading up to the current system. This would, in their view, significantly increase transparency while lowering the cost and time of the review.
130. As regards timing, available data confirm that more than twice as much time is needed for cases involving referrals compared to own jurisdiction cases. However, it may be difficult to shorten the time periods for the referral process provided for by the EC Merger Regulation as has been suggested by stakeholders. Virtually all of the NCAs of the Member States have indicated that the 15 working days mentioned under both Article 4(4) and 4(5) is necessary for their assessment. The same applies in the Commission's view with regard to the 10 working days period within which the Commission must decide on referral under Article 4(4). It should also be recalled that the referral system is voluntary and the parties have the option of choosing the referral mechanism where suitable, taking into account the overall timing of the transaction and other factors specific to the case. In this respect, the reporting requirements and additional time needed for a referral process must be weighed against the additional benefits of achieving a "one-stop-shop" or of having the "more appropriate authority" reviewing any given case. As regards information requirements, the purpose of the data requested in the Form RS is to allow the Member States (and in case of Article 4(4), the Commission) to determine whether the referral should be made or not. Therefore, any efforts to reduce the scope of information requested in the Form RS must not undermine the NCAs and the Commission's ability to make such assessments.
131. Finally, the issue of legal uncertainty raised by a large number of respondents - essentially as regards the scope of and the exercise of a Member State power of refusal - must be assessed against the actual number of refusals in the past five years. Although the number of formal refusals (one under Article 4(4) and four under Article 4(5)) probably underestimates the total number of actual refusals, it still gives some indication that, overall, there is a low probability of refusal in the great majority of cases, at least for unproblematic cases involving notifications of an "administrative" nature. Also, for the more problematic cases, there is always the

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It is noted that such a measure was recently taken by Germany by amending the applicable jurisdictional thresholds. Mandatory notification is now required if the parties' combined worldwide turnover exceeds 500 million euros, one party's turnover exceeds 25 million euros and the other party's turnover exceeds 5 million euros. The stated objective of the reform which took effect on 25 March 2009 is to reduce the number of notifications for transactions with insufficient local nexus.



possibility of seeking informal guidance from the concerned Member State(s) at an early stage in the process. Furthermore, the refusal power is limited to the jurisdictions in which the transaction is reviewable. Therefore, any concern raised by stakeholders in relation to the lack of impact with regard to any given transaction in a particular Member State having refusal power is in essence a criticism of the design of the jurisdictional thresholds in that Member State as such rather than of the scope of the refusal power provided by the EC Merger Regulation.

#### **4. POST-NOTIFICATION REFERRALS**

132. Whilst the EC Merger Regulation does not require the Commission to report on the operation of the post-notification referral mechanism, it is appropriate to also evaluate these mechanisms in order to have a comprehensive view of the operation of the thresholds and their corrective mechanisms generally.

##### **4.1. Referrals under Article 22**

###### *4.1.1. Introduction*

133. Article 22 is a referral provision of the EC Merger Regulation which is at the disposal of the Member States, post notification. The historical background to Article 22 is that it was intended to allow Member States without merger control legislation to refer a case to the Commission (the "Dutch clause"). The new version of Article 22 makes provision for the referral of cases where a concentration affects more than one Member State. It allows other Member States to join a referral request already made. It also describes the deadlines within which such referrals may be made or joined by Member States as well as acceded to by the Commission. A Member State joining a referral will now automatically relinquish its jurisdiction. The EC Merger Regulation does not distinguish between Member States that have jurisdiction to assess the transaction and those that do not. Article 22(2) states that any other Member State shall have the right to join the initial referral and, unlike Article 4(5) there is no minimum number of jurisdictions necessary in order to complete the referral process.<sup>54</sup> Finally, the scope of a referral is also different since the Commission can only take jurisdiction for the part of a transaction which was referred by one or several Member States, the non-referred parts remaining with other Member States.
134. In order for a Member State's request for referral to be admissible, two legal pre-conditions must be fulfilled. The concentration must: **(i)** affect trade between Member States; and **(ii)** it must threaten to significantly affect competition within the territory of the Member State(s) making the request.<sup>55</sup> This is in contrast to the procedure that the parties use to refer cases to the Commission under Article 4(5) where the case must be capable of being reviewed under the national competition laws of at least three Member States and where they must also inform the Commission by means of a reasoned submission before notifying in any competent

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<sup>54</sup> In Article 4(5), the referral of a case is to the Commission but by the parties concerned; in Article 22 a Member State makes the referral request to the Commission.

<sup>55</sup> See Commission Notice on Case Referral, Official Journal C 56, 05.03.2005, para. 42.

Member State.<sup>56</sup> Article 22, is also used by Member States to curtail parallel procedures: when a Member State joins a referral, it thereby elects to no longer apply its own national competition laws to the concentration.

135. Since the EC Merger Regulation was recast with effect from 1 May 2004,<sup>57</sup> there have been only 14 referrals under the new Article 22. Of the 14 requests for referral, the following data was gathered:

Table 5: Article 22 Referrals 2004-2008

Total No. of Referral Requests	Ensuing Procedure	Relevant Markets	Geog. Scope of Markets	Referring Countries	Joining Countries	Cases with 3 or more Countries involved	Cases with less than 3 Countries involved
<b>14</b>	Phase II (6); Phase I (5); Refused (2); Withdrawn (1);	Chemicals (8); Satellite Equipment (2); Energy (1); Paper (1); Explosives (1); Soft Drinks (1);	Greater than National (12); National (2);	UK (4); DE (3); E (2); FR (1); FI (1); PT (1); CY (1); S (1);	DE (4); FR (3); UK (2); S (2); PL (1); NO (1); AU (1); IT (1); PT (1);	<b>5</b>	<b>9</b>

136. The fact that 6 of the 14 cases referred under Article 22 entered into Phase II proceedings clearly indicates that Article 22 is mainly used for cases which are critical and which have a Community relevance (most of the relevant geographic markets were greater than national in scope). One should bear in mind that of all the cases notified to the Commission, those entering Phase II would normally only account for only about 5% of the total. A corollary to this is the fact that no simplified cases have ever been referred to the Commission under this provision. This contrasts sharply with the number of standard notifications that are made directly to the Commission, of which, during the last five years, about 60% consistently qualify for treatment by the simplified procedure. There are more cases referred to the Commission under Article 22 involving less than three Member States than there are involving three Member States or more and this statistic serves to underline the complementary nature of Article 22 to Article 4(5).

#### 4.1.2. Views expressed by the NCAs

137. The NCAs generally regard Article 22 as functioning effectively and that the appropriate cases are being referred to the Commission<sup>58</sup>. Table 5 above shows that since 1 May 2004 as many as eight different Member States have requested a referral and that nine have joined a referral request at least once. Several of the responding NCAs (who have been actively involved in at least one referral process) made the

<sup>56</sup> This involves filing a Form RS to establish jurisdiction see Annex II of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

<sup>57</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004) (the "EC Merger Regulation") which entered into force on 1 May 2004.

<sup>58</sup> Source: Replies by the National Competition Authorities to a questionnaire sent by the Commission.

point that they felt that there was no scope for shortening the deadlines mentioned in Article 22.

138. On the issue of whether or not a Member State should be able to make or join a referral without having jurisdiction in the case, five thought that it should be allowed while nine thought that it should not. This does raise the question of whether or not a Member State should be able to refer a case when its jurisdiction is not triggered but where the activity of the parties does have an effect in that Member State.
139. All of the respondents who addressed the issue of whether or not "*lone referrals*"<sup>59</sup> by a single Member State should be permitted agreed that this practice should continue. On the subject of whether or not it should still be possible to refer an already implemented (or partially implemented) transaction under Article 22, a majority of respondents thought that it should be.

#### 4.1.3. *Views expressed by the stakeholders*

140. The issue of referring with or without jurisdiction was mentioned often in the public consultation where some of the respondents proposed that a Member State without jurisdiction should not be able to refer or to join a referral under Article 22. Some respondents referred to what they described as the unpredictability (or the "legal uncertainty") of the Article 22 procedure and others questioned the need for it altogether, citing in support of their argument, the greater number of Article 4(5) referrals compared to those under Article 22. However, such suggestions must make the assumption that the scope, objectives and function of both provisions are identical, which is clearly not the case. Firstly, Article 4(5) referrals are at the instigation of the parties, whereas Article 22 referrals are initiated by Member States: two completely different starting points. Secondly, as mentioned above, an Article 4(5) referral requires that a concentration be capable of being reviewed under the competition laws of at least three Member States. This is not a requirement of an Article 22 referral.
141. Respondents also pointed out that as all but one Member State now has a merger control regime, the original rationale for having an Article 22 has largely disappeared. There were repeated proposals for harmonising the procedural differences between Article 22 and Article 4(5) referrals with respect to the number of Member States where filing was necessary. Some suggested that, as with Article 4(5) referrals, the Commission should only be able to accept Article 22 referrals when they are notifiable in three or more Member States. Whereas the present arrangement may give the Member States under Article 22 a broader discretion when referring to the Commission than the parties enjoy when referring under Article 4(5),<sup>60</sup> the outcome of the questionnaire sent to NCAs clearly values the need to be able to refer cases which have only been notified in one Member State but which also have a Community relevance. Some respondents also raised the point that a case with cross-border characteristics which is notified to Member States might not be able to benefit from a cross-border remedies package. Nor indeed would there be the essential central influence necessary to obtain and collate from all jurisdictions the

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<sup>59</sup> I.e. referrals not joined by any other Member State. There have been four such lone referrals.

<sup>60</sup> I.e. as seen from the perspective of the parties.

required market information upon which to make a proper assessment of the effects of the transaction.

142. But by far the most popular Article 22 topic raised was the difficulty that notifying parties have with the length of time a referral can take.<sup>61</sup> There is a trend of opinion that considers that the aggregate of all the time periods for assessment in Article 22 (added to another likely six weeks devoted to pre-notification discussions and the preparation of a Form CO) delays the implementation of a transaction for an unduly long period of time. And delays also mean increased costs for business. Therefore, the public consultations responses contain suggestions for reducing all assessment periods. This is clearly at odds with the position expressed by NCAs who feel that there is no scope for shortening deadlines (see above).

#### 4.1.4. Conclusion on the operation of the referral mechanism under Article 22

143. Clearly Article 22 is used by Member States where cases are complex and not simplified. Even though the original reason for the existence of Article 22 has become almost obsolete,<sup>62</sup> it clearly serves a purpose where a Member State, after a period of assessment of a transaction, forms the opinion that a case would be better assessed by the Commission. This may be based upon factors such as the nature of the relevant markets - which may turn out to have a Community relevance and consequently require a corresponding market investigation - as well as the possibility of an appropriate cross-border remedies package which the Commission would be better placed to negotiate.
144. On the matter of whether or not a Member State should be able to make a referral request without having jurisdiction in the case, there are two issues deserving mention. Firstly, Article 22(1) of the EC Merger Regulation clearly states that in order to be able to refer a case, the concentration must threaten to "*significantly affect competition within the territory of the Member State making the request.*"<sup>63</sup> The requirement here is unambiguous: there should be some significant effect on competition within the Member State making the referral. And this brings us to the second issue: it is possible that a Member State may still have cause to refer a case which has a significant effect within its borders but which was not caught by its own jurisdictional thresholds. Under such circumstances, a request for referral would not be automatically excluded by the EC Merger Regulation.
145. When a referral is joined, no distinction is made between Member States who have and who do not have jurisdiction. Joined referrals under Article 22 also reduce parallel procedures in that the jurisdiction of joining Member States is surrendered. Equally, with respect to lone referrals, the EC Merger Regulation is silent on the issue of whether or not a referral must be joined.

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<sup>61</sup> One respondent described an Article 22 referral as "...the most disruptive of all referrals".

<sup>62</sup> All but one Member state now has a merger control regime.

<sup>63</sup> This new formulation of Article 22 is a lower legal standard than that contained in the old Regulation which required the creation or strengthening "*of a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned*".

146. On balance, although the original purpose of this referral process has been overtaken by events, the benefits of being able to re-allocate to a more appropriate jurisdiction are significant and this mechanism continues to serve an important purpose.

## 4.2. Referrals under Article 9

### 4.2.1. Introduction

147. Article 9 of the EC Merger Regulation provides a mechanism for referring cases to Member States (which have already been notified to the Commission) in circumstances where it is felt that the Member State is better positioned to carry out the investigation.<sup>64</sup> A referral may be made of the whole case or of portions of it, depending on the effect of the concentration in the relevant markets. A Member State may request (at its own initiative or after an invitation to do so by the Commission) that a case be referred to it in either of the following circumstances: (i) the concentration must *"threaten to affect significantly competition in a market"* and the market in question must be within the requesting Member State and *"present all the characteristics of a distinct market"*,<sup>65</sup> or (ii) the concentration must *"affect competition in a market"* and the market in question must be within the requesting Member State and *"present all the characteristics of a distinct market"* and *"does not constitute a substantial part of the common market"*.<sup>66</sup> Sometimes both circumstances are argued.

Table 6: Article 9 Referrals 2004-2008

Country	No. of Referral Requests	Comments
Germany	8	1 request not renewed; 1 notification withdrawn
United Kingdom	4	1 withdrawn
Poland	3	2 withdrawn
Italy	2	
Spain	2	1 withdrawn
Bulgaria	1	1 request rejected
Ireland	1	
Czech Republic	1	
Belgium	1	1 withdrawn
France	1	
Slovakia	1	
	<b>Total 25</b>	

148. The table above shows that between 2004 and 2008, there were a total of 25 Article 9 referral requests by Member states of which six were withdrawn and one not renewed following the opening of Phase II proceedings. In only one case was a

<sup>64</sup> The Commission Notice of Case Referral in respect of concentrations (2005/C 56/02) elaborates on this (paragraph 9): "...having regard to the specific characteristics of the case as well as the tools and expertise available to the authority".

<sup>65</sup> Article 9(2)(a) EC Merger Regulation.

<sup>66</sup> Article 9(2)(b) EC Merger Regulation.

referral rejected by the Commission. In ten cases, the new article 9(2)(b) was argued.<sup>67</sup> Requests were made for 13 full and 12 partial referrals.

149. The assortment of relevant product markets was diverse with 14 different relevant product markets concerned ranging from scrap metal to casinos.<sup>68</sup> The Member States most active in requesting referrals were Germany and the UK.

#### 4.2.2. *Views expressed by the NCAs*

150. The NCAs generally regard Article 9 as functioning effectively and that original jurisdiction is being re-allocated from the European Community to the appropriate Member States. Two NCAs expressed reservations about the length of time it takes and one proposed a reduction in the assessment periods. However this is a minority view and the greater trend of opinion is that there is no scope for shortening assessment periods. It is also the opinion generally of the NCAs that the appropriate kind of cases are being referred to Member States.

151. Statistically, there has been a small reduction in the number of Article 9 referrals since the introduction of Article 4(4). The average of about eight per year in the five years preceding the new EC Merger Regulation has gone down to roughly five per year since then. However, the clear view of the NCAs is that this trend is not because these two provisions are mutually exclusive: they are viewed as two complementary instruments and in many cases Article 9 is regarded as a safeguard (or even a "corrective" mechanism) for appropriately re-allocating jurisdiction.

#### 4.2.3. *Views expressed by the stakeholders*

152. On balance the response to the public consultation indicates that the Article 9 referral mechanism is a functional vehicle for re-allocating jurisdiction to a Member State. However, there are many instances where shortcomings are highlighted. The most prevalent of these concerns the time a referral request can take and the ensuing disruption it can have on the transaction's timetable. Clearly, from the point of view of the notifying parties, an Article 9 referral is not part of their objective as otherwise, they would have already used the Article 4(4) provision. And this is where the debate centres: between the advantage of a "one-stop-shop" that a central filing provides and the principle of assessment by the "more appropriate authority" that underpins a referral to a Member State. Regardless of the inconvenience of the re-allocation of a case to another jurisdiction (including the need to re-notify under the national laws of that Member State) there are many responses which describe the Article 9 assessment periods as too long. This, allied to the legal uncertainty resulting from a change of jurisdiction, the lack of precision in paragraphs 9(6)<sup>69</sup> and 9(8),<sup>70</sup>

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<sup>67</sup> Article 9(2)(b) can be argued in the alternative to Article 9(2)(a).

<sup>68</sup> The list of relevant product markets included: Cable TV; Casinos; Printing; Airport Services; Construction; Daily Retail Markets; IT; Press; Bottling; Gases; Chemicals; Scrap Iron; Beer; Water Services.

<sup>69</sup> Paragraph 9(6) states that: The competent authority of the Member State concerned shall decide upon the case without *undue delay*." Furthermore, it provides that "within 45 working days after the Commission's referral, the competent authority of the Member State concerned *shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take*. The Member State concerned may exceptionally suspend this time

and the resulting extra costs for the undertakings involved make an Article 9 referral protracted and unpredictable in the eyes of the parties.

153. There are also some suggestions from the public consultation for mitigating the effects of a referral request, such as: (i) giving the parties a right to be heard when such a request is submitted; (ii) adding more transparency to the process by providing access to key documents from the Commission's case file to the parties; (iii) allowing the parties to use the same Form CO to notify to the Member State concerned rather than having to re-assemble more market information in another form to notify in the Member State. There are also suggestions to outlaw partial referrals in an effort to curtail parallel proceedings. Another respondent opined that a more streamlined Article 4(4) (i.e. with respect to the information burden and the length of time it can take) would make Article 4(4) referrals more appealing and therefore ultimately reduce the number of Article 9 referrals. As discussed above, the NCAs differ slightly in their view on this point, regarding the two provisions as complementary rather than mutually exclusive.

#### 4.2.4. *Conclusion on the operation of the referral mechanism under Article 9*

154. One may conclude therefore that, on balance, Article 9 is a useful tool underpinned by the principle of the "more appropriate authority". Nevertheless, the limited use of this referral mechanism indicates that in most situations the right kind of cases are being allocated to the Commission on the basis of the current thresholds. There are a significant number of stakeholders of the opinion that the referral process could be made more business friendly with regard to cutting down delays, the resulting costs, and the uncertainty of the outcome.

### **PART III – GENERAL CONCLUSION**

155. The report accompanied by this staff working paper gives account to the Council of the operation of the notification thresholds under Article 1 of the EC Merger Regulation in allocating merger cases between the Community level and the national level and of the referral mechanisms provided for by its Articles 4, 9 and 22. The conclusions of this report are limited to taking stock of the situation to date without proposing any measures. Following the report and considering in particular the reactions of the Council, the Commission may, pursuant to Articles 1(5) and 4(6) of the EC Merger Regulation, present proposals to revise the notification thresholds or the referral mechanisms.
156. The Commission concludes that overall, the jurisdictional thresholds and the set of corrective mechanisms provided for by the EC Merger Regulation have provided an appropriate legal framework for allocating cases between the Community level and the Member States. This framework has in most cases been effective in distinguishing cases that have a Community relevance from those with a primarily

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limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law" (emphasis added).

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Article 9(8) provides that "[i]n 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" (emphasis added).

national nexus, in pursuit of the objectives of "one-stop-shop" and the principle of the "more appropriate authority".

157. The two-thirds rule has in most cases appropriately distinguished between concentrations having Community relevance from those that do not. However, there are a small number of cases with potential cross-border effects in the Community. It is outside the scope of the report to assess whether it would be necessary, appropriate or possible to take measures to remedy this problem. However, for future reference it may be a useful exercise to further analyse the need and possibilities for introducing more efficient and flexible mechanisms for the re-allocation of certain two-thirds rule cases than those currently provided by the EC Merger Regulation. More generally, it is desirable that, independently of which authority is the reviewing agency, merger control across the EU ensures the protection of undistorted competition.
158. The pre-notification referral mechanisms of Article 4 as introduced in 2004 have considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU. These mechanisms have improved the allocation of cases between the Commission and the Member States having regard to the principles of "one-stop-shop" and "more appropriate authority". They have contributed to avoiding unnecessary duplication and inconsistent enforcement efforts to the benefit of all involved parties not least the business Community.
159. Notwithstanding this success, there is scope for further improvements of the current system of case allocation. The business community has expressed concern with regard to the way the referral system operates. Some would therefore welcome a shift from the current referral system under Article 4(5) to an automatic notification system based on the three Member State threshold ("3+"). Others have emphasised that for the pre-notification mechanisms to achieve their full potential, there is a need for swifter and less cumbersome referral procedures.
160. While it is outside the scope of the report to assess whether further procedural or other improvements or adaptations are feasible, it can be concluded that there is still more scope for "one-stop-shop" review. In fact, there are still a large number of cases with a cross-border interest that are neither caught by Article 1(3) nor referred under Article 4(5). Should further improvements of the pre-notification referral mechanisms be feasible, this would most likely result in fewer multiple filings and therefore lower cost for the business community. Conversely, there may be some scope for more referrals in the direction of the Member States in application of Article 4(4).
161. The post-notification mechanisms provided by Articles 9 and 22 of the EC Merger Regulation, have proven to continue to be useful corrective instruments also after the introduction of pre-notification referrals. This is a reflection of the different function of the post-notification mechanisms, allowing for a flexible reallocation of cases at the initiative of either the Member States or the Commission when appropriate. Nevertheless, the business community's concern regarding the timing and cumbersomeness of the procedures extend also to these mechanisms.
162. Looking beyond the application of the existing jurisdictional thresholds and their corrective mechanisms, in order to fully achieve the objective of a level playing field in the Common Market, the public consultation has suggested that efforts towards



further convergence of the various national rules governing merger control and their relation to Community rules should be envisaged in order to alleviate difficulties encountered in the context of multiple filings. This would concern a number of aspects ranging from jurisdictional matters to procedural and, to a certain extent, also some substantive issues.

## ANNEX 1

### Report on Regulation 139/2004

#### Questionnaire for Member State Competition Authorities

##### Explanatory Remarks

*The European Commission must report to the Council by 1 July 2009 on the operation of Article 1(2) and (3) and of Article 4(4) and (5) of Council Regulation (EC) No 139/2004<sup>71</sup> (the "Merger Regulation"), pursuant to Articles 1(4) and 4(6) of that Regulation. To this end, the Commission is launching a wide-ranging consultation on the functioning of these jurisdictional provisions in the Merger Regulation, including a fact-finding exercise which seeks information and opinions from Member State Competition Authorities and from other stakeholders in the EU merger control process.*

*The questions are intended to yield a comprehensive picture of how the turnover thresholds in Article 1 are functioning in combination with the concentration referral provisions in the Regulation. For that reason, information and opinions are being sought not only on the pre-notification referral mechanisms introduced for the first time with the adoption of the Regulation 139/2004, but also on the pre-existing post-notification referral mechanisms which were somewhat modified in 2004.*

*Detailed information concerning the operation of the Article 1 thresholds is only requested for the year 2007; this is considered to be a sufficiently long time period to enable meaningful conclusions to be drawn concerning the functioning of the thresholds. However, detailed information concerning the operation of the two thirds rule is requested for a longer time period<sup>72</sup>. Insofar as the referral system is concerned, information is sought concerning all cases referred to Member States since 1 May 2004. Bulgaria and Romania are only required to submit information concerning the operation of the Article 1 thresholds relating to cases dealt with by their authorities in the year 2007, and concerning cases referred to those Member States during the period since 1 January 2007.*

*This questionnaire also seeks any comments which Member State Competition Authorities may have on the operation of the Merger Regulation more generally.*

*Replies to this questionnaire should be communicated to the Commission by no later than **Friday 29 August 2008**.*

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<sup>71</sup> OJ L24 (Vol. 47) of 29 January 2004; p.1

<sup>72</sup> The information requested concerning the operation of the two-thirds rule in Article 1(2) and (3) of the Merger Regulation is virtually identical to what was requested in the questionnaire attached to Commission Competition D-G Philip Lowe's letter to Member State Competition Authorities of 16/12/2005 (\*30849) for the 5-year period 2001-2005.

## Questionnaire

### A. *The functioning of the turnover thresholds in Article 1(2) and (3) of Council Regulation (EC) No 139/2004 (the EC Merger Regulation)*

#### (i) **Your authority's views about the functioning of the turnover thresholds in Article 1(2) and (3)**

*The functioning of the turnover thresholds in Article 1(2) and (3) generally*

1. Does your Competition Authority believe that Article 1(2) and (3) of the Merger Regulation is functioning as an **effective** means of distinguishing those transactions which are most appropriately the subject of merger control at the Community level from those which are not? Please explain your answer, if possible illustrating your explanation by reference to your practical experience with the provisions.<sup>73</sup>

If you do not believe that Article 1(2) and (3) of the Merger Regulation is functioning effectively in this way, please indicate **any suggestions you may have as to how any shortcomings might be remedied**.

*The functioning of the turnover thresholds in Article 1(2) and (3) in specific markets or economic sectors*

2. Are there **any specific markets or economic sectors where**, in the view of your Competition Authority, the **turnover thresholds in Article 1(2) and (3) are not functioning in the manner intended**, namely to identify those concentrations which would most appropriately be the subject of merger control at the Community level? Do you, **for example**, consider that the turnover thresholds are functioning effectively with regard to mergers in industries where revenues are generated by fees or commissions (e.g. stock exchanges or similar trading platforms)?

If there are any such specific markets or economic sectors where, in the view of your Authority, the turnover thresholds are not functioning in the manner intended, please **indicate them and explain why** your Competition Authority believes that the turnover thresholds do not always identify those concentrations which would most appropriately be the subject of merger control at the Community level. Please also indicate **any manner in which you think this shortcoming might be remedied**.

*The functioning of the two-thirds rule in Article 1(2) and (3)*

3. Please describe any specific concerns you may have about the functioning of the **"two-thirds rule"** in Article 1(2) and (3) of the Merger Regulation, if possible by reference to your practical experience with the provisions. Please also describe any suggestions you may have as to how these concerns might be remedied.

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To the extent that you would in this context like to make any specific remarks on the functioning of the case referral system provided for in Articles 4(4), 4(5), 9 and 22 of the Merger Regulation, please make these remarks in response to the questions in Section B of this questionnaire.

**(ii) Factual information concerning cases dealt with by your authority since 2004**

*Number of merger control filings at the national level*

**4.** Please indicate the **total number of concentrations** reviewed by your Competition Authority under the relevant national merger control law/s in **each of the four years 2004–2007**.

*Turnover details concerning merger control filings at the national level*

**5.** For each concentration reviewed by your Competition authority in 2007, please indicate the number of cases where the combined aggregate worldwide turnover of all the undertakings concerned exceeded (i) EUR 2500 million and (ii) EUR 5000 million.

*Merger control filings in more than one Member State*

**6.** Please indicate **how many** of the concentrations reviewed by your Competition Authority under the relevant national merger control law/s **in the year 2007** were also **reviewed in at least one other EU jurisdiction** under its/their relevant national merger control law/s.

Please then also answer the questions included in the form attached as **Annex 1** to this Questionnaire for **each** concentration reviewed by your Competition Authority in the year 2007 which was reviewed in at least one other EU jurisdiction. Please use **one form per concentration**.

*The functioning of the two-thirds rule in Article 1(2) and (3)*

**7.** Please indicate **how many** of the concentrations reviewed by your Competition Authority **in each of the two years 2006–2007** (both years included) **fell under the "two-thirds rule"** in Article 1(2) and (3) of the Merger Regulation. In other words, please indicate how many concentrations reviewed by your Competition Authority under the relevant national merger control law/s in this two-year period would, in the absence of the "two-thirds rule" in Article 1(2) and (3) of the Merger Regulation, have constituted a "concentration" within the meaning of Article 3 of the Merger Regulation, and would have had a "Community dimension" within the meaning of Article 1(2) and (3) of the Merger Regulation.

Please then also provide the information requested in the form attached as **Annex 2** to this Questionnaire concerning **each** of the concentrations reviewed by your Competition Authority in the two-year period 2006-2007 (both years included) which fell under the "two-thirds rule". Please use **one form per concentration**.

The information requested in Annex 2 concerning the operation of the two-thirds rule is virtually identical to what was requested in the questionnaire attached to Commission Competition D-G Philip Lowe's letter to Member State Competition Authorities of 16/12/2005 (\*30849) for the 5-year period 2001-2005. If your authority did not provide the requested information – or all of the requested information – on that occasion, you are requested to do so in response to this questionnaire, by filling out Annex 2 for each concentration reviewed by your Competition Authority in the five-year period 2001-2005 (both years included) which fell under the "two-thirds rule".

**B. The functioning of the case referral provisions in Article 4(4), 4(5), 9 and 22 of Council Regulation (EC) No 139/2004 (the EC Merger Regulation) since May 2004**

*The functioning of the case referral provisions generally*

**8.** Does your Competition Authority believe that the **merger case referral system in general**, which was the subject of a major overhaul with the entry into force of Council Regulation (EC) No 139/2004 on 1 May 2004, is **functioning effectively as a means of re-allocating "original" jurisdiction** from the Community level to the national level or vice versa on the basis that a case is more appropriately dealt with in the jurisdiction to which referral is requested? Please explain your answer, if possible illustrating your explanation by reference to your practical experience with the case referral system. Please also describe **any suggestions you may have as to how any shortcomings in the system might be remedied**.

*The functioning of Article 4(4)*

**9.** Does your Competition Authority believe that Article 4(4) is *in general* functioning effectively as a means of re-allocating "original" jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction to which referral is requested?

If there are *any particular concerns* which your Competition Authority has about the functioning of Article 4(4), please describe those concerns – if possible by reference to your Competition Authority's practical experience with the functioning of the provision – and any suggestions you may have as to how they might be remedied.

Do you consider that *the right kinds of cases* (in terms of their likely impact on competition, and in terms of the likely geographic scope of any such impact) are being referred pursuant to Article 4(4)? Please explain your answer.

Do you consider that Article 4(4) is functioning as effectively as it could *in procedural terms*? In particular, do you think that the deadlines in Article 4(4) are appropriate, or do you believe there would be scope to shorten them? Please explain your answer.

*Information concerning cases referred under Article 4(4)*

**10.** For **each** concentration referred to your Competition Authority pursuant to Article 4(4) since 1 May 2004, please provide the information requested in the form attached as **Annex 3** to this Questionnaire. Please use **one form per concentration**.

*The functioning of Article 4(5)*

**11.** Does your Competition Authority believe that Article 4(5) is *in general* functioning effectively as a means of re-allocating "original" jurisdiction from the national level to the Community level on the basis that a case is more appropriately dealt with by the Commission?

If there are *any particular concerns* which your Competition Authority has about the functioning of Article 4(5), please describe those concerns – if possible by reference to your Competition Authority's practical experience with the functioning of the provision – and any suggestions you may have as to how they might be remedied.

Do you consider that *the right kinds of cases* (in terms of their likely impact on competition, and in terms of the likely geographic scope of any such impact) are being referred pursuant to Article 4(5)? Please explain your answer.

If your Authority has vetoed a referral pursuant to Article 4(5) at any time since 1 May 2004, please explain why this was done.

Do you think it would be appropriate for a concentration to be referred pursuant to Article 4(5) if the concentration appeared likely to have an impact on competition in a market/s which represent/s a non-substantial part/s of the common market? Please explain your answer.

Do you consider that Article 4(5) is functioning as effectively as it could *in procedural terms*? In particular, do you think that the deadline of 15 working days in Article 4(5) is appropriate, or do you believe there would be scope to shorten it? Please explain your answer.

Have you encountered any difficulties in establishing whether or not your Member State has been correctly considered capable of reviewing a concentration for the purposes of Article 4(5) by the party or parties requesting referral? Please explain your answer, with reference to any specific experience you have had.

#### *The functioning of Article 9*

**12.** Does your Competition Authority believe that Article 9 is *in general* functioning effectively as a means of re-allocating "original" jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction to which referral is requested?

If there are *any particular concerns* which your Competition Authority has about the functioning of Article 9, please describe those concerns – if possible by reference to your Competition Authority's practical experience with the functioning of the provision – and any suggestions you may have as to how they might be remedied.

Do you consider that *the right kinds of cases* (in terms of their likely impact on competition, and in terms of the likely geographic scope of any such impact) are being referred pursuant to Article 9? Please explain your answer.

Do you consider that Article 9 is functioning as effectively as it could *in procedural terms*? In particular, do you think that the deadlines in Article 9 are appropriate, or do you believe there would be scope to shorten them? Please explain your answer.

Has the introduction of Article 4(4) had, in the opinion of your Competition Authority, any impact on the functioning/usefulness of Article 9? Please explain your answer.

#### *Information concerning cases referred under Article 9*

**13.** For **each** concentration referred to your Competition Authority pursuant to Article 9 since 1 May 2004, please provide the information requested in the form attached as **Annex 3** to this Questionnaire. Please use **one form per concentration**.

## *The functioning of Article 22*

**14.** Does your Competition Authority believe that Article 22 is *in general* functioning effectively as a means of referring a concentration to the Commission on the basis that the case is more appropriately dealt with at the Community level?

If there are *any particular concerns* which your Competition Authority has about the functioning of Article 22, please describe those concerns – if possible by reference to your Competition Authority's practical experience with the functioning of the provision – and any suggestions you may have as to how they might be remedied.

Do you consider that *the right kinds of cases* (in terms of their likely impact on competition, and in terms of the likely geographic scope of any such impact) are being referred pursuant to Article 22? Please explain your answer.

Do you consider that Article 22 is functioning as effectively as it could *in procedural terms*? In particular, do you think that the deadlines in Article 22 are appropriate, or do you believe there would be scope to shorten them? Please explain your answer.

Do you consider that it should be possible for a Member State to make a request for referral of a concentration under Article 22, or to join a request for referral made by another Member State, if the requesting Member State is not itself capable of reviewing the concentration under its national competition laws? Please explain your answer.

Do you consider that a request for referral of a concentration under Article 22 by a single Member State (i.e. one which is not joined by any other Member State) should normally be accepted by the Commission? Please explain your answer.

Do you consider that it is appropriate for a Member State to make a request for referral of a concentration under Article 22, or to join a request for referral made by another Member State, if the concentration in question has already been implemented or partially implemented? Please explain your answer.

Before contemplating making or joining a referral request under Article 22, how extensive would your Authority's examination of the likely impact of the concentration on competition normally be? Please explain your answer by reference to any specific referral requests you have made or joined under Article 22.

Has the introduction of Article 4(5) had, in the opinion of your Competition Authority, any impact on the functioning/usefulness of Article 22? Please explain your answer.

**C.    *The functioning of Council Regulation (EC) No 139/2004 (the EC Merger Regulation) generally***

**15.**    Does your Competition Authority have **any comments on the functioning of the Merger Regulation generally**? In particular, are there any aspects of the Regulation, or of its application in practice, which you believe are not functioning effectively? If so, please explain your answer – if possible by reference to your Competition Authority's practical experience with the functioning of the Regulation – and any suggestions you may have as to how this/these shortcoming/s might be remedied. Please feel free to raise any issue, whether relating to the *jurisdictional, substantive or procedural aspects* of the functioning of the Regulation.



## **Annex 1**

### **Questionnaire for concentrations subject to multiple national filings**

*This form is to be completed for each concentration reviewed by your Competition Authority under the relevant national merger control law/s which, to the knowledge of your Competition Authority, was also reviewed in another EU national jurisdiction. Please answer the questions included in the form for each case fulfilling this condition which has been dealt with by your Competition Authority in the year 2007. Please use one form per concentration.*

### **Questions**

1. Concentration (please indicate case reference, reference of publication or link to the website and the date of decision): .....
2. Parties to the concentration (please specify the undertakings concerned)<sup>74</sup>  
  
Undertaking A: .....  
Undertaking B: .....  
Undertaking C: .....  
Undertaking D: .....
3. Reviewed in which other Member State/s?  
(Please indicate here in which one/s): .....
4. Economic sector/s concerned: .....
5. First phase only or in-depth investigation? **FIRST PHASE ONLY / IN-DEPTH**
6. Outcome: **CLEARANCE / CLEARANCE WITH REMEDIES / PROHIBITION / ABANDONMENT**
7. Please indicate whether the investigation was in any way hampered by difficulties in fact-finding outside of the territory of your Member State. If so, please explain the nature of those difficulties, and any impact they had on the effectiveness of the investigation.

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<sup>74</sup> For the sake of clarity, the notion of "undertaking concerned" is explained in detail at paragraphs 129-131 of the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, of 10.07.2007.

8. For **each** market where the concentration might have had a possible impact on competition, please indicate in the table below the relevant product market, its geographic scope, and whether competition problems have been identified in this market.

Relevant Product Market	Geographic Scope	Competition Problems?

## Annex 2

### Questionnaire for concentrations falling under the "two-thirds rule"

*This form is to be completed for each concentration reviewed by your Competition Authority under the relevant national merger control law/s which, in the absence of the "two-thirds rule" in Article 1(2) and (3) of the Merger Regulation, would have constituted a "concentration" within the meaning of Article 3 of the Merger Regulation, and would have had a "Community dimension" within the meaning of Article 1(2) and (3) of the Merger Regulation. Please answer the questions included in the form for each of the cases fulfilling this condition which have been dealt with by your Competition Authority in the two-year period 2006-2007 (both years included). Please use one form per concentration.*

#### Questions

1. Concentration (please indicate case reference, reference of publication or link to the website and the date of decision): .....

2. Parties to the concentration (please specify the undertakings concerned)<sup>75</sup>

Undertaking A: .....

Undertaking B: .....

Undertaking C: .....

Undertaking D: .....

3. Annual turnover (in EUR)

Undertaking	Member State	EU-wide	World-wide
A			
B			
C			
D			

4. Reviewed/Subject to review in other EU Member States? YES / NO

(if YES, please indicate in which one/s): .....

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<sup>75</sup> For the sake of clarity, the notion of "undertaking concerned" is explained in detail at paragraphs 129-131 of the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, of 10.07.2007.

5. Economic sector/s concerned: .....
6. First phase only or in-depth investigation? FIRST PHASE ONLY / IN-DEPTH
7. Outcome: CLEARANCE / CLEARANCE WITH REMEDIES / PROHIBITION / ABANDONMENT
8. For **each** market where the concentration might have had a possible impact on competition, please indicate in the table below the relevant product market, its geographic scope, and whether competition problems have been identified in this market.

Relevant Product Market	Geographic Scope	Competition Problems?

### Annex 3

#### Questionnaire for concentrations subject to referral under Article 4(4) or 9

*This form is to be completed for each concentration reviewed by your Competition Authority under the relevant national merger control law/s following a referral from the European Commission pursuant to Article 4(4) or Article 9 of the Merger Regulation. Please answer the questions included in the form for each case referred under either of these provisions which has been dealt with by your Competition Authority since 1 May 2004. Please use one form per concentration.*

#### Questions

1. Concentration (please indicate case reference, reference of publication or link to the website and the date of decision): .....
2. First phase only or in-depth investigation? FIRST PHASE ONLY / IN-DEPTH
3. Outcome: CLEARANCE / CLEARANCE WITH REMEDIES / PROHIBITION / ABANDONMENT
4. Please indicate the total duration of proceedings between the date of referral and the date of clearance, clearance with remedies, prohibition or abandonment:  
.....
7. For **each** market where the concentration might have had a possible impact on competition, please indicate in the table below the relevant product market, its geographic scope, and whether competition problems have been identified in this market.

Relevant Product Market	Geographic Scope	Competition Problems?

Document: Directors General cover letter Questionnaire[3]

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## ANNEX 2

### Report on Regulation 139/2004

#### Questionnaire for respondents to the public consultation

##### Explanatory Remarks

*The European Commission must report to the Council by 1 July 2009 on the operation of Article 1(2) and (3) and of Article 4(4) and (5) of Council Regulation (EC) No 139/2004<sup>76</sup> (the “Merger Regulation”), pursuant to Articles 1(4) and 4(6) of that Regulation. To this end, the Commission is launching a wide-ranging consultation on the functioning of these jurisdictional provisions in the Merger Regulation, including a fact-finding exercise which seeks information and opinions from Member State Competition Authorities and from other stakeholders in the EU merger control process.*

*The questions are intended to yield a comprehensive picture of how the turnover thresholds in Article 1 are functioning in combination with the concentration referral provisions in the Regulation. For that reason, information and opinions are being sought not only on the pre-notification referral mechanisms introduced for the first time with the adoption of the Regulation 13.9/2004, but also on the pre-existing post-notification referral mechanisms which were somewhat modified in 2004.*

*This questionnaire also seeks any comments which you may have on the operation of the Merger Regulation more generally.*

*Replies to this questionnaire should be communicated to the Commission by no later than **1 December 2008**. In your response, please indicate clearly your identity and that of any interest you represent. Please also specify whether you are, or are representing, a company, business association, consumer interest organisation, public authority, law firm, academic institution or individual, private individual or some other entity.*

*Responses should be addressed to the Commission at:*

*European Commission*

*DG Competition*

*Merger Registry*

*B-1049 BRUSSELS*

*or by email to [comp-merger-registry@ec.europa.eu](mailto:comp-merger-registry@ec.europa.eu)*

*specifying the reference “HT.1277 – reply to public consultation”*

*All submissions may be published on the Commission's website. However, information which is clearly marked “**confidential**” will be treated as such. You are kindly requested to identify them in your reply by putting them in a separate annex. You may alternatively consider providing a non-confidential version of your reply, which is the Commission’s preferred option.*

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<sup>76</sup> OJ L24 (Vol. 47) of 29 January 2004; p. 1

## Questionnaire

### **A. *The functioning of the turnover thresholds in Article 1(2) and (3) of Council Regulation (EC) No 139/2004 (the EC Merger Regulation)***

*The functioning of the turnover thresholds in Article 1(2) and (3) generally*

**1.** Do you believe that Article 1(2) and (3) of the Merger Regulation is functioning as an effective means of distinguishing those transactions which are most appropriately the subject of merger control at the Community level from those which are not? Please explain your answer, if possible illustrating your explanation by reference to your practical experience with the provisions.<sup>77</sup>

If you do not believe that Article 1(2) and (3) of the Merger Regulation is functioning effectively in this way, please indicate any suggestions you may have as to how any shortcomings might be remedied.

*The functioning of the turnover thresholds in Article 1(2) and (3) in specific markets or economic sectors*

**2.** Are there any specific markets or economic sectors where, in your view, the turnover thresholds in Article 1(2) and (3) are not functioning in the manner intended, namely to identify those concentrations which would most appropriately be the subject of merger control at the Community level?

If there are any such markets or sectors, please indicate them and explain why you believe that the turnover thresholds do not always identify those concentrations which would most appropriately be the subject of merger control at the Community level. Please also indicate any manner in which you think this shortcoming might be remedied.

*Merger control filings at the national level*

**3.** Some merger transactions are subject to review under the merger control laws of more than one EU Member State. If you have any specific concerns about the fact or the manner in which some transactions are reviewed under the merger control laws of multiple EU jurisdictions, please explain those concerns - if possible by reference to your practical experience - and any suggestions you may have as to how they might be remedied.

*The functioning of the two-thirds rule in Article 1(2) and (3)*

**4.** Please describe any specific concerns you may have about the functioning of the "two-thirds rule" in Article 1(2) and (3) of the Merger Regulation, if possible by reference to your practical experience with the provisions. Please also describe any suggestions you may have as to how these concerns might be remedied.

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To the extent that you would in this context like to make any specific remarks on the functioning of the case referral system provided for in Articles 4(4), 4(5), 9 and 22 of the Merger Regulation, please make these remarks in response to the questions in Section B of this questionnaire.

**B.     *The functioning of the case referral provisions in Article 4(4), 4(5), 9 and 22 of Council Regulation (EC) No 139/2004 (the EC Merger Regulation) since May 2004***

*The functioning of Article 4(4)*

**5.**     Do you believe that Article 4(4) is functioning effectively as a means of re-allocating "original" jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction to which referral is requested?

If there are any particular concerns which you have about the functioning of Article 4(4), please describe those concerns – preferably by reference to your experience with a specific cases/s – and any suggestions you may have as to how they might be remedied.

*The functioning of Article 4(5)*

**6.**     Do you believe that Article 4(5) is functioning effectively as a means of re-allocating "original" jurisdiction from the national level to the Community level on the basis that a case is more appropriately dealt with by the Commission?

If there are any particular concerns which you have about the functioning of Article 4(5), please describe those concerns – preferably by reference to your experience with a specific cases/s – and any suggestions you may have as to how they might be remedied.

*The functioning of Article 9*

**7.**     Do you believe that Article 9 is functioning effectively as a means of re-allocating "original" jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction to which referral is requested?

Has the introduction of Article 4(4) had, in your opinion, any impact on the functioning/usefulness of Article 9? Please explain your answer.

If there are any particular concerns which you have about the functioning of Article 9, please describe those concerns – preferably by reference to your experience with a specific cases/s – and any suggestions you may have as to how they might be remedied.

*The functioning of Article 22*

**8.**     Do you believe that Article 22 is functioning effectively as a means of referring a concentration to the Commission on the basis that the case is more appropriately dealt with at the Community level?

Has the introduction of Article 4(5) had, in your opinion, any impact on the functioning/usefulness of Article 22? Please explain your answer.

If there are any particular concerns which you have about the functioning of Article 22, please describe those concerns – preferably by reference to your experience with a specific cases/s – and any suggestions you may have as to how they might be remedied.



**C.     *The functioning of the Council Regulation (EC) No 139/2004 (the EC Merger Regulation) generally***

**9.**     Do you have any comments on the functioning of the Merger Regulation generally? In particular, are there any aspects of the Regulation, or of its application in practice, which you believe are not functioning effectively? If so, please explain your answer – if possible by reference to your practical experience with the functioning of the Regulation – and any suggestions you may have as to how this/these shortcoming/s might be remedied.

