International Chamber of Commerce
The world business organization

Comments on the Proposal for a new EC Merger Regulation (COM (2002) 711 final)

Commission on Competition, 13 March 2003

A. General Remarks

ICC supports the European Commission in its endeavour to modernise European competition law and policy. The review of the EC Merger Regulation 4064/89 (ECMR) is an important part of this process, and the majority of the Commission's proposals in the Green Paper on Merger Review which have been incorporated into the ECMR in its proposed new formulation have been met with general approval within ICC.

ICC welcomes the recasting of the new ECMR in a consolida ted text, as opposed to the issuing of an amending Regulation (as happened when the ECMR was amended in 1998). We recommend that this approach is applied in the future more generally and used when any major piece of EC legislation is the subject of subsequent amendments.

B. Jurisdiction

ICC wishes to reemphasize the importance for business - especially in view of the impending enlargement of the European Union - of the 'one-stop-shop' concept, which the Commission recognizes in its proposal as being one of the main assets of the current system. While we note the concerns that the Commission has expressed with respect to the original proposal made in the Green Paper for a '3+ system' and generally welcome its proposals to improve the current system of referrals to the Commission, ICC would urge the Commission to continue working in the longer term towards a system which would reduce even further the risk of multiple filings, and the increased transaction costs which these imply.

1. Criteria for referral back to Member States, Article 9 ECMR

Article 9(2) ECMR lays down the circumstances in which the Member States may request a referral back to them of the whole or part of a notified concentration .

In our view, Article 9(2)(a) ECMR does not need to be amended. Article 9(2)(a) in its present form allows a Member State to request a referral back of whole or part of a notified transaction only where there is a risk that it will lead to the creation or strengthening of a dominant position which will significantly impede competition on a distinct national market. This ensures that a merger must present real competition concerns at a national level before a Member State has the right to intervene.

The new Article 9(2)(a) effectively removes the requirement for a Member State to demonstrate the existence of a serious risk to competition in its territory, since now all that is required is for the transaction to affect competition on a distinct national market. Since the majority of mergers remain national in scope, the reference criteria will be easily fulfilled in virtually every case. This will lead to an unacceptable degree of legal uncertainty for companies notifying their mergers to the Commission and will detract enormously from the spirit of the "one-stop-shop" ECMR regime. The current wording of Article 9(2)(a) should therefore be retained.

In addition, given that the parties will now have a right to make a reasoned submission on the appropriateness of request a referral back to a Member State under Article 4(4), we consider that the parties should also have the right to make a reasoned submission on the appropriateness of a request for a referral made by a Member State under Article 9(2)(a) ECMR. The parties should be allowed to

International Chamber of Commerce
38 Cours Albert 1er, 75008 Paris, France
Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 29 42
E-mail icc@iccwbo.org Website www.iccwbo.org

make such a reasoned submission within 10 working days of being informed by the Commission of a request pursuant to Article 9(2)(a) ECMR.

2. Referral at parties' request, Article 4 ECMR

ICC welcomes the new Articles 4(4) and 4(5) ECMR which will allow the parties at their option, prior to notific ation, to request the Commission to refer back a concentration with a Community dimension to a Member State and also to request the Commission to examine a merger that does not have a Community dimension. However, we consider that the proposed time limits within which such requests are to be handled are too long.

In the case of both a request under Article 4(4) ECMR for a concentration with a Community dimension to be referred back to a Member State and a request under Article 4(5) ECMR for a merger that does not have a Community dimension but which does have "significant cross-border effects" to be examined by the Commission, the proposed time limits effectively add 20 working days (i.e. a full month) to merger timetable. In both cases, Member States have 10 days from receipt of the notification (which must be sent to Member States by the Commission "without delay") to give their views on the parties' request and the Commission then has an additional 10 days to decide whether the referral should go ahead.

ICC considers that these time limits are unacceptably long. In the case of requests under both Article 4(4) and 4(5), the reasoned submission will contain all the information required to enable the Commission and the Member State concerned to decide whether or not to accept the parties' request. The Member State concerned should have 5 working days from the date of the submission (the parties having sent the submission to the Commission and the releant Member State simultaneously) to give its views on the parties' reasoned submission. The Commission should then make its decision on the matter within a further 5 working days, so that the issue as to jurisdiction can be resolved within 10 working days of the parties' request.

3. Referral to Commission (Article 22 ECMR)

We propose a similar reduction in time limits for the examination of requests by Member States for the Commission to take jurisdiction over a merger which does not have a Community dimension.

Under the current proposed timetable, a request by Member States under Article 22 will effectively add 40 to 50 working days (i.e. two to two and a half months) to the merger timetable, depending on the outcome of such a request. Following a national notification, Member States have 20 working days to request that the Comission examine the merger instead, other Member States have a further 20 working days to join in the request and the Commission has an additional 10 working days thereafter to decide whether to accept the referral (unless two or more Member States join the initial request, in which case the merger is automatically referred to the Commission).

In our opinion, these time limits are unacceptably long and should be reduced. The Member State making the initial request should have to do so within 10 working days of receiving the national merger notification. Other Member States should then have to decide within 5 working days whether to join the initial request, with the Commission having an additional 5 working days to decide whether to accept the request. This will ensure that the issue can be resolved within 20 working days of the national merger notification.

Article 22 should also be amended to make it clear that, where a merger is deemed to have a Community dimension (as a result of the operation of Articles 22(3) or 22(4)), no Member State shall apply its national merger legislation, as required by the Commission's exclusive jurisdiction under Article 21(3) ECMR (including during the time the Commission is considering a request under Article 22). We note that the last indent of Article 4(5) already makes this clear by reference to Article 22(5) ECMR.

The current wording of the third indent of Article 22(4) seems to imply that only those Member States having made a request under Article 22 are prevented from applying their national merger rules, but not other Member States who have not joined such a request. As is clear from Article 21(3), this obligation is not to be limited to Member States having made a request under Article 22(1), but applies to all Member States irrespective of whether they were involved in a request under Article 22.

Likewise, the second indent of Article 22(2) seems to limit this "stand still" obligation to the period of 20 working days mentioned in that Article. The second indent of Article 22(2) should therefore be amended to ensure that Member States do not apply their national procedures until the Commission has decided whether to accept the referral pursuant under Article 22(4) or Article 22(3) applies.

C. Substantive Issues

1. Efficiencies, Article 2(1) ECMR

We agree with the Commission that the examination of efficiencies which mergers may generate can be made under the existing Article 2(1) ECMR and that therefore the ECMR does not need to be amended in this regard (Explanatory Memorandum, 59-60). We note that the Commission has set out in detail its proposed approach towards efficiencies in its draft Horizontal Merger Guidelines (Part VI) and refer the Commission to our separate comments on those Guidelines.

2. Unilateral effects, Article 2(2) ECMR

In the proposed new Article 2(2) ECMR, the Commission aims to clarify that the concept of dominance covers both non-collusive and collusive oligopolies whilst at the same time ensuring that the concept of dominance is retained(1). ICC understands the Commission's intention but considers that the current proposed wording for the new Article 2(2) is defective.

In our view, the use of the term "appreciably" is not appropriate in the context of the ECMR. The Court of Justice has interpreted this Community concept in the context of Article 81 EC in such a way that the threshold which the Commission is required to pass before it can intervene in an agreement on the basis of Article 81 EC is low. The appreciability threshold is therefore not appropriate in merger cases. Our suggestion is that the term "substantially" should be used instead.

More broadly, we question the ambit of the new Article 2(2) ECMR as it is currently drafted, which, in our view, is too wide. If, as we understand it, the amendment is designed to fill the so-called unilateral effects "gap" so that it is clear that the ECMR applies to non-collusive oligopolies, the wording in the new Article 2(2) is too wide and appears to us to cover a vast range of situations beyond non-collusive oligopolies. For example, according to Article 2(2), a single company ("one or more undertakings") is deemed to be in a dominant position if it holds the economic power to influence the parameters of competition.

In our view, the proposed Article 2(2) should be amended to ensure that its application is specifically limited to non-collusive oligopolies. Footnote 7 of the draft Horizontal Merger Guidelines provides guidance in this respect, describing an oligopolistic market as a market structure with a limited number of sizeable firms where the behaviour of one firm has an appreciable impact on the overall market conditions so that the firms are interdependent.

Article 2(2) could simply state that two or more undertakings may be in a dominant position within the meaning of Article 2(3) where they comprise a limited number of sizeable firms in a market structure where the behaviour of one of them has a substantial impact on the overall market conditions so that those firms are interdependent.

3. Ancillary restraints, Articles 6 and 8 ECMR

In the Lagardère/Canal+ case(2), the Court of First Instance recently examined the Commission's obligation to review ancillary restraints in the context of examining a concentration.

The case suggests that the Commission is obliged to rule on ancillary restraints described in a notification (paras 80 and 90 of the judgment). The CFI's ruling directly contradicts the Commission's Notice on Ancillary Restraints in which it took the view that it is not obliged to assess ancillary restraints and abandoned its previous practice of individually assessing and formally addressing ancillary restraints in merger decisions.

We do not regard the proposed changes to Recital 17 (which now states that the Commission is not obliged to assess ancillary restraints) and Articles 6(1) and 8(2) ECMR (through the use of the words "be deemed to") as in line with the CFI's judgment in this case. The current provisions relating to ancillary restraints in the ECMR should therefore remain untouched (Explanatory Memorandum, 101-104). Furthermore, the Notice on Ancillary Restraints (para 2) should be redrafted to take account of this judicial development.

D. Procedural Issues

1. Multiple connected transactions, Article 3(4) ECMR

We welcome the Commission's proposal to treat interdependent transactions as a single concentration (Explanatory Memorandum, 42-49).

2. Notification, Article 4 ECMR

We welcome the removal of the one week time limit for the notification of mergers (Explanatory Memorandum, 61-64). Such an amendment will help to ensure that the parties to a transaction can make simultaneous notifications in the EU and elsewhere on the basis of a memorandum of understanding, letter of intent or other agreement to negotiate in good faith. In particul ar, this amendment will help to facilitate the further cooperation between the DOJ/FTC and the Commission contemplated by the US-EU Merger Working Group's Best Practices on Cooperation in Merger Investigations.

As regards notification a public company takeover, the equivalent to a binding agreement in the private transaction context is the announcement of the public bid. What the new ECMR needs to do therefore is permit notification prior to the announcement of a public bid (i.e. at the good faith intention stage). The new wording in Article 4(1) should therefore permit notification where the parties have a good faith intention to conclude an agreement or, in the case of a public bid, by the bidder where the bidder has a good faith intention to make such a bid.

3. Derogation from suspension, Article 7(4) ECMR

We welcome the Commission's intention to define those categories of mergers that will auto-matically be deemed to have been granted a derogation from the obligation to suspend a merger pending clearance. We agree that all cases which qualify for the simplified procedure should automatically be granted a derogation from suspension (Explanatory Memorandum 67-68).

4. Extension of timetable in case of commitments, Article 10(1) and (3) ECMR

We welcome the Commission's proposal to extend automatically the time limits in cases which are the subject of Phase I or Phase II proceedings (Explanatory Memorandum, 78).

5. Fines in respect of witness statements obtained with interviewee's consent, Article 14(1)(b) ECMR

The Merger Green Paper suggested that, to the extent that the adjustments to the Article 81 and 82 enforcement regime contemplated by the Commission's Modernisation Proposal relate to issues of similar importance to the merger control procedure, those adjustments should be made to the ECMR. However, in suggesting that the Commission increase the potential effectiveness of the ECMR's provisions on inspection and introduce into the merger control regime the power to take oral statements, the Commission has failed to explain why these issues are as important in the merger context as they are in Article 81 and 82 cases. ICC sees no need for inspections and oral statements

during the merger control process, which essentially involves the pre-approval of stated commercial activity, as opposed to quasi-criminal investigation into past activities. For the same reason, ICC does not understand why the level of fines and periodic payments need to be increased in the merger context (Explanatory Memorandum Paras 80 - 84).

However, in the event the Commission does proceed with its proposal to bring its powers of enforcement under the EC Merger Regulation in line with its new powers under Regulation 1/2003, we wish to make the following comment.

A new Article 11(7) will give the Commission the power to take witness statements from persons who consent to be interviewed. This corresponds to a similar power under Article 19 of Regulation 1/2003. (This new power to interview persons with their consent is in addition to the Commission's enhanced power to ask for "oral explanations on facts or documents", as contemplated by the new Article 13(e) ECMR and Article 20(2)(e) of Regulation 1/2003). However, in the case of Article 19, there is no power to impose fines in respect of the supply of incorrect or misleading information during such interviews. Given this, in our view, the Commission should not have the ability to impose fines in the context of interviews conducted with the interviewee's consent under Article 11(7) ECMR.

6. Filing Fees (Article 23(1)(e))

We are strongly opposed to the introduction of filing fees which will add further financial burden to the already significant administrative burden and associated costs of making notifications under the ECMR.

In any event, we strongly recommend that the European Commission should monitor and review costs incurred by the European Commission in investigating concentrations before deciding upon the level of fees that will be levied. Its findings should then be published in a report, that can then serve as a basis for the calculation of the level of filing fees that will be imposed. Furthermore, cases dealt under the simplified procedure should be the subject of a reduced filing fee, given that significantly less resources and efforts are put into examining such notifications.

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FOOTNOTE
(1) Explanatory Memorandum, 55-57.
(2) Case T-251/00 Lagardère/Canal+ v. Commission (judgment of 20 November 2002).