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COUNCIL REGULATION (EC) No 1310/97

of 30 June 1997

amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings

(OJ L 180, 9.7.1997, p. 1)

Corrected by:

► **C1** Corrigendum, OJ L 199, 26.7.1997, p. 69 (1310/97)

► **C2** Corrigendum, OJ L 40, 13.2.1998, p. 17 (1310/97)

<p>NB: This consolidated version contains references to the European unit of account and/or the ecu, which from 1 January 1999 should be understood as references to the euro — Council Regulation (EEC) No 3308/80 (OJ L 345, 20.12.1980, p. 1) and Council Regulation (EC) No 1103/97 (OJ L 162, 19.6.1997, p. 1).</p>
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COUNCIL REGULATION (EC) No 1310/97
of 30 June 1997
amending Regulation (EEC) No 4064/89 on the control of concen-
trations between undertakings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 87 and 235 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

- (1) Whereas concentrations with a significant impact in several Member States that fall below the thresholds referred to in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽⁴⁾ may qualify for examination under a number of national merger control systems; whereas multiple notification of the same transaction increases legal uncertainty, effort and cost for companies and may lead to conflicting assessments;
- (2) Whereas extending the scope of Community merger control to concentrations with a significant impact in several Member States will ensure that a 'one-stop shop' system applies and will allow, in compliance with the subsidiarity principle, for an appreciation of the competition impact of such concentrations in the Community as a whole;
- (3) Whereas additional criteria should be established for the application of Community merger control in order to meet the above-mentioned objectives; whereas those criteria should consist of new thresholds established in terms of the total turnover of the undertakings concerned achieved world-wide, at Community level and in at least three Member States;
- (4) Whereas at the end of the initial phase of application of this Regulation the Commission should report to the Council on the implementation of all applicable thresholds and criteria, so that the Council is in a position, acting in accordance with Article 145 of the Treaty, to change the criteria or adjust the thresholds laid down in this Regulation;
- (5) Whereas it is appropriate to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the structure of the undertakings concerned; whereas in the specific case of joint ventures it is appropriate to include within the scope and procedure of Regulation (EEC) No 4064/89 all full-function joint ventures; whereas, in addition to the dominance test set out in Article 2 of that Regulation, it should be provided that the Commission apply the criteria of Article 85 (1) and (3) of the Treaty to such joint ventures, to the extent that their creation has as its direct consequence an appreciable restriction of competition between undertakings that remain independent; whereas, if the effects of such joint ventures on the market are primarily structural, Article 85 (1) does not as a general rule apply; whereas Article 85 (1) may apply if two or more parent companies remain active in the market of the joint venture, or, possibly, if the creation of the joint venture has as its object or effect the prevention, restriction or distortion of competition

⁽¹⁾ OJ No C 350, 21. 11. 1996, pp. 8 and 10.

⁽²⁾ OJ No C 362, 2. 12. 1996, p. 130.

⁽³⁾ OJ No C 56, 24. 2. 1997, p. 71.

⁽⁴⁾ OJ No L 395, 30. 12. 1989, p. 1. Regulation rectified by OJ No L 257, 21. 9. 1990, p. 13 and amended by the 1994 Act of Accession.

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between the parent companies in upstream, downstream or neighbouring markets; whereas, in this context, the appraisal of all competition aspects of the creation of the joint venture must be made within the same procedure;

- (6) Whereas, for the purposes of calculating the turnover of credit and financial institutions, banking income is a better criterion than a proportion of assets, because it reflects more accurately the economic reality of the whole banking sector;
- (7) Whereas it should be expressly provided that decisions taken at the end of the first phase of the procedure cover restrictions directly related and necessary for the implementation of a concentration;
- (8) Whereas the Commission may declare a concentration compatible with the common market in the second phase of the procedure, following commitments by the parties that are proportional to and would entirely eliminate the competition problem; whereas it is also appropriate to accept commitments in the first phase of the procedure where the competition problem is readily identifiable and can easily be remedied; whereas it should be expressly provided that in these cases the Commission may attach to its decision conditions and obligations; whereas transparency and effective consultation of Member States and interested third parties should be ensured in both phases of the procedure;
- (9) Whereas, to ensure effective control, concentrations should be suspended until a final decision has been taken; whereas, on the other hand, it should be possible to waive a suspension, where appropriate; whereas, in deciding whether or not to grant a waiver, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned by a concentration or to third parties, and the threat to competition posed by the concentration;
- (10) Whereas the rules governing the referral of concentrations between the Commission and Member States should be reviewed at the same time as the additional criteria for implementation of Community merger control are established; whereas these rules protect the competition interests of the Member States in an adequate manner and take due account of legal security and the 'one-stop shop' principle; whereas, however, certain aspects of the referral procedures should be improved or clarified;
- (11) Whereas, in particular, the Commission can declare a concentration incompatible with the common market only if it impedes effective competition in a substantial part thereof; whereas the application of national competition law is, therefore, particularly appropriate where a concentration affects competition on a distinct market within a Member State that does not constitute a substantial part of the common market; whereas in this case it should not be necessary to demonstrate, in the request for referral, that the concentration threatens to create or to strengthen a dominant position on this distinct market;
- (12) Whereas it should be possible to suspend exceptionally the period within which the Commission must take a decision within the first phase of the procedure;
- (13) Whereas it should be expressly provided that two or more Member States may make a joint request pursuant to Article 22 of Regulation (EEC) No 4064/89; whereas to ensure effective control, provision should be made for the suspension of concentrations referred to the Commission by one or more Member States;
- (14) Whereas the Commission should be given the power to adopt implementing provisions where necessary,



HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 4064/89 is hereby amended as follows:

1. in Article 1:

(a) paragraph 1 shall be replaced by the following:

‘1. Without prejudice to Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in paragraphs 2 and 3.’;

(b) paragraph 3 shall be replaced by the following:

‘3. 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 2 500 million;

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

(c) the following paragraphs shall be added:

‘4. Before 1 July 2000 the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3.

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

2. in Article 2, the following paragraph shall be added:

‘4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85 (1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

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

— whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

— whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.’;

3. in Article 3, paragraph 2 shall be amended as follows:

(a) the first subparagraph shall be deleted;

(b) in the second subparagraph the phrase ‘which does not give rise to the coordination of the competitive behaviour of the parties

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amongst themselves or between them and the joint venture' shall be deleted.

4. in Article 5:

— paragraph 3 shall be replaced by the following:

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

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

- (i) interest income and similar income;
- (ii) income from securities:
 - income from shares and other variable yield securities,
 - income from participating interests,
 - income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;

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

(*) OJ No L 372, 31. 12. 1986, p. 1.

— in paragraph 4, the introductory sentence shall be replaced by the following:

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

— in paragraph 5, the introductory sentence shall be replaced by the following:

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

5. in Article 6:

(a) in paragraph 1:

— in point (b) the following subparagraph shall be added:

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

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— point (c) shall be replaced by the following:

‘►C2 (c) Without prejudice to paragraph 2 ◄, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.’;

(b) the following paragraphs shall be inserted:

‘►C2 2. Where the Commission finds ◄ that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1 (c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1 (b).

The Commission may attach to its decision under paragraph 1 (b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to rendering the concentration compatible with the common market.

►C2 3. The Commission may revoke ◄ the decision it has taken pursuant to paragraph 1 (a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

►C2 4. In the cases referred to in paragraph 3, the Commission ◄ may take a decision under paragraph 1, without being bound by the deadlines referred to in Article 10 (1).’;

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(c) Paragraph 2 shall become paragraph 5.

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6. in Article 7:

(a) paragraph 1 shall be replaced by the following:

‘1. A concentration as defined in Article 1 shall not be put into effect either before its notification or until it has been declared compatible with the common market pursuant to a decision under Article 6 (1) (b) or Article 8 (2) or on the basis of a presumption according to Article 10 (6).’;

(b) paragraph 2 shall be deleted;

(c) paragraph 3 shall be amended as follows:

the words ‘paragraphs 1 and 2’ at the beginning of the paragraph shall be replaced by the words ‘paragraph 1’;

(d) paragraph 4 shall be replaced by the following:

‘4. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 3. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account *inter alia* the effects of the suspension on one or more undertakings concerned by a concentration or on a third party and the threat to competition posed by the concentration. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.’;

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- (e) paragraph 5 shall be replaced by the following:

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

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.’;

7. in Article 8:

- (a) paragraph 2 shall be replaced by the following:

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

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. The decision declaring the concentration compatible with the common market shall also cover restrictions directly related and necessary to the implementation of the concentration.’;

- (b) paragraph 3 shall be replaced by the following:

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

8. in Article 9:

- (a) paragraph 2 shall be replaced by the following:

‘2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that:

- (a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market, or
- (b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.’;

- (b) in paragraph 3:

- point (b) shall be replaced by the following:

‘(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State’s national competition law.’;

- the following subparagraph shall be added:

‘In cases where a Member State informs the Commission that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall

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refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.’;

(c) paragraph 10 shall be replaced by the following:

‘10. This Article may be re-examined at the same time as the thresholds referred to in Article 1.’;

9. in Article 10:

(a) in paragraph 1, the following text shall be added at the end of the second subparagraph:

‘or where, after notification of a concentration, ►C2 the undertakings concerned submit commitments pursuant to Article 6(2), which are intended ◀ by the parties to form the basis for a decision pursuant to Article 6 (1) (b).’;

(b) at the beginning of paragraph 4 the phrase ‘The period set by paragraph 3’ shall be replaced by the phrase ‘The periods set by paragraphs 1 and 3’;

10. in Article 18:

(a) in paragraph 1 the words: ‘Article 7 (2) and (4)’ shall be replaced by the words ‘Article 7 (4)’;

(b) paragraph 2 shall be replaced by the following:

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

11. in Article 19, the following text shall be added at the end of paragraph 1:

‘Such documents shall include commitments which are intended by the parties to form the basis for a decision pursuant to Articles 6 (1) (b) or 8 (2).’;

12. in Article 22:

(a) paragraphs 1 and 2 shall be replaced by the following:

‘1. This Regulation alone shall apply to concentrations as defined in Article 3, and Regulations No 17 ⁽¹⁾, (EEC) No 1017/68 ⁽²⁾, (EEC) No 4056/86 ⁽³⁾ and (EEC) No 3975/87 ⁽⁴⁾ shall not apply, except in relation to joint ventures that do not have a Community dimension and which have their object or effect the coordination of the competitive behaviour of undertakings that remain independent.’;

(b) paragraph 3 shall be amended as follows:

‘3. If the Commission finds, at the request of a Member State or at the joint request of two or more Member States, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State or States making the joint request, it may, insofar as that concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4).’;

(c) paragraph 4 shall be replaced by the following:

‘4. Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply to a request made pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been put into effect on the date on which the Commission informs the parties that a request has been made.’;

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The period within which proceedings may be initiated pursuant to Article 10 (1) shall begin on the day following that of the receipt of the request from the Member State or States concerned. The request must be made within one month at most of the date on which the concentration was made known to the Member State or to all Member States making a joint request or effected. This period shall begin on the date of the first of those events.’;

(d) in paragraph 5 the phrase ‘or States’ shall be inserted after the phrase ‘within the territory of the Member State’;

(e) paragraph 6 shall be deleted;

13. in Article 23:

(a) these phrase ‘time limits pursuant to Article 10’ shall be replaced by the phrase ‘time limits pursuant to Articles 7, 9, 10 and 22’;

(b) the following subparagraph shall be added:

‘The Commission shall have the power to lay down the procedure ►C2 and time limits for the submission of commitments pursuant to Articles 6(2) and 8(2). ◄’

Article 2

This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) of Regulation (EEC) No 4064/89, before 1 March 1998 and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before 1 March 1998 by a Member State’s authority with responsibility for competition.

Article 3

This Regulation shall enter into force on 1 March 1998.

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