

***Case No COMP/M.2810 -  
DELOITTE & TOUCHE /  
ANDERSEN (UK)***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 01/07/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 01/07/2002

SG (2002) D/230449

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

**To the notifying party**

Dear Sir/Madam,

**Subject: Case No COMP/M.2810 – DELOITTE & TOUCHE / ANDERSEN UK  
Notification of 29/05/2002 pursuant to Article 4 of Council Regulation No 4064/89<sup>1</sup>**

1. On 29.05.2002, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (the “Merger Regulation”), by which Deloitte & Touche UK (“D&T”), the UK entities of the world-wide Deloitte Touche Tohmatsu network (“DTT”), acquires sole control within the meaning of Article 3(1)(b) of the Merger Regulation of parts of the undertaking consisting of the UK entities (“Andersen UK”) of the Andersen network.
2. After examining the notification, the Commission has concluded that the notified operation falls within the scope of the Council Regulation No 4064/89 and that it does not raise serious doubts as to its compatibility with the common market and with the EEA agreement.

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<sup>1</sup> OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

## I. THE PARTIES

3. D&T is a member of the global DTT network of accounting and professional services firms, which employs over 95,000 people in 140 countries. Andersen UK was active as member firm of the Andersen Worldwide (“Andersen Worldwide”) international network of accounting and professional services firms. Until recently the member firms collectively employed approximately 85,000 people. D&T as well as Andersen UK (being made up of a series of partnerships under the authority of one Managing Partner and with a common Partnership Council) are therefore the UK branches of two of the so-called Big Five world-wide active accounting and professional services organisations. Apart from Andersen Worldwide and DTT, the other Big-Five firms are PricewaterhouseCoopers (“PWC”), Ernst & Young (“E&Y”), and KPMG. In this decision, DTT, PWC, E&Y and KPMG will be called the Big Four.
4. Both D&T and Andersen UK are active in the same fields of business activity, that is to say the supply of the following professional services: assurance and advisory (which includes auditing and related accounting services); tax; corporate finance; reorganisation services; and business consulting services (advising on business strategy and technology systems). In addition, Andersen UK provides legal services through associate law firms.

## II. THE OPERATION

5. On 9 April 2002 D&T and Andersen UK entered into a binding Heads of Terms agreement (the “Agreement”) which sets out the principal terms of an Asset Purchase Agreement which the parties intend to enter into as soon as practicable. The national partner groups of D&T and Andersen UK have already approved this transaction.
6. According to the Agreement the proposed transaction constitutes the acquisition of various assets owned by Andersen UK. In addition, D&T is offering partnership or employment to around 260 existing Andersen UK partners and around 3,500 Andersen UK employees from across Andersen UK’s practice areas.
7. The provision of legal services by Andersen through associate law firms is not subject to the Agreement. Furthermore, subsequent to the execution of the Agreement, the insolvency/corporate restructuring division of Andersen UK decided not to join D&T. Both lines of business are therefore excluded from the present transaction.

## III. CONCENTRATION

### *DTT constitutes one single economic entity for the purpose of the application of the Merger Regulation*

8. First, it has to be decided whether DTT constitutes a single economic entity for the purposes of the Merger Regulation and whether, therefore, DTT is to be considered as an undertaking for the purposes of Article 3(1)(b) of the Merger Regulation. For this purpose, it is necessary to examine whether DTT firms share the same, permanent economic management and financial interests to confer on it the character of a single economic entity for the purposes of the Merger Regulation.

9. The assessment of whether or not DTT is to be regarded as a single economic entity has to be made in the special and specific context of the audit and accounting market where there is an inherent economic incentive for member firms of the networks to act as a single economic entity. The key element for the operation of the Big Five firms is the holding up of an international network, operating under a common brand name, and observing common professional rules and service standards which are centrally imposed on the member firms and centrally controlled. Member firms are dependent on the centrally organised network as they could not even provide the services (which are international in nature) in their territory without having access to the world-wide network and the support of its international partner firms. Therefore, compared to franchise networks in which member firms active in different geographic markets hardly depend on each other, Big Five member firms vitally depend on the possibility of working together with their international partner firms and, ultimately, also on the reputation of each individual member firm of the network.
10. In addition, even when no central distribution of revenues takes place between the individual member firms, a strong common financial interest is established by the systematic referral of clients across the member firms in the network. As the disintegration of the Andersen network shows, the failure of one member firm of the network to comply with the professional standards puts all other member firms and the whole network at risk. This leads to the result that risks created by individual member firms are shared among the whole network. This sharing of risks is further underlined by the existence of a common captive insurance for the entire network. Furthermore, as discussed in a previous decision<sup>2</sup>, each of the networks are de facto considered as single economic entities and showing a single behaviour on the market.
11. These features are all present for the central DTT entity, the DTT Verein (but do no longer apply to Andersen, see below). According to the DTT Verein's articles and practice,[...].
12. Furthermore, according to the DTT Verein's articles the DTT Verein is responsible for [...].
13. In addition, the DTT Verein provides central services to member firms, in areas such as [...].
14. The interdependence of the member firms is further strengthened by the consideration that the possibility for a member firm to leave DTT is economically almost unfeasible and very unlikely. [...]
15. The activity of the member firms of DTT therefore relies on the common brand name and its reputation, the world-wide network and the centrally imposed professional standards and common client relationships. Thereby the member firms share risks as well as financial interests. These very strong economic links are reinforced by the centrally performed global planning and the alignment of the plans of the member firms as well as the provision of key services, partly mandatory for the member firms. These elements indicate a decisive degree of common economic management and common financial interests. They therefore lead to the conclusion that DTT is to be considered as a single economic entity for the purposes of the Merger Regulation, and that DTT as a whole is one of the parties to the present transaction.

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<sup>2</sup> Case IV/M.1016 – Price Waterhouse/Coopers & Lybrand, paragraph 118, OJ - L 050, 26/02/1999 p.27

Andersen UK does not form part of the Andersen worldwide network for the purpose of the application of the Merger Regulation

16. Second, it has to be decided whether Andersen UK forms the relevant economic undertaking for the purposes of the Merger Regulation or whether Andersen Worldwide still exists as a single economic entity. The latter conclusion would lead to the result that, in accordance with Article 5(2) of the Merger Regulation, all transactions between Andersen Worldwide and DTT would have to be considered as one and the same concentration.
17. Formally, Andersen UK is still a member firm of Andersen Worldwide SC (a Swiss legal entity) and a party to the Member Firm Interfirm Agreement (“MFIA”). Andersen Worldwide entered into separate MFIA with Andersen firms around the world which form the contractual nexus between Andersen member firms. Under the MFIA, each Andersen member firm shall agree to co-operate in the market under a common brand, philosophy, technologies and practice methods, and Andersen Worldwide shall act as the custodian of the brand and the co-ordinator of matters affecting the network generally. However, following the events involving the US Andersen firm, Andersen UK considers that [...].
18. The Commission’s investigation has indeed shown that Andersen Worldwide is no longer able to discharge its core contractual obligations of co-ordinating the global development of the member firms’ practices world-wide, their commercial strategies and their management. This is notably demonstrated by the fact that the former member firms of the global Andersen network, each individually and without awaiting Andersen Worldwide's consent, have already joined or seek to join different networks of the remaining Big Four firms on a country-by-country basis. As a result of this disintegration, no central decision making process is any longer in place and the member firms do no longer operate under a common brand name and comply with common professional and service standards. For these reasons, Andersen Worldwide is no longer considered to constitute a single economic entity and a single undertaking for the purposes of the Merger Regulation. Instead, Andersen UK is to be regarded as the relevant economic undertaking for the purposes of the Merger Regulation.
19. As a result of the proposed transaction, DTT will acquire sole control of parts of the undertaking consisting of the Andersen UK entities. The operation thus constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

#### **IV. COMMUNITY DIMENSION**

20. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion<sup>3</sup> (DTT €13.8 billion, Andersen UK (excluding legal and corporate recovery businesses) € [...]) in 2001. Each of DTT and Andersen UK have a Community-wide turnover in excess of EUR 250 million (DTT € [...]), Andersen UK (excluding legal and corporate recovery businesses) € [...]), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

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<sup>3</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

## V. COMPETITIVE ASSESSMENT

### A. RELEVANT PRODUCT MARKETS

21. Both DTT and Andersen, before the disintegration of its network, were considered as two of the “Big Five” global audit and accounting networks. Both parties are active in the provision of a broad range of professional services to clients, which consist mainly of large companies, of both a national and multinational dimension, spanning a broad spectrum of business sectors, as well as to clients in the public sector. As set out by a previous Commission decision<sup>4</sup> the activities of the Big Five firms can be divided into the following relevant product markets:

- i) Audit and accounting services to quoted and large companies;
- ii) Audit and accounting services to small and medium-sized companies;
- iii) Tax advisory and compliance services;
- iv) Corporate finance advisory services; and
- v) Management consultancy services.

#### *i) Audit and accounting services to quoted and large companies*

22. “Audit and accounting” services consist of the performance of statutory and other audits of companies’ accounts and other “audit-related” accounting services. In this context, “audit related” accounting services include such services as general accounting services, systems assurance, business risks assessment, internal audit, due diligence work preparatory to the acquisition of new businesses, the preparation of reports in connection with stock exchange listings and post acquisition reviews.

23. In case IV/M.1016 of 20.5.1998 - Price Waterhouse/Coopers & Lybrand, the Commission’s identified the main reasons for which it is considered that audit and accounting services to quoted and large companies form part of a separate product market: the necessity for such companies to have audit and accounting services provided by a firm with the necessary reputation in the financial markets (in the case of quoted companies), the geographic breath to cover the companies’ needs worldwide (in the case of multinationals), the depth of expertise in the particular sector (large companies in general and, in particular, regulated sectors such as banking and insurance) and significant resources (all large companies).

24. The parties do not dispute this product market definition. Furthermore, the market investigation has confirmed that, the market for audit and accounting services to quoted and large companies comprises services provided to large quoted companies, whether national or international in dimension, as well as to large non-quoted companies. In any case, both types of companies require a wide international coverage of the audit firm’s network if they are internationally active. Large quoted companies require the audit firm’s reputation and credentials vis-à-vis the capital markets (the same is true for companies relying on the capital markets by offering other forms of securities such as bonds, participation rights, etc.). Even if large non-quoted companies do not directly rely on the audit firm's reputation vis-à-vis the capital markets, they require the audit firm’s resources. All these features are only provided by one of the large global audit and accounting networks.

#### *ii) Audit and accounting services to small and medium-sized companies*

25. The market for audit and accounting services to small and medium-sized companies covers the audit and accounting services to all those companies, who do not require one of the features

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<sup>4</sup> Price Waterhouse/Coopers & Lybrand quoted above, paragraphs 20,22

mentioned above, which can only be provided by one of the global audit and accounting networks.

*iii) Tax advisory and compliance services*

26. The market investigation showed some features, which could justify a definition of separate markets depending on whether such services were provided predominantly with regard to national tax legislation, or to international issues. Whereas national tax advice can be provided by a firm, which is only active in one country, the provision of international tax advice services can, in principle, be provided either by an international network or by co-operation of different national firms. The market investigation indicated that for a significant number of customers the network solution is the preferred choice. However, it is not necessary for the purpose of this decision to define the market precisely, as the proposed operation does not lead to the creation or strengthening of a dominant position irrespective of the precise definition retained.

*iv) Corporate Finance Advisory Services and v) Management Consultancy Services*

27. As regards the markets iv) for the provision of corporate finance advisory services and for the provision of v) management consultancy services, the market investigation has confirmed the results of the case IV/M.1016 – Price Waterhouse/Coopers & Lybrand that these two areas could be considered as two distinct product markets.

**B. RELEVANT GEOGRAPHIC MARKETS**

28. As regards the geographic dimension of the relevant product markets for i) audit and accounting services to quoted and large companies, ii) audit and accounting services to small and medium-sized companies, and iii) tax advisory and compliance services the Commission has stated in case IV/M.1016 – Price Waterhouse/Coopers & Lybrand that these markets are national in scope. The reasons given were in particular significant national differences for the services' main features such as the specific professional expertise required, applicable regulations, and the relevant laws for which the above mentioned advisory services are provided. The market investigation has confirmed the national scope of these product markets as these features of the market have not changed to date.
29. If a separate market for tax advisory services with international dimension were to be considered, the market investigation has indicated that such a market would show some national characteristics. Tax advice on international matters is linked to the national tax law of the advice seeking company and therefore presupposes knowledge of the national tax regime under which the company is operating. The company will therefore normally liaise on matters with an international character with its national tax adviser, who will then usually co-operate with experts - either from the network or from independent co-operating firms - in the jurisdiction where the other end of the operation in question is located. The precise definition of this market, however, can be left open, as the proposed operation does not create or strengthen a dominant position irrespective of the geographic delineation of the market chosen.
30. With regard to the geographic markets for iv) corporate finance advisory services and v) management consultancy services, the Commission has already recognised the existence of both national and international aspects for the provision of these services. In the absence of competition concerns, the Commission did not have to conclude on the geographic scope of these markets. As the market investigation has not raised new elements in this respect, and as these two markets do not lead to the creation or the strengthening of a dominant position irrespective of the precise definition of the markets' geographic scope, the Commission does not need to deviate from its previous approach for the purpose of the present case.

### C. COMPETITIVE ASSESSMENT

31. The transaction will lead to horizontal overlaps in all the relevant markets mentioned above. The parties' combined market shares will, however, only exceed 15 % in the UK's audit and accounting services market for quoted and large companies and the UK's tax advisory services market with an international dimension, assuming that such a market exists. Therefore the competition assessment of the transaction will focus on the markets for i) audit and accounting services to quoted and large companies, and the possible market for ii) tax advisory and compliance services with an international dimension.
32. On all other relevant markets deterioration of competition can be excluded, as the parties combined market shares will be well below 15% and the clients' choice of service providers in these areas is not limited to the Big Five audit and accounting firms. Audit and accounting services to small and medium-sized companies can be provided by a large number of smaller audit and accounting firms active on the UK market. For corporate finance advisory services and management consultancy services the parties are in competition with the large investment banks and the international and national management consultancy firms respectively.

#### 1. Market for audit and accounting services for quoted and large companies

##### a) Total size of the market and market shares

33. No categorisation defining exactly the sample of companies for the market for audit and accounting services for quoted and large companies is available. However, several categorisations can be considered to provide a sample representing the best approximation for the relevant market. These samples are in particular FTSE 100, FTSE 350<sup>5</sup> and turnover threshold of \$ 250 million and \$ 1 billion. The market share data for each of these categorisations of the UK market can be summarised as follows.

**Table 1 Market shares by audit fees (all competitors)**

Threshold	Sample	Total Fees (000)	PWC	KPMG	E&Y	AA	D&T	Parties Combined	Others (in particular 2 <sup>nd</sup> Tier firms)
Turnover \$250m+	555	€513,945 (£319,674)	38%	22%	17%	8%	11%	19%	4%
Turnover \$1bn+	201	€395,918 (£246,261)	40%	22%	18%	6%	12%	18%	2%
FTSE 350	349	€535,145 (£332,860)	43%	23%	15%	6%	12%	18%	1%
FTSE 100	99	€369,336 (£229,727)	47%	22%	17%	4%	10%	14%	0%

Source according to parties: FAME latest available data<sup>6</sup>.

<sup>5</sup> FTSE 100 and FTSE 350 are indices including the 100 and respectively 350 largest companies noted the London Stock Exchange.

<sup>6</sup> According to the parties FTSE data samples are more complete than the turnover thresholds because (i) financial services firms are excluded from company data sets using turnover thresholds and (ii) missing fee data for companies in the London Stock Exchange indices have been sourced from annual report.



34. The samples are overlapping. For example, the FTSE samples do not necessarily include only large companies requiring the services from Big Five firms whereas these companies are covered by the samples based on turnover thresholds which, on the other hand, also include quoted companies. Apart from the FTSE 100 sample, which provides a too small sample for all companies requiring audit and accounting services from a Big Five audit and accounting firm, all other samples above include also marginally some smaller companies, which do not require audit and accounting services from one of the Big Five audit and accounting firms (other than Big Five firm's ranging from 0% - 4%). However, it does not have to be decided, which of the above samples gives the best approximation for the relevant market, as the differences of the repartition of market shares regarding the different samples are not significant to the extent that they could alter the outcome of the competitive assessment of the transaction.

***b) General characteristics of the market***

35. Before assessing the impact of the transaction on competition in the market for audit and accounting services for quoted and large companies, it is useful to outline the conditions of competition in this market. Under UK law, companies are required to have their accounts periodically audited by a qualified person/firm. These auditors –and each of the Big Five- have to be registered by a Recognised Supervisory Body, like the Institute of Chartered Accountants in England and Wales, before they are permitted to perform audits. Clients will then select registered auditors. In large public companies, the Board of directors will typically appoint an audit committee of the Board, which will have the responsibility for recommending the appointment of the auditor. The auditor will then be formally approved by the shareholders at the company's annual meeting.

36. In selecting the auditor, large companies typically use a competitive tender process. They invite several firms (generally not more than three or four) to submit a proposal. For quoted and large companies, the competition for audit and accounting services therefore operates at the moment of such competitive tenders. As set out by a previous Commission decision<sup>7</sup> and confirmed by the investigation, the length of time for which audit appointments are made tend to be long-term -since the norm is that appointed auditors will be renewed- so that the auditor-client relationship can last many years. Even if an audit appointment is very often renewed in favour of the incumbent auditor, launching an invitation to tenders imposes a competitive constraint on the incumbent auditor, often leading to a re-negotiation of the fees.

37. The Commission's investigation showed that the respective market shares among the Big Five did not fully reflect the ability to win a tender. The market investigation has shown that any of the Big Five could possibly win or lose a competitive tender, without any clear link towards its existing market shares.

***c) Single dominance***

38. For each possible categorisation the parties represent the two smallest Big Five players on the market (depending on the categorisation chosen D&T 10% - 11% and Andersen UK 4% - 8%). The combination of the parties' market shares (14% - 19%) will only result in the creation of the third largest player on the market (by FTSE 100 only fourth largest player), which will be significantly smaller than the market leader PWC (38% - 47%). In any case, the ability of the merged entity to win tenders will not be increased as a result of the addition of market shares. Therefore the proposed operation will not result in the creation of a single dominant position.

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<sup>7</sup> Price Waterhouse/Coopers & Lybrand, quoted above, paragraphs 20,22

#### *d) Collective dominance*

39. In case IV/M.1016 – Price Waterhouse/Coopers & Lybrand quoted above, the Commission considered that the market characteristics of the audit and accounting market for quoted and large companies could, in principle, lead to collective dominance. On the demand side, the Commission considered, in particular, that there was moderate growth in the market and a low price elasticity of demand. On the supply side, the Commission considered the existence of a high concentration, high market transparency for a rather homogeneous product, mature production technology and structural links between competitors. Finally the Commission considered that high barriers to entry characterise this market, in particular, due to the audit firm's required broad geographical network, extensive human resources required, and a well established reputation which has been built up over a significant period of time.
40. However, the Commission found no conclusive proof that such dominance resulted from the relevant operation in the (then) Big Six market. The Commission concluded that 'in view of the continued post-merger existence of no fewer than five suppliers, of the likely continued participation of these five suppliers in the tender offers which constitute the competitive process in the relevant markets, and of the non-emergence of any two clear leading firms following the merger; the Commission has found no conclusive proof that the merger would create or strengthen a position of oligopolistic or duopolistic dominance within any of the national Big Six markets for audit and accounting services to large companies within the Community.'<sup>8</sup>
41. The Commission in previous decisions<sup>9</sup> and the Court of First Instance<sup>10</sup> have identified three conditions which are necessary for a finding of collective dominance:
- each member of the oligopoly must have the ability to know how the other members are behaving (transparency)
  - the tacit co-ordination must be sustainable over time; there must be an incentive not to depart from the common policy on the market;
  - actual and potential competitors and clients have no possibility to jeopardise the oligopolistic behaviour.
42. In the context of the present proposed concentration, it could be considered whether the current market characteristics in combination with the further reduction of market players from five to four players could lead to sufficient market transparency, to effective retaliation mechanisms and to a lack of threatening response from actual and potential competitors and clients, these elements resulting in the creation of collective dominance in the audit and accounting market for quoted and large companies.
43. The market investigation has shown that the markets characteristics described in paragraph 35-37 above have not changed in such a way as to exclude the possibility that a reduction from five to four market players could lead to the creation of collective dominance.
44. However, for the purpose of this decision it can be left open whether or not the proposed transaction leads to a situation of oligopolistic dominance, as a causal link between the proposed operation and the possible situation of collective dominance can be excluded. The reasons for excluding this causal link are the following:

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<sup>8</sup> Price Waterhouse/Coopers & Lybrand, quoted above, paragraph 119

<sup>9</sup> Case IV/M.1741 MCI Worldcom/Sprint paragraph 259

<sup>10</sup> Case T-342/99 of 6 June 2002 *Airtours v Commission*, paragraph 62

- the reduction from five to four global accounting networks was inevitable;
- no other scenario could be established, which would be less harmful for competition on the market for audit and accounting services to large and quoted companies (it is considered that other scenarios can be established for the market which is under consideration in this decision, given its specific characteristics, in particular that only a very limited number of companies is there operating, and that there is no realistic possibility of penetration following an acquisition by a new entrant).

Reduction from Big Five to Big Four was inevitable

45. This operation has to be seen in the general context of the disintegration of the Andersen network in the aftermath of the Enron scandal. The parties have argued that Andersen (UK) is no longer an effective top-tier audit competitor and, hence, that the reduction in the number of top-tier suppliers of audit services will inevitably be reduced from five to four, irrespective of the merger. The rapid disintegration of Andersen's world-wide network has compounded the difficulty of any possibility of reversal of Andersen's demise or for another organisation to use the individual Andersen units to recreate a fifth force for the provision of audit and accounting services.
46. Even if Andersen UK could continue as an independent audit and accounting services firm, the market investigation has shown that Andersen UK could no longer exist as a viable competitor in the market for audit and accounting services to quoted and large companies.
47. Both the audit and accounting firms and the companies requiring one of the Big 5 firms as their statutory auditor, who were addressed in the framework of the market investigation, stated that either already or at least in the near future the number of the big audit and accounting firms providing a global network with sufficient resources and reputation for their audit requirements has been reduced from five to four. Reasons for this assessment are in particular
  - the loss of the Andersen network's reputation;
  - the dissolution of the global Andersen network through the fact that each national Andersen entity has joined or is currently about to join one of the remaining four global audit and accounting networks; and
  - in the context of the dissolution of the Andersen network the loss of Andersen UK's possibility to make use of Andersen US' SEC Accreditation<sup>11</sup>, which results in Andersen UK losing the business that it gets from the UK companies quoted in the US, and which represents a significant part of Andersen UK's international audit business.
  - the take-over by a new entrant into the now Big Four market (e.g. by one of the second tier firms) would only maintain a viable fifth player if the whole, or at least the majority of the national Andersen entities were taken over by such a newly created competitor. Such an attempt could, if at all, only be successful in a long-term perspective. As quoted and large companies require from their audit and accounting services' supplier a long-existing audit reputation and an international network, both cannot be reached by a newcomer in the short term. Neither the brand of "Andersen" nor the dissolving network seem to represent sufficient assets to remain as an adequate competitor in this relevant product market. In any event the necessary take-over of the entire Andersen network by a new entrant is no longer possible, since, world-wide, the different former Andersen member firms, each

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<sup>11</sup> US Securities and Exchange Commission approval is a pre-requisite for the auditing of companies quoted in the US. In fact, after a recent Judgement of a Houston Court on Andersen withholding Enron documents to the US Securities and Exchange Commission Andersen US considers the possibility that in the near future it could lose its SEC accreditation.

individually, have already joined or are about to join the different remaining Big Four networks.

48. Thus in any event, the business of providing auditing and accounting services to large and quoted companies would accrue to the existing remaining Big Four.

Possible alternative scenarios to the proposed transaction

49. As the reduction of market players from five to four appears to be inevitable, if the transaction proposed did not take place for any conceivable reasons (such as withdrawal of the notification or regulatory prohibition), only two possible alternative scenarios to the proposed transaction can be established. These two scenarios are
- the take-over of Andersen UK by one of the other remaining Big Four audit and accounting firms;
  - no take-over takes place and the existing clients would be dispersed between the remaining Big Four firms (with two sub-scenarios for the attribution of shares).
50. The different scenarios which could lead to a repartition of market shares are set out in Table 2 below. The ranges used in Table 2 make reference to the different approximations set out in Table 1 and explained in paragraph 34.

**Table 2. Hypothetical market shares for the different scenarios**

	<b>PWC</b>	<b>KPMG</b>	<b>E&amp;Y</b>	<b>D&amp;T</b>
Range of market shares ex ante	38-47%	22-23%	15-18%	10-12%
<b>Proposed Merger between D&amp;T and Andersen UK</b>	<b>38-47%</b>	<b>22-23%</b>	<b>15-18%</b>	<b>14-19%</b>
<b><u>Scenario I</u></b>				
Takeover Andersen UK by PWC	46-51%	22-23%	15-18%	10-12%
Takeover Andersen UK by KPMG	38-47%	26-30%	15-18%	10-12%
Takeover Andersen UK by E&Y	38-47%	22-23%	21-25%	10-12%
<b><u>Scenario II</u></b>				
Dispersion : Equal share	40-48%	23-25%	17-20%	11-14%
Dispersion: Equi-proportional share	41-49%	23-24%	16-19%	10-13%

Source: Calculation on the basis of market shares as calculated in Table 1

51. Scenario I refers to the hypothesis of an addition of market shares following a supposed concentration between one of the other three remaining Big Four firms. This scenario does not take into account of any possible post merger losses of Andersen UK in the wake of the Enron affair.
52. In Scenario II, relating to the hypothesis of dispersion of shares, two different alternatives have been considered. The first could be that Andersen's market share is equally distributed to each of the remaining Big Four firms (“Equal share”). The second is a distribution on an equi-proportional basis, where Andersen’ market share is transferred to the remaining Big Four in proportion to their respective current market shares (“Equi-proportional share”).

*Proposed merger is not more harmful for competition than other possible scenarios as regards the risk for collective dominance*

53. As indicated above, the reduction of market players from five to four players appears to be inevitable. When examining all different possible situations described in scenarios I and II, the only difference between them and the proposed operation, in terms of competition analysis, is the different repartition of market shares between the market players. However, as already stated above, market shares are of limited importance in audit and accounting services market for large and quoted companies, as almost all acquisition of new clients takes place via bidding procedures launched by the clients. In general all Big Four firms have sufficient reputation and resources to be seen as a viable supplier of audit and accounting services. The market investigation has shown that, if clients decide to switch, they do it through a competitive tender, which usually involves three or four potential suppliers. The market investigation has further shown that, if a client excludes one of the Big Four companies from the bidding procedure, the most likely reason is a conflict of interest issue, not the size of the Big Four audit firm.
54. In all different situations analysed in scenario I and II, it can be seen from Table 2 that the differences in the repartition of market shares regarding all possible alternatives to the operation are rather marginal compared to the market structure resulting from the proposed merger<sup>12</sup>. To exclude that any of the alternatives could create a market structure, which could be less harmful for competition, it must therefore be assessed whether the marginal differences in the repartition of market shares (which would be created as a result of the proposed operation) could more likely create a situation of oligopolistic dominance than any of the possible alternatives. If this is not the case, a causal link between the merger proposed and a possible deterioration of the competitive structure in the market resulting from the present operation can be excluded.
55. In this respect, the market investigation has shown that, compared to the two scenarios, the operation proposed will not
- increase the likelihood that each member of the oligopoly will have the ability to know how the other members are behaving (transparency) –first condition-
  - increase the likelihood that the tacit co-ordination would be sustainable over time and that there would be an incentive not to depart from the common policy on the market –second condition-;
  - increase the likelihood that competitors and clients would have no possibility to jeopardise the oligopolistic behaviour –third condition-.

*First condition*

56. The proposed transaction does not have an impact on the ability to monitor the competitors' behaviour, which is different to the impact of any of the possible scenarios. The possible impact on market transparency would be created by the inevitable reduction from five to four market players. A marginal different repartition of market shares would neither increase nor decrease the market's transparency. As regards cost transparency among the Big Four - considering the specificity of this market, for which the main capacity restraint for a company are not large investments but human resources- the importance of market shares on both cost efficiencies and overall cost structure as such is of limited importance. Therefore, the marginal

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<sup>12</sup> With the exemption of the hypothetical take-over of Andersen UK by PWC, which would strengthen PWC's leading market position and could thus raise single dominance issues. In any event, as shown in par 56 ff, it can be excluded that such an operation could increase the likelihood of collective dominance issues.

differences in the repartition of market shares between the proposed operation and the possible alternative scenarios, an impact of a possible variation of the overall cost structure of all market players can be excluded. In these circumstances the degree of cost transparency will not be different as a result of the proposed transaction or of any other scenario.

57. In addition, if according to scenario II, Andersen UK's staff was dispersed and any further and key persons were equally spread among the Big Four firms, tacit collusion would be even more facilitated by this spread of common experience and by the creation of a network of personal links.

*Second condition*

58. Second, it can be excluded that the marginal differences between the repartition of market shares between any alternative and the proposed transaction could change the incentives of the Big Four firms to depart from a possible common policy on the market. In principle symmetry in market shares could be one of the elements considered to make a market structure conducive to sustainable tacit collusion. However, as shown in Table 2, the differences in the repartition of market shares are marginal and do therefore not affect incentives to depart from a possible common policy in any different way. Furthermore although the proposed transaction could be considered as increasing symmetry marginally, this would not lead to a symmetric market structure, as PWC would still remain by far the market leader as it would be the case for any alternative of the possible scenarios.

*Third condition*

59. Finally, a different repartition of market shares between the remaining Big Four companies does not have any effect on the barriers to enter the now Big Four audit and accounting market and does therefore not affect the possibility of competitors to jeopardise the oligopolistic behaviour. Neither would a marginal difference in the repartition of market shares change the client's choice whether to invite one or another Big Four firm to a tender. Hence the clients' ability to challenge a possible oligopoly is not different in any possible scenario compared to the proposed operation.

*Conclusion on possible alternative scenarios on collective dominance*

60. In conclusion, it can be excluded that neither scenario I nor scenario II, which represent the only other possible alternatives to the proposed transaction, could create a market structure which could, compared with the market structure resulting from the proposed transaction, decrease the likelihood for collective dominance on the market for audit and accounting services for quoted and large companies.

***e) Conclusion on the market for audit and accounting services for quoted and large companies***

61. Given that any conceivable alternative to the proposed merger would not be less harmful for competition there is no causal link between the proposed operation and any possible deterioration of the competitive structure in the market resulting from the present operation.

**2. Market for Tax Advisory services**

62. The market investigation has shown that it could be considered that the market for tax advisory services might be further divided between international tax advisory services, and national tax advisory services.

63. In this case, the market for international tax advisory services would be similar to the market for the provision of audit and accounting services to large and quoted companies, in that the service requires an international network and there are few providers on the market. The market investigation has shown that it is, however, not likely that the Big Five are the only service providers on this possible market for international tax advisory services in the UK. To a certain extent big law firms are or at least could be active on this market, by covering their lack of expertise over tax jurisdictions from other countries by co-operating with other law firms in these countries.
64. Assuming on the other hand that a separate market for international tax advice does not exist, the combined shares of the parties in the overall market for tax advice would be below 15%. This situation would not lead to any creation or strengthening of a dominant position. If such a separate market does exist, this market would largely coincide with the market for audit and accounting services to international firms. Thus the same reasoning and assessment can be carried out as above. Moreover, in any case, there would be other competitors in the market for international tax advisory services and barriers to entry would be lower.

## **VI. CONCLUSION**

65. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission