EC Merger Control Conference — highlights of proceedings

Mary LOUGHRAN — Directorate General Competition, Directorate B

Introduction

In November the Commission and the IBA jointly hosted a two-day conference on the subject of reform of the merger control system. The Conference focussed on reform both in terms of review of the merger control regulation and merger practice generally. More than 40 speakers from the Commission, the US anti-trust agencies, academia and the legal profession presented papers to the Conference which provided the basis for some stimulating debates and discussions.

Keynote Address from Commissioner Monti and Mrs Randzio-Plath of the European Parliament

The Conference began with a key-note speech from Commissioner Monti who announced that he would be proposing a series of reform measures to the Commission. The details of these reforms, subsequently adopted by the Commission on 11 December, are described in ‘Reform of the EU Merger Control System — a comprehensive package of proposals’ (1).

The Conference then moved on to an address from Mrs Randzio-Plath, Chairperson of the Economic and Monetary Committee of the European Parliament who raised a number of important issues which arise in the context of a merger investigation including the protection of workers and other social aspects as well as consumer welfare which is naturally central to the Commission’s analysis of mergers. Anticipating this point Commissioner Monti had already announced at the Conference his plans to create a new Consumer Liaison function through which the views of consumers could be better channelled and presented.

In response to this address Mr. Philip Lowe, Director General, Directorate-General for Competition, said that the substantive competition test, regardless of which one was eventually selected, could not be designed to address the issue of the social impact of mergers. In the Commission’s view, these matters were best dealt with by specific tailor-made legislation for this purpose, such as the European Works Council Directive. He announced however that the Commission had decided to ensure that firms are specifically reminded of their obligations to respect these employee-related legislative questions in the notification provisions in Form CO. In addition, in discharging its merger control function, the Commission would continue to respect the rights of employee representatives to be heard. One particular example was their right to receive information regarding proposed divestiture commitments and to provide comments on them.

Jurisdictional issues

During the first morning session the conference addressed the topic of case allocation within the EU and more particularly the question of multiple filings within the EU and more widely. Mr. Götz Drauz, Director, Merger Task Force, Directorate-General for Competition, provided the conference with an overall view of the issues involved and presented the aims of the current review process which were essentially to optimise the system of case allocation between the Commission and national competition authorities, in line with the twin pillars of EU merger control: the one-stop-shop and the principal of subsidiarity. He outlined the main options open to the Commission and explained why it had been decided to discard some of the earlier ideas floated in the Green Paper.

There was strong support from all speakers for a clear system, based on the one-stop shop principle, while recognising also the need to address the issue of multiple filings.

Mr. Drauz explained that the proposed reforms announced by Commissioner Monti aimed to offer an early opportunity to make requests for referrals at pre-notification stage. The objective was to respond to the multiple filings issue by offering a ‘facility’ to notifying parties so that they can request cases which would normally fall under the Commission’s jurisdiction to be dealt with by national authorities and vice versa. It had been decided after some reflection not to pursue the mooted ‘3-plus’ rule i.e. that where the transaction was notifiable in more than 3 Member States it

(1) See article by Stephen A. RYAN — Competition Directorate General, Directorate B Merger Task Force in the beginning of this Newsletter.
should ‘automatically’ qualify for treatment at Community level. It was thought that a ‘voluntary 3-plus rule’ could have led to forum shopping while a ‘mandatory 3-plus rule’ would have brought under Community jurisdiction too many cases which were purely national in scope and which had in reality no Community dimension. He underlined that these proposals were not intended to base competence on geographical market definition. Rather the reforms on case allocation were directed by the principles of clarity, subsidiarity and proportionality.

The role of the Commission and the Community Courts

President Vesterdorf provided the conference with a view from inside the Court of First Instance on the workings of the judicial system and how it might be improved. President Vesterdorf called attention to the respective roles of the Commission and the Court: the Commission’s job was to ensure that the correct legal framework is in place to maintain competitive markets, and to develop matters of competition policy accordingly. The Court, on the other hand, was entrusted with the task of ensuring that the decisions taken by the Commission, are lawful, both in terms of substance and procedure. He recalled however that in each case the matter is decided on the facts, not on issues of institutional balance.

President Vesterdorf outlined in particular the Court’s view of the nature of the Commission’s discretion in the competition assessment of a merger. As far as the existing facts are concerned he stated that discretion did not exist. The Court would rigourously review the precision with which the Commission had assessed the existing market structure etc. However, as to the future behaviour of firms, President Vesterdorf indicated that there was some scope for discretion, related precisely to the issue of predicting future events based on economic theories.

A common concern expressed by all speakers was that judicial review should be timely. President Vesterdorf made it clear that this could be done only with more resources for the Court. On interim measures as applied in merger cases, President Vesterdorf also recognised that such relief might be available in certain circumstances, but he expressed some reservations about its feasibility in practice, especially for prohibition decisions.

The conference also addressed a quite topical issue relating to the legal consequences of a Court judgement annulling the Commission’s assessment of a merger. Opinions were divided on the interpretation of Article 10 (5). On the one hand the Commission’s decision in Kali und Salz suggested that the new assessment should start from the beginning of Phase I. On the other hand, some expressed the view that Article 10(5) should be reviewed to provide a more flexible means for giving effect to the Court’s judgements. The panel did not address what approach should be taken where the Court’s judgement partially vindicates a decision and partially annuls it. Philip Lowe concluded generally that the Commission needed to look at Article 10(5) again.

Judicial Review: A comparison of the EU and the US systems

During the first afternoon session the conference looked at and compared the respective merits of the EU’s administrative system and the US prosecutorial system of merger control. The conference heard that in the US, the parties’ rights of due process are mainly protected within the context of the judicial proceedings. By contrast, the administrative process in the EU is characterised by extensive checks and balances throughout the investigative procedure as well as during the judicial review if an appeal is launched. Also in the EU, the control of concentrations with a Community dimension is entrusted to a supra-national institution. This is not so in the US. Both in legal and political terms, this entails the transfer of national sovereignty to the Commission.

Mr. Lowe summed up the discussion by pointing out that a move over to a US-style system would remove the rationale for our current checks and balances, since the Commission would only be taking a preparatory step. However far from removing power from the Commission, such a development could in fact concentrate even greater power in the hands of the ‘prosecutor’ without providing any obvious countervailing benefits in terms of due process or timeliness. The rights of all interested parties would have to be respected during the judicial proceedings in any event. The quid pro quo for the EU system has so far been a relatively transparent and predictable system of merger control in consultation with Member States.

Procedure and Due Process

On procedural issues Commissioner Monti recognised in his key-note speech that the Review exercise had revealed a need for greater respect for the rights of all parties, be they notifying parties or third parties, in the conduct of our investigations — and for alleviating the time squeeze put on all
concerned at given key moments. He went on to outline the amendments that the Commission would seek in order to introduce greater flexibility through ‘stop-the clock’ provisions to allow for more time to be spent on the conduct of investigations or the negotiation of remedies in addition to the extension of parties’ rights with regard to access to information during the procedure.

Mr. Lowe summed up the debate by pointing out that in the last few years the Commission had faced increased pressure, not only due to the growth in the number of merger notifications, but also to the greater economic complexity of the cases being reviewed. Higher levels of industrial concentration have also brought a need for greater sophistication in the economic analysis contained in our recent decisions. In addition, an increasingly expert private bar operating at a European level had developed a dialogue with the Commission on the interpretation of the merger regulation which had led to a much more incisive application of its provisions. He expressed the hope that this dialogue would continue to enlighten and enrich the work of the MTF and would continue to contribute to the efficiency and the objectivity of our decision-making system.

**Substantive test**

The session on the substantive test focussed on the question of whether the current dominance test was sufficiently wide to cover all mergers which involved competitive harm. Some argued that the current test was sufficiently wide. Others argued that there was a category of cases which fell outside its scope. Those who advocated a change to a significant lessening of competition (SLC) test nevertheless recognised the risk of the loss to the EU legal system of a body of case law which had been built up over decades. Some felt that the cost of switching to a significant lessening of competition test might outway the perceived benefits of this test in terms of greater clarity.

Mr. Lowe summed up the discussion by pointing to the common wish for a predictable and transparent application of the Merger Regulation. He acknowledged that before we amended the current test we would have to carry out to a certain extent a cost-benefit analysis of any change. The planned changes in regard to Article 2, the introduction of new recitals and the draft guidelines would allow us to interpret dominance to cover the kinds of behaviour in non-collusive oligopolistic situations envisaged. That change would be limited to the Merger Regulation and would not affect Art. 82.

**Efficiencies**

The session on efficiencies revealed the reasons why there was no explicit role for efficiencies from the outset of the application of the Merger Control Regulation. In particular it emerged that the history surrounding the adoption of the Merger Regulation, and the subsequent commitment by the Commission was to make it clear that merger policy was about maintaining competitive markets and not an instrument of industrial policy. Speakers from DG Competition explained that our policy and practice in this area would be set out in the new horizontal merger guidelines.

**Conclusion**

Mr. Lowe concluded the two-day debate by highlighting some of the fundamental issues at the centre of our deliberations. These were at the heart of the values that underpinned our system of merger control in Europe. The system was founded on one of the most fundamental tenets of the European Union — that is the principle of an open market economy with free and fair competition. As the guardian of the Treaty, the Commission obviously bore primary responsibility for ensuring that the Community’s policies respect those principles. In the area of mergers this meant the public interest as expressed in a competition test aimed at protecting consumer welfare from anti-competitive harm had to be balanced against the necessary private interest of investors in getting their deals done.