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**The Reform of the EC Merger Regulation:
An Unreasonable Loss of National Competition
Authorities' Competences?**

- An Analysis of the Reform Process -

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SUMMARY

The EC merger control system is currently on the verge of its most fundamental revision since it came into force twelve years ago. On December 11, 2002 the European Commission published its Proposal for a new Council Regulation on the control of concentrations between undertakings following one year of consultation and debate of its Green Paper on the Review of the E.C. Merger Regulation.

Among the many proposed amendments, the ones relating to delimitation of jurisdiction between the Commission and national competition authorities form the core part of the reform. This question of delimitation has presented the most controversial issue ever since the adoption of the European merger control. The particular sensitivity of merger control was reflected in the reluctance of national governments to cede broad control to the Commission in view of a perceived discretion to pursue industrial policy agendas. On the one side, the industry lobbied for an expansion of the Commission's jurisdiction in the hope of facilitation of transaction procedures, an approach also advocated by the Commission, thereby increasing its influence. On the other side, the Member States opined differently according to their size, with the larger ones opposing any loss of national competences, and the smaller ones, either without a control system of their own or one of minor importance, for an increased application of the Regulation. A similar scenario is evident during the current reform process.

The most far-reaching Green Paper proposal was the one of a jurisdictional test establishing automatic Community competence over cases subject to multiple filings in three or more Member States in order to reduce the high number of multi jurisdictional filings. This suggestion of a "mandatory 3+ system" caused strong opposition from national competition authorities, particularly from the German Federal Cartel Office (*Bundeskartellamt*). This proposal would have resulted in an unreasonable loss of national competition authorities' competences in view of numerous difficulties associated with it, which would have introduced an unacceptable amount of legal uncertainty to the Merger Regulation. Hereafter, the Commission shifted its objectives with the adoption of its Proposal for a new EC Merger Regulation. In the Commission's final Proposal this initial approach is not pursued any longer. Instead, the jurisdictional issues are being addressed by the introduction of a system of streamlined referrals. The Proposal calls for an enhanced recourse to the Merger Regulation's concept of referring cases under Articles 9 and 22 E.C.M.R., including their improvement and, moreover, use at a pre-notification stage at the request of the parties.

The introduction of a system of streamlined referrals in order to, first, optimize case allocation, and, secondly, reduce the number of multiple filings, can no longer be regarded as entailing an unreasonable loss of national cartel authorities' competences. While it is not flawless this "two-way approach" promises to be a success in terms of improving the delimitation of jurisdiction by preserving substantial legal certainty. It is admitted that the proposals will not achieve an *ad hoc* reduction of multi jurisdictional filings desirable in view of the economic realities. But they lay the ground for it in view of the political realities. The latest reform proposals would increase the cooperation between the authorities on the Community and national level in the delineation of competences, thus promoting a relationship of equal partners. This is to be appraised, simultaneously, as the correct way to build trust in each other. Consequently, the national competition authorities' trust in the European Commission will lead to greater competence of it in the control of European mergers and acquisitions in recognition of the importance of centralized regulation. Therefore the latest step appears to be the most promising of the reform process.

The reform of the EC Merger Regulation has come to a critical stage with the adoption of the Commission's proposal for a new Council Regulation. After this latest step in the reform process, the Commission faces the difficult task in winning the Member States' approval. The Commission would like for the new EC Merger Regulation to come into effect on May 1, 2004, the prospective date of the next enlargement of the European Union. In accordance with Article 308 EC (*ex Article 235 EC Treaty*) the Council shall act unanimously on the Commission proposal after consultation of the European Parliament. It is certain that the new EC Merger Regulation will not resemble the proposal in all aspects. At present, the reform process is still on-going. However, it appears relatively safe to say that the reform will not result in an unreasonable loss of national competition authorities' competences.

ABBREVIATIONS

BDI	Bundesverband der Deutschen Industrie
CFI	Court of First Instance
E.B.J.	European Business Journal
E.C.L.R.	European Competition Law Review
E.C.R.	European Court Report
e.g.	exempli gratia
E.L.Rev.	European Law Review
EC	EC Treaty
ECA	European Competition Authorities
ECJ	European Court of Justice
ECMR	EC Merger Regulation
et al.	et alii
et seq.	et sequentes
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
FKVO	Fusionskontrollverordnung
fn.	Footnote
ibid.....	ibidem
i.e.....	id est
NCA	National Competition Authority
O.J.	Official Journal (of the European Communities)
par.	Paragraph
RIW	Recht der Internationalen Wirtschaft
Rn.	Randnummer
V	versus
W.C.	World Competition
WuW	Wirtschaft und Wettbewerb

1 INTRODUCTION

On December 11, 2002 the European Commission published its Proposal for a Council Regulation on the control of concentrations between undertakings.¹ The legal obligations contained in Articles 1 (4) and (5) and 9 (10) of the EC Merger Regulation had induced the Commission to review the turnover thresholds and the case referral rules and the Commission took the opportunity to examine the operation of the Regulation as a whole.

The Commission first adopted a Green Paper on the Review of the E.C. Merger Regulation on December 11, 2001 and invited all interested parties to submit their comments thereto.² Among the proposed amendments, the most far-reaching was the reform of the jurisdictional test establishing automatic Community competence over cases subject to multiple filings in three or more Member States. This suggestion of a “mandatory 3+ system” caused strong opposition from national competition authorities, particularly from the German Federal Cartel Office (*Bundeskartellamt*). In the Commission’s final Proposal, this initial approach is not pursued any longer. Instead, the jurisdictional issues are being addressed by the introduction of a system of streamlined referrals. The Proposal calls for an enhanced recourse to the Merger Regulation’s concept of referring cases under Articles 9 and 22 ECMR, including their improvement and, moreover, use at a pre-notification stage at the request of the parties.

The objective of this thesis is to analyze this reform process of the Merger Regulation with the focus being on the delimitation of jurisdiction between the Commission and the Member States. It will be discussed, whether or not the proposed reform would lead to an unreasonable loss of national competition authorities’ competences. The Commission’s proposals will be examined in consideration of the need to optimize case allocation and to reduce the number of cases currently subject to multiple filings in several Member States.

This thesis analyzes the jurisdictional issues of the reform process of the Merger Regulation. The original jurisdiction of the Commission is determined primarily by the criteria of “Community dimension”, contained in Article 1 ECMR, the material determination of jurisdiction following the definition of a concentration in Article 3 will therefore not be discussed. In addition to the current workings and potentially necessary changes to the jurisdictional test, contained in

¹ Proposal for a Council Regulation on the control of concentrations between undertakings, COM (2002) 711 final, Brussels, 11.12.2002.

² Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745/6 final, Brussels, 11.12.2001.

Articles 1 (2) and (3) ECMR, the work will also examine the exceptions from the “one-stop shop” principle, particularly the referral system, contained in Articles 9 and 22 ECMR. Delimitation is thus to be drawn with regard to the substantive and procedural issues addressed by the reform, which will only be considered where regarded necessary for the discussion.

The work relies on traditional methods of legal interpretation of the norms subject to the discussion. Thus, it primarily draws on literal, teleological, historical and systematical means of interpretation; but also on analogies and fill-in-the-gap assumptions. Accordingly, references to relevant jurisdiction, decisions and doctrine are being made. In this respect, traditional sources of legal journals, textbooks and commentaries are taken into consideration. Furthermore, the analysis is carried out relying on statements by and interviews with officials of the respective authorities and relating newspaper articles and online-publications. This shall be done while having particular regard to the German perspective.

First, an introduction to the operation of the current jurisdictional test and case referral system under the Merger Regulation, taking into account its history of origins, and a brief summary of the issue of multi jurisdictional filings shall serve as a starting point of the analysis. Secondly, the relating proposals to amend the jurisdictional test suggested in the Green Paper and comments submitted thereto will form the basis for the presentation of the latest schemes. Thus, thirdly, the Commission’s proposal to introduce a system of streamlined referrals in order to achieve optimal case allocation and reduction of multiple filings in several Member States will be examined and subject to critical review. Finally, a conclusion shall be drawn.

2 EC MERGER CONTROL TODAY

A presentation of the current workings of the Merger Regulation, including its history of origins, as well as an overview of the situation concerning multi jurisdictional filings shall serve as the starting point of the analysis of the reform process. The account will be given in view of the question of delimitation of jurisdiction between the Commission and the competent national authorities of the Member States and focus on the relating development until the date of the publication of the Green Paper. In the end, an opinion on the status quo established shall follow.

2.1 History of Origins

The Merger Regulation underwent a very long period of gestation.

The Treaty of Rome, which came into force on January 1, 1958, did not contain specific rules for merger control. The absence thereof was not unintentional since the Paris Agreement, which had come into force six years earlier, had introduced instruments for merger control in Articles 66 et seq.³ In this context it must, however, be observed that at the time none of the national legal orders contained merger control systems. Moreover it is noteworthy, that the insertion of the control mechanism in the ECSC Treaty was a result of the particular intention to prevent a re-concentration of the German steel industry in the Ruhr area.⁴

During the following years the discussions leading to the creation of national merger control legislations in the Contracting States⁵ was paralleled by activities in the Commission, which in 1966 for the first time publicly articulated its desire for a legal framework to control concentrations affecting competition at Community level.⁶ The European Parliament expressed its opinion on the matter by passing a resolution in favor of the creation of a European merger control system in 1971.⁷ Meanwhile, the Commission made use of Article 82 EC and its criteria of abuse of a dominant position. This approach was for the first time forcefully displayed in its prominent *Continental*

³ Löffler, FKVO 4064/89, Vorbemerkungen, Rn. 2, p. 27; Cook/Kerse, par. 1.3, p. 3.

⁴ Löffler, FKVO 4064/89, Vorbemerkungen, Rn. 2, p. 27.

⁵ Great Britain introduced a merger control in 1965, Germany in 1973 and France in 1977. Until Regulation 4064/89 was adopted on December 21, 1989 also Greece, Spain, Ireland and Portugal had created their own merger control systems.

⁶ Commission's Memorandum on the Problem of Concentration in the Common Market, Brussels 1966. Therein, use of Article 81 as a means of control is considered unsuitable while the application of Article 82 EC is not excluded.

⁷ O.J. 1971 C 66/11.

Can decision of December 1971.⁸ Subsequently, the applicability of Article 82 EC to structural market changes involving an acquisition of a competitor by a firm enjoying a dominant position was confirmed by the European Court of Justice in 1973.⁹

Hereafter, the Commission took a twofold approach to pursue its objective to receive a mandate for the revision of concentrations on a Community level. It proposed a Council Regulation¹⁰ and exercised, albeit mainly informally, a significant measure of control over Community takeover activity by considering mergers under Article 82 EC. Furthermore, in 1987, the applicability of Article 81 EC to mergers was confirmed by the ECJ in *Philip Morris*.¹¹ The Commission was all along well aware of the advantages of clear and precise merger control legislation over the prospects of building such a system upon case law. Though applicable to certain structural changes, Articles 81 and 82 EC are not well designed to control mergers and acquisitions, because in the pursuit of such transactions major changes occur within the entities involved, which are difficult, if not virtually impossible to reverse.¹²

Nevertheless, opposition to the idea of increased power for the Commission in this area remained strong among several Member States and prevented the adoption of a Merger Regulation for another 16 years after the first proposal.¹³ The final triggers for the change were the elegant exploitation of the ambiguities and uncertainties resulting from the *Philip Morris* case by former Competition Commissioner, Mr. Peter Sutherland, to persuade Member States on the one hand and the increase of the number of mergers having cross-border effects and economical dynamics in view of the completion of a Common Market by the end of 1992 on the other.¹⁴ The question of delineating jurisdiction between the Commission and Member States presented the most controversial question of debate during the negotiations.¹⁵

⁸ Commission, 9.12.1971, [O.J. 1971] L 7/25. The Commission had decided that Continental Can, a U.S. manufacturer of metal containers, had infringed ex Article 86 by acquiring Thomassen, a Dutch can manufacturer and potential competitor in the German market.

⁹ Case 6/72, *Europemballage Corporation and Continental Can Co. Inc. v. EC Commission*, 21 February 1973: [1973] E.C.R. 215.

¹⁰ O.J. 1973 C 92/1.

¹¹ Joined Cases 142/84 & 156/84, *British American Tobacco Company Ltd. and R.J. Reynolds Industries Inc. v EC Commission* 17 November 1987, [1987] E.C.R. 4487; 1988 4 C.M.L.R. 24. Compare par. 37 & 38.

¹² Lidgard, p. 314: referring particularly to ECJ Cases 68/94 and 30/95, *France v EC Commission & Société Commerciale des Potasses et de l'Azote (SCPA) and Entreprise Minière et chimique v EC Commission (« Kali und Salz »)*, 31 March 1998 [1998] E.C.R. I-1375.

¹³ Stockenhuber, p. 59 et seq.

¹⁴ Löffler, FKVO 4064/89, Vorbemerkungen, Rn. 10, p. 31; Cook/Kerse, p. 3.

¹⁵ Immenga/Mestmäcker-Immenga, FKVO, Rn. 17, p. 780; Löffler, FKVO 4064/89, Vorbemerkungen, Rn. 13, p. 32.

2.2 Regulation 4064/89

It is against this background that the Council of Ministers, on December 21, 1989, eventually adopted Council Regulation 4064/89 (Merger Regulation) introducing the first Europe-wide *ex ante* merger control¹⁶. It came into force on September 21, 1990 and gave the Commission the exclusive right to assess, on competition grounds, concentrations having an impact beyond the borders of any Member State, i.e. with a Community dimension. It affects concentrations without distinguishing one form from another provided they have such an effect.

2.2.1 “One-Stop Shop” Principle

The “one-stop shop” principle is provided for in Article 21 (1) ECMR, whereby “the Commission shall have sole jurisdiction to take decisions provided for in this Regulation”, subject only to review by the Court of Justice. The general rule, contained in Article 21 (2) ECMR, is that “no Member State shall apply its national legislation to any concentration that has a Community dimension”.¹⁷ At the same time, as states Recital 29 ECMR, concentrations which have no Community dimension shall be subject only to national merger control systems.¹⁸ Thus, the political concept of “subsidiarity”, embodied in Article 5 EC is being upheld.¹⁹

The fundamental principle of the “one-stop shop” is the most important feature of the Merger Regulation in terms of legal certainty, because it aims to prevent parallel control mechanisms by the Commission and competent national authorities, as is e.g. possible to a certain extent in the application of Articles 81 and 82 EC. This is also a significant advantage from the industry’s point of view: a single authority, namely the Commission, uniformly examines mergers having a Community dimension within a strict and short timetable having exclusive Community-wide competence.²⁰

¹⁶ Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [1989] O.J. L 395/1, revised in [1990] O.J. L 257/14.

¹⁷ Recitals 7, 27 and 28 are also of relevance in this context.

¹⁸ However, a Member States or Member States jointly may ask the Commission to intervene in respect of a concentration falling outside the Regulation’s scope according to Article 22 (3) ECMR: comp. below at 2.2.3.3.

¹⁹ Art. 5 EC (by virtue of the 1992 Maastricht Treaty): “...the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”

²⁰ Cook/Kerse, p. 3. The intention to introduce a mechanism of merger control at the Community level, which would obviate the need for multiple filings of concentrations in several Member States, is stated in Recital 7.

2.2.2 Community Dimension

The allocation of jurisdiction between the respective jurisdictions of the Commission and competent national competition authorities relies on the concept of a “concentration with a Community dimension”. The determination of this notion is subject to the world- and EC-wide turnover thresholds laid down in Article 1 ECMR.

2.2.2.1 Article 1 (2)

The original turnover thresholds are provided for in Article 1 (2) ECMR:

“a concentration has a Community dimension, where:

(a) the combined aggregate worldwide 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.”

These high turnover thresholds introduced a definition of Community dimension, which subjected, if not only “mega-mergers” at least only mergers involving at least one large-scale undertaking to Community control.²¹ It was in particular those levels of thresholds that were most strongly debated during the Council negotiations. While the Commission had argued for significantly lower thresholds, a number of Member States, among them the United Kingdom, Germany and France, insisted on higher ones.²² The adoption of the Regulation therefore had to be based on a political compromise. This was reflected by the insertion of a revision clause in ex Article 1 (3) ECMR, which called for a revision of the thresholds by the end of the fourth year following that of its adoption.²³ Thus, the thresholds remained subject to debate among the respective institutions and interest groups.²⁴ At the time foreseen for the first revision in 1993,

²¹ Groeben/Thiesing/Ehlermann-Bruhn, FKVO, Art. 1, Rn. 8, p. 2/1131; Lidgard, p. 316; Oppermann, § 14, Rn. 1048, p. 401.

²² Immenga/Mestmäcker-Immenga, FKVO, Rn. 17, p. 780; Löffler, FKVO 4064/89, Rn. 13, p. 33: The Commission advocated a de-minimis-threshold of an EC-wide turnover of 100 million ECU and of 2,000 million ECU world-wide while the German delegation proposed a 10.000 million ECU worldwide-turnover threshold level.

²³ In this context also the insertion of Articles 9 and 22 (3) is of relevance, which will be discussed below under 2.2.3.

²⁴ Löffler, FKVO 4064/89, Rn. 27, p. 39; Verloop, p. 10.

no political agreement could be reached and the revision was postponed until 1997²⁵.

2.2.2.2 Article 1 (3)

During the review process of 1997, the Member States, especially some of the larger ones, again rejected any general reduction of the turnover thresholds and, instead, opted for different means to amend the jurisdictional test in response to the rapid increase of national merger control systems, which undertakings faced.²⁶

Eventually, a new Article 1 (3) ECMR featuring an additional set of thresholds, was introduced by Regulation 1310/97, which came into force on March 1, 1997.²⁷ According to Recitals 1 and 2 concentrations with a significant impact in several Member States falling below the original thresholds qualifying for examination under a number of national merger control systems, should thereby also benefit from the 'one-stop shop' principle and be subjected, in compliance with the subsidiarity principle, to Community control appreciating their impact on competition in the Community as a whole.

Article 1 (3) ECMR states that where a concentration does not meet these thresholds, it may still have a Community dimension if:

“(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than € 2 500 million;
(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than € 100 million;
(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than € 25 million; and
(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than € 100 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.”

This additional set of thresholds, thus, did not only contain lower levels of world- and Community-wide turnover subject to the same rules as the ones in Article 1 (2) ECMR, but also introduced two novel criteria in relation to multi jurisdictional filings in Article 1 (3) (b)

²⁵ Immenga/Mestmäcker-Immenga, FKVO, Rn. 17, p. 780

²⁶ Kerse, p.5; Steiner/Woods, p. 263.

²⁷ Council Regulation 1310/97 of 30 June 1997 amending Regulation 4064/89/EEC on the control of concentrations between undertakings, [1997] O.J. L 180/1.

and (c) ECMR. Hence, the Commission's competences were increased to cover smaller operations with a Community dimension by the introduction of this rather complex formula. However, also Article 1 (3) ECMR was the end product of controversial debates and, unfortunately, did not lead to a satisfactory reduction of multiple filings.²⁸ As was the case for the original thresholds, also the additional ones were subjected to a time limit, because the necessity of a revision - expressed in Article 1 (4) and (5) ECMR - was already consensus at the time of their adoption.

2.2.2.3 The 2/3 Rule

An important feature, both of the original and additional sets of turnover thresholds contained in Articles 1 (2) and (3) ECMR is the "2/3 rule".

This negative criterion is an embodiment in law of the principle of subsidiarity delineating the jurisdiction between the Commission and national authorities by adopting a centre of gravity approach. It must be fulfilled cumulatively to the other criteria. A concentration is hereafter deemed not to have a Community dimension, where "each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State".²⁹ In general, this rule is not of great practical impact for large scale undertakings of smaller (e.g. Philips in the Netherlands), and not even for those of larger Member States, because they generally generate more than a third of their Community-wide turnover in other Member States.³⁰ It can, however, be of crucial influence in individual cases, as e.g. in the 1992 UK case of rival bids for the Midland Bank takeover.³¹

2.2.3 Exceptions

There are important exceptions to the "one-stop shop" principle, i.e. to the exclusive jurisdiction of the Commission above the respective threshold levels constituting a Community dimension and to the exclusive jurisdiction of national competition authorities below them.

²⁸ Albors-Lloroens, E.B.J. 2002, p. 36; Sinclair, E.C.L.R. 2002, p. 326: In 2000 there were only 20 notifications under Article 1 (3) ECMR as against 75 notifications to three or more Member States.

²⁹ The relating wording in the German text: "...wenn die beteiligten Unternehmen jeweils mehr als zwei Drittel .. Umsatzes in ein und demselben Mitgliedsstaat erzielen" is not as precise as those in the English and French "...chacune des entreprises concernées réalise plus de deux tiers..à l'intérieur d'un seul et même Etat membre" versions.

³⁰ Löffler, FKVO 4064/89, Art. 1 Anwendungsbereich, Rn. 26, p. 57.

³¹ See Cook/Kerse at p. 61 for a detailed account of the case.

They are not only to be found in the provisions relating to the referral schemes under Articles 9 and 22 (3) ECMR, but also in the recognition of instances where the protection of national interests other than issues of competition is concerned according to Article 21 (3).

2.2.3.1 Article 9 – the German Clause

The first exception is to be found in Article 9 ECMR, which was included into the Regulation as a safeguard clause to detach a notified concentration from the Commission's jurisdiction in order to refer the matter back to a national competition authority. Stemming from a German initiative, supported by Great Britain, it is a well-known secret that the German delegation would not have supported the adoption of Regulation 4064/89 without its insertion, because of serious concerns over the restriction of jurisdiction of the *Bundeskartellamt*.³² This provision was neither included in any of the Commission proposals nor discussed in any other official documents and is not being referred to in the Recitals, because it was included in the last minute.³³ The then Commissioner, Sir Leon Brittan, stated that "it was the last provision of the Regulation to be agreed and ... on that agreement depended the fate of the Regulation as a whole".³⁴

Article 9 ECMR, as amended by Regulation 1310/97, provides for the referral back to a competent national authority of a notified concentration, in its entirety or partially, where

"(a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market, or
(b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market."

Where a Member State seeks a referral, the Commission must be informed within three weeks of the date of receipt from the Commission of the copy of the notified concentration (Article 9 (1) and 19 (1) ECMR) that a concentration has an impact on competition on a distinct market within that Member State according to Article 9 (2) (a) or (b) ECMR. It is noteworthy in this context that ground (b) was added in 1997 and introduced a lower threshold in so far as the Member State needs only to demonstrate that the concentration

³² Groeben/Thiesing/Ehlermann-Hirsbrunner, FKVO, Art. 9, Rn. 2 p. 2/1533; Immenga/Mestmäcker-Immenga, FKVO, Rn. 25, p. 782; Veelken, p. 23..

³³ Löffler, FKVO 4064/89, Art. 9, Rn. 2, p. 221.

³⁴ Brittan, E.L.Rev. 15 (1990), p. 355.

affects competition rather than threatens to create or strengthen a dominant position, which had presented very restrictive conditions. Whether a market is “distinct” or not within the meaning of Article 9 (7) ECMR is to be determined in consideration of both the product and the geographical market.

In the light of its history of origins the rather complicated structure of Article 9 ECMR can be traced back to its nature of a political compromise.³⁵ While the exceptional character of the provision was emphasized jointly by Council and Commission at the time of adoption, it has been used more frequently in recent years. In eighteen out of twenty-nine requests until 1999 the Commission referred cases entirely (six) or partially (twelve) back, and while the majority of requests came from the *Bundeskartellamt* (eighteen) they were not all successful.³⁶

Even though the field of application of Article 9 ECMR is very wide, there are some product markets or sectors which generally come into question.³⁷ Where local or regional markets persist and mergers involving national undertakings may adversely affect competition, e.g. the retail (food and non-food) sector.³⁸ There also remain sectors today, where for historic or other reasons local or regional market structures dominate, e.g. the German gas or electricity market.³⁹ The Commission has also not shown any reluctance to refer cases where parallel related operations are under examination by national authorities, e.g. in the tourism and travel services industry.⁴⁰

Also Article 9 (10) ECMR prescribes a re-examination at the same time as provided for the thresholds contained in Article 1.

2.2.3.2 Article 21 (3)

The second exception to the exclusive jurisdiction of the Commission to review concentrations with a Community dimension is to be found in Article 21 (3) ECMR and relates to situations, where the protection of national interests other than issues of competition is concerned. In this context, another immanent exception, contained in Article 298 (1) (b) EC on national defense, is noteworthy.

³⁵ See also: Notice on Cooperation Notice on Cooperation between National Competition Authorities and the Commission, [1997] O.J. C 313/1.

³⁶ Löffler, FKVO 4064/89, Art. 9, Rn. 3, p. 222 et seq.; Wiedemann-Wagemann, § 17, Rn. 141, p. 606 et seq.

³⁷ Cook/Kerse, p. 237.

³⁸ See e.g. *Promodes/Casino* [1997] 5 C.M.L.R. 766; *Promodes/S21/Gruppo GS* [1998] 4 C.M.L.R. 656.

³⁹ *SEHB/VIAG/PE-Bewag* [1997] 5 C.M.L.R. 285; *RWE/Thyssengas* [1997] 4 C.M.L.R. 23; *Bayernwerk/Isarwerke* [1997] 4 C.M.L.R. 23.

⁴⁰ *Preussag/Hapag Lloyd/Touristik Union International* [1998] 4 C.M.L.R. 21.

In line with the history of origins of Article 9 ECMR - Article 21 even contains a reference to the German clause - also Article 21 (3) was included to limit Member States' concerns regarding the "one-stop shop" principle.⁴¹ There was large consensus that there were certain aspects related to concentration activities, which should remain in national control instead of coming within the exclusive competence of the Commission.⁴² The compromise reached was a non-exhaustive list of three interests, which will always be regarded as legitimate for an intervention: public security, plurality of the media and prudential rules. In addition, a recognition procedure for other interests notified to the Commission was included.

Public security is a term often to be found in the Treaty itself (e.g. in Articles 30, 46 and 54) and is subject to a narrow interpretation. While military and defense matters form part of public security, the terms are not synonymous. It is important in this context that the Member States rights to take appropriate measures necessary for the protection of the essential interests of their security under Article 296 (1) (b) EC and the Commission's relating obligation in view of a potentially distorted competition under Article 298 EC are not affected by Article 21 (3) EC (Recital 28 ECMR).⁴³ In *IBM France/CGI* the French authorities notified the Commission that it had taken "appropriate measures" in respect of two subsidiaries of CGI, working with the French ministry of defense, affected by the merger and the Commission responded acknowledging that the measures necessary for the protection of French public interest were taken in accordance with Article 21 (3) ECMR.⁴⁴

Plurality of the media involves the Member States right to take action in order to maintain diversity of sources of information for the sake of plurality of opinion and multiplicity of expression.⁴⁵ While there does not exist a legal framework in respect of the plurality on the federal level in Germany, the situation in the United Kingdom is different. Newspaper mergers are subject to a special control regime under the Fair Trading Act, which led to dual jurisdiction of the UK authorities and the Commission in *Newspaper Publishing*.⁴⁶ The so called prudential rules listed in the list of exceptions in Article 21 (3) ECMR mainly envision rules relating to the supervision of undertakings in the financial and insurance service sectors. Thus, it concerns in particular rules on the trustworthiness of individuals associated with as well as the capital adequacy, regularity of transactions and

⁴¹ Cook/Kerse, p. 238; Löffler, FKVO 4064/89, Art. 21, Rn. 2, p. 285.

⁴² Brittan, E.L.Rev. 15 (1990), p. 356.

⁴³ Groeben/Thiesing/Ehlermann-*Langeheine*, FKVO, Art. 21, Rn. 12, p. 2/1608.

⁴⁴ Groeben/Thiesing/Ehlermann-*Langeheine*, FKVO, Art. 21, Rn. 16, p. 2/1610; Cook/Kerse, p. 239.

⁴⁵ *Ibid.*

⁴⁶ Wiedemann-Wagemann, § 15, Rn. 23; Cook/Kerse, p. 239.

services of a company.⁴⁷ In *Sun Alliance/Royal Insurance* the dual application of the United Kingdom Insurance Companies Act and the Regulation was recognized by the Commission.⁴⁸ As concerns the possibility to invoke other legitimate interests, no measures of protection can be taken before the notification has been recognized by the Commission as compatible with Community law. Problems may arise in view of regulatory provisions for specific economic sectors in Member States, e.g. the telecommunication or energy markets.⁴⁹

2.2.3.3 Article 22 (3) - the Dutch Clause

Conversely, Article 22 (3) ECMR provides exceptions to the exclusive jurisdiction of national competition authorities for concentrations falling below the thresholds. It enables a Member State or group of Member States to ask the Commission to review a concentration, which lacks a Community dimension, but “significantly impedes” competition within its own territory. It does, moreover, share a similarity with its antagonist provision in terms of its origin. Article 22 (3) ECMR was included into the Regulation on the initiative of a single Member State, which is why it is also referred to as Dutch clause.⁵⁰ The original ratio of Article 22 (3) ECMR was to let Member States without a merger control system of their own to benefit from the Regulation.⁵¹ The possibility for two or more Member States to make joint referrals was included in 1997 to further reduce the number of multiple filings cases by broadening the scope for the application of Community competition law.⁵²

“ 3. If the Commission finds, at the request of a Member State or at the joint request of two or more Member States, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State or States making the joint request, it may, insofar as that concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4).”

⁴⁷ Groeben/Thiesing/Ehlermann-Langeheine, FKVO, Art. 21, Rn. 19, p. 2/1610; Cook/Kerse, p. 240.

⁴⁸ *Sun Alliance/Royal Insurance* [1996] 5 C.M.L.R. 136.

⁴⁹ Groeben/Thiesing/Ehlermann-Langeheine, FKVO, Art. 21, Rn. 22, p. 2/1611. An exemplary decision was *Lyonnaise des Eaux/ Northumbrian Water* [1996] 4 C.M.L.R. 145, regarding the British Water Industry Act of 1991.

⁵⁰ *Immenga/Mestmäcker-Immenga*, FKVO, Rn. 25, p. 782; Löffler, FKVO 4064/89, Vorbemerkungen, Rn. 26, p. 39. At the time, the Netherlands did not have a merger control system of their own.

⁵¹ *Wiedemann-Wagemann*, § 17, Rn. 156, p. 612.

⁵² Baron, WuW 1997, p. 585.

The Member States have to request the Commission's jurisdiction within one month of the date on which the concentration was "made known" to the Member State or to all the Member States making the joint request, or effected, whichever is the earlier (Article 22 (4) ECMR). It is of importance to take the implications of triggering the application of the Regulation into account. While the criteria for appraisal of the concentration in Article 2 (1) (a) and (b) ECMR are applicable, the test is only to assess, whether the concentration can be prevented or not (Article 22 (4) ECMR). It is therefore not for a Member State to request the Commission to ensure a concentration falling below the thresholds.⁵³ Articles 9 and 21 ECMR do not apply and, thus, in the lack of exclusive jurisdiction of the Commission any Member State having jurisdiction may apply its own competition laws.⁵⁴

The number of requests has been low, but the subsequent decisions were nevertheless of importance.⁵⁵ In *British Airways/Dan Air*, involving air routes between London and Brussels, the Commission cleared the merger in spite of Belgium's request to the contrary.⁵⁶ Conversely, the Commission prevented the mergers in *RTL/Veronica/Endemol* (at the request of the Netherlands) and *Kesko/Tuko* (at Finland's request).⁵⁷ The former decision led to the confirmation of the Commission's full control over the assessment following a reference without Member States ability to control its conduct or define the scope of its investigation by the Court of First Instance.⁵⁸ *Kesko/Tuko* involved the divestment of the concentration, and the Commission's view that Article 22 (3) ECMR expressly refers to Article 8 (4) ECMR, because automatic suspension provided for in Article 7 ECMR is not available, where the transaction has already been completed, was upheld by the CFI.⁵⁹ Another divestment was the result of the referral of *Blokker/Toys "R" Us* (at the request of the Netherlands).⁶⁰

2.3 Multi Jurisdictional Filings

As has been elaborated, one of the foremost reasons to introduce a Europe-wide merger control in 1990 was to obviate the need for multiple filings of concentrations in several Member States. The

⁵³ Brittan, E.L.Rev. 15 (1990), p. 356.

⁵⁴ Groeben/Thiesing/Ehlermann-Langeheine, FKVO, Art. 22, Rn. 15, p. 2/1619; Cook/Kerse, p. 247.

⁵⁵ Wiedemann-Wagemann, § 17, Rn. 157, p. 613; Cook/Kerse, p. 245 et seq.

⁵⁶ *British Airways/Dan Air* [1993] 5 C.M.L.R. 61.

⁵⁷ *RTL/Veronica/Endemol* [1996] O.J. L 134/32, which was later cleared: [1996] O.J. L 294/14; *Kesko/Tuko* [1997] O.J. L 110/53.

⁵⁸ Case T-221/95, *Endemol Entertainment Holdings BV v Commission*, 28 April 1999, [1999] E.C.R. II-1299.

⁵⁹ Case T-22/97 *Kesko v Commission*, 15 December 1999, [1999] E.C.R. II-3775

⁶⁰ *Blokker/Toys "R" Us* [1998] O.J. L 336/16.

pursuit of this objective was furthermore the ratio of the 1997 amendments, which aimed at broadening the accessibility to the “one-stop shop”. Therefore, a closer look at the situation concerning multi jurisdictional filings and the relating disadvantages for companies shall follow.

2.3.1 Spill-over Effects

According to basic economic regulatory theory, centralized regulation is desirable for all mergers capable of having a spill-over effect.⁶¹ There are several reasons for this, particularly in view of concentration activity affecting economic conditions in multiple jurisdictions.

Multiple jurisdictions over one and the same merger could result in conflicting decisions causing considerable irritation on the political level, particularly so since political influence over competition regulation varies considerably in Europe.⁶² From an economical perspective, multiple notifications and decisions put serious burdens on the undertakings time- as well as resources-wise.⁶³ This is, because in the EU, with all Member States except one (Luxembourg) having merger control legislation, the different control mechanisms vary considerably.⁶⁴ In terms of efficiency the procedural aspects and flow of information during negotiations of remedial action or third party intervention present further disadvantages of multi jurisdictional filings.⁶⁵ In the absence of a uniform regulatory standard, concentrations having a spill-over effect may, furthermore, be approved or prevented by the respective national authorities regardless of their effect on the Community level, thus also creating the risk of forum-shopping.⁶⁶

2.3.2 National Merger Control Systems

The number of national merger controls introduced or amended has been on a constant rise in recent years, particularly so in the candidate countries, who have tried to bring their competition laws in line with the European system.⁶⁷ Merger activities having spill-over

⁶¹ Burnley, W.C. 2002, p. 265; Gatsios/Seabright, Oxford Review of EC Policy 1989, p. 37 et seq.

⁶² Burnley, W.C. 2002, p. 265; Immenga/Mestmäcker-Immenga, FKVO, Rn. 25, p. 786 and Rn. 21, p. 789.

⁶³ Berg/Nachtsheim/Kronberger, RIW 2003, p. 15; Bischke/Wirtz, RIW 2001, p. 329.

⁶⁴ This will be discussed below at 2.3.2.

⁶⁵ Burnley, W.C. 2002, p. 266.

⁶⁶ Ibid.

⁶⁷ Berg/Nachtsheim/Kronberger, RIW 2003, p. 15; Bischke/Wirtz, RIW 2001, p. 329: While - world-wide - only 20 countries had a merger control system of their own in 1990, the number today is more than 60.

effects have, at the same time, not ceased to increase, but are instead increasing in parallel to the considerable pace of economic integration and globalization processes.

Problems associated with such transactions stem from the differences between national systems. While timing is essential for any merger it is becoming more and more difficult for undertakings to assess, whether a notification is necessary, at which stage and in what manner it is to be made, which legal consequences the missing of deadlines have - not only with regard to the substantive approach, but in particular to the formal one and the level of predictability of the outcome.⁶⁸

Within Europe, i.e. the Union including the candidate countries, the national merger control systems provide considerably differing answers in response to these questions. The vast majority of laws provide for a mandatory merger control, except for Great Britain, which provides for a voluntary system typical for the Commonwealth states.⁶⁹ Most national laws are based on the "effects doctrine", but there are some, which base the duty to notify primarily on world-wide turnover thresholds, (Estonia, Lithuania, Latvia, and Poland).⁷⁰ And while turnover-thresholds are the pre-dominant jurisdictional trigger in Europe, the relating levels vary considerably. In some jurisdictions market-share-thresholds serve as alternative (Greece, Spain, Slovenia, and Portugal) or even cumulative triggers (Latvia).⁷¹ The time-limits for a notification range from one week after the triggering event (ECMR, Czech Republic, Latvia, Lithuania, and Poland) to the requirement of a notification at any point in time prior to the execution of the transaction (Germany, Portugal, Spain).⁷² Most systems in Europe provide for a two-stage process (all EU-Member States, Czech Republic, Lithuania, and Slovenia), but the procedural requirements are either restrictive in terms of formalities, providing for a notification form (e.g. CO as annexed to Regulation 4064/89, similar: Czech Republic, Hungary, Italy, and Poland) or more flexible (Germany).⁷³ In addition, mandatory notification systems provide for automatic suspension of the concentration, while voluntary ones do not, time-limits for assessment by the respective control authorities vary as well as legal consequences at the event of failure to notify, or to do so within the time-limits etc., ranging from financial to criminal sanctions (Ireland, Austria).⁷⁴

⁶⁸ Burnley, W.C. 2002, p. 265; Sinclair, E.C.L.R. 2002, p. 326 et seq.

⁶⁹ Berg/Nachtsheim/Kronberger, RIW 2003, p. 16.

⁷⁰ Ibid., p. 17; Bischke/Wirtz, RIW 2001, p. 329:

⁷¹ Bischke/Wirtz, RIW 2001, p. 330; Sinclair, E.C.L.R. 2002, p. 328.

⁷² Berg/Nachtsheim/Kronberger, RIW 2003, p. 19; Immenga/Mestmäcker-Immenga, FKVO, Rn. 13 et seq., p. 787 et seq.

⁷³ Berg/Nachtsheim/Kronberger, RIW 2003, p. 19; Lampert, WuW 2002, p. 454.

⁷⁴ Berg/Nachtsheim/Kronberger, RIW 2003, p. 21; Bischke/Wirtz, RIW 2001, p. 331; Immenga/Mestmäcker-Immenga, FKVO, Rn. 71 et seq., p. 797.

It is for these reasons that the different national merger control schemes demand a serious amount of economical risk-taking of undertakings involved in multi jurisdictional filings in view of the existing legal uncertainty. Harmonization of laws is thus being widely advocated.⁷⁵

2.4 Opinion

Against the background of its history of origins, it is a noteworthy accomplishment that the centralized European merger control today has developed into a system generally welcomed not only by the industry, but also by the Member States. The application of Regulation 4064/89 facilitated corporate restructuring in the European Union and did, in general, not fail to respond adequately to its responsibilities in view of the principle of subsidiarity. In more than twelve years, 90% of the more than 2,000 mergers reviewed by the Commission have been cleared, while only 18, less than 1%, were prohibited.⁷⁶ Nevertheless, the time appears to be ripe for a reform of the jurisdictional issues.

Regarding the workings of Articles 1 (2) and (3) ECMR, it must initially be stated that the current turnover tests represent a rather clear cut and practical means of providing the undertakings concerned with an instrument to determine the respective jurisdiction with a reasonable amount of legal certainty. This is particularly true in comparison with the market shares tests, which necessitate the difficult definition of relevant product and geographical markets, or with one based on asset values, both of which would not have produced an equivalent amount of certainty. Nevertheless, the high original thresholds of Article 1 (2) ECMR introduced an immanent weakness into the innovative merger control system. They drew an arbitrary dividing line, which, from the very beginning, was subject to skepticism. This weakness was not adequately responded to by the additional set of thresholds of Article 1 (3) ECMR, because of Member States reluctance to cede broader competences to the Commission. While this truly cumbersome political compromise was meant to improve the situation in view of an increasing number of multi jurisdictional filings, it clearly did not suffice to achieve this.

The number of requests to refer cases under Article 9 ECMR is very low in comparison with the total number of cases reviewed by the Commission. Still, the provision is of importance in view of its function to fill in the gap. It is designated for cases in which the

⁷⁵ Berg/Nachtsheim/Kronberger, RIW 2003, p. 16; Bischke/Wirtz, RIW 2001, p. 332 et seq.; Meessen, WuW 2000, p. 5 et seq.

⁷⁶ Monti, Mario, *Europe's merger monitor*, The Economist, November 9, 2002, p. 71.

interests in respect of competition of Member States concerned cannot be adequately protected by the Regulation. Moreover, the requests so far have had a considerable impact and were noticed beyond competent authorities. And even if cases are not referred back to the national level, requests may influence a suggested negative decision by the Commission. The application of Article 9 ECMR must, as an expression of real subsidiarity resulting in the application of the respective national law instead of a decentralized application of Community law, be facilitated. Its complicated structure and procedural requirements hinders adequate usage.

The limited number of occasions, where legitimate interests were invoked by Member States according to Article 21 (3) ECMR most probably originate in the declaratory character of the provision. It should, nevertheless, remain for the sake of completeness. The original ratio to insert the possibility to refer cases under Article 22 (3) ECMR has been outdated in view of the proliferation of national merger control systems. Today, only Luxembourg does not provide for a merger control. Unless it will form an integral part of a revised concept of case referrals, its decreasing use should be understood as a reflection of its declining relevance and, particularly the possibility of requests by single Member States would seem anachronistic. However, the low number of case referrals could also be interpreted as an expression of the lack of trust by the national competition authorities in the Commission, which needs to be overcome in view of the great number of multiple filings, necessitating further centralization of merger control.

The problems associated with multi jurisdictional filings must be taken seriously and addressed in a proper manner by the reform of the Merger Regulation. Not, because the industry should be relieved from its economic burdens for its own sake, but because it is consumer welfare that will benefit subsequently. The maintenance of competitive structures and stimulation of economic development in Europe in the light of globalization are the underlying reasons for the urgent necessity to adjust the system to the reality of today's European merger activities. Even more so in view of future, i.e. post-enlargement, development. Broader access to the "one-stop shop" would, therefore, facilitate the application of a uniform merger policy and should, in general, not be underestimated in serving as an important signal in view of international harmonization of merger control schemes.

3 THE COMMISSION GREEN PAPER

In meeting its obligations to review the workings of the turnover thresholds and case referral rules according to Articles 1 (4) and (5) and 9 (10) ECMR the Commission in June 2000 first submitted a Report to the Council⁷⁷, based on which on December 11, 2001 it then published a Green Paper on the review of the EC Merger Regulation.⁷⁸

In this chapter, the proposed amendments of the Green Paper and replies thereto will be presented, having particular regard to comments made by the *Bundeskartellamt*. Eventually, an opinion consisting of a critical review of this step of the reform process shall follow.

3.1 The Proposed Amendments

At the heart of the reform proposals of the Green Paper lies the reform of the jurisdictional test under Article 1 (3) ECMR. In addition to the introduction of a so called “mandatory 3+ system” the proposed amendments of the referral systems under Articles 9 and 22 (3) ECMR are also of interest.

3.1.1 “Mandatory 3+ System”

From its review of the appropriateness of the turnover thresholds in Article 1 ECMR the Commission draws the conclusion that the current thresholds of Article 1 (2) and the 2/3-rule should remain unaltered, because they served well in recognition of the principle of subsidiarity.⁷⁹ However, in its 2000 Report, the Commission found that the 1997 introduction of an extra set of turnover-based thresholds in Article 1 (3) ECMR, to confer Community competence over cases affecting three or more Member States in order to reduce the number of multiple filings, to be unsuitable to reach this objective.⁸⁰ Only a limited number of concentrations had been caught by this provision while far too many concentrations involving cross-

⁷⁷ Report from the Commission to the Council on the application of the Merger Regulation thresholds, COM (2000) 399 final, Brussels 28.06.2000. (2000 Report)

⁷⁸ Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745/6 final, Brussels, 11.12.2001.

⁷⁹ *Ibid.*, par. 23.

⁸⁰ *Ibid.*, par. 24 et seq.: In 2000, only 20 (5%) out of 345 notifications were made under Article 1 (3) compared to 75 multiple notifications to three or more Member States; in 1999 it were 34 (12%) out of 292 notifications. See Annex I of the Green Paper.

border interests escaped its exclusive jurisdiction. In addressing this issue, the Commission disapproves of attempts to improve the situation by reducing the threshold levels or by modifying the current criteria of Article 1 (3) ECMR.⁸¹ Neither possibility would suffice to guarantee the obviation of multi jurisdictional filings and, moreover, would contain the risk of conferring Commission jurisdiction over cases that are currently not subject to multiple filings.⁸²

Instead, the Commission proposes to replace the current jurisdictional test in Article 1 (3) ECMR with the introduction of automatic Community competence over cases subject to multiple filings in three or more Member States.⁸³ This effects-oriented test would deem any concentration notifiable under the national merger control rules of three or more Member States to indicate a manifest cross-border nature and subsequent Community dimension. With regard to the underlying procedure, parties would need to demonstrate, no later than in the case of formal notification, that the operation meets the notification thresholds in three Member States.⁸⁴ This would, in turn, require a system by which the Member States concerned would have to confirm the parties' analysis within a set period of time (one or two weeks) and by which non-opposition would establish Commission competence.⁸⁵

In this context, it must be noted that the Commission based its proposal on an idea already brought forward in a Green Paper at the event of the 1997 revision of the Merger Regulation.⁸⁶ In its prior proposal, the Commission had favored an extension of its competences either by the introduction of a similar "mandatory 3+ system" or, alternatively, by a general reduction of turnover-thresholds to 2,000 million world-, and 100 million EC-wide.⁸⁷ Then, the idea had clearly been rejected by the Member States (Germany, France, Great Britain, Spain and Sweden) following substantial opposition from the *Bundeskartellamt*.⁸⁸ The Commission based its trust in a different outcome today primarily on the argument that there has been significant harmonization of relating Member State laws since 1996.⁸⁹

⁸¹ *Ibid.*, par. 32 and par. 34-51.

⁸² *Ibid.*, par. 51.

⁸³ *Ibid.*, par. 32 and par. 54 et seq.

⁸⁴ *Ibid.*, par. 58 et seq.

⁸⁵ *Ibid.*, par. 60.

⁸⁶ Green Paper on the Review of the Merger Regulation, COM (96) 19 final, Brussels, 31.01.1996.

⁸⁷ See Hirsbrunner, *EuZW* 1998, p. 69-75 and Baron, *WuW* 1997, 579-591 for an in-depth account.

⁸⁸ Broberg, *E.C.L.R.* 2002, p. 430; Ysewyn, *E.C.L.R.* 2002, p. 207.

⁸⁹ Green Paper, fn. 78, par. 57.

3.1.2 Referral System

Furthermore, the Commission's review of the functioning of the Merger Regulation included the referral system under Articles 9 and 22 (3) ECMR. In the Green Paper, a simplification of the currently complex test for referral requests under Article 9 as well as the insertion of a new possibility for the Commission to initiate such referrals are proposed in conjunction with parallel modifications of Article 22 (3).

3.1.2.1 Article 9

The Commission aims to improve the fine-tuning mechanism of Article 9 ECMR by addressing the difficulties arising from the application of its complex referral criteria, the current time schedule and partial referral schemes as well as from certain procedural treatment of referred cases by national competition authorities.

The test for the definition of concentrations to be referred prescribed by Article 9 (2) ECMR should accordingly be maintained only with regard to a facilitated use of lit. (b).⁹⁰ The Member States would not only no longer have to demonstrate the creation or strengthening of a dominant position, but instead only have to show that an alleged effect on competition in a specific Member State - assuming it is a distinct geographic market - does not extend to significant effects in terms of foreclosure, spillover on related markets of greater geographic scope or similar cross-border effects. In addition, the Commission proposes a novelty to the referral scheme in the form of *ex-officio* referrals to the Member States, where the same criteria are fulfilled.⁹¹

Length of deadlines for final decisions, which first begin to run after a referral decision has been made, vary under national laws. The three-week deadline available for submitting requests is considered to be too long, since many requests come at a late stage, where parties already prepare remedy proposals for negotiations with the Commission.⁹² In line with the simplification of referral criteria, this time period should, according to the Green Paper, be shortened to two weeks.⁹³ Furthermore, the Commission proposes an equal treatment of referred cases in procedural terms, either by obliging national competition authorities to adopt decisions within the time limits of the Regulation or, even more far-reaching by obliging them

⁹⁰ *Ibid.*, par. 81 a).

⁹¹ *Ibid.*, par. 81 b).

⁹² *Ibid.*, par. 73.

⁹³ *Ibid.*, par. 81 c).

to examine the referred concentrations in accordance with the rules of the Regulation.⁹⁴

3.1.2.2 Article 22 (3)

In its Green Paper the Commission also proposes to amend the referral mechanism of Article 22 (3) ECMR. In acknowledgment of the declining practical relevance of its original objective, i.e. to fill-in-the-gap for the benefit of Member States without a merger control of their own, due to the proliferation of merger control systems the Commission focuses on the workings of the 1997 amendment.⁹⁵ In this regard, the Commission points to the provision's failure to fulfill the objective of reducing multiple filings, as it had - until the adoption of the Green Paper - not received a single joint request.⁹⁶

The Green Paper proposes a facilitation of the applicable test similar to Article 9 in view of the provision's character as a mirror image. Thus, Member States would no longer have to demonstrate the creation or strengthening of a dominant position by a concentration that does not have a Community dimension in the meaning of Article 1 ECMR. Instead, it would suffice for joint referrals to demonstrate an alleged effect on competition in a specific Member State. In addition, the Green Paper highlights the provision's problems in procedural and operational terms, particularly due to the absence of harmonized rules in the Member States. The provision lacks a legal definition of the triggering event for the one-month request deadline while national notification systems differ significantly and do not provide for uniform provisions on suspension of applicable national deadlines pending a joint referral.⁹⁷

Furthermore, it points to the fact that the referral system would still imply longer overall procedures and uncertainties as compared with the immediate one-stop shop system.⁹⁸ In particular the lack of exclusive Commission competence in cases of joint referrals would present an operational weakness of Article 22 (3), because of potential parallel proceedings.⁹⁹ The Commission is doubtful, whether the provision could be modified to a sufficient extent in order to contribute to a coherent system of case allocation.¹⁰⁰

⁹⁴ Ibid., par. 82.

⁹⁵ Ibid., par. 84 -85.

⁹⁶ Ibid., par. 86.

⁹⁷ Ibid., par. 91-93.

⁹⁸ Ibid., par. 93.

⁹⁹ Ibid., par. 97.

¹⁰⁰ Ibid., par. 98-99.

The Commission invited all interested parties to submit their views on any or all of the specific issues it raised throughout its paper.¹⁰¹

3.2 Comments made by the *Bundeskartellamt*

The German Federal Cartel Office (*Bundeskartellamt*) followed the invitation by the Commission and published its comments on the Green Paper in March 2002.¹⁰² The initial acknowledgment that the European merger control has essentially proved successful is followed by the statement that a fundamental reform is not necessary.¹⁰³

Regarding the allocation of competences between Commission and Member States, the *Bundeskartellamt* emphasizes the importance of a system that provides clear and predictable rules and shares the Commission's assessment of Article 1 (2) ECMR and the 2/3-rule.¹⁰⁴ It does, however, question their authority in view of the fact that the turnover-thresholds have not been adjusted in line with the inflation and annual increase of gross national product.¹⁰⁵

3.2.1 "Mandatory 3+ System"

Commenting upon the proposed revision of Article 1 (3) ECMR the *Bundeskartellamt* opposes the "3+mandatory system" primarily in view of the principles of limited individual authority and subsidiarity.

It argues that the Commission should only become active in the field of competition if the goal of effective protection of competition cannot sufficiently be achieved at the level of Member States.¹⁰⁶ According to Article 1 ECMR this only involves cases of "Community dimension", i.e. those causing significant structural changes whose impact on the market goes beyond the national borders of a single Member State. To replace the current delineation based on specific turnover thresholds with an effects-based test, where the mere triggering of national merger controls in more than two Member

¹⁰¹ Ibid., par. 254 et seq.

¹⁰² Stellungnahme des Bundeskartellamtes zum Grünbuch der Kommission zur Revision der Verordnung Nr. EG 4064/89 des Rates über die Kontrolle von Unternehmenszusammenschlüssen, Bundeskartellamt e/G4 – 3001/93 Bd. 3 / Reply of the *Bundeskartellamt* to the Green Paper of the Commission of the Review of Regulation (EEC) No 4064/89 of the Council on the control of concentrations between undertakings.

http://europa.eu.int/comm/competition/mergers/review/comments/ref037_bundeskartellamt.pdf

¹⁰³ Ibid., p. 1.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., p. 3.

States would suffice, would introduce a weakness to the system in so far as national laws normally do not set high requirements for the application of merger control and thus would *per se* not suffice to guarantee cross-border effects.¹⁰⁷ In line with this argumentation the *Bundeskartellamt* concludes that Commission competence with respect to all cases notified in more than two Member States could only be derived from the subsidiarity principle if the objectives of merger control to prevent the creation or strengthening of market dominance was not being served by the existing practical division of labour to a significant degree.¹⁰⁸ Since this has not been established in the Green Paper, the desire to decrease bureaucratic efforts in the light of multiple filings is subordinate to the aim of effective protection of competition in recognition of the subsidiarity principle.¹⁰⁹ Instead, it suggests to meet the industry's legitimate demands through an increasingly close co-operation of national competition authorities and, moreover, by further recourse to the fine-tuning mechanisms of Articles 9 and 22 (3) ECMR, whose revision to develop into a sufficiently practical form should become the reform's main objective.¹¹⁰

3.2.2 Referral System

Regarding the proposed amendments of the referral system under Articles 9 and 22 (3) ECMR, the *Bundeskartellamt*, in general, supports the suggested measures to facilitate the provisions, but opposes a modification of their legal nature.

3.2.2.1 Article 9

The *Bundeskartellamt* underlines the important role of Article 9 ECMR in view of the great number of cases notified to the Commission, which relate exclusively or largely to national and/or local markets.¹¹¹ Referral to national competition authorities in such cases is, in its opinion, not only preferable because of the closer proximity, but an expression of the subsidiarity principle where the economic and competitive focus is national.¹¹² It welcomes the development of the German clause into a real instrument for decentralisation by simplifying the referral criteria, but demands

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid., p. 5 et seq.

¹¹¹ Ibid., p. 8: The *Bundeskartellamt* assessed 288 Commission decisions in 2000. It became evident from its study that 54 cases (18,75%) affected exclusively national or regional markets. In another 50 cases dealt with in the simplified procedure, the Commission left the market delineation open.

¹¹² Ibid.

limitation of the Commission's broad discretion and disagrees with the introduction of *ex officio* referrals of cases for the Commission.¹¹³ In view of the latter modification it foreshadows a similar application for referrals from Member States to the Commission for consistency's sake. It also disapproves of a shortening of the three-week deadline for submittal of requests relying on the Commission's survey of companies, which regarded the deadline as reasonable and pointing to the time-consuming consultation process.¹¹⁴

The *Bundeskartellamt* objects to both alternative proposals to modify the examination of referred cases in accordance with national law. Questioning the existence of any related problems it opposes the obligation to adopt a decision within the same timeframe as would have applied to the Commission decision.¹¹⁵ Moreover, it strongly objects to base the examination on the provisions of the Merger Regulation by pointing not only to relating practical difficulties, e.g. in view of the procedural provisions being customized for the Commission, but also by generally questioning, the ratio of this idea.¹¹⁶ Finally, it advocates the publication of all Commission decisions referring or refusing to refer a case.¹¹⁷

3.2.2.2 Article 22 (3)

In the opinion of the *Bundeskartellamt* Article 22 (3) ECMR should continue to serve as a fine-tuning instrument to refer cases to the Commission, where competition concerns can be better relieved by the Commission.¹¹⁸ In order to promote more efficient referrals of multiple notification cases which remain within the national jurisdiction of the Member States, such as in the recent *Promatech/Sulzer* and *GEES/Unison* concentrations¹¹⁹, a simplified joint referrals-only system should determine that joint action can also exist if the requests are not filed simultaneously as a result of differing national decision-making.¹²⁰ It proposes to clarify the legal framework with regard to time limits in so far as to calculate the request deadline from the date of receipt of the complete notification and/or of all material information to examine a referral.¹²¹ In addition,

¹¹³ Ibid., p. 8-9.

¹¹⁴ Ibid., p. 10.

¹¹⁵ Ibid., p. 11

¹¹⁶ Ibid., p. 11: "Where the effects of a concentration are focused in a Member State, it is not evident why the strictly national procedures should not be implemented as an effectively recognised investigative system".

¹¹⁷ Ibid., p. 10.

¹¹⁸ Ibid., p. 12 et seq.

¹¹⁹ *Promatech/Sulzer*, [2002] O.J. C 61/04, 8.3.2002; *GEES/Unison*, [2002] O.J. C 72/04, 21.3.2002. Both joint referral requests were submitted by seven Member States and submitted on and around the date of adoption of the Green Paper

¹²⁰ Ibid., p. 12.

¹²¹ Ibid., p. 13.

the Commission's examination deadline should commence upon receipt of the complete notification with information on all affected Member States to clarify the existing uncertain effects of an admissible referral request on national proceedings.¹²²

3.3 Other Responses

The Commission's Green Paper proposals to amend the jurisdictional test as well as the relating referral system in the EC Merger Regulation were commented upon in some 120 replies received from industry, law firms, Member State governments, national authorities¹²³ as well as in the legal literature. Thus, an overview of the responses shall be given.

3.3.1 "Mandatory 3+ System"

While the great majority of responses agree with the Green Paper's finding that the turnover-thresholds in Article 1 (2) ECMR and the 2/3-rule have functioned well and should therefore not be modified, this cannot be said for its proposal of a "mandatory 3+ system". In this regard, the expressed opinions differ significantly.

3.3.1.1 Proponents

The introduction of automatic Community competence over mergers notifiable in three or more Member States is generally welcomed by industry representatives and parts of the legal profession, because of its subsequent efficiency potentials.¹²⁴

In particular, industry representatives opine for this system as the most or only effective way to address the problems of multi jurisdictional filings.¹²⁵ The Federal Association of German Industry

¹²² Ibid.

¹²³ Green Paper on the Review of Council Regulation (EEC) No 4064/89 ("Merger Review") - Summary of the Replies Received.
http://europa.eu.int/comm/competition/mergers/review/comments/summary_publication.pdf

¹²⁴ Ibid., p. 2 et seq.; Arhold, EWS 2002, p. 449; Bartosch/Noltau, EuZW 2002, p. 197 et seq.; Ysewyn, E.C.L.R. 2002, p 207.

¹²⁵ See, e.g. the following replies:

BDI - Bundesverband der Deutschen Industrie

http://europa.eu.int/comm/competition/mergers/review/comments/ref047_bdi.pdf

EVCA - European Private Equity & Venture Capital Association

http://europa.eu.int/comm/competition/mergers/review/comments/ref077_evca.pdf

UNICE- Union of Industrial and Employers' Confederations of Europe

http://europa.eu.int/comm/competition/mergers/review/comments/ref014_wko.pdf

(*Bundesverband der Deutschen Industrie-BDI*), e.g., strongly advocates expansion of the Commission's jurisdiction.¹²⁶ In view of the increasing number of merger controls world-wide and remaining differences among EU Member States it regards an implementation of the "one-stop shop" principle as far as possible as necessary. Since harmonization of national laws in the field of merger control in Europe seem unlikely the establishment of a single authority competent for concentrations having cross-border effects, whether on a Community or national level, would be the only solution.¹²⁷ It welcomes the "mandatory 3+ system" as introducing a model establishing jurisdiction with clear and simple rules, while referrals should only be considered in exceptional cases, where this clear competence rule would be unsuitable.¹²⁸ The *BDI* furthermore demands Commission jurisdiction also in cases, where the concentration is notifiable in only two Member States and opposes the requirement for undertakings to demonstrate that a merger falls within the relating competences, which should be examined *ex officio*.¹²⁹

While positive responses to the "mandatory 3+ system" by legal scholars are based on similar arguments in terms of efficiency, they are made conditional upon further fundamental reform steps.¹³⁰ The inability of any other modification of Article 1 (3) ECMR, further recourse to Article 22 (3) ECMR, or a delineation based on geographical markets - as suggested by the *Bundeskartellamt* - to achieve the objective of efficient case allocation lead to this preference. With regard to the latter, the example of concentrations resulting in foreclosure of markets and thus having a Community dimension is brought forward.¹³¹ However, the difficulties associated with an automatic Community jurisdiction are being recognized. A comprehensive reform of Article 9 ECMR is advocated with regard to the risk of bringing concentrations without a Community dimension into the Commission's competence.¹³² The problem of incorporating legal uncertainty into European merger control due to differing national merger control rules is addressed by a demand of further harmonization of national laws.¹³³

Wirtschaftskammer Österreich

http://europa.eu.int/comm/competition/mergers/review/comments/ref014_wko.pdf

¹²⁶ *BDI*, fn. 125, p. 2 and 4 et seq.

¹²⁷ *Ibid.*, p. 4.

¹²⁸ *Ibid.*, p. 5.

¹²⁹ *Ibid.*, p. 6.

¹³⁰ Arhold, *EWS* 2002, p. 451 et seq.; Bartosch/Noltau, *EuZW* 2002, p. 200 et seq.

¹³¹ Arhold, *EuZW* 2002, p. 451; Bartosch/Noltau, *EuZW* 2002, p. 199 - with the examples of negative Commission decisions in the pay-tv sector: *MSG Media Service*, [1994] O.J. L 364, 1; *Nordic Satellite Distribution*, [1996] O.J. L 53, 20; *RTL/Veronica Endemol*, [1996] O.J. L 134, 32; *Bertelsmann/Kirch/Premiere*, [1999] O.J. L 53, 1; *Deutsche Telekom/BetaResearch*, [1999] O.J. 53, 31.

¹³² Arhold, *EWS* 2002, p. 451; Bartosch/Noltau, *EuZW* 2002, p. 201.

¹³³ Bartosch/Noltau, *EuZW* 2002, p. 200.

3.3.1.2 Opponents

There has, however, been strong opposition to the introduction of a “mandatory 3+ system”. In response to the Green Paper serious concerns over the introduction of legal uncertainty into the Community-wide merger control have been formulated.

The identified difficulties associated with this far-reaching reform proposal range from the complaint of the new notification requirement not being sufficient to indicate Community interest, introducing, in general, an unacceptable amount of legal uncertainty and potential risk of wider applicability than foreseen to procedural and technical difficulties.¹³⁴ Most of those difficulties originate in the different national merger control rules.¹³⁵ An adoption of the proposed reform would fail to meet the stated requirements of effective, efficient, fair and transparent control of concentrations at the most appropriate level.¹³⁶

The broad scope of the new test would extend to cases without a Community dimension, because of national merger control rules triggering jurisdiction on the basis of very low turnover thresholds or without reference to a specific national jurisdictional nexus.¹³⁷ This approach would, moreover, incorporate existing legal uncertainties of current and future Member States’ laws in view of the use of rather ambiguous delimitations, e.g. market share thresholds or the voluntary notification system in the UK.¹³⁸ Another serious disadvantage stems from the great risk that by making the Commission’s jurisdiction conditional upon national merger control schemes, Member States could unilaterally and independently alter the Commission’s jurisdiction.¹³⁹ Considerable practical problems would remain with regard to the undertakings responsibility to assess whether a concentration falls within the competence of three or more Member States and would arguably increase administrative burdens.¹⁴⁰ While there has been some “soft harmonization” of national laws in the field of merger control, harmonization has not gone far enough, particularly not the respective definitions of concentrations or points in time when a concentration becomes notifiable.¹⁴¹ In the absence of sufficient harmonization the “mandatory 3+ system” is therefore being opposed.

¹³⁴ Summary of the Replies Received, fn. 123, p. 3 et seq.

¹³⁵ See in so far the overview of national merger control systems given above at 2.3.2.

¹³⁶ Sinclair, E.C.L.R. 2002, p. 326.

¹³⁷ Bischke/Mäger, EWS 2003, p. 99; Broberg, E.C.L.R. 2002, p. 431.

¹³⁸ Broberg, E.C.L.R. 2002, p. 431; Lampert, WuW 2002, p. 453; Sinclair, E.C.L.R. 2002, p. 328.

¹³⁹ Broberg, E.C.L.R. 2002, p. 431.

¹⁴⁰ Ibid; Sinclair, E.C.L.R. 2002, p. 327.

¹⁴¹ Broberg, E.C.L.R. 2002, p. 431; Lampert, WuW 2002, p. 453.

3.3.2 Referral System

The proposed amendments of the Regulation's referral system under Articles 9 and 22 (3) ECMR have also sparked off different responses.

3.3.2.1 Article 9

While the proposal to facilitate the referral mechanism by simplifying the test for identifying the cases to be referred as well as the subsequent reduction of the request deadline is, generally, being welcomed by Member States, industry, and the legal profession alike, this cannot be said for the other proposed modifications.¹⁴²

In this context, some industry representatives reject the concept of facilitated case referrals in its entirety, unless the Commission would only refer cases to one Member State exclusively, whose respective national competition authority would retain exclusive jurisdiction.¹⁴³ While disapproval of any division of cases under the Regulation's regime is also expressed with regard to partial case referrals, which should in the light of disproportionately high costs and legal uncertainty only be carried out in a very restrictive manner, the application of European merger control law to referred cases is welcomed.¹⁴⁴

Some representatives of the legal profession claim that the facilitation does not go far enough in order to soothe Member States criticism in view of giving up their competences under the "mandatory 3+ system". Even where concentrations have cross-border effects should a request be possible, granted that the center of gravity of the competition concerns lies within the territory of one Member State only.¹⁴⁵ In respect of the currently broad discretion of the Commission it is being suggested, that the Commission should be bound to refer a case if other Member States do not object to the requested referral.¹⁴⁶ Approval of *ex-officio* referrals to Member States is often being made conditional upon the publication of guidelines and decisions in view of the necessity to render the underlying principles more transparent and predictable.¹⁴⁷ In this respect, the Commission is, however, also being criticized for "taking with one hand what it giveth with the other" by the introduction of a much more flexible approach to sending cases back on its own

¹⁴² Summary of the Replies Received, fn. 123, p. 9-10.

¹⁴³ BDI, fn. 125, p. 7.

¹⁴⁴ Ibid., p. 7-8.

¹⁴⁵ Bartosch/Noltau, EuZW 2002, p. 201

¹⁴⁶ Ibid.

¹⁴⁷ Lampert, WuW, p. 455 et seq. ; Sinclair, E.C.L.R. 2002, p. 330.

initiative.¹⁴⁸ In conjunction with the application of European merger control law, the Commission's possibility to discharge itself of the prospective work-load would present a risk of eliminating, once again, the advantages of the reform in terms of costs, time and legal certainty, especially if referrals would not be exclusive.¹⁴⁹

3.3.2.2 Article 22 (3)

While the procedural and operational weaknesses of the referral mechanism under Article 22 (3) ECMR identified in the Green Paper are recognized by most respondents, and facilitating measures thus supported, the opinions differ primarily in view of its potential.¹⁵⁰

In view of the Commission's skepticism concerning the question, whether any amendment could truly encourage more referrals and its' relating tendency towards a joint-referrals only concept, some industry representatives underline the provision's potential to become a more important instrument to reduce number of multiple filings.¹⁵¹ The Commission is being asked to reconsider its assessment, particularly in the light of the upcoming enlargement, and to leave a possibility for requests by only one Member State and to enable joint referrals, where the Member States examinations differ in substance.¹⁵² In the literature, the proliferation of national merger control schemes is perceived as contributing to the diminishing relevance of Article 22 (3) ECMR, which single Member States have only used in events of great affliction in the absence of systems of their own.¹⁵³ The potential of Article 22 (3) ECMR to serve as a means of dealing with multiple filings is being questioned, because of the related delay and legal uncertainty.¹⁵⁴ Nevertheless, the latest joint referrals in the cross-border mergers of *Promatech/Sulzer* and *GEES/ Unison* have raised support for more cooperation between national competition authorities. In view of the "mandatory 3+ system", particularly if in an optional manner, the provision should serve as a corrective and instrument to prevent "forum shopping" by providing for exclusive Commission jurisdiction, where other national competition authorities do not raise any objections.¹⁵⁵

¹⁴⁸ Ysewyn, E.C.L.R. 2002, p. 207.

¹⁴⁹ Arhold, EWS 2002, p. 454.

¹⁵⁰ Summary of the Replies Received, fn. 123, p. 10-12

¹⁵¹ BDI, fn. 125, p. 8.

¹⁵² Ibid.

¹⁵³ Bartosch/Nollau, EuZW 2002, p. 201.

¹⁵⁴ Arhold, EWS 2002, p. 454; Sinclair, E.C.L.R. 2002, p. 327.

¹⁵⁵ Arhold, EWS 2002, p. 454; Bartosch/Nollau, EuZW 2002, p. 202; Lampert, WuW 2002, p. 456 et seq.

3.4 Opinion

The comments made by the *Bundeskartellamt* were not merely an opinion given by a national authority upon the Commission's invitation to submit comments, but rather a harsh, publicly expressed critique of the Commission's Green Paper denying the necessity of a fundamental reform of the European merger control, and opposing the proposed reform of the jurisdictional test. And while they can be explained as an expression of a natural defense reaction to protect its competences and subsequent *raison d'être* to some extent, it is questionable, whether they could be justified on the rationale that the reform would lead to an unreasonable loss of its competences or not.

The *Bundeskartellamt* disregards the need to reduce the number of multiple filings, because it has not determined any grounds for assuming any actual multiple notification problems in its practice and therefore opines for delineating jurisdiction alongside the lines of geographical markets. However, its evaluation of multi jurisdictional filings does not come as a surprise as it concerns only its very own experiences with cases notified to it, while concentrations resulting in foreclosure of markets inhibiting investors from other Member States demonstrate that national competition authorities are not per definition better qualified to review concentrations on national or geographically limited markets. But even though its findings concerning the reform's objective to reduce the number of multiple filings has to be disagreed with, it is doubtful, whether the proposal of a "mandatory 3+ system" is to be welcomed. In this context, the high degree of legal certainty of the current jurisdictional tests provided for in the Merger Regulation must, once more, be underlined.

While the new rules introduced in Article 1 (3) ECMR evidently did not suffice to expand the Commission's jurisdiction to merger cases involving undertakings in at least three Member States, the recourse to turnover thresholds in those Member States was, and is, an important feature. A mere reference to notifications under national law as proposed in the Green Paper would, on the contrary, introduce a relatively unrefined test, which could not guarantee to demonstrate the existence of a Community interest. It would entail an unacceptable amount of legal uncertainty with regard to differing national merger control schemes and also the potential risk of "forum shopping". As has been demonstrated distinctly, while the need for a significant reduction of the number of multi jurisdictional filings is not to be questioned, the pursuit of this objective cannot prevail over the associated difficulties. The risks of losing a clear delimitation of jurisdiction based solely on thresholds to a system, which could ultimately even lead to the determination of jurisdiction under the Merger Regulation through judicial review by bodies of national merger control or national courts are too high to accept. The

subsequent loss of national competition authorities' competences would be unreasonable.

Also, in view of the proposed amendments of Articles 9 and 22 (3) ECMR to facilitate use of the referral system it is questionable, whether they present steps into the right direction or entail an unreasonable loss of national competition authorities' competences.

The simplification of the test to implement the fine-tuning mechanism in Article 9 is to be agreed with. Also, the subsequent reduction of the relating request deadline appears reasonable. But only if the provision is to remain a real instrument for decentralisation in expression of the subsidiarity principle and not subjected to a fundamental alteration of its legal nature, according to which it would provide for the decentralized application of EC merger control law on the Commission's initiative. This is not only true in recognition of the apparent logic to, generally, apply national law to concentrations whose competition concerns have their centre of gravity on a single national market, but also because it would, thereby, contradict the reform's objectives. Even though the Commission's attempt – expressed in a single sentence of the Green Paper - to enable itself to diminish the expected work overload caused by the “mandatory 3+ system” is understandable in the light of its scarce resources, it is more than questionable to introduce *ex officio* referrals. This approach would only weaken the initial pursuit of providing for a coherent system. Furthermore, the Commission's discretion ought to be limited, where other Member States do not object to a referral request. A corresponding provision in the Merger Regulation would increase legal certainty not only for the companies involved, but also for the national competition authorities.

Regarding the proposed amendment of Article 22 (3) ECMR, the Commission's aim to preserve and facilitate the use of a specific provision for multiple notifications for which competition-related problems can only be solved uniformly for all Member States involved seems reasonable. Increased co-operation of the national competition authorities has enabled affected Member States to jointly refer the *Promatech/Sulzer* and *GES/Unison* cases to the Commission. Simplification of the relevant test – parallel to the one of Article 9 - is thus being welcomed, since further recourse to the provisions could serve a relationship of equal partners rather than one of subordination between the Commission and national competition authorities.

4 THE COMMISSION'S PROPOSAL

Following one year of consultation and debate on the Green Paper the European Commission published its Proposal for a Council Regulation on the control of concentrations between undertakings along with an Explanatory Memorandum on December 11, 2002.¹⁵⁶ The fundamental character of the reform is reflected by the fact that the proposed new EC Merger Regulation is supposed to replace both the current Merger Regulation and the amending Regulation.¹⁵⁷ Thus, the reform process has come to a critical point. The relating revision proposals aim to optimize the allocation of cases between the Commission and national competition authorities and to reduce the number of multi jurisdictional filings, in line with the principle of subsidiarity.¹⁵⁸

In this chapter, the Commission's latest proposals to reform the Merger Regulation shall be presented and subjected to a critical review in light of the question, whether it would entail an unreasonable loss of national competition authorities' competences.

4.1 Dismissal of the "Mandatory 3+ System"

Regarding the comments received after the adoption of the Green Paper, the Commission decided not to pursue its prior proposal of providing for exclusive Commission jurisdiction over all merger cases that are notifiable in at least three Member States any further.¹⁵⁹

Commenting upon the feedback Competition Commissioner Mr. Mario Monti acknowledged already in June 2002 the validity of some of the potential drawbacks associated with the proposed "mandatory 3+ system", in particular in view of the legal uncertainties it might bring about.¹⁶⁰ In its memorandum the Commission admits that this system would not have provided the initially perceived advantages of being simple, clear and legally certain.¹⁶¹ The requirement to notify in three or more Member States would not be a sufficient indication of the existence of Community interest whilst the system would

¹⁵⁶ Proposal for a Council Regulation on the control of concentrations between undertakings, COM (2002) 711 final, Brussels, 11.12.2002.

¹⁵⁷ Explanatory Memorandum, fn. 156, par. 6.

¹⁵⁸ Ibid., par. 8-10.

¹⁵⁹ Ibid., par. 13 et seq.

¹⁶⁰ Monti, Mario, *Review of the EC Merger Regulation – Roadmap for the reform project*, Speech at the British Chamber of Commerce – Brussels, June 4, 2002.

http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/02/252|0|AGED&lg=EN&type=PDF

¹⁶¹ Explanatory Memorandum, fn. 156, par. 13.

introduce unacceptable legal uncertainty.¹⁶² In response to other comments received it also dismisses the idea of an “optional 3+system”, because it would retain many of the disadvantages and, moreover, at the same time be more complex.¹⁶³ However, in evaluating the feedback, Mr. Monti also underlined the strong support to render the mechanism for case allocation more effective and to tackle the phenomenon of intra-EU multi jurisdictional filings by modifying the referral mechanisms.¹⁶⁴ Thus, the Commission dismisses the “mandatory 3+ system” and instead proposes to facilitate the referral system, while at the same time rendering it more flexible.

4.2 System of Streamlined Referrals

It is against this background that the Commission draws the conclusion that the most effective way of meeting the two key objectives of the reform, i.e. optimal case allocation and reduction of multiple filings, could be achieved through a more streamlined system of referrals.¹⁶⁵ Accordingly, the proposal is based on enhanced recourse to the referral schemes provided for in Articles 9 and 22 ECMR, including their improvement and use at a pre-notification stage, in order to serve as an effective means of fine-tuning the allocation of cases brought about by the turnover thresholds of Articles 1 (2) and (3) ECMR.¹⁶⁶

Applicability of Articles 9 and 22 ECMR at a pre-notification stage at the request of the parties is provided for in the proposed new Article 4 (4) and (5).¹⁶⁷ Moreover, improvement of the requirements for referrals, including a closer alignment of the respective criteria, is being accompanied by the possibility to confer exclusive jurisdiction on the Commission in cases of referrals made under Article 22 and the Commission’s formal right of initiative to invite Member States to make referrals under Articles 22 or to request referrals under Article 9.¹⁶⁸

4.2.1 Applicability at a Pre-Notification Stage

The most significant novelty among the Commission’s proposals is the applicability of Article 9 and 22 ECMR at a pre-notification stage at the request of the notifying parties.

¹⁶² Ibid., par. 14-15.

¹⁶³ Ibid., par. 16-17. Compare in this context: Lampert, WuW 2002, 449-458.

¹⁶⁴ Monti, fn. 160.

¹⁶⁵ Explanatory Memorandum, fn. 156, par. 18.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid., par. 19.

¹⁶⁸ Ibid.

The Commission found the fact that the current referral schemes only allow for requests to be made after a merger has been notified to the respective competition authority to be the principal drawback in view of the related substantial loss of time, significant amount of administrative burdens and subsequently high costs for the merging companies.¹⁶⁹ Thus, the merging parties should be given the exclusive right of initiative to make a reasoned request for pre-notification referrals in recognition of their better knowledge of their merging plans at this early stage of procedures.¹⁷⁰ The Commission underlines the precision of this system as a clear advantage over the relatively crude alternatives of turnover or “3+ systems” tests by providing a “two-way approach” to broaden access to a “one-stop shop” in order to reduce legal uncertainty and costs for the merging parties.¹⁷¹ Regarding prior concerns expressed by industry representatives about a more extensive use of the referral mechanism, it points to the fact that the skepticism related to the model of post-notification referrals and therefore deems them to be overcome by pre-notification use initiated by the merging parties.¹⁷²

A new Article 4 should provide for this new referral mechanism whilst the Commission would, according to new Article 23 (1) lit. (a) and (b), have the power to lay down implementing provisions and a revision clause would be inserted in Article 4 (6).¹⁷³

4.2.1.1 Referral to National Competition Authorities, Article 4 (4)

According to the proposed Article 4 (4) the parties to the merger or those acquiring joint control could prior to the notification of a concentration inform the Commission, by means of a reasoned submission, that the concentration, which as such has a Community dimension within the meaning of Article 1, only affects competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

Following the Commission’s transmittal of this submission to all Member States without delay, the Member State concerned shall, within 10 working days of receiving the submission, express its agreement or disagreement. Where the Member State concerned

¹⁶⁹ Ibid., par. 22.

¹⁷⁰ Ibid., par. 19, 23, 25, 29 and Recital 14 of the Proposal.

¹⁷¹ Ibid., par. 29.

¹⁷² Ibid., par. 30.

¹⁷³ Article 4 (6) provides for a revision of the new schemes at the time of the report on the operation of the thresholds and criteria of Article 1 (2) and (3) provided for in Article 1 (4), i.e. before July 1, 2007.

disagrees, no referral will be made. Where it agrees, in this context also non-opposition shall be deemed as an agreement, the Commission may decide to refer the whole or part of the case, granted that it considers that such a distinct market exists, and will be affected by the concentration. Hereafter, the competent national competition authority applies, in accordance with Article 9 (8), its respective national competition law. If the Commission refers the case in its entirety, no parallel notification shall be made. The decision shall be taken within 20 working days starting from the receipt of the reasoned submission by the Commission. Otherwise it shall be deemed to have adopted a decision according to the submission.

4.2.1.2 Referral to the Commission, Article 4 (5)

Conversely, in early application of Article 22, the proposed Article 4 (5) would provide for the parties concerned to inform the Commission prior to the notification of a concentration by means of a reasoned submission that the concentration, which as such has no Community dimension, has nevertheless significant cross-border effects and should therefore be examined by the Commission.

Following the Commission's transmittal of this submission to all Member States without delay, the Member State or States concerned shall, within 10 working days of receiving the submission, decide whether or not to request the Commission to examine the concentration. During this time no notification of the concentration shall be submitted to the Member State or States concerned. Again, where a Member State takes no such decision within this time limit, it shall be deemed to have adopted a decision to make such a request to the Commission. Where all the Member States concerned, or at least three such Member States, have requested the Commission to examine the concentration, the concentration shall be deemed to have a Community dimension and shall be notified - exclusively - to the Commission. But even in the absence of such requests, the Commission may, at the latest 10 working days after the expiry of the time limit for the Member States, decide to examine, in accordance with a request received pursuant to this paragraph¹⁷⁴, any concentration which it regards as having significant cross-border effects. Where the Commission has not taken a decision within this period it is deemed to have adopted a decision to examine the

¹⁷⁴ While the wording in the English text is imprecise, because it is not clear, whether a "request received pursuant to this paragraph" means the undertakings initiative or requires at least one Member State to have forwarded a request, the wording of the German "auf der Grundlage eines Antrags im Sinne dieses Absatzes" and French "lorsqu'elle est saisie d'une demande présentée conformément à ce paragraphe", texts suggest an interpretation with the former meaning.

concentration. Following a positive decision, it may request the submission of a notification pursuant to paragraphs 1 and 2. Furthermore it is provided that the Member State or States having made the request to the Commission shall not apply their national legislation on competition to the concentration.

4.2.2 Improvement of Articles 9 and 22

In order to provide for an effective means of fine-tuning the allocation of cases the Commission's proposal furthermore entails the simplification and improvement of the substantive criteria in Articles 9 and 22 of the new Regulation whilst aligning them at the same time.

4.2.2.1 Article 9

With regard to the German clause of Article 9 ECMR the Commission proposes to facilitate referral requests made by Member States to the Commission by modifying the current wording of its paragraph (2) lit. (a) whilst leaving lit. (b) unaltered.¹⁷⁵ Under the newly proposed Article 9 (2) lit. (a) Member States would no longer have to demonstrate the creation or strengthening of a dominant position, but instead only have to show that a concentration significantly affects competition on a market within that Member State, which presents all the characteristics of a distinct market. Hence, national authorities would be relieved of the presently complex competitive assessment of the case, which would save time.¹⁷⁶ The proposed Article 9 (2) therefore stipulates that a request may only be made within 10 working days of the date of receipt of the copy of the notification.

4.2.2.2 Article 22

Conversely, the Commission proposes a facilitation of the applicable test of Article 22 similar to the one in Article 9 in view of the provision's character as a mirror image. According to the proposed Article 22 (1) one or more Member States would no longer have to demonstrate the creation or strengthening of a dominant position by a concentration that does not have a Community dimension in the meaning of Article 1, but merely its affection of competition within their territories. In addition to the provision of a legal definition of the triggering event for the request deadline, determining the date on which the concentration was notified, or if no notification is required,

¹⁷⁵ Explanatory Memorandum, fn. 156, par. 20.

¹⁷⁶ Ibid.

otherwise made known, it is furthermore shortened to 20 working days.

The procedure proposed in paragraph 2 is similar to the one provided in Article 4 (5). The Commission then informs the competent national authorities without delay and hereafter any other Member State may join the initial request within a period of 20 working days, during which time all national procedures relating to the concentration shall be suspended. Again, a non-opposition procedure is being provided for. An important novelty included in proposed paragraph 3 would provide exclusive Community jurisdiction where all, or at least three, Member States with jurisdiction under their national rules decide to refer a case to the Commission.¹⁷⁷ In all other cases, the Commission may, at the latest 10 working days after the expiry of the 20 working days deadline of paragraph 2, decide to examine, any concentration which it regards as having significant cross-border effects following a referral request, while it shall be deemed to have adopted a decision to examine the concentration if it has not taken a decision within this period.

Finally, the Commission's proposal would introduce express provisions to enable it to invite a Member State or Member States to make a referral request pursuant to the mechanism laid down in Articles 9 and 22 of the Merger Regulation, after a case has been notified.¹⁷⁸ In accordance with the proposed Article 4 (4) and (5) the Commission would, at a pre-notification stage, be restricted to transmittal of the request by the merging parties.¹⁷⁹

4.3 Responses

Even though the core of the debates and negotiations during the final stage of the reform process until the adoption and prospective date of effect of a new EC Merger Regulation will take place behind closed doors, there have been some public responses which may indicate the path for this final stage.

4.3.1 Assessment by the *Bundeskartellamt*

The President of the *Bundeskartellamt*, Mr. Ulf Böge, has generally welcomed the latest Commission proposal, because it would introduce several improvements to the current Regulation and has not raised any objections to the proposed right of initiative for the

¹⁷⁷ Ibid., par. 26.

¹⁷⁸ Ibid., par. 28.

¹⁷⁹ Ibid.

notifying parties at a pre-notification stage.¹⁸⁰ However, the *Bundeskartellamt* expressed serious concerns over the non-opposition procedures.¹⁸¹

In particular in view of the automatism inherent in the proposed referral mechanism to the Commission, where Member States do not take a decision within the 10 working days time limit following the referral initiative of undertakings is regarded as unacceptable, since it would make referrals possible without any examination - simply because of national competition authorities' work-overload or their disregard of a certain case.¹⁸² Böge also criticizes the proposed automatism where the Commission fails to take a negative decision on a referral request within 10 working days, because the functioning of merger control relies on examinations which are being carried out at the most appropriate level in line with the principle of subsidiarity.¹⁸³ Thus, an examination by the competent competition authorities should always be mandatory for a referral, while a time limit of 10 working days is held to be insufficient for a thorough examination.¹⁸⁴ In this context the German government expects that the non-opposition procedure will not remain as it stands and Mr. Böge predicts opposition from other Member States, among them also larger ones, who have sided with the German position.¹⁸⁵

4.3.2 Other Responses

From the industries perspective the dismissal of the "mandatory 3+ system" and mere modification of the referral system appears to be a step backwards in the reform process in view of the need to reduce the number of multiple filings.

While the *BDI* generally supports the facilitation of the referral mechanisms it expresses its regrets that the Commission could not resist opposition from Member States and national competition authorities to introduce a mandatory or optional "3+ system" and is doubtful, whether the latest proposals could reduce the number of multiple filings as effectively.¹⁸⁶ Regarding the proposed right for undertakings to initiate referrals at a pre-notification stage of the proposed Article 4 (4) and (5), concerns over the potential scope of

¹⁸⁰ Böge, Ulf, "*Monti ist immer für eine Überraschung gut*", Interview with the *Frankfurter Allgemeine Zeitung*, December 13, 2003, Nr. 290, p. 15.

¹⁸¹ *Frankfurter Allgemeine Zeitung*, December 11, 2002, Nr. 288, p. 11.

¹⁸² Böge, fn. 180.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*; *Frankfurter Allgemeine Zeitung*, December 12, 2002, Nr. 289, p. 14.

¹⁸⁶ *BDI*, Stellungnahme zur Reform der europäischen Fusionskontrolle, March 14, 2003. http://www.bdi-online.de/BDIONLINE_INEAASP/iFILE.dII/XCACB453487B842C6AC89D71471177F075/2F252102116711D5A9C0009027D62C80/PDF/neu%20!!!14.3.03%20Positionsp%20FKVO.PDF

the “reasoned submission”, which should require significantly less details than an ordinary notification, are expressed.¹⁸⁷ It welcomes the shortening of the deadlines and the non-opposition procedures, but demands to exclude a later application of Article 9, where the Commission’s jurisdiction originates from a pre-notification initiative.¹⁸⁸ Commenting upon the Commission’s efforts to generally enhance recourse to the referral system of Articles 9 and 22 the *BDI* disagrees with the desire to increase the number of referrals pointing to the legal uncertainties, delays and financial burdens associated with such referrals, in particular in cases of partial referrals.¹⁸⁹

Responses to the Commission’s latest proposals in the legal literature have focused on the Commission’s efforts to balance the conflicting interests by making the allocation of cases at the most appropriate level and not only the reduction of multiple filings a true key objective of the reform following the consultation process of the Green Paper.¹⁹⁰ In this context it has also been pointed out that the pressure on the Commission to reform increased as a consequence of the European Court of First Instance judgements which overturned on appeal its negative decisions in *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*.^{191 192}

The dismissal of the “mandatory 3+ system” and its related alternatives is welcomed in view of the disadvantages associated with it while the facilitation of the referral system under Articles 9 and 22 in addition to the more flexible pre-notification schemes is generally being agreed with.¹⁹³ In assessment of the Commission’s efforts to balance differing interests, it is being acknowledged that the Commission in its proposal to amend Article 9 ECMR gave up the idea to introduce *ex officio* referrals, leaving merely a possibility to invite Member States to request a referral.¹⁹⁴ Also, the fact that the more far-reaching proposals to apply the rules of the Merger Regulation to cases referred or to align time limits in accordance with those rules have not made it into the latest proposal have been noticed.¹⁹⁵ Nevertheless, the Commission also withstood demands to limit its own discretion or to provide for exclusive jurisdiction of the Member State to which a case would be referred.¹⁹⁶ It is furthermore

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Bartosch, BB 2003, Beilage 3, p. 4-5; Klees, EuZW 2003, p. 197, 200.

¹⁹¹ Case T-342/99 *Airtours plc v Commission*, 6 June 2002, [2002] E.C.R. II-02585; Case T-310/01 *Schneider Electric SA v Commission*, 22 October 2002, [2002] E.C.R. 00000; Case T-05/02 *Tetra Laval BV v Commission*, 25 October 2002, [2002] E.C.R. 00000. See in this context: Ehlermann/Völcker, EuZW 2003, p. 1.

¹⁹² Bischke/Mäger, EWS 2003, p. 97 and 99 et seq.; Klees, EuZW 2003, p. 197;

Ryan, Competition Policy Newsletter 2003, p. 9.

¹⁹³ Bartosch, BB 2003, Beilage 3, p. 4.

¹⁹⁴ Klees, EuZW 2003, p. 199.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

being pointed out that the exclusive jurisdiction of the Commission following Article 22 referrals is still limited to specific instances and that the objective to establish a system of case allocation in which only one authority would be competent to examine a case is still far from having been reached.¹⁹⁷ The Commission's proposal is furthermore being criticized in terms of the Commission's remaining discretion to decide upon referrals in both directions.¹⁹⁸ Since the relationship between the Commission and Member States should be understood as one of cooperation on an equal level it should be provided that the discretion to refer cases within the means of Article 9 and 22 should lie with the respective authority having the original jurisdiction.¹⁹⁹ While the Commission's discretion to refer cases having a Community dimension stipulated in the proposed Article 4 (4) is thus correct, this cannot be said for the one in the proposed Article 4 (5) and, instead, a bound decision to refer a case where at least three Member States have requested it is being suggested.²⁰⁰

4.4 Opinion

The Commission's Proposal for a new EC Merger Regulation has been commented upon by the *Bundeskartellamt* in a rather reserved tone. The latest proposals to achieve, first, optimal case allocation and, secondly, a reduction of multiple filings through a more streamlined system of referrals can no longer be opposed with argumentation based on an accusation of wrongful centralization. It is questionable, whether the latest proposals would entail an unreasonable loss of national competition authorities' competences.

By allowing referrals to be made at the pre-notification stage whilst giving the notifying parties the exclusive right of initiative to request a referral of the case in either direction, in addition to a general improvement and facilitation of the referral schemes, the Commission surprisingly introduced a new reform approach. And while the fact that both Articles 1 (2) and (3) ECMR would remain unaltered in the new Regulation is somewhat awkward in light of the Commission's prior findings, the dismissal of the "mandatory 3+ system", and related alternatives, had to be expected after the justified opposition to it. It is, nevertheless, astonishing how the reasoning underlying the dismissal of the Commission's former central reform idea resembles the line of argumentation brought forward by the *Bundeskartellamt* in its reply to the Green Paper. That the Commission even shifted its objectives accordingly, setting the objective to optimize the allocation of cases so they could be dealt with at the most appropriate level

¹⁹⁷ Ibid., p. 199-200.

¹⁹⁸ Bartosch, BB 2003, Beilage 3, p. 4.

¹⁹⁹ Ibid.

²⁰⁰ Ibid., p. 4-5.

before the one to reduce the number of multiple filings also indicates that it caved in to the national competition authorities concerns.

In general, the Commission deserves merits for the proposed schemes, which provide the necessary flexibility to ensure that cases are dealt with at the most appropriate level by an enhanced recourse to a streamlined referral system, because it guarantees a substantial degree of legal certainty. Situations of deadlock would be prevented because the requests would have to be assented to by both the Commission and respective national competition authorities within reasonably short deadlines. However, the proposals are not flawless. It is correct to seriously question the Commission's attempt to maintain its broad discretion over referral decisions in both directions. This does not complement its "two-way approach" in a relationship of equal partners. The examination of referral decisions should lie with the respective competent authority. Thus, the automatism of the proposed system cannot entirely be justified by efficiency concerns. Non-opposition procedures have to be carefully applied and should not result in the Commission's jurisdiction in the absence of examination.

Access to the "one-stop shop" would be broadened. And even though it is legitimate to question, whether the right to initiate referrals at a pre-notification stage could truly compensate for the dismissal of the "mandatory 3+ system" from the industries perspective, legal certainty must prevail over a flawed system, which would instantly decrease the number of multiple filings. It is equally admitted that it is doubtful whether companies would actually make use of such a system where it is foreseeable that Member States would disapprove of a referral to the Commission and that the referral system implies longer overall procedures and uncertainties as compared with the immediate "one-stop shop" system. But the possibility to initiate referrals at a pre-notification stage still gives the merging parties an improved and broader access to the "one stop shop" in view of the problems associated with multi jurisdictional filings as is currently available. It needs to be borne in mind that the one-stop shop principle does not only envision cases to be dealt with by the Commission, but entails transactions which come into the exclusive jurisdiction of a single competition authority, whether on the Community or on the national level. The subsequent benefits of reduced costs and administrative burdens for the merging parties and, as a matter of fact, also for the resources of public authorities, are maintained in both scenarios.

The latest proposals to reform the delimitation of jurisdiction between the Commission and the national competition authorities would, except for the examples given above, not result in an unreasonable loss of national competition authorities' competences. A significant amount of influence in the European merger control would remain in

their authority, but at the same time they would be challenged to exercise it properly. It is admitted that the proposals will not achieve an *ad hoc* reduction of multi jurisdictional filings desirable in view of the economic realities. But they lay the ground for it in view of the political realities. The proposals are welcomed, because they aim at fostering closer cooperation in the delineation of competences between the Commission and national competition authorities, thus promoting a relationship of equal partners. This is to be appraised, simultaneously, as the correct way to build trust in each other. Consequently, the national competition authorities' trust in the European Commission will lead to greater competence of it in the control of European mergers and acquisitions in recognition of the importance of centralized regulation. Therefore the latest step appears to be the most promising of the reform process.

4 CONCLUSION

The EC merger control system is currently on the verge of its most fundamental revision since it came into force twelve years ago. Among the many proposed amendments, the ones relating to delimitation of jurisdiction between the Commission and the national competition authorities form the core part of the reform. This question of delimitation of jurisdiction has presented the most controversial issue ever since the adoption of European merger control legislation.

The particular sensitivity of merger control has been reflected by national governments' reluctance to cede broad control to the European Commission in view of a perceived discretion to pursue industrial policy agendas since its adoption and throughout the development of European merger control. On the one side, the industry lobbied for an expansion of the Commission's jurisdiction in the hope of facilitation of transaction procedures, an approach also advocated by the Commission, thereby increasing its influence. On the other, Member States opined according to their size, with the larger ones opposing any loss of national competences and the smaller ones, at the time either without a control system of their own or with one of minor importance, for an increase of the scope of application of the Regulation. At the same time, national competition authorities have generally been concerned about losing their competences. The same scenario, in particular with regard to the *Bundeskartellamt*, can be observed in the context of the latest reform process.

Following the publication of the Green Paper the *Bundeskartellamt* fiercely opposed the Commission's reform proposals. The introduction of automatic Community competence over cases subject to notification in three or more Member States in order to reduce the number of multiple filings would have resulted in a tremendous increase of the Commission's competence. And while the concurrent loss of national competition authorities' competences *per se* would not have justified the disapproval of such centralization the legal uncertainty associated with it did. The "mandatory 3+ system" or similar alternatives would have resulted in an unreasonable loss of national cartel authorities' competences in view of the numerous difficulties associated with it. Likewise, the far-reaching proposals for Article 9 ECMR to decentralize the application of EC merger control law on the Commission's initiative posed an unreasonable interference with those competences.

The Commission shifted its objectives with the adoption of its Proposal for a new EC Merger Regulation. The introduction of a system of streamlined referrals in order to, first, optimize case

allocation, and, secondly, to reduce the number of multiple filings, is a step in the right direction – though, admittedly, a careful one. While it is not flawless, this “two-way approach” promises to be a success in terms of improving the delimitation of jurisdiction by preserving a substantial legal certainty. Reasonable use of the right to initiate referrals at a pre-notification stage could serve as an important instrument for undertakings to reduce the number of multi-jurisdictional filings. An unreasonable loss of national competition authorities’ competences can, in general, not be identified. Instead, the latest proposals to reform the delimitation of jurisdiction between Commission and national competition authorities would increase the cooperation between the authorities on the Community and national level in the delineation of competences, thus promoting a relationship of equal partners. In view of the prospective building of trust, through this system of co-determination, broader access to the “one-stop shop” will be feasible. Consequently, the national competition authorities’ trust in the Commission will lead to greater competence of it in the control of European mergers and acquisitions in recognition of the importance of centralized regulation. Therefore the latest step appears to be the most promising of the reform process.

The reform of the EC Merger Regulation has come to a critical stage with the adoption of the Commission’s proposal for a new Council Regulation. After this latest step in the reform process, the Commission faces the difficult task of winning the Member States’ approval. The Commission would like the new EC Merger Regulation to come into effect on May 1, 2004, the prospective date of the next enlargement of the European Union. In accordance with Article 308 EC (*ex Article 235 EC Treaty*) the Council shall act unanimously on the Commission proposal after consultation of the European Parliament. It is certain that the new EC Merger Regulation will not resemble the proposal in all aspects. At present, the reform process is still on-going. However, it appears relatively safe to say that the reform will not result in an unreasonable loss of national competition authorities’ competences.

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