EUROPEAN MERGER CONTROL

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The impact of Schneider / Legrand and Tetra Laval / Sidel on the Merger Reform Process

Part 1. Introduction

After over ten years of successful application of the Merger Regulation[182], the last 16 months have proved a far more controversial and challenging time for the Commission than the years that preceded them. In 2001, the Commission exercised its powers to block an unprecedented number of cases, although this should not be taken out of context. In 2001, there were 335 cases notified to the Commission of which 5 were prohibited. Furthermore, the Commission's prohibitions in GE / Honeywell[183], Schneider / Legrand[184] and Sidel/Tetra Laval[185] provoked extensive comment on and criticism of the role of the Commission and its current practices. GE / Honeywell in particular raised particularly sensitive issues, given that the Commission's prohibition related to an "all-American" merger which had been cleared by the US authorities.

However, the public comment which these decisions attracted pales into insignificance when compared with the effect which the Court of First Instance ("CFI") has had on the Commission's image in the last 5 months. The effect of the CFI's unprecedented decision on 6th June, 2002 in Airtours has been well documented. Its quashing of the Commission's decision and the stinging judgement that it delivered raised significant questions about the way in which the Commission treats major merger evaluations, both in terms of the standard of proof that the Commission uses to justify its decisions and the level of economic analysis which forms the bedrock of the Commission's decisions.

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182 Council Regulation (EEC) No.4064/89 of 21/12/1989 on the control of concentrations between undertakings.

183 Case Nº. COMP/M.2220

184 Case Nº. COMP/M.2283.

185 Case Nº. COMP/M.2416.

However, the Airtours judgement has proved not to be a one-off. At the time the decision was delivered, the CFI was in the process of examining two further merger prohibitions by the Commission which had been issued in 2001: that of Tetra Laval / Sidel[186] and Schneider / Legrand[187]. Both cases had been appealed to the CFI and were benefiting from the expedited, fast-track procedure. Decisions were due in the latter half of 2002 and were eagerly awaited not just by the parties themselves, but also by the wider business and legal communities.

The anticipation did not reduce the impact of the two judgements handed down in the same week in October. The combined effect of Airtours, Schneider / Legrand and Tetra Laval / Sidel meant that inactivity on the part of the Commission was not an option. It had to respond.

In many respects, however, the decisions of the Court have been, in the Commissioner's own words, "timely". A review of the Merger Regulation had already begun in December 2001 with the publication of the Commission's Green Paper calling for comments on reform proposals in a number of areas covering jurisdiction, substantive review and operational issues. The Green Paper stemmed from the Commission obligation to review periodically the rules and procedures governing merger treatment under EU law. The last amendments in 1997 resulted in a second set of turnover thresholds designed to catch cases involving multiple national filings. Nevertheless, in the context of the Commission's prohibitions in 2001 and the lively debates which those decisions had sparked, the Green Paper prompted a highly dynamic interchange of views between the Commission and respondents to the proposals for reform.

What became apparent towards the end of October 2002 was that the proposals envisaged by the Green Paper were simply not sufficient to answer the criticisms that had been levelled at the Commission by the CFI in its three judgements. Schneider was particularly damning in this respect, with the CFI declaring unreservedly that:

> "The Commission's economic analysis is vitiated by errors and omissions which deprive it of probative value."

[186] Case Nº. COMP/M.2416

[187] Case Nº. COMP/M.2283

As such, the Commission has been forced to re-think the extent and shape of the reforms which it proposed to adopt in the Green Paper, taking into account the particular criticisms which were articulated by the Court in its judgements.

This paper seeks to highlight the ways in which the reform proposals have been changed and strengthened as a result of Schneider / Legrand and Tetra Laval / Sidel. To do this, however, it is important first to examine the Green Paper which the Commission had already proposed, for the argument is frequently put that the CFI's judgements are a vindication of the reform proposals which have already been proposed by the Commission. The Green Paper proposals, including comments made on them by respondents and, more recently, by the Commission itself, are discussed in Part 2.

Part 3, looks briefly at the decisions of the court in Schneider / Legrand and Tetra Laval / Sidel, while Part 4 focuses on recent reform proposals by Commissioner Monti and Philip Lowe, the new head of the Competition Directorate General (DG-COMP), which seek to strengthen the Commission's reform process to a greater extent than originally suggested in the Green Paper. This includes an examination of an area of reform outside the Commission's own competence that has become of major importance in the light of the CFI judgements – viz. the effectiveness of Community judicial review and the possible reforms which may be needed in that area.

Part 2. The Green Paper on the Review of the Merger Regulation

According to the Commission, the underlying objective of the Green Paper reform process, launched on 11th December last year, is to meet the challenges posed by global mergers, monetary union, market integration, enlargement and the need to co-operate with other jurisdictions. The Commission believes that the reform should be built on the principles underlying the Merger Regulation, i.e. the need to ensure effective, efficient, fair and transparent control of concentrations at the most appropriate level. The official period for public comment on the Commission's Green Paper closed at the end of March and the Commission has published a summary of the 120 written submissions received on the Green Paper (a significant number of which are from US industry, law firms and public and non-public bodies). The Commissioner has expressed the recently that he hopes to be able to present a package of reforms, including proposed amendments to the Merger Regulation, before the end of 2002.

This review complements the Commission's assessment of Regulation 17 on the implementation of the antitrust rules in Articles 81 and 82 of the EC Treaty, and it is intended that the two review exercises be seen as part of a comprehensive modernisation of the European legislative framework in the field of competition.

The Green Paper addresses issues of jurisdiction, substance and procedure and, in certain areas, it presents concrete proposals. The principal suggestions made by the Commission in its Green Paper include:

- an extension of the Commission's competence to transactions which would otherwise require notification to three or more national competition authorities;
- a simplification of the mechanism whereby the Commission can refer cases to national competition authorities and the introduction of an option for the Commission to refer cases on its own initiative; and
- a "stop the clock" provision in respect of the submission of commitments, in both Phase I and Phase II of a notification.

The Green Paper also launched a debate on the merits of the substantive competition test enshrined in the Merger Regulation, namely that a merger should not be allowed to proceed if it is likely to create or reinforce market dominance. Specifically, the Green Paper invited comment on how the effectiveness of this test compares with the "substantial lessening of competition test" used in the US and other jurisdictions. In addition, the Green Paper invited views on the proper role and scope of merger-specific efficiencies. Although some jurisdictions, such as the US, explicitly provide for these to be taken into account in the context of merger control, the scope for taking them into account under the Merger Regulation has not been fully developed.

JURISDICTION

Thresholds

One of the main proposals presented by the Commission in its Green Paper relates to the perceived failings of the Merger Regulation's supplementary turnover thresholds. The supplementary turnover thresholds

were introduced in 1997 in an attempt to catch large pan-European transactions that fell just beneath the Merger Regulation's original thresholds, and which often triggered obligations under multiple and diverse national Member State merger control laws. Since their introduction, however, the supplementary thresholds have proved to be somewhat complex to apply and, in practice, have caught relatively few of the cross-border transactions they were intended to catch. In 2000, for example, only 20 cases were notified to the Commission under the supplementary thresholds, compared to 75 transactions notified to three or more Member States. This problem will be exacerbated with enlargement and the resulting increase in the number of national merger control regimes within the Community.

The Green Paper therefore proposed a far simpler test (the "3+ rule"): the Commission should have automatic jurisdiction over transactions that would otherwise have to be notified under three or more national regimes. The concept behind the proposal is not new. The same proposal was originally presented in the Commission's January 1996 Green Paper, but was rejected in favour of the supplementary thresholds. The main criticisms levelled against the proposal in 1996 related to disparities in Member States' laws in respect of, for example, the definition of a concentration and in relation to whether the notification requirement was obligatory or voluntary. Such disparities were found not only to raise issues of legal certainty, but also to make the Commission's assessment of whether national rules applied to a certain case overly complex. Since then, however, many of the Member States and accession countries have adopted merger control regimes based on a system similar to that of the Merger Regulation or have amended their existing merger control regimes, thus reducing to some extent the difficulties associated with applying the proposed system that were identified in 1996.

The Commission's main argument in support of its proposed revision was that it is often best placed to deal with cases which generate competition concerns across various Member States, particularly since such cases might result in significant competitive repercussions in other parts of the Community (e.g. by impeding the entry of competitors from other Member States into the areas concerned). The Green Paper observed that a number of markets within the EU are in a transitional state, citing as an example the Pirelli-BICC[188] case, in which it was found that deregulation and harmonisation

[188] M.1882, decision of 19th July, 2000.

had led to a widening of the relevant markets from national to EEA-wide. The Commission considered, given that it is able to consider fully all effects at both national and European levels, that it was particularly well placed to deal with cases where such a transition is occurring.

Moreover, the Commission concluded that Community competence in such cases is in line with the principle of subsidiarity, according to which action should be taken at the most appropriate level of jurisdiction in view of the objectives to be attained and the means available to the Community and Member States. Although the Commission acknowledged and supported the recent initiative by the competition authorities of Member States for closer co-operation in dealing with merger cases notified in more than one country, it did not believe that such co-operation could be viewed as a substitute for "one-stop shop" control of mergers with cross-border effects.

In its response to the Green Paper, industry in particular has been highly supportive of the "one-stop shop", but respondents also appreciated the merit of having a system that is sufficiently flexible to ensure that cases are dealt with at the appropriate level. The UK House of Lords supports a change to the "3+ test".[189] Allen & Overy submitted to the Commission that a "2+ test" should be introduced in combination with accelerated harmonisation of the various merger control regimes of the Member States.

The Commission's proposal envisaged a system where, once its competence on the basis of the multiple notification requirements is established, its powers and the procedure to be adopted would be the same as for cases falling within Article 1(2) (i.e. under the primary turnover thresholds), save that it would also be necessary to determine whether the concentration in question meets the notification thresholds of at least three Member States. The Commission's initial view was that the relevant Member States should confirm the parties' interpretation of the national thresholds, as any alternative approach would mean that it would have to interpret national merger laws, and since national merger laws are not yet fully harmonised, the Commission and Member States could have divergent interpretations of national laws. The Member States concerned would then be required to confirm the parties' analysis to the Commission within a relatively short period of time - the Commission proposed one or two weeks.

[189] Session 2001-20002, 32nd Report of the Select Committee on the European Union, HL Paper 165.

It suggested that the system could take the form of a non-opposition procedure, whereby the Commission's competence would be established if the Member States concerned did not oppose the analysis of the parties within the period.

It was argued in 1996 that it may be difficult to determine quickly whether a concentration meets the national notification thresholds, especially in those Member States where criteria other than turnover are used. This concern was re-emphasised by the responses to the current Green Paper. For instance, in the case of market share thresholds, it is necessary to establish a suitable market definition or market definitions, which is no easy task and often goes to the heart of the substantive assessment of a transaction. In response to this, the Commission observes that the application of national thresholds would have to be done even if the Merger Regulation did not apply, and notes that a smaller number of Member States apply non-turnover-based criteria than was the case in 1996. However, it should be noted that Greece, Portugal and Spain all still have regimes that have a threshold based on market share[190]. To the extent that a legal certainty issue were to arise, the Commission suggested that the requirement set out in Article 4(1) of the Merger Regulation to notify within one week of the conclusion of an agreement, the announcement of a bid or the acquisition of a controlling interest could be made inapplicable to this category of cases.

An issue not addressed by the Commission in its Green Paper is where Member State regimes catch mergers which have little or no effect in their own territory. The Czech Republic (an accession country) and Ireland, for instance, have thresholds based in part on worldwide turnover, and in practice catch many transactions which have little or no effect in their respective territories. In addition, the Green Paper did not address the problem of jurisdictions where there is no mandatory notification requirement, like the UK. Some respondents pointed out that these factors would also have the effect of importing uncertainty into the Community's jurisdictional criteria.

Another issue not addressed was whether the Commission would be capable of dealing with the increase of notifications that the proposal presented in the Green Paper would be likely to generate. The Commission's Merger Task Force, or MTF, is already often perceived as being under-resourced. The Commission's proposal to introduce an automatic Community

[190] The issue of jurisdiction is also complex in the UK where notification is voluntary and where a market share test forms part of the jurisdictional analysis.

competence over cases subject to filing requirements in three or more Member States would have increased the number of mergers notified to the Commission in 2000 from 345 to approximately 420. On these conservative figures, it is clear that if the proposed reform is to be implemented and effective, the Commission's staffing resources would clearly need to be reviewed and increased accordingly.

In addition to proposing a system whereby notification to the Commission would be based upon the fact that a transaction is subject to multiple national filing requirements in EU Member States, the Commission continued in its Green Paper to contemplate the removal of turnover thresholds altogether. However, further harmonisation of national merger control thresholds is a key pre-condition to the functionality of such a system. The Commission suggested that a more systematic approach to the setting of notification thresholds in national merger laws could allow the thresholds to serve as direct measurements of the cross-border impact of concentrations. In addition, the Commission was of the view that it would be useful to strengthen the existing degree of alignment of merger control rules within the Community, for example, concerning the concept of a concentration and important parts of the procedural framework, thereby promoting the effective and transparent protection of competition and the maintenance of a level playing field. The Commission believed that such an environment would lead to a more seamless network of competition authorities, where, ultimately, the Commission and one or more national authorities could share the task of assessing a concentration on global to local markets.

The Commission's Recent Response in relation to Thresholds

In his initial response to the comments received on the Green Paper, Mario Monti considered that the comments validate the need to resolve, as a matter of priority, the problem of multiple filings whilst retaining a flexible case allocation system.

However, speaking at the International Bar Association conference in Brussels in November, 2002, Götz Drauz appeared to reject the proposal on the basis that the feedback in relation to mandatory jurisdiction if notification were required in three or more jurisdictions had been negative. Specifically, he pointed to the fact that the "3+" notification system was of necessity somewhat crude, and would not necessarily catch all merger cases whether there was a genuine cross-border interest such that the Commission

should have jurisdiction. The other main problem with the proposal was its heavy dependence on the jurisdictional laws of the Member States. The operation of these tests – which are currently unharmonised, despite claims of convergence – would lead to the creation of legal uncertainty, which is intrinsically undesirable both for the Commission and, more importantly, for prospective merging parties.

Instead of the adoption of a compulsory "3+" system to determine Community jurisdiction, Drauz indicated that more favourable options were a voluntary "3+" test, or the determination of jurisdiction on a case by case re-allocation. The latter option would involve the streamlining of the referral mechanisms found in Articles 9 and 22, which is dealt with below.

Referrals to Member States

Under Article 9 of the Merger Regulation, the Commission can refer transactions that fall under the Merger Regulation to relevant Member State competition authorities for investigation. In June 2000, the Commission issued a report on this referral process that examined referral requests over the last five years. The time schedule, the criteria for referring a case and the problems caused by partial referrals were identified as aspects that could benefit from amendment. In addition, a recurrent view expressed by respondents was that the assessment of concentrations at national level could be susceptible to political influence depending upon the degree of maturity of the relevant national competition law, the ownership regime of the undertakings concerned and the political or social importance of the relevant sector for the Member State in question.

As a result of the Commission's review, the Green Paper proposed a simplification of the requirement for the submission of a referral request, reducing the need for specific investigation by a national authority into the likely effects of a concentration before making such a request. The Green Paper envisaged maintaining Article 9(2)(b) but facilitating its use, disjoining the referral request from evidence of a threat of creation or strengthening of dominance. A substantiated claim of effect on competition in a distinct market within the Member State is considered by the Commission to be sufficient. Further, the Commission did not envisage that the geographic scope of the relevant markets would need to be defined, provided that the effects do not extend beyond the Member State's borders. The Commission also considered it possible to limit the time needed for internal consultation within the

administrative structure of the Member State, given the fact that a request would no longer represent a preliminary conclusion that the transaction is likely to give rise to anti-competitive effects. Consequently, the Green Paper proposed that the three-week period for a referral request could be shortened to two weeks. However, in their responses Member States did not generally endorse the reduction of time proposed.

Additionally, the Green Paper proposed the possibility that the Commission could refer such cases on its own initiative. The Commission's option to do so would basically mirror the current option for Member States to refer appropriate cases to the Commission under Article 22 of the Merger Regulation. A two-week period was proposed for the Commission's exercise of an initiative to refer.

In respect of referred cases, the Commission also suggested harmonising the timeframe in which a final decision is taken, by clarifying the current rule in Article 9(6), which provides that the results of the Member State's examination of a concentration must be published within four months of the Commission's referral, so that a decision of a definitive nature comparable to an Article 8 decision under the Merger Regulation would have to be adopted within the same timeframe as would have applied for the Commission. Alternatively, the Commission proposed that the Merger Regulation could provide that any national authority dealing with a case that has been referred to it should do so under the procedure indicated in the Merger Regulation. The Commission acknowledged that either amendment would require substantial amendments to national merger control procedures.

The Commission's recent thinking in respect of the referrals is that the referral proposals should aim to produce a mirroring between referrals back to Member States and referrals up to the Commission. These developments are dealt with in section C, below.

Joint Referrals to the Commission

Article 22(3) allows two or more Member States to make joint referrals to the Commission where they feel that the Commission is better placed to assess a transaction. In its Green Paper, the Commission observed that it has not, hitherto, received any such request (although since the Green Paper has been published, there have been two instances where the Commission has accepted jurisdiction following a joint request from two or more Member States[191]). The Commission set out what it perceived to be the procedural

weaknesses of Article 22(3) (such as the pre-condition of timely contacts between the various competition authorities not being met), but concluded that in order to make Article 22(3) operational as a generally applicable corrective mechanism to the multiple filing problem, the system would be likely to require amendment of more than just the Merger Regulation. In any event, if the threshold proposals set out in the Green Paper (and discussed above) are put into effect, cases which involve multiple notification to Member States would automatically need to be notified to the Commission.

Overall, the Member States that submitted comments believe that Article 22 must be retained, in view of the pending enlargement, but that it must be made more operational. Mario Monti, in responding to the submissions, stated that it is the Commission's intention that any important changes to the referral mechanisms under Article 9 and 22 would be accompanied by Commission guidelines on how the mechanisms should operate in practice.

The Commission's Recent Response in relation to Referrals

The Commission has made it clear that it intends the procedures and rules for "referral up" of merger cases from Member States to the Commission mirror those for referral down from the Commission to the States.

The Commission's recent proposals envisage that referrals in both directions upon the request of the merging parties will become possible before notification. Under the Commission's proposals, the merging parties would need to submit a reasoned request to the Commission and the appropriate national competition authorities for referral which must be acceded to in order for the referral to take effect. In the event that a minimum number (as yet undetermined) of national competition authorities agree to a case being referred upwards from their jurisdiction to the Commission, the Commission would take exclusive jurisdiction for the merger investigation throughout the Community.

The proposed amendments to the Merger Regulation would also introduce a "right of initiative" for the Commission, whereby it could expressly invite Member States to make referrals to it, or invite Member

[191] Case Nº. COMP/M.2698 Promatech/Sulzer and Case No. COMP/M.2738 GEES/ UNISON.

States to request “referral down” to their own jurisdiction from the Commission. The Commission expects to produce a set of guiding principles to accompany the changes to the referral mechanism in the proposed new Merger Regulation.

Concept of concentration

The Green Paper explored a number of potential adjustments to the concept of concentration as set out in Article 3 of the Merger Regulation.

Minority shareholdings and strategic alliances

The Green Paper examined the treatment of this concept in relation to the acquisition of non-controlling joint or sole minority shareholdings and in respect of strategic alliances. Strategic alliances are co-operative arrangements of varying scope, involving the creation of several links that are usually contractual but which may have structural aspects, such as the creation of a joint venture and even the acquisition of shareholdings. The Commission observed that, to date, only one strategic alliance, namely that between Alitalia and KLM[192], has been assessed on the basis of the Merger Regulation. In that case, the Commission considered that, for a number of reasons, the alliance fulfilled the criteria for a full-function joint venture, as defined in its Notice on the concept of full-function joint ventures.[193] The Commission concluded that whilst, in certain cases, the acquisition of a minority shareholding or strategic alliances might have structural effects, this does not apply as a general rule, and it does not appear to be possible to make a distinction with sufficient legal certainty. Article 81, rather than the Merger Regulation, was therefore considered by the Commission to remain the most appropriate instrument for the assessment of such transactions. The great majority of comments received by the Commission supported its view.

Partial function production joint ventures

A key amendment to the Merger Regulation in 1998 was the inclusion

[192] Case Nº. JV.19 (1999).

[193] OJ C66/1 (1998).

within its scope of full-function co-operative joint ventures. The Commission considered that such cases are well suited to the more structural type of assessment of the Merger Regulation. The Commission's modernisation proposal for Articles 81 and 82 left the question of the possibility of the further concept of a concentration to its review of the Merger Regulation. The Commission's White Paper of April 1999 indicated that it appeared desirable to maintain a prior authorisation system for partial-function production joint ventures, due to the substantial investment and far-reaching integration of operations involved in such operations. It was envisaged that partial-function joint production ventures, like full-function joint ventures, would be subjected both to the dominance test and to Article 2(4) of the Merger Regulation. However, the subsequent consultation procedure revealed several important criticisms of this proposal:

- First, it was considered to be very difficult to find an unambiguous legal definition of the concept of a partial-function production joint venture, particularly in the context of service markets.
- Secondly, the consultation did not produce indications that such production joint ventures are inherently more suited to ex ante control than other operations that may involve large-scale investments (e.g. R&D joint ventures or distribution systems). In addition, partial-function production joint ventures would continue to be covered by block exemption regulations under Article 81.

The Commission therefore concluded that there did not seem to be any compelling reason to extend the scope of the Merger Regulation to partial-function production joint ventures. The Commission's position appears to have been generally supported by the respondents; however, some respondents considered that voluntary notification of partial-function production joint ventures should be allowed in order to increase legal certainty for investments (especially in light of abandonment of a notification system under Article 81 in the modernisation process).

Multiple transactions

Article 5(2)(2) of the Merger Regulation currently provides that two or more transactions which take place within a two-year period between the

same undertakings may constitute a single transaction. In its discussion in respect of the concept of a "concentration", the Green Paper proposed that other multiple transactions should be assessed as a whole if they involve a link revealing economic unity between the transactions in a way which is considered to be equivalent to a single transaction. Under the Commission's proposal, the concept of economic unity would be assessed against the goals pursued by the parties. The factors relevant to the assessment of whether the transactions are equivalent to a single transaction would include a time connection and an identity link.

The Green Paper specified three types of transaction that it proposes should be taken as a whole for the purposes of the Merger Regulation:

- acquisitions of joint control of one part of an undertaking and sole control of another part, which would be the case where an acquisition concerns the parent company of a group which has jointly controlled subsidiaries which, as a consequence of the acquisition, become (jointly) controlled by the acquirer;
- the exchange of assets between two companies, or swaps, as these are often determined by a single contract and the conclusion of each transaction is conditional upon the conclusion of the other; and
- creeping takeovers via the stock exchange, which often occur in "hostile" situations, where the target company and/or some of its previous shareholders are not fully supportive of the takeover.

The Commission considered that it is normally clear in such situations from the viewpoint of all parties involved that a number of legally separate acquisitions of rights form, from an economic viewpoint, a unity, and that the intention is to acquire control over the target company. In respect of the three types of transaction that it suggested should be brought within the scope of the Merger Regulation, the Commission proposed limiting the scope of an amended Article 5(2)(2) to transactions relating to the same economic sector. The majority of respondents supported the Commission's proposals in this regard.

Venture capital transactions

Article 3(5) of the Merger Regulation, which describes certain

narrowly-defined situations where a concentration is not to be deemed to exist, includes the normal trading activity of financial institutions. However, the Commission's review brought to its attention new forms of financing in the equity markets. Specifically, growth capital/technology investments are considered by the Commission potentially to fall under the Merger Regulation, as they are normally syndicated. This means that, even in the case of start-up businesses with no sales, they may be notifiable under the rules applicable to full-function joint ventures. This type of venture capital investment is likely to meet the criteria for simplified treatment under the Merger Regulation. However, the Commission considered that even if it were accepted that competition concerns are unlikely to occur with this type of venture capital investment, there are difficulties in defining the scope of a specific exemption. The Commission stated that, notwithstanding such difficulties, it remained open to the possibility of extending the scope of Article 3(5). The number of respondents supporting and objecting to the exclusion of venture capital investment from the scope of the Merger Regulation was almost balanced.

Qualitative or quantitative notion of control?

The Commission noted that, in some cases, controversy has arisen as to the compatibility of Article 3(3) of the Merger Regulation with Article 5(4). Article 3(3) defines the concept of control for the purposes of determining the circumstances in which a concentration is deemed to arise. The test is qualitative rather than quantitative. Article 5(4) defines the concept of the group of undertakings to be included for the purposes of determining whether the turnover thresholds in Article 1 are satisfied. The first three sub-sections of Article 5(4)(b) state that a company shall be considered to be part of a group if more than half of its capital or assets are owned by the group, if more than half of its voting rights can be exercised by the group, or if the group can appoint more than half of its Board. The fourth sub-section states that a company shall be included in the group if the group has the right to manage its affairs.

Whilst the first three sub-sections are quantitative form-based criteria, the fourth sub-section is similar to the qualitative test in Article 3(3). The Commission acknowledged that the differences between the two provisions may cause uncertainty. For example, control in the sense of Article 3(3) may be acquired by a company holding significantly less than half of the

voting rights in another company, assuming that it is likely to hold a majority at shareholders' meetings. In contrast, it is not clear that control in the sense of Article 3(3) would be deemed to arise even after the acquisition of, for example, 51% of the share capital or assets, assuming that another shareholder controlled more than half of the votes. The Commission invited comments on whether it would be appropriate to base the Article 5(4) group concept on the principles underlying Article 3(3). Mixed responses were received in relation to this issue; however many respondents mentioned that their major interest is simplicity and certainty in the calculation of turnover.

SUBSTANTIVE ISSUES

Substantive Test

The Green Paper launched a debate on the respective merits of the "dominance test", as laid down in the Merger Regulation and the "substantial lessening of competition test", or "SLC test", as used in other major jurisdictions, including the US, Canada and Australia[194].

The Green Paper acknowledged the attractions of an alignment towards a global standard for merger assessment. It would, for example, facilitate merging parties' global assessment of possible competition issues arising from contemplated transactions (and save them costs) by obviating the current need to argue their case according to differently formulated tests. The Commission pointed out, however, that an amendment of the Merger Regulation test may result in interested parties facing greater difficulties in forecasting the likely outcome of merger control proceedings in Europe, as the existing body of case law has been built up under the dominance test. The Commission's view was that similarities exist between the dominance test and the SLC test. It observed that experience in applying the dominance test has not revealed major loopholes in the scope of the test and that it has not frequently led to different results from the SLC test approaches in other jurisdictions. The Commission notes in the Green Paper that, despite the current difference in legal tests, the vast majority of cases dealt with by the Commission and other major jurisdictions using the SLC test have revealed a significant degree of convergence in the approach to merger analysis. This

[194] The UK Enterprise Act will bring about the SLC test for merger control in the UK.

is in line with the Commission's acknowledgement that international convergence is already occurring to a considerable extent, as discussed by Commissioner Monti in his speech to the ABA General Counsel Roundtable in Washington on 14th November, 2001.

The Commission noted that the application of the notion of dominance has evolved, and that it has proved adaptable to developments in economic theory and to refinements of the econometric tools now available to measure market power. An example of the evolution of the dominance test is the European courts' interpretation of it as applicable to situations of collective dominance, in the judgments of the Court of Justice and the Court of First Instance in the Kali und Salz[195], Gencor[196] and Airtours[197] cases. It has been suggested to the Commission, however, that the SLC test might be closer to the spirit of the economically-based analysis undertaken in merger control and less rigid than the dominance test. A hypothetical question raised in respect of the dominance test has been the extent to which it would address a merger between the second and third largest players in a market, these firms being the closest substitutes. In such a scenario, the merging firms may remain smaller than the market leader, and the SLC test would better address the situation, particularly if the market characteristics would not be conducive to a finding of collective dominance.

The Airtours ruling

The result of the Court of First Instance appeal in the Airtours/First Choice case is of considerable interest in relation to how well adapted the dominance test is to oligopolies. The Commission's decision in the Airtours case, prohibiting the proposed acquisition by the UK travel company, Airtours plc, of First Choice Holidays plc on the basis of collective dominance, was overturned by the Court of First Instance, which criticised strongly the Commission's factual and substantive analysis. The Commission had not prior to the Airtours case published definitive guidelines relating to its analysis of oligopolistic dominance, and the approach was in flux, with recent cases seemingly extending the boundaries.

[195] Joined cases C-68/1994 and C-30/1995, decision of 30th March, 1998.

[196] Case T-102/96, decision of 25th March, 1999.

[197] Case T-342/99, decision of 6th June, 2002.

By way of background, where a concentration takes place within a relatively concentrated market, the Commission will normally examine not only whether the merger would create or strengthen a position of single firm dominance, but also whether the transaction would lead to a situation of oligopolistic dominance. The Commission has long maintained that the Merger Regulation applies to the creation or strengthening of oligopolistic dominance (see Nestle/Perrier[198], Mannesmann/Vallourec/ILVA[199]) and this view has been upheld on appeal by the Court of First Instance (Gencor v Commission[200]) and the Court of Justice (France v Commission[201] ("Kali & Salz")).

Oligopolistic dominance (also referred to as collective, or joint, dominance) may arise in a situation where a merger enables the remaining companies in a market to increase their profits by taking actions the success of which depends on accommodating the reactions from their competitors (i.e. by tacitly co-ordinating their decisions and activities on, for example, pricing and output and thereby mimicking the monopoly outcome). A distinction should be drawn between: (i) tacit co-ordination (whereby the nature of a market is such that competitors may independently take decisions so as to pursue a "common policy" without the need for any express collusion), which is the target of the Commission's collective dominance analysis under the Merger Regulation; and (ii) express collusion (i.e. cartel behaviour), which would be caught under Article 81 rules.

The Airtours ruling does not reverse or substantially change the previous legal position in relation to collective dominance, although it elaborates on it, and to some extent clarifies it. Notably, in Airtours, the Court of First Instance sets out a three-stage test of conditions necessary for collective dominance:

> (i) Each member of the oligopoly must have the ability to know how the other members are behaving (transparency)
>
> There must be sufficient transparency in a market for oligopolists to be aware sufficiently precisely and quickly of the way in which other oligopolists' market conduct is evolving and to be able to

[198] Case Nº. IV/M.190 (1992).

[199] Case Nº. IV/M.315 (1993).

[200] Case T-102/96, [1999] ECR II-879.

[201] Joined Cases C-68/94 and C-30/95, [1998] ECR I-1375.

monitor whether or not oligopolists are maintaining the common policy;

(ii) Tacit co-ordination must be sustainable over time; i.e. there must be an incentive in not departing from the common policy

Such sustainability requires that the oligopolists gain from co-ordination and, crucially, that there are adequate deterrents to ensure that there is no deviation from this co-ordination by the oligopoly members. Essentially, there must be a credible retaliation or punishment mechanism, whereby the oligopolists are deterred from defecting from the common policy (e.g. to earn higher profits in the short term) by the threat of punishment by the non-defecting oligopolists, the costs of which (e.g. reduction of profits, exclusion from the common policy) in the medium and longer term are greater than the short term gains for which they may have considered "cheating" on the common policy.

(iii) The foreseeable reaction of current and potential competitors and customers must not jeopardise the expected results from the common policy.

For a finding of collective dominance, the Commission will need to establish that the oligopolists are capable of imposing their co-ordinated behaviour on the market without being undermined by, for example, buyer power, a competitive and non-oligopolistic fringe or new entrants.

Since the Court of First Instance's ruling in Airtours, the Commission has published one decision directly addressing the criteria for analysis of collective dominance. In Deloitte & Touche/Andersen (UK)[202], the Commission confirmed that the appropriate analysis of collective dominance is in accordance with the three-stage test discussed above[203].

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[202] Case Nº. COMP/M.2810.

[203] Case M.2810, paragraph 41. The Commission concluded that it was able in this case to leave open whether or not the proposed transaction would lead to a position of oligopolistic dominance, as a causal link (i.e. the strengthening or creating of a position of dominance) between the proposed transaction and the possible situation of collective dominance could be excluded.

As stated above, the Airtours ruling should not be regarded as a sea change in the Commission's analysis of collective dominance and previous precedent remains important. Whilst in the past, across different cases, the Commission has recognised that some or all of the factors that make up the three-fold criteria set out in Airtours are central to a finding of collective dominance, the Airtours ruling is the first time that the three-stage test is set out explicitly. In Deloitte & Touche, the Commission referred to having identified the Airtours three-stage test in its earlier MCI Worldcom/Sprint decision[204], but this appears somewhat as being retrospective justification of the reversal it suffered in the Airtours ruling. The four-limbed test set out in the MCI Worldcom/Sprint decision is indeed consistent with the three-fold test in the Airtours ruling. However, in a number of cases between the decision in MCI Worldcom/Sprint and the Airtours ruling, the Commission reverted to the checklist approach described below.[205]

Prior to the Airtours ruling, the Commission generally took what has been described as a checklist approach. The Commission indicated in its published decisions that the following non-exhaustive list of factors, in its analysis, tends to indicate an oligopolistic market.

- Low demand-side growth
- Absence of demand side purchasing power
- Concentrated supply side
- Homogenous products
- Mature technology
- High entry barriers
- Similar cost structures
- Price and volume transparency
- Stability of market shares over time

[204] Case Nº. COMP/M.1741, paragraph 259.

[205] E.g. BP/E.ON, Case No. COMP/M.2533, Shell/DEA, Case No. COMP/M.2389, Alcoa/British Aluminium, Case No. COMP/M.2111, Johnson Professional Holdings/Diverseylever, Case No. COMP/M.2665, Norsle Skog/Parenco/Walsum, Case No. COMP/M.2499, UPM-Kymmene/Haindl, Case No. COMP/M.2498).

In as much as the factors that make up the above checklist will all contribute to a lesser or greater extent in establishing whether the threefold Airtours criteria are met, the factors and previous decisions that have provided insight on them remain relevant.[206] For example, the existence of high entry barriers will be directly relevant to the third limb of whether potential competitors would jeopardise a "common policy". Similarly, the homogeneity of products assists the formulation and application of parallel behaviour, because, for example, consumers will tend to choose between competitors on the basis predominantly of price (i.e. price may become the sole variable that it is necessary to monitor and adopt a common policy in relation to), thereby contributing to fulfilment of the first and second limb of the Airtours test.

In addition to providing guidance on the assessment criteria for collective dominance, the Court of First Instance also made clear in the Airtours ruling that the Commission is required to meet strict standards of evidence and analysis in reaching a collective dominance finding, and strongly criticised the Commission for conspicuously failing to do so in its Airtours decision. The Court stated that the Commission must produce "convincing evidence"[207] that a merger would create a position of collective dominance. The Court was scathing about the Commission's factual case and made it plain that future Commission decision will be required to present a more rigorous and thorough analysis than that encountered in Airtours.

The Court of First Instance's ruling in Airtours impacts on the consideration of the substantive test under the Commission's Green Paper. It has been suggested to the Commission that the SLC test might be closer to the spirit of the economically-based analysis undertaken in merger control and less rigid than the dominance test. The dominance test is ill-suited to analysing anti-competitive effects that may emerge through the reduction of the number of companies in a non-collusive (nor dominant) oligopoly. This

[206] For example, in Johnson Professional Holdings/Diverseylever (Case No. COMP/M.2665) the Commission decided not to oppose a merger between companies operating in the cleaning and hygiene products/services sector on the basis, inter alia, that competitors and strong buyers would be able to counter any attempted joint price rises by the potential oligopoly under consideration (i.e. effectively on the basis that the third limb of the Airtours test would not be met. Similarly, in Alcoa/British Aluminium (Case No. COMP/M.2111), the Commission considered that collective dominance would not arise, inter alia, because of the absence of a retaliation mechanism (i.e. effectively that the second limb of the Airtours test would not be met).

[207] Paragraph 63.

appears to be a lacuna in the dominance test. A hypothetical question raised in respect of the dominance test has been the extent to which it would address a merger between the second and third largest players in a market, these firms being the closest substitutes. In such a scenario, the merging firms may remain smaller than the market leader, and the SLC test would better address the situation, particularly if the market characteristics would not be conducive to a finding of collective dominance. Following the overturning of the Commission's Airtours decision and the Court's criticisms of the laxity of its argument, it was thought to be more appealing to the Commission to consider the introduction of the SLC test, rather than what some respondents have called the "legal strait jacket" of finding dominance.

The Airtours ruling was published by the Court of First Instance on 6th June, 2002, 32½ months after the Commission's prohibition decision on 22nd September, 1999. Airtours' victory was Pyrrhic. It is generally acknowledged that this time scale for an appeal decision is outside a commercially viable time period, in that the circumstances motivating the original attempt at merger on the terms originally proposed will inevitably have changed. Commission Monti has acknowledged[208] that the normal speed of judicial review presents some problems and welcomed the Court of First Instance's new "fast-track" rules on expedited procedure that have been used effectively in the Tetra Laval / Sidel and Schneider / Legrand appeals as discussed below.

Submissions on the substantive test

The respondents to the Green Paper presented an array of arguments (which Mario Monti considered finely balanced) for and against the replacement of the dominance test with the SLC test. Certain respondents suggested that the wording of the merger control test should be linguistically distinguished from the dominance concept that is used in Article 82 of the Treaty to control abuse of a company's dominant position on a market. Given that the Merger Regulation and Article 82 have different conceptual functions, there is an obvious argument that clarification is achieved by not using similar language to describe them.

Many of those against the change in the substantive test considered

[208] Ibid.

that the two tests (despite differences in wording) produced essentially convergent outcomes and that substantive convergence between different jurisdictions is achieved by reliance upon similar economic theories rather than by means of a merely semantic convergence. Those respondents in favour of the retention of the dominance test who do identify a difference between the two tests tend to view the SLC standard as a lower, and potentially more uncertain, threshold than the current dominance test.

In relation to its merits, those in favour of the dominance test point out that it has proved sufficiently adaptable to be used in a wide variety of different situations (e.g. collective dominance). As such, the argument essentially runs that, if the dominance test has proved capable of translating relevant economic theories into practical decision making, there is no need to change it, given that such a change would effectively discard over ten years of Commission jurisprudence on the dominance test.

Some of the respondents also pointed out that many European jurisdictions, including most of the candidate accession countries, have aligned their own internal merger tests with the dominance test. Thus, as the Bundeskartellamt noted, convergence on an international level would cause divergence within the Community.

The Commissioner's Response in relation to the Substantive Test

In his speech on 7th November[209], Mario Monti explained his preliminary view that the dominance test should in fact be retained. Despite the claims made by some that the SLC test would allow a better analysis of oligopolistic situations, Monti was prepared to state that he believed the concept of dominance to be:

> "capable of dealing with the full range of anticompetitive scenarios which mergers may engender."

Furthermore, he pointed to the benefits of retaining the Commission's jurisprudence in interpreting the dominance test – there is, after all, a costs-benefit analysis to be performed in relation to whether or not to discard the

[209] Mario Monti: "Merger Control in the EU: a radical reform", IBA Conference on Merger Control, Brussels, 7th November, 2002.

existing dominance test in favour of the SLC test. However, he conceded that further clarification of the dominance test would indeed be useful, proposing the addition of a paragraph in Article 2 to make it clear that the test applies in what have been termed "unilateral effect" situations. Philip Lowe has commented that this amendment to Article 2 will lead to what John Vickers of the OFT referred to as a bifurcated test capable of catching both conventional dominance situations and those of non-collusive oligopolistic situations.

This approach would not only synchronise with the ECJ's interpretation of the dominance test in merger cases, but would also allow a decoupling of the dominance concept in merger situations from that which is applied under Article 82.

Mario Monti pointed out that he shared the view of those emphasising the importance of the principles underpinning the application of the test rather than the actual wording of the test itself:

> "after all, what surely matters most is the reasoning underlying our analytical approach to merger analysis".

As such, the Commissioner outlined his intention to submit two sets of guidelines in relation to the substantive application of the dominance test:

- the assessment of horizontal mergers – the first set of guidelines, in the form of a draft Notice, will address situations where both undertakings are active sellers on the same market, or are at least potential competitors on that market. The guidelines would provide clarity on how the Commission analyses such horizontal mergers, with particular focus on the application of the notion of collective dominance; these guidelines have been seen as key to the future conduct of the Commission's investigations, with Monti stating expressly that he attached definitively more importance to their adoption than to the choice between the SLC and the dominance test.[210]
- the assessment of vertical and "conglomerate" mergers – these guidelines would similarly flesh out the way in which such mergers

[210] Monti – Speech at Fordham Annual Conference on Antitrust and Policy, New York, 31st October, 2002.

would be treated by the Commission. As in the case of the horizontal guidelines, above, the aim would be to increase transparency, predictability and therefore legal certainty for all participants in the merger process. These guidelines are particularly important in the light of the CFI's judgement in Tetra Laval / Sidel. In this case, the CFI recognised that conglomerate-type mergers are generally considered by economists to be neutral, or even beneficial for competition on the markets concerned. To this end, it stated that the proof of anti-competitive effects requires "particularly close" and "precise examination" on the part of the Commission of the circumstances which would allegedly produce these effects, supported by "convincing evidence". The guidelines would be expected to mirror the CFI's assessment of the analysis of conglomerate mergers in the Tetra Laval / Sidel decision and to ensure that Commission decisions which relied upon such theories met the level of scrutiny which the Court has demanded.

Efficiencies

The Commission also considered in its Green Paper how, and the extent to which, efficiencies should be taken into account in competition analysis, acknowledging that some jurisdictions explicitly provide for merger-specific efficiencies to be taken into account in the context of merger control, e.g. the US Horizontal Merger Guidelines. An "efficiency defence" allows a merger to go ahead where the benefits to the economy resulting from the efficiencies are deemed to outweigh the harm to the economy resulting from reduced competition. The Commission considered that those jurisdictions which take these efficiencies into account tend to allow for a defence of this kind only in the exceptional circumstances where the efficiencies are likely to be passed on to consumers, despite a situation of dominance or substantial lessening of competition. The Commission's own attitude towards efficiencies produced as a result of a merger has itself been the subject of much analysis, both by others and by the Commission itself.

Allen & Overy submitted to the Commission that a re-balancing of the Commission's policy in this respect to give proportional weight to merger-specific efficiencies (together with appropriate guidance) would be welcome.

The Commissioner's Response in relation to the treatment of Efficiencies

Mario Monti has acknowledged the divergence among respondents to the Green Paper and the current lack of clarity in relation to the scope of an "efficiency defence", and stated that the forthcoming market power guidelines would address the issue.

Indeed, although Commissioner Monti's description of the matters to be addressed in the guidelines on merger control included buyer power and ease of market entry, he drew particular attention to the role of efficiencies as worthy of explanation. The guidelines will make it clear, within the existing structural framework of Article 2(1)(6) of the Merger Regulation, that efficiency claims will be considered as part of the overall assessment of the effect of a merger.

However, Monti stressed that efficiency claims would be accepted only when it could be shown with sufficient certainty that such efficiencies would enhance the incentive of the merged entity to act pro-competitively because "the efficiencies generated by the merger will either outweigh any adverse effects on consumers or make these effects unlikely." Such benefits would have to be directly beneficial to consumers, merger-specific, substantial, timely and verifiable, and it is clear that the onus will be on the merging parties to establish that such is the case. The limited faith which the Commission attaches to the efficiency argument is evidenced by the fact that the guidelines will indicate that no level of efficiency production will be such as to permit the creation of a monopoly situation, i.e. the Commission would rather use its powers under the Merger Regulation than seek to rely post facto on its behavioural powers under Article 82.

Simplified procedure

In September 2000, the Commission introduced a Notice on a simplified procedure for the treatment of certain concentrations under the Merger Regulation. Between September 2000 and April 2001, around 40% of the 216 notifications made to the Commission under the Merger Regulation were considered to fall under the provisions of the simplified treatment procedure, with the average duration from notification to clearance being 25 calendar days.

The Commission concluded in its Green Paper that while the Notice has significantly enhanced the efficiency of European merger control, in

terms of procedural length the new procedure has had little significant impact. It observes that this situation is likely to continue unless the current rule in Article 9(2) of the Merger Regulation, which gives Member States three weeks from the date of receipt of a copy of the notification to request a referral, is amended. The Commission proposed that Article 9(2) could be amended in conjunction with a shortening of the current three-week deadline for a referral request under Article 9, or it could be provided that Article 9(2) would not apply at all, or would apply with a shorter deadline, to cases where the parties make reference to the Notice on simplified procedure in their notification.

The Commission suggested that measures could be taken to further streamline procedures in respect of such cases, e.g. by means of the introduction of a simpler Form CO. This would be of specific aid to the notifying parties themselves, which so far have benefited little from the introduction of the simplified procedure. The Commission also considered whether the practice on simplified procedure could be consolidated either into the Merger Regulation itself or into a form of "block exemption" that could be built around the underlying principles of the Notice. This would obviate the need to process harmless concentrations and the need to adopt formal decisions in cases unlikely to have any significant value as precedents. However, the Commission observed that it might be prudent, and in the interests of legal certainty, to maintain a form of information requirement vis-à-vis the Commission and Member States.

It has also been suggested to the Commission that the Merger Regulation should allow for a de minimis threshold, with the result that the Commission would not examine dominance concerns arising in small markets.

PROCEDURE

Triggering Event

Article 4(1) of the Merger Regulation, unlike some other mandatory pre-notification merger control systems, specifies a point in time for the notification of a transaction (namely within one week of a "triggering event"). Failure to comply with this deadline exposes parties to the risk of being fined under Article 14(1)(a). It is established practice that the Commission will not enforce the one-week obligation, assuming that the parties do not take any steps towards implementation of the merger agreement. Cases such

as Samsung and AP Möller, where fines have been issued for late notification, also involved implementation of the concentration in contravention of Article 14(2)(b) and Article 7(1).

Various proposals were made to the Commission during the course of its review as to the latest time for notification, ranging from a removal of the deadline for notification to a codification of current practice, including the proposal of an amendment whereby the one-week requirement would relate to the provision of informal information in respect of the transaction, with a longer period provided for the notification itself.

Proposals were also made to the Commission as to the amendment or repeal of the current requirement in Article 4(1) in respect of the earliest possible time for notification. The Commission noted that it has regularly accepted notifications on the basis of an agreement between companies' Boards, even where these may not be strictly enforceable, pointing out that national differences as to the extent to which the management of a company may bind the company is a complication in interpreting Article 4(1). The Commission acknowledged that the main argument in favour of relaxing the requirement for a binding agreement prior to notification is that it would facilitate the co-ordination of notification to the Commission with notification to other jurisdictions, such as the US. The Commission noted that co-ordination is possible under the current system, but recognises that business reasons may advocate that a notification be given as early as possible.

The Commission reasoned that its current policy of requiring the conclusion of a sufficiently binding agreement is based upon a number of valid considerations, including the fact that confidentiality restrictions must not be allowed to restrict the Commission's ability to fully investigate the transactions. The notification is published in the Official Journal, in accordance with Article 4(3). However, the Commission did believe that the possibility of introducing greater flexibility should be further examined.

Article 7(1) of the Merger Regulation provides that a concentration shall not be put into effect before its notification or until it has been declared compatible with the common market – the "stand-still obligation". In certain circumstances, a derogation of this rule applies to public bids (Article 7(3)), but, in other cases, the Commission can grant an exemption under Article 7(4). It was suggested to the Commission during its review that the relationship between the exemption under Article 7(3) and the situation in relation to other acquisitions through the stock exchange could benefit from clarification. Acquisitions over the stock exchange are not, unlike public

bids, subject to mandatory rules obliging the bidder to implement the transaction by a certain date. Companies making such acquisitions have argued that the provision in Article 7(1) should not be allowed to pre-empt the completion of such transactions if the conditions in Article 7(3) are met. The Commission invited comments as to whether the scope of the stand-still obligation should be clarified, in addition to its consideration of the extension of the scope of Article 5(2) to cover acquisitions through the stock exchange.

The responses provided almost unanimous support for proposals to make the timing of notifications more flexible.

The Commission's Recent Proposals in respect of timing

Commissioner Monti's recent speech to the International Bar Association ("IBA") envisages altering the Merger Regulation in order to introduce a more flexible arrangement in terms of timing. As such, he suggested proposals which would enable so as to permit notification:

- before the conclusion of a binding agreement; and
- after the current one-week deadline following signing of a binding, provided that no steps are taken to implement the agreement.

The increased flexibility in terms of when to notify should enable the parties to better organise their affairs without being constrained, as they are now, by tight regulatory constraints.

Remedy negotiations

The Commission has devoted much effort recently to consolidating its approach to remedies. In December 2000, the Commission adopted a Notice outlining its policy in respect of commitments offered in merger cases. This Notice has proved extremely useful for companies in relation to clarifying the Commission's approach to remedies. In 2001, for example, the vast majority of the competition concerns that arose in merger cases were addressed by means of divestiture according to the provisions of the Notice. In April 2001, the Commission introduced an Enforcement Unit within DG Competition to develop and ensure a consistent policy for remedies in merger cases.

In its Green Paper, the Commission proposed to improve the rules relating to the time limits provided for in the current procedure. Under Article 18(1) of Regulation 447/98, in the initial phase of a notification, parties are able to submit commitments up to three weeks from the date of notification. In Phase II, commitments may be proposed up to three months from the date on which the Phase II proceedings were opened, and only in "exceptional circumstances" may that three-month time limit be extended. For example, in Telia / Telenor[211], the Commission agreed to accept commitments one week after the expiry of the legal deadline, account being taken of the fact that the companies had to consult the Swedish and Norwegian Parliaments prior to the submission of the proposed remedies. The Commission pointed out that the extension provision must be interpreted narrowly, in order to maintain respect for the deadlines and to guarantee a level playing field.

Speaking in Paris on 18th January, Commissioner Monti stressed the importance of submitting remedies in due time. He pointed out that in the TotalFina / Elf[212] case, a concentration leading to the creation of a national champion and raising serious competition problems was approved due to an early commencement of discussions on remedies. He acknowledged that it is not always easy for companies to propose remedies to the Commission within the deadlines provided for in the Merger Regulation. Similarly, in the Telia / Sonera decision, the parties' commitments to remedy discussions enabled the Commission to clear a potentially problematic merger with merely an extended Phase I investigation.

In its Green Paper, the Commission noted that the three-month deadline in Phase II will often occur relatively shortly after the Oral Hearing, meaning that the parties may have to prepare for remedy negotiations at the same time as preparing for the Oral Hearing. This, in turn, often leads to a situation where commitments are submitted on the last day of the three-month period, leaving the Commission little time to conduct the necessary consultation with Member States and interested third parties prior to preparing a draft decision for discussion in the Advisory Committee.

The Commission considered that timely submission of "best shot" commitments should be encouraged, but that provision should be made for an additional period between the Oral Hearing and the deadline for submission of commitments. It suggested a "stop the clock" provision for both the first

[211] M.1439, decision of 13th October, 1999.

[212] M.1628, decision of 9th February, 2000.

and second phases. Specifically, the Commission suggested that the provision should operate solely at the request of the parties, and should be available for a short, finite period, such as between 20 and 30 working days. In respect of Phase I, the Commission considered that it should be allowed discretion as to whether or not to accept a request, as it would be inefficient to use more than the current six weeks for first phase cases where the Commission does not see any possibility of adopting an authorisation decision. The vast majority of respondents are generally in favour of introducing a possibility to "stop the clock" in merger cases involving remedies issues.

Commenting on these proposals for reform in November, 2002, the Commissioner clarified that he proposed providing the parties with the option of extending the Phase 2 procedure for 3 weeks after having submitted a remedy offer. This would allow a more thorough and less rushed consideration of remedial offers and would also permit consultation with the Member States.

Phase 2 cases might also be extended by four weeks, if Monti's proposals are adopted, in order to allow for a more in depth investigation into particularly complex cases. Such extra time could be suggested by either the parties themselves or the Commission; however, in the latter case, the parties would have to agree to the extension.

Enforcement Provisions

The Commission's modernisation proposal for Articles 81 and 82 introduces amendments in relation to powers of investigation and penalties, and the Commission considers it appropriate to introduce similar amendments in respect of the Merger Regulation.

The Green Paper proposed that the Commission be empowered to conduct enquiries under the Merger Regulation not only on the basis of a specific notification, but also to carry out more general studies, including post-merger studies, as such studies would provide insight into the effects of decisions. This would coincide with one of the stated objectives of the Enforcement Unit.

The Commission also suggested introducing a clarification that companies remain responsible for the correctness of information provided by their legal representatives. In addition, it is proposed that the Commission be allowed to take oral statements and use these as evidence. The Commission considered that this would considerably enhance the efficiency of the Merger Regulation. The Commission would also welcome an increase in the

effectiveness of the provisions in the Merger Regulation in respect of inspections. Further, the Commission considered that it would be appropriate in the context of the Merger Regulation to switch to a percentage-based calculation of fines for breach of procedural rules - the Commission suggests up to 1% of average turnover. Finally, the Commission proposed that it be empowered, in certain circumstances, to adopt a decision requiring the provision of information without first having requested that information, allowing it to use Article 11(5) of the Merger Regulation, e.g. where there are reasons to suspect that the respondent would not provide a full reply in a timely manner.

Opinions of those submitting responses are divided in relation to the alignment of the Merger Regulation and Article 81 and 82 enforcement provisions. However, Mario Monti continues to favour the idea of the Commission having broadly equivalent powers in both contexts.

Judicial review

The Commission notes in its Green Paper that on 6th December, 2000 the Court of First Instance adopted a "fast track" procedure with a view to expediting proceedings, including merger control. Although noting that the reform of judicial procedures is outside the scope of its competence, the Commission stated that it would welcome any further reform undertaken by the European Courts to expedite appeals.

The Commission observed that certain commentators have pointed to elements in other merger control systems that they regard as more capable of effectively guaranteeing systematic judicial review. For example, under the US system, competition authorities must initiate proceedings before a federal court in order to block a merger. The Commission pointed out, however, that many cases which are settled in the US on the basis of agreed remedies are not subject to court review, and nor are prohibition decisions in the US necessarily subject to judicial review, as merging parties may abandon their merger plans when the competition authorities file suit.

The Commission concluded that it did not believe that the current system of judicial review fails to provide adequate judicial protection to companies whose merger plans are challenged under the Merger Regulation. Many respondents approved of the short, fixed deadlines of the Commission's decisions under the Merger Regulations, whilst expressing concerns about due process guarantees (notably the absence of differentiation between

investigation and decision-making). Mario Monti has noted that a number of the respondents' suggestions to improve due process guarantees do not require amendments to be made to the Merger Regulation.

Nevertheless, in the light of the Court's decisions in Schneider / Legrand and Tetra / Laval, the increased significance assumed by the issue of judicial review has prompted the Commission to make further comments in relation to the issue of judicial review and these are dealt with in Part 4 below.

Other proposals

The Commission also proposed the following minor reforms and additions to the regime.

- Using a concept of working days in all relevant parts of the Merger Regulation. The current system, which includes references to months, weeks and working days, causes some confusion as to calculating the procedural timetable and causes discrepancies based on the month in which a filing is made (for instance, the Commission has a few days less to carry out a first phase investigation of a notification filed in February than, say, in April).
- Submission of Form COs directly to the competent authorities of Member States, rather than the Commission transmitting such copies under the current Article 19. However, practitioners will be only too aware of the practical difficulties in preparing and submitting 24 copies to the Commission, without the added complication of distributing the same to the Member State competition authorities (especially after enlargement).
- Imposing a legal deadline for its ability to declare a submitted notification incomplete. The Green Paper noted that if the system were made more rigid, notifying parties would face an increased risk of prolonged procedures, involving additional costs, loss of time and contractual uncertainty. However, the Commission also stated its view that the current possibility of declaring a notification incomplete fulfils a proportionate and appropriate objective in the rare cases in which it is used.
- Imposing filing fees on notifying parties. The Green Paper

noted that filing fees are currently applied by several Member States and by a number of candidate countries and other jurisdictions, including the US. The Commission invited comments as to the appropriateness of including an enabling provision in the Merger Regulation, allowing the introduction of filing fees by means of a subsequent Commission Regulation, if and when the Commission regards this as justified. The Commission stated that it sees some benefit in a possible future international harmonisation in respect of filing fees in merger cases.

• Sourcing views of consumers and consumer organisations. The Green Paper acknowledged that consumers, or their representative organisations, only rarely make their views known in the context of merger control procedures. It welcomed any suggestions as to what assistance it could lend in order to encourage and facilitate consumer groups and organisations to more actively make their views known in respect of mergers affecting their interests. The Commission stated that it was also open to hearing the views of employees, including during Phase I of a merger investigation, and welcomed suggestions as to how to enable employees or their representatives to more effectively express these views, particularly in respect of the likely market impact of a proposed merger.

The Commissioner's response in relation to the role of consumers

The Commission has asserted on numerous occasions that its function in respect of the Merger Regulation is the protection of consumers rather than the protection of other competitors per se.[213] However, it has been acknowledged that the voice of the consumer is rarely heard in the midst of the merger investigation process and that more could be done to allow consumers to present their own views on consumer welfare. Although this was recognised in the context of the Green Paper, but more recently organisational changes have been proposed which would allow this problem to be addressed.

[213] See, inter alia, Kolasky – "US and EC Competition Policy: Cartels, Mergers and Beyond" (25th January, 2002).

As such, Commissioner Monti has outlined plans to create a Consumer Liason function with DC-COMP which would facilitate the presentation of consumer bodies' views to the Commission and would encourage a more frequent and dynamic dialogue between consumer bodies and those responsible for merger investigations. This does not equate to the supplanting of a substantive competition test by a social welfare test. Philip Lowe made it clear in his speech to the IBA Conference in November that the social consequences of a merger should continue to be dealt with under specific legislation which has been designed with this purpose in mind (i.e. the European Works Council Directive). However, it is likely that the Form CO will be revised so as to include reference to such employee-related legislation.

Conclusion in relation to the green paper

The reaction to the Green Paper from many quarters, including industry, was that the Commission's original proposals do not go far enough. Specifically, it was felt that the Commission should have considered in greater depth the concept of "fairness" and should have devoted consideration to the system of checks and balances that operate in the merger control system. The Green Paper acknowledged the apparent dual function of the Commission as investigator and decision-making body, but reasons that this is inherent in the structure of the administrative, rather than judicial, procedure established by the Merger Regulation.

In addition, speaking on 11th December, 2001 Commissioner Monti said that the increased powers granted to hearing officers in May 2001, combined with the Court of First Instance's fast-track procedure would quickly counteract any perception of unfairness. However, some commentators and respondents were not convinced of this, and it has been suggested that the Commission should subject itself to court monitoring, as is the case in the US. The House of Lords in the UK felt that the top priority for reform should be to ensure objectivity and fairness in the Merger Regulation process (concerns that are best addressed by improving the procedural checks and balances in the system). What has become clear is that the Commission accepts now that its Green Paper reform was not as radical as it should have been and has been prompted to deepen the reform process further.

The reaction of Member States and industry to the Green Paper was not wholeheartedly positive. For example, Member States have raised

concerns related to the Commission's proposal that it may refer cases back to Member States on its own initiative. Indeed, the French Competition authority has expressed scepticism at the proposed extension of the Commission's competence and has argued for more involvement of Member States in the decision-making process, an issue barely discussed by the Commission in the Green Paper.

However, it should be noted that the reforms proposed to Regulation 17 will lead to the Commission sharing with Member States' authorities and the Courts the currently exclusive power of the Commission to grant exemptions under Article 81(3). Therefore, although the Green Paper would extend the Commission's competence at the expense of that of Member States in the context of merger control, the parallel competence of the Commission and the Member States in the field of antitrust is to be strengthened.

The Commission hopes to present its amendments to the Merger Regulation for approval by the Council by the end of this year. In the same time frame, the Commission also hopes to produce draft guidelines relating to the application of the substantive test (and notably the analysis of market power) and best practice guidelines for the conduct of merger investigations, and also to undertake a review of structural and management changes that may be required to accompany the reforms. As discussed below, the impetus for reform in the Commission's merger process has been further accentuated by the decisions in Airtours, Schneider / Legrand and Tetra Laval / Sidel. Part 3 below provides an overview of the two most recent decisions, while Part 4 goes on to examine the further proposals for reform which have emerged following the decisions.

Part 3. An Outline of the Decisions in Schneider / Legrand and Tetra Laval / Sidel schneider / legrand[214]

The Commission's decision to block the acquisition of Legrand by Schneider, a French manufacturer of low voltage electrical equipment, such as switches, circuit breakers and electrical panels, came on 10th October, 2001, after a detailed second-stage investigation. Schneider's acquisition was blocked by the Commission because of fears of the combined group's strength on the market for plugs and electrical equipment in France. By the time of the

[214] Cases T-77/02 and T310/01.

Commission decision, Schneider had already acquired 98.1% of Legrand's shares by way of a public offer. As such, the Commission ordered Schneider to divest its interest in Legrand in a separate decision in January, 2002.

However, Allen & Overy on behalf of Schneider, appealed the Commission's prohibition decision in December, 2001. The CFI employed the expedited fast-track procedure, with the result that the hearing took place on 10th July, 2002 and the decision was handed down a little more than three months later on 22nd October, 2002.

The Commission's decision blocking the merger was criticised on two grounds by the CFI:

- First, the Court challenged the Commission's economic analysis used in the decision, accepting that part of the analysis only relating to French sectoral markets. The Court described the reasoning of the Commission in this regard as suffering from obvious errors, omissions and contradictions, which led it to underestimate the strength of the merged entity's competitors (i.e. Siemens and ABB) while overstating the economic power of Schneider Legrand.
- Second, in relation to the affected French markets only, the Commission believed that there were procedural irregularities constituting a serious infringement of defence rights with regard to the discrepancy between the statement of objections and the Commission's decision. Whereas the statement of objections concentrated on the overlapping of the parties' activities in certain markets and Schneider's consequent strengthening in relation to wholesalers, the Commission's decision focuses on what it terms an "association", meaning two preponderant positions held in one country by two undertakings in two separate but complementary sectoral markets. As such, Schneider was unable to respond to offer remedial measures.

One positive aspect of the case, in contrast to the decision in GE / Honeywell is that the CFI's decision has come within a reasonably short time frame as a result of the fast-track procedure – just over a year between the Commission decision and the Court's judgment (as opposed to three years in Airtours). As a result, the possibility of reinstating the merger remains a commercial reality for Schneider. The Court's judgment overturning the Commission's decision allows Schneider to repurchase Legrand from the

investment companies, Wendel Investissement and Kohlberg Kravis Roberts, to which Legrand was sold in July this year.[215] However, it is not at this point known whether Schneider intends to exercise its option of repurchase or not.

However, the decision in Schneider undoubtedly came as a blow to the Commission, which had previously lost only one merger case before the court in the previous twelve years. Coming just four months after the Airtours decision, Schneider increased the pressure on the Commission to contemplate more radical reforms than those which had been outlined in the Green Paper.

Tetra laval / sidel

Just two days after the Court's decision in Schneider / Legrand, the CFI delivered its judgment in Tetra Laval / Sidel[216]. Using the expedited procedure once again, the Court annulled the Commission's decision of July, 2001[217] prohibiting the merger between Tetra Laval BG group, the global leader in carton packaging, and Sidel of France, which designs and manufactures plastic bottles. As in Schneider, the companies had already merged at the time of the Commission's decision, and hence had to be separated as a result of the Commission's finding.

Tetra is the worldwide market leader in liquid food carton packaging. Tetra also has more limited activities in plastic packaging, notably including manufacture and supply of empty high density polyethylene bottles. Sidel is involved in the design and production of packaging equipment and systems. It is the world leader in stretch blow moulding machines which are used for production of polyethylene terephtalate bottles. Sidel is also involved in "barrier technology" that enables PET bottles to be used to hold products that are sensitive to oxygen and light.

The Commission considered in its decision of October 2001 that the combination of Tetra's dominant position in carton packaging and Sidel's leading position in PET packaging equipment would provide the merged entity with the ability and incentives to leverage its dominant position in carton to

[215] The Commission approved this acquisition on 14th October, 2002 Case No. M.2917 See IP/02/1471.

[216] Cases T-5/02 and T-80/02.

[217] Case No COMP/M.2416.

create a dominant position in PET packaging equipment (in particular SBM machines used in the sensitive product end use segments). The Commission concluded that by eliminating Sidel as a competitor in a "closely neighbouring market", Tetra's existing dominant position in carton (particularly aseptic carton packaging machines and aseptic cartons) would also be strengthened. Furthermore, it regarded the merged entity's dominant position in two closely neighbouring markets as being likely to further reinforce one another, raise barriers to entry and reduce competition in the overall market for aseptic and non-aseptic packaging of "sensitive products" in the EEA.

In its decision, the CFI re-affirmed that mergers between companies operating in different markets are capable of being found by the Commission to be incompatible with the common market on the grounds inter alia that a dominant position on one market may be "leveraged" so as to create or strengthen dominance on another market. This is especially the case where the relevant markets are converging and the merged entity already holds a leading position on the market over which it is acquiring market share through leveraging.

However, the CFI found that the Commission's case was, in this particular instance, based on insufficient evidence and errors of assessment. Notably, in its analysis of leveraging, the Commission failed to take properly into account the impact of the commitments proposed by the parties. Central to the CFI's rejection of the Commission's leveraging arguments was an analysis of the competitive nature of the markets over which the Commission considered the merged entity would acquire dominance through leveraging.

The Court overturned the Commission's reasoning on the basis that the Commission had overestimated the anti-competitive effects of the merger in respect of horizontal and vertical effects. The Court also rejected the conclusions drawn by the Commission's in relation to future anti-competitive conglomerate effects (on the separate carton and plastic bottle (PET) markets). The Court did not accept that the Commission had demonstrated with sufficient certainty in the circumstances of the case that the merged entity was likely to seek to leverage its strong position on the carton market so as to force customers to use Sidel's PET equipment.

The Commission suggested that the leveraging from the aseptic carton market to the PET market would manifest itself through: tying and forced sales; predatory pricing; price wars; and the granting of loyalty rebates. The CFI notes that the last three of these factors are in themselves likely to constitute illegal abuse of a dominant position. The CFI criticised the

Commission for failing to examine whether the likely illegality of the foreseeable leveraging conduct in question would impact upon the merged entity's willingness to carry out those actions. The Commission did not carry out any assessment of how the incentives to engage in an anti-competitive leveraging strategy would be tempered (or eliminated) by the illegality (including risk of detection and resultant consequences) of those actions. The CFI noted that "recourse to such strategies cannot be presumed".

It is believed now that Tetra Laval is keen to have the Commission swiftly re-examine the merger with Sidel in the light of the ECJ's decision in order that the parties be allowed to implement fully the deal, albeit after a year's delay. The Court is believed to have sought additional information from Tetra Laval in order to update the information provided to the Commission in the context of the original filing. As such, the Commission's decision on clearance is not now expected until early in the new year.

However, it is probable that the Commission will proceed to clear the acquisition, not least because Tetra has meanwhile disposed of two businesses in order to reduce the probability of the Commission's persisting in the view that the deal is incompatible with the Merger Regulation. It will indeed be interesting to see what happens in relation to the Commission's decision. If approved, this will be the first time under the Merger Regulation that the quashing of a Commission decision by the Court will have led to the re-implementation of the transaction. A Commission persistence in blocking the merger would be controversial to say the least, as it would to some extent involve a snub to the Court. Such a confrontational outcome is, however, thought to be fairly unlikely.

Part 4. Recent Reform Proposals further Reforms introduced by monti

A matter of hours had elapsed after the publication of the CFI's judgement in Tetra Laval / Sidel before Commissioner Monti held a press conference at which he announced radical changes to the way in which the Commission examines merger notifications. The package of reforms which he announced in the press conference have been detailed more fully in a speech given at the IBA Conference in November.[218] As well as providing further details about the reforms already envisaged, as discussed above,

[218] See note 28.

Commissioner Monti took the opportunity to broaden the scope of the reforms in an effort to meet the criticisms of the Commission approach. The Commission's review process had, by necessity, to become more radical than had previously been envisaged, and Monti was quick to make the best of what some saw as a very difficult challenge to the Commission in the CFI's judgements:

> "Although obviously I am disappointed that the Court has annulled these two decisions I nevertheless see this as an opportunity to improve our system even further. The insights from the CFI's rulings will, indeed, represent a substantial contribution to our Merger Review process."[219]

It had become obvious that, as a result of the cumulative effect of the three judgements, the reforms envisaged by the December 2001 paper were inadequate to deal with the momentum of criticism, which was fast developing after the delivery of the Tetra Laval / Sidel judgement. Commissioner Monti himself openly acknowledged the necessity for reform outside the parameters of the Green Paper:

> "We should transform [the setbacks suffered by the Commission] into an opportunity for even deeper reform than originally envisaged."

Furthermore, there had been calls from various bodies, including the European Parliament[220], for a deeper and more encompassing review than had originally been found in the Green Paper.

Monti proceeded by giving details of a package of internal changes in the way in which the Commission evaluates merger notifications which will be reflected in a set of best-practice guidelines. The fact that these do not require any substantive amendment to the Merger Regulation does not diminish their significance: they seek to take the sting out of the criticism which the Commission has faced in terms of its own operational procedures.

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[219] Monti – see note 29.

[220] See the motion for a resolution of the European Parliament adopted by the Committee on Economic and Monetary Affairs on 8th October, 2002

Strengthening the economic basis for Commission decisions

In the aftermath of GE / Honeywell, it had become obvious in relation to the criticism of the Commission's decision, not least from their regulatory counterparts in the United States, that the Commission lacked, or at least appeared to lack, a strong economic foundation for its merger decisions. Equally, Schneider / Legrand and Tetra Laval / Sidel focussed on the economic defects in the Commission's arguments as part of the reason why the decisions deserved to be quashed. Quite clearly, an evaluation of the economics behind any merger decision was regarded as critical to the Commission's ultimate decision on a potential merger and, as the Commissioner acknowledged, the complexity and increasing size of the mergers being evaluated by the Commission rendered it important for it to be able to draw upon economic expertise which was to some degree independent of the merger investigating team itself.

Monti therefore announced in his reform package the creation of a new role within the Commission - that of Chief Competition Economist (a concept already found in the FTC in the US), backed by a suitable staff in order to be able to create an "independent economic viewpoint" in respect of Commission decisions. The economist will also be available to furnish the Commission with economic guidance more generally. The independent status of the Chief Competition Economist, which is of major significance if the role is to be accorded outside the Commission the weight which Commissioner Monti intends for it, is to be created and maintained by having economists seconded on a temporary basis to the Commission. As such, the danger of the economist's own thinking being influenced by life within DG-COMP is thereby considerably diminished.

Philip Lowe has outlined three essential elements to the role of the competition economist:

- Guidance on the established policy in terms of the application of economic and econometrics;
- The provision of general guidance, from the inception of the case, in individual cases; and
- The possibility of a member of the Chief Economist's team being seconded to a case team in highly complex cases.

Finally, Monti has made it clear that he intends more generally to accelerate the existing policy of recruiting industrial economists in order to bolster generally the level of economic thinking within the Directorate General as a whole. Monti has previously indicated that an approach to merger control based firmly upon economics – rather than a legalistic approach to the problem – has been a high priority for him during his three years as Competition Commissioner.[221] Notwithstanding increased internal economic expertise, the Commissioner made it clear that he intends to appoint external economic expertise more frequently in Phase 2 merger investigations.

Internal peer review of Commission decisions

One of the greatest concerns to emerge in relation to the ECJ decisions has been that there is no effective scrutiny of the Commission's thinking before the final decision is taken and published. The only truly objective review is obtained after the Commission's decision in the form of potential review by the CFI (and then ECJ), with all the disadvantages in terms of cost and timing which such retrospective review necessarily brings. It has been argued that what is needed is some kind of objective "check" to take place before the Commission decision is published. This check would scrutinise the evidence and determine whether the level of support for a prohibition really is as convincing as those responsible for the investigation believe it to be. In this way, it has been argued, the Commission is less likely to prohibit decisions on the basis of what the court in Schneider / Legrand regarded as "obvious" flaws.

Such criticisms have been implicitly accepted by the Commission, who elegantly acknowledged:

> "the natural tendency of all human beings of being convinced by their own arguments."

In order to avoid such a tendency influencing unduly (and unfairly) the outcome of a Commission investigation, Monti has announced his intention to introduce what he described as a "peer review panel" system. The panel would be independent from the MTF and from the case team

[221] Monti – see note 29.

investigating the merger in question, and would be charged with the task of scrutinising the evidence and arguments of the individual case team. Such an addition could be seen as merely the addition of a further layer of bureaucracy within the Commission, but the new Director General, Philip Lowe, appointed to oversee the creation of the new unit within the Commission that will provide logistical support to the panels, has rejected such a claim. Philip Lowe has clarified that review by the scrutiny panel will not be necessary in all cases; rather, it will be a matter of discretion for the unit whether the organisation of a panel is required for a particular case. When the scrutiny unit regards a panel as required for a case, it would be organised for what have been described as "key moments", such as prior to the issuance of a Statement of Objections or a final decision in an extended phase II case.

Philip Lowe has also indicated that the popularly coined term for the reform, "devil's advocate's panel", is in fact a misnomer for the scrutiny, or peer review, panel in that:

> "the panels will be established to guide, educate, improve and contest – without threat – the ideas of the case teams. In that sense, they are good for the parties."

It is intended that the introduction of these panels, which aim to provide "a real and effective internal check on the soundness of the investigators' preliminary conclusions", will go some way to answering the criticism that the Commission's decisions are not sufficiently accountable. The success of this particular reform will therefore depend, to a large extent, on the extent to which the scrutiny panels are in fact regarded as genuinely independent of the investigation team (and whether they stay independent) and whether they do effectively operate to prevent prospectively decisions which are insufficiently grounded in evidence or fact.

Increased defence rights

The active participation of third parties in a merger investigation process has become an integral part of the way in which the Commission deals with notifications, but has led in part to the criticism that the rights of the merging parties themselves are sometimes given insufficient attention by the Commission. Commissioner Monti has shown himself keen to correct any possible imbalance which exists in this respect, so as to allow merging

parties to present their arguments and to counter any potential concerns of third parties at the earliest possible opportunity.

This aim is achieved by permitting access to the Commission's file at an earlier stage in proceedings than is presently the case. Specifically, Monti outlined four proposals in his IBA speech aimed at strengthening defence rights:

> • Merging parties will now be granted access to the Commission's file immediately after the publication of an Article 6(1)(c) decision, i.e. after the opening of an in depth investigation;
>
> • The merging parties will be given ad hoc access during the course of the investigation to the main submissions made by third parties in respect of the merger in order that the merging parties may be aware of the concerns raised by the merger as far as third parties are concerned. The merging parties will be able to respond to such fears by submissions of their own early on – they will not have to wait (as happens at present) until the publication of the Statement of Objections in order to be able to respond effectively to such arguments;
>
> • In order for the views of third parties and those of the merging parties to be answered, Monti outlined the concept of a meeting taking place before the publication of the Statement of Objections where such opposing views could be "thrashed out informally" in order to bring clarity to the issues involved;
>
> • Further meetings (labelled "State of Play meetings" by the Commissioner) should be held throughout the procedure between the merging parties and the Commission which will enable the parties to be kept updated on the Commission's current thinking and to ensure they know what stage has been reached at key times in the procedure.

Commissioner Monti also indicated strengthening of the rights of defence by means of supporting the role of the Hearing Officer. The role of the Hearing Officer is to safeguard the right to be heard and to ensure that the merging process is conducted smoothly and fairly. Following a new decision on the Hearing Officer's mandate in May, 2001,[222] the Hearing

[222] OJ 162/21 2001 23rd May, 2001

Officer prepares a report on the respect of the right to be heard which is communicated to the Member States and which is then attached to the final decision and published in the Official Journal.

The reforms proposed in relation to the Hearing Officer differ in a significant aspect to those made in relation to the Commission's own internal procedure: the Hearing Office is external to the Directorate General for Competition, and he is thus the sole truly independent voice in the merger system before the Commission's decision is made (after which there is judicial review). A practical, but important, way in which the Hearing Officer's role will be strengthened will be by the provision of a sufficient number of high quality officials able to perform the role effectively: this was promised by Commissioner Monti in his speech to the IBA.

There have been calls for the Hearing Officer to be responsible for commenting on the substantive issues in the case, although that predictably raises concerns that his investigation would then be seen to be running in parallel with that of the Merger Task Force. It is possible to envisage a situation in which the Hearing Officer's view was formed, not on the basis of his own inquiry, but on the basis of the Statement of Objections.

Philip Lowe has referred to another way in which the Commission intends to bolster the rights of the defence, namely by increasing the role given to the "rapporteur" or "discussant" representing each member state during the course of Phase 2 merger investigations. By ensuring that such rapporteurs are involved as early as possible in the context of the Phase 2 process, the chances are increased of their being able to provide meaningful advice to their member state in the Advisory Committee. The development of closer ties between the Commission and the national competition authorities would also enable the former to draw more heavily than previously on any experience gained by the latter in the context of merger investigations in their own jurisdictions in a particular field or sector.

Potential reforms in relation to court procedure

Controversy over the Commission's decisions in GE / Honeywell, coupled with the Court's judgments in Airtours, Schneider / Legrand and Tetra Laval / Sidel have led some to argue that the Commission's decisions should be subject to an objective and external review to test their credibility before they are published and take effect. The Commission's response to this has, naturally, been unenthusiastic. Instead, its dual response has been:

first, to suggest reforms incorporating some element of independent checking or "scrutiny" into its own procedure (as described above); and secondly, to emphasise what it regards as the effective role played by the Court of First Instance whilst suggesting further reforms which would streamline and render more effective the judicial review process.

The Commission has argued that there are good grounds for claiming that the current system of judicial review is able to provide an effective form of analysis of Commission decisions. Whereas the Court's judgment in Airtours came too late to be anything but a Phyrric victory for the parties, the decisions under the Court of First Instance's new fast-track expedited procedure in Schneider / Legrand and Tetra Laval / Sidel have been rendered far more quickly: just a year between the Commission's prohibition and the Court's judgment in the former and 15 months in the latter. Of critical importance is whether both judgments have come sufficiently swiftly to be of practical and commercial benefit to the parties. In other words, does the judicial review process operate so as to provide legal certainty to complex mergers or does it undermine the transaction process. In both Schneider / Legrand and Tetra Laval / Sidel, the Commission has re-commenced investigations into the mergers under Article 10(5) of the Merger Regulation, suggesting that the deals may in both instances remain potentially viable.

However, the fact remains that Schneider/Legrand and Tetra Laval / Sidel are the exception and not the rule. Both transactions were subject to the French takeover rules which meant that the shares in the target company had already been acquired although the voting rights in the shares could not be exercised. The Commission's prohibition decision required the shares to be divested by the acquiring companies, however (with the shares now in trust), it is possible that the appeal procedure, Court annulment and re-commencement of the Commission's proceedings may have been rapid enough to leave the transactions intact in substantially similar form.

However, this is not the case in respect of all mergers currently under appeal. The appeal in WorldCom / Sprint was lodged on 28th September, 2000, and that in GE / Honeywell was made on 12th September, 2001. Neither are benefiting from the expedited procedure. It is likely that judgments in both cases will be too late to provide any commercial benefit to the parties in question. In many cases, then, the opportunity to implement the transaction will have disappeared by the time the Court of First Instance delivers its judgement. It should be noted that the Court only acceded to the expedited procedure for the Schneider appeal after the list of pleas was reduced.

The manner in which the Court may respond to a decision with which it disagrees is hugely limited. The Court has power under Article 230 of the EC Treaty simply to annul a Commission decision. This means that the Court cannot itself approve a blocked merger, or ask the Commission to re-open its investigation, for example, to re-consider a disputed point settled by the Court. To give the Courts wider express powers to take positive decisions in relation to individual mergers would require an amendment to the EC Treaty itself and this is a mammoth political task.

The application of the re-commencement procedure in Article 10(5) of the existing Merger Regulation has itself emerged as a cause of concern in the light of the Schneider / Legrand and Tetra Laval / Sidel decisions. Article 10(5) provides simply that the periods laid down in the Regulation start again from the date of the Court's annulment decision. The Commission's previous jurisprudence in Kali und Salz indicates that upon an annulment decision by the court, a new investigation of the merger should commence again from the beginning of Phase 1. This would entail a new notification by the parties, and a completely new competitive assessment to be carried out based on the facts pertaining to the current market circumstances. This appears to be a costly, lengthy and unhelpful way by which to proceed, especially if the Court has restricted its criticisms to a specific part of the Commission's analysis. For example, the Commission's decision in Schneider / Legrand was quashed on the basis of a discrepancy between the statement of objections and the final decision. Similarly, the Court's judgement appears to indicate that in relation to the national markets outside France, the parties should be free to proceed with the transaction. Subject to an analysis of any changes in competitive conditions during the appeal period, there appear to be strong reasons why the case should be re-opened rather than re-evaluated from scratch. Similarly, Tetra Laval is pushing the Commission to make a quick decision on its frozen takeover bid. However, press speculation suggests that the Commission will delay its decision until January 13th, 2003 (i.e. Phase 2) having required Tetra Laval to update the data provided during the first investigation.

As such, there is a case for an amendment of Article 10(5) to allow for the case to be re-opened (rather than re-commenced) in situations where the judgment of the court makes it appropriate. It remains to be seen exactly how this concern will be addressed in the merger reforms, but Philip Lowe, speaking at the IBA Merger Control Conference on 8th November, made clear that the possibility of incorporating some flexibility into the means by

which the Commission may give effect to the Court's judgments (especially in cases of partial annulments of decisions) through an amendment to Article 10(5) will need to be considered by the Commission.

The Commission has emphasised that the three judgments in the last five months serve to demonstrate that judicial review is doing exactly what it should be doing: providing a rigorous and thorough evaluation of the way in which the Commission applies the Merger Regulation and creating a useful jurisprudence to guide the Commission in the future. In fact, the Court of First Instance has become, in the view of the Commissioner, so successful in its role as scrutineer of Commission decisions that it:

> "has for all practical purposes become a specialised competition court, exerting constant pressure on the Commission to continuously improve its level of expertise."

It is clear that some weaknesses still remain in the judicial review process. Nevertheless, it is vitally important, if the present system of Commission as investigator and decision maker is to be credible, that effective judicial review is provided by the Court in a timely and constructive fashion. It should be borne in mind that the Court's own annulment decision is subject to appeal on points of law, and this may further add uncertainty to the merger process.

Philip Lowe has described the "common concern" of the Commission and the Courts that judicial review should be "timely". Commissioner Monti has suggested a number of alternative means by which the time between Commission decision and delivery of judgment by the court might further be reduced:

- One option may be through the application of an interim measures procedure for merger appeals.
- Alternatively, Commissioner Monti has suggested the creation of specialist "judicial panels" or a specific merger chamber within the Court of First Instance. For example, non-merger cases could be put before judicial panels, thus leaving the Court of First Instance free to devote further resources to the examination of merger appeals.

Other judicial models appear to support the view that the expedited procedure followed by the Court of First Instance could be further improved in terms of timing. In the UK, the Competition Commission's prohibition of the acquisition of Bass by Interbrew was successfully appealed before the High Court in less than five months.

The Commission emphasised that it has already engaged in consultation with the Court of First Instance in relation to the various reform proposals in respect of merger cases. Whilst the Commissioner has acknowledged frankly that the Commission does not have the power to determine the Court's reforms, the Commission is nevertheless keen to ensure that judicial review is seen as sufficiently strong to alleviate the need for any external checks prior to the Commission issuing its merger decisions. Ultimately, Bo Vesterdorf, President of the Court of First Instance has indicated that his view is that judicial review will be more timely only when additional resources are given to the Court.

Part 5. Conclusion

The recent Court decisions have illustrated the tough challenge that the Commission faces in improving the standard of its decision-making. It is not so much the theoretical approach of the Commission that was attacked in the rulings, but rather the failure to substantiate arguments with facts. The Court demands a very high standard of proof, in response to which the Commission has sought to improve its economic expertise, its resourcing and its internal scrutiny procedures. The Commission also wants to increase the time available to it to reach a final decision in complex cases. A crucial question is whether the reforms taken together amount to a sufficient package of checks and balances to restore credibility to the Commission's merger control regime in the eyes of the business community. This remains to be seen, and the outcome of the pending appeals in MCI / Worldcom and GE / Honeywell will be watched with interest.

Similarly, the cases have brought to centre stage a number of troublesome substantive issues including, for example, the appropriate analysis of conglomerate mergers, joint dominance, technical leveraging and efficiency effects. The draft guidance which the Commission has announced it will publish (together with guidance on procedural issues), bolstered and focussed by the unfavourable judgments, should serve as welcome clarification for merging parties.

The Court is clearly willing to flex its muscles. However, annulment of prohibition decisions by the Court appear defective in terms of their practical effect on transactions disrupted by the Commission. A possible consequence of a confident and active court (which has now annulled three out of the 6 Commission merger prohibition decisions put before it) is that third parties that oppose mergers may seek to use the Court as a frustrating device. Not many mergers will be able to survive a prolonged Commission investigation, a prohibition decision, a judicial review decision and a subsequent positive authorisation by the Commission. However, it is hoped that the discussions between the Court and the Commission together with the Commission's own reforms will improve the current state of affairs.

As Philip Lowe made clear, the proposed reforms are not a fait accompli and will no doubt change as they pass through the consultation, legislation and implementation processes. While the Commission is not willing to relinquish its investigation and decision making authority, Commissioner Monti's recent statements suggest that the Commission is prepared to engage in constructive and radical reform, so as to navigate its merger policy through what Commissioner Monti has very aptly described as "choppy seas".

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