



International Chamber of Commerce

*The world business organization*

Department of Policy and Business Practices

## **Response to the European Commission's public consultation on the application of the EC Merger Regulation**

*Prepared by the Commission on Competition*

The International Chamber of Commerce (ICC) welcomes the opportunity to continue its constructive dialogue with the European Commission and comment on the current working of Regulation (EC) No 139/2004 (ECMR)<sup>1</sup>.

The response below follows the European Commission's questionnaire of 28 October 2008.

***1. Do you believe that Article 1(2) and (3) of the Merger Regulation is functioning as an effective means of distinguishing those transactions which are most appropriately the subject of merger control at the Community level from those which are not?***

Since its adoption, the ECMR has been a success. Particularly the 'one-stop-shop' aspect provides businesses with significant benefits. The recent accessions extended the reach of the ECMR, reducing filing burdens in larger transactions.

ICC believes that there is a real benefit in extending the ECMR yet further to all transactions that would otherwise require filings in a number of member states. The intention of achieving this through Article 1(3) was not, however, successful. Less than 5% of all ECMR cases have "community dimension" by virtue of Article 1(3).

While there are no public statistics which look at the number of multijurisdictional filings of concentrations that lack community dimension, members' anecdotal evidence is clear that there is still a significant number of cases that require filings in three or more member states. ICC supports a downward revision of the thresholds in Article 1 as this would lead to a larger number of cases being examined under the ECMR. While ICC believes that the referral mechanisms under Articles 4(4) and 4(5) ECMR work relatively well to repatriate cases to more appropriately placed authorities, the timing implications of the Article 4(5) process hinder more

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## Department of Policy and Business Practices

frequent referrals, particularly of cases with few or no substantive issues (see answers to questions 5 and 6 below).

By contrast, the well-functioning referral mechanisms of Articles 4(4) and 9 would mean that if potentially significant issues were to arise in only one member state, the parties and the relevant NCA retain the possibility of achieving repatriation of the case.

***2. Are there any specific markets or economic sectors where, in your view, the turnover thresholds in Article 1(2) and (3) are not functioning in the manner intended, namely to identify those concentrations which would most appropriately be the subject of merger control at the Community level?***

ICC believes that the method of calculating turnover in Article 1 works reasonably well. There is a clear benefit in having an essentially unified approach to establishing turnover. Introducing industry specific methodologies would result in unnecessary complexity.

### **Merger control filings at the national level**

***3. Some merger transactions are subject to review under the merger control laws of more than one EU Member State. If you have any specific concerns about the fact or the manner in which some transactions are reviewed under the merger control laws of multiple EU jurisdictions, please explain those concerns - if possible by reference to your practical experience - and any suggestions you may have as to how they might be remedied.***

ICC believes that there is still a significant divergence both in national procedures as well as in substantive analysis, which leads to unnecessary complexities in multi-jurisdictional merger reviews.

#### **Process**

The divergent methods used to establish national jurisdiction could benefit from harmonisation. Not only would this ease multi-jurisdictional filings, it would also facilitate the Article 4(5) process.

Particular concerns about divergent national approaches are set out below. ICC believes that this complexity adds unnecessary cost to international transactions.

- **Divergent approaches to jurisdiction.** Some countries still operate market share thresholds which are particularly difficult to apply given the uncertainty surrounding market definition. This is a particularly difficult issue in jurisdictions with mandatory filing and suspension obligations (e.g. Spain and Greece). The UK's share of supply threshold, which is deliberately not a market share threshold, is not easily understood outside of the UK (or indeed within the UK).

In most countries there is a minimum turnover required for both parties. By contrast, the UK thresholds only look at the target's turnover while in Germany or Italy a filing



## Department of Policy and Business Practices

obligation can arise even if the target is not active in that country. We are seeing some degree of convergence as Germany, for example, has introduced draft legislation in Parliament that would create a second turnover threshold but there is still significant scope for alignment.

- **Divergent approaches to the definition of a concentration.** In some jurisdictions (e.g. Belgium, France and the Netherlands) only full function joint ventures as defined under the ECMR amount to concentrations. In others (e.g. Austria, UK, Germany or Poland) the definition of a concentration extends also to non-full function JVs. By contrast, Italy follows the pre-1998 EC Commission practice. This means that the same transaction amounts to a concentration in some jurisdictions and not in others. Again, this is an unnecessary complexity. Similarly, there is also significant divergence of approach (and often uncertainty) in transactions conferring influence that is short of positive control. For example, in the UK an acquisition of 'material influence' over a company's policy amounts to a concentration<sup>2</sup>. This concept is different (i.e. wider) than 'decisive influence' under the ECMR and acquisitions of shareholdings as low as 17.9% (and possibly lower) have been held to amount to material influence<sup>3</sup>. Similarly, in Germany, acquisitions of shareholdings of more than 25% are notifiable irrespective of control rights and acquisitions of below 25% are notifiable where this confers on the acquirer a "competitively significant influence" over the target. Such influence can exist with shareholdings of 10% or lower.

All of this leads to a diverse and unnecessarily complex system within the common market. ICC therefore recommends seeking a unified approach and methodology for establishing jurisdiction at both Community and national levels. That is not to say that the level of those thresholds should be harmonised but only (i) the methodology of the jurisdictional tests (e.g. set as a combination of both parties combined turnover and each party's minimum individual turnover in the relevant member state); and (ii) the methodology for calculating turnover.

### Substance

Divergence in approach is not, however, limited to process. NCAs also have divergent approaches to substance. This issue comes to the fore particularly in multi-jurisdictional transactions, but there is also a question of consistency and intellectual rigour even for cases that do not.

There is some divergence in wording between the EMCR test of "significant impediment to effective competition", the "significant obstacle to effective competition" test in Belgium, the "substantial lessening of competition" in the UK and in France, as well as the "maintenance of effective competition" in Spain. While it is probably fair to say that despite the different wordings of these tests they tend to converge around some form of SLC, the dominance tests applied in Germany and Austria differ significantly from an SLC approach. Moreover, the German

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<sup>2</sup> Section 26(3) Enterprise Act 2002.

<sup>3</sup> See *BSkyB/ITV* Competition Commission Report of 14 December 2007) and *British Sky Broadcasting Group plc –v- Competition Commission and others* [2008] CAT 25.



## Department of Policy and Business Practices

dominance test is coupled with strict presumptions that do not exist under the EMCR. Finally, there are countries in which overriding public policy interests can justify the clearance of a concentration that is found to fulfil the test for a prohibition (e.g. Germany and the United Kingdom).

Occasionally, the fact that several NCAs analyse the same concentration under different tests even leads to conflicting decisions. Whereas the Spanish NCA approved the acquisition of CVS Ferrari by Cargotech in 2007 on the grounds that it did not “obstruct the maintenance of effective competition in the market”, its German counterpart prohibited the same acquisition on the grounds that it led to collective dominance. Interestingly, both authorities considered the relevant markets to be at least EU-wide.

ICC therefore proposes harmonisation of such divergent procedural and substantive approaches. Whilst such harmonisation would require in many cases changes to the national merger legislation, achieving such alignment need not necessarily involve EC legislation but could possibly also be achieved through voluntary harmonisation/coordination via the ECN.

### **The functioning of the two-thirds rule in Article 1(2) and (3)**

*4. Please describe any specific concerns you may have about the functioning of the "two-thirds rule" in Article 1(2) and (3) of the Merger Regulation, if possible by reference to your practical experience with the provisions. Please also describe any suggestions you may have as to how these concerns might be remedied.*

The original intention of the two-thirds rule was to ensure that cases which impact essentially only in one member state remain with the member state. Even if this was the case at the time of the adoption of the ECMR, this is no longer the effect of the two-thirds rule.

Most concentrations that fall within the two-thirds rule still require significant filings in other jurisdictions. Given the availability of Articles 4(4) and 9, there must be a real question over whether the two-thirds rule is still meaningful. Indeed, Commissioner Kroes finds the two-thirds rule outdated<sup>4</sup>. ICC takes the view that it could be abolished.

If there were a concern on the part of NCAs that this may remove cases with significant/predominant effects in their member state an alternative approach would be to retain jurisdiction at Brussels level for all member states other than that in which the parties achieve the two-thirds of their turnover.

This could be achieved by moving the two thirds rule from Article 1 to Articles 4(4) and 9 with the effect that in cases where the parties fulfil the two-thirds rule the Commission is obliged to

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<sup>4</sup> See

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/364&format=HTML&aged=0&language=EN&guiLanguage=en>



## Department of Policy and Business Practices

refer the case to the NCA if the parties request so under Article 4(4) or where the relevant NCA requests so under Article 9.

This would mean that the one-stop shop principle is retained for the remainder of the merger. If the transaction does not raise national concerns the entire transaction will be dealt with by the Commission. If the NCA believes that there are significant effects within its own territory it will have the ability to pull the case back.

### **The functioning of Article 4(4)**

*5. Do you believe that Article 4(4) is functioning effectively as a means of re-allocating "original" jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction to which referral is requested?*

See 6 below.

### **The functioning of Article 4(5)**

*6. Do you believe that Article 4(5) is functioning effectively as a means of re-allocating "original" jurisdiction from the national level to the Community level on the basis that a case is more appropriately dealt with by the Commission?*

#### **Introduction**

The introduction of Articles 4(4) and 4(5) has been a success. Since 2004, some 43 applications under Article 4(4) have been received. None have been refused and only one resulted in a partial, rather than a full referral. More impressively, some 157 Article 4(5) applications have been received since 2004. Out of that number, only 4 applications have been refused.

The absolute volume of applications also demonstrates the success of the process. Article 4(5) applications amount to almost 10% of ECMR cases, whilst Article 4(4) cases amount to almost 3%. The low refusal/veto rate demonstrates that, on the whole, users (i.e. parties and advisers) have no problem identifying cases that are more appropriately decided by another authority. The low number of refusals, however, also shows that parties are likely to use Article 4(5) only in clear cases. There are still a large number of cases that would merit an Article 4(5) referral but where the parties are deterred from making a request because of (i) the long timeframe involved in the process and/or (ii) the uncertainty of outcome given the right of veto.

#### **Procedural Issues**

There are a number of procedural issues that ICC would like to bring to the Commission's attention:



**Department of Policy and Business Practices**

**Information burden in Form RS**

Given that the purpose of Form RS is largely to establish which authority is best placed to review a particular transaction, ICC believes that the information burden is too heavy. No doubt there are a number of cases where the question of referral depends on whether likely issues require solutions beyond the confines of individual member states. ICC does not, however, believe that this is a feature of referral cases generally. ICC submits that the review ought to be reduced to confirming the number of likely jurisdictions in the case of Article 4(5) and the absence of significant trans-national issues in Article 4(4) cases.

**Removing the veto provisions in Article 4(5)**

In view of the success of the process and the fact there is no evidence of system 'gaming', it seems to us that particularly the provisions of Article 4(5) could be refined along the following lines.

In cases where a large number of NCAs have jurisdiction, say five jurisdictions, ICC believes there is a compelling case that such transactions have 'community dimension'. Therefore, for such cases member states' rights of veto should be removed entirely. This will effectively give the parties the choice of notifying in Brussels and benefitting from the one-stop principle. Forum shopping concerns are avoided by virtue of the continued application of Article 9 as a safety valve.

For cases in which only three or four NCAs have jurisdiction, the veto rights could continue in the present form as these cases arguably have a less clear cut community dimension.

**Shortening the review period**

The length of the review period for both Article 4(4) and 4(5) acts as a disincentive to more referral applications. Especially in Article 4(4) cases there is little benefit in timing over a process that involves a full notification together with an Article 9 referral. In Article 4(5) cases there is generally a trade-off between, on the one hand, the longer process under Article 4 and, on the other hand, the complexities, cost and burden of significant multijurisdictional filings. If the Commission were to streamline the process as suggested above into a more limited examination of filing obligations, the review period could be significantly shortened.

For example, ICC is aware of an Article 4(5) case with 8 NCAs having jurisdiction but in a case without overlaps. The pre-notification discussions on Form RS took almost a month, with a further month pre-notification discussions on the draft Form CO in a case without overlaps. This meant a two month period from first contact with the Commission until submission of Form CO and three and a half months until clearance (this is almost the same period that the Bundeskartellamt would take to conduct both a Phase I and a Phase II process).

**Member states' deadlines**

In times of electronic communications and overnight courier deliveries, it seems somewhat anachronistic not to link member states' deadlines under Articles 4 and 9 to the date of notification but to assume an additional three working days for postal delivery. ICC believes that this anachronism should be removed by linking all deadlines to the date of notification/reasoned submission.



## Department of Policy and Business Practices

### **Common NCA approach to the Article 4(5) process**

Currently the various NCAs have very different approaches to deciding whether to allow an Article 4(5) request. For example, ICC understand that NCAs in Germany, Spain and Portugal require detailed engagement with the parties while others are more prepared to decide on the basis of the Form RS alone. Given the detail in the Form RS and given that the overall intention of Article 4(5) is to reduce, rather than enhance, the administrative burden, there may be a need for a more harmonised approach. Clearly, if the suggestion on removing the veto in certain circumstances were followed, this point would be less of an issue.

### **Market share jurisdictions**

As already pointed out in answer to question 3 above, the use of market shares or shares of supply adds a significant layer of uncertainty in Article 4(5) cases. For example, the UK share of supply test is not readily understood by advisers in other member states and may therefore result in incorrectly failing to identify UK jurisdiction in a particular case.

## **The functioning of Article 9**

*7. Do you believe that Article 9 is functioning effectively as a means of re-allocating "original" jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction to which referral is requested?*

*Has the introduction of Article 4(4) had, in your opinion, any impact on the functioning/usefulness of Article 9? Please explain your answer.*

The introduction of Article 4(4) had the effect of removing some clear Article 9 cases upfront. It is probably also the case that overall there have been more referrals than there would have been absent Article 4(4).

ICC can still see the logic in keeping Article 9 in its current form, as there may well be cases which, upon closer examination, ought to be repatriated to a member state. ICC believes, however, that the long process under Article 4(4) and the burdensome information requirements of Form RS chill potential Article 4(4) referrals.

ICC is aware of a number of cases with impact in only one or two member states where purely for timing reasons the parties notified to and were cleared by the European Commission. A shorter and more streamlined Article 4(4) process would in our view result in more Article 9 cases being dealt with under Article 4(4).



## The functioning of Article 22

*8. Do you believe that Article 22 is functioning effectively as a means of referring a concentration to the Commission on the basis that the case is more appropriately dealt with at the Community level?*

*Has the introduction of Article 4(5) had, in your opinion, any impact on the functioning/usefulness of Article 22? Please explain your answer.*

The historical reason for Article 22 was to allow member states without their own national merger regimes to refer cases meriting review to the European Commission. All EC member states, except for Luxembourg, have now adopted their national merger control regimes, so that the original rationale for Article 22 may have disappeared.

Moreover, in those jurisdictions with pre-existing merger control regimes, there has been a substantial increase in resources at the NCAs over the last years. NCAs are today far better equipped than they have ever been to deal with even complex cases. In spite of this development, the number of referrals under Article 22 appears to be on the increase and this is difficult to reconcile with this provision's rationale.

This does not, however, render Article 22 meaningless. There may be benefit in referring cases from NCAs to the European Commission where the relevant geographic market extends beyond the confines of individual member states or where potential cross-border divestments are required.

However, there have been instances where Article 22 was used inconsistently with this new rationale. There are cases where the NCA referred the case to the EC Commission even though the transaction fell below the applicable national turnover thresholds<sup>5</sup>.

In another case, the UK NCA referred a transaction that had already been legally implemented at the time of the referral because of the absence of a suspension obligation in the UK, in spite of the fact that the target had sales in the UK only and that the relevant markets were found to be national<sup>6</sup>.

ICC submits that Article 22 should only be used to achieve a harmonised approach where individual NCAs are not equipped adequately to deal with a case or remedies on a national level. This could be the case where the relevant geographic market extends beyond the confines of individual member states, where potential cross-border divestments are required or where an NCA will not have adequate investigative powers or resources to deal with a case. However, there should be no scope for using Article 22 for cases that fall below the national thresholds for merger review.

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<sup>5</sup> Case COMP/M.3796 *Omya/J.M. Huber PCC*; See also Case COMP/M.4980 *ABF/GBI Business IP/08/591*.

<sup>6</sup> Case COMP/M.5020 *Lesaffre/GBI UK*; See also IP/08/1135.



Department of Policy and Business Practices

*9. Do you have any comments on the functioning of the Merger Regulation generally? In particular, are there any aspects of the Regulation, or of its application in practice, which you believe are not functioning effectively? If so, please explain your answer – if possible by reference to your practical experience with the functioning of the Regulation – and any suggestions you may have as to how this/these shortcoming/s might be remedied.*

**Pre-notification contacts**

ICC believes that over the past years there has been a significant shift in the information required from notifying parties even in relatively straightforward cases. Pre-notification discussions have become more extended and more detailed. While there may be merit in longer pre-notification discussions in complex cases with potentially significant substantive issues, it seems that straightforward cases which do not fall within the simplified procedure are subjected to disproportionately intense review.

In some instances this may have been for lack of more senior oversight. In others, it may have been the result of conflicting work pressures of the case team or an unduly risk-averse case handler.

**Full Function Joint Ventures**

The Commission's approach to the notification requirements of joint ventures has significantly changed in the period leading up to the publication of the consolidated jurisdictional notice. ICC has commented on the draft notice<sup>7</sup> and believes that some of the points made in that response still hold true.

In particular, the distinction between extensions in the scope of JVs involving, on the one hand, the injection of assets and those that do not<sup>8</sup> is difficult to apply in practice. Similarly, the rules on changes to a non-full function JV seem unworkable in practice<sup>9</sup>. For example, if the JV is non-full function because of the proportion of sales or purchases it has/conducts with its parents, it is impracticable, if not impossible, to establish exactly when third party transactions become significant enough to make it full function. It also seems at odds with the requirement of a trigger event. Moreover, there is little, if any, discussion of those issues in cases irrespective of whether they are dealt with under the simplified procedure or under the standard procedure.

ICC believes there ought to be more transparency preferably in the decisions themselves or, in the case of simplified cases, through DG Comp's Competition Policy Newsletter.

**Document n° 225/654**

15 December 2008

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<sup>7</sup> See section 14 of ICC's submission of 18 December 2006.

<sup>8</sup> Consolidated Jurisdictional Notice, para 108.

<sup>9</sup> Consolidated Jurisdictional Notice, para 109.