

The new EC Merger Regulation

One year on

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Matthew Hall of Ashurst considers the amended EC Merger Regulation and its impact since 1 May 2004.

On 1 May 2004 the original EC Merger Regulation (4064/89) (the old ECMR), which was the EC's first instrument dealing specifically with merger control, was replaced by EC Regulation 139/2004 (the new ECMR). The European Commission (the Commission) at the same time issued a revised implementing Regulation (802/2004), which deals with certain procedural matters arising under the new ECMR.

Much of the basic structure of the old ECMR remains and the changes, many of a procedural or practical nature, are best described as "evolutionary" rather than "revolutionary". Nevertheless, the changes were significant and generated a large amount of debate in the period up to their final adoption.

This article provides an outline of the new ECMR and the principal changes introduced by it and considers how the Commission has applied them in its decision-making during the first year of the



new ECMR. (References to Articles are to Articles in the new ECMR unless otherwise stated.)

THE REGIME

The new ECMR retains the basic regime of the old ECMR, which is that "concentrations" involving parties whose turnover is above relevant thresholds have to be notified to the Commission in Brussels and cannot be completed before clearance is obtained.

"Concentrations" are true legal mergers, acquisitions of "control" and certain joint ventures. The new ECMR uses the term "Community dimension" to describe the turnover thresholds that the parties to a concentration must meet before the regime applies. Therefore, only a "concentration with a Community dimension" must be notified under the new ECMR (*see boxes "Concentrations" and "Community dimension"*). It is then appraised in order to determine whether it

Concentrations

The new EC Merger Regulation (139/2004) (new ECMR) (like the old ECMR (4064/89)) does not apply to a transaction unless it amounts to a “concentration”, which includes true legal mergers, acquisitions of control and certain joint ventures:

- True legal mergers are simple: the combination of two businesses or parts of businesses into one.
- Acquisitions of control are less simple: control means acquisition of the whole of a business or the acquisition of “decisive influence” over it. Decisive influence normally arises due to the acquisition of more than 50% of the shares of a business but can also arise in other circumstances; for example, where a holding of less than 50% would be likely in practice to confer a majority of the votes in a general meeting or the shareholding is combined with veto rights over matters such as the budget or business plan of the business or the appointment of senior management. Where a minority stake gives rise to decisive influence, the acquisition of such an interest may result in the creation of joint control whereby two or more entities are able to exercise decisive influence jointly and so share control: this in turn gives rise to a joint venture (*see below*).
- A joint venture (that is, a business which will be subject to the control of at least two parties) only amounts to a concentration if it is “full function”, which essentially means that the joint venture results in a lasting change in the structure of the parties concerned, and it operates autonomously in a market, performing all the functions normally carried out by businesses in that market.

Joint ventures that are not full function (and therefore outside the new ECMR) are subject to Articles 81 and 82 of the EC Treaty (the general anti-competitive provisions) and also to national merger control laws. Full-function joint ventures which do not satisfy the turnover thresholds (*see box “Community dimension”*) and which have as their object or effect the co-ordination of the competitive behaviour of undertakings which remain independent (that is, the parents), will also be subject to Articles 81 and 82 and possibly also to national merger laws.

is likely to have an anti-competitive result (*see box “Appraisal of concentrations”*).

Clearance under the new ECMR covers all 25 EU member states plus the EFTA states (Norway, Iceland and Liechtenstein). In some cases a merger that primarily affects the EFTA states (that is, has an EFTA dimension and does not have a Community dimension) will fall to be considered by the EFTA Surveillance Authority (applying, in effect, the new ECMR rules). However, for ease of analysis only EU member states will be referred to in this article.

Notification

Under the new ECMR a transaction that has reached a certain point in negotia-

tions (a good faith intention to reach an agreement or a public announcement of an intention to make a public bid) may be notified to the Commission on Form CO. Full binding documentation is therefore not required but parties will need to bear in mind when notifying that the Commission will, soon after notification, publicly seek comments on the transaction (*see “Timetable and outcome” below*). There is no longer a deadline by which Form CO must be submitted.

Form CO requires a considerable amount of information and its preparation can be very time-consuming. This can take from one or two weeks for straightforward cases raising no issues (where it may be possible to use the Short Form CO) to a couple of months for

complex cases (where the “normal” Form CO will be required).

It is standard practice even in straightforward cases for the Commission to approve the content of a draft Form CO before it is formally filed. Since the Commission is able to reject a Form CO as incomplete at its discretion, it is advisable to co-operate with the Commission to ensure that it is satisfied with the final notification.

Referrals

Cases may be referred from the Commission to the national competition authorities (NCAs) and vice versa. These “corrective mechanisms” in the new ECMR are designed to ensure that a merger is reviewed by the most appropriate body. So mergers with a significant cross-border impact but subject to national controls can be transferred to the Commission, and cases whose impact is primarily national or local but which fall under the new ECMR can be transferred to the NCAs (*see “Pre-notification referrals” and “Post-notification referrals” below*).

Suspension

A concentration may not in most cases be completed before it is cleared following submission of the Form CO. In exceptional circumstances the Commission may waive the requirement to suspend completion; for example, where the acquisition does not raise any competition concerns and the target company is likely to fail imminently or, alternatively, the buyer would otherwise be excluded from an auction, as in *Cinven Ltd/Angel Street Holdings Ltd (Case No COMP/M.2777)*. However, such derogations are rare and will not be given for reasons of “commercial convenience” (such as wishing to complete within a particular accounting period). The obligation also does not apply in the case of a public bid or “creeping takeover”, provided voting powers are not exercised to control the target.

Timetable and outcome

In the course of its inquiry the Commission will consider the arguments proposed in Form CO and, except in simple

cases, “market test” them with third parties. This involves writing to customers, competitors, trade associations and suppliers whose details the parties are required to provide in Form CO. In addition, the Commission invites comments from any person in a standard notice published in the Official Journal of the European Union (and also in practice invites comments through publishing the fact of the notification on its website (http://europa.eu.int/comm/competition/index_en.html)).

The new ECMR timetable has many variations, depending on the type of case and its difficulty from a competition point of view. The Commission has an initial period of 25 working days (Phase I) from notification within which to take one of the following decisions:

No jurisdiction. The transaction falls outside the new ECMR (for example, because the turnover thresholds are not met or control is not obtained) (*Article 6(1)(a)*). These decisions are now very rare.

Phase I clearance. The transaction does not raise “serious doubts as to its compatibility with the common market” (*see box “Appraisal of concentrations”*) and so a Phase I clearance is justified (*Article 6(1)(b)*). Unconditional Phase I clearance decisions are by far the most common type under the new and old ECMRs (around 85% of all cases notified).

A Phase I clearance decision may be conditional, in other words, subject to commitments offered by the parties which address possible competition concerns (*Article 6(2)*). Commitments are typically structural in nature (usually the divestment of a business) and behavioural remedies (focused on future behaviour) are rarely acceptable. Where commitments are offered (which must be within 20 working days of the start of Phase I), the Phase I timetable is extended to 35 working days (this extension is also made where a referral request under Article 9 is received (*see below*)). Around 4% of notified cases have been subject to Phase I conditional clearance decisions.

Community dimension

The turnover thresholds determine whether a concentration has a “Community dimension”, and, therefore, whether it falls to be notified under the new EC Merger Regulation (*139/2004*) (new ECMR) (*see box “Concentrations”*). The first step is to identify the “undertakings concerned” in the transaction, namely, the merging parties in the case of a merger or, usually, the entity(ies) acquiring sole or joint control and the business over which control is acquired (but not the seller). The turnover of an undertaking concerned is the turnover of its group.

There are two alternative sets of turnover thresholds (*Article 1*). The first requires:

- The combined world-wide turnover of all of the undertakings concerned to exceed €5 billion; and
- The EC-wide turnover of each of at least two of the undertakings concerned to exceed €250 million.

The second requires:

- The combined world-wide turnover of all of the undertakings concerned to exceed €2.5 billion;
- In each of at least three EU member states, the combined turnover of all of the undertakings concerned to exceed €100 million;
- In each of at least three of those member states, the turnover of each of at least two of the undertakings concerned to exceed €25 million; and
- The EC-wide turnover of each of at least two of the undertakings concerned to exceed €100 million.

Under either set of thresholds, the new ECMR does not apply if, even if the thresholds are met, each of the undertakings concerned achieves more than two-thirds of its EC-wide turnover within one and the same member state. Therefore, concentrations involving companies with operations solely or largely within the same member state will usually fall outside the new ECMR.

There are particular rules for calculating the turnover of certain types of businesses (such as private equity groups) and also for the geographical allocation of turnover.

Referral. The case is referred (in whole or in part) to the NCA of a member state which has requested jurisdiction and has a sufficient interest (an Article 9 decision) (*see “Post-notification referrals” below*). These decisions (which can also provide for references to more than one member state) are fairly rare (only around 2% of all notified cases have been subject to an Article 9 decision).

Phase II investigation required. The transaction “raises serious doubts as to its compatibility with the common mar-

ket”, which means it warrants an in-depth Phase II investigation (*Article 6(1)(c)*). This is the second most common type of decision (but nevertheless only around 5% of all cases notified to the Commission have been the subject of a decision initiating a Phase II investigation).

If in-depth Phase II proceedings are initiated, the inquiry timetable is extended by a further 90 working days, which is extendable by up to 20 working days (to a total of 110 working days). A Phase II

Appraisal of concentrations

The new EC Merger Regulation (139/2004) (new ECMR) (like the old ECMR (4064/89)) is ultimately intended to curb transactions likely to lead to an anti-competitive result. The test under the new ECMR is whether the concentration can be expected "significantly [to] impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position" (SIEC) (*Article 2*) (see box "Concentrations"). If the merger is expected to be anti-competitive, the concentration must be declared incompatible with the common market (unless remedies can be agreed). Unlike EC law on dominant positions (*Article 82, EC Treaty*), there is no requirement for abusive conduct; the creation of a dominant position resulting in a SIEC is sufficient to prohibit a transaction.

Joint ventures which are "full function", and therefore subject to analysis under the new ECMR (see box "Concentrations"), but which have as their object or effect the co-ordination of the competitive behaviour of undertakings which remain independent (because, for example, the parents retain competing businesses), are also subject to an Article 81-type analysis (Article 81 broadly prohibits anti-competitive arrangements). The risk of wider co-ordination will be appraised in accordance with Articles 81(1) and 81(3) criteria with a view to establishing whether the operation is compatible with the common market, but within the timeframe of the ECMR inquiry. If the competition concerns cannot be exempted under Article 81(3) the joint venture must be declared incompatible with the common market (unless remedies can be agreed).

investigation is very involved, usually requiring the parties to answer extensive questionnaires and will also usually include the issue of a Statement of Objections by the Commission (setting out its competition concerns), a written reply by the parties, an oral hearing (if requested by the parties) which interested third parties as well as the main parties are able to attend and consultation with the Advisory Committee (made up of representatives of NCAs).

In addition, if the decision is to be made subject to commitments given by the parties (to remedy competition concerns), these need to be negotiated and agreed. Under the new ECMR the timetable is extended by an additional 15 working days (therefore to a maximum in most cases of 125 working days) if commitments are offered after the 54th working day in Phase II. In any event commitments must be offered not more than 65 working days from the start of Phase II.

Most Phase II investigations (around 80% to date) end with either an unconditional clearance (*Article 8(1)*) or a clearance subject to commitments (*Article*

8(2)). Around 16% of Phase II cases have been prohibited outright (*Article 8(3)*) and, very rarely, the Commission has required an implemented transaction to be undone at the end of a Phase II investigation (see box "New ECMR timetable").

Fines

The Commission may impose substantial fines on undertakings or individuals for infringing the new ECMR. The provision of incorrect or misleading information can result in fines of up to 1% of the aggregate world-wide group turnover of the undertakings concerned, and failure to comply with an obligation arising from an investigation, or implementation of a transaction before a clearance decision or in breach of a prohibition decision, can result in fines of up to 10% of the aggregate world-wide group turnover of the undertakings concerned. Failure to notify is also subject to a potential fine of up to 10% of aggregate world-wide group turnover.

Appeals

There have been an increasing number of appeals (by the parties themselves and by third parties) to the European Court of

First Instance (CFI) against Commission decisions under the ECMR. This has been in part a result of the adoption from February 2001 of an expedited ("fast track") procedure before the CFI. Where expedited status is granted (which is not automatic), the expedited procedure can provide a judgment on the basis of a single exchange of 25-page pleadings in as little as a year.

The Commission has seen its decisions overturned on several occasions, including the *Tetra Laval/Sidel* decision, which went to the European Court of Justice (ECJ), and is the most recent ECJ judgment concerning the ECMR (for more information, see News brief "Tetra Laval decision: good news for business?", www.practicallaw.com/A47909).

While appeals are still likely to occur only in a small proportion of all cases, judgments like *Tetra Laval/Sidel* have had a noticeable impact on the data required by the Commission in its analysis. The Commission is more professional but also more cautious in its approach. More information is therefore required to complete Form CO to the Commission's satisfaction, particularly if a case raises any potential issues (however remote). However, as Commission officials admit, this information is often simply "for the file".

PRINCIPAL CHANGES

From a practical point of view, what were the principal changes brought in by the new ECMR and how has the Commission dealt with them during the first year?

Test for assessing mergers

The old ECMR used the dominance test for assessing mergers: would a transaction create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it? This covered both single firm dominance (essentially where the merged business would have a leading position in the market which would allow it to raise prices or otherwise affect competition negatively, such as by reducing choice or innovation) and collective dominance

(where the transaction would lead to a likelihood of tacit co-ordination on pricing or other matters between the merged business and one or more other large player(s) in the market).

The US has long used a test based on whether a transaction would result in a “substantial lessening of competition” (SLC), and this test has been adopted by other regimes (for example, the UK in the Enterprise Act 2002 (for a feature article on this Act, see “Enterprise Act: competition aspects”, www.practicallaw.com/A29048)). The question of whether “dominance” should be replaced by SLC or some other test generated a significant amount of academic debate and the issue was not resolved until late in the day, with a typically “Brussels” compromise.

The new test is whether a concentration can be expected “significantly [to] impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position” (SIEC test) (Article 2) (see box “Appraisal of concentrations”). However, Recital 25 to the new ECMR makes it clear that the SIEC test applies, beyond the concept of dominance, only to the “anti-competitive effects of a concentration resulting from the non-co-ordinated behaviour of undertakings which would not have a dominant position on the market concerned”.

This is the so-called “gap” which some commentators considered was not covered by the dominance test under the old ECMR. For example, there is a proposed merger between numbers two and three in a three firm market with shares of 60%/20%/20%. The combined entity remains smaller (at 40% market share) than the leader (60%) and therefore would not itself become dominant and the big difference in market share would militate against (although not necessarily exclude) a finding of collective dominance. The problem is nevertheless that both the leader and the combined entity may reduce their competitive efforts due to a shortage of other competition.

New ECMR timetable

| | | Working days |
|--------------------------|---|------------------------------------|
| Pre-notification | The following may occur: <ul style="list-style-type: none"> ◆ Referral to EU member state(s) at request of parties (Article 4(4)). ◆ Referral to European Commission at request of parties (Article 4(5)). ◆ Member state referral to Commission (Article 22). | |
| Notification | Form CO submitted to Commission and accepted. | 0 |
| Phase I decision | The Commission must decide whether to: <ul style="list-style-type: none"> ◆ Dismiss the case for lack of jurisdiction. ◆ Give unconditional clearance. ◆ Give clearance subject to commitments. ◆ Start Phase II proceedings. <p>(Parties may offer commitments at the latest 20 working days into this period. Member states may request referral back during this period (Article 9(2)).)</p> | 25-35 |
| Phase II decision | The Commission must decide whether to: <ul style="list-style-type: none"> ◆ Give unconditional clearance. ◆ Give clearance subject to commitments. ◆ Prohibit the transaction. <p>(Parties may offer commitments at the latest 65 working days into this period.)</p> | 90-125 (from start of Phase II) |

Note: This timetable is not exhaustive.

It was always clear that the SLC, dominance and SIEC tests would, in the vast majority of cases, produce the same result. This is illustrated by the Commission’s Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (horizontal merger guidelines), which adopted a generally straightforward and recognisable analysis (OJ C31/5, 5 February 2004; http://europa.eu.int/eur-lex/pril/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf).

The first year of the new ECMR has not seen an obvious change in the Commission’s analysis. It found concerns in 16 of the cases notified to it, giving rise to nine Phase I conditional clearances (as against 11 in 2003) and the instigation of

Phase II proceedings in seven cases (2003; nine). Although of course the number of “problematic” cases varies from year to year, it is clear that these cases have been analysed in effectively the same way as they would have been under the old ECMR. In other words, as expected, the SIEC test has not given rise to any real change on the ground.

However, it is notable that in the first conditional Phase I clearance decision under the new ECMR, the Commission appears to have found a situation which, under the old ECMR, could have fallen in the “gap” (*Syngenta CP/Advanta*, Case No COMP/M.3465). In *Syngenta* the Commission found that in relation to one of the relevant markets, the merged party would have shares of 50-60% in Belgium and 40-50% in France, with the

remainder of the market almost entirely held by one competitor. This gave rise to the risk of the creation of “non-co-ordinated effects in a highly concentrated oligopolistic market”. However, it is not clear from the decision why in relation to those two countries the case could not have been decided on traditional single firm dominance grounds.

Efficiencies

The US has long provided for merger-specific efficiencies to be taken into account and, in particular, an “efficiency defence” can be pleaded in certain circumstances to allow a merger to go ahead where the benefits to the economy from the efficiencies are deemed to outweigh the harm to the economy resulting from reduced competition.

The horizontal merger guidelines refer to efficiencies and new Form CO has a (voluntary) section requesting details. Nevertheless, it is clear that there has not been and is unlikely to be a material change in the attitude to efficiencies. The Commission argues that efficiencies were taken into account under the old ECMR (it has indicated that a number of borderline Phase I cases were cleared due to efficiencies and that it has looked at efficiencies in Phase II cases but discarded the argument on the facts), albeit the precise situations in which it would do so were not clear.

Advisers continue to be careful when considering emphasising efficiencies: there remains a concern that too much “efficiency” creates an “offence” of being a unique competitor. This caution is justified: the Commission’s Chief Economist has indicated that he does not expect efficiency arguments to clear many cases. It is also notable that, in the view of some, an “efficiency offence” was relied on by the Commission in the *General Electric/Honeywell* decision (*Case No COMP/M.2220, appeal pending; see also News brief “GE and Honeywell: the end of the affair”, www.practicallaw.com/A19225*).

There were no cases in the first year of the new ECMR that relied on efficiencies.

Timetables

The fixed review timetable is undoubtedly one of the great advantages of the new ECMR (*see “Timetable and outcome” above*), as it was under the old ECMR. The Commission altered the timetables under the new ECMR. The rationale was to try to reduce the likelihood that transactions may be blocked because there is no time left to discuss remedies and also to ensure that the Commission itself has enough time to prove the existence or non-existence of competition concerns, to discuss proposed remedies with third parties and to receive all of the internal approvals it requires.

Although the new periods allow more time for submissions and negotiations as deadlines approach, in practice substantial pre-filing talks will still be required in order to solve a difficult Phase I case. So far as Phase II is concerned, in practice it is likely that all cases will take at least 105 working days, since most Phase II cases are settled with undertakings. Indeed, it would be surprising if in many cases the extra 20 working days is not taken. The first case to go through the full Phase I and II process under the new ECMR took 122 working days (that is, nearly the absolute maximum of 125) (*Bertelsmann/Springer/JV, Case No COMP/M.3178; see “Bertelsmann/Springer”, Bulletin, Competition, this issue*).

Pre-notification referrals

Probably the most significant changes from a practitioner’s point of view are those in Articles 4(4) and 4(5). Merging parties are now allowed to take a pro-active role in discussions regarding a possible referral to or from the Commission.

Referral to the Commission. Article 4(5) is the principal provision by which the new ECMR attempts to deal with the issue of multiple merger filings across the EU (and therefore to reinforce one of the main advantages of the new ECMR, namely that it provides a “one-stop-shop” for merger filings in the EU).

Where a transaction that falls below the new ECMR thresholds is subject to the

merger control regime of at least three member states, the parties may, before any national notifications are made, make an application (a reasoned submission on Form RS) to the Commission requesting that the transaction is referred to the Commission. If one competent member state does not agree to a referral then it is not made. However, referral is automatic if no competent member state disagrees. The benefit of a referral is, of course, that a single filing to the Commission (on Form CO) is then made instead of, in many cases, a large number of national filings.

Referral to NCAs. Article 4(4) provides for the reverse. Where a transaction falls within the new ECMR the parties may, before Form CO is filed, make an application (again, a reasoned submission) to the Commission requesting that the transaction be examined in whole or in part by the NCAs of one or more member states. Provided the member state(s) in question agree(s), it is up to the Commission to decide whether to make the referral.

Pros and cons. The form for making a reasoned submission (Form RS) is detailed and burdensome and the use of Articles 4(4) or 4(5) raises timing implications due to the strict procedural provisions in the new ECMR and the need to liaise with the Commission before making a reasoned submission (which in practice must, as with a Form CO, be approved in advance). It is often simpler and quicker to continue with a Form CO (and not use Article 4(4)) or to proceed straight to making a number of national filings (and not use Article 4(5)). In addition, in some cases the use of Article 4(5) will increase the regulatory risk; the Commission will look at potential issues in all member states (possibly in more detail than national regulators), whether or not the transaction qualifies to be looked at under the merger rules in each of those states.

Even so, the provisions, particularly Article 4(5), have been a definite success and requests are now being routinely accepted. Commission staff have said that the use of Article 4(5) is largely “correct”, meaning that parties are appropri-

ately identifying suitable transactions with a cross-border effect and are not “forum shopping”. Vetoes have, however, been exercised and Commission staff have also said that it makes no sense to make Article 4(5) referral requests for cases in which there are clear national interests or which clearly affect a number of markets in different member states. In the latter case, it appears that the Commission may even encourage member states to veto the referral request.

According to Commission staff, as at April 2005, 32 Article 4(5) requests had been made, of which 29 had been accepted, two had been vetoed by member states and one was pending. Four Article 4(4) requests had been made, all of which had been accepted.

UK approach. The Office of Fair Trading’s (OFT) view is that if a transaction has a strong association with the UK, then practitioners should discuss the issue of the most appropriate regulator with the OFT in advance.

In *Blackstone (TBG CareCo)/NHP plc*, the OFT made a request under Article 9 (see “Post-notification referrals” below) for the case to be referred to it in full (*Case No COMP/M.3669; www.practicallaw.com/A47548*). The Commission commented that “in view of the limited, and clearly local competition impact of this transaction, the Commission considers that this case could have been an appropriate candidate for a pre-notification referral request [under Article 4(4) by] the notifying parties”.

The OFT ultimately cleared the transaction, nearly four months after Form CO had been submitted. Even allowing for the preparation of the reasoned submission and the timetable under Article 4(4), it is likely that the parties would have received clearance at least one month earlier if Article 4(4) had been employed.

Post-notification referrals

Articles 9 and 22, which provide for referrals to the NCAs or Commission respectively, were also amended as part of the effort to ensure the most appropriate allocation of cases and a reduction in the

number of multiple merger filings made by parties. It is understood that, following the changes, there has been far more contact than previously between the Commission and NCAs in relation to the allocation of cases.

The new ECMR lowered the threshold that a member state must satisfy to obtain a referral back under Article 9. Article 9(2)(a) now requires that the merger threatens significantly to affect competition (and not, as before, that it threatens to create or strengthen a dominant position or even, reflecting the new SIEC test, that it threatens significantly to impede effective competition). The idea was to remove the need for NCAs to present elaborate preliminary conclusions with regard to the competitive assessment of a case and so facilitate a more rapid and efficient use of Article 9.

The alternative Article 9 test (applying to small markets which do not constitute a substantial part of the common market) remains unchanged (and was used in *Blackstone (TBG CareCo)/NHP*).

Article 22, providing for referrals by member states to the Commission, was extensively rewritten in the new ECMR. It is now designed to apply mainly in cases which have a significant impact on competition beyond a single member state. Its original purpose was to allow member states without domestic merger control provisions to refer cases to the Commission. Since all but Luxembourg had introduced domestic merger control, the purpose of Article 22 had, however, changed and practice under the old ECMR was to accept a reference under Article 22 only where a transaction fell within the jurisdiction of at least three member states. However, it is clear that it is now accepted that a single member state may use Article 22.

Commission staff have indicated that Article 4(5) has largely displaced post-notification referrals under Article 22 but that Article 4(4) requests are still infrequent and therefore post-notification referrals under Article 9 will continue to be made.

Ancillary restraints

The old ECMR provided that the Commission’s decision should cover ancillary restraints (for example, non-compete covenants, long-term supply agreements and licences entered into at the same time as a transaction which are considered to be an essential part of the transaction and therefore are cleared along with it). These are, of course, often of great commercial importance. The Commission’s original practice was to individually assess and formally address these provisions in its decisions, although it stopped doing so in 2001.

A CFI judgment had thrown doubt on this post-2001 practice (*Lagardère and Canal+ SA v Commission, Case T-251/00*). However, under the new ECMR clearance decisions are now deemed to cover ancillary restraints (Articles 6(1), 8(1) and 8(2)). This means that decisions do not now specify whether or not a restriction is ancillary (and therefore cleared as part of the transaction). This issue must be analysed separately from first principles under general competition law (that is, whether the restriction produces a material anti-competitive effect). However, Recital 21 provides that the Commission should, in cases presenting “novel or unresolved questions giving rise to genuine uncertainty”, expressly assess the ancillary nature of a restriction.

There were no examples of the Commission being asked to make such an assessment during the first year of the new ECMR.

Non-legislative changes

At the same time as it announced (in December 2002) its draft of the new ECMR, the Commission introduced a series of non-legislative changes designed to improve the quality of its decision-making. These included the creation of the Chief Economist post, the use of peer review panels in Phase II cases (obtaining a second opinion on these cases from other members of the Commission’s competition staff), the introduction of systematic “state of play” meetings during the process in order to keep parties better informed and “triangular meetings” be-

tween the parties, interested third parties and the Commission. Some of these changes were codified in the Commission's document "Best practices on the conduct of EC merger control proceedings" (http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf).

Commission staff believe that these new procedures have changed the Commission's culture and have made its decision-making more robust although, ultimately, only CFI judgments will determine this. However, it does appear that, at the same time as requiring more information, the Commission has "lowered the bar" for clearance, in the sense that it is more willing to clear mergers and requires more evidence of harm before it blocks a transaction or clears it subject to conditions.

This change in the Commission's approach is no doubt influenced by its defeats in court (for example, in *Tetra Laval/Sidel*), but peer review in particular does appear to have had an impact as well. For example, in *Carnival Corporation/P&O Princess* the Commission had, it is believed, changed its mind following a peer review even before the formal introduction of this process (*Case No COMP/M.2706*; www.practicallaw.com/A28594). Also, since the introduction of the new ECMR, it appears that at least one transaction would have been prohibited but for the new procedures (*Sony/BMG Case No COMP/M.3333*; see also *News brief, "Sony Bertelsmann: the Commission changes the record"*; www.practicallaw.com/A43381). Indeed, Commission staff have referred to *Sony* as a good example of the Commission taking seriously the burden of proof imposed on it following CFI judgments such as *Tetra Laval/Sidel*.

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THE FUTURE

The Commission is unlikely to consider major changes to the new ECMR for some time. Instead, the focus is now on consolidating and refining its internal procedures and guidance. The horizontal merger guidelines will be reassessed in due course. Meanwhile, the Commission has stated that it is working on guidelines considering vertical and conglomerate mergers although these are not likely to be finalised until the CFI has delivered its judgment (expected soon) on *General Electric/Honeywell*.

The Commission is also preparing a study on remedies, publication of which is expected during 2005, and has indicated that it will review its various notices on jurisdictional issues (which are in practice heavily relied on but are now rather old). Practice under the new ECMR will therefore continue to evolve and there will remain much for lawyers active in this field to do just to keep up to date.

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