"The interaction between the Commission and Small Member States in Merger Review"

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Ladies and Gentlemen,

I am delighted to be here today in Dublin and to have the opportunity to make this opening address, etc

Introduction - a decade of merger control in Europe

In 1989, the EU's Council of Ministers adopted for the first time a legal instrument enabling the European Commission to scrutinise proposed large cross-border mergers in order to assess their impact on competition within the European Community. In the thirteen years that have gone by since the entry into force of the Merger Regulation in September 1990, the Commission has taken over two thousand decisions in merger cases. A large body of case law in the form of both Commission decisions and Court judgments has been built up. The ECMR has proved to be a highly effective instrument for merger control, enabling the Commission to shape an efficient, transparent and highly effective merger control policy. Moreover, I believe that - 13 years on - it is fair to say that the broad lines of the Commission's merger control policy are now clear.

Part of that policy involves maintaining strong ties throughout our investigations with Member States' competition authorities. I feel that the Commission and the Member States have a good record of mutually beneficial co-operation under the current Merger Regulation. This co-operation is absolutely vital to our work as I hope to show you in more detail later. One of the aims of the merger review process currently under way is to build upon and strengthen that co-operation.

The proposals which the Commission made last year are currently under discussion within the Council and the European Parliament. Some of these proposals involve the jurisdictional and procedural rules governing this co-operation between the Commission and the Member States. We believe that it is important to build upon and

strengthen the existing level of co-operation with Member States. This current exercise is the first radical appraisal of the EU Merger Regulation since its adoption in 1989. The aim is to ensure that we obtain a framework capable of facing up to the challenges of the next decade. I would emphasise that the philosophy we started with in 1989 – an open and transparent system developed in dialogue with business - remains at the cornerstone of our policy.

Co-operation with Member States – A Few Preliminary Remarks

There are several aspects to this co-operation between the Commission and Member States in the course of the merger review procedure: the *first* of these is the question of case allocation – i.e. within the EU which authority is best placed to deal with the case? The *second* aspect, which is closely linked to the first, is the question of geographic market definition – which geographic area should form the basis for the analysis of the case?. The *third* aspect of this relationship is the close and constant liaison with Member States that occurs throughout the merger control procedure. I propose to look in more detail at each of these aspects.

Before doing so I think it is important to emphasise that the procedural and jursidictional rules governing co-operation between the Commission and Member States are the same for all Member States regardless of their relative size or importance. Within a Community of 15 Member States - soon to become 25 - all Member States 'have their own importance'[1].

Market Definition – An Issue for Small Countries?

Which was more important?
……I made the Iliad from such
A local row

One of the most important tasks in any merger investigation is to identify the area within which which competition takes place. This area can be world-wide, European, regional, national or local. Some criticism has been made in recent years and in particular in the Nordic countries, of the way in which we define markets in small countries. The basis of this criticism seems to be that if we define markets as national in small countries this will prevent or at least impede the indigenous industry from reaching the critical mass necessary to compete at European or world level. Before answering this criticism let me first explain how we go about defining markets under the Merger Regulation.

The main purpose of defining a market is to identify the competitors of the merged undertaking that are capable of constraining its behaviour. This involves identifying the area where the "conditions of competition are suffciently homogenous and which can be distinguished from neighbouring areas because in particular conditions of competition are appreciably different in those areas". In order to make this identification there are various elements which the Commission takes into account.

[1] *Epic, P. Kavanagh,*

Factors such as national preferences or preferences for national brands, culture and life style and the need for a local presence are all very relevant. Barriers to entry and switching costs for companies located in other areas are also very relevant. Perhaps the most important barrier for a customer, and particularly for Irish customers, might be the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. Physical geography – which is also relevant for Ireland – can also impact on transport costs and therefore on the scope of the relevant geographic market.

We have answered the criticism I mentioned above by pointing to our objective which is to identify competitive constraints on the merging companies. When national companies do not face serious competitive constraints from abroad the market can only be defined as national. Merger control is about protecting the competitive process in the market and aims at ensuring consumers a sufficient choice of products at competitive prices. By preventing a merger from creating a dominant position in a small country the Commission protects the customers who live there. Our job is to ensure that consumers in all countries regardless of their size enjoy a high degree of protection from dominant suppliers. If we were to do otherwise – this could in effect lead to discrimination between consumers in small countries and those in larger countries.

Case Allocation between the Community and the Member States

'Here is the march along these iron stones'

EC Merger Regulation – Exclusive Jurisdiction

The question of which authority deals with the case has quite important consequences for the companies and also for the Member States involved. Among other things this is because the EC Merger Regulation is based on the concept of exclusive jurisdiction; that is to say, a merger is to be reviewed either at the Community level or at the national level. A parallelism of jurisdiction does not exist[2]. Moreover, the Commission and national competition authorities do not apply the same substantive and procedural rules. Whilst the Commission reviews mergers falling within its own jurisdiction on the basis of the Merger Regulation, the national competition authorities apply their respective national legislation to mergers falling within their jurisdiction; they do not apply the Merger Regulation[3].

Turnover– related Criteria

Community jurisdiction in the field of merger control is defined by the application of a matrix of turnover-related criteria contained in Articles 1(2) and 1(3)[4] of the Merger Regulation. A division of jurisdiction between the Community and national levels based on objectively-determinable criteria of this kind is designed to ensure that

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2 Article 21(1), (2) and recital 29 of Council Regulation (EEC) No 4064/89.

3 Article 21(1), (2) of the current Merger Regulation.

4 The jurisdictional criteria set out in Article 1(2) were supplemented in 1997 by a more complex set of criteria designed to catch transactions not caught by Article 1(2) but nonetheless having a significant cross-border impact.

merging firms have a high degree of legal certainty about which transactions will benefit from the "one stop shop" and which will not[5]. By contrast, the division between the application of Articles 81 and 82 EC Treaty and their national law equivalents is determined by application of the notion of an "effect on trade between Member States".

"Local" or "Distinct" Markets

However local or regional markets may cause competition problems which the criteria and procedures of the Regulation may not address. The test in Art. 2 is compatibility with the Common Market. What is prohibited is the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it. However cases may arise where a concentration with a Community dimension may be acceptable when measured against the test in Article 2 but may nevertheless present problems at local level. It was to deal with these "local difficulties", which in Community terminology are termed "distinct markets", that the procedure in Art. 9 was introduced. Thus where the Member State considers that there is such a distinct market it may request a referral of the case for review by its own competition agency.

Ireland made its first request under this provision last year in relation to a proposed joint venture between Allied Irish Banks and Bank of Ireland[6]. However the parties decided to withdraw their notification just some few days before the Commission was due to take a decision on Ireland's request for referral of the case.

Concentrations without a Community Dimension

It is also possible for Member States to refer cases to the Commission. Art. 22 allows Member States to confer jurisdiction on the Commission even where a Community dimension is lacking. Art. 22 (3) enables a Member State or two or more Member States acting jointly to trigger the procedures of the regulation and thereby give the Commission jurisdiction to take measures in respect of a concentration, where the concentration creates or strengthens a dominant position as a result of which competition will be significantly impeded within the territory of a Member State or States.

Proposed New System of Case Allocation

When the Merger Regulation was first introduced, it was envisaged by the Council and Commission that referrals (notably pursuant to Article 9) would only be resorted to in "exceptional circumstances" and where "the interests in respect of competition of the Member State concerned could not be adequately protected in any other way"[7].

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5 By contrast, the division between the application of Articles 81 EC Treaty and its national law equivalents is determined by application of the notion of an "effect on trade between Member States".

6 M.2866 – Allied Irish Banks/Bank of Ireland /JV

7 See the Notes on Council Regulation (EEC) 4064/89 ["Merger Control in the European union", European Commission, Brussels-Luxembourg, 1998, at p. 54].

Since then, however, referrals have been made under both Articles 9 and 22 in somewhat less restrictive circumstances.

This is explained by a number of developments. *First*, whereas in 1989 when the Merger Regulation was adopted only some Member States had merger control laws now all Member States, with the exception of Luxembourg, have such laws. *Second*, the Commission has exercised its discretion to refer a number of cases to Member States pursuant to Article 9 in circumstances where it was felt that the Member State in question was better placed to carry out the investigation than the Commission. Likewise, in three recent cases[8], several Member States decided to make a joint referral of a case pursuant to Article 22 in circumstances where it was felt that the Commission was the authority best-placed to carry out the investigation[9]. *Third*, the past decade has seen a marked increase in the number of transactions not meeting the thresholds in Article 1 ECMR, and requiring to be filed in multiple EU Member State jurisdictions. Many of these cases produce significant cross-border effects, and the introduction of the new Article 1(3) in 1997 has had only limited success in bringing such cases under the jurisdiction of the ECMR[10]. This phenomenon of multiple EU Member State merger control filings in cases involving significant cross-border effects is likely to be exacerbated post-enlargement.

To take account of all these factors the Commission has proposed to rationalise this system of referrals. One of the main objectives of the proposal is to optimise the allocation of merger cases between the Commission and national competition authorities in the light of the principle of subsidiarity. The purpose is not to increase the total number of cases referred in either direction, but to streamline the system and ensure that it operates at minimal cost to all involved (both companies and regulators). The main elements of the proposed system are the following:

- improvement of the criteria for referrals, including a closer "mirroring" of the criteria for referral in both directions.

- applicability of Article 9 and 22 at the pre-notification stage. Given their superior knowledge of the circumstances of the case, the notifying parties should be given an exclusive right of initiative at this stage of the procedure. In relevant cases, this would enable them to make a reasoned request for a pre-notification referral of the case in either direction. For the sake of efficiency, the request would be deemed to be accepted if not expressly opposed within given deadlines. The relevant authorities and the Commission would be organised in an informal “network” so as to enhance the efficiency and effectiveness of the

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8 M.2698 *Promatech/Sulzer*; M.2738 *GE/Unison*; M.3136 *GE/AGFA*.

9 In the same vein, Member states’ competition authorities, in the context of the European Competition Authorities’ association, have issued a recommendation designed to provide guidance as to the principles upon which national competition authorities should deal with cases eligible for joint referrals under article 22 ECMR [*Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*]

10 See para. 21 *et seq* of the Commission's Green Paper of 11 December 2001 [COM (2001)745 final]

process, an approach supported by the current level of experience in the Member States regarding merger control. The proposed changes for the pre-notification referrals have been incorporated into the proposed new Article 4(4) and 4(5).

- conferring exclusive jurisdiction on the Commission if all the Member States concerned, or a minimum number of three such Member States, agree to a case being referred under Article 22;

- possibility for the Commission to invite Member States to make referrals under Article 22, or to request the Commission to refer cases to them under Article 9; currently the Commission has no such formal "right of initiative".

Rationale for Proposal

The overall purpose of the proposed new system is to put in place a more rational system of case allocation between the Commission and Member States, reflecting the developments explained above, while at the same time preserving to the greatest extent possible the basic features of the ECMR system introduced in 1989, namely the provision of a "one stop shop" for the competition scrutiny of large cross-border mergers[11]; this system provides legal certainty and cost efficiency for merging companies (and any affected third parties), in the form of a guarantee that the investigation will be concluded within a fixed timeframe by a single authority, and ensures that all such large cross-border transactions are scrutinised in a like manner throughout the EU.

The changes proposed by the Commission are designed to ensure that the authority or authorities best-placed to carry out a particular merger investigation should deal with the case. The relative failure of Article 1(3) to "deliver" the benefits it was intended to bring about, combined with perceived inadequacies of the so-called "automatic 3+ system" suggested in the Commission's Green Paper of 11 December 2001[12], persuaded the Commission that what was needed was a jurisdictional mechanism characterised by a greater degree of flexibility than either of the latter two approaches allow for. Accordingly, the proposed new referral system is based on the principle that cases which require to be filed at the Member State level, but which engender "significant cross-border effects", should be eligible for referral to the Commission. Conversely, cases which only affect competition in a distinct market within a Member State should be eligible for referral to that Member State.

At the same time, the Commission proposal foresees that merging companies should have the option of determining, as early as possible, where jurisdiction for scrutiny of their deal will ultimately lie, thereby avoiding unnecessary delay and expense. Accordingly, the proposed new referral system provides that a referral may be triggered before a formal filing has been made in any EU jurisdiction. While it is envisaged that pre-filing referrals should then account for the bulk of all referrals, post-filing referral will still be possible. However the latter do not have the advantage

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[11] Such a periodic review is foreseen by Article 9(10) ECMR.

[12] See paras. 13-17 of the Explanatory Memorandum accompanying the Commission Proposal for a recast ECMR

of alleviating the additional costs and burdens (for competition agencies and business alike) as well as the time delays that are associated with multiple filing. As a consequence, post-filing referrals should ideally be confined to a more limited number of cases in which, following an initial investigation, it is concluded that a referral would allow for more effective protection of competition in the market in question.

Exercise of discretion by authorities referring cases

It is important to emphasise that referrals would by no means be automatic and that, under the recast Merger Regulation, both the Commission and national authorities would retain a large degree of discretion when deciding to make or not to make a referral.

In exercising their discretion with regard to referrals it is important that the Commission and Member States not lose sight of the importance of preserving the ECMR's "one stop shop" principle and its attendant benefits. In its recent judgement in *Philips v The Commission*[13] ("the *SEB/Moulinex* judgement") the Court of First Instance made it clear that referral decisions are capable of appeal by an interested third party. The CFI also noted that the Commission's discretion in deciding whether or not to refer a case under Article 9 ECMR is "not unlimited", noting in particular that referrals should not be made where "it is clear" that the referral could not "safeguard or restore effective competition on the relevant markets"[14].

The Court also takes the view that "fragmentation" of cases, while possible as a result of the application of Article 9, is "undesirable in view of the 'one-stop-shop' principle on which Regulation 4064/89 is based"[15]. Moreover, the CFI, while recognising that the risk of "inconsistent, or even irreconcilable" decisions by the Commission and Member States" is inherent in the referral system established by Article 9", makes it clear that this is not desirable, and suggests that it might even merit intervention by the legislator to ensure that such divergence cannot occur[16].

Consequently, fragmentation of cases should, in the absence of other over-riding considerations, be avoided to the greatest extent possible. In particular in cases where there is a foreseeable risk of divergent/incoherent treatment resulting from the fragmentation of a case, the Commission should exercise its discretion to either keep the whole case (or at least all connected parts thereof), or refer the whole case (or all connected parts thereof) to a single Member State authority - if that authority would be better placed to deal with the case (or at least all connected parts thereof) than the Commission[17].

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13 Case T-119/02 of 3 April 2003 (Case M.2621 *SEB/Moulinex*)

14 Ibid; See paras 341 *et seq*

15 Ibid; See para. 350

16 Ibid; See paras 380 *et seq*

17 This is consistent with the Commission's decision in cases M.2389 *Shell/DEA* and M.2533 *BP/E.ON* to refer to Germany all of the markets for downstream oil products (some of which were not addressed in the referral request), because they were intrinsically linked to the markets addressed in the request. The Commission retained the parts of the cases involving upstream markets. Likewise, in M.2706 *P&O Princess/Carnival*, the Commission exercised its discretion

More generally, it is appropriate that the Commission and Member States take due account of all relevant factors before exercising their discretion with regard to a referral decision. This would involve careful consideration of which authority is best-placed to carry out the investigation, bearing in mind the need to ensure effective protection of competition in all markets affected by the transaction, and in the most efficient manner possible. This will necessarily involve specific consideration of the interests of the notifying party, of the other undertakings concerned, and of any third parties likely to be affected by the transaction. It will also involve consideration of the desirability of avoiding unnecessary duplication of enforcement efforts by multiple authorities. Ensuring that these issues will be given appropriate consideration will be one of the main tasks of the informal network which it is envisaged to establish between the Commission and the Member States[18].

Liaison with Competent Authorities

The Advisory Committee

The Merger Regulation contemplates, and indeed requires, constant and close liaison between the Commission and the competent authorities of the Member States. The designation of this authority is a matter exclusively for the Member State concerned. The consultation of the Advisory Committee is one of the most important aspects of this "close and constant liaison" and is an essential part of the decision-making procedure. The Commission is required to take the utmost account of the Committee's opinion and is required to inform the Committee as to how its opinion has been taken into account. In some cases it has been necessary to consult the Committee more than once where for example commitments have had to be revised[19].

Proposals for Strengthening of Advisory Committee

At present we are looking at how the functioning of the Advisory Committee on Concentrations might be improved and strengthened. Some Member States have taken the opportunity of the ongoing reforms in the area of EU merger control to call for a strengthening of the Advisory Committee. Particular concern has been expressed about the short time within which the Advisory Committee must absorb key documentation relating to individual merger cases. There have also been some calls for the meetings to be conducted more effectively and for the Committee's opinion to be rendered more transparent.

As regards *timing* one of the principal reasons underlying the proposed automatic extension of the timetable by 15 working days when commitments are offered in Phase II is to allow sufficient time to be allocated to the proper consideration by Member States of preliminary draft decisions and remedy proposals[20]. This

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not to refer a part of the case to the UK, because it wished to avoid a fragmentation of the case (See Commission press release of 11/04/2002, IP/02/552)

18 See point 19 of the Explanatory Memorandum accompanying the Commission Proposal for a recast ECMR

19 See Bertelsmann/Kirch/Premiere and Deutsche Telekom/Beta research [1999] O.J. L53 /1 and 31.

20 See Recital 29 and of Article 10(3) of the Commission proposal for a recast Merger Regulation, as well as paras. 70 *et seq* of the Explanatory Memorandum.

additional time should ensure that the timing requirements contained in Article 19(5) ECMR are fulfilled in each and every case.

We are also looking at ways of introducing more flexibility in the *scheduling and formatting* of Advisory Committee meetings. And, conscious of the desirability of maximising the effectiveness of the Advisory Committee's deliberations, at ways in which that effectiveness might be enhanced. One way of achieving this would be to ensure closer and earlier involvement of Committee's rapporteur, and to appoint co-rapporteurs.

Finally as regards greater *transparency* to us it would seem to be desirable that the opinion of the Advisory Committee should be made public, and in particular made available to the merging parties, as soon as possible following the Commission decision. Consideration should also be given to providing for enhanced transparency regarding the Committee's deliberations. Following the publication of the December 2001 Green Paper, the Commission received widespread calls, including from Member States, for the systematic publication of Advisory Committee opinions. Since the Commission agreed that such publication is consistent with the desirability of increased transparency in the enforcement of Community competition law accordingly, Article 19(7) of the Commission proposal for a recast Merger Regulation provides for the compulsory publication in the Official Journal of Advisory Committee opinions.

Conclusion

Ladies and gentlemen, I hope that from these explanations you will get a sense of the importance we attach to co-operation between the Commission and Member States and the seriousness with which we view the need to strengthen it. These ties are vital to our work at European level and we are hoping to strengthen them through the proposals we are currently discussing in Council. I look forward to hearing the views of the other speakers this morning and indeed this afternoon and to engaging in what I am sure will be a lively debate and discussion throughout the course of the day.