

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 28 April 1992

declaring the compatibility with the common market of a concentration

(Case No IV/M. 126 — Accor/Wagons-Lits)

Council Regulation (EEC) No 4064/89

(Only the French text is authentic)

(92/385/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, and in particular Article 8 (2) thereof,

Having regard to the Commission's Decision of 16 December 1991 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations given on 26 March 1992 ⁽²⁾,

Whereas:

I. NATURE OF THE PROCEEDINGS

(1) These proceedings relate to a concentration which was notified to the Commission pursuant to

⁽¹⁾ OJ No L 395, 30. 12. 1989, p. 1, amended: OJ No L 257, 21. 9. 1990, p. 13.

⁽²⁾ OJ No C 184, 21. 7. 1992, p. 2.

Article 4 of Regulation (EEC) No 4064/89 ('the Regulation'). The notification came into effect on 15 November 1991. The concentration involves the proposed acquisition by Accor SA ('Accor'), through the intermediary of the holding company Cobefin, of all the shares still in circulation of the Compagnie Internationale des Wagons-lits et du Tourisme (CIWLT) by means of a takeover bid preceded by the acquisition of the majority of Cobefin's capital.

II. THE PARTIES

(2) Accor is a French catering and hotel group. Its main activities are catering (particularly on motorways), group catering, luncheon vouchers, hotels (including salt-water cures), certain tourism activities (cruises, tour operators, etc.) and certain related services.

(3) CIWLT is a Belgian catering, hotel and tourism group. Its main activities are catering (particularly on motorways and on trains), group catering, hotels (including railway sleeping-cars), car hire and travel agencies.

III. THE CONCENTRATION

- (4) Following the takeover bid, which ended on 19 December 1991, Accor holds 69,5 % of the capital of CIWLT. Before the operation, Accor had only a minority holding in CIWLT. According to Accor, its minority holding did not allow it to exercise any control over CIWLT. However, the Brussels Commercial Court, in a judgment delivered on 4 December 1991, against which Accor has appealed and which does not bind the Commission, took the view that, prior to the operation, CIWLT was jointly controlled by a number of undertakings, including Accor. It is not necessary to determine whether Accor already exercised joint control over CIWLT before the operation. The Commission considers that even an operation whose object or effect was to enable an undertaking which exercised over another undertaking joint control within the meaning of the second subparagraph of Article 3 (2) of the Regulation to control such undertaking on its own is a concentration within the meaning of Article 3 (1) (b) of the Regulation. The operation is thus a concentration within the meaning of Article 3 (1) (b) of the Regulation.

IV. COMMUNITY DIMENSION

- (5) The turnover of the last financial year known ⁽¹⁾ as shown in the consolidated profit and loss account of each of the undertakings concerned is as follows:

Accor: ECU 1 992 511 122 ⁽²⁾,

CIWLT: ECU 2 332 250 499 ⁽³⁾.

- (6) Accor has proposed adding to the sum of these two turnover figures, pursuant to Article 5 of the Regulation, the turnover achieved by operations of minority subsidiaries managed by Accor or one of its subsidiaries, under hotel management contracts in which Accor operates a hotel in the name and for the account of the minority subsidiary. Such companies are not included in the consolidated accounts. The Commission has noted that such contracts have the following characteristics:

- Accor runs the hotel under one of the group's established names and undertakes its management. Its terms of reference are general in scope, and it looks after the operation of the hotel, marketing, sales, accounting and financial management, management control, and legal, administrative and tax matters. The owner has

the option of entrusting it with other services as well,

- Accor has full control of staffing policy: it recruits, manages, dismisses and supervises staff. It plays an important role in training. Only the negotiation of collective agreements and the secondment of members of Accor's staff to the hotel require the explicit agreement of the owner,
- the contract is long term (10 years on average, with renewal often tacit),
- if the owner sells, leases or otherwise disposes of the hotel, the buyer or new lessee must undertake to comply with an assume all the obligations incumbent on the owner *vis-à-vis* Accor. However, Accor may refuse the transaction and purchase or lease the hotel at the same price or rent and on the same terms and conditions as those set out in the owner's notification. If the buyer or new occupant refuses to assume the obligations incumbent on the owner and if Accor does not wish to purchase or lease the hotel, the contract will be terminated, and Accor will receive [...] ⁽⁴⁾ compensation.

In conclusion, it appears that the contract allows the owner virtually only the role of providing capital and confers on Accor the role of fully fledged manager. It follows that Accor has the right to manage the relevant undertakings' affairs within the meaning of the fourth indent of Article 5 (4) (b) of the Regulation. This conclusion is based on a detailed analysis of the contract, notably as regards the precise powers of the owner on budgetary matters, an analysis which has allowed the Commission to accept Accor's argument. The turnover generated by the contracts concerned is ECU 495 232 730.

- (7) Account should also be taken of the item 'other operating proceeds' included in CIWLT's profit and loss account. The Commission considers that the components ⁽⁵⁾ of this item derive from the sale of products and the provision of services by CIWLT and are part of its ordinary activities.

This item amounts to ECU 422 436 636.

⁽¹⁾ 1990.

⁽²⁾ The ECU/FF conversion rate used is ECU 1 = FF 6,91412 (average rate for 1990).

⁽³⁾ The ECU/BFR conversion rate used is ECU 1 = BFR 42,4257 (average rate for 1990).

⁽⁴⁾ Substantial

In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 17 (2) of Regulation (EEC) No 4064/89.

⁽⁵⁾ Including proceeds from the sale of used cars by Europcar and volume discounts granted to Europcar by manufacturers on its purchases.

- (8) The total of the amounts shown in recitals 5, 6 and 7 above represents the aggregate turnover of the relevant undertakings within the meaning of Article 5 of the Regulation and amounts to some ECU 5 240 000 000. The combined aggregate worldwide turnover of all the undertakings concerned is thus more than ECU 5 billion.
- (9) Accor, like CIWLT, has a Community-wide turnover of more than ECU 250 million.
- (10) The parties concerned do not achieve more than two-thirds of their turnover within one and the same Member State.
- (11) Consequently, the concentration has a Community dimension within the meaning of Article 1 (2) of the Regulation.

V. ASSESSMENT PURSUANT TO ARTICLE 2 OF THE REGULATION

- (12) The Commission has examined the tour operator and travel agency, group catering, hotel and commercial catering sectors in which the concentration will lead to an increase in Accor's market share. The vertical and conglomerate relationships that will emerge from the concentration have been taken into account in the analysis of the hotel sector.

A. The tour operator and travel agency sector

- (13) In the tour operator and travel agency sector, the activities of Accor and CIWLT are marginal and they occupy at present a very modest place in the market. Consequently, the Commission has not included these two markets in its decision to open proceedings pursuant to Article 6 (1) (c) of the Regulation. The Commission has no objections concerning the effects of the concentration in these sectors.

B. The group catering sector

- (14) In the group catering sector, the concentration will bring about an increase in market shares for the new entity only in Germany and Spain.

- (15) (a) *The relevant product market*

The relevant product market is the market for contract group catering. By contract group catering the Commission means the provision of catering services outside the home performed by third parties and including principally the provision of prepared, or partly prepared, meals on the premises of public or private sector bodies:

- the provision of such services is carried out in various sectors, including catering at places of work (firms, administrative offices), in the social welfare and health sector (hospitals, old people's homes) and in education (schools, colleges). The Commission agrees with the view taken by Accor and most of the competitors questioned that there are no significant differences between these segments or between the public and private sectors that indicate the existence of distinct markets. The basic know-how is the same, and the majority of the undertakings concerned are engaged in all the above market segments. It may thus be considered that the group catering market as a whole constitutes the relevant product market,
- contrary to Accor's opinion, the relevant market does not include group catering carried out by bodies themselves (direct group catering). The running of a canteen by a firm or an administrative body is not a service offered on the market for the supply of catering services. It does not represent an alternative for customers seeking group catering provided by a third party. This view is in line with the Commission's consistent practice⁽⁸⁾.

- (16) (b) *The relevant geographic market*

Although there are signs of a tendency for the markets to open up, various features point to the conclusion that the group catering market must be regarded as still being national in character:

- the legislative provisions differ from one Member State to another, notably as regards the awarding of contracts in the public sector and as regards social welfare aspects,
- the preferences of client firms are not the same as between Member States with regard to quality of service, charging method, prices, etc.,
- the proportion of contract and in-house group catering and the extent to which group catering is not provided at all differ widely from one Member State to another.

- (17) (c) *Compatibility with the common market*

1. The group catering market in Germany

The supply structure in group catering in Germany is characterized by a large number of small firms or independent contractors (Pächter) who offer their

⁽¹⁾ See in particular the Commission Decision of 23 September 1991 in Case IV/M. 134 (Mannesmann/Boge).

catering services at the regional or local level. Also present on the market are a restricted number of firms that are larger in terms of size and capacity (so called 'catering firms'), which often belong to a foreign group of companies (e.g. ARA, Sodexho, Gardner & Merchant).

The Commission has carried out an investigation among the eight most important German catering firms. As a result, it seems that services offered by the catering firms on the one hand and the small companies and independent contractors on the other hand are to a significant extent regarded as substitutable for the following reasons:

- a not inconsiderable part of the customers served by the catering firms is accounted for by bodies requiring an average number of 100 to 400 meals a day. This demand can be satisfied by the catering firms as well as by the small companies,
- the fact that the company supplying the services is represented 'on-the-spot' constitutes an important element in the choice of the customers. According to the information available to the Commission, there are only a few 'national contracts' according to which the catering firms supplies a catering service to all the companies belonging to the group on a national or European scale,
- finally the independent contractors who are more flexible in terms of price are in effective competition with the catering firms whose fixed cost structures are much higher.

In assessing the position which the new entity will acquire on the group catering market the question of whether the small firms and the independent contractors must be included in the relevant market or whether they form, on the contrary, a distinct market, may be left open. In either case, the Commission considers that the concentration is compatible with the common market.

- (a) If the activities of the small companies and contractors are included, the value of the German contract group catering market may be estimated at ECU 1,2 billion. On such a market the new entity will have a market share of around 20 % which in itself does not indicate a dominant position.
- (b) If one only takes into account the activities of the large catering firms, thus defining the market in a very restrictive way, the combined turnover of the nine leading catering firms amounts to some ECU 450 million ⁽¹⁾. On such a market the new entity will have a market share of about 51 %,

followed by ARA (18 %), Sodexho (11,8 %), Pedus (7,3 %) and a number of firms having a smaller market share (PSG, Apetito, KSG, Gardner & Merchant and Zorn). On such a market, Accor will hold an important market position following the concentration not only in terms of absolute and relative market share, but also in terms of financial power and capacity. Despite this strengthening of Accor's market position, the Commission considers that an overall analysis of the conditions of competition determining the German catering market as required by Article 2 of the Regulation does not indicate that Accor will achieve a scope of action allowing it to behave to an appreciable extent independently of its competitors and its customers. This can be explained by the following reasons:

1. The contract catering market in Germany is still not very developed because of the traditional existence of in-house canteens, but it is growing quite rapidly. The majority of the catering firms consulted by the Commission forecast annual growth of 15 to 20 % in the years ahead;
2. There are no particular legal, technical or economic barriers that would hinder a new competitor from entering the market or that would restrain an actual competitor even of a smaller size from enlarging its activity in the market. On the one hand this has been confirmed by a majority of the catering companies upon inquiry by the Commission and on the other hand it has been demonstrated by the development of the German catering market itself, where a number of foreign companies have entered in the last years either by acquisition of a German company (Sodexho, Eirung & Ott) or by the creation of their own subsidiaries (Gardner & Merchant). These companies presently hold a significant position in the market as shown by the example of ARA and Sodexho who are the number two and number three of the catering firms in Germany;
3. Furthermore there are a number of competitors (ARA, Gardner & Merchant and Sodexho) present in the catering market, whose financial power is comparable to the financial power of the new entity and which have comparable activities in other Member States of the Community. On the other hand, financial power in itself does not seem to constitute a prerequisite for the success of a company in the market concerned. This is

⁽¹⁾ Source: information from catering firms and „Umsatzsteuerstatistik des Statistischen Bundesamtes“ 1988.

shown by the existence of a number of medium-sized companies like Pedus, KSG or Apetito;

4. The competitive behaviour of Accor will in addition partially be influenced by the small companies and the independent contractors which represent a viable alternative for the customers on a regional or local level. There seem to be a large number of customers who take into consideration the companies represented 'on-the-spot' which are at the same time directly available and assure the regional characteristics in their supply. In the light of the existence of this local or regional demand Accor will be obliged to take into consideration the competitive reaction of the independent contractors or small companies. As a result, its scope of action in the market will be restricted;
5. Lastly, the negotiating strength of the catering firms will be limited by the fact that their clientèle is made up essentially of industrial firms, for which catering is only an auxiliary business.

Since the contract group catering is a growing market, since there are no significant barriers to entry, since there are a number of competitors comparable in size and financial power, since there is some competitive influence resulting from the small companies and independent contractors who offer their catering services on a local or regional level, and since the industrial character of the clientèle affects the demand side, the high market share the new entity will achieve through the merger will not lead to a dominant position that would result in effective competition being impeded on the German group catering market.

2. The group catering market in Spain

The Spanish group catering market is comparable to the German market in that it is still not very developed, but growing rapidly. Its supply structure is characterized by the presence of a certain number of small companies with restricted geographic activity and some larger companies (catering firms) who account for about 90 % of the whole group catering market in Spain according to estimates of the industry.

If one only takes into consideration the activities of the large catering firms, the new entity will have a market share of 43 % according to the information available to the Commission. It will be followed by Sodexho (22 %), Husa (15 %), Seruni6n (10,8 %), Vasca (6,2 %) and Osesa (5,4 %). The concentration will therefore result in a high market

share for the new entity in the Spanish market as well as in a strengthening of its financial power and improved access to the customers. Nevertheless, an overall analysis of the conditions of competition in the market shows that Accor will not acquire a dominant position following the concentration as a result of which effective competition would be significantly impeded in the Spanish market. This can be explained in particular by the following reasons:

1. The Spanish market for contract catering is a growing market. According to Accor the share that the contract catering firms in Spain presently hold in this market accounts for 7 % of total group catering including in-house group catering ⁽¹⁾. According to the GIRA-SIC study, the catering market in Spain has experienced annual growth of 10 % from 1980 to 1990. The catering firms present in the Spanish market and asked by the Commission have confirmed that they forecast comparable annual growth in the years ahead;
2. There are no specific legal, technical or economic barriers which would prevent a new competitor from entering the market or which would hinder an actual competitor, even of a small size, from developing its activities in the market. In addition, it is possible for a foreign competitor to enter the market either by acquiring a Spanish company already established in the market or by creating a joint venture with such a company. As to the expansion of actual competitors, the reasons explained under point 1 (b) 2 of this recital referring to the German market hold as well for the Spanish market;
3. Furthermore the supply structure of the group catering market is characterized by the existence of a number of competitors holding significant market shares. The presence of a number of medium-sized companies in terms of volume as well as financial power in the market shows that success in the market does not seem to depend on size or the financial power of the company;
4. Finally, the customers of the catering firms can turn without difficulty to small companies on a regional or local level. These small companies represent a viable alternative, particularly in terms of price, as a result of their greater flexibility and in terms of availability as a result of their local presence. This has been confirmed by the majority of the catering firms which were questioned on the Spanish market;
5. The Commission therefore considers that the concentration will not lead to a dominant position of the new entity as a result of which

⁽¹⁾ In terms of number of meals.

effective competition would be significantly impeded on the Spanish market for group catering.

(18) (d) *Conclusion*

The Commission has not included these markets in its decision to initiate proceedings under Article 6 (1) (c) of the Regulation. The Commission has no objections concerning the effects of the concentration in these markets.

C. The hotel sector

(a) *The decision to initiate proceeding*

- (19) On 16 December 1991, the Commission decided to initiate proceedings pursuant to Article 6 (1) (c) of the Regulation including the hotel sector. The Decision was not followed by any communication pursuant to Article 18 of the Regulation, since the Commission took the view, after thorough investigations carried out as part of the proceedings, that it had no objections to the concentration in the hotel sector.

(b) *The market for hotel services supplied at local level*

- (20) In its above mentioned Decision, the Commission stated that it had examined the effects of the concentration on the market for hotel services supplied at local level by hotels and establishments providing accommodation. Its examination had looked at the hotel sector both generally and separately by category. As regards this market, the Commission had concluded that the concentration did not raise any serious doubts as to its compatibility with the common market.

(c) *Study of hotel chains*

- (21) Following its above mentioned Decision, the Commission carried out detailed investigations on hotel chains. The investigations prompted it to make the following observations:

- the industry distinguishes three broad categories of hotels⁽¹⁾: independent hotels consisting of legally and economically independent undertakings (59 % of the total number of approved hotels, 47 % of rooms); voluntary chains consisting of groups of independent hotels which carry out their marketing, promotion, purchasing etc. under one and the same hotel name (32 % of the total number of approved hotels and 23,7 % of rooms); integrated chains

which operate hotels directly through subsidiaries or indirectly by a franchise or management contract (9 % of the total number of approved hotels and 25,6 % of the total number of rooms),

- as regards supply, chain hotels differ in certain respects from independent hotels:

- chain hotels are based on a network concept involving a large number of establishments, which, as a result of broad geographical coverage meet service requirements that go beyond the purely local framework,

- from the point of view of the product and service supplied, the chain hotel offers a more uniform product from one hotel to another and a more extensive range of services (more extended opening hours, restaurant, reservation network, etc.),

- chain hotels are also based on a policy of operating under a common hotel name and trade mark, a policy which combines the marketing and commercial activities of the various hotels and allows them to become better known to the public at large by means that are inaccessible to a single independent hotel, because of their financial cost. Chain hotels also have their own centralized reservation systems (for example, Resinter for Accor, Holidex for Holiday Inn) or access to international reservation systems (for example, Amadeus, Galileo),

- hotel chains pursue a policy of actively seeking out customers. They approach intermediaries such as tour operators, travel agencies, airlines, computerized reservation systems and major companies. They offer them contracts which provide for special prices, promotional packages and access to related services such as car hire, the aim being to boost their network's clientèle.

Through such a joint policy, chains create aggregate demand, with the performance of one hotel benefiting the other hotels in the same network. Conversely, the number of overnight stays at an independent hotel established in only one site and whose name does not have the familiarity created by a network is entirely dependent on local competition and the habitual frequency of visits by its guests,

- as regards demand:

There are large customers, tour operators, travel agencies and large firms which work primarily with this type of hotel. The transaction cost of

⁽¹⁾ Study report by the national group of hotel chains 'les chaînes hôtelières en France'.

reservations is lower once it forms part of a pre-negotiated framework. Reservations are then made on the basis of pre-arranged formulae and framework agreements governing invoiced prices, terms of payment, commissions and discounts.

The investigations carried out have shown that at least two-thirds of the turnover of integrated chains derives from sales through travel agencies, Tour operators or customers covered by a framework contract.

Lastly, thanks to computerized reservation systems and tour operators, hotel chains have preferential access to international customers.

In the hotel trade, Accor and CIWLT operate mainly the following chains in France: Formule 1, Ibis, Urbis, Novotel, Mercure, Sofitel in the case of Accor; Arcade, Altea and Pullmann in the case of CIWLT.

Accor takes the view that hotel chains do not constitute a distinct market that is separate from the hotel trade as a whole. It is not necessary to determine, within the framework of this Decision, whether the hotel chain market must be regarded as distinct from independent hotels. Similarly, it is not necessary to determine the geographical framework within which competition operates.

The reason for this is that, even taking the narrowest market definition, which would be that of a national hotel chain market, the concentration would result in Accor/CIWLT holding, on the French hotel chain market, a market share of 18,7 % in terms of turnover and 25 % in terms of capacity (on the basis of the number of rooms). Of course, these market shares must be viewed in the light of the fact that Accor is the market leader in France, that the group has extremely wide geographical coverage (hotels in about 200 towns outside the Paris region) and that it is represented in all hotel categories through the large number of hotel names under which it operates.

In addition, Accor will improve its access to customers through its acquisition of CIWLT's travel agency network and will broaden its range of services through the joint control which it will acquire over Europcar (car hire). However, in view of the points set out below, the market shares noted, which are moreover modest in themselves, suggest that the concentration will not give the new entity a dominant position:

- other competing hotel chains with considerable financial strength, such as the Société du Louvre, Holiday Inn (Bass Plc group), Trust

House/Forte, Hilton/Ladbroke, and Marriott operate on the market,

- the French hotel industry is continuing to develop, notably through the establishment of new chain hotels and through the modernization of independent hotels, facilitated by incentives and support measures made available by the public authorities,
- the increasing grouping together of independent hotels into voluntary chains is helping to increase the supply of hotel networks and is giving agencies, tour operators and large customers alternative sources of supply. In addition, independent computerized hotel reservation systems are being developed and increased,
- lastly, tour operators and travel agencies have, because of the volume of their business, considerable negotiating power which the chains must take into account. Tour operators and travel agencies provide services other than hotel services (transport, car hire etc.) which may involve a specific clientèle.

(d) *Conclusion*

- (22) The Commission therefore considers that the concentration does not create or reinforce a dominant position that would result in effective competition being significantly impeded on the hotel market in the common market or a substantial part thereof.

D. The motorway catering sector

On the commercial catering side, only motorway catering is involved. Moreover, in this sector, it is only in France that the concentration will result in an increase in the market share of the new entity.

(a) *The decision to initiate proceedings*

- (23) On 16 December 1991, after having examined the notification, the Commission decided to initiate proceedings pursuant to Article 6 (1) (c) of the Regulation, in particular because it had serious doubts as to the compatibility of the concentration with the common market in the motorway catering sector in France.

(b) *Communication pursuant to Article 18 of the Regulation*

- (24) Following the investigations carried out in respect of a broad range of undertakings and associations, the

Commission sent Accor, on 29 January 1992, and CIWLT, on 7 February 1992, a communication pursuant to Article 18 of the Regulation.

(25) The objections raised in the communication may be summarized as follows:

1. the motorway catering market in France is a market that is distinct from traditional catering. This is due, as far as demand is concerned, to the fact that the clientèle is specific (only motorway users can have access to such a service) and captive (the majority of users do not leave the motorway when they wish to have a meal). As far as supply is concerned, motorway catering is characterized by very wide variations in turnover depending on the days of the year, the very great importance of the related services supplied to customers, the need to remain open seven days a week and to have very long opening hours, and a particularly strict legal framework notably because of the obligations imposed by the government;
2. a distinction must be drawn between three product markets within motorway catering. These are catering in the strict sense (with waiter service or self-service), light meals (snacks and sandwich bars) and sales of food products (through shops, vending machines, picnic facilities and take-aways). This distinction is based, as far as demand is concerned, on five criteria (time required for consumption, nature of the service provided, price, place of consumption and whether the journey is for business or pleasure) and, as far as supply is concerned, on five other criteria (nature of the firms for each type of service, presence of several types of catering at one and the same services area, perception of Accor's competitors, clauses contained in the contract documents, and amount of investment);
3. the relevant geographic market is the French market. Competition takes place essentially at the time when the catering facilities are being established, i.e. at the time of tendering for the right to operate the facilities. For legal and regulatory reasons, the conditions governing establishment, like the conditions governing operation, are uniform throughout the national territory. In addition, the differences between Member States in the organization of motorway networks and in the conditions governing establishment and operation of catering facilities mean that the market is not a Community market. This is confirmed by the fact that the major motorway catering firms operate in several Member States simultaneously to only a limited extent, that foreign firms (with the very

particular exception of CIWLT) hardly operate at all in France and that attempts to establish operations on foreign networks have generally been a failure;

4. the planned concentration would give the new entity a dominant position, with the result that effective competition would be impeded significantly on the markets for catering in the strict sense and for light meals, for the following reasons:
 - the market share of the new entity would be 89 % for catering in the strict sense and 69 % for light meals,
 - in catering in the strict sense, the new entity would be 18 times the size of its nearest competitor; as regards light meals, a very large number of competitors would share 31 % of the market,
 - the market share does not seem likely to diminish appreciably in the near future, notably because of the number of service areas available and the period covered by subconcessions,
 - in catering in the strict sense, the only competitors of the new entity would be a small group — Elitair — whose market share is 5 %, and independent caterers; as regards light meals, the only competitors would be fuel distributing companies, whose competitive strength in this sphere is limited,
 - the financial strength of the new entity would be out of all proportion to that of its competitors,
 - barriers to market entry are very high. They are due to legal and regulatory constraints (no freedom of establishment, long duration of concessions, heavy burden of administrative obligations for small firms), to the fact that motorways are limited in number and that the future development of the network is uncertain, and to the difficulty for foreign firms to penetrate the market,
 - the new entity would see its procurement power increased, would benefit more than in the past from the advantage of operating successive service areas along given stretches of motorway and would have a more

diversified image in the eyes of the companies operating the motorways in France,

- it is not certain that there would be any improvement in technical and economic progress to the benefit of the consumer. Even if this were the case, The Commission considers that there are other possible means of achieving it. At all events, the major obstacle to competition which the concentration would represent on the two markets of catering in the strict sense and light meals would not allow the Commission to alter its conclusion that the new entity would have a dominant position that would impede significantly competition on the relevant markets;

5. if motorway catering were to be regarded as a single product market, which the Commission disputes, the position would not be altered in substance. Even assuming such a market definition, the market share of the new entity is 58 %, and the other points set out in (4) above apply in a similar way. There would thus also be a dominant position resulting in effective competition being impeded significantly on the French market.

(c) *The reply made by Accor and CIWLT to the communication*

- (26) Accor's observations on the Commission's communication were set out in a letter dated 12 February 1992. The objectives of Accor may be classified into two categories: those by which Accor questions the product markets as defined by the Commission, and those by which it contests the view that the concentration would create a dominant position. The Commission's response to Accor's observations in these respects are as follows:

1. Objections relating to market definition

- (a) Accor considers that the figure of 5 % of motorway users that leave the motorway in order to make their purchases appears to be under-estimated. In this respect, the Commission can only repeat that the 5 % figure was indicated by 5 motorway companies (out of 7 that were questioned), and appears to correspond to reality. The Commission notes that Accor provides no evidence capable of raising doubts in this respect.
- (b) Accor regrets that the Commission has not indicated that the type of meal chosen depends on the distance of the clients' journey. In this

respect, the Commission does not know if this criterion is relevant, because none of the third parties questioned raised the issue. If this is the case, Accor's observation reinforces the fact that there really are three relevant product markets.

- (c) Accor indicates that sales of light meals are increasing. The Commission does not contest this fact, but remarks that this evolution may equally be reflected in a reduction of sales in shops or of consumption of products purchased before the journey and outside the motorway, as in a reduction of restaurant purchases *stricto sensu*.

- (d) Accor notes an increase in the market shares of the petrol retailers compared to the stagnation of motorway restaurant companies. In this respect, it is relevant to recall that petrol retailers are not present on the market for catering in the strict sense, which puts this argument into perspective.

- (e) Accor considers that the presence of different service providers on the same service station and the configuration of such service stations facilitates the substitutability between these services. The Commission maintains that the presence of different services on the same service station demonstrates that the requirements of consumers vary. Furthermore, the Commission considers that the importance given by Accor to the second criteria is exaggerated in particular because the consumer is informed by specific motorway signalling (graphic representations).

- (f) Accor considers that the existence of ancillary services common to the three service sectors and the presence of tables in proximity to automatic vending machines indicates substitutability. The Commission notes that the existence of these ancillary services does not in itself put into doubt the distinction to be made between the three product markets resulting from the combination of a number of relevant factors operating at the level of both supply and demand. Furthermore, the second argument put forward which does not correspond to common practice, would not in any event justify an inclusion of catering in the strict sense, even if it would permit the grouping of light meals and the retailing of food-stuffs.

- (g) Accor considers that the price variation between the different services is in fact lower than that indicated by its competitors. In this respect, the Commission notes that Accor admits the

existence of a price variation. The Commission notes, however, that in this respect, the price variation indicated Accor is largely based on the average price of purchases when calculated on a basket of goods, thus ignoring the price difference between individual products.

2. Objections in relation to the creation of a dominant position

- (a) Accor reproaches the Commission for not having taken account of the development plans of the motorway companies. The Commission notes, however, that in relation to the development plans in question, Accor changed its position since the notification (see page 191) and mentions no precise details of the said development plans. Furthermore, the motorway companies envisage approximately 30 new installations in the following five years, a low annual increment (4 %) which does not bring into doubt the Commission's analysis.
- (b) Accor considers that the service station shops have financial resources available that are comparable to those of Accor and CIWLT because they belong to the major petroleum companies. The Commission notes however that contrary to the partners of CIWLT installations, the manager of a service station shop is financially independent in this respect and has no recourse to the support of a group.
- (c) Accor cites certain motorway restaurant companies that have a financial power comparable to its own. The Commission can only remark that none of these groups are, or have ever been, present on the French motorway network.
- (d) Accor notes that the companies already present on the market must resubmit bids for new tender offers. The Commission recognizes this and recalls however that the remaining duration of most of the sub-concessions is long (at least 10 years).
- (e) Accor considers that small undertakings may establish themselves notably through partnership, and notes a growing tendency in this respect. The Commission considers that the existence of partnerships demonstrates that it is difficult for a small undertaking to set up alone. The market share of these small catering companies is in this respect negligible (5 %).
- (f) Accor argues that the concentration will enable training of personnel to be improved and certain installations to be modernized. The Commission observes firstly that the increases in productivity claimed by Accor remain vague, and have not been evaluated. Secondly, supposing that these benefits exist, nothing demonstrates that they will be superior to the running costs created by

the larger size of the new entity. Finally, on the motorway restaurant market which has a weak elastic demand structure, the new undertaking with the dominant position that it will hold will have no interest to pass any assumed gains on to the consumer.

It therefore follows that Accor's observations do not fundamentally alter the conclusions contained in the Commission's communication. After making its observations Accor has, nonetheless, given a certain number of undertakings which are set out under heading VI.

- (27) By letter dated 18 February 1992, CIWLT commented on the Commission's communication. CIWLT's comments may be summarized as follows. The Commission's reply is given in response to each comment:

1. CIWLT considers that the geographical reference market, motorway catering, will soon become a Community-wide market. It bases this view on the proposal for a Council Directive coordinating procedures for the award of public service contracts. The Directive will be applicable to motorway catering. The Commission is not unaware of the existence of the proposal and does of course consider that it must take account of such factors when, within the framework of merger control, it has to determine the geographical size of a reference market. However, it maintains that, in the case in question, the reference market is the French market and that there is no reason to think that this will change in the years ahead.

As CIWLT points out, the Directive has reached the stage of a common position adopted on 25 February 1992 by the Council. *A fortiori*, it is not yet transposed into the national law of the Member States. The Directive will in principle not lay down any provisions on the granting of concessions. The procedures on the award of contracts and the rules governing operation are excluded from the Directive as regards the type of services concerned. In addition, the remaining period left to run for subconcessions (10 years and more) is such that the Directive could not have any impact until after a very long period. As for the number of invitations to tender anticipated for the new establishments in the years ahead, it is out of all proportion to the current number of establishments operated. The Commission therefore believes that the circumstances are completely different from Case IV/M. 102, TNT, cited by CIWLT;

2. CIWLT stresses the current features of its operations. Its establishments are operated in partnership with local caterers, chambers of

commerce or local authorities, which have a minority holding in the capital of the companies. It submits that such partnership, which confers rights on the minority partners, will mean that the Accor and Wagons-Lits networks will continue to be operated separately.

Internal competition between establishments belonging to one and the same group is not a sufficient argument for accepting a dominant position on the part of the group concerned [...] ⁽¹⁾. It is at any rate out of the question that Accor would refrain from intervening in the strategic decisions and/or management of CIWLT's operations. Consequently, CIWLT's argument is not relevant in the Commission's view.

It follows from the above that CIWLT's comments do not fundamentally alter the conclusions contained in the Commission's communication.

(d) Comments of third parties

- (28) Three third parties submitted written comments to the Commission pursuant to Article 18 of the Regulation and Article 15 of Commission Regulation (EEC) No 2367/90 ⁽²⁾.

A motorway company wrote on 6 February 1992 to confirm its previous letters. In one of its previous letters, it had clearly stated that it was opposed to the concentration because of the obstacle to competition which would result.

An association of motorway companies stated, by letter dated 14 February 1992, that the concentration would not, in its view, jeopardize the balance between the two networks, provided that internal competition continued (through the maintenance of separate trade names) and that the system of local partnership was maintained.

A motorway company stated, by letter dated 7 February 1992, that it supported the position of the abovementioned association.

The points made by the latter two third parties have already been analysed by the Commission in point (2) of recital 27. They do not alter the conclusion contained in the Commission's communication.

VI. CHANGES MADE TO THE PLANNED CONCENTRATION

- (29) However, Accor has informed the Commission by letter of 25 February 1992 its willingness to alter certain aspects of the concentration.
- (30) It will undertake, within an agreed period, to sell off CIWLT's motorway catering activities. All of these motorway catering activities of CIWLT are directly or indirectly dependent on a subsidiary of CIWLT, Sogerba.

Accor's commitment relating to the transfer is accompanied by other commitments intended to make the transfer fully effective.

The undertaking given by Accor does not in any way prevent internal growth of its motorway catering activities.

VII. CONSEQUENCES OF THE SALE OF CIWLT'S MOTORWAY CATERING ACTIVITIES ON THE ANALYSIS UNDER THE COMPETITION RULES

- (31) Accor's sale of CIWLT's motorway catering activities represents an important change in the facts of the case and has an influence on the assessment of the concentration on the French motorway catering market.

The sale would mean that Accor would not increase its share of the motorway catering market in France after the concentration. Consequently, the effects of the concentration outlined in the Commission's communication would not arise.

This change in the facts of the proposed concentration prompts the Commission to consider the concentration compatible with the common market, in the light of conditions and obligations within the meaning of the second subparagraph of Article 8 (2) of the Regulation which are the counterpart of the undertakings given by Accor. These conditions and obligations were sent for comment to CIWLT which replied to the Commission on 3 April 1992. On the one hand it disputed the right of Accor to give the sale undertaking because it considered that Accor did not own 100 % of the capital of CIWLT and that it was necessary to take into account the interests of minority shareholders. On the other hand, it requested the imposition of other conditions and obligations than those communicated by the Commission. On the first point it can be said that following the Commission's authorization the operation will allow Accor to exercise control over

⁽¹⁾ The possibility remains for Accor to change the existing internal structure of CIWLT.

⁽²⁾ OJ No L 219, 14. 8. 1990, p. 5

CIWLT and thus to keep the undertaking given to the Commission. On the second point the Commission considers, after examination of the other conditions and obligations proposed by CIWLT, that they are not necessary either to authorize the concentration or to prevent serious harm to CIWLT.

HAS AOPPTED THIS DECISION:

Article 1

The concentration between Accor SA and the Compagnie Internationale des Wagons-Lits et du Tourisme is hereby declared compatible with the common market, subject to the obligation specified in Article 2 and the arrangements for implementing it specified in Article 3.

Article 2

Accor shall sell CIWLT's French motorway catering activities that are directly or indirectly dependent on Sogerba in one or more operations to one or more buyers within a given period.

Article 3

The obligation specified in Article 2 shall be subject to the following practical arrangements:

- (a) no sale shall take place to natural or legal persons that would prevent the above mentioned sale from achieving its full effect (i.e. the removal of any link of any kind between Sogerba and Accor);
- (b) as from the date of notification of this Decision until the date when the sale takes place:
 - there shall be no transfer of activity from Sogerba to Accor,
 - Accor shall ensure that the way in which the motorway catering activity dependent on Sogerba is

operated commercially is not altered, and in particular that the trade names of the restaurants and sales outlets are not changed;

- (c) Accor shall inform the Commission of the measures taken to comply with Article 2 above within six months of the date of notification of this Decision, and subsequently every six months; this obligation to furnish information will end at the date of the transfer, of which the Commission must be informed without delay;

- (d) Accor means:

- the company Accor,
- any company controlled directly or indirectly by Accor or by a natural or legal person controlled directly or indirectly by Accor,
- any person acting on behalf of a company referred to in the two indents above;

- (e) Sogerba means:

- the company Sogerba,
- any company controlled directly or indirectly by Sogerba or by a natural or legal person controlled directly or indirectly by Sogerba,
- any person acting on behalf of a company referred to in the two indents above.

Article 4

This Decision is addressed to:

Accor SA,
2, rue de la Mare-Neuve,
F-91000 Evry.

Done at Brussels, 28 April 1992,

For the Commission

Leon BRITTAN

Vice-President