HOUSE OF LORDS

SESSION 2001–02
32nd REPORT

SELECT COMMITTEE ON
THE EUROPEAN UNION

THE REVIEW OF THE EC MERGER REGULATION

WITH EVIDENCE

Ordered to be printed 23 July 2002

PUBLISHED BY AUTHORITY OF THE HOUSE OF LORDS
LONDON – THE STATIONERY OFFICE LIMITED

[price]

HL Paper 165

CONTENTS

THIRTY-SECOND REPORT

23 JULY 2002

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE REVIEW OF THE EC MERGER REGULATION

COM(2001) 745/6 Final: Green Paper on the Review of Council Regulation (EEC) No 4064/89

PART 1: EXECUTIVE SUMMARY

1. The European Union's merger control regime is facing new challenges posed by global mergers, further market integration, the introduction of the euro and, perhaps most importantly, the enlargement of the Union. Furthermore, the European Commission has had to deal with an exponential increase in the number of cases it considers each year and has come under increasing criticism over its handling of cases and the perceived absence of checks and balances on its decisions. Some of these criticisms have been borne out by the recent judgment of the Court of First Instance in the *Airtours/First Choice* case. In this Report, we[1] examine ways in which the European Community's Merger Regulation (ECMR) can be amended to meet these challenges and consider how it is best for the Commission to address these criticisms.

2. Last December, the European Commission published a Green Paper reviewing the Merger Regulation. The Green Paper (COM(2001) 745/6 final) launched a debate on how the ECMR functions and proposed a wide range of possible reforms to Europe's merger control regime. This Report is a response to that Green Paper. We examine what the objectives of the ECMR should be and analyse the Commission's policy proposal.

3. The Green Paper identifies three areas for potential reform: jurisdictional issues; substantive issues; and procedural issues. Our greatest concern is with the procedural issues and the question of what the appropriate checks and balances should be to the work and decisions of the Commission.

4. The top priority for reform should be to ensure objectivity and fairness in the ECMR process. The many concerns about due process are best addressed by improving the procedural safeguards in the current system. Efforts must focus on improving the internal checks and balances in the ECMR regime. To achieve this, the Commission should take the following action:

- Responsibility for the consideration of cases in Phase I and Phase II should be divided between two separate teams of officials.
- The role of the Hearing Officer should be strengthened so that they take a prominent role in the negotiation of remedies.
- The Commission needs to strengthen its overall capacity for economic analysis in merger cases. In particular, DG Competition should appoint a Chief Economist.

5. Of great consequential importance is the issue of how the Commission should be staffed for its functions. The ECMR and its effective, equitable and transparent implementation is far too important to be jeopardised by resource constraints. The new posts required to carry out the necessary procedural changes should be provided to the Competition Commissioner.

6. We make two further key policy recommendations:

---

[1] Our membership is listed in Appendix 1. Our witnesses are listed in Appendix 2: we are grateful to all of them.

7. The criteria by which mergers are assessed should be changed. The European Union should adopt the substantial lessening of competition—the standard that is used in the other major jurisdictions around the world—as the substantive test in the ECMR.

8. To clarify the issue of who has jurisdiction over which mergers, we support the Commission's proposal to move to a simpler system whereby it would have jurisdiction over all mergers that are subject to three or more national filings. This would reduce the number of instances where companies are required to file for clearance with a multiplicity of National Competition Authorities. Such a change would give greater certainty for business.

PART 2: INTRODUCTION

Background

9. An effective competition policy is one of the cornerstones of the Single Market, bringing benefits to consumers across Europe. It is desirable, in order to protect competition in the EU market, that mergers are appraised, so far as possible, on objective criteria that reflect the interests of the Community as a whole.

The Competition Rules

10. One of the activities of the Community listed in Article 3(1)(g) of the EC Treaty is to promote "a system ensuring that competition in the internal market is not distorted". The removal of state-imposed barriers to the free movement of goods and services across national boundaries is accompanied by prohibitions on enterprises to stop them agreeing, for example, to divide and share national markets or to fix prices. Community competition policy has played an important role in the development of an integrated/single market and has ensured that competition acts as a dynamic force in the European economy. The competition rules applicable to undertakings are set out in Articles 81 and 82 (formerly 85 and 86). Article 81 contains a prohibition on restrictive agreements but allows exemptions where the agreement contains countervailing economic benefits in which consumers share. Prohibited agreements are automatically void. Article 82 prohibits the abuse of a dominant position. These two rules have played a key part "in establishing a common market" as provided for in Article 2 of the EC Treaty.

11. Enforcement of the Community's competition rules is undertaken primarily by the EC Commission on whom extensive powers of investigation, decision and fining have been conferred. Subject to review by the Community Courts, the Commission acts as investigator, prosecutor and judge.

How the ECMR works

12. The EC Treaty does not contain specific provisions for the control of mergers.[2] In 1966, the Commission published a memorandum on concentrations which considered the prospect of controlling those affecting competition at Community level through the use of the competition rules in Articles 81 and 82 (then 85 and 86). There was some doubt how far these rules applied to mergers and whether they were suitable for exercising prior control. Landmark decisions of the Court of Justice, notably the *Continental Can* and *Philip Morris* cases, showed that there could be circumstances where mergers fell within the scope of Articles 81 and 82. However, considerable legal uncertainty remained, a factor which the Commission exploited in order to persuade Member States back to the negotiating table to consider a draft Regulation.

13. In contrast to the procedure relating to the application of Articles 81 and 82, Council Regulation (EEC) No 4064/89 (the Merger Regulation (the ECMR)) introduced a compulsory system of prior notification for "concentrations" with a Community dimension, set out a so-called 'substantive test' for their appraisal and established a strict timetable for handling cases.[3] As a result, the control of a significant number of large mergers now lies with the Merger Task Force (MTF) in the Competition Directorate-General (formerly DG IV), currently under Commissioner Mario Monti. Companies risk fines and the invalidity of their transaction if they fail to notify the MTF of their proposed merger. Generally, mergers must not be put into effect before notification or before the merger has been declared compatible with the common market by Commission decision.

14. The Commission must carry out an initial examination of the proposed merger within one month of notification to ascertain whether the merger falls within the scope of the Regulation and, if so, whether serious doubts are raised as to its compatibility with the common market (this is referred to as Phase I). If it judges that such doubts exist, a further examination (which can last up to four months) is set in motion to determine whether the merger would create or strengthen a dominant position as a result of which competition would be significantly impeded in the common market or a substantial part of it (this is known as Phase II). Where the Commission concludes that a merger would create or strengthen a dominant position as a result of which competition would be significantly impeded, it must declare it incompatible with the common market. The Commission has the power,

[2] The ECSC Treaty, by contrast, made express provision in Article 66 for the control of mergers and acquisitions falling within the scope of the European Coal and Steel Community.

[3] We analyse the substantive test in paragraphs 98–161 below. We examine some aspects of the timetable in paragraphs 188–214 below.

however, to accept undertakings from the parties to avoid prohibiting the merger. In practice, the vast majority of mergers notified under the ECMR (approximately 95 per cent)[4] have been considered to raise no serious competition issues and have been cleared at the end of Phase I.

15. The procedural rules governing the notification and appraisal of mergers are set out in the Merger Control Regulation and the Implementing Regulation.[5] To assist it in the performance of its task, the Commission has coercive powers of inquiry analogous to Articles 11 and 14 of Regulation 17 (the principal implementing Regulation for the competition rules in Articles 81 and 82). Before any final decision on the merger is reached (at the end of Phase II), the parties must be told the case against them and given the opportunity to respond. The Commission may order remedial action to be taken if it considers such action necessary. It has the ability to impose fines and penalties to back up its powers of inquiry and capacity to take suspensive and remedial action. During the procedure, the Commission may be assisted by the competent authorities of the Member States. As in cases under Articles 81 and 82, decisions of the Commission are subject to judicial review by the Community Courts.

Previous Reports of the Committee

16. The Select Committee has taken a long and sustained interest in the ECMR. We have reported to the House on the ECMR on several previous occasions. The ECMR was the subject of a detailed inquiry by the Committee prior to its adoption in 1989.[6] The Commission carried out a review of the working of the Regulation in 1993 and then again in 1996; the Committee reported on each occasion.[7] Most recently, we examined in detail the role of the Hearing Officer in Phase II of merger cases.[8]

The content of this Report

17. On 11 December 2001, the European Commission adopted a Green Paper reviewing the Merger Regulation.[9] The Green Paper aimed to launch a debate on how the ECMR functions and proposed a wide range of possible reforms to Europe's merger control regime.

18. This report is a response to that Green Paper and we welcome the opportunity to contribute once again to the debate. The scope of the Commission's Green Paper is, however, very broad. The issues raised in it range from technical modifications on procedural matters to the possibility of a fundamental change to the substantive test for judging whether a merger should be prohibited, as well as reconsideration of the important question of who—the Commission or Member States—should be responsible for examining large mergers having trans-national effects. Due to the limited amount of time available to the Committee, we could not examine all of these issues. The Committee therefore decided to focus on certain key questions. When analysing the Green Paper, the Committee defined the central issues as: which mergers should be assigned to Community control; by which criteria they should be assessed; what powers should rest with Member States; how the Commission should be staffed for its functions and what the appropriate checks and balances are to the work and decisions of the Commission.

19. The decision to focus on these five questions means that there are several issues with which we do not deal in this Report. These include: the concept of 'concentration';[10] suspension of concentrations; calculation of time limits; administrative efficiency; completeness of notification; Article 8(4), which deals with the situation when a merger has already been implemented; enforcement provisions; and filing fees. This does not mean that we judge these issues not to be worthy of consideration.

---

[4] In 1999, 260 out of a total of 270 (or 96.3 per cent) cases referred under the ECMR were cleared at the end of Phase I. In 2000, the figure was 328 out of 345 cases (95.1 per cent). In 2001, 320 out of 340 cases (94.1 per cent) were cleared at the end of Phase I.

[5] Regulation 447/98.

[6] *Merger Control*, 6th Report, HL 31, Session 1988–99. Prior to this, the Committee also reported on two drafts of the Regulation: European Communities Committee, 8th Report, HL 62, Session 1974–75 *Concentrations Between Undertakings*; and *Competition Practice*, 8th Report, HL 91, Session 1981–82.

[7] *Enforcement of Community Competition Rules*, 1st Report, HL 7-I, Session 1993–94; *Review of the EC Merger Regulation*, 4th Report, HL 30, Session 1996–97.

[8] *Strengthening the Role of the Hearing Officer in EC Competition Cases*, 19th Report, HL 125, Session 1999–00.

[9] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745/6, 11.12.2001.

[10] The Regulation refers to the control of "concentrations" between undertakings, a term which includes not only full mergers but also other transactions (see the Commission Notice on the concept of concentration: http://europa.eu.int/comm/competition/mergers/legislation/co406489_en.pdf). However, for convenience, in this Report we use the more familiar expression "mergers".

20. For the ease of the reader who wishes to read this report in conjunction with the Green Paper itself, we have followed its structure. That is, we deal first with jurisdictional questions, then move on to substantive issues and conclude with procedural matters. Where possible, cross references are provided to the paragraphs in the Green Paper.

THE SUCCESS OF THE ECMR AND THE NEED FOR FURTHER IMPROVEMENT

21. **The Merger Regulation has become one of the cornerstones of EC competition law and many witnesses (from business to regulators) have spoken to us about how highly they regard the Regulation and what a success its operation has been. The Committee recognises the good work of the Commission in applying the ECMR. We endorse the Government's view that the Commission "has responded with great success to the huge challenge of enforcing the regulation rigorously, but fairly, despite an exponential increase in its caseload" (Q 411).**[11]

22. **Furthermore, we welcome the way in which the Commission has conducted the current review. The Green Paper has launched a wide-ranging debate to which we are pleased to be able to add our voice. Despite welcoming the review, witnesses were disappointed by the limited amount of attention given in the Green Paper to the important issues of due process and the checks and balances to the Commission's decision making process. These issues go beyond the rules set out in the ECMR itself and concern the Commission's internal administrative practices for handling cases and even the role of the Community Courts.**

23. **The Commission has been the subject of some serious criticism and witnesses have drawn our attention to shortcomings in the ECMR system which are causing increasing concern. Some of these criticisms have been borne out by the recent judgment of the Court of First Instance in the *Airtours/First Choice* case. The Committee therefore considers it important that the current Review should be taken as an opportunity to assess all of the ECMR procedures. We hope that our recommendations can help to achieve this aim. However, when considering ways in which the ECMR might be improved, we have been mindful of the need to safeguard its fundamental strengths.**

[11] The table below illustrates the great increase in the number of cases notified under the Merger Regulation:

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Notifications	12	63	60	58	95	110	131	172	235	292	345	340

PART 3: JURISDICTIONAL ISSUES

Who should examine which mergers?

24. In this section, we examine the scope of application of the ECMR. The question of jurisdiction is the major issue that triggered the Commission's current review. It has always been one of the more politically sensitive issues at the heart of the EU Merger regime. Indeed, when the Regulation was initially negotiated, the hardest issue to resolve was how to decide which cases should be dealt with exclusively by the Commission and which cases should be dealt with at Member State level.

25. In attempting to answer the question of which mergers should be assigned to Community control and which should remain within the remit of the national competition authorities (NCAs), the ECMR reflects the principle of subsidiarity i.e., that action should be taken at the most appropriate level in view of the objectives to be obtained and the means available to the Community and to the Member States. One of the aims of the ECMR was to ensure that large mergers having trans-national effects were examined by the most appropriate authority. The principle of the ECMR is that the Commission is generally better placed to deal with a merger that has international impact, while NCAs are better placed for examining mergers having effects on competition that are limited to a national market.[12]

26. Drawing up legal rules (including sanctions for failure to pre-notify) to achieve such a distribution of competencies has been challenging. To determine this, one would ideally examine where the merger would have most significant impact. But such an exercise may be complex and contentious. Consequently, the ECMR adopted a straightforward 'bright line' test comprising a set of thresholds based on the turnover of the companies involved, both at a global and Community level, in the merger (Article 1(2)). Mergers involving companies whose turnovers exceed these thresholds are deemed to have a 'Community dimension', and so are examined and controlled exclusively by the Commission. Thus such mergers no longer have to be cleared by NCAs; the Commission works as a 'one-stop shop'. *Vice versa*, mergers involving companies whose turnovers fall below the required threshold are left for examination by NCAs.

27. By way of exception, to deal with cases which may give rise to particular competition problems in a Member State, the ECMR enables cases to be referred back from the Commission to the competition authorities of specific Member States at their request (Article 9). That referral may be limited to a particular product market. There is also a procedure for Member States to refer cases falling outside the thresholds of the ECMR to the Commission (Article 22).

28. The Commission's 1996 review of the Regulation concluded that the thresholds set in 1989 were not catching all the cases that potentially had significant cross-border effects. Since it is inefficient and expensive to have parallel treatment of the same case in a number of Member States, the ECMR was amended in an attempt to resolve the so-called 'multiple filings' problem, which has been exacerbated following the growth of national merger regimes. This was, and remains, a particular concern for businesses because of the additional cost burden of having to notify the merger (possibly in different languages) to a number of NCAs who operate with different jurisdictional and procedural rules.[13]

29. Following the 1996 review, the initial thresholds were supplemented in 1997 with a rather more complicated set of thresholds based not just on the parties' operations world-wide and in the EU, but also on the turnover generated in three or more Member States. It was hoped that this would deliver a better *ex ante* distribution of cases between the Commission and Member States. However, these secondary thresholds (contained in Article 1(3)) have fallen short of achieving their underlying objective of conferring competence on the Commission for cases affecting three or more Member States. There have been a limited and decreasing number of notifications under this Article, whereas there has been an increase in the number of multiple filing notifications in three or more Member States.[14] This problem will inevitably be compounded with the forthcoming enlargement of the EU.[15]

30. The Commission considers that the jurisdictional criteria should be amended to provide a more direct case-related test for establishing the cross-border nature of a merger. It has been suggested that there may also be a need for greater alignment of national merger control rules.

---

[12] There are now also a number of large international or global mergers that have substantial effects within the EU. Such mergers may be notified to the Commission at the same time as to other jurisdictions outside the EU. One of the principal goals of the newly established International Competition Network is to move towards convergence in international merger control. We discuss this issue further below (paragraphs 122–29).

[13] QQ 1, 12, 83, 94, 363; pp 5, 105, 127, 193; cf. BEUC/X/016/2002.

[14] See paragraph 24 of the Green Paper.

[15] QQ 3, 85, 88–89; p 193.

ARE THE RIGHT MERGERS BEING JUDGED TO HAVE A COMMUNITY DIMENSION?

31. Witnesses did not think that current thresholds resulted in significant misallocation of cases between the Commission's Merger Task Force and the NCAs. The Joint Working Party of the Bars and Law Societies of the UK (JWP) said that there were "not that many cases" where the Commission might usefully have analysed the substance of the transaction rather than individual Member States (Q 83). The Confederation of British Industry (CBI) considered that the data collected by the Commission in its 2000 report[16] indicated that, despite the introduction of the secondary thresholds in Article 1(3), there had not been a significant increase in the number of notifications made to the Commission under this Article. Furthermore, a large and increasing number of cross-border transactions involving several different Member States had fallen outside the scope of the Regulation (Q 2).[17] The JWP was concerned for the burden and cost that multiple filings placed on industry. The CBI stressed that the need to file in three or more countries was "a huge inefficiency for business" (Q 12), while the Union of Industrial and Employers' Confederation of Europe (UNICE) argued that multiple filings could hinder the competitiveness of European businesses in global markets (p 105).

32. Many witnesses (including the American Chamber of Commerce, UNICE, the CBI, and the United Kingdom Government) saw the 'one-stop-shop' approach adopted in the ECMR as one of the Regulation's "key strengths". The Government therefore appreciated the Commission's concern that an increasing number of merger cases continued to require multiple filings with a number of national authorities. The Government agreed that the Commission would be better placed to deal with some mergers with significant cross-border effects which were falling to the national regimes (p 150; Q 412). For a number of witnesses, the priority was to strengthen the 'one-stop shop' principle and increase consistency and predictability.

33. **The key jurisdictional issue, as we see it, is how best to amend the ECMR to minimise the problems associated with multiple filings while ensuring that those mergers that significantly affect competition in a distinct market within a Member State are examined at national level. It is a question of striking the right balance between the need for simplicity, predictability, consistency and rapidity (all of which are particularly important for business) and the need to have a flexible system that will ensure that a merger is examined by the regulatory body that is best placed to ensure the maintenance of effective competition.**

34. **We agree with those witnesses who suggested that no single amendment would achieve this. The question of how to amend Article 1(3) is not separable from consideration of Article 9 and Article 22. The different elements must work together in a coherent way. We endorse the response of John Vickers, the Director General of the Office of Fair Trading, who emphasised that the difficult but important objective is to design a workable "package" of measures that will meet the aims (QQ 202, 207, 209).**

35. **We recognise that the speed of the referral procedure is important. It should not, however, be the paramount requirement of the jurisdictional rules in the Merger Regulation. It is more important to ensure that, where possible, mergers are examined by the best-placed competition authority. The public interest is better served by a system whereby mergers are examined by the authority which can most effectively analyse the specifics of the case and, in the interests of competition in the Union and in Member States, impose any necessary sanctions and remedies.**

ARTICLE 1(2)

36. Among our witnesses, the American Chamber of Commerce (ACC) was alone in advocating an extension of the Commission's jurisdiction through a reduction of the quantitative thresholds contained in Article 1(2)[18] (p 127). Whilst recognising that such an amendment was "not very realistic", it supported the reduction "as a principle" (Q 359). All of our other witnesses were agreed

[16] COM(2000)399 final. This report is summarised, updated and expanded upon in the annexes to the Green Paper (pages 59–111).

[17] The number of referrals under Article 1(3) is low and decreasing. In 2000, only 20 out of 345 notifications to the Commission (5.8 per cent) were made under Article 1(3). In 1999, it was 34 out of 292 notifications (11.6 per cent). In comparison, in 2000, there were 75 multiple notifications to three or more Member States. Furthermore, the number of multiple-filings that are made to three or more Member States is increasing. In 1998, 22 per cent of all multiple filings were made to three or more Member States; in 1999, the figure was 32 per cent; by 2000 it had risen to 35 per cent.

[18] Under the current Regulation, a merger has a Community dimension where: (a) the combined aggregate world-wide turnover of all the undertakings concerned is more than €5000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

that the thresholds in Article 1(2) should not be amended.[19] Whilst some witnesses would have liked the thresholds to be lowered, they recognised that this was impracticable given the consequent increase of the MTF's resources that would be required. On balance, they supported no change to Article 1(2) (pp 5, 48). Other witnesses, including the Government, the Office of Fair Trading (OFT) and the Competition Commission, simply saw "no need" to change the thresholds contained in Article 1(2).[20]

37. Witnesses pointed out that the thresholds in Article 1(2) had not been increased in line with inflation since they were introduced in 1989; *de facto* they had been gradually lowered over time (Q 252; p 5). The OFT concluded that the thresholds had "actually fallen […] effectively by 23 per cent." Ms Bloom, Director of Competition Enforcement in the OFT, added that, if you calculated the change "in terms of nominal GDP, it would be something nearer to a 33 per cent decline" (Q 203). The scale of business had also increased as business turnover and market capitalisations of firms had increased (QQ 203–04).

38. **The Committee recommends that the thresholds in Article 1(2) should not be amended.**

ARTICLE 1(3)

39. Having concluded that the secondary thresholds introduced in 1996 are not doing the job they were intended to do, the Commission has looked in detail at the possibility of changing the figures involved in Article 1(3).[21] However, it has concluded that no combination of changes to those thresholds could avoid the problem of multiple filings and deliver the desired outcome of catching all mergers having significant cross-border effects (paragraphs 34–51). Our witnesses agreed.[22]

40. The Commission is now proposing that Article 1 be amended to provide that mergers which do not meet the thresholds in Article 1(2) would be deemed to have a Community dimension when they fall within the jurisdiction of three or more Member States (the '3 plus' rule).[23] Under this proposal, the turnover thresholds in Article 1(3) would be removed. The Commission's proposal takes account of the findings of its research that, in the majority of recent cases where notification was necessary in three or more Member States, some or all of the Member States involved defined the relevant geographic market as wider than national.[24] A '3 plus' rule would be simpler and easier to understand than the complicated set of rules currently in Article 1(3) but it would also remain quite a crude way of establishing jurisdiction. The JWP was not convinced that such a rule "would capture those cross-border cases that would be more appropriately allocated to the Commission" (p 31). It would not necessarily identify mergers which it was important for the Commission to review (Q 85).

41. The Government saw "real advantages" in replacing the complex thresholds laid out in Article 1(3) with a simpler system; they gave "a qualified welcome" to the '3 plus' rule as it would lift more cases of 'multiple filings' out of national jurisdictions. However, there remained "a number of concerns" about the Commission's proposal. Simply because a transaction required notification in a number of Member States did not by itself render it apt for review by the Merger Task Force. It was possible for international transactions to affect purely national markets; in those circumstances, such transactions were often better dealt with by the relevant NCA, which would be closer to the markets involved and closer to the consumers and would often have a better knowledge of how a market worked in a particular country (p 150). Nonetheless, the International Chamber of Commerce (ICC) thought that it was "a reasonable assumption" that a merger that would be subject to three or more national filings had "a dimension and a significance which transcends the national level" (p 188). The Competition Commission and the National Consumer Council (NCC) agreed that, in a merger "where cross-border activity is involved, it should be dealt with by a cross-border authority" (Q 254; p 194).

42. **The Committee agrees with the Government that the Commission's proposal to replace the Article 1(3) thresholds with a '3 plus' rule could provide the basis of a solution to the jurisdictional question and the problem of multiple filings (Q 412). We support such a change. However, for the same reasons as given in paragraphs 33 and 34 above, such an amendment would need to be accompanied by changes to Articles 9 and 22.**

---

19 This is also the view of the European Parliament's Committee on Economic and Monetary Affairs (A5–0217/2002).

20 QQ 203, 252, 412; pp 31, 150.

21 The Green Paper contains a substantial and very detailed annex of the Commission's analysis of the ECMR thresholds (see pages 59–108).

22 QQ 252, 412; pp 150, 188; cf. BEUC/X/016/2002.

23 The Commission first proposed this amendment in its Green Paper of January 1996, but the proposal did not receive much support at that time.

24 See Annex 1 of the Green Paper.

Optional notification

43. The CBI favoured abolishing the secondary thresholds in Article 1(3) provided they were "replaced with a system whereby companies have the *option* of notifying under the ECMR if filings could otherwise be made in three or more Member States" (p 2). It argued that, as the merger rules are not harmonised across the EU, "any other approach would increase legal uncertainty" (p 2).[25] Where the new '3 plus' test was satisfied, the CBI wanted companies to have "the option either to notify nationally or to notify Brussels" (Q 6). The ACC "strongly" supported making notification optional as notifying with the Commission could impose "a significantly higher burden" on the parties than national filings (Q 360). The Competition Law Association (CLA) and the ICC also supported optional notification (pp 48; 190). UNICE went further and suggested that parties should have the option to request the Commission to take jurisdiction "as soon as the relevant national jurisdiction criteria of two or more Member States" were met (p 105; Q 297).[26] UNICE said:

> "parties should not be prevented from notifying their transaction to several national competition authorities, and not to the Commission, if they wish to do so, for instance because it would be more efficient for reasons related to information or linguistic requirements, or because the authorities concerned have particular knowledge about the markets concerned" (p 106).

44. Any move to a system of optional notification would fundamentally change the ECMR, where the principle is that notification to the Commission is mandatory once the appropriate thresholds have been met. For the European Parliament's Economic and Monetary Affairs Committee, a system where responsibility was "assigned automatically" would not only clarify and simplify the system but also "make for more uniform assessment criteria".[27]

45. The Commission stressed that its proposal had been to retain mandatory notification—one of the basic features of the ECMR at present. Introducing an optional element could lead to multinational companies 'forum shopping', enabling them to operate in countries where they would like to submit to national scrutiny and thus avoid EU scrutiny. The Commission said it "would naturally weigh that into [its] consideration when deciding what proposal to go forward with" (Q 390).

46. The Government saw "merit" in a system of optional notification under a new '3 plus' rule. However, they also recognised that this "could be said to amount to a formalisation of forum shopping […] there would clearly be a risk that parties might use their discretion to select the regulatory regime under which they expect to get the easiest ride" (p 151; Q 413).

47. The CBI dismissed talk of forum shopping by arguing that "all of the Member States' authorities are relatively sophisticated and professional" and so loopholes did not exist (Q 6). The ACC used the same argument (Q 360). The CBI conceded, however, that a standard of regulation did not necessarily exist in all of the applicant countries. Some had "a long way to come in understanding a competition-driven market economy", though they were being "very thorough and very particular about finding out everything about mergers" (Q 12).

48. Whilst recognising the "danger" of forum shopping, the Competition Commission was "supportive" of the principle of companies being allowed to notify to the Commission voluntarily. Dr Derek Morris, the Chairman of the Competition Commission, considered that this "clearly" made sense. He suggested that "an effective solution" to the problem of forum shopping could be found by amending Articles 9 and 22 (QQ 253, 261).

49. The OFT also thought that it was possible to "guard against that risk" (Q 205). Like the CBI, Ms Bloom of the OFT suggested that forum shopping was really only a problem

> "if there is a difference in quality between the authorities as to how well they will handle the case. Given the professional approach of all the national competition authorities, and also obviously of Brussels, I think that is not the same worry that it might have been some years back when the other authorities were much newer to handling mergers. They now have a fair amount of experience and we exchange among ourselves learning and staff, so I think it is much less of a concern now." (Q 205)

50. For the OFT, a well-functioning Article 22 could provide a safeguard: "in the event that the parties to a merger were trying to engage in forum shopping to get an easy ride, there would be a natural corrective on the part of the authorities" (Q 205). UNICE also saw Article 22(3) as "a fall-back mechanism" and a "safeguard against forum shopping" (Q 302).

---

[25] The CBI, UNICE and the ICC argued for the harmonisation of national merger rules within Europe (QQ 8, 297; p 188).

[26] The Commission's report to the Council in June 2000 (COM(2000)399 final) suggested further consideration of this possibility, but it has now dropped this proposal.

[27] A5–0217/2002.

51. Were the '3 plus' rule adopted in Article 1(3), the question arises of how to deal with the case where the notification is voluntary in one or more of the jurisdictions (e.g. the United Kingdom). The NCC called for clarification of this point (p 193). The CBI did not consider that requiring notification in three or more mandatory regimes would solve the multiple filings problem. It cited the potential scenario where "filings might end up being made in two mandatory jurisdictions and two voluntary ones, with the transaction still falling outside the ECMR" (p 5). The CBI held that this "would be a serious lacuna and could adversely affect United Kingdom businesses" for whom the multiple-filings problem would not be completely resolved. It called such a move "an 'own goal' against British business" (Q 14). In contrast, it supported a self-certification procedure whereby companies would be entitled to notify the merger to the Commission if the transaction fell within the jurisdiction of three or more Member States. This position was also supported by the American Chamber of Commerce and the International Chamber of Commerce (pp 126, 188).

52. **The Committee does not support the proposal that notification be optional under the revised Article 1(3). Greater certainty and clarity would be achieved by maintaining a mandatory system of notification. In order to assist those companies who wish to notify under the ECMR, however, the Commission might give further consideration to the proposal that parties should be able to request the Commission to take jurisdiction over a case as soon as the relevant national jurisdictional criteria of two or more Member States are met (including cases where filing is optional in one or more Member State). The Commission would have the discretion whether or not to take over the case.**

General conclusions on multiple filings and Article 1(3)

53. **The thresholds, as they are set out in Article 1(3) in terms of the turnover of companies at global or Community level, are only an approximate way of deciding which is the best placed authority to deal with the case but they have been shown to be workable in practice.**

54. **Reducing the number of instances where companies are required to file for clearance with a multiplicity of NCAs is an important objective. Consequently, we support the Commission's proposal to move to a simpler system whereby it would have jurisdiction over all mergers that are subject to three or more national filings, including cases where filing is optional in one or more Member State. Such a change would mean that more mergers having effects on competition in more than one Member State would be dealt with by the Commission. It would give greater certainty for business.**

55. **The possibility would remain that there would be cases caught by the '3 plus' test that would still significantly affect markets with which national authorities were better placed to deal. In the Committee's view, the adoption of the '3 plus' test should therefore be accompanied by an efficient 'corrective' mechanism which should ensure that mergers that significantly affect competition on a national market can be dealt with by the relevant national authority.**

REFERRALS TO MEMBER STATES—ARTICLE 9

56. As mentioned above, because the main test for determining whether a merger has a Community dimension is set out in terms of the turnover of the undertakings concerned at global or Community level, it is a crude way of determining who is the best-placed authority to deal with the case. Article 9 provides a corrective mechanism and allows a Member State to request that the Commission refer back a case that might have a particular competition problem in a distinct market within that Member State and which might not be remedied by the MTF applying the ECMR. In the Green Paper, the Commission suggests that the referral back system laid out in Article 9 should be amended. It suggests that it should be easier for the Commission to pass cases back to the Member States. The proposal to amend and simplify the criteria the Member States must meet to request a referral back (which are contained in Article 9(2)) is aimed at ensuring that mergers are dealt with by the best-placed authority.

57. Clarification of the operation of the referral back mechanism was widely welcomed by witnesses. They believed that the criteria for referring a case back to a Member State needed to be simple and predictable so that its function was, in the Government's words, "as close as possible to automatic" (p 151). The parties to a merger (and the Member States) needed to understand the types of cases that the Commission considered apt for Article 9 referral. Yet the Competition Commission saw reform of Article 9 as "very critical" for establishing the flexibility necessary to make sure that mergers end up being examined by the most appropriate regulatory body (Q 259). A number of witnesses from industry, however, were against any amendment that would increase the number of referrals back to Member States (see below paragraphs 59–67).

58. The Government agreed with the Commission that Article 9 had the potential to provide a corrective mechanism to the proposed amendments to Article 1(3). However, the Government considered that Article 9 would not be able to perform this role "if the Commission's current broad discretion over Article 9 referrals were retained" (p 150). The decision not to refer a case should be possible only "on certain clearly defined grounds" (p 151). The Government argue that "a more predictable system would bring more certainty about the regulatory path a particular deal is likely to take" (p 151). The Union of Industrial and Employers' Confederation of Europe (UNICE) backed this call for more transparency in how Article 9 referrals would work (Q 299).

Grounds for Member States to request a referral

59. The Green Paper proposes that, when making an Article 9 request, the National Competition Authority (NCA) should no longer be obliged to show that a merger would lead to a threat that a dominant position in a distinct market in the Member State will be created or strengthened. Dominance is too complex and too difficult a concept for Member States to prove at this stage in the merger review process. Instead, it would be sufficient for Member States to provide "a substantiated claim of effect on competition" in such a market. That is, Article 9(2)(a) would be removed; Article 9(2)(b) would be maintained, but the Commission would facilitate its use by establishing simpler geographic criteria.[28]

60. This amendment was supported by the Government, who saw it as limiting the Commission's current broad discretion to refuse an Article 9 request. The Government considered that the Commission's proposal to simplify Article 9 by removing the need to demonstrate dominance, thereby making its operation more predictable, had "potential" (p 151). The Office of Fair Trading (OFT) agreed that this amendment would make the test simpler with the consequence of making the application procedure more predictable (Q 204). These witnesses argued that simplification of the requirements for submission of a referral request was in the interests of procedural efficiency.

61. The Competition Commission considered the new form of words proposed by the Commission to be "the right wording". It saw the amendment as "a sound step" that could deliver "an element of automaticity" (Q 259). The National Consumer Council (NCC) also saw the Commission's proposal for simpler criteria as providing "a less cumbersome and swifter means of ensuring that the best placed authority has jurisdiction over the merger" (p 193).[29]

62. Other witnesses, however, opposed the changes proposed to Article 9 by the Commission. The Competition Law Association (CLA) argued that the effect of theses changes would be "to make referrals easier and more frequent than is the case today" (p 49). The Joint Working Party of the Bars and Law Societies of the UK (JWP) shared the concern that increasing the number of referrals would add to uncertainty (Q 89).

63. The American Chamber of Commerce feared that the Commission's amendment would cause "procedural inefficiency and legal uncertainty to the parties to a concentration having a Community dimension and constitute a clear departure from the one-stop-shop principle" (p 127). UNICE also opposed this amendment, considering that it would increase the number of referrals to Member States (p 106). It proposed that an Article 9 request should be granted only when it has the consent of the parties (Q 299)

64. The Confederation of British Industry (CBI) wanted the requirements for referral to be "predictable and exceptional". It opposed the increased use of Article 9 and considered partial referrals to be "particularly inefficient and contrary to the interests of business" (Q 15).[30] The CBI would "firmly oppose" any measures which would significantly increase the number of referrals back to NCAs (p 2).

65. In contrast, the Competition Commission did not believe that the number of referrals would greatly increase. For one thing, Dr Derek Morris, the Chairman of the Competition Commission, did not think that, if one analysed past cases, amending Article 9 as the Commission was proposing would have led to a vast increase in the number of referrals back to Member States. Moreover, he argued that there was no magic or ideal figure for the number of cases that should be examined by the Commission under the ECMR. He reasoned that cases should go to the MTF only if they were of a cross-border nature and so should be dealt with by a supranational authority:

[28] The Green Paper suggests that for the purposes of a referral back "there would not seem to be any need for even defining the geographic scope of the relevant market/s, provided that the effects do not extend beyond the Member State's borders."

[29] BEUC, the European Consumers' Organisation, also supports this amendment (BEUC/X/016/2002), as does the European Parliament's Committee on Economic and Monetary Affairs (A5–0217/2002).

[30] Under Article 9(3)(b), the Commission can refer "the whole or part of the case to the competent authorities of the Member State concerned".

"the one-stop shop is about applying a Community dimension, if a Community dimension is appropriate. That is what we need to reflect [in the Regulation]. It is not about saying 'let us have everything in Brussels, irrespective of the characteristics of the case'" (Q 258).

66. Commissioner Monti explained that, as far as he was concerned, "the 'one-stop-shop' model did not imply that a case should in all circumstances be dealt with by the Commission".[31] He emphasised that the issue had to be seen "from a qualitative rather than quantitative perspective". He said that, in order for a case to be referred back to Member States, "there must clearly be a national competition problem". He added that he planned that the Commission would retain "some degree of discretion" (Q 393).

67. **The Committee believes that speed is important in the referral process. Dominance is too complex and too difficult a concept to expect the Member States to demonstrate at this stage in the merger review process. The Committee therefore considers that the grounds for referral under Article 9 should be simplified. The Committee supports the Commission's proposal to amend Article 9 so that, to be granted a referral back, Member States only have to provide evidence of an "effect on competition" in a distinct national market, that is, they should no longer have to demonstrate that a merger would lead to a threat that a dominant position would be created or strengthened.**

Should Member States use the ECMR rules rather than their national law?

68. UNICE proposed that, where a merger was referred back under Article 9, the Member States should deal with the case under the substantive rules of the ECMR and not under the national law of the countries involved.[32] UNICE were "very much against" Member States applying their own national merger control law after an Article 9 referral since it would mean that a case would be subject to different substantive criteria in different countries. As UNICE was against referrals to more than one country in principle, it saw this as a means of ensuring the case was dealt with consistently across the Union (QQ 299, 303–05).

69. The NCC supported the proposal that the NCA should deal with referred cases "in line with ECMR procedures". It considered this would strengthen "the wider need for harmonisation of practices and greater co-operation between NCAs across the EU, to increase certainty and consistency for all interested parties" (p 193). Furthermore, the European Consumers' Organisation (Bureau Européan des Unions de Consommateurs—BEUC) "strongly support" this proposal for harmonisation, based on EU principles.[33] Mr Van Gerven, of the ACC, thought that having the NCAs apply EC law might help though he suggested that the main differences in national merger laws were procedural rather than substantive (Q 363). In its Report on the Green Paper, the European Parliament's Committee on Economic and Monetary Affairs was quite clear that the Member State to which a merger with a Community dimension has been referred "must apply Community law" to that merger.[34]

70. The Government considered that such a move would be "unnecessary" (Q 415). Article 9(8) already prevented Member States from considering anything other than competition issues in their assessment of repatriated cases.[35] The Government considered it difficult to see how this proposal for NCAs to apply the ECMR "could actually be made to work". It would not be possible for national authorities to apply all the rules of the ECMR because their institutional structures were different and they would not be compatible on procedural grounds (this would apply, for instance, to rules of timing). An alternative would be to limit the requirement to the application of the ECMR substantive test. However, this would also have "a downside attached to it" and would not necessarily be in the interests of the parties, as the national authorities would often be applying a test with which they were not very familiar (Q 415).

71. **While the Committee does want to "increase certainty and consistency", it does not consider that requiring NCAs to use ECMR procedural or substantive rules for cases referred back would be the most effective or realistic way of achieving this. NCAs should not be required to apply a substantive test other than that in their national legislation because it could lead to greater confusion and delay.**

---

31 Speech "Review of the EC Merger Regulation—Roadmap for the reform project", given at the Conference on Reform of European Merger Control, in the British Chamber of Commerce, Brussels, on 4 June 2002.

32 Under Article 9(3)(b), the Commission refers cases back to Member States "with a view to the application of that State's national competition law."

33 BEUC/X/016/2002.

34 A5–0217/2002.

35 Article 9(8) stipulates that in applying the provisions of Article 9 "the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned."

Grounds for the Commission to refuse a referral

72. Witnesses were keen to limit the number of circumstances in which the Commission could refuse an Article 9 request. The Competition Commission suggested that there should be two criteria: the Commission should have to be able to disprove the argument that there was a strict national market or identify cross-border activities that the NCA had not identified. It considered that, combined with the proposed amendments to the criteria for requesting a referral, these could deliver a near-to-automatic system that would, "in the vast majority of cases, lead to a merger being dealt with at the right level (QQ 258–59). The OFT also said that the Commission should be able to refuse a request for an Article 9 referral only if essentially the Member State had it wrong and the merger was one that had cross-border effects (i.e. if the case was one that really should not have fallen to a Member State because it did not just have solely national effects) (Q 204).

73. **The criteria upon which the Commission can refuse to grant a referral back should be strictly limited. They also need to be clear and unambiguous.**

Transparency

74. The Government strongly supported the Commission's suggestion that guidelines be issued on how the new system will operate in practice. This would have the benefit of maximising transparency (p 151). They urged the Commission to outline how it proposed to use its discretion over referrals. The JWP regretted the fact that there was currently very little guidance from the Commission on Article 9 (Q 89). Even witnesses, such as the CLA, who opposed altering Article 9 strongly urged the Commission "to issue clear, unambiguously worded guidelines explaining its policy in this area" (p 49).

75. The Government also argued that, in order to further the predictability of the referral process, reasoned decisions capable of challenge should be published "in all cases" (p 151). The Competition Commission considered transparency to be "critical" to the successful working of Article 9. This would have to include not only published guidelines on the whole mechanism but also "publication of the outcome" (Q 259).

76. Commissioner Monti agreed that publication of the Commission's decisions on referrals under Article 9 and of guidelines defining the Commission's discretion would help to make the Article "more predictable and transparent". Moreover, he appreciated the effect that ensuring all decisions were "fully reasoned" would have on these objectives. He added that "steps have been taken to ensure the publication of all referral decisions taken so far" (Q 391).

77. **The Committee considers that the Commission should issue, as soon as possible, guidelines on the implementation of Article 9 and supports the call for greater transparency in decision making under that Article.**

Referral back at the Commission's initiative

78. The Green Paper suggested that the Commission should be able to refer cases to Member States on its own initiative and without a specific request from a Member State. The Green Paper notes that such a decision would nonetheless normally involve prior consultation between the Commission and the relevant Member State. The idea is that this amendment would basically mirror the current option for Member States to refer cases to the Commission under Article 22(3) (see paragraphs 86–95 below).

79. Again witnesses were divided on this issue. On the one hand, the CBI saw "no good reason for such a proposal" (p 6). The American Chamber of Commerce also opposed it (p 127). The JWP felt that such a move would "disproportionately undermine the principle of the 'one-stop shop'," concluding that "Article 9 referrals should be made only pursuant to a request from a Member State" (p 32). UNICE would only support this amendment if the referrals had to have the consent of the parties in order to go ahead (Q 300)

80. On the other hand, the Competition Commission saw such an amendment to Article 9 as "a key element" in ensuring that mergers were examined by the most appropriate regulatory regime. The Government were also "content in principle" with the idea of referrals at the Commission's initiative and saw it as "an important possibility". Mr Burnside, of Linklaters, had "no objection" to this amendment. Mr Kirch, of the ACC, believed that such referrals would happen very infrequently in practice. But the Government pointed out that the Commission was "already increasingly taking the initiative over Article 9 referrals in an informal way".[36]

[36] p 152; QQ 258, 365–66, 424; cf. BEUC/X/016/2002.

81. **Where the Commission's initial analysis on a case suggests that it would be better dealt with by a national authority, the Commission should be able to take the initiative to refer it back to the relevant NCA. Article 9 should be amended accordingly. Such an amendment would not have any greater implication for the principle of the one-stop shop than a Member State being able to make an Article 9 request.**

82. **However, the right of referral should not be absolute. Referrals back at the Commission's initiative should be preceded by prior consultation between the Commission and the Member State. Moreover, such referrals back should be subject to the agreement of the Member State: a national authority should not be required to deal with cases which it considers raise trans-national or cross-border issues that the Commission should address.**

General conclusions on Article 9

83. **If the '3 plus' rule is adopted in Article 1(3) and this has the effect that substantially more mergers fall to Brussels for initial consideration, it may well be necessary to have a system whereby more of those cases than at present would then come back to the Member States.**

84. **The Committee is aware of concerns that amending Article 9 to make referrals back easier could lead to delay, increased legal uncertainty and inconsistent application in decision-making. However, as John Vickers, the Director General of the Office of Fair Trading, said, it is "well worth the price in terms of flexibility to ensure that things are, where possible, considered in the most sensible place, to have that element of unpredictability about where that location will be" (Q 210).**

85. **In order to counter the concern over uncertainty, the Committee supports the principle that all the Member States should employ common criteria and standards. We encourage a process of convergence to this end.**

JOINT REFERRALS TO THE COMMISSION—ARTICLE 22(3)

86. The Green Paper also aims to facilitate the referral of cases in the opposite direction, that is, from one or more Member States to the Commission. Article 22 allows Member States to request that the Merger Task Force take a case that has no Community dimension within the meaning of Article 1. The Committee asked whether it should it be easier for Member States jointly to refer national cases to the Commission.

87. Article 22 was originally included in the Merger Regulation in 1989 to deal with the absence of effective merger control regimes in a number of Member States. Article 22 enabled a Member State to ask the Commission to assume jurisdiction where they could not examine the merger themselves. However, all the Member States, except Luxembourg, now have merger control laws and so Article 22 now serves a slightly different purpose. Amendments made in 1997 were intended to allow two or more Member States to make joint referrals to the Commission where they felt that the Commission was better placed to act (it is therefore complementary to Article 1(3) and its operation reflects that of Article 9). It has been used in this way in only two cases.[37] However, the drafting was not originally intended for this type of situation and the NCAs have said that understanding how the Article now works is difficult. They say that the Commission's procedure and timetables, both for the parties and for the Member States, are hard to define.

88. The Article's main purpose now is to try and catch cases where, because of the turnover of the parties in particular countries, the case falls to national jurisdiction, yet the merger would affect wider markets.[38] The Competition Commission saw Article 22 as providing a mechanism to try to address that shortfall in regulatory oversight and to enable such cases to be dealt with by the MTF (Q 251). The Competition Commission thought, operating in such a way, Article 22(3) should be "an extremely important mechanism […] an important bulwark" for Member States (Q 261).

89. Nonetheless, the regulators were clear that the Article needed reform. The Government viewed it as "important" that the Commission address the current weaknesses in this Article since difficulties in its drafting had caused "a number of problems" and made it "very difficult to use" (p 152; Q 425). The Government considered that Article 22 could provide a "useful complement" to the new system of establishing jurisdiction that the Commission is proposing in Article 1(3) and saw it as having "an important role to play as part of the corrective mechanism" (p 153; Q 425).

[37] *General Electric/Unison* in December 2001 and *Promotech/Saltzer* in January 2002.

[38] For example, in the *BASF/Takeda* case neither company had any assets in the United Kingdom; the case impacted on a world-wide market.

90. The JWP went further and believed that Article 22 was a "more promising mechanism for dealing with the 'problem' of multiple filing than an adjustment to the thresholds in Article 1(3)" (p 32). The JWP considered that "the Member States should determine whether they believe there is a case of such importance that the Commission should look at it" (Q 87). The JWP believed that "the principle" of Member States being able voluntarily to renounce their jurisdiction in favour of the one-stop shop of the Commission was "a good one" and preferable to it happening automatically as the Commission proposed (p 32). The JWP stressed that "Article 22(3) referrals should not be allowed simply on the basis that the parties would obtain the administrative benefit of avoiding multiple filings." It said that "referrals should *not* be available at the request of the parties to a concentration". Its proposal to amend Article 22(3) and retain a mandatory scheme of notification for the thresholds in Article 1(3) would thus avoid any risk of forum shopping (p 32).

91. Whether or not Article 22(3) is amended in conjunction with amendments to Article 1(3), there are procedural weaknesses that need addressing. For instance, at present, the request to refer a case has to be made within one month of when the merger is "made known to Member State(s)". There is much confusion surrounding the meaning of this provision. Does it mean the notification date? What about when there is no mandatory notification system? What about when a merger is effective in different Member States at different times? The Government said this provision was "unclear" and specifically wanted clarification of its meaning. The OFT confirmed that "it is actually difficult to know when the article is complied with" (Q 212). There was also a question about the timetable for the article. The Commission needed to clarify the deadline by when joint referrals had to be made and the point at which the ECMR timetable began to run following referral (Q 212).

92. For the OFT, too, these problems were "real issues." Clarification "would doubtless make future use of the article much easier" (Q 212). The OFT explained that its request, made with other NCAs, was only successful because of the Association of European Competition Authorities.[39] For the article to operate more efficiently in the future, this body of NCAs might need to be more formalised. The OFT concluded that these procedural difficulties were "serious issues" and the article needed to be "reformed so that it is easier to operate." (Q 212)

93. Because of the current absence of an efficient information exchange network between the Member States' competition authorities and in the absence of greater harmonisation of national rules, BEUC considered that amending Article 22(3), to make it easier for Member States to make joint referrals, could not in itself ensure that all mergers of a Community dimension were examined by the Commission.[40]

94. **It should be easier for Member States jointly to refer national cases to the Commission. The Commission should, after consultation, bring forward proposals for a re-drafted Article 22(3) that will address these procedural weaknesses.**

95. **Greater co-operation between the Member States' competition authorities is to be encouraged. This might be achieved through greater use of the meetings of the European Competition Authorities.**

Should the Commission be able to request an Article 22(3) referral?

96. The Government considered that it would also "be logical" for the Commission itself to be able to request that an Article 22 referral be made and saw "no reason" why this should not be permitted. The article could then operate as a form of reverse Article 9 (p 152; Q 425). Such a change was supported by both the NCC and the OFT (p 194; Q 213). Dr Morris saw it as vital to combating any forum shopping that could arise if Article 1(3) were to be made optional, as "it may well be the European Commission that is the first to identify that there is a series of cross-border activities such that it should go to the Commission" (Q 263). **The Committee agrees that the Commission should be able to request that an Article 22 referral be made.**

The need for the Commission to issue guidelines on Article 22(3)

97. The Competition Commission called on the European Commission to issue clear guidelines on Article 22 (Q 261). **We support the view that the Commission should issue guidelines on the implementation of an amended Article 22(3).**

[39] The ECA consists of the competition authorities in the European Economic Area (EEA) (the 15 Member States of the European Community, the European Commission and of the EEA, EFTA States and the EFTA Surveillance Authority). In contrast to the EC network of competition authorities, which will concentrate on the application of EC anti-trust rules, the ECA is intended to discuss issues linked to the application of national competition law.

[40] BEUC/X/016/2002.

PART 4: SUBSTANTIVE ISSUES

The substantive test

98. Currently, the ECMR uses a ‘dominance’ test[41] to judge whether a merger is “compatible with the common market.” Under Article 2 of the Merger Regulation, the Commission blocks those mergers that it determines would “create or strengthen a dominant position as a result of which competition would be significantly impeded in the common market or a substantial part of it”. The Green Paper instigates a debate on whether it might be appropriate to substitute for this ‘dominance test’ a different test, namely, will the merger substantially lessen competition. This test, commonly known as the SLC test, is used in many other jurisdictions, including the USA, Canada, South Africa, Japan, Australia and New Zealand. Given that the Government’s Enterprise Bill would replace the existing United Kingdom ‘public interest’ test with one based on SLC, it came as no surprise that the Government saw “real benefit in moving to such a test under the ECMR” (p 153).

99. The Commission has stressed that it is not “wedded to the current wording” and has “no prejudice in favour of one formulation or another.” Commissioner Monti has said that he is not expecting to reach definite conclusions on the substantive test within the time available for this review as this is a subject he would like “further discuss[ed] with Member States before deciding what course of action to take”.[42] When we met with the Commission, it emphasised that it was “looking into this issue carefully” and was doing so “with an open mind” (Q 402).

100. This section deals with the advantages and disadvantages of both tests, as well as the question of the proper role of efficiencies in merger assessment.[43] In it, we weigh up the array of arguments for and against changing the current substantive test.

ARE WE PLAYING WITH SEMANTICS?

101. We were keen to discover what the differences were between the two tests. For some witnesses, it was a mere matter of semantics that distinguished the two tests. However, we received conflicting opinions on this issue.

No real differences?

102. Some witnesses, such as Dr William Bishop, Chairman of Lexecon Limited, thought that there was “very little difference in practice between the two tests” (Q 57). He did not see “major differences” between SLC and dominance in the way that the latter had been developed and applied by the Commission (Q 68). The Government said that a change from dominance to SLC would not be “a fundamental change” to how the ECMR functioned (Q 411). The Confederation of British Industry (CBI) accepted that “real differences” between the tests were “difficult to pin down”. Nonetheless, the CBI claimed that a move away from the dominance test would bring with it “certain risks”: businesses were concerned that the rules on merger control might “significantly change” as a result of a change of substantive test (Q 24).

The current ECMR test could be called ‘dominance plus’

103. Several witnesses said the differences between the two tests were minimal because the Commission’s current test was ‘dominance plus’. They argued that the existing test, properly construed, involved two elements, namely (i) “creating or strengthening a dominant position” and (ii) “as a result of which effective competition would be significantly impeded in the common market or a substantial part of it.” The Union of Industrial and Employers’ Confederation of Europe (UNICE) claimed that the ECMR test as drafted required the Commission to demonstrate both the creation or strengthening of dominance and a significant impediment to competition in the common market before

---

41 This is the common short-hand name for the substantive test and is used by the Commission in the Green Paper. Some witnesses questioned whether it accurately reflected the wording of the test and the procedure by which the Commission examines mergers. We outline this discussion below (paragraphs 103–04).

42 Paragraph 169 of the Green Paper. See also Commissioner Monti’s speech “Review of the EC Merger Regulation—Roadmap for the reform project”, given at the Conference on Reform of European Merger Control, in the British Chamber of Commerce, Brussels, on 4 June 2002.

43 There is a debate as to whether mergers that fail the substantive test in the ECMR (i.e., that create or strengthen a dominant position as a result of which competition would be significantly impeded) should be permitted if, as a result of the merger, benefits (or ‘efficiencies’) would accrue to the customer. We explore this issue below (paragraphs 162–87).

a merger could be prohibited (Q 306).[44] The CBI also argued that a switch was unnecessary as the concept of SLC was already incorporated into the dominance test (Q 40). The Commission too emphasised that, in the Regulation, dominance was "surrounded by other wording" which was "quite similar to the SLC test" (Q 399).

104. The National Consumer Council (NCC) argued that a move to the SLC test would remove "the distracting need to demonstrate dominance." Instead, the immediate focus of the authorities would be on the competitive conditions in the relevant market, which was "the key issue for consumers". Because of the order of the wording in Article 2, at present the Commission had to find a dominant position as "a pre-condition" before it could examine the competition effects of the proposed merger. Yet the notion of dominance did not, of itself, say "anything about the effects on competition that might take place" (pp 194–95).

Real differences

105. There clearly are similarities between the wording of the two tests. However, some witnesses, such as the TUC, held that the two tests were "clearly different" and would lead to "different decisions being made" (QQ 132, 150). Professor John Kay saw the SLC test as "both different and preferable" to the dominance test (Q 174).

A move to SLC would lead to more investigation

106. One area where many witnesses did perceive a difference between the two tests was in the number of mergers that might be subjected to serious scrutiny in Phase II. Witnesses were agreed that under SLC more cases would be taken to Phase II (and so possibly prohibited unless acceptable remedies could be found).[45] It was suggested that mergers involving companies in oligopolistic markets would be particularly affected (see below paragraphs 142–51). Witnesses disagreed over whether or not such an increase would be a good thing.

107. For some witnesses, an increase in the number of mergers prohibited or subjected to commitments was certainly not desirable. The Competition Law Association (CLA) thought there was "a risk" that under the SLC test there would be "a great deal more intervention" under "a far stricter policy". It feared that the Commission, "as it did with Article 81(1) and the concept of appreciability," would apply SLC with "a very wide scope" and as a result take many more cases to Phase II and possibly even prohibit "significantly more cases based on the SLC test than it could do on dominance" (Q 97). The Joint Working Party of the Bars and Law Societies of the UK (JWP) confirmed that it was a "genuine concern" that there would be a greater number of Phase II investigations (Q 104).

108. From industry, UNICE signed up to the proposition that SLC was "a broader test" and "stricter" than dominance. The American Chamber of Commerce (ACC) also saw SLC as "marginally less permissive" and thought that it would probably lead to "more transactions being prohibited or subjected to remedies". Both organisations were unsurprisingly against greater intervention by the Merger Task Force (MTF), with UNICE arguing that oligopolistic markets were not "wrong or bad *per se*". As a switch to SLC would probably lead to more intervention, the ACC deemed this "to a certain extent" to be "a political decision".[46]

109. Dr Derek Morris, the Chairman of the Competition Commission, was absolutely clear that a switch to the SLC test would lead to more cases being tackled by the MTF than under the dominance test. However, he considered that this was a good thing: "if there is a substantial lessening of competition, that is something that should be investigated" (Q 264, 276–77).

110. The Commission appreciated that "arguably" SLC could be "interpreted in a wider way than dominance". However, Commissioner Monti rejected the idea that "it is easy to make a link between the substantive test and the degree of rigour or of toughness in the outcome" (QQ 397, 399).

111. The evidence suggests that, despite the similarity between the wording of the two tests, there are differences between them. In particular, it would seem that the SLC test will lead to more investigation by the Commission and that this would particularly affect oligopolistic markets, where it might be difficult for the Commission to find dominance. We return to this issue below (paragraphs 142–151).

---

[44] In practice, it is not clear whether both elements of the test must be satisfied before the Commission may prohibit a transaction or whether the second element (i.e., significantly impeding effective competition) is merely a description of the consequences of the first.

[45] The *GE/Honeywell* case was cleared in the US on SLC and prohibited in Europe on the dominance test. However, witnesses referred to this as an exception that was not comparable to other cases (see below paragraph 124–25).

[46] QQ 306, 310–15, 323, 372–73.

ARGUMENTS FOR RETAINING THE DOMINANCE TEST

112. The CBI and Mr Nicholson, of Slaughter & May, put the case for retaining the dominance test as "if it is not broken, why fix it?" (QQ 21, 472) Taking the position that, due to the current test being dominance plus, the differences between the tests were not that great, they considered that the current test was already an effective instrument of merger control. Moreover, witnesses who wanted to retain the dominance test claimed that there were a number of risks involved in a switch to SLC.

The loss of jurisprudence

113. One argument frequently cited against a move away from the dominance test was based on the fact that, in the time since the ECMR had been adopted in 1989, the Commission and the Community courts had generated a considerable amount of case law on the dominance test. Some witnesses feared that this would be lost in a move to SLC and that a change of substantive test would give rise to legal uncertainty for merging parties (Q 308). After any change of test, it would take time for a body of precedent to develop. As European merger law has already undergone substantial change—first by the recognition that Articles 81 and 82 of the EC Treaty applied to concentrations,[47] and then by the adoption of the ECMR and subsequent amendments to it—lawyers and representatives from industry were, unsurprisingly, reluctant to see another change.

114. The CBI said that people knew where they stood with the dominance test, although it might not be "the perfect test" (Q 21). The uncertainty and unpredictability that would result from any change was the main concern of the CBI (QQ 30, 37, 38). The TUC also took this line, arguing that the dominance test should be retained "for the sake of certainty and clarity" (QQ 126, 131). The European Consumers' Organisation (Bureau Européan des Unions de Consommateurs—BEUC) also expressed some concern about the "confusion" there would be in forecasting results under the ECMR if the present case law were to become invalid.[48] Even advocates of the change to SLC, such as Dr Bishop and the ACC, acknowledged that associated with a switch there would be costs in terms of precedents being devalued and some uncertainty being created (QQ 57, 60, 369).

115. However, the Commission said that the effect of such a loss "should not be exaggerated" (paragraph 161). Some witnesses suggested that this short-term loss of certainty could be lessened by the Commission issuing clear guidelines on how it would interpret and apply the SLC test.

116. The JWP did not think that the loss of jurisprudence would matter "enormously" as long as the SLC test was "clearly described and set out in guidelines" (Q 100). It pointed out that the value of precedents was "limited because each case turns so much on its facts" (Q 109). The Office of Fair Trading (OFT) also explained that "much of the case law would still be relevant", for example, where it was to do with defining the relevant market and market power (Q 220).

117. Witnesses were against changing the substantive test because they were worried about uncertainty; they argued that the change would render it more difficult to forecast the outcomes of cases. That the dominance test has a long antecedence in EC law and there is a considerable body of jurisprudence on the meaning of 'dominant position' is a strong argument in favour of not changing the test. Once SLC was well established, however, there would be no reason why that test should be any less certain than dominance. The argument is about the transition costs of any change of test and whether the switch warrants the confusion of going from one to another. We note that the Government considered that, in the long term, the advantages of a change of test would "outweigh the loss of case history" in the short term (Q 427).

Many domestic systems of merger control in the Member States have adopted dominance as their substantive test

118. Many witnesses claimed that a change to SLC in the ECMR might be controversial for the Commission, as many domestic systems of merger control in the Member States and the applicant countries applied dominance under their national law.[49] Moreover, some of these countries had only recently adopted dominance as their substantive test in order to mirror the test in the ECMR. The CBI argued that it would be unwise for the ECMR to change to SLC when the SLC test was not widely applied elsewhere in Europe (QQ 21, 30). Mr Van Gerven, of the ACC, thought that this was "very important". He believed that the Member States would block a move to SLC (Q 377). The concern about the disparity between EU legislation and that of its Member States was also shared by the

[47] See paragraph 5 above.

[48] BEUC/X/016/2002.

[49] For information on which accession countries use which substantive test see the Government's evidence (p 169).

International Chamber of Commerce (ICC) (p 190), the TUC (Q 131) and the BEUC.[50] Dr Bishop thought that the resulting lack of co-ordination between the Commission and those Member States who operated a dominance test would be the "main disadvantage" of switching to SLC (Q 60).

119. The JWP recognised the potential political difficulty of the Commission proposing a shift to SLC and appreciated that it might be not be easy to persuade the Council of the benefits of changing to SLC. However, this difficulty, in itself, did not "justify the retention of the dominance test" if the SLC test was a better test (p 34; Q 106).

120. The short-term discrepancy between regulation at a national and EU level obviously had not been viewed as a persuasive argument by the Government, who have proposed a change to SLC in its Enterprise Bill, despite the difference that would arise as a consequence between the United Kingdom on the one hand and several other Member States and the Community on the other. Although it would be "helpful", the Government did not consider it "crucial" to share the same substantive test as the other Member States and the Commission. So long as there were two tests operating internationally there would always be some differences between different jurisdictions. The Government considered themselves to be moving into the "mainstream" by switching to SLC and thereby aligning themselves with other jurisdictions. But of greater importance for the Government was the fact that they saw the SLC test as "the better test" (Q 427).

121. Changes to the ECMR require unanimity. It has been suggested, however, that if the Commission led the way in changing to SLC, Member States would follow. Furthermore, in its Green Paper, the Commission briefly mentions that, as well as Ireland and the United Kingdom planning to introduce the SLC test, "other Member States are interested in evaluating the possible advantages of moving to such a test."[51] Likewise, the OFT suggested that a number of the European the National Competition Authorities (NCAs) currently apply a dominance test were receptive to the idea of the SLC test, although OFT pointed out that it would be the governments who would make the decision whether to switch (Q 222). The extent of any trend towards SLC will be a relevant factor in the decision on the substantive test.

ARGUMENTS FOR SWITCHING TO THE SLC TEST

'International' mergers and the convergence of substantive tests

122. The increasing globalisation of markets has led to an increase in the number and scale of large cross-border mergers. This has meant that such mergers often have to be examined by numerous separate NCAs across the world. Consequently, international co-operation between competition authorities is increasing in importance (p 153). In view of the fact that the main merger control regimes outside Europe use the SLC test, some witnesses said that changing the substantive test in the ECMR could improve co-operation between competition authorities and the handling of international or global mergers that have substantial effects outside the EU. This was one of the Government's two main reasons for arguing that "a move to SLC would be beneficial in the ECMR context" (p 153). The JWP also considered that adopting the SLC test would be a "helpful move towards the international harmonisation of merger control systems" (p 34).

123. However, some witnesses pointed out that, even if the same substantive test were applied across the different jurisdictions, the way in which the test was applied could give different results. For the CBI, harmonising the legal test in the legislation would not "in and of itself lead to a more consistent approach" because, however the test was phrased, the regulators would retain "a broad margin of discretion". Differences in the way in which a substantive test could be applied meant that it would be necessary to go "much further than simply harmonising the basic legislation" to obtain convergence of international standards (Q 26).

124. The two different tests have been working side by side for some time and some witnesses observed that there had not been a great deal of difficulty between international regimes because of the different tests. When invited, the CBI was unable to name any cases where different jurisdictions using different tests had come to different answers that were attributable to the substantive test used. Even with the *GE/Honeywell* case as a possible example, Dr Bishop was amongst those who did not think the difference of substantive test between the US and EC had had any impact on the outcome of a case (Q 60).

125. Discussions between US and EU case handlers have frequently focused on the definition of the relevant product market. Where the authorities have formed different views on market definition

---

[50] BEUC/X/016/2002.

[51] Footnote to paragraph 161 of the Green Paper.

(e.g. *American Home Products/Monsanto, Hoffmann-La Roche/Boehringer Mannheim*) the reasons for the divergence have been explained by other factors and are rarely attributable to different substantive tests. In a relatively small number of instances, differences in analytical approach and substantive conclusions have led the EU and US authorities to seek different remedies in respect of the same transaction. For example, in *Glaxo/Wellcome*, the US agencies required complete divestiture of *Wellcome's* R&D activities in a certain field, whereas the EU conditioned approval on the license of only one of the parties products. Up to *GE/Honeywell*, the most notable example of the Commission and its US counterpart failing to reach agreement occurred in *Boeing/McDonnell Douglas*, where the Department of Justice viewed the transaction as benign and concluded that no remedy was necessary, while the Commission challenged the transaction and ultimately required a package of remedies to address their competition concerns.

126. Derek Morris agreed that problems caused by the difference of substantive tests had been "relatively rare." Nonetheless, he stressed that in individual cases the distinction could be "significant". Moreover, he saw this as "an increasing problem" with the situations in which differences would occur becoming "more prevalent". Consequently, he thought that harmonising the substantive test with that of other countries was "certainly an important reason" for the Commission to switch to a SLC test (QQ 264, 278).

127. The OFT also argued that this potential "transatlantic harmony in terms of language" would be one of the benefits of switching. It too was keen, however, to point out that differences in how some mergers had been handled were "relatively rarely" to do with differences in the substantive test; the test had not been "a significant factor" in the exceptional cases where there had been disagreements. The OFT suggested that there was already "considerable" convergence between the way in which mergers were handled in Brussels and the US (for example, in the methodological analysis of market definition, market power, and barriers to entry). The major differences were procedural (QQ 223, 236).

128. Whereas these witnesses presumed that, for international convergence to occur, the ECMR would have to move to SLC, the CBI and UNICE hoped for international convergence on the dominance test (QQ 31, 303, 317).

129. As far as Professor Kay was concerned, these considerations of international convergence were secondary. He considered "the only reason" for having convergence of tests was if one were "converging towards a good policy" (Q 187).

The SLC test is more solidly rooted in economics

130. A number of witnesses claimed that the SLC test was directly grounded in economic analysis and the impact of a merger on competition in a way that the concept of dominance was not. Thus, the Government argued, the SLC test was "fundamentally better adapted to merger control" (p 153). For Professor Kay, the dominance test focused too much on "the structure of an industry"; it was not flexible enough to deal with differences between industries and did not focus enough on maintaining competition (Q 183).

131. For the JWP, the SLC test was "a less artificial notion than dominance," which was "a legal construct" and was not "rooted in economic theory" (p 34). The ACC and NCC also believed that the adoption of the SLC test would result in a more economics based approach in the assessment of mergers (p 129; Q 372). Dr Bishop thought the SLC test was better suited to the economic analysis required in merger cases, but only "to a marginal degree" (Q 58). The CBI, however, said that, although it recognised that it had been argued that SLC was a more economics based test, it did not agree (Q 40). On the basis that the current test was 'dominance plus', UNICE also rejected the argument that SLC a was a more economics based test (Q 306).[52] However, the Commission did concede that 'dominance' was "not directly an economic term" (Q 402).

The SLC test has a common-sense resonance

132. Many witnesses explained that the SLC test was a more straightforward test than the current dominance test, which could be interpreted as a two-stage 'dominance plus' test (see above paragraphs 103–04). The regulator, rather than having first to establish that a merger would create or strengthen a dominant position and then to examine whether that would result in a significant impediment to effective competition, could just analyse whether a merger would significantly lessen competition.

[52] For an explanation of this argument see above paragraphs 103–04.

133. John Vickers, the Director General of the Office of Fair Trading, said that, if the prime purpose of merger policy was to safeguard against competitive market processes being undermined, the SLC test was better. "A great attraction" of the SLC test was its "directness" (Q 218). The NCC agreed that having to demonstrate dominance was a distraction. The authorities should focus directly "on the competitive conditions in the relevant market," which was "the key issue for consumers" (pp 194–95). BEUC considered that the SLC test would "fit in more easily with the analytical process" of examining a merger.[53] Derek Morris concurred that, from the regulators' point of view, the SLC test was superior "just in terms of the very words and concepts" contained within it (Q 264).

134. Dr Bishop also took the position that the SLC was a better test than dominance and was linked more directly in its language to the way in which regulators needed to examine mergers. There was an "artificiality" in talking about dominance (Q 57). John Vickers agreed that the SLC test would bring greater clarity to the substantive test in the ECMR. Even if the two substantive tests did mean the same thing, it was unfortunate that that was not clear to everybody (Q 218). However, the Commission pointed out that although SLC probably had "some conceptual advantages", it was not completely transparent as the word 'substantial' in 'substantial lessening of competition' did not have an automatic definition and there would still be borderline cases (Q 402).

135. The Committee shared the concern that proving dominance might be a distraction for regulators, who are primarily concerned with maintaining the competitive conditions in the relevant market. The SLC test might more closely mirror the Commission's analysis of mergers and could assist them in focussing on the competitive impact of the merger in question. However, the question remains whether the issue is one of substance or just language; that is, whether to some extent the dominance test as applied by the Commission is indistinguishable in effect from to the SLC test.

Could the Commission already be applying the SLC test?

136. It has been suggested that a move to SLC would not significantly change either the way in which the Commission went about its competition analysis or the outcome of the ECMR process in the great majority of cases. Nonetheless, some witnesses argued that the Regulation should be amended so that the substantive test set out in it and the analytical method applied in practice by the Commission more closely equate.

137. The Government developed this argument and said that it could be used as evidence that the risks of a change to the substantive test in the ECMR were "in practice relatively limited". They reported that some stakeholders had held that the Commission's flexible use of dominance meant that the test in operation was "in practice already very close to SLC and that a change would lead to the legal text reflecting enforcement practice more precisely" (p 153). The JWP agreed with this argument saying that "most cases would be decided in the same way, whether the test was based on dominance or the substantial lessening of competition" (p 34).

138. The ACC explained that the way in which the Commission was now construing dominance had moved towards what the US did under its SLC test namely, not so much studying the market structure and applying a structural test based on comparing market shares, but analysing instead what the effect of the merger would be likely to be by examining how it would impact on the conduct of the undertakings involved: "In reality therefore the two tests have moved together" (Q 371). The ACC also explained how the Commission had had to "stretch" the interpretation of dominance in order to carry out investigations into the cases it wanted to examine (QQ 371, 376). The dominance test was originally addressed to transactions involving firms that were individually dominant. The Commission had since expanded the test to cover situations of 'collective dominance'. Even witnesses who argued against a change of substantive test, such as the CBI and the TUC, were concerned that the concept of dominance was being over-stretched by the Commission (p 2; Q 153). John Vickers explained that this had led to a "frustrating uncertainty" about exactly what was meant by the phrase collective dominance (QQ 219, 224).

139. Mr Götz Drauz, the Director of the Merger Task Force, admitted that the Commission had "developed and exploited progressively" its interpretation of dominance since 1989, when there was a presumption that dominance could only occur in cases where an individual company had more than 50 per cent of the market. The Commission had since found dominance in market shares as low as 27 per cent (Q 399).[54] For Dr Bishop, the uncertainty over collective dominance and the way in which the Commission had moved the goalposts for the dominance test was "one of the least satisfactory matters" of the ECMR and one that had led to a "great lack of clarity" (QQ 54, 55).

[53] BEUC/X/016/2002.

[54] This is probably a reference to *Carrefour/Promodes*, where the Commission's decision found dominance at less than 30 per cent.

140. Derek Morris agreed that the Commission was probably applying SLC, but dressed up in the language of dominance. That was "very confusing" for the parties and introduced "an element of randomness" into a test that should be as predictable as possible (Q 265).

141. The benefits associated with the Commission's practice mirroring the wording of the substantive test in the ECMR might not outweigh the disadvantages of a change. If the Commission were to adopt SLC merely as a reflection of its current enforcement policy, any impact might be restricted to the wording of the Regulation and not its application. However, that might be too conservative an assessment; there remain other arguments for change. For its part, although the Government said that a move to SLC would "in all probability not alter the way that the Commission goes about its job in the majority of cases," it remained convinced that adopting SLC "could bring real benefits in certain types of cases" (Q 411). We examine these scenarios below.

The SLC test is better than the use of 'collective dominance' for dealing with the problem of co-ordinated effects

142. It was argued that the SLC test was better for examining mergers that did not give a company a market share that could be judged to make it individually dominant, but which reduced the number of companies operating in a market that was highly concentrated (i.e., that held few competitors). Changing the ECMR for this reason would only affect a small percentage of mergers, but, as shown by the *Airtours/First Choice* case, these can be very significant.

143. The Committee heard much criticism of the approach taken by the Commission to cases of collective dominance. It was said that, in applying the dominance test, the Commission had failed to articulate a consistent framework for assessing co-ordinated effects. Dr Bishop was particularly concerned:

> "It is not natural to speak of dominance when you have a leading firm—that is, say, 40 per cent—and what you are really worried about is that the second firm will merge with the fourth firm, and the total concentration will rise. You have to go through the mental contortions of saying that they are dominant, and you do that through saying that there is such a thing as a collectively dominant entity. It would be much simpler to analyse the likely outcome directly, in terms of whether quantities will be further restricted and prices rise, and not have to go through these mental contortions about 'dominance' and describing a 'dominant' entity, which is a rather artificial construct." (Q 60).

144. Others witnesses also expressed concern about the concept of collective dominance in the ECMR context. The CLA thought that it was a "slightly artificial concept" (Q 97). The Government agreed, considering that the SLC test avoided "the need to shoehorn assessment of a significant competition detriment into the artificial construct" of collective dominance (Q 430). Professor Kay agreed that the dominance test resulted in the MTF "trying to shoehorn" the decisions they wanted to make into a framework that was "not really appropriate for them" (Q 180). He argued that

> "it would be a much better structure if one could get to the right decisions for the right reasons even if it does not necessarily change the decisions, and it certainly serves better in future the task of giving people more confidence in the process and more ability to assess what the outcome is likely to be" (Q 192).

145. Many witnesses considered that, if adopting SLC meant losing the case law concerned with collective dominance, this would not be a cause for concern. Derek Morris was sceptical of the value of the existing case law (QQ 278–79). Professor Kay said the loss would not be a problem as he did not feel that there was "a body of case law that had defined what [collective dominance] was or applied it in a coherent way" (Q 191). John Vickers also drew attention to these "ambiguities and uncertainties" that had arisen, pointing out that there remained "open questions" on collective dominance "given the case law to date" (QQ 219–20). It was suggested that moving to SLC would enable the Commission to establish a clear framework for evaluating collective dominance and co-ordinated effects.

146. The Commission's application of the concept of 'collective dominance' in merger cases was recently examined by the Court of First Instance (CFI) in the appeal over the Commission's decision to prohibit the merger between Airtours and First Choice. The ruling by the CFI in the *Airtours/First Choice* case clarified the assessment of collective dominance under the ECMR and the burden of proof required of the Commission to prohibit a merger in highly concentrated markets.[55] In the

[55] Case T–342/99, judgment of 6 June 2002. The Court of First Instance annulled the European Commission's decision to block the acquisition of the United Kingdom's tour operator *First Choice* by competitor *Airtours*, on the basis that the Commission had made a series of fundamental errors of assessment. The CFI concluded "*that the Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental*

Government's view, although the judgment did "not undermine the concept of collective dominance", it did "make clear the very high level of proof" that the Commission was required to meet in order to block a merger on the grounds of collective dominance (Q 430).

147. Witnesses not only complained about the lack of clarity over the concept of collective dominance; they also argued that there were three types of case with which collective dominance was incapable of dealing. Each involved companies competing less vigorously post-merger without necessarily colluding tacitly and without the creation or strengthening of a dominant position.

148. The first type of case, mentioned by the Government (Q 429) and Derek Morris, involved small companies introducing new innovations into a well-established market. Dr Morris painted the picture of:

> "a set of incumbent firms in the market, perhaps a market in which there has not been any great innovation, and a new entrant appears with new technology, new ideas, new products, and it really threatens the existing companies, so one of them buys it out. It may be a very small company. It may just involve buying this particular computer specialist or whatever. It is almost impossible to apply the concept of dominance, and yet it could very effectively and substantially lessen the competition that would appear in that market. Indeed, you could have a series of such innovative entrants emerging and the incumbents just picking them off one at a time." (Q 264)

149. In the second type of case, which was given as an example by the Government (Q 429), there might be one very significant player in the market (with a market share of say 75 per cent) and a merger between the two remaining, more minor players (who would occupy the other 25 per cent of the market). In this situation, where the second and third largest firms merge,[56] it would seem that the dominance test would not allow the Commission to intervene, despite the substantial lessening of competition. Commissioner Monti appreciated the potential difficulty for dealing with such a case under the dominance test (Q 401). Mr Van Gerven, of the ACC, suggested that perhaps the Commission might be able to raise competition questions about such cases but it would not do so "using the right analysis" and would have to lower still further the test for collective dominance (Q 376).

150. The third case again demonstrates how a reduction in competition could occur in an oligopoly without either tacit collusion taking place or the creation or strengthening of a dominant position. Professor Kay and Derek Morris both mentioned the *Abbey National/Lloyds TSB* merger in the United Kingdom as a proposed merger that could have caused problems for the Commission applying the dominance test. The merger would have increased the market share of Lloyds TSB from 22 per cent to 27 per cent and the share of the four largest banks from 72 per cent to 77 per cent. The Competition Commission had prohibited the merger but reported that it would have been "extremely difficult" for it to have done so under the dominance test, even though there was clearly a substantial lessening of competition. Professor Kay thought this was such a problem that it warranted a change of substantive test in the ECMR (QQ 179, 182, 264).

151. Dr Bishop agreed that the main problem with the dominance test was its capacity to deal with such oligopolies. There was no "robust method" of predicting a post-merger outcome in most oligopolies and this would "remain a question of judgement for the foreseeable future" as judgement could "never be done away with". Nonetheless, the SLC test would be preferable here (QQ 63, 64).

---

to any assessment of whether a collective dominant position might be created". The ruling does not call into question the theoretical idea of collective dominance it merely expounds strict criteria that the Commission will have to satisfy in order to defend a finding of collective dominance. The Court stated that three conditions must be met if there is to be a finding of collective dominance:

1. Each member of the alleged dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy. According to the Court, this required *"sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the ways in which the other members' market conduct is evolving"*.
2. The situation of tacit collusion must be *"sustainable over time, that is to say there must be an incentive not to depart from the common policy on the market"*.
3. The Court stated that *"the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy"*.

In short, tacit collusion must be feasible and it must be sustainable, both internally (within the dominant oligopoly) and externally (the competitive pressures from fringe firms and customers must be sufficiently weak).

Equally important, the judgment stresses that by merely relying on assumptions without establishing *"cogent evidence"*, the Commission failed to prove *"to the requisite legal standard that the concentration would give rise to a collective dominant position"*.

[56] This was typified in the *Heinz/Beech-Nut* case in the US, which was mentioned by the OFT, the Commission, Dr Bishop and Mr Burnside, of Linklaters (QQ 58–59, 222, 376, 401).

The JWP were quite clear that "the 'problem' of oligopolistic markets could be better addressed under a SLC standard" (p 34). The Government also viewed SLC as "particularly well-suited to tackling oligopolistic markets" (p 153).

Separating the substantive test from Article 82

152. Dominance is also a precondition for Article 82 of the EC Treaty and assessing abuses of market power—a separate matter from mergers—under Article 82 and in national competition law in almost all of the Member States (including in the UK Competition Act). When the ECMR was first established, one of the reasons the Committee was in favour of the dominance test was on account of its "familiar terminology" (1989 Report, p 21). At the time, the Committee was concerned about the legal uncertainty if the wording in the ECMR test were different from (what was then) Article 86 EC. In 1989, the dominance test had the advantage for legal practitioners that the jurisprudence of the European Court of Justice in interpreting this word would apply to the Regulation. After over a decade and some 2000 decisions made under the ECMR, it is necessary to reconsider whether or not this link between the language of Article 86 (now 82) and the substantive test in the ECMR is still beneficial.

153. The Committee heard sound arguments for completely detaching the test under the ECMR from the dominance standard under Article 82.[57] Witnesses explained that the purpose of merger control was to ensure that the structure of the market is not rendered less competitive after a merger than before it rather than to prevent future abuse of a dominant position. They argued that there would be an advantage in the fact that the adoption of the SLC test would effectively de-link the ECMR and Article 82. The Government saw real benefits in introducing a "clear separation" between the competition test applied in the ECMR and the concept of dominance under Article 82:

> "Under Article 82, a party that holds a dominant position is under a special obligation as to its future commercial conduct. This obligation applies to parties found to be either singly or collectively dominant. The increasingly broad interpretation of the concept of collective dominance under the existing ECMR is, therefore, placing numbers of undertakings under a special responsibility under Article 82 even if they themselves hold a relatively small market share, since they have been found to be in a position of collective dominance. A move to SLC under the ECMR would prevent this situation being aggravated any further, since the direct read-across to Article 82 would be removed" (p 153).

154. The JWP agreed that merger control required a prospective consideration of the structure of a market, post-merger, whereas Article 82 sought to identify those acts or omissions of dominant firms that deviated from the standards required arising from the special responsibilities which Article 82 imposed upon them. The JWP therefore considered that it would be "beneficial" if the jurisprudence and decisional practice in relation to these two matters were left to develop separately from one another. This was an increasingly acute problem as the Commission, in some of its decisions under the ECMR, appeared to have given a different meaning to dominance and had reached a finding of dominance which it would have been unlikely to have reached under Article 82. The JWP concluded that eliminating that confusion between the two tests by a move to SLC would be helpful. (p 34; Q 100).

155. Many other witnesses, including John Vickers (Q 218), agreed with this analysis. The ACC considered the impact of the ECMR decisions on the dominance case law under Article 82 to be a "real drawback" and saw this as one of "the most compelling arguments" for a change to SLC (QQ 371, 379). Dr Bishop agreed that this problem of "cross-contamination" between the ECMR and Article 82 was the "main disadvantage" of the dominance test (Q 57).[58] Professor Kay saw the current link between the two pieces of legislation as limiting the way in which the MTF could operate and interpret dominance (Q 181).

The need for guidelines on the substantive test in the ECMR

156. Whether witnesses were for or against SLC, they were unanimous in calling on the Commission to issue, without delay, guidelines on how it interpreted the substantive test in the ECMR. The CBI said that it was "high time that the Commission issued a notice on its substantive analysis" and wanted the Commission to provide "very detailed" guidelines (Q 39). The JWP considered such guidelines to be "essential". If the Commission were to move to SLC, guidelines would be even more important as everyone would need to know in advance precisely what that test

---

[57] If the current test is interpreted as a two-stage 'dominance plus' test (see above paragraphs 103–04), it could be argued that some detachment is afforded by the second element of the test (i.e., "as a result of which effective competition would be significantly impeded"). But no witness mentioned this as having an effect.

[58] UNICE was alone in not considering this to be an "important" point (Q 316).

meant (p 34; Q 106). The JWP was concerned about the amount of discretion the Commission would otherwise have when it came to interpreting the term ‘substantial’ (Q 98). Dr Bishop and the OFT both agreed that the substantive test should only change when the Commission had issued guidelines (QQ 60, 220).

157. It was suggested that the Commission could draw on the guidelines on the SLC test that other jurisdictions had already produced. John Vickers considered that “a great deal” could be learned from the various guidelines issued by regulators around the world on the application of the test. He thought that there should be and would be “considerable” international convergence in terms of the guidelines issued on this topic (QQ 220, 232).[59]

158. Commissioner Monti promised that the Commission would issue a notice on market power in merger analysis irrespective of whether or not it proposed a change in the substantive test. He was confident that this notice would provide “a very important set of clarifications” (Q 402).

Conclusions on the Substantive Test

159. **The debate about the substantive test raises questions of fundamental importance to the Community’s competition regime: the decision to change the test should not be taken lightly. We considered the arguments advanced in favour of both dominance and SLC. There are similarities between the tests; both require making predictions and in many cases their application may give the same result. However, there is broad agreement that the SLC test is in many ways better in theory and that, if now one were drafting the Regulation from scratch, it is probable that the SLC test would be adopted.[60]**

160. **The Regulation has, however, been in force for more than a decade and witnesses were concerned about the implications of a change, in terms of the uncertainty it would cause and the unpredictability of how the new test would be applied. A move in Europe to SLC could certainly have short-term disruptive consequences. There is, therefore, a tension between what is convenient in the short term and a sensible long-term objective. Nevertheless, we believe that the SLC test should be the substantive test in the ECMR for the following reasons:**

- **If a merger might significantly impede competition in a market, the transaction should be examined in detail. It should not be a pre-requisite for the Commission first to prove that the merger would also create or strengthen a dominant position. Moving to the SLC test would allow the Commission to analyse mergers solely on how they lessen competition. The Commission’s application of the present test stresses dominance, may cause the Commission to “stretch” the wording of the Regulation and runs the risk that significant impediments to competition may not be investigated.**
- **The SLC test comprehends the dominance test, but this does not apply *vice versa*. In particular, the recent *Airtours/First Choice* case may have serious implications for the dominance test and the ability of the Commission to vet mergers that substantially lessen competition in oligopolistic markets.**
- **Businesses are understandably concerned that the SLC test would lead to more mergers going to Phase II investigation and possibly being prohibited. It is, however, the Committee’s view that any merger that substantially lessens competition should be investigated and the SLC test provides a better basis on which to assess such cases than the dominance test.**
- **A move to SLC would establish a clear separation between the language contained in the substantive test of the Merger Regulation and the threshold for assessing abuses of market power under Article 82 of the EC Treaty. It would allow the jurisprudence and decisional practice of the Commission in relation to these two matters to develop separately from one another and result in greater clarity.**
- **There would be costs and risks associated with a change of substantive test in the ECMR but these, we believe, would be manageable. Any change should be accompanied by the Commission issuing draft guidelines on how it proposed to interpret and apply the SLC**

---

59 The Office of Fair Trading, in the context of the Enterprise Bill, is currently working on draft guidelines to explain how it considers the SLC test will be applied in the United Kingdom.

60 Derek Morris: “almost all economists and almost all lawyers in principle agree that the substantial lessening of competition test is the better test. To get such widespread agreement across both professions is truly wondrous to behold and extremely rare. […] I do not think if we were designing the test today almost anyone would go for the dominance test.” (Q 264). Dr Bishop said: “If we started with a blank piece of paper today, I think we would start with substantial lessening of competition and it would not be controversial” (Q 57).

test. It is imperative that such guidelines are discussed and put in place ahead of any change taking practical effect. The argument about the uncertainty that would result from adopting a different substantive test—that parties would not be able to anticipate how the Commission might apply the test—should then lose much of its force. Even if there is no change of test, the Committee is firmly of the opinion that the Commission should, without delay, issue guidelines on how it interprets the substantive test in the ECMR. This would help to alleviate the current uncertainty as to how the dominance test as applied by the Commission differs from SLC.

- **International convergence of merger laws is a desirable objective. As a first move in this direction, we would like to see the harmonisation of substantive tests. Although there might still be differences in its practical application, this would represent a major step. It would improve co-operation between competition authorities and the handling of international or global mergers.**

161. **Having weighed all the evidence and the arguments on either side, we consider that the SLC test should be the substantive test in the ECMR. A move to SLC would give greater clarity, transparency and predictability.**

Merger-specific efficiencies

162. Article 2(1)(b) of the ECMR provides, *inter alia*, that, when determining whether or not a merger is compatible with the common market, the Commission should take into account "the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition". The Commission, however, has never approved a merger that created or strengthened a dominant position on those grounds. If the Commission deems that a merger would create or strengthen a dominant position that would result in a significant impediment to competition, the merger is blocked.

163. Some witnesses suggested that the creation or strengthening of a dominant position was not always unacceptable when set against the attempts to achieve efficiencies for consumers. In some instances, a merger that might create or strengthen a dominant position could, at the same time, produce benefits for consumers in the form of either lower prices or greater choice or quality. It was proposed that, if these efficiencies—such as economies of scale or innovation through expensive research and development—were merger specific, they might occasionally outweigh the disadvantages to consumers associated with the reduction in competition. In these very exceptional cases, the ECMR should be able to take account of these efficiencies and allow the merger to go ahead. Such an amendment would create a 'defence' for those mergers that might lessen competition but which would yield demonstrable economic efficiencies.[61] This could be achieved by introducing a possible second stage to the ECMR appraisal process. Those mergers which were judged to fail the initial assessment of competitive effect (i.e., that create or strengthen a dominant position—or, following a switch, substantially reduce competition) would still have a possibility of exemption and authorisation. This would allow the competition detriment to be balanced or set off against other benefits.

164. Witnesses from industry were very keen for the Commission to give explicit reference to an efficiencies defence in the ECMR (pp 8; 130). They argued that efficiencies, such as innovation and consumer benefits, should be balanced against any anti-competitive effects of a merger. Noting that the US was more prepared to make such a balance, the Union of Industrial and Employers' Confederation of Europe (UNICE) even suggested that a change of Commission policy in this respect "could improve constructive co-ordination with the United States" (Q 293; p107). Arguments in favour of considering efficiencies also came from the European Parliament's Committee on Economic and Monetary Affairs, who said that, "for mergers in innovatory sectors, a balance should be sought between the need for economies of scale in the research and development sector […] and maintaining reasonable competition".[62] Dr Bishop also thought that "in principle" an efficiencies defence should be established (Q 76).

165. Professor John Kay, however, was against introducing an efficiencies defence into the ECMR. It would necessitate the Merger Task Force (MTF) making the kind of speculative cost-benefit analyses which he considered impossible to do with any degree of certainty and he was sceptical about

[61] The Government's Enterprise Bill suggests a limited efficiencies defence in United Kingdom domestic law. This appears in Clause 29 (relevant consumer benefits) as first published for the House of Lords (HL 92). The efficiencies that are acceptable in this bill and so qualify as relevant customer benefits are "lower prices, higher quality of goods or services in any market in the United Kingdom […] or greater innovation in relation to such goods or services." The benefits must also accrue "within a reasonable period [of the merger]" and be "unlikely to accrue without the [merger taking place]".

[62] A5–0217/2002.

the ability of economists to predict what the future structure of the industry and market would be. Although Professor Kay believed that there were pro-competitive mergers, he considered that it would be possible to take account of all the relevant arguments involved in such cases by applying the SLC test, without the need for an explicit efficiencies defence (Q 188). Mr McMahon, of Mytravel Group, agreed that efficiencies should not stand apart as a separate aspect of merger appraisals (Q 478).

166. The Commission explained that "one of the main streams of thought behind the merger review" was "to give more explicit and more predictable recognition to efficiency considerations." It said that if a merger brought efficiencies, and it could be expected that these efficiencies would be passed on to consumers, this was something to be taken into account. It believed that clarifying this issue would help companies to perceive its procedure as more predictable. (QQ 396, 398)

Can an efficiencies defence be incorporated into the dominance test?

167. The Commission requested views on the role of efficiencies in merger control, independently of a discussion of the two tests. However, the Green Paper highlighted claims that the dominance test might not allow for the proper consideration of efficiencies that could arise from mergers (paragraph 40).

168. Indeed, several of our witnesses who had supported the introduction of the SLC test considered that SLC would make it easier to adopt an explicit rule on efficiencies (pp 34, 195). In this respect, they thought that the SLC test was more solidly rooted in economics than the dominance test (see above paragraphs 130–131), and would provide "a more explicit basis" for assessing efficiencies arising from mergers.[63]

169. Not all the witnesses agreed on this point, however. Some claimed that as the current test was 'dominance plus' (see above paragraphs 103–04), this already enabled the Commission to take efficiencies into account. The "second limb" of the existing substantive test (i.e., "as a result of which effective competition would be significantly impeded in the common market or a substantial part of it") made the consideration of efficiencies possible (QQ 319, 378). Other arguments were used to suggest that the Commission already had a legal basis to take account of efficiencies (pp 50, 107).

170. The Confederation of British Industry (CBI) also raised a more general point. The ECMR was based on Article 81 of the EC Treaty, so Article 81(3) arguments (about efficiencies being verifiable and measurable) should apply to it by analogy in any event (p 8). The Commission also mentioned Article 81(3) and, perhaps conscious of Article 2(1)(b) of the ECMR, did not think that there was "an objection in principle" to efficiencies being taken into consideration in the ECMR dominance test. They too stressed that the dominance test was 'dominance plus' and "on that basis" felt "more confident about looking in a more prospective and dynamic way at efficiencies" (QQ 397–99).

Would an efficiencies defence be particularly important if the ECMR changed to SLC?

171. A separate argument was founded on the proposition that a test based on SLC would be likely to prohibit more mergers than the dominance test (see above paragraphs 106–11). The Joint Working Party of the Bars and Law Societies of the UK (JWP) said that if the ECMR incorporated the SLC test it would be particularly important for it to adopt an explicit efficiencies defence in order to compensate for the higher number of mergers that it envisaged would be prohibited under the new test (p 34). The Competition Law Association (CLA) agreed that if the SLC test were adopted an explicit efficiency defence would be "one of the most important things" that would need to change in the ECMR, in order to reflect "the lower SLC hurdle" (p 50; QQ 97–98).

172. John Vickers, the Director General of the Office of Fair Trading, acknowledged that there were some who would argue that the efficiencies defence would or could be treated differently in the context of the two substantive tests but he described this as "rather arcane and difficult territory" (Q 225).

Does the Commission have an efficiencies 'offence'?

173. The American Chamber of Commerce (ACC) mentioned "the widespread perception" that occasionally the Commission had *de facto* applied an efficiencies offence. That is, in situations where the merger of two companies could generate economies of scale and scope making it more difficult for other companies to compete, the Commission would say that this, in itself, was an offence and a reason to prohibit the merger (p 130).[64] Indeed, the National Consumer Council (NCC) considered that

[63] BEUC/X/016/2002.

[64] The case most frequently cited (e.g. by the ACC, p 130) to support this assertion is *GE/Honeywell*.

the Green Paper implicitly acknowledged that, "on rare occasions", the dominance test might "actually lead to the rejection of a merger case that stands to benefit consumers" (p 195).

174. The Commission, however, insisted that it did not have an efficiencies offence. Rather, when companies become more efficient, and therefore stronger competitors, the Commission considered this to be "a positive point for competition" (Q 396).

What conditions must be met for efficiencies to be considered?

175. Although the Government saw merit in the Commission clarifying its approach to this subject, they urged "a relatively cautious approach" because they considered that efficiencies would "only be relevant to the assessment of mergers in a small number of cases" (p 156).

176. The JWP argued that any efficiencies defence "should be drawn narrowly". It should be available to the parties only where the efficiencies were merger-specific (i.e., where the efficiencies could be achieved only as a result of the merger) (p 34). The view that the Commission should consider only those efficiencies which came about as a consequence of the proposed merger was widely held (e.g. pp 50, 156). Other criteria were also commonly judged to be important for the Commission to consider. Dr Derek Morris, the Chairman of the Competition Commission, insisted that for efficiencies to be considered they should be "significant, reasonably imminent, reasonably certain." The most forceful opinion, however, was that the Commission should take account of efficiencies only where they would demonstrably be passed on to the consumer. It was argued that if the significant efficiency gains accrued only to shareholders, there would be no reason for them to be passed on to consumers. Dr Morris stressed this point:

> "A merger that clearly has substantial synergistic gains but creates a very substantial degree of market power such that there really would be no particular incentive or pressure to pass those benefits on, would have benefits that would be unlikely to count" (QQ 267, 275).

177. The European Parliament's Committee on Economic and Monetary Affairs agreed that, when evaluating efficiencies, attention should focus especially on the consumer.[65] Judging whether or not the efficiencies would be passed on would demand very close examination by a Competition Authority.

178. The Commission confirmed that under its proposed efficiencies test the parties would have to show that the efficiencies would be passed on to the consumer. The Commission admitted that, once it had ruled that a merger would create or strengthen a dominant position, it would be difficult to demonstrate that the remaining elements of competition were such that they would "lead to a transfer of wealth or benefits to the consumer." The Commission, therefore, thought that in future any efficiency defence would be used "rather exceptionally" (QQ 396, 400).

179. Consumer groups expressed a concern that, when considering efficiency gains that accrued to the consumer, the Commission should not extend these benefits to include other social concerns. The NCC believed that the criteria should be "specifically focused on the interests of consumers rather than the wider economy or social concerns". Furthermore, it asserted that "very strong evidence" should be necessary to approve a merger in such circumstances (p 196). The European Consumers' Organisation (Bureau Européan des Unions de Consommateurs—BEUC) was concerned that an efficiencies test "would introduce 'industrial policy' considerations into key decisions." That could "politicise" the decision-making process, "much to the detriment of expediency, transparency and consistency".[66]

At what stage in the review process should the Commission consider efficiencies?

180. Witnesses were clear that an explicit efficiency defence could only take place after the Commission had found that a merger could give rise to a competition problem. If a merger had been judged to have failed the substantive test, there could be explicit provision in the ECMR to consider whether there were any offsetting benefits from efficiencies when the Commission was considering remedies.

181. John Vickers saw "a lot of merit" in a system where, if there were benefits flowing through to customers in the relevant market, those could be taken into account at the remedies stage. However, he considered it to be "quite hard to think of mergers which would substantially lessen competition and bring such efficiency gains which moreover flowed through to customers in the relevant market."

---

65 A5–0217/2002.

66 BEUC/X/016/2002.

Nonetheless, he did not consider it to be impossible and consideration of efficiencies could be a "useful" part of the remedies stage (Q 226).

Consultation with consumer groups

182. We considered whether it would be possible for the Commission to judge better whether, and if so to what extent, the proposed efficiencies of mergers would be passed on to consumers by consulting more with consumer groups.[67] The Government attached "importance to facilitating the active involvement of consumers' representatives in competition enforcement". They welcomed "more active steps to engage consumers' representatives in ECMR cases", although they stressed that "any input should be on competition issues alone and not the broader social implications of any concentration" (p 150). The NCC and BEUC both called for the MTF to notify consumer groups directly of mergers and invite these organisations to comment on each case.[68] The NCC even went as far as suggesting that the MTF should create an Office for the Consumer in European Mergers in which a separate post would be established—"the Consumer Participation Officer." This person "could be regarded as comparable to the Hearing Office" and would have responsibility for notifying consumer groups and facilitating their access to non-confidential aspects of the file (pp 197–98).

The need for guidelines on efficiencies

183. Witnesses wanted the Commission to provide guidelines on all of these areas of uncertainty. The JWP argued the need for the Commission to clarify the position of efficiencies in merger analysis. The Commission should "provide guidance both on efficiencies as a 'defence' and as on 'offence'" (p 34). Witnesses from industry also called for clarification on the scope of the efficiency defence that would lay out both when efficiencies would be considered and what the standard of proof required by the Commission would be (pp 8, 107, 190).

184. As noted above (paragraph 158), the Commission undertook, "by the end of this year", to produce draft interpretative guidelines on its practice relating to the application of the substantive test. The guidelines would embrace the analysis of market power and "necessarily" would have to include "an important chapter" on how the Commission would look at efficiencies and take such considerations into account (QQ 389, 396).

Conclusions on efficiencies

185. **The Committee is extremely sceptical whether it is necessary or desirable to introduce into the text of the ECMR provisions setting out an explicit efficiency defence. If there were a significant reduction in competition in a market, there would be very little incentive or reason for the company to pass on any efficiencies to the consumer. The ECMR is about maintaining competition and the Committee is keen to ensure that that object is achieved.**

186. **The Committee is also concerned about how the Commission could ensure that the efficiencies proposed by the parties were in fact passed on to the consumer after the merger, without regulating prices or controlling capacity. It is difficult to envisage an acceptable and effective system of imposing sanctions where projected efficiencies do not materialise and it would be hard for the regulator to defend the public interest. This is a particular problem as the vast majority of mergers have been shown not to deliver value.[69] Accordingly, the Committee recommends that the ECMR should not include an explicit efficiencies defence.**

187. **If, however, in a specific case an efficiencies defence were to be put forward, the Commission should be encouraged, when considering possible efficiency gains and remedies, to seek advice from consumer groups. The Commission should also issue guidelines to consumer groups on the most effective ways of becoming involved in merger cases.**

---

[67] In the Green Paper, the Commission declares that it is open to ideas encouraging or facilitating the involvement of consumer groups (paragraph 243).

[68] BEUC/X/016/2002.

[69] cf. *World Class Transactions: Insights into Creating Shareholder Value Through Mergers and Acquisitions*, KMPG Transaction Services, 2001. In its 1999 survey, KMPG found that only 17% of the companies in the survey created value as a result of the merger. In 2001, KMPG found that 30% of deals added value.

PART 5: PROCEDURAL ISSUES

The Commitments procedure

THE CURRENT TIMETABLE

188. The Merger Regulation sets out a strict time frame for commitments.[70] In Phase I, commitments can be submitted within three weeks of the date of notification (Article 18(1) of the Implementing Regulation 447/98). In Phase II, commitments can be submitted up to three months after the date on which proceedings were initiated (Article 18(2) of the Implementing Regulation 447/98).[71]

189. Witnesses from industry were keen to stress that the clear deadlines of the ECMR were one of its most positive features. They ensured "speedy decision-making and legal certainty". But, whilst supporting the time limits, the Confederation of British Industry (CBI) said that they could "impose a straitjacket in some cases, where more time to produce suitable remedies could prevent the outright prohibition of a deal." When the timetable slipped, the parties were squeezed up against the three-month deadline for proposing remedies. In contentious merger cases this meant that there was not sufficient time to refine the remedy offer. This lack of time for finely adjusting the remedy offer was particularly a problem in cases that involved "sophisticated markets, high tech markets, and other markets where a very sophisticated remedy package might ultimately be adequate [to fulfil the Commission's competition concerns and so prevent it from blocking the merger]." The time available for negotiating remedies was a critical issue for businesses since the remedy offer was often ultimately "the key factor" in getting a merger approved (p 9; Q 50). Industry was concerned that the time limits could lead to mergers being prohibited "only for reasons of procedure rather than substance" (pp 109, 132). The National Consumer Council (NCC) added that this anomaly was not in the interest of consumers:

> "If an acceptable remedy that does not have anti-competitive consequences can be agreed upon, then it is not in the consumer interest for this to be prevented by procedural difficulties" (p 196).

190. The Commission recognised that the ECMR's strict time limits were widely seen as "a big advantage of the EU system over the US system" (Q 403). It realised, however, that they resulted in "some difficult moments" when the deadlines were approaching. Many witnesses confirmed that the timetables were "very, very tight", "in some cases too tight," saying that this often resulted in "a hothouse effect" with pressure building up. Witnesses complained that the three-month deadline for commitments in Phase II was often soon after the oral hearing, when parties were still in the process of absorbing the Commission's Statement of Objections. Businesses and law practitioners wanted a clearer separation of the Statement of Objections and the discussions of remedies. (Q 199; p 132).

A DEADLINE FOR THE STATEMENT OF OBJECTIONS

191. Some witnesses suggested that this separation could be achieved by the Commission establishing clear deadlines for the issuing of the Statement of Objection. The CBI and the CLA both said that this change "would restore a degree of balance in the respective positions of the parties and the Commission by removing the ability of the latter to reduce, whether deliberately or not, the time available to the parties to respond to the Commission's case. This reform would immediately eliminate the widely held, but unwarranted, suspicion that the Commission [had] used the tight timetable to weaken the position of the parties. In this way justice would be seen to be done." (pp 5, 52). Gavin Anderson agreed that the Statement of Objections was often issued too late in the review proceedings (p 184).

'STOP THE CLOCK'

192. The Commission recognised that the period currently available for discussing remedies was "often squeezed into the end" of the procedure. It was often too short for the parties to establish the exact scope of the Commission's competition concerns and for the two sides to agree commitments

[70] If the Commission concludes that a proposed merger would create or strengthen a dominant position as a result of which competition would be significantly impeded, it has to rule the merger incompatible with the common market and order that it be prohibited. The parties, however, can offer 'commitments' to the Commission to modify the initial merger proposal in an attempt to overcome the competition problems that the Commission has identified. These commitments are also known as 'remedies' or 'undertakings'.

[71] The deadline in Phase II can be extended, but the Commission rarely finds the "exceptional" circumstances necessary to activate this provision.

(Q 404). To mitigate for this difficulty, the Commission suggested that there could be a procedure for extending the timetable on the initiative of the parties. The Commission's suggestion was that the parties should be able to 'stop the clock' thereby suspending the ECMR timetable for a given period. It would be up to the parties whether they ask for the clock to be stopped, though any stop would be only for a short and finite period. The Commission hoped that this option would give companies "the positivity of the time limitation but, at their request, the possibility to extend this a little more" (Q 403). The Commission saw this as having several advantages and only minor inconveniences.[72]

A 'stop-the-clock' provision could help by giving time to discuss remedies

193. The Competition Law Association (CLA) suggested that allowing the parties the right to 'stop the clock' could help with the discussion of remedies and "allow a period of reflection to be introduced into the procedure" (Q 119). The CBI called this proposal "a very welcome idea". It wanted the provision to be available to enable the fine tuning of the remedy offer "and for no other purpose" (pp 2, 9; Q 50). Many other witnesses were also in favour the possibility of the parties being able to 'stop the clock' in situations where they needed time to formulate their remedies. The proposal could introduce a potential "safety valve" into the commitments procedure, which could ease the pressure on all sides to agree upon workable remedies.[73] But Mr Gilchrist, a former Hearing Officer, was sceptical of the value of 'stop the clock'. In the context of discussing remedies, the proposal would not ameliorate the pressure of the situation: "By the very nature of negotiations they will always go to the last minute where major issues are involved" (p 186).

How long should the clock be stopped for?

194. The European Parliament's Committee on Economic and Monetary Affairs called on the Commission to ensure that the proposal translated into "simple and effective rules and time limits".[74] The CBI and the Competition Commission agreed that any break from the timetable should be for "clearly limited periods" that were "incapable of further extension" (Q 292).

195. Whilst witnesses were agreed that the parties should be allowed to 'stop the clock' just once in each Phase of a merger investigation—so that it was not something that could be used on a recurring basis[75]—they suggested the clock should be stopped for different lengths of time. These ranged from 10 to 15 working days in Phase I and from 15 working days to a month in Phase II.[76] The American Chamber of Commerce (ACC) proposed a system whereby "the notifying parties should be free to ask the Commission for a shorter deadline if they believed that it would be reasonable and sufficient to address the Commission's concerns" (p 133).

Should the Commission be allowed to 'stop the clock'?

196. Witnesses from industry and legal representatives were unanimous in insisting that the decision to 'stop the clock' should only be at the option of the notifying parties.[77] However, Dr Derek Morris, the Chairman of the Competition Commission, thought that to be "misguided". He explained that the Competition Commission "very rarely" needed an extension to the timetable. When it did, there were "very good reasons for it"—such as discovering late in the day some new facts on the case. For such facts only to be taken into account at the request of the parties "would be undesirable". He thought there should be "very limited scope" for either side to 'stop the clock' in the ECMR timetable (Q 292). The European Consumers' Organisation (Bureau Européan des Unions de Consommateurs—BEUC) was also concerned that, if the parties were the only ones who could 'stop the clock', the Commission "would still be subject to the squeeze effect".[78]

Could 'stop the clock' also be used to allow greater consultation?

197. The CLA thought that 'stop the clock' was "sensible but of minor importance". Considering the crux issue in the review of the ECMR to be due process, it claimed that the proposed changes to the timetable were "only likely to improve the situation at the margins" (p 51). Similarly, the

---

[72] The Commission stated that if such amendments were adopted it would be necessary for it to revise the notice on remedies (paragraph 211).

[73] pp 36, 184, 196; QQ 243, 324; cf. BEUC/X/016/2002.

[74] A5–0217/2002.

[75] pp 2, 9; Q 50.

[76] p 109; cf. BEUC/X/016/2002.

[77] pp 36, 109, 132–33, 191; QQ 50, 119.

[78] BEUC/X/016/2002.

Government said that 'stop the clock' was only part of the issue and considered that it "should not be the focus of due process". The Government admitted, however, that 'stop the clock' could help to ensure that there was time available for the investigation process to work properly and fairly: the limited time available to discuss remedies could prevent the Advisory Committee,[79] which provided one of the main checks and balances in the system, from doing its job as well as it might do (p 159). Commitments proposed at the end of the timetable left little time for the Commission to consult Member States or third parties prior to preparing a draft decision.

198. John Vickers, the Director General of the Office of Fair Trading, confirmed that the time allowed for the Advisory Committee to see the papers was "way below the time that Member States should have". If the Member States were to work effectively as a check, they needed to have the papers sufficiently ahead of the meeting. Within the current timetable that was very difficult and rarely achieved. He agreed that the 'stop-the-clock' provision might therefore have the further benefit of providing additional time to the Member States on the Advisory Committee who wished to play a fuller role in the review process. That would, however, be a "bonus rather than the prime purpose" of the measure (Q 243).

199. The TUC supported 'stop the clock', considering that it could allow more consultation or information to be fed in to the Commission. It would be "a positive change that could help a wider range of views and trade unions' views to feed into the process effectively" (Q 129). Likewise, for BEUC, the real issue was the "proper involvement of all interested parties in merger review, including consumer organisations." It was concerned that consumer organisations had little time to conduct research and gather the evidence necessary to have a real impact on the Commission's decision.[80]

Conclusions on 'stop the clock'

200. **The Committee supports the idea of a 'stop the clock' provision being included in the ECMR. This change could allow more time for the collection of information and for remedies to be negotiated and agreed upon, which would be in the public interest. 'Stop the clock' should be possible once in both Phases but should only be for very strictly limited periods of time. The aim should be to give sufficient additional time to find solutions to the identified competition problems that are acceptable to both the parties and the Commission. Such sensitive negotiations are always liable to go to the deadline, whatever time limit is set. If 'stop the clock' is too generous, we fear that an extension could become the norm rather than an exception. We suggest 5–10 working days in Phase I and 15–20 in Phase II. The parties should be free, however, to ask the Commission to stipulate a shorter deadline if they believe that this would be sufficient to address the Commission's concerns.**

201. **'Stop the clock' could permit greater consultation by the Commission and incidentally allow the Advisory Committee to act as a more efficient check on the system. These objectives would not necessarily be achieved if it were only available at the option of the parties. It would be in the public interest if the Commission had the ability to 'stop the clock' under the same terms and conditions as the parties.**

SHOULD THE COMMISSION TAKE A MORE ACTIVE ROLE IN PROPOSING REMEDIES?

The current situation

202. When the Commission concludes that a proposed merger would create or strengthen a dominant position as a result of which competition would be significantly impeded and so would have to be prohibited, it identifies the competition concerns it has with the merger. The onus is then on the parties to put forward undertakings to the Commission that might remedy those concerns. The process is similar in the UK and the US regimes.

203. Mr Gilchrist, a former Hearing Officer, explained that often the parties could not identify clearly the scope of the competition problems or the consequent remedies that the Commission considered necessary to overcome the problems. Given the tightness of the timetable, this could become a real problem:

---

79 The Commission is under an obligation to consult the "Advisory Committee on concentrations" prior to taking certain decisions, particularly decisions closing in-depth proceedings (Article 19(3)). The Advisory Committee consists of representatives of the authorities of each Member State, at least one of whom must be competent in competition matters (Article 19(4)). Although non-binding upon the Commission, the opinions of the Advisory Committee are influential in shaping the Commission's views: the Commission must take "the utmost account" of the Committee's opinion (Article 19(6)).

80 BEUC/X/016/2002.

> "The psychology of the situation means that the parties are put under great pressure to offer successively more concessions in order to complete their proposed merger. Whether these concessions are the right ones or necessary in their totality is not made clear to the parties. It also encourages a kind of poker atmosphere, which is not conducive to logical debate and seeking equitable solutions. […]
> [The result is] an auction, where the Commission is sometimes accused of moving the goalposts and the parties feel they have to constantly offer more […] thereby giving the impression to the Commission that there is always something more to be obtained if you apply more pressure" (pp 185–186).[81]

Access to the file

204. The CBI and the CLA urged the Commission to grant the parties access to the file immediately after the beginning of Phase II proceedings (i.e., immediately after the Commission issued the Article 6(1)(c) decision). Both witnesses said that this would be a simple but important change that would "increase transparency by allowing the parties to understand better the foundation of the Commission's preliminary case and to devise better remedies at an early stage." The two witnesses agreed that this change would put an end to the argument that was often made, albeit without foundation in their view, that the Commission refused to grant access "until much later in the process as a tactical device to increase pressure on the parties by reducing the time they [had] to marshal their counter-arguments" (pp 5, 52). Lawyers from Squire, Sanders & Dempsey agreed that access to the file came too late in the review process to allow parties to respond fully to the Commission's position when formulating a package of commitments (p 181).

Changing the role of the Commission in identifying remedial measures

205. Some witnesses suggested that the Commission should take a more active role in identifying remedial measures, both in the first and the second phases. Witnesses from industry wanted a procedure where the parties could ask the Commission to provide guidance in the structuring of undertakings. The CBI said that as a matter of practice this happened already. However, the Commission should clarify that it had the ability to take a more active role in the identification of appropriate remedies (p 9). Many witnesses agreed that this would be in the interests of efficiency and could provide more clarity and transparency to companies going through the investigation process (pp 133, 196; Q 324). The Government "would not suggest that the Commission should be under any obligation to come forward with proposals, but a clarification that there was no bar on their responding to parties' questions about the possible nature and proportionality of an effective remedy would appear sensible" (p 159).

206. The Joint Working Party of the Bars and Law Societies of the UK (JWP) and the ACC agreed that the Commission should adopt a "best practice approach" of giving clearer guidance to parties about outstanding issues, the areas where remedies were required and the adequacy of any remedies proposed. But this should not be enshrined in a legally-binding procedure. The parties did not always understand why the Commission found some of the commitments they had offered to be unacceptable or unsatisfactory. A "best practice approach", requiring the Commission to set out its reasons for rejection, could be of particular benefit for such cases (pp 36, 133; Q 123).

207. The Commission, however, was clear that it would only "accept undertakings in a decision." It was not the role of a competition agency to propose remedies and "to be a merchant banker." The Commission's role was "to identify as clearly as possible, in as timely a way as possible, the nature of [its] competition concerns." It was then for the parties to suggest appropriate remedies and for the Commission to assess those proposed commitments (Q 404).

208. **The Commission should not be obliged to take the initiative to identify the measures that it deems necessary for it not to oppose a notified merger. Such a change would reverse the dynamic of the negotiation of commitments, placing the onus on the Commission and inviting the parties to challenge its proposals. Nonetheless, a greater degree of clarification of whether, and under what circumstances, the Commission has the ability to propose remedies would be helpful to companies. In all merger cases, the Commission's position on remedies should be made public as a matter of course.**

---

[81] The CBI also complained there was a "lack of transparency in the interface between the MTF and third parties, especially in relation to the market testing of remedies." It proposed that there should be a "duty on the MTF to record on file all contacts with third parties" (p 3). Mr Gilchrist suggested, however, that one of the consequential advantages of his proposals to involve the Hearing Officer in the negotiations of remedies (see below paragraphs 209–211) could be to render unnecessary the market testing of proposed commitments (p 186).

Changing the role of the Hearing Officer in the negotiation of remedies

209. Mr Gilchrist thought that, "to establish a sense of equity", a neutral Chairman, possibly the Hearing Officer, could oversee the latter stages of the case, including helping the parties to identify remedies that would answer the objections of the Commission. There should be a clear negotiating framework that could involve organised negotiating sessions, under the watch of the Chairman. The Hearing Officer's report on the oral hearing should:

> "present a summary of the key arguments and nature of the case, together with a statement of the issues that would need to be solved, i.e., definition of the competition problem and scale of the measures needed to solve these problems. […] On the basis of the Hearing Officer's report, negotiations could then be planned between the MTF and the parties to see whether solutions could be found to the problems identified at a cost to the parties which they would be willing to bear in order to complete their merger. [...] The advantage of this approach would be that negotiations took place in a clearly defined scenario." (p 186)

210. Lawyers from Squire, Sanders & Dempsey agreed that the Hearing Officer should be encouraged "to take a more pro-active role in the reporting of Oral Hearing proceedings" (p 182). Further, Gavin Anderson supported the idea that the Hearing Officer should assist in the negotiation of commitments: "In negotiating undertakings, greater trust could be engendered by the Hearing Officer assisting in the commitments negotiation and acting as a broker or indeed arbitrageur" (p 184).

211. **The Hearing Officer's report on the Oral Hearing could provide the basis of the negotiations of remedies. The Hearing Officer, or a similar appointment, could then chair the negotiations and act as a mediator between the parties and the Commission. This suggestion would improve transparency in the commitments procedure. It could thus be ensured that the companies concerned might perceive the ECMR system as fair by giving them confidence that the negotiation of remedies was more balanced and not loaded against them. Such a strengthening of the role of the Hearing Officer could provide a greater safeguard to protect the position of the notifying parties and would be achievable within the current institutional arrangements.**

Changing the timetable

212. Mr Gilchrist also suggested that much could be achieved by reversing the ordering of some stages of the procedure. Currently, the Commission issues a Statement of Objections, which is followed by an oral hearing that is frequently sterile as everybody repeats the same arguments. Lawyers from Squire, Sanders & Dempsey complained that the Oral Hearing, "far from being an attempt to get to the heart of the issues at stake," was little more than "a rubber-stamping exercise for the Commission's views expressed in the Statement of Objections" (p 182). If the order were reversed, bringing the oral hearing further forward in the procedure, the oral hearing might be less antagonistic and could be an attempt to identify the issues involved in the case. As proposed above, the Hearing Officer would summarise the situation after the oral hearing, identifying the competition problems and possible solutions to them. The MTF's Statement of Objections that would follow the oral hearing could draw on the Hearing Officer's report. It would be similar to a draft decision of the Commission and could "act as a framework for the remedy negotiations," which would be conducted on the basis outlined above. Gavin Anderson supported the proposal that the Commission issue "a preliminary (or even draft) conclusion to the parties". This document would help the parties to construct remedies, as they would already know the Commission's position (p 184).

213. Mr Nicholson agreed that, because timetables were too tight, the oral hearing did not work very well. Changing the ordering as proposed would change the nature of the oral hearing. It could usefully be used

> "broadly speaking to get people up to speed with the case as it has developed to the end of phase I[82] […] but it would have drawbacks too. It would be held before the Commission's case was fully articulated: probably before the parties have got all their evidence together – their economic analyses, their consumer surveys, etc: it would be some way before people are properly prep'd to think about remedies and solutions and ways forward, so at that stage it would be very much an interim step. Now it may be an interim step and it may be useful but it is a different purpose to the oral hearing as it is currently intended to be" (Q 480).

214. **The current procedure for remedy negotiations is unsatisfactory in that it might prejudice the negotiation of suitable remedies. 'Stop the clock', while useful, would not solve all**

[82] Mr Nicholson added that this would be particularly beneficial if there were a separation of the teams examining the case in Phases I and II (see below paragraphs 250–56).

of the problems related to the timetable and the atmosphere under which the negotiations are conducted. On the limited amount of evidence we have taken on commitments, there is no immediate and clear solution to the problems identified by industry, although we see great advantages in the suggestion of reversing the order of the oral hearing and the Statement of Objections. We urge the Commission to give full consideration to this change.

EMPLOYMENT CONSIDERATIONS AND THE ECMR

The current provision for employee involvement

215. Recital 31 of the ECMR stipulates that the Regulation "in no way detracts from the collective rights of workers as recognised in the undertakings concerned". Recital 19 goes further, stating that "the members of management and supervisory organs and recognised workers' representatives in the undertakings concerned, together with third parties showing a legitimate interest, must […] be given the opportunity to be heard". In the Green Paper, the Commission confirmed that it is "open to hearing the views of employees" in merger investigations (paragraph 244). We explored various ways in which this might be facilitated.

Should the ECMR oblige the parties to consider the impact of a merger on employment?

216. The trade unions drew attention to Article 127(2) of the Treaty of Amsterdam, which states that the "objective of a high level of employment shall be taken into account in the formulation and implementation of Community policies and activities." Despite this provision, the unions considered that the ECMR ignored the employment consequences of a merger.[83]

217. To tackle this issue of employment considerations, ETUC proposed that Form CO should include a question asking the parties what the employment consequences were of a proposed merger. Where the parties judged that the effects of the merger on employment would be negative, the form would contain further questions asking them what action they had considered taking, whether they had any plans to address the job losses and whether they had "discussed the situation with the respective, competent worker representation". ETUC said that such an addition to Form CO would be "a considerable step" and would help employees since it would provide one practical way in which employees might express their views, indirectly, to the Commission (Q 345).

The role of worker representatives

218. The TUC suggested that companies planning a merger should inform and consult representatives of the workforce "at the earliest possible stage of the process" and before the case reached the competition authorities (Q 126). ETUC complained that on the occasions when they were consulted, the time available for them to respond was too short and did not allow them to carry out a proper evaluation of the case. Both the TUC and ETUC recognised that the parties might have concerns about the confidentiality of the case. But senior officials of trade unions were capable of maintaining confidentiality. Nor did ETUC accept that consulting workers could conflict with the Stock Exchange rules. (QQ 126, 345, 353).

219. ETUC suggested that the responsibility to contact the worker representatives should rest with the Merger Task Force (MTF). Although the Commission already notified ETUC if a merger investigation went into Phase II, the unions wanted this to happen in the first stage of the process or even earlier (p 55). They argued that such a move would not result in delay, since in most cases company management contacted the Commission well in advance, on an unofficial basis, and had talks with MTF officials before a notification was formally sent to the Commission (Q 345). However, if the workers were notified of a case—whether the Commission itself communicated a notification to the worker representatives, or whether it were conveyed by companies, asking for the advice of worker representatives—the ETUC said that this contact "would help a great deal" (Q 345).

220. In opposition to such moves, the CBI said that, given the very tight deadlines for decision-making and the fact that employee representatives were already entitled to make their views known on a proposed transaction (either orally or in writing), it would "strongly oppose any expansion of their role in the decision-making process." Any such development could cause uncertainty and delay (pp 10–11). The Competition Law Association (CLA) also made the point that trade unions, and other bodies, already had the right to make representations to the Commission (Q 113). The GMB, however, dismissed the current system as "inadequate" (p 58).

[83] QQ 345, 356; pp 55, 56.

221. The Government had "no objection to the Commission taking more active steps to seek the views of employees' representatives on merger cases." But "any input should be on competition issues alone and not the broader social implications of any concentration" (p 150). This went directly against the wish of the GMB, who wanted the Commission to "stop seeking to limit the scope of consultations to market impact and broaden discussions to include assessment of the wider employment and social impact" (p 59).

Should the criteria for the appraisal of mergers be extended to take account of employment considerations?

222. The trade unions argued that "the criteria for assessing mergers should go beyond the impact on competition and include wider economic assessment, which would include the impact on employment" (TUC p 1). Consequently, the Committee considered whether the criteria in the substantive test of the ECMR should be amended to require the Commission to take employment considerations into account when judging a proposed merger.[84]

223. Apart from the trade unions, witnesses were firmly opposed to widening the scope of the Commission's analysis to take into account wider non-competition criteria such as employment or economic effect on the region in question. Professor John Kay, who was against the Commission performing cost benefit assessments of the consequences of mergers, said that to bring in these considerations "would be pushing the Commission even further down the road of trying to predict what was going to happen in the industry in future." He considered such analyses to be impracticable and unreliable (Q 196).

224. Witnesses from industry agreed that the MTF should be authorised only to make competition judgements. Accordingly, they were against proposals to introduce non-competition matters into the ECMR (Q 307). They argued that the ECMR should remain a competition regulation, in which employment and the regional effect a transaction were not relevant. Non-competition criteria, such as employment, could still be taken into account by national authorities insofar as they were compatible with Community law. The CBI argued strongly that expanding the criteria on which the Commission judged a merger would "undermine the competition focus of the MTF's analysis" (pp 10–11). The CLA insisted that competition policy "ought to deal with competition issues, the structure of the market, the effects on the intensity of competition." The CLA argued that social issues were difficult to deal with in the context of a review of an individual merger:

> "The issues of concentration, of putting together two companies, are not necessarily the same issues as those that might be troubling the workforce or the region. It is better that those are dealt with in parallel procedures, many of which of course exist" (Q 111).

The JWP also stressed the presence and role of other areas of legislation covering these issues (QQ 111–12).

225. John Vickers considered it important to be clear what merger policy could and could not reasonably be expected to do:

> "What it is designed for and best at is safeguarding the competitive market process and I would add that there are many wider social issues, for example, employment issues, where I think the preservation and promotion of competitive markets are the best thing that competition policy can do for employment prospects. So I do not see a collision between competition objectives and other objectives. It is more a question of complementarity. I think there would be all sorts of dangers of mission creep and the like if the authorities were deflected from the competition assessments, which are paramount for all of us and in all the main jurisdictions" (Q 228).

Professor Kay agreed:

> "In general, we have to rely on what I personally believe which is that the best way of securing employment, good jobs for people in the long run, is a competitive market economy and that, if we have one, some people will gain, some people will lose but on balance that is what secures good, well-paid jobs in the long term" (Q 196).

Conclusions

226. **In 1989, after careful consideration of the impact of mergers on employment, the Committee reached the conclusion that "it would not be appropriate to include such wider criteria in a competition Regulation based on the competition provisions of the Treaty" (1989**

[84] This mirrors the practice of the Committee when the ECMR was first negotiated (1989 Report, pp 21–22).

Report, p 22). The Committee reasoned that there were other provisions in the Treaty with social objectives and other measures of Community social policy. The Committee remains of the same opinion. The interests of employees should be addressed by specific legislation providing for the information and consultation of employees and for their protection in the event of a merger leading to restructuring. Many Member States already provide for this in their national law. Further, the EU has adopted a number of measures to provide for such issues at the European level. Foremost among these is the Directive to harmonise the information and consultation rights of workers.[85] Similar requirements are included in the Directive on the establishment of a European Works Council[86] and in the Directive supplementing the Statute on the European Company with regard to the involvement of employees.[87] The GMB recognised that these recent Directives should help to safeguard workers' rights (p 5). There may also be such a provision in any legislation that might be adopted on take-overs. The Committee would consider supporting moves to strengthen these Directives. The substantive test in the ECMR and the way in which it is applied, however, should remain focused exclusively on competition.

227. **The parties to a merger will inevitably consider the impact of mergers on their workers. Adding to the already long and complicated Form CO would bring little, if any benefit, if competition is to remain the key consideration in evaluating mergers. Employees should be able to express their views on a merger that would affect them. The responsibility for notifying them of the proposal should rest with employers, who should be encouraged to do so at the earliest opportunity. The Commission has a duty to listen to representations from employees and their trade unions representatives, but it should not be obliged to inform and consult representatives of the workforce prior to notification. The Commission's responsibility is set out in recital 19 to which it should continue to pay high regard.**

Due Process and "Checks and Balances"

THE COMMISSION'S POSITION IN THE GREEN PAPER

228. In the Green Paper, the Commission claimed that its dual function as investigator and decision-maker was inherent in the structure of an administrative procedure. It also held that it was subject to "effective judicial review" by an independent and impartial judge. Commissioner Monti further pointed out that the decision-making set up in the Merger Task Force (MTF)—where the administration took decisions that had executive effect and that could be appealed to a court—was exactly the same as in the majority of the Union's National Competition Authorities (NCAs) (Q 403).

229. The Commission declared that there was a high degree of transparency in its procedures that came from the publication of the reasoned decision, the Statement of Objections, the right to an oral hearing and the full reasoning of final decisions. In addition, transparency was further strengthened through Guidance Notices and the publicity given to the Commission's treatment of individual cases.

230. The Commission claimed that the merger control system respected due process and that the Commission's other departments and the Member States provided the current system with internal and external checks and balances. The Green Paper proposed that, as the review was limited to the ECMR itself, suggestions should be limited to those that aimed at reform within the present institutional and Treaty framework.

CRITICISMS OF THE COMMISSION

231. Witnesses were very critical of the Green Paper's narrow frame of reference and were keen that no artificial limits should be imposed on their comments. We received much evidence on how the Commission conducted its reviews of merger cases; witnesses raised important questions over the level of accountability for the Commission's decisions. Although the Commission's final decision on a notified merger is subject to appeal to the European Courts, it was widely considered that this appeal procedure took so long that the transaction would no longer be viable for the parties since the economic situation would have changed. The Commission's decision therefore for all intents and purposes was final (QQ 55, 452).

---

[85] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 080, 23.03.2002, p. 0029.

[86] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ No L 254, 30.9.1994, p. 0064.

[87] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ No L 294, 10.11.2001, p. 0022.

232. The Confederation of British Industry (CBI), amongst many others, remained completely unconvinced by the Commission's arguments in the Green Paper, and was clear that a lack of due process in the system was "the ECMR's greatest defect" (p 3). Whereas the Commission said that it had to account for itself to the Member States (through the Advisory Committee) and in front of its own Legal Service, both of these checks were criticised by our witnesses. The Government said that the role of the Advisory Committee needed to be reconsidered. They explained that the involvement of the Advisory Committee was "of little benefit to the parties" who only saw a summary opinion published in the Official Journal a number of months after the Commission had reached its decision (p 149). The Government further reported that, in the past, Member States had had inadequate time to consider any commitments before the meeting of the Advisory Committee, which had made it "impossible for the Advisory Committee to give a properly considered view" (p 159). In addition, lawyers from Squire, Sanders & Dempsey said that the timeframe meant that the Legal Service could not be "effectively consulted on the legality of certain actions throughout the case" (pp 181–82). Furthermore, the American Chamber of Commerce (ACC) said that the Commission's Legal Service did not act as an adequate safeguard in the system because the parties involved in a notification did not have access to the Legal Service and so could not know what the legal service was telling the Merger Task Force (Q 381).

233. In addition to the changes to the commitments procedure outlined above, we examined a number of recommendations for how to incorporate further checks and balances into the administrative arrangements for the handling of ECMR cases prior to the Commission reaching a final decision. We also addressed the question of judicial review of Commission decisions. The proposed reforms are presented below.

CHANGING TO A JUDICIAL-BASED SYSTEM

234. The most drastic and contentious reform, which would fundamentally alter the current working of the Commission and the Merger Regulation, was the possibility of the EU moving to a system of merger control that would more closely resemble the regime in the United States. Under such an arrangement, the Commission would act as a prosecuting agency (as does the Department of Justice and sometimes the Federal Trade Commission in the United States). If the Commission considered that a merger raised serious competition concerns, it would have to take the case to a court, where the decision and power to prohibit the merger would lie with the judge.

235. This proposal would be a very radical change for the ECMR because it would change the role of the Commission and the Community Courts. As such, it would require amending the Treaties. Nonetheless, this suggestion was supported by Dr Bishop, the Union of Industrial and Employers' Confederation of Europe (UNICE), the Competition Law Association (CLA) and the CBI (QQ 43–45, 55-57, 324).

236. For the CBI, looking at comparisons around the world, the US model was "the fairest system" as it removed the issue of a particular agency having a concern about a merger and its decision not being subject to sufficient checks and balances. However, whilst both the CBI and the CLA would support the ECMR moving to a US system "in an ideal world", they noted that full-scale institutional reform was not on the agenda as part of this review exercise and "would take years and years of, no doubt, anxious debate" (QQ 43, 45; p 52). Likewise, UNICE realised that such a change would certainly not happen within the next few years and concluded that it went "too far at present" (Q 331). Dr Bishop was alone in supporting an immediate move to a US-style regime. He could see "absolutely no reason" why such a change was impossible in Europe (Q 55).

237. In sharp contrast, the European consumer group, BEUC, was hostile to the suggestion that Europe should move to a court-based system, saying that it did not favour "any attempt to mimic other systems for the sake of making companies life easier".[88] The majority of witnesses gave little consideration to such a far-reaching suggestion. Instead, they concentrated on more achievable aims and favoured incorporating further checks and balances into the current system. The ACC appreciated that moving to a US system of merger control would involve "a very dramatic overhaul" of the ECMR and was not a realistic aim. It concluded:

> "Instead of going after what is not really achievable, there are things that should be done, relatively short term if possible, in order to make the process better within the constraints that we have." (Q 386)

238. Mr Burnside, of Linklaters, agreed: "The system that we have is not sufficiently broken that it needs to be abandoned, but not sufficiently working that it does not need fixing" (Q 386).

[88] BEUC/X/016/2002.

239. **This is an important debate that raises questions of justiciability, institutional balance and resources. Whether a court is better suited to analysing and taking decisions on the economic issues arising in merger cases is arguable. Further reflection is needed before any such fundamental change is proposed. If the EU were to give consideration to such a move, it would require a more comprehensive exploration of the issues involved than was instigated by the Green Paper. Such an exercise would have to include a more extensive consultation and a review of the experiences of other jurisdictions.**

240. **The top priority is to ensure as soon as possible objectivity and fairness in the ECMR process. Rather than changing the institutional arrangements, these could be improved more quickly by enhancing the procedural safeguards in the current system. The concerns about due process are best addressed in this way.**

REFORM OF THE SYSTEM OF JUDICIAL REVIEW

241. A number of witnesses pressed for reform of the judicial review process in merger cases. They called for improvements both in terms of the grounds on which appeals could be made and in terms of the time taken for appeals to be heard. They wanted the Court of First Instance (CFI) to hear cases faster and to have the fullest jurisdiction to deal with all matters of fact and law.

242. The Committee heard that the US had a much speedier court system than that in the EU. Dr Bishop reported that, in the US, an application could be made and the case could be in court "in a week or two, if not a few days" (Q 44). In contrast, appeals to the Community Courts could take years to be decided, by which time the judgment would be "useless to the company" as the deal would effectively be dead (Q 55; pp 3–4). The inadequacy of the speed of judicial redress was demonstrated by the recent appeal by Airtours, which took two and a half years to settle after the end of Phase II (Q 452). Accordingly, a number of witnesses put forward the argument that a much speedier court system was needed in the EU. UNICE, the Government and BEUC called for quicker access to the CFI (Q 324; pp 149–50).[89]

243. A second complaint against the CFI was that it normally only looked at the due process and legality of a case rather than its substance. Dr Bishop said that the CFI was "far from the ideal court" to hear merger cases. He pressed for institutional reform that would allow more effective appeals and called for "a more professional court" that might take the form of a special mergers chamber. That is, it would still be a court, but it would have a specialist unit, experienced in merger cases (QQ 57, 66). BEUC also supported consideration being given to establishing "specialist tribunals" that could hear appeals on fact and law.[90]

244. However, in the *Airtours/First Choice* appeal, the CFI had proved itself capable of investigating the substance of a case. It had examined the evidence; it had been willing to study the facts involved in the case and analyse the Commission's conclusions. The Chairman of Mytravel Group (formerly Airtours) was pleased that the Court had performed a very thorough job (Q 469).

The "fast-track" procedure

245. A key development in this area was the introduction, in December 2000, of amended rules of procedure for the CFI which aimed at expediting its proceedings.[91] This initiative, which was supported by the Commission, introduced a "fast-track" procedure for certain types of case, which could include merger cases. (Q 403). The Commission has said that it would welcome "any further reform undertaken by the European Courts to expedite appeals" (paragraph 250).

246. It was pointed out, however, that this system was not a panacea: for every case that was expedited, another was held up. This meant that the procedure was only used for simple cases with a very limited number of issues, generally where the arguments were mainly limited to points of law. Consequently, the procedure could not be used in many cases (Q 456).[92] UNICE thought it should be improved and used for more cases, by broadening the grounds on which a case can qualify (QQ 324–26). Dr Bishop complained that the expedited procedure was "still not adequate" (Q 66).

---

89 BEUC/X/016/2002.

90 BEUC/X/016/2002.

91 OJ L 322 of 19 December 2000.

92 Two appeals were currently being processed under the expedited the procedure and rulings in both cases were expected in October. These cases concerned the mergers between French electrical companies Schneider Electric and Legrand (the appeal was lodged in Decemeber 2001), and Swedish packaging firm Tetra Laval's takeover of France's Sidel (lodged in March 2002).

247. The ACC considered that the procedure was starting to work but wanted "a truly accelerated procedure before the CFI." The system had to be very quick and faster than the 8 months it took, which was still too long (QQ 383, 385). The ACC explained that companies could not afford to wait "longer than a couple of months for a decision" (Q 384). However, Mr Nicholson, of Slaughter & May, who represented Airtours, explained that many cases did not lend themselves to fast-track treatment as they were too complex and involved too much evidence for a court to consider in that amount of time. He concluded that the time taken for court cases was not the problem that needed to be resolved. Although the US judicial system was quicker at dealing with merger cases, the initial decision of the Department of Justice or Federal Trade Commission could take much longer than the maximum five-month period that the ECMR provides for the MTF to review a proposed merger and come to a decision (Q 456). The CBI was also quick to point out that the ECMR compared "favourably as against other similar systems in terms of speedy decision-making and transparency" (p 3).

248. The concerns expressed by witnesses over the adequacy of judicial review extend beyond the reform of the Commission's competition policy and impact directly on the jurisdiction and procedure of the Court of First Instance. As the Government point out, "changes to the Court's procedures are not a matter over which the Commission has control; any amendments, including the question of resources, would be something Member States would have to pursue in other fora" (p 150). **The Committee agrees with the Commission (paragraph 250) and the ACC (Q 385) that it is too early to judge the expedited procedure. Before coming to a conclusion on the working of this new procedure, it would be better to wait and see how the cases currently before the CFI work out. Notwithstanding this, it is clear to the Committee that unless the Courts are given extra resources, including extra judges, there may not be much more they can do to make the judicial review process speedier.**

249. **Only a very small fraction of merger cases are referred to judicial review in the Community Courts and some of these cases are likely to be too complex to be resolved in a time frame that would enable the original merger to proceed. The priority for ensuring an effective system of due process within the ECMR should not therefore be limited to trying to obtain speedier judicial review or a greater role for the Courts. Efforts should focus instead on improving the internal checks and balances in the ECMR regime.**

SEPARATION OF THE TEAMS THAT EXAMINE MERGERS IN PHASE I AND PHASE II

250. The third reform suggested for improving the system of due process in the ECMR regime was to separate the team of officials working on Phase I of the investigation of a notified merger from the team conducting the investigation in Phase II. This approach would more closely reflect the separation of the two steps in the process between different administrative bodies adopted in many Member States such as the UK, France and Spain. Mr Burnside, of Linklaters, considered the separation between the Office of Fair Trading (OFT) and the Competition Commission in the United Kingdom to be "a fundamental advantage of the UK system" and urged this model to be replicated for the ECMR (QQ 387–38). Unsurprisingly, the Government (p 149), the OFT (Q 238) and the Competition Commission (Q 281) all supported such a change.

251. Even if the current process within the MTF, where one case team conducted the appraisal in Phases I and II, was fair, it was not always seen to be so. Whilst acknowledging that the majority of accusations levelled at the Commission lacked substance, the CLA was keen for justice to be seen to be done (p 53). This could not be the case so long as the Commission maintained its dual role of prosecutor and judge. Professor John Kay was not sure that it was a problem for the Commission to combine these functions, but if it was perceived to be a problem then that was, in itself, a problem. Dividing the fact-finding and prosecutorial functions of the case team from the Commission's final decision-making function "would clearly give people more confidence in the process" and was a strong case for separating the teams in Phases I and II (QQ 194–95).

252. Mr Nicholson, of Slaughter & May, also considered it important for people to feel that they had had a fair hearing and that there was "some balance in the decision" taken. This could be achieved by splitting the two teams. It was against human nature for a team investigating in both Phases to say that its decision in Phase I to refer the case to Phase II (thereby saying that the merger raised serious doubts) was unnecessary or wrong and so clear the case. Some division between the case handlers in Phases I and II was therefore desirable (QQ 467–69). Indeed, Gavin Anderson considered such a division to be essential. It would allow "a more balanced assessment of the parties' views and recommendations from within the merger review process" (pp 183–84).

253. If the procedures were to be split, so that different teams would deal with the two stages of the procedure, the issue would then be how strict this separation would need to be and whether it could be

meaningfully achieved within DG Competition. Witnesses put forward a variety of suggestions. At the most radical end of the scale, Mr Crossland, the Chairman of Mytravel Group (formerly Airtours), who criticised the current set up as being "totally unacceptable", wanted to see the team responsible for Phase II to be outside the Commission. It should be composed "not of civil servants but of academics who [would] look at the case cleanly without any bias." This way the case would be reviewed not only by a government body but by an independent body as well (Q 467). The CLA suggested that the members of Phase II teams should be drawn from a different body that would report to the Commissioner for Competition but would be outside DG Competition (p 52). The Government agreed that "ideally the new team would report up a separate chain of command with only the Director General having responsibility for both teams" (p 149). The least radical suggestion for a separation was proposed by lawyers from Squire, Sanders & Dempsey, who said the composition of the case team (whether all or some of its members) could be altered once a case moves from a Phase I to a Phase II review (p 182). The CBI proposed an entirely different team, but still drawn from within the MTF (p 4). The Joint Working Party of the Bars and Law Societies of the UK (JWP) questioned whether it would be possible, within the Commission, to establish a team of case-handlers to conduct Phase II investigations who would be separate from the staff of the MTF (p 12; Q 121). Dr Derek Morris, the Chairman of the Competition Commission, thought that the strictness of the division between the two teams could evolve over time (Q 281).

254. Mr Nicholson, of Slaughter & May, did not believe that there was "any prospect of the Commission allowing decision-taking on major competition cases to escape to a body outside the institution of the Commission". It was therefore important to look for a system of checks and balances within the Commission. The best way to achieve a fair system within the Commission was to move to a quasi-judicial process within DG Competition. The same team that had identified an issue in Phase I would take the case into Phase II, but they would act as a prosecution team. They would collect the evidence together and write the statement of objections. But there would be an entirely different team, from a different division within the competition directorate, with specific responsibility to sit as the decision-taking body and write the decision. Mr Nicholson thought the internal dynamics of the Phase I team having to prove its case and having a separate team to review the evidence would bring about significant improvements in decision-taking, reasoning, evidencing and substantiating.

255. **The Commission should divide responsibility for the consideration of cases in Phase I and Phase II. Separate teams of officials for dealing with Phase I and Phase II would be both desirable and achievable within the Commission. This would be the most straightforward way of introducing a 'second pair of eyes' into the ECMR regime and should ensure that any case which reaches Phase II is subjected to a measure of independent thinking. It would be a simple but significant change that would directly compensate for the fact that, except on appeal, the Commission does not have to submit its conclusions to an independent authority.**

256. **We recognise that having a second group of people examining a case could be said to impose further demands on DG Competition's limited resources, since the new case team would have to devote significant effort to familiarising itself with the detail of the case. However, such considerations need to be weighed against the urgent need for more effective internal checks in the ECMR system.**

Strengthening the Role of the Hearing Officer

257. In 1982, in response to criticisms of the quality of decision-making by the Commission and its disregard for the rights of defence, the Commission created the post of Hearing Officer. His initial responsibility concerned the organisation, chairing and conduct of the oral hearing. Over the years, his powers and responsibilities have increased to include supervision of the disclosure of documents and access to the file. The post was recently strengthened by the Commission Decision of May 2001.[93] His role is to ensure that the procedural rights of companies undergoing competition investigations are upheld. Nevertheless, many witnesses wanted the Hearing Officer's role to be further strengthened. The CBI said that, though welcome, the measures introduced last year did not go far enough; much more needed to be done to ensure an adequate process of review by the Hearing Officer (p 4).

Should the Hearing Officer have a mandate to report on substantive issues?

258. All the witnesses from industry called for the Hearing Officer's mandate to be widened to include greater scrutiny of substantive issues (pp 134, 192). The CBI wanted the Hearing Officer's role to be expanded so that, instead of concentrating on matters of procedure, he or she would check

[93] Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (Text with EEA relevance) (notified under document number C(2001) 1461), OJ L162 , 19/06/2001, pp.21-24.

that the actions taken by the Commission were justified by the evidence (Q 51). UNICE also wanted the Hearing Officer to be specifically empowered to assess the substantive aspects of a case and the way in which the Commission had reached its substantive decisions (QQ 324, 334; p 110). The Government also saw "some merit" in enhancing the role of the Hearing Officers. Expanding their remit in this way would assure the parties that "the Commissioner would receive the benefit of a second opinion on the substance of the Merger Task Force's arguments" (p 149).

259. The Government recognised, however, that this proposal was "not without its difficulties." It would be important to ensure that the Hearing Officer's role did not expand so as effectively to require him or her to conduct a parallel enquiry to that of the MTF and thus make them a separate target of parties' lobbying efforts (p 149). The OFT shared the Government's concern that strengthening the role of the hearing officer risked creating parallel inquiries, which would be unproductive. The more the Hearing Officer inquired into the substance of the merger as opposed to the issue of due process, the more the issue of parallel inquiries would become an issue and a potential risk, especially if there were major discrepancies (Q 239). This concern was effectively confirmed by UNICE who wanted the Hearing Officer's report on substantive issues to go to the Commission as a collegiate body so that the Commissioners would all know about any divergences of view between him and the Commissioner for Competition (Q 324).

260. Mr Nikpay, of Clifford Chance, wondered whether it might be better "for the Hearing Officer to focus and deal with administrative issues, access to files, procedural fairness and so on and so forth, and for another body, another office, to be created which would deal with the issues on substance" (Q 123). This would not address the problem of parallel inquiries, however. The Government suggested that this concern might be reduced by asking the Hearing Officer only to state a view at one or two particular points in the proceedings (perhaps in the report on the oral hearing and in the final opinion to the Commissioner). The Hearing Officer's input could also be limited to the question of whether the Commission's conclusion appeared to meet the burden of proof in the light of the evidence available (p 149).

261. Mr Gilchrist explained that, under the new mandate of May 2001, the Hearing Officer was already authorised to intervene not only in matters of pure procedure but was also invited to intervene in evaluating matters of substance. Article 3(3) states: "the Hearing Officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission" (p 4). Similar facilities are given in the other articles of the mandate and invite the Hearing Officer to comment on remedies (Articles 13(2) and 14).

262. **We would discourage any further extension to the mandate of the Hearing Officer that would lead to a parallel inquiry that might challenge that of the MTF. There are, however, clear advantages in the Hearing Officer taking a prominent role in the negotiation of remedies (see above paragraphs 209–211). The Hearing Officer already has, as Mr Gilchrist noted, extensive powers.**

The content of the Hearing Officer's report

263. The decision, introduced by the May 2001 reforms, to publish the Hearing Officer's report was widely welcomed. However, the CBI was hugely disappointed by the content of these reports as they sometimes gave no indication as to how the Hearing Officer arrived at his or her conclusions. The CBI wanted the reports, "even in straightforward or non-controversial cases," to contain some measure of reasoning and analysis by the Hearing Officer (p 4). UNICE and ACC supported this call for the Hearing Officer to produce fully reasoned opinions (pp 110, 192).

264. **We welcome the Commission's decision to publish the reports of the Hearing Officers.**[94] **We see this as a most significant improvement in the review process; it reinforced the Hearing Officer's authority and was a step towards openness and ensuring a fair hearing for the parties. The objectivity of the Commission's proceedings and the transparency of its ultimate decision could be further enhanced if the Hearing Officer's report was full reasoned and contained a full explanation of his or her conclusions. Hearing Officers should be required to do this.**

Greater independence

265. Since last year's reforms, the Hearing Officers no longer belong to DG Competition but instead report directly to the Commissioner for Competition. Detractors from industry argued that this change did not provide an adequate safeguard against bias and that the independence of the Hearing Officers remained compromised. Derek Morris thought that, given the current arrangements, this

94 We made recommendations to this effect in our 1993 and 2000 reports.

complaint was understandable (Q 285). Witnesses suggested various, some quite radical, ways in which the Hearing Officer could be seen to be more independent *vis-à-vis* the Commission and the Commissioner for Competition in particular.

266. First, the CBI and the CLA said that, to ensure independence, the post of Hearing Officer should not to be open to serving Commission officials (pp 4, 52). Secondly, UNICE put forward the proposal that the Hearing Officers could be attached to the President of the Commission to whom they would directly report (p 110). The CLA agreed that, as with the Legal Service, the Hearing Officer should not fall under the auspices of any particular Commissioner but should be answerable only to the President (p 52). Thirdly, the ACC thought the Hearing Officer should be "entirely independent from the Commission and fulfil a role analogous to that of the Advocate-General at the ECJ" (p 134). Fourthly, UNICE suggested that the Hearing Officer should be nominated by the CFI so that he was subject to the rules for judges (Q 324). Lawyers from Squire, Sanders & Dempsey said that this suggestion was not without merit, but cautioned that "such a blurring of the distinction between regulator and appellate reviewer should be carefully considered before adoption" (p 182).

267. **The Committee welcomes the fact that the Hearing Officer is no longer part of DG Competition. The Hearing Officer should be independent and must be seen to be independent. We are certainly not persuaded that the Hearing Officer should be made a judicial officer or should be attached to the President of the Commission.**

The need for more resources for the Hearing Officer

268. Many witnesses called for the Hearing Officers to be given extra staff and greatly enhanced resources. The CLA said the current situation of resources for the Hearing Officers was "untenable" and severely undermined the credibility of the Office (p 52). The CBI agreed that the office of the Hearing Officer must be given proper resources to enable them to scrutinise the work of MTF case teams properly. One or two individuals—no matter how competent or experienced—could not be expected to do this on their own. (pp 2, 4; Q 51). If the Hearing Officers were to conduct fuller reviews of merger cases, this would have clear resource implications. An increase in their role would have to be matched by adequate financial and human resources to enable them to be able to carry out the additional work effectively (pp 36, 134, 187). Additional Hearing Officers might even be required (p 149).

269. **It is clear that, if the role of the Hearing Officer were to increase, this would have resource implications. It is important that the Hearing Officer should have adequate staff and resources to be able to exercise real supervision over the ECMR process.**

MORE ECONOMISTS

270. Possibly the least radical proposal to the working of the ECMR involved developing the economic capability of the MTF. There was criticism of the lack of capability and capacity within the MTF for performing high-quality economics. Many witnesses claimed that the MTF did not have enough qualified economists. Dr Bishop and Mr Nicholson felt that an increase in their number would help the Commission's current "dependence on self-interested complainants" on whom they were "abjectly dependent" (QQ 61, 466). Dr Bishop thought that this development would add an internal check to the Commission's decisions and was "more important than anything in the Green Paper" (QQ 56, 60).

271. Witnesses suggested that a particular weakness in the structure of the MTF was the absence of a Chief Economist. If created, this post would mean that one person could oversee and standardise the economic work of the MTF, raising the standard of the economics and providing a degree of predictability. The Government saw merit in appointing a Chief Economist in DG Competition (pp 148–49). It could help to increase peer review of the economic analysis underpinning ECMR cases and ensure consistency. UNICE urged the MTF to appoint more economists and a chief economist (Q 337). Gavin Anderson called on the Commission to adopt the US Department of Justice's approach of having a separate department of economists to provide an independent recommendation which, together with the recommendation of the case-team, would provide the advice for the Decision maker (p 183).

272. The Commission responded that it had already increased the number of staff with economic expertise and was making "increasing use of external economic advice." However, Commissioner Monti said he wanted to do more in this area and promised he would come forward with proposals for this. (Q 403).

273. **The Commission should certainly strengthen its overall capacity for economic analysis in merger cases. Given that how the Commission defines markets in merger cases is crucial in**

determining the fate of many mergers, we see merit in the Commission developing a dedicated economics branch within the MTF. In particular, DG Competition should appoint a Chief Economist, which could lend more weight to their decisions. We look forward to seeing what Commissioner Monti's proposal are in this area.

ADDITIONAL POSTS AND RESOURCES ARE REQUIRED FOR PROCEDURAL CHANGES

274. A number of the recommendations that we have made for procedural changes (strengthening the role of the hearing officer, separation of the teams that examine mergers in Phases I and II, the appointment of more economists and a Chief Economist) involve resource implications for the MTF and staff underneath the Competition Commissioner. **The Committee believes that the ECMR and its effective, equitable and transparent implementation is far too important to be jeopardised by resource constraints. We therefore recommend that the new posts required to carry out these changes be provided to the Competition Commissioner.**

PART 6: SUMMARY OF RECOMMENDATIONS

JURISDICTIONAL ISSUES

275. **A balance needs to be struck between the need for simplicity, predictability, consistency and rapidity and the need to have a flexible system that will ensure that a merger is examined by the regulatory body that is best placed to ensure the maintenance of effective competition.** (paragraph 33)

276. **No single amendment would achieve this**. **The objective must be to design a workable "package" of measures that will meet the aims.** (paragraph 34)

277. **The speed of the referral procedure is important. It should not, however, be the paramount requirement of the jurisdictional rules in the Merger Regulation. It is more important to ensure that, where possible, mergers are examined by the best-placed competition authority.** (paragraph 35)

278. **The thresholds in Article 1(2) should not be amended.** (paragraph 38)

279. **The Commission's proposal to replace the Article 1(3) thresholds with a '3 plus' rule could provide the basis of a solution to the jurisdictional question and the problem of multiple filings.** (paragraph 42)

280. **The ECMR should maintain a mandatory system of notification under a revised Article 1(3).** (paragraph 52)

281. **The grounds for referral under Article 9 should be simplified so that, to be granted a referral back, Member States only have to provide evidence of an "effect on competition" in a distinct national market.** (paragraph 67)

282. **The National Competition Authorities should not be required to use ECMR procedural or substantive rules for cases referred back under Article 9.** (paragraph 71)

283. **The criteria upon which the Commission can refuse to grant a referral back should be strictly limited. They also need to be clear and unambiguous.** (paragraph 73)

284. **The Commission should, as soon as possible, issue guidelines on the implementation of Article 9.** (paragraph 77)

285. **The Commission should be able to take the initiative to refer a case back to the relevant the National Competition Authority, subject to the agreement of the Member State.** (paragraph 82)

286. **Article 22(3) needs to be re-drafted so that is easier for Member States jointly to refer national cases to the Commission.** (paragraph 94)

287. **The Commission should be able to request that an Article 22 referral be made.** (paragraph 96)

288. **The Commission should issue guidelines on the implementation of an amended Article 22(3).** (paragraph 97)

THE SUBSTANTIVE TEST

289. **The SLC test should be the substantive test in the ECMR.** (paragraph 160)

290. **The Commission should, without delay, issue guidelines on how it interprets the substantive test in the ECMR.** (paragraph 160)

MERGER-SPECIFIC EFFICIENCIES

291. **The ECMR should not include an explicit efficiencies defence.** (paragraph 186)

292. **The Commission should issue guidelines to consumer groups on the most effective ways of becoming involved in merger cases.** (paragraph 187)

THE COMMITMENTS TIMETABLE

293. **A 'stop the clock' provision should be included in the ECMR.** (paragraph 200)

294. **'Stop the clock' should be possible once in both Phases but should be for very strictly limited periods of time.** (paragraph 200)

295. **The Commission should have the ability to 'stop the clock' under the same terms and conditions as the parties.** (paragraph 200)

296. **The Commission should not be obliged to take the initiative to identify the measures that it deems necessary for it not to oppose a notified merger.** (paragraph 208)

297. **A greater degree of clarification of whether, and under what circumstances, the Commission has the ability to propose remedies would be helpful to companies. In all merger cases, the Commission's position on remedies should be made public as a matter of course.** (paragraph 208)

298. **The Hearing Officer's report on the Oral Hearing could provide the basis of the negotiations of remedies. The Hearing Officer, or a similar appointment, could chair the negotiations and act as a mediator between the parties and the Commission.** (paragraph 211)

299. **The Commission should give full consideration to the suggestion of reversing the order of the oral hearing and the Statement of Objections.** (paragraph 214)

EMPLOYMENT CONSIDERATIONS AND THE ECMR

300. **The substantive test in the ECMR and the way in which it is applied should remain focused exclusively on competition.** (paragraph 226)

DUE PROCESS AND CHECKS AND BALANCES ON THE DECISIONS OF THE COMMISSION

301. **The priority for ensuring an effective system of due process within the ECMR should not be limited to trying to obtain speedier judicial review or a greater role for the Courts. Efforts should focus instead on improving the internal checks and balances in the ECMR regime. The concerns about due process are best addressed by enhancing the procedural safeguards in the current system.** (paragraph 248)

302. **The Commission should divide responsibility for the consideration of cases in Phase I and Phase II.** (paragraph 255)

303. **Hearing Officers should be required to produce fully reasoned reports that contain a full explanation of their conclusions.** (paragraph 264)

304. **The Commission should strengthen its overall capacity for economic analysis in merger cases. In particular, DG Competition should appoint a Chief Economist.** (paragraph 273)

RESOURCES

305. **The ECMR and its effective, equitable and transparent implementation is far too important to be jeopardised by resource constraints. The new posts required to carry out the necessary procedural changes should be provided to the Competition Commissioner.** (paragraph 274)

Recommendation

306. The Committee considers that the review of the ECMR raises important questions to which the attention of the House should be drawn and makes this Report to the House for information.

Appendix 1

Sub-Committee A (Economic and Financial Affairs, Trade and External Relations)

The members of the Sub-Committee which conducted this inquiry were:

Lord Armstrong of Ilminster
Lord Geddes
Lord Grenfell (Chairman)
Lord Hannay of Chiswick
Lord Lamont of Lerwick
Lord Layard
Lord Lea of Crondall
Lord Marlesford
Lord St John of Bletso
Lord Sharman
Baroness Sharp of Guildford
Lord Tomlinson

The Specialist Advisers were Professor Richard Whish and Miss Jennifer Halliday from King's College London.

Declared interests:

Lord Armstrong of Ilminster:
Chairman, Forensic Investigative Associates plc

Lord Geddes:
Non-Executive Chairman:
Pacific Chartered Capital Management Ltd
Pacific Chartered (Europe) Limited
Photo Corporation (UK) Limited
Trinity College London
Chrome Castle Limited
Non-executive Director:
Portman Settled Estates Limited
Trinity College of Music

Lord Grenfell:
Honorary Chairman, Independent Asset Management/SIM (Milan) (unpaid)
Secretary, All-Party British/Croatian Parliamentary Group

Lord Hannay of Chiswick
British Government Special Representative for Cyprus
Consultant, BOC Group
Non-executive Director, Aegis Group
Non-executive Director, Chime Communications
Pro-Chancellor, University of Birmingham

Lord Lamont of Lerwick:
Chairman, East European Fund (*managed by Jupiter Asset Management)*
Director, Balli plc
Director, Banca Commerciala Robank SA
Director, Compagnie Internationale de Participations Bancaires et Financieres
Director, European Growth and Income Trust (managed by Aberdeen Asset Management)
Consultant, Fintrade
Consultant, Rotch Group
Vice-President, Bruges Group
Member, Business for Sterling

Lord Layard:
Director, Firebird New Russia Fund Limited
Member, Britain in Europe

Lord Lea of Crondall:
Treasurer, Parliamentary Group on Macedonia
Treasurer, Parliamentary Group on the Federal Republic of Yugoslavia

Lord Sharman:
Chairman and Shareholder, Aegis plc
Board Member, Britain in Europe
Director and Shareholder, B G International plc
Director, AEA Technology plc
Director, Reed Elsevier plc
Director, Youngs Brewery plc
Director and Shareholder, Phocis plc
Adviser (paid) KPMG

Baroness Sharp of Guildford
Consultant to ESRC project on The Emerging Industrial Architecture of Wider Europe being undertaken by joint group based on UCL and University of Sussex.

Appendix 2

List of Witnesses

The following witnesses gave evidence. Those marked ** gave both oral and written evidence; those marked * gave oral evidence only.

Mr Peter Alexiadis and Ms Miranda Cole, Squire, Sanders & Dempsey LLP.

** Mr Gerwin Van Gerven, Ms Fiona Carlin, Mr Alec Burnside, Mr Pierre Kirch, Mr Andrea De Matteis and Mr Franck Fougère, EU Committee, American Chamber of Commerce in Belgium.

Gavin Anderson & Company.

** Dr Derek Morris, Mr Robert Foster, Mr Brian McHenry and Ms Carole Begent, Competition Commission.

** Mr James Flynn and Mr Ali Nikpay on behalf of the Competition Law Association.

** Mr Rufus Ogilvie Smals, Ms Lynda Martin Alegi, Mr Juan Rodriguez, Mr Jonathan Dykes, Confederation of British Industry.

* Commissioner Mario Monti, Mr Götz Drauz, Director, Merger Task Force, Mr Stephen Ryan, Merger Task Force, Mr Carles Esteva-Mosso, Member of Cabinet and Ms Anna Papaionnou, Directorate-General for Competition, European Commission.

** Mr Willy Buschak, Confederal Secretary, European Trade Union Confederation.

Mr Joseph Gilchrist, Honorary Director and former Hearing Officer of the European Commission.

International Chamber of Commerce, UK Committee on Competition.

** Ms Katherine Holmes and Mr Simon Polito on behalf of the Joint Working Party of the Bars and Law Societies of the UK on Competition Law.

* Professor John Kay.

* Dr William Bishop, Chairman, Lexecon Limited.

* Mr David Crossland, Chairman and Mr Greg McMahon, Company Secretary, MyTravel Group plc (formerly Airtours plc), and Mr Malcolm Nicholson, Slaughter and May.

National Consumer Council.

** Mr John Vickers and Ms Margaret Bloom, Office of Fair Trading.

** Miss Melanie Johnson MP, Parliamentary Under-Secretary of State for Competition, Consumers and Markets, Mrs Pat Sellers, Director Consumer and Competition Policy Directorate, Mr Ben Rimmington, Assistant Director, EC Mergers and Mr David Wirth, Economic Adviser, Department of Trade and Industry.

** Mr David Coats, Ms Janet Williamson, Trades Union Congress and Mr Gerry Veart, GMB.

** Mr Philippe De Buck, Secretary General, Mr Peter Plompen, Chair Company Affairs Committee and Mr Eric Berggren, Senior Adviser, Company Affairs Department, Union of Industrial and Employers' Confederations of Europe.

Appendix 3

Glossary

'3 Plus' Rule	A jurisdictional rule that would mean that mergers which do not meet the thresholds in Article 1(2) would be deemed to have a Community dimension when they fall within the jurisdiction of three or more Member States.
ACC	American Chamber of Commerce
BEUC	Bureau Européan des Unions de Consommateurs
CBI	Confederation of British Industry
CFI	Court of First Instance
CLA	Competition Law Association
ECA	European Competition Authorities
ECJ	European Court of Justice
ECMR	Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, as amended in 1997 by Council Regulation (EC) No 1310/97, OJ L180, 09.07.1997, pp 1–6
GDP	Gross Domestic Product
GMB	The Union's name is registered as "GMB". These initials were adopted as the official title in 1989. For the historically minded the **G** derives from **General,** the **M** from **Municipal** and the **B** from **Boilermakers** but GMB is not an abbreviation for these titles. So many unions have merged with GMB that the initials are its official name.
HHI	Herfindahl-Hirschman Index: a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty per cent the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$).
ICC	International Chamber of Commerce
JWP	Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition
MTF	Merger Task Force
NCA	National Competition Authority
NCC	National Consumer Council
OFT	Office of Fair Trading
SLC	Substantial lessening of competition
SSNIP	Small but significant and non-transitory increase in prices
'Stop the Clock'	A provision whereby the parties to a merger could suspend the ECMR timetable for a given period
UNICE	Union of Industrial and Employers' Confederation of Europe