

EDITORIAL COMMENTS

The next step in reform of EC competition law: Merger control

2002 was an extremely challenging year for the EC Commission and its Directorate-General Competition. On 26 November, the Competitiveness Council adopted the new Regulation implementing Articles 81 and 82 EC in all but a very few sectors of the economy.¹ This decision concluded four years of intensive debate.² This new Regulation “modernizes” the enforcement procedures radically.

Even though merger control is not part of the new Regulation, it was also subject to major storm unleashed by jurisprudential developments. This time it was the Court of First Instance that wrote history in its three judgments: *Airtours*,³ *Schneider Electric*⁴ and *Tetra Laval*.⁵ All the judgments ended with the annulment of Commission decisions prohibiting the relevant mergers. In the last two judgments the CFI followed its new expedited procedure. The judgments have generally been interpreted as a severe blow to the work of the Commission and in particular its merger task force.

A second crucial element in the recent discussion on EC merger control was the Commission’s prohibition decision in the *GE-Honeywell* case. This decision highlighted two important points. First, it once and for all put the EC Commission on the map as a force to be reckoned with by international business. Second, it revealed the necessity of close coordination between the antitrust authorities in the US and the EU. The effects of this hallmark decision are still being discussed by the antitrust authorities on both sides of

1. As a result of the demise of the Coal and Steel Treaty on 23 July 2002, Arts. 81 and 82 and the implementing rules also apply to these sectors. Art. 32 of the new Regulation only excludes bulk and cabotage maritime services as well as air transport services between Community airports and third countries. As the new Regulation does not touch Regulation 26/62, agriculture will be subject to the new rules, as it was subject to the rules of Regulation 17.

2. The White paper was published in O.J. 1999, C 132/1. See for an idea of the discussion e.g. Ehlermann, “The modernization of EC antitrust policy: A legal and cultural revolution”, 37 CML Rev., 537–590; Möschel, “Guest editorial: Change of policy in European competition law?”, 37 CML Rev., 495–499. The new Regulation will be discussed in a forthcoming issue of this *Review*.

3. Case T-342/99, judgment of 6 June 2002, nyr.

4. Case T-310/02, judgment of 22 Oct. 2002, nyr. In case T-77/02, of the same date, the CFI annulled the Commission’s decision ordering the divestiture of the consummated merger.

5. Case T-5/02, judgment of 25 Oct. 2002, nyr. In case T-80/02, of the same date, the CFI annulled the Commission’s decision ordering divestiture.

the Atlantic. A working group was established to try to bridge the perceived gap between the two merger control systems. On 6 December 2002, the Commission published a paper elaborated by the US-EU Merger Working Group: "Best Practices on Cooperation in Merger Investigations". The document is intended to provide an advisory framework for interagency cooperation.⁶ It is based primarily on the 1991 US-EC Agreement on the application of their competition laws. In the meantime the appeal against the *GE-Honeywell* prohibition decision is still pending. This time the CFI has not applied the expedited procedure so that its judgment may take considerable time. A review by the ECJ seems the inevitable course of action in this case. It may therefore well take several years before the full "fall-out" of this decision can be assessed.

To cap all these developments in the area of merger control, the Commission published on 11 December 2002 its proposal for a new merger control regulation.⁷ On the same date it published a draft notice on the appraisal of horizontal mergers.⁸ A week later the Commission published a draft paper "Best Practices on the conduct of EC merger control proceedings".⁹ The proposal follows a year's discussion of the Commission's Green paper on this topic.¹⁰ The discussion was extensive as can be gleaned from the long list of submissions to the Commission.¹¹

These proposals were on the cards for some time, as they were required by Regulation 1310/97 amending the original Regulation 4064/89.¹² This explosion of legislative activities was certainly strongly influenced by the recent "three musketeers" of the CFI. The substance of the package reflects to some extent the discussion following the *GE-Honeywell* decision. The key features of the proposal are as follows:

- the proposal seeks to clarify the substantive standard for the analysis of mergers on competition grounds, by making it clear in particular that the Regulation can be applied to situations of oligopoly which may give rise to

6. It is noted that, consistent with past practice, only one US Agency – either the Department of Justice or the Federal Trade Commission – will review each pertinent action and, accordingly, coordinate with the EU.

7. COM(2002)711 final, available at www.europa.eu.int/comm/competition/mergers/review/IP/02/1856 gives a useful summary of the proposal.

8. O.J. 2002, C 331/18. The Commission intends to adopt further guidance on its approach to vertical and conglomerate mergers.

9. Also available at the website of DG Comp.

10. COM(2001)745 final of 11 Dec. 2001.

11. Available at DG Comp's website.

12. O.J. 1997, L 180/1 with a corrigendum in O.J. 1998, L 40/17. According to Art. 1, 1(4): "Before 1 July 2000 the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3." It will be recalled that at the time this regulation was negotiated it was very difficult to reach agreement on the thresholds for establishing Community jurisdiction.

competition problems;

- the proposed new Merger Regulation moreover seeks to rationalize the timing of the notification of proposed mergers to the Commission, by introducing the possibility for notification prior to the conclusion of a binding agreement, and by abolishing the requirement that transactions be notified within a week of the conclusion of such an agreement. These measures are intended to remove unnecessary regulatory rigidities and facilitate the co-ordination of merger investigations with competition agencies in other jurisdictions;

- a simplification of the system for the referral of merger cases from the Commission to Member State competition authorities for investigation, and vice versa, is also foreseen. This reform will seek to ensure, consistently with the principle of subsidiarity, that the best-placed authority should examine a particular transaction, while at the same time it seeks to reduce the incidence of “multiple filing”, i.e. notification to numerous competition authorities within the EU;

- the Commission is proposing to introduce a degree of flexibility into the timeframe for the conduct of merger investigations, in particular for complex cases. Where a notified merger is the subject of an in-depth enquiry, it is proposed that an additional three weeks should be added to the timetable following the submission of a remedy offer, thereby allowing more time for the proper consideration of remedies, including the consultation of Member States. It is also proposed that up to four extra weeks could, with the agreement of the merging companies, be added to the timetable for the purpose of ensuring a thorough investigation, particularly in view of the high evidentiary burden that is incumbent upon the Commission in cases where it proposes to intervene;

- the Commission’s fact-finding powers would also be strengthened under the new proposal, thereby enabling it to more easily obtain information for the purposes of an investigation, including the possibility of imposing higher fines for failure to comply with requests to supply such information. This would, for example, mean an increase to 1% of aggregate turnover (from a current level of Euro 50,000) in the fine companies may incur for supplying incorrect or misleading information. This increase is in line with investigative powers granted to the Commission under the new Regulation for the enforcement of Articles 81 and 82 adopted by the Council of Ministers on 26 November 2002.¹³

Furthermore, the Commission intends to introduce non-legislative measures that are, in the terminology of its proposal, qualified as elements of “internal organization”. First, it lists two measures: the appointment of a Chief Competition Economist and the establishment of a peer-review system.

13. Quoted from Press release IP/02/1856, of 11 Dec. 2002.

These proposals can be seen as a response to critique by the CFI in the three cases lost. If anything, the analysis of the CFI leading to the annulment of the Commission decisions can be seen as requiring the Commission to employ the standards of economic theory and to apply those standards properly.

In addition, the Commission proposes the following measures:

- allocation of additional support staff for the Hearing Officer;
- the appointment of a Consumer Liaison Officer with DG Comp so that the consumer voice would be better heard;
- allowing companies to have earlier access to the file;
- allowing companies to have an earlier opportunity to review the comments of third parties on proposed commitments and allowing a discussion of those concerns with the third parties and the Commission;
- the Commission intends systematically to offer to hold so-called “state-of-play” meetings in order to ensure that parties are constantly informed about the progress of the case.

The Commission’s plans call for several comments of a general nature, though an Editorial comment is not the place for detailed discussion. First, the plans will lead to substantive rules for assessing mergers that will be closer to the corresponding US rules. This is mainly achieved by the recognition of efficiencies as part of the appraisal process. The Commission does not propose, however, to substitute the “substantial lessening of competition” (“SLC”) test for the dominance test of Article 2 of Regulation 4064/89. The proposal also seeks to clarify that the Regulation can be applied to situations of oligopoly that may give rise to competition concerns.¹⁴ Thus a certain degree of alignment with the US rules will be achieved.

Second, the plans for changes in the internal organization may certainly enhance the quality of the economic analysis of Commission decisions. On the other hand, it must be pointed out that there is less of a tradition of industrial organization economics in Europe as compared with the US. Thus there is more than meets the eye.

Third, the plans on the procedural level are rather timid if measured against the difficulties that came to the surface in cases like *Boeing-McDonnell Douglas* and *GE-Honeywell*. It would seem that a much more radical alignment of procedures on both sides of the Atlantic is required to solve the problem of multi-jurisdiction merger control. Such measures would include the harmonization of the time limits for merger control. The proposed change in time limits seems to be exclusively addressed at solving intra-Community problems. It is true that the paper on the “Best Practices” of the working group

14. The Commission distinguishes two different situations; first, the merger may lead to eliminating important competitive constraints on one or more firms in the market; and second, the merger may change the nature of competition in an oligopolistic market so that firms that were previously unable to coordinate their behaviour would be able to do so.

points to the necessity of coordination in timing. Yet its proposed remedies fall short of a clear alignment of the relevant rules on time-limits in the two jurisdictions.

The present situation may lead to undue pressure from the US on the EC, as the two cases just mentioned have shown. Furthermore, it is important that the respective procedures allow for either authority properly to take into account the comments and suggestions made by the other authority. Closely connected with this is the opportunity to consult on proposed remedies. Clearly a situation in which one authority would require a remedy that is unacceptable for the other authority should be avoided. This sort of antitrust “beggar my neighbour” policy would be anybody’s nightmare. The working group proposes that the merging parties should be offered an opportunity to confer with the relevant US and EU authorities. This may be a step in the right direction, but more is clearly needed. This part of the Commission’s plans lacks imagination and courage. If the Commission is serious about solving multi-jurisdiction mergers, it should come with bolder proposals.

Fourth, the Commission’s plans to simplify and improve the system of referral of cases to the national competition authorities follow closely one of the main principles of the new Regulation implementing Article 81 and 82. Following the principle that the best-placed authority should be handling the case, the Commission also proposes to streamline the Article 22 of Regulation 4064/89 procedure allowing Member States to request the Commission to take the case. The Commission proposes a system whereby it would acquire exclusive jurisdiction where at least three Member States decide to refer a case to the Commission. Furthermore, the Commission proposes that it be given the power to request referrals for Article 9 as well as for Article 22. At present such referrals are only possible at the request of Member States. The proposed system of cooperation would further contribute to avoiding positive jurisdiction conflicts that are not uncommon under the US federal and state antitrust laws and the case law of the US Supreme Court.¹⁵

Finally, the Commission’s plans do not face the question whether prohibition decisions should be authorized by the CFI as has been suggested by some.¹⁶ Closely linked with this issue is the question what the proper role of the CFI in merger cases should be in the future. In the “three musketeers” judgments, the Court ventured far into the territory that traditionally

15. *California v. ARC America Corporation* 490 U.S. 93, 109 S.Ct. 1661, 1989. In this judgment the Supreme Court ruled that State action on a merger case even after the Federal antitrust authority had closed the case with a consent decree did not run counter to the traditional pre-emption doctrine. It should be recalled that many US states have antitrust laws empowering their state to take action on mergers.

16. *The Economist* of 23 June 2001 in its leader.

seemed to be reserved for the Commission.¹⁷ The CFI also stretched its own resources considerably in applying the expedited procedure. The normal case load handled by it was seriously reduced as a result of this all-comprehensive and very time-consuming procedure. It can be doubted whether the CFI can continue such judicial muscle flexing. As its plans indicate, the Commission for its part will continue to push for speedy review by the courts. It notes that the fast track procedure represents considerable progress, but it seems aware of the limits of this system. Consequently it proposes to pursue contacts with the courts on this issue.

It would seem that a more radical solution could kill two birds with one stone. Such a solution would be to have prohibition decisions approved by the CFI. After the three judgments annulling the Commission's decisions further appeals seem inevitable. With hindsight it is surprising that previous negative decisions have hardly been appealed. Of course, the very nature of the merger process does not foster such appeals. Court victories after a long drawn out battle do not necessarily create the conditions for a successful merger long after the actual event was supposed to take place.¹⁸

Prior approval of mergers by the CFI would at least eliminate the delay of the appeal of negative decisions to the CFI. It would also have the merit of aligning the EC system with that of the US.¹⁹ It may also save time for the CFI because it may well put more pressure on the Commission to produce a proper analysis. Such a procedure may also be more effective because the parties concerned have an interest in reaching an expeditious solution. Is such an a priori approval system feasible for the CFI? In order to put the workload into perspective it may be recalled that so far some 20 mergers have been prohibited. It is, of course, also possible that under such a system parties to the proposed merger would be rather less inclined to accept onerous remedies and prefer the case to go to court. That would lead to more cases to be handled by the CFI. It is difficult to predict the future behaviour of the parties in this respect. All in all it seems worthwhile to explore fully the merits of an approval system by the CFI. Additionally, further thought should be given to the suggestion – made in the course of the debate on the functioning of the

17. According to established case law, the Community courts review Commission decisions according to the principle that in complex factual and economic matters it is not for the courts to substitute their assessment for that of the Commission.

18. *Schneider and LeGrand* decided to withdraw their merger plans after the judgment was handed down.

19. In the US the antitrust authority, the Department of Justice or the Federal Trade Commission, seeking to prohibit a merger has to obtain an order from the Federal District Court in Washington DC. This procedure provides for a full hearing of the case. It also provides possibilities for appeal, see e.g. *Federal Trade Commission v. Heinz Co. and Milnot Holding Corporation*, 246 F.3r 708, (D.C. Cir. 2001).

Community courts – to create panels for separate areas of law, from whose decisions only one appeal on points of law would be permitted to the CFI.²⁰

20. See Johnston, “Judicial reform and the Treaty of Nice”, 38 CML Rev., 499 et seq. at section 6.2 , 513.