Institut Européen
d'Administration Publique

European Institute
of Public Administration

Minutes of the Seminar

The Reform of the EC Merger Regime: A Critical Assessment of the New Rules and Procedures and the Implications for Enforcers and Practitioners

European Institute of Public Administration (EIPA)
Maastricht (NL), 7 - 8 October 2004

Seminar venue:
European Institute of Public Administration
Blue Conference Room (0.18)
O.L. Vrouweplein 22
6211 HE Maastricht (NL)

On Thursday 7 and Friday 8 October 2004, the seminar "The Reform of the EC Merger Regime: A Critical Assessment of the New Rules and Procedures and the Implications for Enforcers and Practitioners" took place at the European Institute of Public Administration in Maastricht as part of its series of EC Competition Law Seminars. With speakers from the European Commission, national competition authorities as well as law and consultancy firms specialising in competition law, the objective of this seminar was to analyse the substantive issues (first day) as well as the jurisdictional and procedural aspects (second day) of the European merger control regime and its interaction with the national level. It offered participants an international forum for exchanging information, first experiences and views on the new regime in force since 1 May 2004.

We are grateful to all speakers for their valuable comments and remarks received in the course of the preparation of the following summary.

Thursday 7 October 2004

DAY 1: SUBSTANTIVE ISSUES OF EC MERGER CONTROL

Welcome and introduction to the seminar
Dr Phedon Nicolaides, Professor, EIPA, Maastricht (NL)
Dr Michael Kekelekis, Project Leader, EIPA, Maastricht (NL)

In his welcoming speech, Professor Nicolaides addressed the growing importance of competition law and especially cooperation in competition proceedings in an enlarged Union of 25 Member States, and commented on EIPA's mission to provide training to practitioners in the Member States in specific fields of European law. Dr Kekelekis informed the participants of the Institute's Competition Law Seminar series (of which this Merger Seminar formed part) that started in 2003 with the aim to provide interactive fora for international experts on specific questions of competition law and state aid.

Overview of the new EC Merger Control Regulation; the evolving concept of dominance in EC merger control
Stephen Ryan, European Commission, DG Competition, Brussels (B)

Stephen Ryan first gave an overview of the new EC Merger Regulation and in the second part of his presentation focused on the evolving concept of dominance in EC merger control. The reform of the old merger control regime was a process foreseen in Regulation 4064/89, and with the enlargement to a Union of 25, it was felt that this would be good opportunity for a major review. The consultations and proposals preceding the actual adoption of the Regulation by the Council had taken place within a largely consensual climate, enabling a relatively quick adoption of the Regulation. With regard to the content of the reform, a central objective was to provide a better allocation of jurisdiction in the light of the subsidiarity principle, while retaining "one-stop-shop".

The new *streamlined referral system* based on simplified criteria for referrals and the possibility for parties to make applications for referral at pre-notification stage [Articles 4 (4) and (5)] has on the whole been designed to represent an efficient system with short, legally binding deadlines. In terms of procedural rules, the new Regulation provides a more flexible framework. In addition, the fact-finding powers of the Commission largely brought in tune with Regulation 1/2003 has come to present a greater incentive for compliance to big businesses. With regard to steps regarding the so-called "soft reform" of merger control, Mr Ryan referred to best practices, such as the improvement of cooperation between the Commission, companies and their advisers and of pre-notification contacts as well as the introduction of triangular meetings. He also pointed to internal reforms aimed at introducing more checks and balances and measures to improve the quality of decision making, including the formalisation of the peer review system in all Phase II cases ("panels") and the creation of the position of Chief Economist.

With regard to the *substantive test*, Mr Ryan recalled that the reform of the substantive criterion aimed at ensuring that the ECMR test could effectively tackle all anti-competitive mergers, ensuring continued legal certainty. Characterising it as the most difficult point in the discussion of the working groups, he qualified the new SIEC test as a more clearly effects-based solution with distinctive European traits, the application of which would be more important than its wording, given that in recent years competition tests around the world had been applied in a broadly convergent manner. The new test will be applied on the basis of a sound economic framework of assessment as set out in the Guidelines for the Assessment of Horizontal Mergers.

A critical assessment of the changes introduced to the substance of the EC merger regime; *Jacques Steenbergen,* Partner, Allen & Overy, Brussels (B)

In his critical assessment on recent developments in the EC merger regime, Jacques Steenbergen first gave an overview of recent developments in merger control before the adoption of Regulation 139/2004 and then discussed the changes introduced by the latter.

The judgments of the *CFI* in the *landmark cases* Schneider, Airtours and Tetra Laval, are generally regarded as major legal defeats for the Commission. In reality, the CFI upheld the economic reasoning of the Commission in these cases with regard to market definitions, prospective analysis, leverage or portfolio theory and oligopolistic dominance as well as the Commission's methods of investigation (Art. 11 questionnaires), rejecting only the inconsistencies in the application of a method it approved of in principle. These cases contained useful features which subsequently made their way into the new Regulation. In the Airtours judgement, a highly useful clarification of the conditions for collective

dominance was given and it was also the first time for the fast-track procedure to be applied before the CFI. Among the issues *not resolved in the recent case law* figures primarily the interpretation of the rules on the assessment of remedies, and the interpretation of the concept of dominance (and its impact on Art. 82).

Regulation 139/2004 took up the developments in the case law described and brought along additional changes to the EC merger regime. With regard to the *substantive test*, the clarification/expansion of the prohibition test could be regarded as a moderate advance, whereas the much bigger step forward (though not, in fact, for merger control itself) was perceived to be its effect of limiting the risk of 'pollution' of the Article 82 enforcement policy. The *flexibility* of time frames and deadlines has received a positive assessment as well. With regard to the *referral mechanism*, it was stressed that the referrals themselves had in fact not been simplified and that those procedures were chiefly designed for more complex cases. The least favourable assessment has been given in relation to the provision of *Art. 10 (4)* as it still does not provide a sanction where the Commission fails to prove its case.

In the discussion following the presentation, access to the fast-track procedure was said to be a good thing in principle that will however not produce miracles.

Use of economics in merger control
Paul Hofer, Economist, NERA Economic Consulting, Brussels (B)

In his presentation Paul Hofer talked about the theme of "mapping markets to models". In discussing horizontal merger assessment he set out the two principal categories of competitive harm: non-coordinated and coordinated effects. Non-coordinated effects are analysed in the framework of "one-shot games", where firms do not take into account how their own actions of today will affect their competitors' behaviour of tomorrow. Mr Hofer explained the two influential models of Bertrand competition, which assumes that firms choose price, and Cournot competition, where firms are assumed to choose quantity after which demand and supply determine the market-clearing price. When applied e.g. to a market with homogenous goods, these models can give very different results: under Bertrand, price falls to marginal cost, whereas under Cournot a mark-up above cost can be sustained. Accordingly, Mr Hofer argued, it is important to choose the right model for a given market. He then widened his discussion to a series of particular types of competition, including differentiated products competition, capacity setting, bidding models, and bargaining games. After discussing how the elimination of a competitor reduces the competitive pressure on the remaining firms in a static context, Mr Hofer went on to analyse the effects of a merger in the dynamic framework of coordinated effects. These rely on repeated interaction, so that competitors have the possibility in the future to "punish" those firms that compete aggressively. Under coordinated effects theories, a merger might lead to a "regime shift" after which competitors adopt a "live-and-let-live" strategy. Mr Hofer set out the necessary conditions for such collusion, like a transition mechanism from low prices to high prices; sufficient market transparency; a punishment mechanism and no disruption by factors like buyer power or entry.

In the second part of his presentation, Mr Hofer briefly analysed real-world markets with reference to these models. In *Carnival/P&O Princess* and *P&O Princess/Royal Caribbean*, he identified price discrimination and a capacity overhang; in *Airtours/First Choice*, he drew attention to the two-stage competitive interaction, consisting of first setting inventories and then competing on price; in *Heinz/Beechnut*, he pointed out the competition for the second slot on supermarket shelves; in *GE/Instrumentarium*, the relevant market was that for patient monitors which were typically procured by tender; in *Lagardère/Vivendi*, the

publishing market was modelled in a differentiated goods framework where individual titles could by themselves have some market power; as regards *Varta/Bosch*, Mr Hofer observed that it might have been the first non-coordinated effects case under European merger control; in *UPM-Kymmene/Haindl* & *Norske Skog/Parenco/Walsum*, capacity coordination was investigated; and in *Sony/BMG*, the Commission investigated concerns over the strengthening of tacit collusion as a result of the merger.

While pointing to their general instructiveness, Mr Hofer conceded that the main problem with the models presented was that, as models, they were dependent on assumptions and their framework of analysis. Especially with regard to coordinated effects, only probabilistic conclusions seem possible.

In the discussion, a participant expressed the view that in industrial economics there were four main market imperfections – namely few companies, incomplete information, heterogeneity of products and entry barriers – and that these made it very difficult to develop a single overarching economic theory in competition analysis.

Efficiency considerations in the assessment of mergers

Vincent Verouden, Chief Economist Team, DG Competition, European Commission, Brussels (B)

In his presentation on efficiency considerations in EC merger control, Vincent Verouden identified the scope of the traditional "dominance" test and the role of efficiencies in merger analysis as the two central substantive issues underlying the recent reform of the merger control system. While in previous times, efficiencies had not received much emphasis in EC merger control, it had become clear in the review process that efficiencies should be given more explicit consideration, as they could bring more competition to the market. While there was no need to change Art. 2 of the ECMR for the purpose of analysing efficiencies, the new wording of this provision nevertheless expresses more clearly that the test in Art. 2 of the new ECMR is an effects-based competition test, a fact also stressed in recital 29. On the whole, the approach adopted towards efficiencies in the guidelines is open but cautious, the focus lying on the "ability of and the incentive for the merged entity to act pro-competitively for the benefit of consumers", which means that efficiencies matter to the extent that they have an effect on competition. The consumer welfare objective is derived from Art. 2 (1) (b) ECMR. The new EU Merger Guidelines provide for three conditions to be taken into account with regard to efficiencies, namely benefit to consumers, merger specificity and verifiability. On the whole, efficiency claims are a challenging aspect of merger control for the parties as well as for the Commission, especially as the latter has to justify all decisions, including clearance decisions.

In the discussion, questions were discussed as to what would happen when efficiencies were not realised, and to what extent efficiencies and, more generally, the effects on competition could or had to be quantified. Regarding this latter point, Verouden indicated that the precise quantification of the overall competitive effect should not be seen as a *sine qua non* for the consideration of efficiencies. He illustrated this by describing the Commission's approach in a recent case.

Friday 8 October 2004

JURISDICTIONAL AND PROCEDURAL ISSUES OF MERGER CONTROL

The referral system under the new EC Merger Regulation and the Notice on Case Allocation

Mario Todino, European Commission, DG Competition, Brussels (B)

In his presentation on the referral system, Mario Todino dealt with procedural aspects of the new mechanism and criteria of case allocation according to the relevant Commission notice.

The *new streamlined referral system* allows for application also at pre-notification stage, containing simplified criteria for referrals and the tests applicable for them. In both Art. 4(4) and Art. 4(5) the parties may make a request to the Commission for early referral. The request is then transferred to the Network and the Member States have 15 working days to make their decision. In (4) cases the Commission has another 10 working days to decide whether a case should be transferred to the competition authority of the state where the parties believe their merger "may significantly affect competition". If a full referral is made, the parties can proceed with national notification only, a Community notification not being necessary. For cases not having a "Community dimension" but being nonetheless reviewable in at least three Member States, the case can, provided all competent Member States have agreed on it, be dealt with under the exclusive jurisdiction of the Commission. However, unanimity amongst the Member States is a requirement for this referral to be permissible, which implies that the Member States have considerable power in Art. 4(5) cases. In Art. 9 and Art. 22, which were already in place in the old ECMR, only a few adaptations were made. The *advantages* of the streamlined referral system were described as follows: the new regime respects the principle of subsidiarity, caters for precision when it comes to making sure that the right authority deals with the right case, enhances efficiency by guaranteeing that decisions are taken within short, binding deadlines, and, where parties have so requested, that decisions are taken even at pre-notification level.

The *Commission's Case Allocation Notice* is based on the principle of subsidiarity, one-stop-shop and legal certainty, which are guiding principles for the adequate assessment of merger cases. It contains legal requirements for referrals and additional factors to be taken into account when a request for referral is envisaged under Art. 4(4) and Art. 4(5).

In the discussion, it was stressed that there was an interesting pattern towards Art. 4(5) referrals. National vetoes by Member States have thus far only occurred in two out of 10 cases. Those cases, however, were not cases that could be regarded as abuse of Member States' veto power. In the discussion, the Member States' power in Art. 4(5) cases was stressed, as well as the issue of the challengeability of a Member State's veto decision, where different systems among Member States seem to apply.

National views on referral mechanisms under the new EC Merger Regulation

Gabriela Esteruelas Berlinguer, Expert, Merger Control Department, Netherlands Competition Authority, The Hague (NL)

Ms Gabriela Esteruelas Berlinguer presented the view of the Netherlands Competition Authority on the referral system of the new EC Merger Control Regulation. While she started with the critical observation that the new system with its different tests and procedures was rather complicated, she felt that certain aspects of the referral system had improved, for example the joint referral mechanism under Art. 22. She also welcomed the

introduction of the possibility to refer cases at a pre-notification stage and the increased transparency that had been achieved with the publication of the Commission's Notice on Case Allocation.

As for experiences with the new system, only one referral had so far occurred in the Netherlands under Art. 4(5). When it comes to referrals, in the Dutch system, the Competition Authority (in particular the Merger Control Department) has an advisory role, whereas the definite decision on the referral of a merger is taken by the Minister of Economic Affairs. Early contacts between firms and the Authority are encouraged with a view to meeting the deadline of 15 working days that is effectively divided between the Authority and the Ministry.

In the *Van Drie/Schils Case*, the Authority agreed with the referral request, given the clear cross-border effects of the proposed merger. The final decision was then made even before the end of the 15-day period, which is something both the Authority and the Ministry will try to achieve where possible. As a result of the introduction of Art. 4(5), fewer referrals under Art. 22 would be expected. With regard to Art. 22, the wording of which has improved, Ms Berlinguer felt that the question of whether the so-called Dutch clause could be invoked in cases of concentrations not falling under the Dutch merger regime was still open. As for Art. 4(4), very few cases are expected to be subject to this referral procedure mainly due to its slightly self-incriminatory nature. Art. 9 seems to have undergone no major changes. Regarding the use of Articles 9 and 22, the Netherlands Competition Authority has published some guidance in the so-called "Rules of Play for Merger Cases (*Spelregels bij Concentratiezaken*)" which can be found on its web site.

To sum up, at the time of the presentation Art. 4(5) seemed to be the 'winner' of the recent reform project. For a more detailed assessment, however, one might well want to wait for five years for the new system to develop.

Edith Mueller, Head of Section, German and European Merger Control Law, *Bundeskartellamt*, Bonn (D)

In her presentation, Edith Mueller described the operation of the referral mechanisms of the ECMR from a German perspective. While she welcomed the decentralisation of the right to initiate a request for referral as well as the changes introduced in Artt. 9 and 22, she criticised the fact that in the provisions for referral no identical material criterion had been included, that partial referrals according to Art. 4(5) were not possible and that the new referral system did not look simple at first glance.

As a consequence of numerous material and procedural changes that have led to increased interdependence between competition authorities across Europe, communication between these authorities is an increasingly important feature, especially with regard to Art. 4(5) referrals. Communication also takes place with other Member States outside the EEA and with the Commission. A number of guidelines set out principles for the application of the merger rules in various fields. As a crucial issue, Ms Mueller explained some possible reasons for disagreement with a referral according to Art. 4(5). With Art. 22 referrals, the new clarity in the time limits seem to constitute a positive development, whereas it is less clear what is exactly meant by the words "... if no notification is required ..." and "... otherwise made known ...". As for Art. 9 referrals, not much appears to have changed, and it is as yet unclear whether the change in the material criterion will have any real impact in practice. Pre-notification referrals to a Member State according to Art. 4(4) seem to be an option in practice when otherwise an Art. 9 referral would be requested for either a part or the whole of the case. Evidentially unproblematic mergers, can be dealt with by the *Bundeskartellamt* very quickly, given its lean hierarchy and the short deadlines applicable.

On the whole, with this new regime as with any new regime, a few questions remain open. However, cooperation has already improved immeasurably and the new regime does provide incentives to further strengthen this kind of cooperation.

Teresa Krajewska, Head of ECMR Branch, OFT, London (UK)

Teresa Krajewska presented the UK view on the new referral system of the ECMR, tracing the development of the UK approach to referrals to and from the Commission since 2001 by reference to some case examples. The UK as the world's fourth largest economy (in terms of GDP) and in view of its open economy, saw a large number of mergers concerning UK-based businesses notified at the national level. Conversely, many mergers notified to the European Commission concerned markets that were either national or UK-centric.

The UK approach had developed upon the principle of the "best placed authority" to consider a merger. By 2001, it had become clear that it would be preferable if cases moved more easily between the EC and NCAs and for that purpose, the concept of "best placed authority" dealing with investigation and remedies needed to be developed. This should be balanced against considerations such as reducing where possible the burden of multiple notifications and the importance of cooperation between European competition authorities.

The UK position at Council negotiations on the ECMR was chiefly oriented towards the principles of "best placed authority", simplification and enhanced effectiveness of referral mechanisms and ensuring that adequate time would be available for Member States in the referral process. Unlike the Netherlands, the UK was, at proposal stage, not in favour of the Commission's "three-plus" referral proposal.

Like Ms Mueller, Ms Krajewska discussed the somewhat differing wording of the new ECMR referral provisions. On the basis of experience so far, she observed that Art. 4(5) was working quite well, while being more cautious with regard to predicting the future use of Articles 4(4), 9 and 22. Time and practice might overcome the uncertainty as to the meaning of the wording of the new provisions. In addition to the new jurisdictional provisions of the ECMR, cooperation between the EC and NCAs is expected to continue to grow and develop

Panel Session

Chairman: *Axel Schulz, Senior Associate, White & Case, Brussels (B)*
Panellists: *Mario Todino, Gabriela Esteruelas Berlinguer, Edith Mueller*

This panel session dealt with two subjects: a) "EC merger procedures – efficiency, communication with notifying and third parties and the protection of procedural rights"; and b) "How should NCAs conduct merger investigations under national law and what lessons can be drawn from the Commission's procedures?"

Everyone agreed that the requirement to notify based on turnover thresholds in the EU worked quite well, in particular by providing legal certainty for undertakings. Stringent filing requirements in other merger control systems entail considerable costs, even for smaller undertakings. The fact that a merger might be permissible in five countries without remedies, while a sixth country would require remedies before clearance, should not be viewed as a flaw in the system, but as the natural outcome of particular circumstances in the sixth country. However, so far there have been no conflicting decisions under the new system. Cooperation seems to be a valuable safeguard in this context, and all panellists agreed that trust-building in working groups acts as an important basis for effective cooperation.

The dissolution of the Commission's Merger Task Force and the reorganisation of case-handling by allocating cases to more specialised sectoral units does not seem to have had a negative impact so far. The new Chief Economist and improved peer review offer additional guarantees of security. Similar systems exist in Member States' NCAs.

In general, European NCAs seem to be easily approachable, which is of particular importance for businesses. However, their methods of dealing with cases vary according to the size of the authority and the jurisdictional framework within which it is established

Winfried Poecherstorfer
Research Fellow
EIPA