Le invio i commenti, predisposti dall’Autorità garante della concorrenza e del mercato, al Libro verde sulla riforma del Regolamento n. 4064/89 relativo alle operazioni di concentrazione.

Con i miei migliori saluti.

(Alberto Heimler)
Introduction

The Italian Competition Authority welcomes the Commission’s Green Paper on the review of the EC Merger Regulation, n. 4064/89 (herebelow ECMR). Based on the practice developed over these years in this field, the Authority is of the opinion that the Merger Regulation has proved to function effectively, attaining for those mergers subject to its jurisdiction a single, expeditious and effective scrutiny. Radical amendments designed to drastically modify the current system would thus not be justified. However, because of the changes of the international context, in particular the future enlargement of the Union and the ever increasing globalisation of the economy, some amendments are needed with a view to better adjusting the ECMR to the new economic environment.

Our comments are structured into three main sections: i) jurisdictional issues, including referral procedures; ii) substantive issues, which cover both the amendment of the legal test for substantive assessment of concentrations and minority shareholdings; iii) procedural issues, which are mainly focused on the timing of the proceedings and on some considerations on due process.

I JURISDICTIONAL ISSUES

1.1 Amendments of thresholds

The current debate should be primarily designed to ascertain whether there are weaknesses in the current EC merger control’s rules, that is to say whether in the current system a significant number of mergers having a transborder impact do not fall within the scope of the Merger Regulation.

In the Green Paper the Commission explores at length the problems relating to multi-jurisdictional mergers, concluding that, because of the ever increasing number of multiple filings involving EU Member States, an amendment of ECMR jurisdiction rules would be appropriate with a view to extending the scope of the ECMR to such transactions. In particular, the Commission seems to endorse the option of qualifying as Community mergers subject to its jurisdiction those transactions notifiable in at least three countries of the EU.
On this matter, the Authority appreciates the valuable work that has been conducted, notably the results of the Commission’s survey set forth in Annex I of the Green Paper. However, the picture is still unclear, nor is the evidence collected in this process unequivocal. In particular, the technical report on multiple filings does not provide conclusive evidence that mergers that have been the object of multiple filings are indeed mergers of Community interest. This is due to a number of reasons. First, the sample used in the study is quite small in statistical terms and thus not sufficiently illustrative of the real situation. Moreover, the investigation does not contain any qualitative analysis of the actual transactions being examined. As a consequence, it remains unclear whether these multiple filings constitute cases involving a Community interest, with regard to the impact of the operation on markets wider than national.

Indeed, the alleged one to one correspondence between multiple filings and mergers of Community interest seems somehow simplistic. The fact that a transaction is notified to more than one member State does not automatically imply that it becomes Community wide. Indeed a number of member States have introduced very low thresholds above which a notification is mandatory. Accordingly, the filing requirement could depend on the too extensive scopes of some merger national provisions, rather than the genuinely cross-border nature of a given transaction. Furthermore, it appears from the Commission statistics that most multiple filings which are not notifiable under the Merger regulation involve only two EU countries. In such cases it may be reasonable to assume that bilateral cooperation between the two EU countries concerned could adequately address the problems.

In any case, irrespective of the statistical results, the current set of jurisdictional rules, including the referral procedures, contains some objective inconsistencies that it would be worth amending. Moreover, the issue of multiple filings, which to date may well be overstated, in a mid-term perspective could eventually become a sensitive political problem. Indeed, there is little doubt that with the enlargement of the Union the number of multiple filings involving EU countries will significantly increase. This in turn could bring the business community to complain about a system which requires companies to bear the unjustified burden to notify a transaction to say three, four or more EU jurisdictions, despite the existence of the one stop shop provided by the Commission in the context of the Merger Regulation.

This is why it is necessary to improve the current system. The amendments should be inspired by the principle that is at the core of the current process of reform of EC competition policy, the principle of subsidiarity. On the other hand, the reform should never frustrate those principles which have made the EC merger control so successful, namely i) the one stop shop and ii) the expeditious and effective scrutiny of cases subject to the ECMR.

In this perspective, a major amendment to the ECMR jurisdiction rules consisting of a thresholds lowering in article 1.2 would not be justified, as such interventions could have negative side effects in terms of allocation of cases. In particular, there is a serious risk that, as a result of lower thresholds, many genuinely national mergers would unduly fall under Community jurisdiction.
Minor refinements of the current system are instead welcome. For instance, one possible improvement of the thresholds provided under art. 1.3 would be to take account of the different size of EU member States. This would imply providing for different turnover thresholds, to be set for each country for example on the basis of their GNP (thresholds could be defined as turnover per billion of GNP). In this way most shortcomings of the current system would be overcome, since many mergers did not fall under article 1.3 because the third country involved was relatively small and the parties’ turnover therein was below the thresholds.

By contrast, the Commission’s proposal, which was already thoroughly discussed in 1998, that is establishing EC jurisdiction whenever a merger is notified in more than three member States would be a cumbersome system: i) many Member States require a notification based on a world-wide turnover, so that a merger would be notified irrespective of the fact that the companies generate some turnover in that country; ii) domestic turnover thresholds are not homogenous across countries, hence the Community or national dimension of individual mergers across Europe would vary depending on the merger notification regime of the involved jurisdictions; iii) in some countries the obligation to notify is based on market share thresholds, not an easily verifiable concept; iv) the general appeal of European law is its clarity, that is the fact that the law is self contained in EU laws and regulations. Should the Commission’s proposal be approved, EC jurisdiction would be based on 15 different domestic laws; v) in order for the Commission to ascertain jurisdiction over a merger, it should rely on the co-operation of national authorities, but under which law would the decision of a national authority declaring EC jurisdiction be challenged and what would happen in case jurisdictional problems were to arise at the end of a proceeding?

1.2. Referral procedures

The 2/3 rule already represents an adjustment of a system entirely based on turnover thresholds. However it is also necessary to amend the referral procedures, so to secure a more effective and rational reallocation of cases between the Commission and the national competition authorities on the basis of the actual markets affected.

Article 9 ECMR

As regards article 9, the Italian Authority agrees with the Commission proposal consisting of removing the reference contained in article 9 (2)b to the non substantial part of the common market. Currently since the merger regulation does not apply when the merger affects markets that are not a substantial part of the common market, one of the main impediments for the referral under article 9(2)b to be applied is that it would stand as a precedent whereby the Commission acknowledges its lack of jurisdiction, thus causing a
sort of shrinking effect of the Commission jurisdiction under the Merger Regulation. This is why the Commission regards 9(2) b referrals with a lot of caution. Instead, once such a requirement would be removed, the Commission would be able to refer mergers without the risk of losing for ever jurisdiction over such cases. At the same time, the burden of proof for member States to request a referral would be softened as it would suffice to show that competition is affected as a result of a given transaction. This would also imply the abrogation of article 9.2 a), which would be absorbed by article 9.2 b).

The removal of the reference contained in article 9 (2)b to the non substantial part of the common market would make it much easier to refer a case and could also make it possible to shorten the time (three weeks) a member State has now at its disposal to ask for referral as well as the time (again three weeks) the Commission has for granting it. However, the Authority does not support the idea to oblige member States, in case of a referral, to follow the EC regulation procedure or to adopt the EC time frame. It would be rather odd for a member State to follow domestic procedures for domestic mergers, and then adopt EC procedures or time frames for article 9 referrals only. On the other hand, a safeguard deadline functioning as a cap - it exists already in the current version of the ECMR - seems a good compromise to avoid exorbitant time delays in the reviewing process conducted by a national Authority under its own domestic regime.

Article 9 referrals (and the same can be argued for article 22 referrals) are the exception, not the rule and it is impossible to eliminate all time delays and additional filing costs. Each referral request by a Member State triggers automatically an extension of deadlines that can be shortened, but cannot be brought down to zero. Moreover, a referral implies by definition that the parties to the transaction first have to file before the Commission, and then before the relevant national competition Authority.

A system of automatic referral could be preferable, but only in principle. In fact an automatic system of referral is so difficult to implement to become unfeasible. The objective of an automatic referral system is to guarantee that national competition authorities have immediate jurisdiction over those cases where competition is affected on a market within one and the same Member State, which presents all the characteristics of a distinct market. This implies that the merging parties, when the market affected is national, would notify the member State. The Commission could then exercise its advocacy function, when the case is of Community interest.

However, such a system raises the fundamental question of whether we have at our disposal a sufficiently clear and simple set of rules which unequivocally identifies those mergers eligible for evaluation by a national competition authority. The key element to make such an assessment is the product and the geographic market definition. This notion, though, is one of the most controversial in the context of the competitive assessment of a merger, leading to discussion and controversies until the end of the procedure. This is why, while in principle a mechanic system would provide the most rational allocation of competences consistent with subsidiarity, it would make ECMR jurisdiction rules more complex and would require a degree of maturity and homogeneity that the overall network
has not reached yet. This is why leaving the actual system in place with minor refinements to article 9 seems the best option available.

Article 22 ECMR

As the Green Paper correctly shows, the main impediment to art. 22 working properly is the lack of coordination between national competition authorities, which is in turn due to the different procedural regimes applicable in each country as regards deadlines and obligation to notify. Another problem is that member States only have the power to start the referral procedure, while under certain circumstances the Commission and the parties may have an incentive to launch such an initiative.

Against this background, starting from the most relevant issues, a possible reform should aim at ensuring a minimum coordination among member States, while not depriving them of the discretionary powers to start the procedure. In essence, this could be done by introducing the following: i) a timely consultation between Member States about multiple filing cases eligible for referral; ii) the introduction of a mechanism that would avoid partial referrals; iii) the possibility for the Commission and the parties to make a formal referral request to Member States.

i) As to the first point, this is a matter of coordination between National Competition Authorities which has little to do with the ECMR amendment. In this respect, it is worth noting that Member States national competition authorities have launched under the ECA project an exchange of information procedure about multiple filings. Such a system made it possible for ECA to become a forum within which Member States engage in timely consultation over multiple filings. To date, co-ordination within ECA has made article 22 referral possible in two cases (Promatech/Sulzer and Ge/Unison).

ii) The second amendment should aim at avoiding partial referrals as well as parallel proceedings which frustrate the logic itself of the referral to the Commission. A joint referral should ideally concern all NCAs involved in the case, since partial referrals and pending parallel proceedings under national legislation would aggravate the position of parties and create uncertainty. In addition, for a NCA retaining jurisdiction over a case despite the joint referral being effected by other NCAs makes little sense as it would be ruling on the same competition problems scrutinised by the Commission, with the risk of adopting a conflicting decision. In the light of the above, the Commission should be granted the power to ask for jurisdiction over a case candidate for joint referral. This would imply that, in case a joint referral request has been filed by some Member States to the Commission, the latter may require also the other countries having jurisdiction over the case to refer it.

iii) The third amendment would be designed to give the initiative of the referral, besides Member States, also to those who may have an incentive to have the case referred, i.e. the Commission and the parties. In essence, article 22 referrals would be based on a procedure more similar to the one currently in force under art. 9 (the decision is started by
the authority requesting the case). In addition, giving the Commission such a power of initiative, would impede parallel proceedings, allowing the Commission to request a case from the member State that, in case of a joint referral by others, has not referred the case to the Commission.

In sum, the recent practice in the application of article 22 ECMR shows that, despite some procedural difficulties, joint referrals can play an important role as a tool for attaining uniform evaluation by the Commission of those multi-jurisdictional mergers having a genuine transborder nature. It also shows that the cooperation system established between NCAs within the ECA Network has played a crucial role in this matter, resolving a number of procedural problems relating to the application of Article 22(3) ECMR. In the light of the above, following some amendments, article 22 ECMR can properly function, becoming an efficient tool of re-allocation of cases between the Commission and NCAs.

Needless to say, the above refinements of the current system would leave unresolved other obstacles to an effective functioning of article 22. In particular, national merger control procedures remain diverse as regards mandatory notification systems and deadlines within which to evaluate the operation. Nor does the harmonization of national procedures seem a realistic option, having regard to the difficulty to obtain legislative amendments at national level. In addition, the whole referral procedure would still entail substantial delays and costs for the companies involved, as any transaction eligible for referral would need to be filed before all the competent national authorities; only then the latter would be in a position to co-ordinate among themselves and possibly refer the case to the Commission. This implies that the referral to the Commission would in any event remain a lengthy and costly procedure for undertakings. On the other hand, the above problems should be balanced against the fact that a uniform assessment of the case is also beneficial to the parties, in so far as it avoids risks of conflict and parallel proceedings which may be costly for the parties as well. In addition, article 22 remains an exceptional tool designed to work for a little number of problematic cross-border transactions accidentally falling outside the scope of the ECMR.

A more radical reform could entail the introduction of some elements of automatism, but as with article 9 the complexities of an automatic referral mechanism would make it unfeasible. As was already argued for article 9, automatism would imply that the Commission would have jurisdiction if as a result of the merger there are affected markets in the meaning of Form CO and these markets are wider than national, or there are more than two national affected markets. In fact, since jurisdiction would be asserted on the basis of a preliminary definition of the relevant market, the complexity of the matter and the legal controversies that it would entail would make such a solution impractical.
II SUBSTANTIVE ISSUES

2.1. Minority shareholdings

To date, the acquisition of a minority stake in a company is not subject to scrutiny under ECMR, unless such a stake gives the acquiring company the possibility of exercising a decisive influence over the activity of the target undertaking.

Throughout the EU, only the German law explicitly provides that the acquisition of 25% of shares or voting rights constitutes by itself a merger and is subject to a prior notification obligation. In all other countries a decisive influence needs to be exercised for a minority acquisition to qualify as a merger. As for the United States, section 7 of the Clayton Act, which has the objective of preventing a merger from substantially lessening competition, also applies to minority shareholding acquisitions. Only pure (passive) financial investment is excluded from merger control.

In some sense the German and US systems address a real issue in so far as, from a competition viewpoint, a minority shareholding acquisition may strongly reduce the incentive for two enterprises to compete aggressively against each other, leading to a less competitive market equilibrium; also, the probability of collusion increases if, for example, a firm more willing to play the maverick role holds a minority shareholding position in the capital of a competitor.

On the other hand the Commission recalls in the Green Paper that there are other legal tools to address the restrictive nature of minority shareholding, such as article 81 and 82 EC. However, with respect to article 81, in order for a minority shareholding acquisition to qualify as an agreement, there must be other convergent factors (interlocking directorates and plans for achieving a greater degree of co-operation). The problem is that acquisitions of minority stake often originate from unilateral action, not from an agreement.

As to article 82 EC, it is a fact that in its past practice the Commission found that a minority shareholding acquisition by a dominant firm was a violation of article 82 (see cases Warner Lambert/Gilette and others and Bic/Gilette). However, the acquisition of an equity interest may also come from a company not being a market leader, and yet substantially worsen the market conditions, with no possibility for article 82 to apply. Not to mention the problems relating to the fact that article 82 would be applied to a structural situation, whereby there is no abusive conduct.

In the light of the above, the ideal solution would be to make such a minority shareholding acquisition subject to prior control, ie. treating it like a merger. Under a legal perspective the solution requires to identify the proper tools for addressing such an issue.

Of course such a move would require a change in the notification criteria and the introduction of an alternative or additional asset or capital share-based threshold disjoined from the acquisition of a decisive influence.

As mentioned before, only in the United States, where the prior notification obligation is based also upon the value of the assets being acquired (and not as in Europe only on
(with the only exception of pure financial investment) for antitrust control. But this is made possible because of the specific US merger review process, based on a non opposition procedure so to speak (i.e the second request mechanism). By contrast, the German system, based on the 25% threshold, is more selective; but there is a higher risk of circumvention by minority shareholding acquisitions running just slightly short of the 25% limit or by the existence of different categories of shares, which make the 25% concept difficult to apply for very broad definitions like the one needed in this context.

Overall, changing the notification system adding an asset or capital share-based dimension, like in the US, is a major change that would require an extensive analysis, probably premature at this stage. By contrast, a less ambitious, but more workable amendment could consist of introducing an ex-ante control system similar to the German one, with a specified share of control to be added to the definition of a concentration in article 3 ECMR.

2.2. Dominance vs Substantial lessening of competition

As to the question of changing the standard for merger evaluation in ECMR, the Authority fails at this stage to see tangible and substantial advantages resulting from such a radical reform.

In favour of the reform militates the fact that the change in standard would promote greater convergence in international mergers. Most of the non-EU systems of merger control apply the substantial lessening of competition standard and there could be some benefits if the European Commission were to apply the same test.

Also, a substantially lessening of competition test is strongly rooted in economics, while dominance, and collective dominance in particular, are eminently legal concepts. Furthermore, since it does not require to prove dominance, a substantial lessening of competition standard is very appropriate for cases where the Commission, in order to prohibit mergers that would restrict competition, would have to define markets very narrowly, in order to find dominance, and then use somehow ambiguous concepts to block the merger, like the portfolio effect doctrine, that do not seem to rely on very solid economic reasoning.

However, a change in the standard should be considered necessary only if some cases that restrict competition could not be challenged under the current standard. This does not seem to be the case. Indeed, it is a fact that, following the Gencor/Lonrho Judgement, the Commission has moved decisively into what can be effectively characterized as a substantial lessening of competition standard. Furthermore, most EU member States have also adopted a dominance test in their domestic legislations. Accordingly, an amendment of the substantive test would create some uncertainty also at the national level.

In sum, the introduction of the substantially lessening of competition standard would solely aim at attaining more clarity, precision and rigor in the EC merger practice, but runs...
the risk of spreading much uncertainty, both at the community and national level. If the standard were to be changed, merger guidelines would need to be published, in order to identify what leads to a substantial lessening of competition and make enterprises better aware thereof. A big undertaking, probably too ambitious for the existing review.

III PROCEDURAL ISSUES

3.1. Commitments in phase I and II: Timing of the procedure

The Authority supports the amendments that the Commission has envisaged in the Green Paper, with some further adjustments relating in particular to phase I.

According to the existing Regulation, whenever the parties to the transaction propose commitments in phase I, deadlines are extended to six weeks. The parties have the first three weeks for presenting commitments, while in the following three weeks the Commission is to assess the adequacy of the remedies proposed: a period which in many instances has proved too short to permit the Commission to get reactions from market operators on the perceived effects of the proposed transaction. As a consequence quite often parties have to present their commitments before they know what is the market evaluation of the proposed transaction and what are the competition problems that would arise. Furthermore the Commission tends to negotiate with the parties possible improvements to the remedies till few days before the final deadline for the decision. As a consequence, Member States do not have enough time for evaluating the adequacy and effectiveness of such commitments.

In any case, neither the parties to the transaction, nor Member States, are formally informed of the concerns raised by the merger, which in turn substantially increases the difficulty of evaluating whether the proposed commitments are appropriate.

To make the procedure for phase I commitments more transparent and efficient it would be useful to: a) extend from six to eight-weeks the time period for evaluating mergers; b) allow four weeks for the parties to present their commitments; c) require the Commission to present a very short and informal statement of objections once the deadline extension is decided; d) require that such a statement be sent to Member States, together with proposed commitments.

Furthermore, the introduction of a stop-the-clock provision might also be envisaged; the mechanism might be conceived to work upon request from the parties, while at the same time permitting the Commission to exercise discretion.

As for phase II commitments, the existing regulation requires that parties present their commitments within three months from the opening of second phase. This implies that parties have to present their commitments only one week after the oral hearing, not being able to take into account possible developments originating from the oral hearing itself. This is probably an additional reason why commitments need to be changed during the last
month of the procedure. Since the meeting of the Advisory Committee has to be announced two weeks in advance, very often it is not possible for the Commission to timely inform member State on the developments of commitments negotiations.

In the Green Paper the Commission rightly suggests not to extend the period of the procedure, but to introduce a stop-the-clock provision of 20-30 working days at the maximum to be granted upon request from the parties within the three-month deadline. The Authority supports such a proposal as it adds further flexibility in the procedure, avoiding that deadlines extensions would cover also those cases that could be assessed within the standard time-frame.