



Competition Law Forum

ECMR REFORM AND DRAFT HORIZONTAL MERGERS GUIDELINES

CLF SUBMISSION*

The Competition Law Forum of the British Institute of International and Comparative Law (hereinafter the CLF) appreciates the opportunity to comment on the Commission Proposal for a Council Regulation on the control of concentrations between undertakings (hereinafter the proposed EC Merger Regulation) and the Draft Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (hereinafter the Draft Commission Notice).

A) THE PROPOSED EC MERGER REGULATION

1) JURISDICTIONAL ISSUES

a) Community dimension

The CLF welcomes the maintenance of the jurisdictional threshold under Article 1(2). The turnover threshold under Article 1(2) is a bright line test that has proven capable of catching a considerable number of mergers raising Community-wide concerns. It is a way of serving the principle of subsidiarity which allocates jurisdiction in a predictable and effective way.

* The views expressed in this submission take full account of the discussion of the CLF members held on 19 March 2003 and the comments made by the members on a draft of this paper. However, this submission does not express the views of any or all the CLF members and is not attributable to any or all the CLF members. This submission is not attributable to the Honorary Consultative Members of the CLF and does not in any way express their views nor is it attributable to them.

b) Pre-notification referrals at the request of the notifying parties

The CLF considers the pre-notification procedures for referral to be a potentially useful opportunity for the parties depending on the circumstances of each particular case. However, it is submitted that the new provisions could be improved.

i) Pre-notification referrals under Article 4(4)

Pre-notification referrals of cases having a Community dimension from the Commission to a Member State may be improved in the following ways. First, since the Commission may decide to refer part of a case even if the parties only requested a referral of the whole case, there is a risk of parallel proceedings on the same transaction, which would be examined in part by the Commission and in part by a Member State. The referral should only regard the whole of the case and partial referrals should be prohibited. When there is more than one Member State concerned, partial referrals should however be allowed to more than one Member State. Secondly, where the procedure under Article 4(4) has been exhausted, there should be no further issues of allocation of jurisdiction between Member States and the Commission. It seems, however, that after the procedure under Article 4(4) has been used, Member States other than the Member States concerned under Article 4(4) may make a further request to refer under Article 9. It is suggested that Member States should be allowed to make an Article 9 request within the procedure under Article 4(4). Further post-notification requests should be precluded. Requests under Article 22 by other Member States should not occur since Article 22 applies to concentrations not having a Community dimension whilst Article 4(4) applies to concentrations having a Community dimension. However, does the exhaustion of the procedure under Article 4(5) constitute a decision that the concentration has a Community dimension binding on all Member States? In order to avoid any problem in the construction and application of these provisions, it is suggested that Article 4(4) should contain an explicit provision that excludes the application of Article 9 and 22 once the parties have requested a pre-notification referral under Article 4(4).

ii) Pre-notification referrals under Article 4(5)

Pre-notification referrals under Article 4(5) have regard to mergers with no Community dimension. Parties may request that the concentration be examined by the Commission. It is suggested that improvements mirroring those submitted in respect of Article 4(4) would make the pre-notification request for referral much more effective. In particular, it would serve legal certainty if the Regulation provided that after exhaustion of the procedure under Article 4(5), Articles 9 and 22 would not be invoked. Furthermore, where the Commission decides to examine a concentration, only Member States which have made the request to the Commission would be prohibited from applying their national legislation on competition to the concentration. This means that other Member States could apply their own national legislation on competition to the merger. Parallel proceedings could occur and this should be ruled out by inserting appropriate provisions into the Regulation.

c) Article 9 Referrals

As regards Article 9 referrals, the following submissions are made. Article 9 is a potentially powerful provision. It may remove a case from the Commission and transfer it to a Member State. In this respect, the CLF believes that the test under the current Article 9 (2) (a) of Regulation 4064/89 should be maintained. This is because it would not be efficient if the Article 9 procedure could be used in respect of mergers that do not raise any serious competition concerns. For these mergers the interest of the parties and the competition authorities is to arrive at a clearance decision as soon as possible. An Article 9 referral would be inimical to this end. Therefore, it is appropriate to require the Member State to show that the merger threatens to create or strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which present all the characteristics of a distinct market. Article 9 allows for partial referrals as does Article 4(4). For the reasons set out at paragraph A).b).i), it is suggested that partial referrals should not be allowed except for referrals to more than one Member State.

2) Article 22 referrals

Article 22 referrals may transfer a case from a Member State to the Commission. Article 22 is a useful provision and should be maintained. Experience shows that whilst in the first years of application of the ECMR Regulation the referral under Article 22 was used mainly to remedy the inefficiencies of domestic laws on the control of concentrations. In later cases, however, that provision, in its current form, has been invoked to avoid the need for multiple filings. In the way it is currently drafted, however, Article 22 allows Member States who have not made a referral request to continue to apply their national laws on merger control. For the sake of legal certainty, this should be excluded. Once a concentration has been notified to the Commission, only Community law should apply.

2) THE SUBSTANTIVE TEST

As regards the new formulation of the “dominance test” in the proposed EC Merger Regulation, the CLF submits that Article 2(2) of the proposal does not clarify the law. It makes it more obscure. Furthermore, it considerably extends the scope of the previous test. The following points are noted. First, it contains an autonomous definition of dominance. Whilst it may serve legal certainty to have such a definition laid down in the law, it is suggested that such a concept, with its deep economic implications, is better defined through the experience of the case law of the Community courts and the practice of the Commission rather than being encapsulated in immutable formulae. Secondly, the new test is too vague and also too all-encompassing, insofar as it applies to single firm dominance as well as collective dominance. Phrases such as “economic power”; “influence”; “appreciably”; “sustainably”; and “parameters of competition” are likely to require an appeal to the Community Courts to be clarified. Thirdly, it makes the application of the previous case law more problematic so that the benefits of maintaining the old test are in part lost. The CLF strongly believes that a clear-cut solution should be adopted. If the gap in the old test is perceived to exist, in other words if the problem of unilateral

effects truly exists and causes problems in the implementation of a sound competition policy, then an SLC test should be adopted. If the old test is thought to have worked well and not to cause problems in the implementation of a sound competition policy, then it should be maintained. There should be no half-way house.

3) MISCELLANEOUS PROCEDURAL ISSUES

The CLF welcomes the clarification in Article 10(4) of the proposed new Merger Regulation, which solves the problems recently experienced in the Commission's practice.

B) THE DRAFT COMMISSION NOTICE

The CLF welcomes the Draft Commission Notice on the appraisal of horizontal mergers. It is time to take stock of the Commission's practice and the Community Courts' case law and frame these in clear and user-friendly terms. For a Notice on horizontal mergers to be an effective tool of competition policy, it must fulfil two conditions. It must comply with European law as a whole, including the Treaty and the case law of the European courts. It must also enhance legal certainty and predictability. In this respect, it is submitted that the Draft Commission Notice should be changed or improved in some material respects. Furthermore, a more general point should be made. The Draft Commission Notice has been published at a time when there is still no clarification as to which test for merger control will be adopted in the new Merger Regulation. Given this situation, it is submitted that the Commission Notice on the appraisal of horizontal mergers cannot be and is not closely linked to the substantive test. As a result, the overall clarity of such a document and its added value are greatly reduced. With this general reservation in mind, attention is drawn to the following points.

1) ANTI-COMPETITIVE EFFECTS OF HORIZONTAL MERGERS

a) Use of HHI and market shares

At paragraph 16, the Commission states that it is unlikely to investigate cases where the aggregate HHI after the merger remains below [1000]. At paragraph 27 on non-collusive oligopolies, it is provided that a merger leading to an aggregate HHI of [2000] or more and an increase of [150] or more is likely "to raise serious doubts within the meaning of Article 6.1 (c) EECMR". It is suggested that the figures in square brackets are too low for the Draft Notice to have any significance for the undertakings concerned and the Commission. The reason why HHI figures are useful is that they provide an indicative threshold above which the merger is likely to go into phase two. As a result, both the parties and the Commission can easily discern mergers that raise no "serious doubts" and mergers that need to be fully investigated. This enhances efficiency on the regulatory side and predictability on the business side. If, however, the thresholds are so low as to be devoid of any practical significance, the purpose of the use of the HHI index is lost. The CLF refrains from suggesting the appropriate

figures to replace those indicated by the Commission. However, it is stressed that sound econometric and comparative research is needed in order to draw the line at the right point. It is submitted that the figures currently indicated are too low.

The same observations can be repeated in relation to paragraph 29, in the context of the analysis of non-collusive oligopolies, where the Commission states that market shares below 25% in sufficiently homogeneous markets are “unlikely to result in level of market power that could impede significantly effective competition”.

b) Coordinated effects

The CLF notes that the Commission endeavoured to adopt the guidelines set by the Court of First Instance in the case of *Airtours v Commission of the European Communities*¹. However, the CLF would like to emphasise the following two points.

i) Reversal of the burden of proof

At paragraph 41 the Commission states that “it is unlikely that the Commission would approve a merger if co-ordination were already taking place prior to the transaction unless it determines that the merger is likely to disrupt such co-ordination”. It is submitted that this paragraph is framed in such a way that it violates either the substantive test for merger control or the allocation of the burden of proof between the Commission and the notifying parties. What this paragraph actually says is that if the market was a collusive oligopoly before the merger, the merger must break the collusion if it is to be cleared. Otherwise it will be prohibited. This is a misapplication of the substantive test for merger control. The merger should be prohibited if it makes the relevant market less competitive. The Commission, instead, seems to suggest that when a market is already collusive, the merger should be beneficial, i.e. disrupts pre-existing collusion, in order for it to be cleared. This is not an expression of a sound competition policy. It is suggested that it would be at odds with the current test, with the new test proposed by the Commission and the SLC test. It is conceded that in paragraph 41 the Commission might be saying that when a market is collusive before the merger there is a rebuttable presumption that the test for prohibition is met and the notifying parties have to disprove that. Even so, the guideline would not sit comfortably with the duty of the Commission to prove that a merger has anti-competitive effects and should, therefore, be prevented. It is, therefore, submitted that paragraph 41 should be rewritten. It should only state that the collusive nature of the market pre-merger would be one of the factors, and in some circumstances an important one, that would help the Commission in its findings on the impact of the merger on the relevant market.

ii) Buyer power in collusive oligopolies

In the analysis of collusive oligopolies, it is noteworthy that the Commission adopts the approach of the Court of First Instance in *Airtours*. This is made clear at paragraph

¹ Case T-342/99 *Airtours v Commission of the European Communities* [2002] ECR II-000.

4 of the Draft Notice. The Commission states that three conditions must be fulfilled in order to establish collective dominance as a result of the merger: 1) the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to; 2) there must be credible deterrent mechanisms; 3) the actions of outsiders, such as current and future competitors, as well as customers, should not be able to jeopardise the results expected from coordination. With respect to point 3, paragraph 69 deals with the reactions from outsiders, and in particular customers, by reference to buyer power. At paragraphs 75 – 77 of the proposed Guidelines the Commission addresses the countervailing effect of buyer power in the post-merger scenario. The analysis focuses on large customers who may resort to credible alternatives if the merged entity raises prices, restricts output or lowers quality. It should be noted that the Commission refers to buyer power at paragraph 69 when dealing with the reaction of outsiders in the context of the assessment of collective dominance. However, it seems that the reference in paragraph 69 is not appropriate. Customers' behaviour in the assessment of collective dominance may well be only a consequence of demand elasticity as the judgment in *Airtours* clearly shows. Therefore, the Commission should either widen the notion of buyer power in paragraphs 75 – 77 or, preferably, clarify the meaning of customers' reaction at paragraph 69 taking into account aspects of demand elasticity, consistently with the judgment in *Airtours*.

4) EFFICIENCIES

Finally, the CLF welcomes the explicit statement that the Commission will take into account efficiencies in merger control. This certainly clarifies the law and contributes to legal certainty. However, the CLF notes that the topic of efficiencies is likely to be less relevant in practice than it might appear. Efficiencies are difficult to prove. Furthermore, pleading efficiencies is risky since it may give the Commission arguments against the merger. On the other hand, efficiencies have a role to play in merger control, because: 1) they help the Commission understand why the parties want to merge; 2) they serve the purpose of sound competition policy and prevent mergers, which are beneficial to consumers, from being stopped by regulators. The CLF believes that if efficiencies are to play their role in merger control, the Commission should give more precise guidelines on what constitutes efficiencies by empirical description rather than abstract provision. Only if the parties have a certain degree of confidence that the beneficial effects of their merger will outweigh its anti-competitive impact on the market, will they put forward efficiency-related arguments at an early stage, even in the pre-notification phase, as the Commission envisages in the Draft Best Practices.