A. FOREWORD

On 11 December 2001, the Commission adopted the Green Paper on the Review of Council Regulation (EEC) N° 4064/89. Cefic is pleased to comment on this Green Paper and contribute to the consultation launched at this occasion on the possible improvement of the current Regulation applicable.

Cefic and its members have always advocated in favour of the Merger Control Regulation (EMCR) and support in particular the main principle on which it is based : the one-stop-shop system, as well as its application by DG Competition where merger cases have a Community dimension.

However, Cefic believes that there are still many mergers, in particular with regard to the chemical industry, which do not fall under the EMCR, but on the basis of a reasonable assessment should have been included in the scope of the EMCR as having a “similar” Community dimension. Therefore, Cefic supports amending the EMCR on this point.

It is worthy of note that the experience of chemical companies is that notifications of “large mergers” which fall under the scope of the EMCR are much easier to manage than those involving multiple filings which latter impose greater demands on companies, in terms of administration, timing and costs.

Cefic submits that some other aspects of the EMCR could be improved. As a consequence, the chemical industry particularly appreciates the Green Paper published, as being quite comprehensive and balanced, and the open consultation organised by DG Competition at this occasion.

In this context, Cefic supports changes to the EMCR provided these bear the following characteristics:

- Improvement of the one-stop-shop system;
- Simplicity, transparency and predictability of the rules applicable and the system in place (including for example on the authority that would adopt the final decision on a merger case);
- Objective and non-discriminatory application of the EMCR;
• Legal certainty of the system in place both for companies and the authorities;
• Implication of companies at all steps of the procedure;
• Further harmonisation of national legislations of the Member States;
• Respect of the Confidential Business Information while applying the EMCR;
• Need to avoid too theoretical approach of economic models to assess merger cases, which do not correspond to the realities of the chemical industry and its necessary restructuring to compete both on the EU and world-wide markets.

The following comments concentrate on the most important points identified by chemical companies, on which improvements ought to be made. Those improvements are particularly needed by chemical companies which are, by the way its restructuring and operations are organised, one of the first sectors in terms of number of merger notifications made both at EU and Member States levels.

B. SPECIFIC COMMENTS

B-1 JURISDICTIONNAL ISSUES

a) The Community dimension

As mentioned above, Cefic is in favour of reinforcing the one-stop-shop approach, in particular by lowering the current thresholds and trying to minimize multiple filings.

In this context, Cefic is of the opinion that, the Commission’s suggestion to replace article 1(3) by a Community competence over cases subject to multiple filing requirements (minimum 3 Member States) would be of great help, and could be supported.

The (minor) inconvenient of this system was already identified by the Commission in the Green Paper: whether a merger triggers the national jurisdictional thresholds in at least some Member States would depend upon a confirmation statement by each of the relevant national authorities. The competence of the Commission could thus only be evidenced by the merging parties, latest in their official form CO notification, once they have obtained such a confirmation statement by at least the required number of national merger control authorities.

To solve potential timing issues, the Commission proposes (1) to create an opposition procedure applying to national authorities confirmations before the official form CO notification and (2) to extend the one week deadline of article 4(1) for this specific category of cross-border mergers.

The solution proposed by the Commission certainly makes sense. However, in order to minimise the number of cases requiring that the parties to the concentration have to collect at least three national statements before the notification to the Commission, Cefic suggests the following amendment to Article 1 of the EMCR:
- article 1(1) : amend the first sentence as follows: “Without prejudice to Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in paragraphs 2, 3 and 4”;

- article 1(2) : unchanged, as suggested by the Commission;

- article 1(3) : unchanged, except through lowering of the threshold of article 1(3)(a) at Euro 2000 million (or even lower);

- insert a new article 1 (4) : “For the purposes of this Regulation, a concentration that does not meet the thresholds laid down in paragraphs 2 or 3 has a Community dimension where the concentration would have to be notified to national competition authorities in at least three Member States.” (procedural rules for obtaining the Member States confirmation statements to be addressed in this paragraph or elsewhere).

b) The referrals

The Commission contemplates to simplify the requirements allowing a total or partial referral to a National Competition Authority (NCA) of mergers having a Community dimension. According to the Green Paper, the sole criteria allowing such a referral at the Member States initiative could be a substantiated claim of effect on competition in a distinct market within a Member State, thus with no (or no significant) cross-border effects. The Commission also considers referrals at the Commission’s initiative, where the same criteria would be applied.

The proposed system of allocation of powers between the Commission and Member States could be acceptable to undertakings, provided it is applied in a transparent and non discriminatory manner and it is made with the consent of the notifying parties or at least their consultation as well as a publication of any referral decision to national competition authorities. Indeed, the effect of such a referral would be to submit the proposed concentration to the national law instead of the EMCR. Moreover, the referral decision might take position on some crucial issues such as the definition of one or several relevant markets. It should also be the possible for companies to request a referral in the form CO.

Concerning joint referrals to the Commission of merger cases without Community dimension according to art. 22(3), the main weakness of the existing system is the lack of competence granted to the Commission to assess the effects of the merger in other Member States than those having made a joint referral. Thus the other competent Member States may continue parallel procedures and this hurts the one stop shop principle.

The chemical industry submits that a possible solution could be inspired by the allocation criteria suggested for Article 9. Namely, to grant to the Commission an exclusive competence to decide on all mergers without Community dimension that are referred to the Commission by two or more Member States, to the extent they have (significant) cross-border effects.

c) The concept of concentration

The Commission in the Green Paper raised questions on whether other operations such as minority shareholdings, strategic alliances, multiple transactions venture capital investments...ought to be included in the scope of application of the EMCR. Having
considered the various elements at stake, Cefic do not support such enlargement of scope safe concerning certain **partial-function joint ventures**.

Regarding partial function production joint ventures, Cefic advocates that there is a need to have legal certainty for these operations which will always have de facto structural effects, leading to long term structural modifications of the links between the undertakings concerned. This is particularly true for the chemical industry.

Taking into consideration the modernisation of the application of Article 81 & 82 of the Treaty and, since companies will not be able to notify anymore, the major demand of the chemical industry is that these operations could still be presented to DG Competition and that companies could obtain a binding decision.

As a consequence, one way to proceed could be to include these operations in the scope of the ECMR, but not with mandatory notification, only it being voluntarily, at the choice of the parties involved in such operation.

**d) The substantive test**

The Commission raised the question whether to abandon one test for the other. Having assessed the situation, the chemical industry is in favour of maintaining the current test as being a concept which is widely spread in all legislation of the Member States and in many jurisdictions around the world and is satisfactory, provided it is applied in a transparent, consistent and predictable manner.

**e) Merger specific efficiencies**

The willingness of the Commission to take substantiated efficiencies into consideration to outweigh the harm to the economy that could be created by a given merger is an interesting evolution, which is supported by the chemical industry.

Indeed, in certain cases, a merger may generate real, merger specific cost savings (e.g. through rationalisation) making post-merger price decreases more likely than the contrary, despite an expected increase of market power of the merging parties.

**B-2 PROCEDURAL ISSUES**

Regarding these issues, the chemical industry fully supports all comments integrated in UNICE’s Position dated 28 March 2002.