

ANNEX II – Article 9 – Article 22

A. TECHNICAL REPORT ON THE COMPANIES' EXPERIENCE CONCERNING THE FUNCTIONING OF ARTICLE 9 ECMR

1. Scope of the survey

A questionnaire was sent to all companies/notifying parties in cases that were notified to the Commission during the period November 1996 to January 2001 and for which one or more referral requests were made.

Table 1-1: General statistics

	Number of cases
Cases for which one or more referral requests were made	34
Number of cases covered by replies to the questionnaire	28
Number of referrals requests granted with respect to these cases	28

2. Companies' experience with referrals

To be noted that the way the term "referral" is used below does not mean a Commission decision to grant a referral in relation to a single case. It may refer, instead, to referrals of individual markets, or referrals to different Member States for the same case. Many respondents have differentiated their answers and comments on the basis of the above distinction.

Table 2-1: Time of awareness that a referral request would be submitted

	Number of referrals
Already at pre-notification stage	19
after notification	11
This awareness was due to	
Contact with Member States	8
Companies' own analysis	19
Notice by the Commission	5

Table 2-2: Impact of referral possibility upon notification planning

	Number of referrals
The possibility for a referral	
Was at least considered at the planning stage of the notification	24
This had an impact on	
Time needed for preparing the Form CO	9
Degree of detail in the Form CO	11
Financial resources	9
Human resources	13
Other impact	5
Was not considered at the planning stage of the notification	5

Respondents mentioned as "other impact", the uncertainty for shareholders, employees and management about the future of the companies involved, as well additional time to be taken into account before making expected profit on the acquisition. Some respondents also drew attention to the effort put in describing affected markets according to FORM CO's heavy requirements while aware of the possibility of a referral to a NCA.

Table 2-3: Timeframe provided for in Article 9 ECMR

		Number of companies
Companies consider that		
	The deadlines are appropriate	14
	The deadlines are long	11
	The deadlines are short	1

Several respondents commented that the three week deadline allowed for a Member State to make a request needs to be shortened, especially where very local markets are concerned. Furthermore, it was underlined that such deadline may interfere negatively with national timeframes and rules concerning the bidding process. Finally, it has been a recurrent background comment that an alignment of national timetables is needed for Article 9 to function in the interest of legal certainty. In one case where the deadlines were considered to be short, the request was unexpected as it concerned an, allegedly, unidentified market.

Table 2-4: Consequences of the referral beyond the stage of notification planning

	Number of companies
The referral entailed additional administrative costs due to the extension of the procedure in time	16
The extension of the procedure has had an impact on human resources employed for the achievement of clearance	16
The change of language may constitute a problem in terms of costs, time and human resources	5

The test used by NCAs

It is generally acknowledged that the NCAs involved have applied a competition test.

3. Recurrent general comments and opinions

a) *On the actual functioning of article 9 ECMR*

- the procedural "hurdle" relating to referrals is at times disproportionate to the competition problems at stake;
- it is crucial for companies to obtain quickly a certainty about a referral request, otherwise detailed pre-notification work with the Commission, including market analysis, may be wasted;
- widespread uncertainty over partial referrals and their outcome. They are deemed to cause confusion, delay, conflicting negotiations and conflicting outcomes. The

problem is mentioned of additional divestitures caused by the fact that the dominance test has been applied at national/local level;

- Article 9 unsuitable as decentralisation mechanism if the Commission has no power of control or monitoring over national proceedings. Commission should, at least, be able to control the application of Article 9 (8). According to one respondent, there is need to monitor the different remedies imposed in order to ensure compliance with EC law;
- parties are excluded from the negotiation between Commission and NCAs and thus have little influence or understanding of the reasons that lead the Commission to refer or retain a case. It is unclear how judicial review covers this part of the procedure.

b) Suggestions for improving Article 9

- widespread urge to enhance the one-stop-shop-principle;
- partial referrals to be avoided or limited to markets which can be clearly defined as sub-national;
- automatic criteria allowing parties to forecast a request should be introduced; no referral if there is an effect on intra-Community trade;
- a preliminary screening process to be devised to avoid the completion of full Forms-CO
- overall procedure to be accelerated.

c) Is an analysis at national level more susceptible to political considerations than the Commission's analysis?

13 companies estimate that NCAs' analysis might be susceptible to political considerations as opposed to an analysis undertaken by the Commission. This may depend however, on the maturity of national competition law, the public ownership régime of the undertakings involved as well as on the political and social importance of the sector concerned.