International Chamber of Commerce
The world business organization

Policy statement

Comments on the EC Green paper on the Review of Merger Regulation 4064/89

Commission on Competition, 16 April 2002

French version

A. General Remarks

ICC supports the European Commission in its endeavour to modernize Euro-pean competition law and policy. The review of the EC Merger Regulation 4064/89 (ECMR) is an important part of this process, and most proposals of the Green Paper on Merger Review have been met with general approval.

We would like to emphasize the paramount importance of adapting European Competition Law to the requirements of globalisation. This is absolutely necessary for increasing the competitiveness of European enterprises on world markets. In particular, greater weight should be given to the dynamics of markets which can change today much more quickly than in the past.

There are two reasons for our positive attitude. Firstly, an overhaul of the ECMR presents an opportunity to improve a central piece of European legislation which has been rightly praised for having worked reasonably well in the years since its adoption but which in the opinion of many practitioners can still be made more effective. We hope that our comments will further this end.

Secondly, ICC expects that the European discussion on merger review will influence international negotiations on the convergence of national merger laws, particularly in the International Competition Network. ICC and BIAC have recommended a "Framework for Best Practices in International Merger Control Procedures". It provides the background against which we have examined the Commission proposals. The quality and the outcome of the European debate should set an example for what will have to be undertaken at a worldwide level.

We have found that the Commission is guided by the same key principles as ICC and BIAC: minimising transaction costs for business through the "one-stop-shop" (the centralized handling of mergers by the Commission), the need for transparency and legal security, the paramount requirement of a speedy procedure and the observance of non-discrimination.
We have also noted that the Commission has not dealt with questions of "due process" in depth but has indicated that suggestions for improvement would be appreciated. We consider this to be a fundamental issue which should be dealt with by the Commission accordingly.

We have one fundamental general comment to offer. Whatever the merger review will bring, the interplay between European law and the national competition laws will present difficulties which exist at present and will increase after enlargement. This relates to decisions on jurisdiction, but also to various aspects of merger control procedure and to the application of substantive standards. It is therefore our urgent recommendation to start work on the harmonisation of national laws as soon as possible. We fully recognize the political implications of this request, but believe that Europe can only play a credible role in the international work on convergence of merger control if it practises at home what it is asking others to do.

B. Jurisdiction

1. The Community Dimension of Mergers, Art. 1 ECMR (21-68)

We share the analysis of the Commission. The amendment of Art. 1 (3) ECMR has failed to achieve its aim of bringing many more mergers which have to be filed in several countries within the

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jurisdiction of the Commission. We also agree that a further change to this provision would not solve this problem but that a simpler and more radical solution mus t be introduced.

It is a reasonable assumption that a merger which could be filed in three EU countries has a dimension and significance which transcends the national level. In such cases the Commission is the proper forum to examine an intended concentration.

As there are still EU countries which do not require mandatory notification it should be sufficient that a merger notification could have been filed with three national competition authorities (NCAs). Whether this is the case will first have to be decided by the parties to the merger. This will sometimes be a very complex exercise as national requirements for filing are by no means similar and can always be changed by national legislators (e.g. market share or asset tests instead of the turnover criterion which we prefer, dissimilar definitions of the notion of concentration). For the "three-country-rule" to succeed, harmonisation would be an indispensable condition.

After their own examination, the parties would have to submit their find-ings on the jurisdiction of at least three countries to the Commission, either together with the merger notification or in a brief separate document in advance of the notification (this latter alternative has been recommended by some). In both instances, the issue of jurisdiction should be settled within a week by informing the NCAs concerned and by giving them the opportunity to react within a given time. If they fail to do so or even if they claim jurisdiction themselves, the jurisdiction of the Commission would be established. However, NCAs would not lose their right to request a referral under Art. 9 ECMR provided its requirements are met.

The "three-country-rule" should be optional. The parties should have the possibility of notifying such mergers with the Commission, but they should also be free to file the merger with the NCAs of the countries concerned, if they so wish.

2. Referral to a Member State, Art. 9 ECMR (69-83)

Referrals to Member States should be avoided as much as possible. They cause delay, create the danger of conflicting decisions and legal uncertainty and burden the parties with extra work and cost. We can see more merit in maintaining the principle of a one-stop-shop than in safeguarding the principle of subsidiarity at the expense of a more efficient and streamlined merger control procedure.

This could be achieved by several measures:

- the time limit for a referral should be two weeks from notification;
- referral only if the merger would lead to dominance in a strictly national market without transborder effects;
- referral only to one country as a merger has a Community dimension if it concerns several countries;
- partial referrals for particular aspects of a merger (e.g. distribution arrangements) should be excluded or at least remain very exceptional;
- transactions which are unlikely to have anti-competitive effects, such as those subject to the simplified procedure, should not be referred;
- the NCA has to accept the file as it comes from the Commission and in particular cannot request translations of docume nts; the language of the case should not be changed.

3. Joint referrals to the Commission, Art. 22 ECMR (84-99)

The Commission rightly states that Art. 22 ECMR is the mirror image of Art. 9 ECMR. Both provisions allow the shifting of a notification from one jurisdiction to another, causing delays and extra work for the parties. For this reason we would like to see Art. 22 ECMR play a very limited role. A joint referral is certainly no means to alleviate the multiple filing problem. As long as national competition laws

remain dissimilar, concerted action among NCAs will create problems (different triggers for notification, different time limits) and joint referrals will be rare exceptions.

4. Concentration, Articles 2 and 3 ECMR (100-158)

The notion of concentration is central to European merger control. Situa-tions can arise where it is doubtful whether the ECMR or whether Articles 81 or 82 of the EU Treaty should be applied. The Commission puts some of them up for discussion:

- minority shareholdings (106-110) can give the shareholder control over a company and will then be subject to merger control. Before this threshold to a controlling interest has been crossed, we do not see the necessity for applying the ECMR.
- strategic alliances (111-113) can take many forms, from a simple cooperation of the parties to the creation of more permanent structures like joint ventures. The application of the ECMR will depend on the details of a particular arrangement. We see no need for change.
- full-function cooperative joint ventures (114-119) are now within the scope of the ECMR. This should not be altered as it gives the parties the possibility of a quick clearance.

However, very few such joint ventures raise concerns of market dominance. Very often, they have to be notified for the only reason that the turnover of the parties exceeds the thresholds of the ECMR while the joint venture itself has no connection with the European Union. Such joint ventures should be exempt from notification, possibly by a "de minimis" rule, or only be subject to a short-form notification.

- partial-function production joint ventures (120-124) can involve the inte-gration of considerable assets. They are often long-term arrangements with structural elements. For these reasons, companies have a substantial interest in dispelling legal doubts about their agreement at a very early stage.

We fear that the new Regulation 17 on the implementation of Articles 81 and 82 of the EU Treaty will not be instrumental in serving this purpose. The Commission is still vehemently opposed to any binding decision affirming that a contract does not violate these articles. We see notification of such joint ventures under the ECMR as a viable alternative to Regulation 17 and recommend a broadening of the meaning of concentration in parallel to the treatment of full-function cooperative joint ventures.

The notification of partial-function joint ventures should be optional. There will be many cases where neither an inf ringement of Articles 81 or 82 nor the creation of a dominant position is likely. Notification would then only be a superfluous and expensive formality.

- It would be appropriate to provide that any concentration resulting from compliance with a ECMR commitment is treated as having a "Community Dimension". At present, if the thresholds are not met there could be parallel investigations by several NCAs. The risk of conflicting decisions would be removed if such concentrations were made fully subject to the ECMR regime.

C. Substantive Issues

1. The Substantive Test (159-169)

At first glance, the creation or strengthening of a dominant market position and the substantial lessening of competition seem to represent very differ-ent tests for assessing mergers. Yet closer analysis shows that the factors which are being taken into account and the theories on which decisions rest are not very far apart. Different results in the same or similar cases seem to be due to different appreciation of the facts rather than to diverging economic theories or legal doctrines.

If SLC vs. Market Dominance is being regarded as a controversy at all, its practical implications are minimal. This is the main reason why we think that Europe should keep its standard which by and large has served its purposes well.

There is another argument against change. Nearly all EU Member States and the candidate countries, adhere to the market dominance test, and it would be unreasonable to switch to the SLC test in Community law. It would make the task of harmonising national competition laws which we advocate strongly much harder.

As to efficiencies (170-172), the US formula seems better suited to take them into account, but there are also precedents in decisions of the European Court of Justice and of the Commission. Under Article 2(2) ECMR a concentration can only be declared incompatible with the Common Market if effective competition would be significantly impeded as a result of market dominance. This is a test which is close to a "lessening of competition" and which should include an efficiency assessment. We urge the Commission to develop a more positive attitude towards efficiencies. Pracititioners should be given more guidance in this matter by way of a Communication or Guidelines.

2. Simplified Procedure (173-179)

After discussing broad principles, the Commission raises a number of points which are not conceptionally fundamental but which nonetheless have an impact on daily practice:

- A simpler form CO, not just for smaller cases, is one of the wishes most often expressed by the business community as it is felt that some of the information demanded is not always entirely relevant for the examination of a particular market situation. Anything which eases the burden of the parties will be greatly welcomed.
- We also urge the Commission to take another look at the procedure for mergers which primarily affect third countries and which produce little or no effect in the European Union. The idea of a block exemption for such cases poses the problems o f self-assessment by the parties. Besides, any exemption would only be granted for a limited time. As this could result in legal uncertainty, it might be better to inform the Commission of such mergers, but this should be done in a manner that is very simple (a "two-pager") and still permits clearance without delay.

D. Procedural Issues

1. Notification: triggering event, electronic filing, completeness (180-202)

The Commission has advanced several ideas on procedural issues with which we find ourselves in agreement:

- Triggering event (180-186): At present, concentrations have to be noti-fied within one week after the conclusion of the agreement, the an-nouncement of a public bid or the acquisition of a controlling interest (Art. 4(1) ECMR). This has worked as a straight jacket on the parties and complicated the planning of parallel notifications, notably in the US and Europe. We recommend the abolition of all triggering events, leaving it to the parties to determine the proper time for a notification. This is the practice in many jurisdictions. As clearance of the merger would be necessary for ending the stand-still obligation, parties would have a very strong incentive to get the deal through very quickly. This would also prevent premature notifications as parties would want to avoid requests for additional information and the risk of the notification being declared incomplete.
- electronic filing (194-196): We express a strong wish that the possibilities of electronic filing of a notification and of informing NCAs of a notification in the same manner be further explored. One alternative could be electronic transmission to the Commission which puts the notification on its website (hard-copy documents would first have to be digitalised) to which NCAs would have secured access. In any case, the parties should not be burdened with the delivery of copies to NCAs.
- completeness of notification (187-202): The right of the Commission to request all the information it regards as necessary for evaluating the effects of a merger is not in dispute, but there has been criticism that the challenge of incompleteness is sometimes used simply to gain time. We suggest that parties should be able to appeal to a neutral party, either the Hearing Officer or a Judge at the Court of First Instance, who could give a quick ruling. An

easier way might be an exclusion date after which the notification is deemed to be complete. Whichever method is chosen, it should be flexible enough to avoid driving the Commission unnecessarily into more Phase 2 proceedings.

- access to file: We propose that parties should have access to the file immediately after the beginning of a Phase 2 proceeding, not just after the Statement of Objections has been issued.
- calculation of time limits (190-193): To avoid confusion the present system of using calendar, not working days, should be retained.

2. Commitment s (203-221)

The Commission favours a "stop-the-clock" provision which would give more time to the parties to propose and to itself to examine commitments in appropriate cases. This is a good idea which has our support:

- The extension should depend on the request of the notifying parties. Third parties should not be able to prolong the procedure against the will of the parties to the merger.
- The extension should only be granted once in each phase of a merger proceeding.
- Parties should be able to request an extension before a notification is declared incomplete as this would allow them to supplement information without having to withdraw the notification and to file it anew.
- The time limit should be fixed. 20 working days in Phase 2 and 10 in Phase 1 would seem reasonable to most, but others opt for much shorter periods fearing that an extension could become the norm rather than an exception.
- Parties should be free to present facts and arguments which demonstrate that a commitment proposed by the Commission is unwarranted.

3. Enforcement (225-226)

The Commission has indicated that some Member States have demanded a review of the enforcement provisions in merger cases. It proposes that íts investigative and prosecutorial powers should be greatly increased in parallel with intended changes of Regulation 17.

All parts of the Green Paper have been received with varying degrees of approval, but this chapter has been universally rejected. The discovery and sanctioning of cartels cannot be compared to the control of concentrations. Cartels are illegal activities which some countries even regard as criminal actions. There is nothing inherently illegal in a merger of two companies which would call for the search of private homes, dawn raids or the interrogation of employees. Rather, the state reserves the right to prohibit certain mergers for reasons of public policy, but nobody has ever thought of fining the parties for attempting such merger in the first place. We think that the Commission is on the wrong track and should not pursue these proposals any further.

4. Filing Fees (227-231)

We see no need for the introduction of filing fees in Europe. Notifying a merger is already a very costly matter for companies. If the present system were upheld, it could continue to be presented as a model to jurisdictions where the receipt of the filing fee seems to be the main reason for exercising merger control.

5. Due process, checks and balances, judicial review (232-253)

The Commission deserves recognition for including these topics in the Green Paper even though they are not strictly within the scope of the ECMR. Unfortunately, the Commission fails to put forward any suggestion for change. Its description of the system today makes two things clear: firstly, any control of the actions of the Merger Task Force is exercised by the Commission itself and therefore an internal matter, and secondly, judicial review can rarely be obtained in time to save a merger which depends on a speedy implementation.

We do not presume to have the remedy which would cure these ills. This would r equire a profound debate. But we hope that enough suggestions will be put forward to stimulate a thorough debate. We would like to contribute two ideas:

- The Hearing Officer could be given a more independent role and his powers be increased (attachment to the President of the Commission, wider mandate to include the scrutiny of substantive issues).
- Parties should have the right to ask the European Court of Justice for a quick substantive review of a Commission decision which would be suspended during this review.

The above are tentative ideas which would have to be worked out in fuller detail, but we would like to emphasize that changes in the directions indicated are thought to be necessary, and indeed to be an improvement of merger control in Europe by most companies and practitioners.

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