

Northwestern Journal of International Law & Business

Volume 24

Issue 3 *Spring*

Spring 2004

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Recommended Citation

Werner Berg, New EC Merger Regulation: A First Assessment of Its Practical Impact, The Symposium on European Competition Law, 24 Nw. J. Int'l L. & Bus. 683 (2003-2004)

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The New EC Merger Regulation: A First Assessment of its Practical Impact

*Dr. Werner Berg, LL.M.**

In the late evening of November 27, 2003, the Council of Ministers reached a political agreement on the amended text of the European Community Merger Regulation¹ (“ECMR”), which is due to enter into force on May 1, 2004, the date for enlargement of the European Union. The new Council Regulation, (EC) No 139/2004 (“New ECMR”), the definitive version that received formal Council approval on January 20, 2004,² marks the culmination of an ongoing reform procedure which was launched by the E.U. Commission in December 2001 on the basis of a review clause in the ECMR.³ The final text brings about significant amendments, which include the introduction of the so-called “significant impediment of effective competition” test (“SIEC test”), facilitation of the referral procedures, and increased flexibility concerning the filing date and the commitment procedures.

In the following article, the New ECMR will be assessed from a practitioner’s perspective. Since the new substantive test is being dealt with in another contribution to this Symposium,⁴ this analysis focuses on the

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¹ Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, corrected version 1990 O.J. (L 257) 13 [hereinafter EC Merger Regulation], amended by Council Regulation 1310/97 of 30 June 1997, 1997 O.J. (L 180) 1, corrected version 1998 O.J. (L 40) 17 [hereinafter Council Regulation 1310/97].

² Council Regulation 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1 [hereinafter New EC Merger Regulation]. Please note that the New ECMR has been recast in the interest of clarity. Council Regulation (EC) No 139/2004 is thus a consolidated version of the New ECMR.

³ See Green Paper on the Review of Council Regulation 4064/89 of 11 December 2001, COM (2001) 745/6 final, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2001&nu_doc=745 (last visited Mar. 4, 2004).

⁴ See Alexander Riesenkauff, *The New E.C. Merger Control Test under Art. 2 of the*

jurisdictional and procedural issues. An introduction providing background information on the context of the reform (Part I) is followed by a brief description of the new substantive test (Part II). Analyses on the referral system (Part III) and the new procedural provisions (Part IV) follow and result in concluding remarks assessing the overall impact of the new merger regulation (Part V).

I. BACKGROUND

The current reform of the EC merger control system has to be viewed in the context of several developments. First, as of May 1, 2004, the European Union will encompass twenty-five Member States, thereby extending the applicability of the ECMR to twenty-eight countries.⁵ Second, the modernization of EC competition law, notably the application of the new regulation implementing Articles 81 and 82 of the EC Treaty⁶ from May 1, 2004, required adaptations of the ECMR. Third, the Court of First Instance of the European Communities (“CFI”) annulled four E.U. Commission prohibition decisions in 2002, largely due to shortcomings of proof in the E.U. Commission’s assessments.⁷ Finally, the divergent decisions of the E.U. Commission and the Federal Trade Commission (“FTC”) in the GE/Honeywell concentration and the increased number of referrals to and from the E.U. Commission⁸ have also played a role in the reform discussions.

The starting point for the second and—to use E.U. Commissioner Monti’s words—the “most far-reaching reform of European Merger Control”⁹ was the review of the jurisdictional threshold laid down in

Merger Control Regulation, 24 NW. J. INT’L L. & BUS. 713 (2004).

⁵ The current and the New ECMR also apply to the contracting parties of the Agreement constituting the European Economic Area, which are not E.U. Member States, i.e. Iceland, Liechtenstein and Norway.

⁶ Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1 [hereinafter Council Regulation 1/2003].

⁷ Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II 2585; Case T-310/01, *Schneider Electric v. Commission*, 2002 E.C.R. II-4071; Case T-80/02, *Tetra Laval v. Commission*, 2002 E.C.R. II-4381; Case T-251/00, *Lagardère and Canal+ v. Commission*, 2002 E.C.R. II-4825; see also Mark Clough, *The Role of Judicial Review in Merger Control*, 24 NW. J. INT’L L. & BUS. 727 (2004).

⁸ Twenty-two of fifty-seven referrals under Article 9 ECMR occurred in the years 2002 and 2003, and three referrals under Article 22 ECMR occurred in the years 2002 and 2003 whereas there were none under Article 22 ECMR in the four preceding years.

⁹ Mario Monti, European Commissioner for Competition Policy, *Merger Control in the European Union: A Radical Reform*, European Commission/IBA Conference on E.U. Merger Control Brussels on 7 November 2002, available at http://www.europa.eu.int/comm/competition/speeches/index_speeches_by_the_commissioner.html (last visited Mar. 4, 2004).

Article 1(3) ECMR, the purpose of which was to avoid burdensome multi-jurisdictional filings within the European Economic Area (“EEA”).¹⁰ Consequently, the Commission’s Green Paper,¹¹ triggering a public consultation on the review of the ECMR, had a clear focus on the jurisdictional issues, the development of which covered half of the Green Paper. The substantive test, on the other hand, was only briefly mentioned, presumably to trigger a discussion on the market dominance test rather than to introduce a sustainable reform. The E.U. Commission’s official reform proposal, published in December 2002 (“Commission Proposal”),¹² did not touch upon the substantive test at all. Discussions, however, took their course and finally led to the adoption of a substantive test which is broader than the mere market dominance test governing EC merger control to date and presumably contributes towards convergence with the “Substantial Lessening of Competition” test (“SLC Test”) applied, for example, in the United States, Australia, and the United Kingdom.

It should be noted from the outset that the reform of EC merger control consists of a number of different legal measures, of which the New ECMR¹³ is but one. In addition to this proposal, there are the Best Practices on the conduct of EC merger control proceedings,¹⁴ the guidelines for divestiture commitments,¹⁵ as well as the guidelines on the assessment of horizontal mergers.¹⁶ Last but not least, there are several internal organizational measures which have been or will be undertaken by DG Competition, such as the appointment of a Chief Competition Economist¹⁷ and a Consumer

¹⁰ The EEA consists of the fifteen E.U. Member States plus Iceland, Liechtenstein, and Norway.

¹¹ See Green Paper on the Review of Council Regulation 4064/89 of 11 December 2001, *supra* note 3.

¹² E.U. Commission Proposal for a Council Regulation on the Control of Concentrations Between Undertakings, 2003 O.J. (C 20) 4 [hereinafter Commission Proposal on the Control of Concentrations].

¹³ See New EC Merger Regulation, *supra* note 2.

¹⁴ DG Competition, Best Practices on the conduct of EC merger control proceedings, at http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf (last visited Mar. 4, 2004) [hereinafter Best Practices].

¹⁵ The Best Practice Guidelines for Divestiture Commitments consist of two model texts for Divestiture Commitment and Trustee Mandate, as well as an explanatory note. Best Practice Guidelines for Divestiture Commitments, IP/03/614 (May 2, 2003), available at http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments (last visited Mar. 4, 2004).

¹⁶ E.U. Commission Notice of January 28, 2004: Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf (last visited Mar. 4, 2004).

¹⁷ On July 16, 2003, the E.U. Commission appointed Professor Lars-Hendrik Röller as the Chief Competition Economist in its Directorate-General for Competition. At the time of his appointment, Mr. Röller was Professor of Economics at Humboldt University in Berlin,

Liaison Officer¹⁸ and the setting up of a panel to scrutinize the investigating team's conclusions with a fresh pair of eyes. There are plans to draft guidelines on "non-horizontal" (including vertical and conglomerate) mergers in 2004 and the existing notices will be reviewed in the near future.¹⁹

II. THE NEW SUBSTANTIVE TEST: "SIGNIFICANT IMPEDIMENT OF EFFECTIVE COMPETITION"

To date, mergers that are likely to "create or strengthen a dominant position as a result of which effective competition would be significantly impeded" are prohibited. The new test focuses on effects on competition rather than the structure of the market, and will prohibit mergers that "significantly impede effective competition [SIEC] . . . in particular as a result of the creation or strengthening of a dominant position."²⁰

The change to the new substantive test for assessing mergers was fiercely disputed in the Council of Ministers until the last minute. Agreement could only be reached after the delegations accepted a compromise between the current dominance test and the SLC Test as discussed in the Commission's Green Paper.²¹ This compromise includes

Director of the Institute for "Competitiveness and Industrial Change" at the Wissenschaftszentrum für Sozialforschung, Berlin, and program director of the industrial organization group of the London-based Centre for Economic Policy Research (CEPR). The Chief Economist reports directly to the Director General of Competition and has a dedicated staff of approximately ten specialized economists. His appointment is for a period of three years, non-renewable, as decided by the Commission in December 2002 as part of the Commission's merger control review package. The role of the Chief Competition Economist extends beyond mergers to include anti-trust and state aid control. He will have three main tasks: guidance on economics and econometrics in the application of E.U. competition rules, which may include contributing to the development of general policy instruments; general guidance in individual competition cases from their early stages, and detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis.

¹⁸ On December 9, 2003, the E.U. Commission announced the appointment of Juan Riviere y Marti to the newly created function of Consumer Liaison Officer within the Commission's Competition Directorate General. Mr. Riviere y Marti has worked in the E.U. Commission's Competition Directorate General since 1989. He shall act as primary contact point for consumer organizations, but also for individual consumers, alert consumer groups to competition cases when their input might be useful, advise them on the way they can provide input and express their views and maintain contacts with National Competition Authorities regarding consumer protection matters.

¹⁹ See Press Release, E.U. Commission, Commission welcomes agreement on new Merger Regulation, IP/03/1621, (Nov. 27, 2003), available at http://www.lex.unict.it/cde/documenti/vari/2003/031127commissione_en.pdf (last visited Mar. 4, 2004).

²⁰ New EC Merger Regulation, *supra* note 2, at art. 2(3).

²¹ In its Green Paper on the review of Council Regulation 4064/89 the E.U. Commission

an addition to Recital 25, which provides that the SIEC Test will “beyond the concept of dominance, only [extend] to the anti-competitive effects of a concentration resulting from the non-coordinated behavior of undertakings which would not have a dominant position on the market concerned.”²² Furthermore, the Council of Ministers and the E.U. Commission made a joint statement in which they agree that the notion of “significant impediment to effective competition” should be interpreted in the light of the objectives of the New ECMR and its Recitals, in particular the amended Recital 25.

The SIEC Test will extend the scope of application to non-collusive oligopolies which significantly impede effective competition. In these cases the Commission will no longer have to prove lasting, tacit coordination as required by the CFI in the *Airtours* case under the dominance test.²³ This will certainly bring E.U. merger control closer to the jurisdictions relying on the SLC Test, such as the United States, Canada, and Australia, facilitating alignment of the Commission’s policy with those of the U.S. Department of Justice and the FTC. It will, furthermore, require the E.U. Commission to develop an exact definition of what “significant impediment of effective competition” means in cases where a concentration does not create or strengthen a dominant position. Under the dominance test, the E.U. Commission did not have to elaborate on this criterion in detail. Whether this will bring about significant developments remains to be seen. Given the limits set for the new substantive test by Recitals 25 and 26 of the New ECMR,²⁴ such developments may rather be triggered by the new analytical framework (constituted by the notices for the assessment of horizontal and non-horizontal mergers), and the procedural changes (including organizational matters) rather than by the SIEC Test itself.

III. JURISDICTIONAL ISSUES, NOTABLY THE NEW REFERRAL SYSTEM

The case allocation between the Member States and the E.U. Commission was at the heart of the current reform of the EC merger control system. The core target of the E.U. Commission’s Green Paper²⁵ that triggered a public consultation on the review of the ECMR was the establishment of automatic competence for the Commission once a filing need for three Member States has been identified (the so-called “three-plus

referred to the SLC-Test as applied in the US, Canada and Australia. Green Paper on the review of Council Regulation 4064/89 of 11 December 2001, *supra* note 3, at para. 160.

²² New EC Merger Regulation, *supra* note 2, at Recital 25-6.

²³ See *Airtours*, *supra* note 7, at para 62.

²⁴ See New EC Merger Regulation, *supra* note 2.

²⁵ See Green Paper on the review of Council Regulation 4064/89 of 11 December 2001, *supra* note 3.

system"). Due to harsh criticism from the legal community,²⁶ neither this system nor the suggestion introduced in the Commission Proposal,²⁷ namely to tie the Commission's competence in with the referral of a case to the E.U. Commission by either all competent or at least three Member States (this could have been called "three-minus system"),²⁸ made it into the final text of the regulation. Instead, the reform is confined to amendments of the referral system and a clarification of the concept of concentration under the ECMR.

A. Post-Notification Referrals

Post-notification referrals have been an integral element of the EC merger control system from the beginning. Article 9 ECMR contains the so-called German clause, which allows referral from the E.U. Commission to the Member States. This clause was introduced to meet Germany's concerns about leaving the E.U. Commission with exclusive jurisdiction for cases with a Community dimension. At the time, Germany had a long-standing merger control regime, which had proven its efficiency, whereas merger control was only just being introduced at Community level. The referral mechanism provided in Article 9 ECMR is intended to fine-tune the effects of the turnover-based thresholds establishing jurisdiction as laid down in Article 1 ECMR. Article 9 ECMR makes it possible to refer the case (or parts of it) to the national merger control authority which is best placed to deal with the concentration. It is thus possible to have a concentration assessed at a national level, even if the thresholds for E.U. merger control are met.

When the ECMR was adopted in 1989, it did not contain any mechanism to allow joint referral from the Member States to the E.U. Commission. Article 22(3) ECMR, which encompasses the so-called Dutch clause, was introduced in the interests of Member States, such as the Netherlands, which lacked their own system of merger control when the

²⁶ For the comments received by the Commission, see European Commission, Summary of the Replies Received, at para. 9, at http://www.europa.eu.int/comm/competition/mergers/reviewcomments/summary_publication.pdf (last visited Mar. 04, 2004) [hereinafter Summary of the Replies received]; for single submissions by economists, associations, national competition authorities, law firms, etc. received on the Green Paper, see European Commission, Submissions Received on the Green Paper on the Review of the Council Regulation (EEC) No. 4046/89, at <http://www.europa.eu.int/comm/competition/mergers/review/comments.html> (last visited Mar. 04, 2004) [hereinafter Submissions Received on the Green Paper].

²⁷ See Commission Proposal on the Control of Concentrations, *supra* note 12.

²⁸ See Werner Berg & Andreas Digel, *Zuständigkeit durch Verweisung: Ein Irrweg! - Artikel 22 im FKVO-Vorschlag der Kommission [Competence through Referral: The Wrong Track! - Article 22 in the Commission's ECMR-Proposal]*, 10 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT 445, 446 (2003).

ECMR entered into force. Since January 1, 1998, the Netherlands has established its own merger control system and within the EEA, even after the accession, only the mini states Luxembourg²⁹ and Liechtenstein³⁰ do not have a national merger control system. Article 22(3) ECMR was amended in its first reform in 1998 to allow joint referrals³¹ but was not used for joint referrals until 2002. Joint referrals to the E.U. Commission have started in recent years due to the consultation within the Network of European Competition Authorities (“ECA”)³². To date only three multi-jurisdictional mergers notified to several E.U. Member States were jointly referred to the E.U. Commission.³³

1. *Referral from the E.U. Commission to the Member States (Article 9 New ECMR)*

In the past, Article 9 ECMR met criticism for a number of reasons; notably the criteria for referring a case, the time schedule, and the problems caused by partial referrals. Undertakings going through referral procedures complained about cost increases. Furthermore, there was also some concern about the treatment of referred cases by national competition authorities, mainly with regard to procedural aspects.³⁴ Additionally, the Article 9 procedure had been used infrequently. Until 2001, the year when the E.U. Commission’s Green Paper was published, only twenty-nine cases had been referred from the E.U. Commission to the Member States. At the end of 2003, the total number of referral decisions taken under this provision was only fifty-eight.³⁵ On only three occasions was

²⁹ Luxembourg had approximately 430,000 inhabitants in 1999.

³⁰ Liechtenstein had approximately 32,000 inhabitants in 1999.

³¹ See Council Regulation 1310/97, *supra* note 1, at art. 1, para. 12(b).

³² Established in April 2001, the ECA is a discussion forum consisting of the national competition authorities of the EEA states, the E.U. Commission, and the European Free Trade Association’s (EFTA) surveillance authority. Its main goal is to improve the cooperation between its member authorities. Since September 2001, the member authorities notify one another of merger cases involving more than one jurisdiction. In April 2002, these authorities adopted a set of uniform application principles, see Principles on the Application, by National Competition Authorities within the ECA Network, of Article 22 of the EC Merger Regulation, available at <http://www.bundeskartellamt.de/eca.html> (last visited Mar. 4, 2004) [hereinafter Principles on Application].

³³ See Case COMP/M.2698, Promatech/Sulzer (July 24, 2002), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2698_en.pdf; Case COMP/M.2738, GEES/Unison (Apr. 17, 2002), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2738_en.pdf; Case COMP/M.3136, GE/Agfa NDT (May 13, 2003), available at http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_62.html; see also Principles on Application, *supra* note 32, at para. 5.

³⁴ For a detailed description of the concerns, see Green Paper on the Review of Council Regulation 4064/89 of 11 December 2001, *supra* note 3, at paras. 72-78.

³⁵ It should be noted that this figure includes multiple counting of cases which are

Article 9(2)(b) ECMR, a provision which had been adopted in the first reform of the ECMR and entered into force on March 1, 1998,³⁶ used as the basis for a referral by the E.U. Commission to the Member States.³⁷

Under the current version of the ECMR, the criteria for referring a case constitutes a significant obstacle for referrals. Article 9(2)(a) gives the E.U. Commission discretion as to whether and to what extent it would refer the case to one or more Member States and requires that the concentration threatens to create or strengthen a dominant position. The test under Article 9(2)(b) is even narrower and is only fulfilled if the concentration affects competition in a market which does not constitute a “substantial part of the common market.” It is the established practice of the Community courts and the E.U. Commission to consider the territories of single Member States as constituting substantial parts of the common market.³⁸ Even regions within Member States have been regarded as constituting substantial parts of the common market by the E.U. Commission.³⁹ To date, satisfactory case allocation has also been constrained by the E.U. Commission’s lack of referral initiative and the lengthy procedures involved. Currently, referrals may only be undertaken after the concentration has been notified. The Member States have three weeks from

partially referred to several National Competition Authorities; without such double-counting the number would be fifty-five.

³⁶ See Council Regulation 1310/97, *supra* note 1, at arts. 1 & 3.

³⁷ See Case COMP/M.2446, *Govia/Connex South Central* (Jul. 20, 2001), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2446_en.pdf; Case COMP/M.2730, *CONNEX/DNVBVG/JV* (Apr. 24, 2002), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2730_de.pdf; Case COMP/M.2898, *Leroy Merlin/Brico* (Dec. 13, 2002) (of the three M.2898 Leroy Merlin/Brico referral decisions, only the decision addressed to Portugal explicitly referred to Article 9(2)(b) ECMR), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2898_pt.pdf.

³⁸ See, e.g., Case T-68/89, *RTE v. Commission*, 1991 E.C.R. II-485, at para. 64, *aff’d* Joined Cases C-241/91 P and C-242/91 P, *PRTE and ITP v. Commission*, 1995 E.C.R. I-743 (Ireland, including Northern Ireland, constitutes substantial part of common market); *but see* Case 77/77, *BP v. Commission*, 1978 E.C.R. 1513, 1537 (1978) (Advocate General Warner questions whether Luxemburg constitutes substantial part of common market).

³⁹ See, e.g., Case IV/M.417, *VIAG/Bayernwerk*, at para. 13 (May 5, 1994) (the Bavarian market for power distribution), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m417_de.pdf; Case IV/M.111, *BP/Petromed* (July 29, 2001), (regarding the Spanish Canaries), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m111_en.pdf. However, it should be noted that the “substantial part of the Common Market” criterion was only accepted implicitly in the latter case and that, in both cases, this had to be assessed under Articles 2(2) and (3) ECMR concerning the E.U. Commission’s jurisdiction. Had there been, at this time, a referral procedure as foreseen in Article 9(2)(b) ECMR, the decision might have been different. For a detailed analysis of the “substantial part of the Common Market” criterion, see AUGUST-CAREL MASKE, *DIE GEOGRAPHISCHE DIMENSION IM EUROPÄISCHEN WETTBEWERBSRECHT* [THE GEOGRAPHICAL DIMENSION IN EUROPEAN COMPETITION LAW] 241 (4th ed. 1998).

notification to request referral, which has to be granted or refused within six weeks from receipt of the notification. For the undertakings concerned this meant significant delays in the procedure and potentially increased costs.

Consequently, the E.U. Commission replaced, in the Commission Proposal, the market dominance criterion in Article 9(2)(a) ECMR with the requirement that a concentration “*significantly affects* competition.”⁴⁰ The final text of Article 9(2)(a) New ECMR adopted by the Council of Ministers adds—in line with the text to date—that it suffices to show that a concentration “*threatens* to significantly affect competition on a market within that Member State, which presents all the characteristics of a distinct market.”⁴¹ Whereas the E.U. Commission’s proposal to shorten the deadline for the Member States for requesting a referral from three weeks to two weeks⁴² was overruled and remains at three weeks in line with the procedure to date. Thus, the E.U. Commission succeeded in claiming a right for itself of initiating referrals.⁴³

Whether the replacement of the market dominance criterion in Article 9(2)(a) ECMR with the requirement that a concentration “significantly affects competition” constitutes an improvement for case allocation remains to be seen. If this test were interpreted in line with the SIEC test, any substantial increase of referrals under this provision would be unlikely. Since the new criterion was introduced in order to facilitate referrals, one may expect, however, an independent interpretation, which would encompass—for example—coordination as explained in Article 2(4) New ECMR. It will be interesting to see whether, in the long run, the SIEC test in Article 2 New ECMR is influenced by the interpretation of the substantive referral criterion in Article 9(2) New ECMR. In case the concentration has been referred to the Member State(s), their competent authority must decide upon the case without undue delay. It must inform the parties to the concentration of the result of the preliminary competition assessment and potential further action within forty-five working days after the E.U. Commission’s referral or, where a notification is requested, within forty-five working days of receipt of a complete notification by the competent authority.⁴⁴

⁴⁰ See Commission Proposal on the Control of Concentrations, *supra* note 12 (emphasis added).

⁴¹ See New EC Merger Regulation, *supra* note 2 (emphasis added).

⁴² See Commission Proposal on the Control of Concentrations, *supra* note 12.

⁴³ See New EC Merger Regulation, *supra* note 2, at art. 9(2) (“... a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned. . .”).

⁴⁴ *Id.* at art. 9(6).

2. *Referral from the Member States to the E.U. Commission (Article 22
New ECMR)*

The new Article 22 does not bring about any material changes to Member States' ability to initiate a referral to the E.U. Commission. However, the procedural rules will be streamlined. One or more Member States may request the E.U. Commission to examine concentrations which fall in their jurisdiction but "affect trade between Member States and threaten to significantly affect competition within the territory of the Member State or States making the request."⁴⁵ The E.U. Commission may initiate a referral by inviting the relevant Member States to make such a request.⁴⁶ The request must be made within fifteen working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.⁴⁷ Other Member States will be able to join in a referral request within fifteen working days of being informed of the request⁴⁸ and the E.U. Commission must decide, within ten working days thereafter, whether to take on the case.⁴⁹ The E.U. Commission must inform all Member States and the parties to the concentration of its decision and may request the submission of a notification.⁵⁰ The Member State or States that made the request will no longer apply their national legislation on competition to the concentration,⁵¹ whereas Member States that have not joined in the referral request will continue to apply their national merger regimes. The national time limits relating to the concentration are suspended until it has been decided where the concentration is to be examined.⁵²

The procedural clarifications provided for by Article 22 ECMR are clearly to be welcomed from the perspective of the parties to a concentration. The clarifications facilitate anticipation of referrals and streamline the procedure. Remaining uncertainties seem to be bearable.⁵³ Probably the biggest achievement, as compared to the concept foreseen in the Commission Proposal,⁵⁴ is that the E.U. Commission will acquire

⁴⁵ See New EC Merger Regulation, *supra* note 2, at art. 22(1).

⁴⁶ *Id.* at art. 22(5).

⁴⁷ *Id.* at art. 22(1).

⁴⁸ *Id.* at art. 22(2).

⁴⁹ *Id.* at art. 22(3).

⁵⁰ *Id.*

⁵¹ New EC Merger Regulation, *supra* note 2, at art. 22(3).

⁵² *Id.* at art. 22(2).

⁵³ *E.g.*, practice may develop an understanding of what is meant by "otherwise made known to the Member State concerned." *Id.* at art. 22(1).

⁵⁴ See Commission Proposal on the Control of Concentrations, *supra* note 12 (this is fundamentally different from the two initial proposals under the three-plus and the three-minus system); see also Submissions received on the Green Paper, *supra* note 26 and

jurisdiction over the case only insofar as it has actually been referred by the respective Member State. Under the three-plus and the three-minus system, the E.U. Commission would have acquired jurisdiction for the whole European Union once a certain number of Member States had referred the concentration to the E.U. Commission.⁵⁵

B. Pre-Notification Referrals

Probably the most important amendment in this area is the implementation of pre-notification referrals in Article 4(4) (from the E.U. Commission to the Member State(s)) and Article 4(5) (from the Member State(s) to the E.U. Commission) of the New ECMR⁵⁶. The introduction of this kind of pre-notification referral fits in with the other amendments according to which—contrary to the current Article 4(1) ECM—concentrations will only have to be notified prior to their implementation but the future notifications may also be made before the conclusion of a final agreement (so-called “Intended Concentrations”).⁵⁷ Pre-notification referrals can only be initiated by the parties to an Intended Concentration. Once the new ECMR has entered into force, they may do so by sending a reasoned submission to the E.U. Commission, which will “transmit this submission to all Member States without delay.”⁵⁸ The E.U. Commission is currently developing a form reasoned submission (“form RS,”)⁵⁹ which parties to Intended Concentrations will have to use to initiate referrals.

1. Referral from the E.U. Commission to the Member States (Article 4(4) New ECMR)

In case of an intended referral to the Member States, the reasoned submission needs to give reasons for referral. Referral is only possible if “the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market”⁶⁰.

accompanying text; Berg and Digel, *supra* note 28 and accompanying text.

⁵⁵ See Submissions Received on the Green Paper, *supra* note 26 and accompanying text; Berg and Digel, *supra* note 28 and accompanying text.

⁵⁶ See New EC Merger Regulation, *supra* note 2, at art. 4(4-5).

⁵⁷ See *id.* at art. 4(1); see also *infra* Part I.A.1 for details on this part of the reform.

⁵⁸ See New EC Merger Regulation, *supra* note 2, at art. 4(4.2 & 4.5).

⁵⁹ The Draft Commission Regulation Implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (“EC Merger Implementing Regulation”) includes a draft form RS; for the public consultation of the EC Merger Implementing Regulation. See Commission of the European Communities, *The EC Merger Implementing Regulation*, available at <http://www.europa.eu.int/comm/competition/mergers/legislation/regulation> [hereinafter *EC Merger Implementing Regulation*].

⁶⁰ See New EC Merger Regulation, *supra* note 2, at art. 4(4.1).

Here again, it will be interesting to see how the E.U. Commission and the national competition authorities interpret the term “significantly affect competition.” A distinct market is understood—in Article 9(2) ECMR—to mean a territory where the conditions of competition are sufficiently homogenous.⁶¹ It is, however, unclear whether such a market has to be entirely within one Member State or may extend beyond the borders of one Member State.⁶²

Member States referred to in the reasoned submission have fifteen days to decide whether they agree to a referral. Agreement is assumed if they do not respond within the deadline. If the Member State(s) agree(s) to the referral and the substantive criteria are fulfilled, it is up to E.U. Commission discretion whether or not to refer the Intended Concentration, or parts thereof, to the national authorities. The E.U. Commission has to decide within twenty-five working days from its receipt of the reasoned submission. It must inform the other Member States and the parties to the Intended Concentration of its decision. If the Commission misses the deadline, “it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.”⁶³ If the case is referred to the Member States the parties do not have to notify the case to the E.U. Commission, but must notify the national merger control authorities if the national laws so provide.

Referral to the Member States at the parties’ instigation is clearly to be welcomed (as an option), but the practical use of this instrument is questionable. Although the parties should not be required to demonstrate that the effects of the concentration would be detrimental to competition,⁶⁴ referral is only possible if “the concentration may significantly affect competition in a market within a Member State.”⁶⁵ This may in fact vitiate the practical use of this referral provision.

2. *Referral from the Member States to the E.U. Commission (Article 4(5) New ECMR)*

It is remarkable that no substantive criteria for referrals from the Member States to the E.U. Commission are listed in Article 4(5) of the New

⁶¹ See EDURNE NAVARRO VARONA ET AL., *MERGER CONTROL IN THE EUROPEAN UNION: LAW, ECONOMICS AND PRACTICE* at para. 14.23 (Oxford 2002).

⁶² See Simon Hirsbrunner, *Article 9*, in *KOMMENTAR ZUM EUROPÄISCHEN WETTBEWERBSRECHT* [COMMENTARY ON EUROPEAN COMPETITION LAW], at para. 20 (Helmuth Schröter et al. eds., 2003).

⁶³ New EC Merger Regulation, *supra* note 2, at art. 4(4), para. 4.

⁶⁴ Recital 16 of the New ECMR explicitly provides that “the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition.” *Id.* at Recital 16.

⁶⁵ *Id.* at art. 4(1); see also *EC Merger Implementing Regulation*, *supra* note 59, § 6.2.4.

ECMR. This provision simply prescribes a sequence of information transmissions, which is triggered by the parties to the Intended Concentration with a reasoned submission to the E.U. Commission. The reasons the submission has to provide will be specified in the final form RS.

A significant difference compared to the referrals under Article 4(5) New ECMR is that it does not allow for partial referrals either in terms of parts of the case or in terms of the referral being made by some (rather than all) Member States. Member States have fifteen working days to decide whether they agree to the referral and if only one Member State expresses disagreement the case will not be referred at all.⁶⁶ It is only if no Member State has expressed its disagreement within the fifteen working day period that “the concentration shall be deemed to have a Community dimension and shall be notified to the Commission.”⁶⁷ It should be noted that initiating a referral under this provision may be very dangerous for the parties to an Intended Concentration because the concentration, by acquiring a Community dimension will be assessed by the E.U. Commission with regard to its impact in the entire European Union although it may have triggered filing needs only in a few Member States. Had it not been referred, it would have been assessed only with regard to the territory of these Member States.⁶⁸ If the Intended Concentration has been referred to the E.U. Commission, the Member States may no longer apply their national competition laws to the concentration.⁶⁹

It seems doubtful that the new pre-notification referral system will ever gain any major practical importance. The request for referral from the E.U. Commission to the Member States is certainly not very attractive for the parties to an Intended Concentration, given that they have to demonstrate their concentration’s negative impact on competition. The absence of substantive criteria for the request for referral from the Member States to the E.U. Commission may render this alternative more attractive for the parties to an Intended Concentration. Given that the geographic area of investigation may be significantly enlarged by an Intended Concentration acquiring Community dimension, one will also have to wait and see what practical use Article 4(5) New ECMR has. It is probably fair to say that with the reform (and in the light of accession) the E.U. Commission’s role has again been reinforced. There will not only be more cases having a Community dimension because of accession (and remaining turnover thresholds) but also because referrals are more likely to the E.U.

⁶⁶ New EC Merger Regulation, *supra* note 2, at art. 4(5), para.4.

⁶⁷ *Id.* at art. 4(5), para. 5.

⁶⁸ See Berg and Digel, *supra* note 28, for the potential problems created under the Commission Proposal, which had envisaged the creation of Community dimension to a much larger extent and without prior right of initiative by the parties.

⁶⁹ See New EC Merger Regulation, *supra* note 2, at art. 4(5), para. 5.

Commission than from the E.U. Commission. Finally, one should not forget that the E.U. Commission will be the primary addressee of the parties in pre-notification referrals and the coordinator of the whole pre-notification process.

C. Clarification of the Concept of Concentration (Article 3(1) New ECMR)

Finally, the Council of Ministers accepted clarification of the concept of concentration in that it only applies to “changes of control on a lasting basis” through mergers or acquisitions.⁷⁰ This seems to have been the E.U. Commission’s understanding to date⁷¹ but was not formally enshrined in the ECMR.⁷²

In addition, this clarification is also reflected in Recital 20 of the New ECMR.⁷³ This Recital explains that “transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time” will be treated as a single concentration.⁷⁴ The E.U. Commission had proposed to amend Article 3(4) ECMR accordingly such that “transactions which are conditional on one another or are so closely connected that their economic rationale justifies their treatment as a single transaction shall be deemed to constitute one and the same concentration.”⁷⁵ This proposal was turned down by the Council of Ministers following criticism from several Member States that the criteria constituting the relevant economic link were not sufficiently clear. Article 5(2), subparagraph 2, ECMR referring to staggered transactions also remains unaltered largely for the same reasons. The E.U. Commission had proposed to confine the applicability of this provision to transactions concerning related economic sectors.⁷⁶

⁷⁰ See *id.* at art. 3(1).

⁷¹ This is certainly the case for joint ventures constituting concentrations in the sense of the ECMR, see *infra*, note 72, but also beyond. See EDURNE NAVARRO VARONA ET AL., *supra* note 61, at paras. 2.05 - 2.11 and accompanying notes.

⁷² However, Recital 23 of Council Regulation 4064/89, EC Merger Regulation, *supra* note 1, explained that it is appropriate to define the concept of concentration as to cover “only operations bringing about a lasting change in the structure of the undertakings concerned.” Additionally, the creation of joint ventures is only covered if they are “performing on a lasting basis all the functions of an autonomous economic entity.” *Id.* at art. 3(2). Further, the exception for credit or other financial institutions and insurance companies in ECMR Art. 3(5) shows that the concept of control in the ECMR requires such lasting change.

⁷³ See New EC Merger Regulation, *supra* note 2.

⁷⁴ *Id.*

⁷⁵ See Commission Proposal on the Control of Concentrations, *supra* note 12.

⁷⁶ *Id.*

IV. PROCEDURAL AMENDMENTS

Perhaps the most important practical amendments of the ECMR are those of procedural nature. They include the merger timetable, procedural safeguards, and the E.U. Commission's investigation powers. One can identify three different areas in the reform of the procedural rules. The first area can be characterized as "increased flexibility." This encompasses the more flexible filing date as well as the invention of "stop the clock" provisions to extend the investigation periods. The second area of reform is commonly referred to as "the system of 'checks and balances' and 'due process.'" This encompasses measures enhancing transparency, procedural safeguards, and improved scrutiny and has to be looked at in conjunction with the CFI's newly invented fast-track procedure.⁷⁷ The third part may be termed "increased powers of investigation."

A. Increased Flexibility

1. *Filing Date: No Triggering Event*

In the current version of the ECMR, notifications of concentrations with a Community dimension (i.e., meeting the ECMR's thresholds) must be made not more than one week after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Whereas the E.U. Commission has been liberal in applying the deadline established by Article 4(1) ECMR,⁷⁸ it does not accept notifications unless and until a binding agreement has been made.

During the review process of the Green Paper, several participants in the discussion voted for a more flexible approach regarding the timetable for notifications of envisioned concentrations. The International Competition Network ("ICN"), for instance, has recommended that parties to a merger should generally be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.⁷⁹

Obviously, the discussion that followed the publication of the Green Paper has dispelled doubts regarding doing away with the so-called

⁷⁷ The expedited procedure was introduced in February 2001 by amending the procedural rules of the CFI and the ECJ. Under this procedure, a much earlier judgment is made possible by eliminating the second round of written pleadings, scheduling an early oral hearing, and having the relevant chamber decide the case as a matter of priority.

⁷⁸ See EDURNE NAVARRO VARONA ET AL., *supra* note 61, at para. 12.37.

⁷⁹ International Competition Network, Recommended Practices for Merger Notification Procedures, at 4, § III(A) (Sept. 2002), available at <http://www.internationalcompetitionnetwork.org/practices.pdf>.

“triggering event.”⁸⁰ Accordingly, Article 4(1) New ECMR provides that a concentration with a Community dimension will only need to be notified before a merger is put into effect and the general principle of ex-ante merger control would therefore remain valid. It will, however, be entirely at the obligated party’s discretion to decide when to notify a concentration. First, the one-week deadline for submitting notifications is abandoned. Second, Article 4(1), subparagraph 2, permits the notification of concentrations before a binding agreement between the undertakings involved has been reached. Notification can occur if and when the undertakings concerned demonstrate to the E.U. Commission a good faith intention to conclude an agreement or, in the case of a public bid, to publicly announce an intention to make such a bid, provided that they would result in a concentration with a Community dimension.

The wording of Article 4(1) raises the question of what exactly the obliged undertakings have to do to demonstrate a “good faith intention.” Recital 34 of the New ECMR suggests that the parties deliver, for example, an “agreement in principle, a memorandum of understanding or a letter of intent signed by all undertakings concerned or, in the case of a public bid, where they have publicly announced an intention to make such a bid” to prove their good faith intention to the E.U. Commission. None of these suggestions provides any further clues as to the actual meaning of demonstrating a “good faith intention.” The term “letter of intent,” in particular, allows for a variety of interpretations which could also include a mere oral declaration of the notifying parties. Nevertheless, it must be concluded in particular from the criterion “signed by all undertakings” introduced by the Council,⁸¹ that a written statement is necessary. A written agreement would at least provide the E.U. Commission with enough information to verify the sincerity of the Intended Concentration.

For the parties in merger procedures, the amendment of Article 4(1) ECMR appears to be advantageous in the majority of cases. Having the opportunity of early notification may expedite the overall examination and reduce transaction costs that are generated during contract negotiations, especially if the merger is at risk of being prohibited. Convergence between different competition authorities as regards the timing of notifications might improve the procedural co-ordination with other jurisdictions (especially with the United States). It is probably for this reason that the U.S.-E.U. Merger Working Group has stressed, in connection with their communication of best practices, that cooperation will

⁸⁰ For details, see Werner Berg & Patrick Ostendorf, *The Reform of EC Merger Control: Substance and Impact of the New Procedural Rules*, 24 EUR. COMPETITION L. REV. 594, 595 (2003).

⁸¹ The Commission Proposal did not contain this suggestion, see Commission Proposal on the Control of Concentrations, *supra* note 12, at Recital 28.

be most effective when the timetables of the reviewing agencies run more or less on a parallel track.⁸²

Nevertheless, there may be one potential problem which is not of mere hypothetical nature in increasingly concentrated markets. So far, it has been the E.U. Commission's practice so far to take into account the fact that two other competitors on the same market have already merged or are planning to do so when considering a proposed merger between competitors. In its assessment of the proposed merger of Price Waterhouse and Coopers & Lybrand ("PW/C & L") for example, the E.U. Commission also took into account the intended merger of KPMG and Ernst & Young, which had been notified to the E.U. Commission on December 23, 1997,⁸³ only twelve days after receipt of the notification in the PW/C & L concentration.⁸⁴ Special attention was given to the post-merger market with regard to this dual-merger scenario. The E.U. Commission found this analysis of a "dual-merger scenario" justified,

since under the Merger Regulation the effects of merger operations are assessed in a perspective which is projected into the future of the market, taking into account not only the changes brought about by the merger itself but also making allowance for future development such as new entrants, liberalisation, product innovation and so on, and since the KPMG/E & Y agreement was a well-known fact in the market place.⁸⁵

When KPMG and Ernst & Young publicly announced that they had jointly agreed to terminate their merger plans,⁸⁶ the E.U. Commission came to the conclusion that the merger of PW/C & L would not lead to an oligopolistic dominance.⁸⁷

A similar situation arose in the case of Shell/DEA⁸⁸ with regard to the proposed BP/E.ON concentration⁸⁹, which was notified on July 27, 2001, only seventeen days after the E.U. Commission had received the notification of Shell and DEA.⁹⁰ In its press releases on the partial referrals of both concentrations to the German Federal Cartel Office

⁸² U.S.-E.U. Merger Working Group, Best Practices on Co-Operation in Merger Investigations, at para. 4, available at http://www.europa.eu.int/comm/competition/mergers/others/eu_us.pdf (last visited Feb. 22, 2004).

⁸³ See Case IV/M.1044, KPMG/Ernst & Young, 1998 O.J. (C5) 3.

⁸⁴ See Case IV/M.1016, Price Waterhouse/Coopers & Lybrand, 1998 O.J. (L50) 27, at paras. 1, 108.

⁸⁵ *Id.* at para. 108.

⁸⁶ *Id.* at para. 110.

⁸⁷ *Id.* at para. 119.

⁸⁸ Case COMP/M.2389, Shell/DEA, 2001 O.J. (C 202) 18.

⁸⁹ Case COMP/M.2533, BP/E.ON, 2001 O.J. (C 222) 11.

⁹⁰ See *Shell*, 2001 O.J. (C 202) 18.

(“Bundeskartellamt”) the E.U. Commission indicated that the “combination of the respective petrochemicals activities of Shell and DEA, on the one hand, and of BP and E.ON, on the other hand, raises fears of a creation of a collective dominant position.”⁹¹

Even though the E.U. Commission was fully aware of the “dual-merger” scenario, in neither case⁹² did it explicitly indicate which criteria it would use to solve the problems arising from these scenarios. It did, however, refer to both the outlook of an assessment under the ECMR and the KPMG and Ernst & Young agreement as “well-known fact(s) in the marketplace.”⁹³ Under Article 4(1) New ECMR, any forward-looking approach of the E.U. Commission will become more difficult because uncertainties may well increase both in terms of whether a concentration will be finalised at all and in terms of timing. In the worst case it could even provoke a situation in which two parties feign a merger in order to hold off another one. Whereas this seems to be a rather theoretical concern given that a notification procedure always includes the provision of sensitive data to the E.U. Commission and—to some extent—to competitors, Article 4(1) New ECMR may result in a sort of race to be assessed first, particularly as markets become increasingly concentrated. It is therefore likely that the E.U. Commission will have to clarify its policy with regard to “dual-merger” scenarios.⁹⁴

2. Decision Deadlines: “Stop the Clock” Provisions

According to the current ECMR, the E.U. Commission starts the initial examination period immediately after receiving the notification. Within a period of one month the E.U. Commission must adopt a first decision, which may be to “initiate proceedings” and therefore to open “Phase Two”

⁹¹ Press Release, European Commission, Commission refers oil products part of Shell/DEA deal to Germany, deepens probe into petrochemicals markets, IP/01/1222 (Aug. 24, 2001), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1222|0|RAPID&lg=EN; Press Release, European Commission, Commission refers oil products part of BP/O.EN deal to Germany, deepens probe into petrochemicals markets, IP/01/1247 (Sept. 6, 2001).

⁹² See also Case IV/M012, Varta/Bosch, 1991, O.J. (L 320) 26 (declaring the compatibility of a concentration with the common market); see also Christoph Stadler, “Conflicting Mergers”: Combined Assessment or Priority Rule?, EUR. COMPETITION L. REV. 321, 330 at n. 2 (2003).

⁹³ There seem to be two limitations: (1) no decision can be based on facts which have not been the object of consultation with the parties, see EC Merger Regulation, *supra* note 1, at art. 18(1); and (2) the reference to potential competition in Article 2 seems to require that future developments of the markets concerned be taken into account, *id.* at art. 2.

⁹⁴ See John M. Schmidt, *Spotting the Elephant in Parallel Mergers*, EUR. COMPETITION L. REV. 183, 183-202 (2003) (discussing the different approaches of combined assessment versus priority rule); see also Stadler, *supra* note 92, at 321.

of the merger control procedure.⁹⁵ This initial examination period will only be extended if either the undertakings concerned propose amendments to the concentrations⁹⁶ or one or more Member States request that the E.U. Commission refers a case to their competition authorities.⁹⁷ If the E.U. Commission has launched “Phase Two” proceedings because it considers that the concentration raises serious doubts as to its compatibility with the common market, a second and therefore final decision must be made within a period of four months.⁹⁸ If the E.U. Commission fails to make a decision within this period, the concentration is cleared regardless of any anti-competitive effects it might have. Again, the time frame for “Phase Two” as laid down in the procedural provisions of the present ECMR cannot be extended by the E.U. Commission, even if the parties concerned agree with such a prolongation of the inquiry or offer commitments.

This strict timetable has increasingly been called into question in the light of increasingly complex concentrations and difficult negotiations regarding commitments. The New ECMR contains some changes which will increase flexibility. First of all, the time periods referred to in the proposal are now expressed in terms of working days in order to simplify the calculation of deadlines.⁹⁹ However, the timetable of “Phase One” has not been substantially modified, with the exception of a brief prolongation of the time allowed for a decision by the E.U. Commission. According to Article 10(1) New ECMR, E.U. Commission decisions finalizing “Phase One” must be taken within twenty-five working days, instead of one month according to the regime to date. If the E.U. Commission receives a request

⁹⁵ EC Merger Regulation, *supra* note 1, at art. 6(2).

⁹⁶ The Commission can accept commitments in Phase One as well as in Phase Two. *Id.* at arts. 6(2), 8(2). Whereas commitments in Phase One will be accepted “where the competition problem is readily identifiable and can easily be remedied,” commitments in Phase Two must be “proportional to and would entirely eliminate the competition problem.” See Council Regulation 1310/97, *supra* note 1, at Recital 8. For further details regarding commitments within merger procedure, see Simon Holmes & Sarah Turnbull, *Remedies in Merger Cases: Recent Developments*, EUR. COMPETITION L. REV. 499 (2002); see also Werner Berg, *Zusagen in der Europäischen Fusionskontrolle [Commitments in European Merger Control]*, 12 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 362 (2003).

⁹⁷ EC Merger Regulation, *supra* note 1, at art. 10(1), para. 2.

⁹⁸ *Id.* at art. 10(3).

⁹⁹ The concept of working days is defined in Article 25 EC Merger Implementing Regulation and refers exclusively to the E.U. Commission’s working days. *EC Merger Implementing Regulation*, *supra* note 59. Commission Proposal on the control of concentrations, *supra* note 12, at 10, para. 69. It is, however, doubtful that deadlines referring exclusively to Member States’ authorities (as, for example, in the referral provisions) are to be calculated on the basis of the E.U. Commission’s working days. In any case the concept of working days will make reference to the holiday calendar which is published yearly. See, e.g. Holidays in 2004, 2003 O.J. (C 284) 10 (listing of official E.U. Commission holidays).

by a Member State to refer the case to the national competition authorities pursuant to Article 9(2) New ECMR or undertakings concerned offer commitments with a view to render the concentration compatible with the common market, the period will automatically be extended to thirty-five working days.

The amendments regarding the timetable for "Phase Two" are more important. According to Article 10(3) New ECMR, final decisions must be made within ninety working days after the initiation of the proceedings by the E.U. Commission. This period would now be extended to 105 working days if the undertakings concerned offer commitments, but not if these commitments were submitted earlier than fifty-five working days after the initiation of the proceedings. This way, all parties concerned shall be encouraged to submit commitments at an early stage.¹⁰⁰ Additionally, the period set for "Phase Two" may be extended by the E.U. Commission at any time by up to twenty working days with the consent of the notifying parties. The notifying parties can also ask for such an extension of the timetable on their own initiative within fifteen working days of the initiation of the proceedings. The E.U. Commission will have no discretion to refuse such a request and the extension must therefore be granted.

An extended timetable will permit a more thorough scrutiny of revised commitments (including market testing). Moreover, additional time will in all likelihood improve the quality of the investigation of facts and the economic assessment as well as the outcome of negotiations between the case team and the notifying parties. Further, more thorough consultation with the Advisory Committee according to Article 19 of the current and the New ECMR might also result in deadline extensions, especially in light of the fact that the Advisory Committee is usually consulted at the end of "Phase Two" proceedings and consultations are therefore often subject to time constraints pursuant to Article 10(3) ECMR.

On the other hand, even if the notifying parties do have to approve an optional prolongation, the pressure to do so might be substantial. For the responsible case team, the request for more time could easily be justified with additional examination requirements, such as the verification of amended commitments. To avoid a prohibition of the merger due to alleged time squeezes, a notifying party would most probably not risk refusing its approval for stopping the clock. This, in turn, might lead to a general uncertainty for the notifying parties regarding the timetable for the proceedings. Finally, reliance on extension provisions could simply delay the procedure without necessarily improving its outcome.

All in all, the positive aspects would appear to outweigh the negative

¹⁰⁰ See Commission Proposal on the Control of Concentrations, *supra* note 12, at 14, para. 75.

ones. First of all, it is up to the parties themselves to determine whether the first “stop the clock provision” will apply (namely, if they do not deliver commitments within the first fifty-five working days). Second, the disadvantages described in connection with the optional extension of the “Phase Two” deadline by up to twenty working days with the agreement of the parties are not too high a price to pay for the main potential advantage, the improvement of scrutiny and therefore the avoidance of decisions, the quality of which is compromised by undue time pressure.

B. The System of “Checks and Balances” and “Due Process”

The system of “Checks and Balances” and “Due Process” in EC merger control proved to be much more efficient than one could have feared, when the CFI delivered its judgments annulling four E.U. Commission prohibition decisions in 2002.¹⁰¹ These judgments, however, left the E.U. Commission with the task to remedy the shortcomings identified in its assessments by the CFI.

1. Internal Checks and Balances

In its prohibition decisions, the CFI emphasized, *inter alia*, serious shortcomings in the application of economic analysis as well as a lack of proven evidence. With a series of non-legislative measures that were introduced by the E.U. Commission in a press release and are, at least partly, included in the Best Practices on the conduct of EC merger control proceedings¹⁰² which form part of the reform package, the E.U. Commission is trying to improve its internal system of checks and balances.¹⁰³ The announced measures can be divided into two categories: improvements in terms of transparency and due process and attempts to enhance the process of substantive scrutiny within the proceedings.

a) Transparency and Due Process

Under the ECMR and in the E.U. Commission’s practice to date, access to the E.U. Commission’s case file is granted at a late stage in the procedure. According to Article 18(3) of the current and the New ECMR and Article 13(3) of Regulation 447/98 (“Implementing Regulation”),¹⁰⁴ the

¹⁰¹ See *Airtours*, 2002 E.C.R. II 2585; *Schneider Electric*, 2002 E.C.R. II-4071; *Tetra Laval*, 2002 E.C.R. II-4381; *Lagardère and Canal+*, 2002 E.C.R. II-4825.

¹⁰² See Best Practices, *supra* note 14.

¹⁰³ See Press Release, European Commission, Commission Adopts Comprehensive Reform of EU Merger Control, IP/02/1856 (Dec. 11, 2002), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1856|0|RAPID&lg=EN [hereinafter Comprehensive Reform Release].

¹⁰⁴ Commission Regulation (EC) No 447/98 of March 1, 1998 on the notifications, time

notifying parties have upon request a right to access the case file after the E.U. Commission has issued a statement of objections to the notifying parties. Further, the notifying parties are given the opportunity to have access to documents received after the issuing of the statement of objections up until the consultation of the Advisory Committee.¹⁰⁵ According to the Best Practices on the conduct of E.C. merger control proceedings, the notifying parties to a concentration will be granted access to “key documents” obtained by the E.U. Commission on the case immediately after the initiation of proceedings (i.e. “Phase Two” of the merger control procedure).¹⁰⁶ Such documents would comprise, in the view of the E.U. Commission, “substantiated submissions of third parties running counter to the notifying parties’ own contentions received during Phase I and thereafter, including key submissions to which specific reference is made in the Article 6(1)(c) decision and market studies.”¹⁰⁷ The E.U. Commission further explains that its DG Competition “will use its best endeavours to provide notifying parties in a timely fashion with the opportunity to review such documents following the initiation of proceedings and thereafter on an ad hoc basis.” This will, however, only be possible provided “genuine concerns regarding confidentiality, including fears of retaliation and the protection of business secrets” of third parties are not undermined.¹⁰⁸

Additionally, the E.U. Commission will introduce “state-of-play” meetings between the parties and the E.U. Commission during the proceedings at “key stages” of the investigation.¹⁰⁹ It further envisages “triangular” meetings with third parties on a voluntary basis prior to the oral hearing (which may be held at the end of the proceedings and is not replaced by the triangular meeting). Triangular meetings may take place in situations where two or more opposing views have been communicated to the E.U. Commission as to key market data and characteristics and the effects of the concentration on competition in the markets concerned.¹¹⁰

Finally, the E.U. Commission has announced that it is allocating additional support staff to the hearing officer.¹¹¹ The hearing officer’s

limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, 1998 O.J. (L 61) 1.

¹⁰⁵ See Best Practices, *supra* note 14, at para. 43.

¹⁰⁶ *Id.* at paras. 45-6.

¹⁰⁷ *Id.* at para. 45.

¹⁰⁸ *Id.* at para. 46.

¹⁰⁹ Key stages are identified to be the point in time in Phase One cases where serious doubts arise within the meaning of Art. 6, within two weeks after a decision to initiate a Phase Two investigation, immediately before the issuing of a statement of objections, following the undertakings’ reply to the statement of objections, and/or following the oral hearing and before the Advisory Committee meets. *Id.* at para. 33.

¹¹⁰ *Id.* at paras. 38-9.

¹¹¹ See Comprehensive Reform Release, *supra* note 103.

powers were already strengthened by the E.U. Commission before the publication of the Green Paper,¹¹² but contrary to what many commentators on the Green Paper had opined,¹¹³ they are still restricted to reviewing whether the procedural rights of the parties concerned have been respected.

b) Enhanced Scrutiny

Probably the most significant lesson learned by the E.U. Commission from the recent judgments of the CFI has been that the substantive scrutiny of envisaged mergers and the use of economic assessment within the proceedings have to be enhanced in order to arrive at decisions that are able to withstand the test of an in-depth juridical review.¹¹⁴ To reach this goal, the Commission has appointed a chief competition economist¹¹⁵ and has announced its intention to install a peer review panel¹¹⁶ consisting of experienced officials to scrutinize with a fresh pair of eyes all conclusions arrived at by the case teams in more complex cases. Whereas the role of the chief economist is more or less clear,¹¹⁷ neither the formation nor the responsibilities of the peer review panel have been outlined in more detail so far.¹¹⁸

Unsolved issues will persist, however, on account of both the lack of new tools and what is probably the main problem in current E.U. merger control: not only does the E.U. Commission remain both investigator and decision-maker throughout the entire merger control procedure—whereas other major jurisdictions have established appeal procedures within the administration process itself¹¹⁹—but responsibility for the consideration of cases in “Phase One” and “Phase Two” will also not be divided between

¹¹² See Commission Decision of May 23 on the terms of reference of hearing officers in certain competition proceedings, 2001 O.J. (L 162) 21.

¹¹³ See Summary of the Replies Received, *supra* note 26, at para. 197.

¹¹⁴ For the impact of these decisions on the reform of the ECMR, see Alessandro Nucara, Schneider/Legrand and Tetra Laval/Sidel: *Fast Track Towards Merger Reform?*, 14 EUR. BUS. L. REV. 193, 198 (2003).

¹¹⁵ See *supra* note 17.

¹¹⁶ Comprehensive Reform Release, *supra* note 103.

¹¹⁷ See *supra* note 17; Notice, E.U. Directorate-General for Competition, Publication of A2 Post of Chief Competition Economist, at http://www.europa.eu.int/comm/dgs/competition/recruitment/chief_economist_en.pdf.

¹¹⁸ According to Commissioner Monti, the panel will be composed of “experienced officers” as well as, if appropriate, officials from other relevant services. See Mario Monti, *supra* note 9. See also Stephen A. Ryan, *Reform of the EU Merger Control System—a comprehensive package of proposals*, 1 EC COMPETITION POL’Y NEWSL. 9, 12 (Spring 2003).

¹¹⁹ See, e.g., U.K. Office of Fair Trading, Overview of the Enterprise Act, at <http://www.offt.gov.uk/nr/rdonlyres/1923f9db-0e78-4e91-92a3-182b6400e46a/0/oft518.pdf> (describing the new system of merger control in the U.K., where decision-making in the two phases are performed by two different, independent bodies).

different task forces or between the E.U. Commission and an independent body. This division has been suggested by different contributors to the debate following the publication of the Green Paper in 2001 as a way of avoiding any kind of prejudice on the part of E.U. Commission officials.¹²⁰ They argue that, in particular, in installing the review panel the Commission does not distinguish between investigation and adjudication¹²¹ and therefore fails to establish an institutionalized division of powers within the Merger Task Force.

There can be no question that all the proposed measures are helpful and will in all likelihood increase transparency of and improve the scrutiny in the examination process. Nevertheless, with few exceptions (i.e., the appointment of a chief competition economist and the peer review panel), all the measures proposed merely seek to improve already existing tools in the current system of checks and balances.

2. *Procedure Following Annulments: Re-examination by the E.U. Commission (Article 10(5) New ECMR)*

Following the prohibition decisions of the CFI, uncertainties arose as to the procedure and the substantive rules to be applied in the merger control procedure. Article 10(5) New ECMR clarifies that after the annulment decision the procedure will start at the beginning of the first phase. Such an annulment will thus lead to the re-examination by the E.U. Commission with a view to adopting a new decision pursuant to Article 6(1) New ECMR. The new examination will be made in the light of current market conditions. The parties will have to submit a new notification or supplement the original notification, where the original notification has become incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, a certification of this fact will suffice. The periods of the proceedings would commence on the working day after the E.U. Commission has received either a new (complete) notification or a certification in the manner described above.

¹²⁰ See Summary of the Replies Received, *supra* note 26, at para. 199.

¹²¹ Herwig H.C. Hofmann, *Good Governance in European Merger Control: Due Process and Checks and Balances under Review*, 24 EUR. COMPETITION L. REV. 114, 127 (2003); Filip Ragolle, *Schneider Electric v Commission: The CFI's Response to the Green Paper on Merger Review*, 24 EUR. COMPETITION L. REV. 176, 180 (stating that it "will be difficult to convince the business community that the panel is truly independent from the Commission" and suggests the upgrading of the Advisory Committee's role in order to "provide a more credible external review").

C. Increased Powers of Investigation

1. Power to take Statements

To date, Article 11(1) ECMR empowers the Commission to obtain all necessary information from governments and competent authorities of the Member States, as well as undertakings and individual persons or entities. However, such information can only be obtained from individuals who control at least one undertaking or acquire one or more undertakings.¹²² The New ECMR will provide increased powers for the Commission. Article 11(7) will allow the E.U. Commission to interview any natural person or legal entity who consents to be interviewed for the purpose of collecting information relating to the subject matter of the investigation. The E.U. Commission will also have the right to record oral submissions and use them as evidence in merger proceedings.¹²³ This new provision fits in with the strategy of the Merger Task Force to increasingly gather information from third parties by way of requests for information and is in accordance with the Best Practices on EC merger control, in which the E.U. Commission even envisages trilateral meetings.¹²⁴

2. "On the Spot" Investigations ("Dawn Raids")

According to Article 13(2) ECMR, the E.U. Commission also has, *inter alia*, the right to enter an undertaking's premises, land and means of transport, examine books and other business documents, as well as seize and copy documents and ask for so-called "on the spot" oral explanations. However, only the representatives and members of the staff of undertakings can be asked questions "on the spot." Additionally, under the present legal situation, it is still controversial whether the E.U. Commission is entitled to ask more general questions relating to the subject matter as well as require copies of electronically stored data.¹²⁵

The New ECMR seeks to align the E.U. Commission's fact-finding powers regarding "on the spot" investigations, including its provisions on fines, with those in the new Council Regulation (EC) 1/2003 implementing

¹²² See EC Merger Regulation, *supra* note 1, at arts. 3(1), 11(1).

¹²³ See New EC Merger Regulation, *supra* note 2, at Recital 38.

¹²⁴ See Best Practices, *supra* note 14, at paras. 38-39.

¹²⁵ See C.S. KERSE, E.C. ANTITRUST PROCEDURE 120 (3d. ed. 1994)(regarding it as "extremely doubtful whether an undertaking is entitled to resist the retrieval and inspection of information contained in sophisticated storage systems"); Von Martin Wissmann, *Rechtsschutz von Unternehmen bei Beschlagnahme von Unterlagen im Rahmen von EG-Nachprüfungsverfahren*, 13 EUROPÄISCHES WIRTSCHAFTS-UND STEUERRECHT 165, 166 (2002).

Articles 81 and 82 EC.¹²⁶ To this end, Article 13(2) of the New ECMR grants the E.U. Commission the right to seal any business premises, books or records during an inspection, to take or obtain copies of books or records in any form and to ask any representative or members of staff of the undertaking for explanations of facts or documents relating to the subject matter and purpose of the inspection. Also in line with the new antitrust rules, the amount of fines which can potentially be imposed by the E.U. Commission has been increased. According to Article 14(1) New ECMR, providing incorrect, misleading or incomplete information, as well as breaking seals affixed by E.U. Commission officials, could lead to a fine of up to 1% of the aggregate annual turnover for the undertaking concerned.

Aligning the enforcement provisions of merger control with antitrust rules also means that the same problems will occur as far as the interpretation and application of several provisions are concerned. For one thing the legislator has failed in both the New ECMR and Regulation (EC) 1/2003 to clarify whether and to what extent documents or responsive information may be withheld from the E.U. Commission. The E.U. Commission will obviously not be empowered, even under the new regulations, to examine correspondence between undertakings and their external lawyers.¹²⁷ Nevertheless, it remains unclear whether individuals will have the right to refuse to provide oral statements in a case of potential self-incrimination. This is likely to be an ongoing issue in antitrust cases, although the problem of self-incrimination will presumably only occur infrequently, if at all, in merger proceedings.

Nevertheless, one distinction has been drawn between merger and antitrust investigations: whereas the new Regulation (EC) 1/2003 for the enforcement of Articles 81 and 82 grants the E.U. Commission the power to search the private homes of representatives of the undertakings concerned,¹²⁸ no such right is provided by the new ECMR. Beyond that, however, the question is whether the alignment of rules for merger and non-merger investigations is justified with regard to the other fact-finding powers. This is particularly doubtful in light of the limited importance of investigations for merger control proceedings within the last thirteen years. Since the introduction of the ECMR in 1989, Article 13 of the current Merger Regulation has been used very rarely by the Commission,¹²⁹ and the

¹²⁶ See Council Regulation 1/2003, *supra* note 6.

¹²⁷ Case T-30/89, *Hilti Aktiengesellschaft v. Commission*, 1990 E.C.R. II-163, at para. 13; Case 155/79, *A.M. & S. Europe Ltd. v. Commission*, 1982 E.C.R. 1575, at paras. 21-27.

¹²⁸ See Council Regulation 1/2003, *supra* note 6, at art. 21.

¹²⁹ Nicole Hacker, *Article 13 FKVO*, in *KOMMENTAR ZUM EUROPÄISCHEN WETTBEWERBSRECHT [COMMENTARY ON EUROPEAN COMPETITION LAW]*, at para. 2 (Helmuth Schröter et al. eds., 2003). See C.J. COOK & C.S. KERSE, *E.C. MERGER CONTROL* 115 (3d ed. 2000).

E.U. Commission has failed to indicate why “on the spot” investigations are likely to become more important in the future.

D. Miscellaneous

1. Ancillary Restraints

Article 6(1)(b), second subparagraph of the current and the New ECMR, Article 8(2), second subparagraph, second sentence ECMR and Article 8(2), third subparagraph New ECMR provide that a decision declaring a concentration compatible with the Common Market shall also cover restrictions which are directly related and necessary to the implementation of the concentrations.¹³⁰ According to Article 22(1) ECMR and Article 21(1) New ECMR, that Regulation alone applies to concentrations covered by the (New) ECMR. Since all such restrictions are already covered by the provisions mentioned above and any such assessment was only of a declaratory nature, the E.U. Commission abandoned its practice of assessing whether ancillary restrictions were “directly related and necessary” to the implementation of a notified merger.¹³¹ When this policy was thrown into doubt by the CFI,¹³² the E.U. Commission needed to implement it in legislation. Under the New ECMR, the E.U. Commission will indeed not generally have to assess such restrictions in individual cases. It will, however, at the request of the parties, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration, in cases presenting novel or unresolved questions giving rise to genuine uncertainty. According to the last sentence of Recital 21 of the New ECMR “a case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.”¹³³

Parties to a concentration will welcome this addendum because they may bring to the E.U. Commission’s attention any restrictions, for which they would like to obtain clearance and, thereby, legal certainty. If they can convince the E.U. Commission that the restriction at issue “presents a novel or unresolved question giving rise to genuine uncertainty” the E.U. Commission will have to give its opinion. The restriction, if regarded as

¹³⁰ This concept is also referred to in Recital 25 ECMR. See EC Merger Regulation, *supra* note 1, at Recital 25, Recital 21 New ECMR; see New EC Merger Regulation, *supra* note 2, at Recital 21.

¹³¹ See Commission Notice on Restrictions Directly Related and Necessary to Concentrations, 2001 O.J. (C 188) 5.

¹³² See *Lagardère and Canal+*, 2002 E.C.R. II-4825, at paras. 2-3.

¹³³ New EC Merger Regulation, *supra* note 2.

directly related and necessary to the merger, could subsequently not be challenged before national competition authorities. Given the importance of the individual circumstances for the assessment of ancillary restraints, parties to concentrations may hope to convince the E.U. Commission of such uncertainties not only in exceptional circumstances.¹³⁴

2. *Suspension of Concentrations: Amending the Scope of Exemptions (Article 7(2) New ECMR)*

Article 7(2) New ECMR has been extended so as to grant automatic derogation from the stand-still obligation in Article 7(1) New ECMR beyond public bids, to all acquisitions made from various sellers through the stock market, e.g. the so-called “creeping takeovers.”¹³⁵ This provision brings legal certainty for the acquirers in creeping takeovers and may facilitate hostile takeovers in the European Union.¹³⁶

3. *Clarification of the Power of Separation (Article 8(4) New ECMR)*

The new wording of Article 8(4) clarifies that the scope of application does not exclude mergers implemented without prior notification to the E.U. Commission. It further empowers the E.U. Commission to order that a prohibited concentration be dissolved completely so as to restore the situation prevailing prior to the implementation of the concentration (*status quo ante*).¹³⁷

¹³⁴ In this regard, parties to concentrations may point at the CFI’s statement in *Lagardère and Canal+* which reads:

[i]n this connection, it must be observed that, as the Commission itself pointed out in the notice on ancillary restrictions (see paragraph II-6), the question whether a restriction is ‘directly related and necessary to the implementation of the concentration’ cannot be answered in general terms. Whether a restriction is directly related and necessary in any particular case therefore requires complex economic assessments for which the competent authority has a broad discretion (see, to that effect, the judgment in *Remia and Others*, cited in paragraph 85 above, and the *M6* judgment, paragraph 114).”

Lagardère and Canal+, 2002 E.C.R. II-4825, at para. 98.

¹³⁵ See Commission Proposal on the control of concentrations, *supra* note 12, at para. 66; see also Green Paper on the review of Council Regulation 4064/89 of 11 December 2001, *supra* note 3, at paras. 187-89.

¹³⁶ See Green Paper on the review of Council Regulation 4064/89 of 11 December 2001, *supra* note 3, at para. 134.

¹³⁷ See Commission Proposal on the control of concentrations, *supra* note 12, at para. 92 (where the Commission referred to the judgment of the CFI in its recent Case T-5/02, *Tetra-Laval v. Commission*, 2002 E.C.R. II-4381, at para. 36).

4. Interim Measures (Article 8(5) New ECMR)

Article 8(5) New ECMR empowers the E.U. Commission to adopt interim measures to restore or maintain conditions of effective competition where a concentration has been implemented in contravention of Article 7 or of a condition attached to a Commission decision under Articles 6(1)(b) or 8(2) New ECMR, or has already been implemented and is declared incompatible with the common market. This provision will enable the E.U. Commission to order any appropriate measure to ensure that conditions of effective competition are not distorted in the interim, i.e., before a final decision is rendered or for the transitional period until the *status quo ante* is restored. Such measures could include, *inter alia*, a requirement to hold separate the undertakings or assets brought together until they are legally separated, the cessation of the exercise of joint control or similar interim measures.¹³⁸

5. No Block Exemptions and no Filing Fees

Finally, it is worth noting that an initiative of the E.U. Commission to introduce a block exemption regulation for *de minimis* concentrations to be exempted from the ECMR¹³⁹ was blocked by the Council. The same holds true for the E.U. Commission's proposal that it should be given the power to levy filing fees.¹⁴⁰ Member States were unwilling to grant these additional powers to the E.U. Commission, which is in line with most comments provided to the E.U. Commission in response to the publication of its Green Paper on the review of Council Regulation 4064/89.¹⁴¹

V. CONCLUSIONS

The adoption of the New ECMR in January 2004 was a significant step in the development of the E.C. merger control which will be finalized with the adoption of the EC Merger Implementing Regulation before May 1, 2004. The allocation of jurisdiction, which will be under constant monitoring, will trigger the next regular reform procedure when the E.U. Commission presents its reports on the functioning of the thresholds in Article 1 New ECMR and the referral procedures in Article 4(4) and (5) New ECMR as laid down in Articles 1(4) and 4(6) New ECMR by July 1, 2009.

¹³⁸ See Commission Proposal on the control of concentrations, *supra* note 12, at para. 93.

¹³⁹ See *id.* at art. 7(4); see also Green Paper on the review of Council Regulation 4064/89 of 11 December 2001, *supra* note 3, at paras. 177-79.

¹⁴⁰ See Commission Proposal on the control of concentrations, *supra* note 12, at art. 23(1)(e); see also Green Paper on the review of Council Regulation 4064/89 of 11 December 2001, *supra* note 3, at paras. 227-31.

¹⁴¹ See Summary of the Replies Received, *supra* note 26, at paras. 185-87.

More than two years of consultation and negotiation of the second regular review procedure saw interesting and unexpected developments, which culminated in the adoption of a new substantive test for merger control in the European Union. It is possible that without the *Airtours* case¹⁴² (and perhaps even without the divergent decisions of the E.U. Commission and the FTC in the GE/Honeywell concentration) the substantive test in Article 2 New ECMR would have remained unchanged. With the new test, the door may be open for further developments in the direction of a fully fledged substantial lessening competition test. One practical impact to date is that concentrations leading to non-collusive oligopolies which trigger price increases, but do not lead to market dominance, may be prohibited under the New ECMR.

Interestingly, the triggering event for the second reform, the revision of the turnover thresholds and thus the allocation of jurisdiction between the European Union and the Member States fell behind the discussion on the substantive test in the public opinion, after the suggested three-plus system—being the key issue in the E.U. Commission's Green Paper—had triggered harsh criticism from the legal community.¹⁴³ The jurisdictional amendments remaining in the New ECMR are a facilitated¹⁴⁴ and more sophisticated¹⁴⁵ post-notification referral system and a pre-notification the significance of which will have to be proved in practice. Let us hope that the increased flexibility in terms of forum (in both directions) will indeed lead to a reduction of multi-jurisdictional filings.

On balance, the procedural amendments of the E.U. merger system seem to be the most important ones. Undoubtedly, the New ECMR will provide more flexibility without doing away with the guarantee of tight and pre-determinable deadlines, and thus the desirable legal certainty for the parties concerned. In particular, the elimination of deadlines and the necessity of a “triggering event” regarding the notification procedure, as well as the introduction of “stop the clock” provisions with the consent of the notifying parties within the proceedings should meet with approval. Although, the European Union has passed up an opportunity to launch a reform implementing an entirely new and more effective system of checks and balances instead of just improving on existing tools or unnecessarily increasing the E.U. Commission's powers of investigation, the procedural

¹⁴² *Airtours*, 2002 E.C.R. II-2585, at para. 62.

¹⁴³ See Summary of the Replies Received, *supra* note 26, at para. 9; see also Werner Berg & Andreas Digel, *supra* note 28. The three-minus system, despite its importance, did not trigger a lot of publicity.

¹⁴⁴ See Council Regulation, *supra* note 2. This is particularly true for referrals from the E.U. Commission under Article 9(2)(a).

¹⁴⁵ See New EC Merger Regulation, *supra* note 2, at art. 22. This is particularly true for referrals to the E.U. Commission under Article 22.

amendments are such that parties to future concentrations may hope to benefit from these measures.

