Reform of the EU Merger Control System — a comprehensive package of proposals

Stephen A. RYAN, Directorate-General Competition, Directorate B

On 11 December 2002, the Commission decide upon a comprehensive reform of the EU merger control system, including the adoption of proposals for legislative change and for substantive guidance on merger analysis. These proposals follow a year of consultation and debate on the Green Paper (¹) on the Review of Council Regulation (EEC) No 4064/89, the Merger Regulation (²). The Paper called for views on how the effectiveness of the legal framework for EU merger control might be improved, adapting it better to the realities of a globalising economy, against the backdrop of an enlarging and increasingly integrated Community. The Merger Regulation foresees a regular review of certain of its provisions, notably those concerning the scope of the Commission’s competence in merger control (³). Since its adoption in 1989, the Merger Regulation has been amended once, in 1997 (⁴). The present reforms include proposals, however, which go beyond jurisdictional matters, and constitute a more comprehensive and forward-looking review of the functioning of the EU’s merger control regime as a whole. The reforms comprise: a proposal for amendment of the current Merger Regulation (⁵); a draft Commission Notice on the appraisal of horizontal mergers, which is the subject of public consultation until the end of March 2003; and certain best practice recommendations and other administrative measures designed to enhance transparency and fairness in the conduct of merger investigations within DG Competition.

Objectives of the reform

The revision proposals build on the Commission’s experience in applying the Merger Regulation over more than twelve years. They are designed to improve the Regulation’s effectiveness, and to take account of changes which have occurred in that period both in terms of the increase in the number of cases, their greater economic complexity and the higher levels of industrial concentration which have necessitated greater sophistication in the economic analysis contained in the Commission’s reasoned decisions. The proposed reform also seeks to redress perceived shortcomings that have emerged over the years. In this regard, particular account has been taken of the three recent judgements of the European Court of First Instance over-turning on appeal the prohibition decisions the Commission had taken in Airtours/First Choice, Schneider/Legrand and Tetra Laval/Sidel.

The reform pursues the two-fold objective of, on the one hand, consolidating the successful features of the EU merger control system, and, on the other, of seeking to ensure the continuing effectiveness of the Merger Regulation as an instrument of merger control in meeting the new challenges faced by the economy of the European Union, notably including its pending enlargement.

The proposed reform

Substantive issues

Amendment to Substantive Test in Merger Regulation

The Commission’s Green Paper launched a reflection on the merits of the substantive test enshrined in Article 2 of the Merger Regulation (the dominance test). In particular, it invited comment on how the effectiveness of the test compares with the ‘substantial lessening of competition’ (SLC) test used in several other jurisdictions (and notably in the USA). The consultation spawned a wide range of commentary pleading both for and against change. The main thrust of the arguments of those pleading for a change to an SLC-type standard is that such a test would be inherently better-suited to dealing with the full range and complexity of competition problems that mergers can give rise to.

³ In its Report of 28 June 2000 to the Council on the application of the Merger Regulation thresholds, the Commission concluded that there were strong indications that the existing thresholds should be revised, so as to better cover all concentrations with a Community interest. It moreover set out a number of other jurisdictional, substantive and procedural issues that would merit a more in-depth discussion (see COM(2000) 399 final — 28.6.2000).
to, and in particular that there may be a ‘gap’ or gaps in the scope of the test in Article 2.

The Commission has concluded however, based on its experience to date, that these potential drawbacks to retention of the dominance test were over-emphasised and that, in practice, the dominance and SLC standards have produced broadly convergent outcomes, especially in the EU and US in recent years. With a view, however, to ensuring legal certainty and enhancing transparency regarding the scope of the current test, the Commission proposed a clarification of the notion of dominance contained in the current substantive test to be added to the text of Article 2 (by the addition of a paragraph in Article 2 and of further recitals to the Regulation) (1), so as to make it clear that the test also applies where a merger results in so-called ‘unilateral effects’ in situations of oligopoly, a potential ‘gap’ to which some commentators have pointed. The clarification proposed is consistent with how the European Court of Justice has defined dominance in merger cases (2), but is intended to more closely focus on the dynamic impact of concentrations.

Draft Notice on the Appraisal of Horizontal Mergers

In addition to this clarification of the scope of Article 2 of the Merger Regulation the Commission also adopted a draft Notice on the appraisal of ‘horizontal’ mergers, thereby providing transparency and predictability regarding the Commission’s merger analysis, and consequently greater legal certainty for all concerned. The Commission also announced that it intends to adopt, at a later stage, further guidance on its approach to the assessment of ‘vertical’ and ‘conglomerate’ mergers.

The first set of draft guidelines have been drawn up with a view to setting out a sound economic framework for the assessment of concentrations where the undertakings concerned are active sellers on the same relevant market or potential competitors on that market (horizontal mergers). The draft Notice sets out three main ways in which horizontal mergers may give rise to competition concerns: where the merger is likely to create or strengthen a so-called ‘paramount market position’; where the merger is likely to diminish competition in an oligopolistic market by eliminating competitive constraints on one or more sellers in that market; or where the merger is likely to create or enhance the likelihood of collusion between competitors in an oligopolistic market. The draft guidelines also deal with particular factors that could mitigate an initial finding of likely harm to competition — factors such as buyer power, ease of market entry, the fact that the merger may be the only alternative to the demise of the firm being acquired, and efficiencies.

The treatment of efficiencies

As regards the treatment of efficiencies the draft Notice states that the Commission intends to carefully consider any substantiated efficiency claim in the context of the overall assessment of a merger, and may ultimately decide that, as a consequence of the efficiencies the merger brings about, the merger does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

In so doing, the Commission takes the view that efficiencies can be taken into account, as an integral part of the competition assessment under Article 2, without changing the present wording of the substantive test in the Merger Regulation. Indeed, Article 2(1)(b) of the Merger Regulation states that the Commission shall take account in its competition assessment, inter alia, of ‘the development of technical and economic progress provided it is to consumers’ advantage and does not form an obstacle to competition’.

The draft Notice cautions, however, that efficiency claims would only be accepted when the Commission is in a position to conclude with sufficient confidence that the efficiencies generated by the merger will enhance the incentive of the merged entity to act pro-competitively for the benefit of consumers, because the efficiencies generated by the merger will either outweigh any adverse effects on consumers or make these effects unlikely. For the Commission to reach such a conclusion, the efficiencies would have to be of direct benefit to consumers, as well as being merger-specific, (i.e. they could not be achieved by means other than via the merger) substantial, timely, and verifiable. The burden of proof would rest on the parties, including the burden of demonstrating that the efficiencies are of such a magnitude as to outweigh the negative effects of the merger on competition. The draft Notice also indicates that it is very unlikely that efficiencies could be accepted as sufficient to permit a merger leading to monopoly or quasi-monopoly to be cleared.

(1) The proposed clarification would apply only to the concept of dominance in the Merger Regulation, and not more widely.
Reform of The Merger Control Process

As indicated above, the reform involves changes to the Merger Regulation itself, as well as a series of non-legislative measures. These measures are designed to ensure that the Commission's merger investigations are conducted in a manner which is more thorough, more focused, and more firmly grounded in sound economic reasoning. As a result, the soundness of the Commission's decisions in merger cases should be enhanced.

Legislative measures

Time limits

The Commission proposes a number of significant amendments to the timing provisions in the Regulation. First, the period during which merging parties may offer commitments in Phase I would be extended from 3 to 4 weeks. Second, the submission of a remedy offer in Phase II will, unless it is made early in the procedure (before the 55th working day), lead to an additional 3 weeks being added, thereby allowing more time for the proper consideration of remedies, including the consultation of Member States. Thirdly, the draft Regulation proposes that up to 4 weeks could be added to Phase II for the purpose of ensuring a thorough investigation in complex cases. The parties would have an initial right to add such extra time. It could, however, also be added at the request of the Commission (but with the agreement of the merging parties), where the Commission is convinced that additional investigation time is warranted. Finally, the draft Regulation foresees the introduction, by means of a Commission Regulation, of generalised exemptions from the prohibition on the implementation of a transaction pending clearance for non-problematic cases.

Enhanced fact-finding powers

With regard to the Merger Regulation's fact-finding provisions, the Commission proposes, with some exceptions, to align its fact-finding powers, including the fining provisions, with those proposed in the new implementing Regulation for Articles 81 and 82 EC (1). This will enable the Commission to obtain information more easily for the purposes of an investigation and includes the possibility of imposing higher fines for failure to comply with requests to supply such information. These measures are important, not least with regard to the high evidentiary burden incumbent upon the Commission in cases where it proposes to intervene. Nonetheless, certain powers foreseen in the context of Articles 81 and 82, and notably the power to conduct home searches and sector enquiries, are not proposed to be included in the Merger Regulation.

Simpler and more flexible allocation of cases

Another of the main objectives of the reform is to optimise the allocation of cases between the Commission and national competition authorities, in the light of the principle of subsidiarity, while at the same time tackling the persistent phenomenon of ‘multiple filing’ (i.e. parallel notification to more than one competition authority within the EU).

In the Green Paper, the Commission put forward for discussion the possibility of providing for exclusive Commission jurisdiction over all merger cases that are notifiable in at least three Member States (the so-called ‘3+ proposal’). The aim of strengthening the application of the principle of subsidiarity in case-allocation was widely supported in feedback to the Green Paper. However, the results of the public consultation have revealed a series of potential drawbacks associated with the initial proposal, in particular the legal uncertainties it might bring about. In the light of this feedback, the Commission has decided not to pursue the ‘3+ proposal’, and instead is proposing a simplification of the referral mechanism, while at the same time rendering it more flexible.

The Commission is now proposing first to simplify the criteria for referral, including a closer alignment of the criteria for referral in both directions (from the Commission to Member States and vice versa), and secondly to allow referrals to be made at the pre-notification stage. Notifying parties

would be given the exclusive right of initiative at this early stage, and could, depending on whether they consider that a merger involves a significant cross-border impact, make a reasoned request for a pre-notification referral of the case in either direction. The request would have to be acceded to by both the Commission and the national competition authorities concerned within short deadlines, thereby excluding situations of deadlock. The Commission further proposes that, if at least three Member States agree to a case being referred to the Commission, the case should be deemed to fall under exclusive Community jurisdiction. These amendments to the Merger Regulation would be complemented by a set of guiding principles regarding the criteria upon which referral decisions should be based, and which would in due course be submitted for the approval of the Commission.

Non-legislative measures

Enhancing DG COMP’s economic capabilities

The Commission intends to create a new position of Chief Competition Economist within the Competition D-G, with the staff necessary to provide an independent economic viewpoint to decision-makers at all levels, as well as guidance throughout the investigative process. He or she would be an eminent economist, on temporary secondment to the Commission, thus ensuring that the holder of this post is someone who is in touch with the latest thinking in the field of industrial economics. The role of the Chief Economist would not be limited to his/her involvement in merger control, but would also extend to competition law enforcement generally, including the control of State aids.

It is also intended to accelerate DG Competition’s recruitment of industrial economists and that greater use be made of outside economic expertise. In particular, it is envisaged that independent econometric studies would more frequently be commissioned in Phase II merger investigations.

Enhancing peer review

A further change is an enhanced and more systematic use of a peer review ‘Panel’ system in Phase 2 merger cases. A Panel composed of experienced officials would be appointed for all in-depth investigations, and would have the task of scrutinising the case team’s conclusions with a ‘fresh pair of eyes’ at key points of the enquiry. To this end, it is intended to create a new Unit to providing the necessary support and structure to allow these Panels to become a real and effective internal check on the soundness of the investigators’ preliminary conclusions. It is moreover intended that this Panel system would be deployed throughout the Directorate-General, to the equal benefit of the Commission’s decision-making in the antitrust and State aid areas.

New Best Practice Guidelines — Enhancing due process generally

It is also intended to further increase the transparency of merger investigations. First the merging parties would be given the opportunity to examine the file shortly after the opening of an in-depth investigation (i.e. following the issuance of a decision pursuant to Article 6(1)(c) of the Regulation). Secondly, it is intended to ensure that merging parties are given ad hoc access throughout the investigation to the main third party submissions running counter to the merging parties’ views — respecting, of course, legitimate claims to the protection of confidential information. This will enhance even further the transparency of procedures and allow the parties to contest these submissions at early stages of the investigation and not, as presently, only once a Statement of Objections is issued.

An opportunity should, it is proposed, furthermore be provided for the merging parties to discuss contentious issues with ‘complaining’ third parties at a meeting which should ideally be held prior to the issuing of a Statement of Objections. This would enable an earlier confrontation of opposing arguments relating to the likely effects of proposed merger and therefore assist in the preparation of a more focused Statement of Objections.

It is also intended to introduce some further discipline and transparency in the conduct of investigations, by offering merging companies the possibility to attend so-called ‘State-of-Play’ meetings with the Commission at decisive points in the procedure. This should guarantee that the merging parties are kept constantly updated on progress in the investigation, and that they are given an ongoing opportunity to discuss the case with senior Commission management.

These non-legislative measures are contained in a draft set of best practices on the conduct of merger investigations, which will be discussed with the legal and business community before they are finalised. These best practices should deal with the day-to-day handling of merger cases by DG Competition, as well as the Commission’s relationship with merging parties and interested third parties, and would in particular concern the timing of meetings, transparency, pre-notification contacts, and due process in merger proceedings.
The draft best practices are published for comments on the DG Competition web-site (1).

Re-inforcement of the Hearing Officers

A further strengthening of the Hearing Officers is also a part of the envisaged reforms. It is intended that the Hearing Officers should be equipped with resources, including A grade officials, sufficient to enable them to fully discharge their responsibilities. A strengthening of the Hearing Officers was widely called for in feedback to the Green Paper.

Participation of consumers and other interested third parties

Other reforms include the creation of a Consumer Liaison function within DG COMP, to encourage and facilitate the involvement of consumer associations, which are often poorly resourced bodies. The purpose here is to enhance consumer involvement in competition proceedings. Despite the fact that the ultimate goal of merger control is the protection of consumer welfare, consumers and their organisations rarely express views to the Commission about the likely impact of specific mergers.

The Commission also intends to amend the merger notification form so as to include a reminder to companies of the need to respect their obligations under national and EU law with regard to the consultation of worker representatives.

Judicial review

The Commission has also announced that it intends to continue to press for speedy review of its decisions by the Courts. The introduction by the CFI of a fast-track procedure represents an important step forward, demonstrating that judicial review can be delivered with relative speed: the efficiency with which the CFI disposed of the appeals in Schneider/Legrand and Tetra Laval/Sidel represents real progress.

The Commission, in parallel with the discussions in the Council of Ministers on the revision of the Merger Regulation, has announced its intention to explore with the Member States the various options available which would ensure speedier judicial review in merger cases. The Commission will also pursue contacts with the ECJ and the CFI on this matter.

(1) http://europa.eu.int/comm/competition/mergers/