Autorité de la concurrence

Making merger control simpler and more consistent in Europe

– A “win-win” agenda in support of competitiveness –

Report to the Ministry for Economy and Finance
– 16 December 2013 –

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"Europe needs an industrial policy that does not conflict, rather builds on its competition rules. Competition rules certainly don't stand in the way of the European companies' search for the best scale and size to compete globally. European competition rules have not opposed the birth of numerous European champions, from EADS to Air France-KLM to mention only two, and even national champions [...] To build European and not national champions, merger control mechanisms remain indispensable. There is therefore an interest in moving towards a greater convergence as regards how mergers are assessed on the substance and the review process at national level".

Mario MONTI, *A new strategy for the Single Market*
at the service of Europe's economy and society
Report to President José Manuel BARROSO, 9 May 2010

The rapporteur wishes to express his gratitude to all the persons that have accepted to meet him in the course of his mission, whose names are listed in annex to the present report. Their insight, thoughts and advice have been invaluably useful. He also thanks the various friends and colleagues, both within and outside the Autorité de la concurrence, who have taken the time to share views and discuss ideas. The content and conclusions of the report remain of the sole responsibility of its author.

Le rapporteur tient à remercier l'ensemble des personnes ayant accepté de le rencontrer dans le cadre de sa mission, dont les noms figurent en annexe au présent rapport. Leur expérience, leurs réflexions et leurs suggestions lui ont fourni une aide précieuse. Il remercie également les nombreux amis et collègues, au sein de l'Autorité de la concurrence et en dehors, qui ont bien voulu lui faire part de leurs conseils et de leurs remarques. Le contenu et les conclusions du rapport n'engagent cependant que l'auteur de celui-ci.

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Context

Two recent cases have shown that the current organisation of merger control in Europe, which shares competences between the EU Commission and the competition authorities of the 28 Member States for legitimate reasons of subsidiarity, could lead to conflicts of decisions that are very detrimental to business. Such outcomes are rare, but the risk that they illustrate is in reality only the tip of the iceberg.

Leaving aside very large deals, which are reviewed since 1989 by the EU « one-stop shop », cross-border mergers may indeed be investigated by 2, 3, 10 authorities or more, each one applying its own national law. Notwithstanding the progressive and partial convergence that has occurred over the last 15 years, this swarm of rules multiplies the burdens, costs and delays that weigh on business, and especially mid-cap companies.

What is at stake?

The stake involved by this regulatory fragmentation is strategic and not merely technical : merger control is the key that opens – or closes – the door on deals that are very often the source of efficiency gains and that may more broadly fuel the growth and jobs which Europe is lacking.

Merger control plays a crucial role : making sure that businesses grow and race for competitiveness without impairing competition and consumer welfare in the long run. In a global economy where corporations have the choice to invest in Europe or elsewhere, public regulation should however be as consistent, simple and predictable as possible. It is not the case today: Europe enjoys the benefit of a Single Market, but keeps a rather piece-meal regulatory framework.

What can be done : main recommendations

25 years after having contributed to the birth of the « one-stop shop » during its EU Presidency, in 1989, France could suggest that its partners continue the teamwork initiated at the time.

The setting up of a simpler, more consistent and more strategic regulatory framework, to the benefit both of the business and legal community and of competition authorities themselves, could focus on three goals of common sense : reinforcing the consistency of national laws ; guaranteeing the coordination and collective efficiency of national authorities ; making legal processes as simple and targeted as possible.

The report makes 10 recommendations to that effect (see page 47).

Synthèse (FR) : pour un contrôle des concentrations plus simple, cohérent et stratégique en Europe
– une réforme « gagnant-gagnant » au service de la compétitivité –

Contexte

Deux affaires récentes ont montré que l'organisation actuelle du contrôle des concentrations en Europe, qui partage les compétences entre la Commission européenne et les autorités de concurrence des 28 États membres de l'Union pour de légitimes raisons de subsidiarité, pouvait aboutir à des conflits de décisions très préjudiciables pour les entreprises concernées. De tels dysfonctionnements sont rares, mais le risque qu'ils illustrent ne constitue en réalité que le haut de l'iceberg.

Si on laisse de côté les opérations de grande dimension, qui relèvent depuis 1989 de la compétence du « guichet unique » européen, les projets de fusion ou d'acquisition transfrontalière sont en effet contrôlables par 2, 3, 10 autorités ou plus, appliquant chacune son propre droit national. En dépit de la convergence incrémentale et partielle intervenue au cours des 15 dernières années, ce fourmillement de règles démultiplie les charges, les coûts et les délais pesant sur les entreprises, en particulier celles de taille intermédiaire.

Qu'est-ce qui est en jeu ?

Sous une apparence technique, l'enjeu de cette fragmentation réglementaire est stratégique. Le contrôle des concentrations est en effet la clef permettant d'ouvrir – ou de refermer – la porte sur des projets de croissance externe bien souvent générateurs d'innovation, de croissance et d'emplois dans une Europe qui en manque cruellement.

Son rôle est fondamental : garantir que la « course à la taille critique » à laquelle se livrent les entreprises s'effectue sans porter atteinte à la concurrence et au bien-être des consommateurs sur le long terme. Dans un monde globalisé et réactif où les entrepreneurs sont ultra-mobiles et ont le choix d'investir en Europe ou ailleurs dans le monde, la régulation se doit cependant d'être aussi cohérente, aussi simple, aussi prévisible que possible. Or, l'Europe dispose aujourd'hui d'un marché intégré, mais d'une régulation plutôt morcelée.

Que peut-on faire : principales recommandations

25 ans après avoir joué un rôle déterminant dans la mise en place du « guichet unique », alors qu'elle présidait le Conseil de l'Union européenne en 1989, la France pourrait proposer à ses partenaires de poursuivre le travail d'équipe entamé à l'époque.

La mise en place d'un paysage « régulatoire » plus simple, plus cohérent et plus stratégique, au bénéfice tant des entreprises et de leurs conseils que des autorités de contrôle elles-mêmes, pourrait être guidée par trois objectifs lisibles et de bon sens : renforcer la cohérence des droits nationaux ; garantir la coordination et l'efficacité collective des régulateurs ; rendre les procédures plus simples et réactives.

Le rapport fait 10 recommandations en ce sens (voir page 48).

Introduction: context, aim and scope of the mission

The French Minister for Economy and Finance, Mr Pierre MOSCOVICI, and the President of the *Autorité de la concurrence* (French Competition Authority), Mr Bruno LASSERRE, have requested, upon short notice, an assessment of the way in which Europe's various merger control regimes interoperate, coupled to the extent deemed necessary with recommendations of possible reforms[1].

This mission, initiated on 9 October 2013 and implemented with the technical assistance of the *Autorité de la concurrence* as well as of the French Directorate General for Competition, Consumer Affairs and Fraud Control (DGCCRF), resulted in the submission of the present report on 16 December 2013.

In this timeframe, the mission did not endeavour to make an authoritative analysis, based on comprehensive data, of the manner in which the European "one-stop shop" set up a quarter of a century ago to control mergers of Community dimension, in 1989, and the merger control regimes that have been created in almost all Member States since then, operate together.

The purpose of the report is rather to open a discussion, on the basis of an assessment performed hand in hand with a representative set of individuals involved[2]. Following an initial phase dedicated to the analysis of the available documentary resources (e.g. applicable legislation; reports and documents released by the European institutions; best practices of the competition authorities; articles published by competition experts), qualitative interviews based on targeted questionnaires[3] were held with the various stakeholders concerned by merger control (European institutions and national administrations, sample of national competition authorities, representatives of the business and legal community in Brussels and Paris, qualified individuals, etc.). The feedback and points of view gathered during the 40 hearings organised by the rapporteur were then compared with his own findings[4]. This work was performed in complete independence.

On this basis, the report first makes a set of technical, practical and legal findings. It then draws a series of recommendations to the French government.

The two (twin) aims of these recommendations are straightforward: simplicity on the one hand; consistency on the other. So that merger control may remain, in an institutional, legal and economic context that has changed dramatically since 1989, an instrument that helps business "*find ways to do things, rather than stop them*", to paraphrase two great European Commissioners responsible for competition, Mr Peter SUTHERLAND and Mr Mario MONTI.

[1] The commissioning letter is enclosed as Appendix 1 to the present report
[2] The list of individuals interviewed in the course of the mission is enclosed as Appendix 2 to the present report
[3] A summary of the main questions put to the various stakeholders met in the course of the mission is enclosed as Appendix 3 to the present report
[4] A bibliography summarising the main documents examined in camera at the start of the mission is enclosed as Appendix 4 to the present report

The findings:
a fragmented system in which each part works better than the whole

Following a short presentation of the institutional framework set up to control mergers in Europe, which is based on a so-called "multi-jurisdictional" system, four findings are made concerning the way in which it operates:

1. the "one-stop shop" introduced at European level 25 years ago in order to control large-scale mergers has been an overall success;

2. however, if once considers the system as a whole, the multiplication of merger control regimes at national level has made life more complicated for businesses, that are now faced with a plethora of rules and regulators;

3. the progressive convergence of these rules and the voluntary efforts of cooperation initiated by national competition authorities, which are welcome, do not suffice to prevent the risk of conflicting decisions; even though each system operates quite well when taken in isolation, there is no real overall governance;

4. this risk is only the tip of the iceberg: the issue of multiple merger filings, which has never been really tackled by the European legislator, is a lasting cause of additional burdens, delays and costs that artificially impede businesses in their efforts to be competitive and innovative.

Brief presentation of merger control in Europe: a "multi-jurisdictional" system

Since 1989, the European Union has benefited from the existence of a "one stop-shop" created for the purpose of controlling large-scale mergers[5]. The two main aims of this reform were namely:

– to facilitate the life of companies intending to achieve mergers, acquisitions and other types of takeover on the European market, by enabling them to notify their transactions to a single competition authority, the European Commission;

– at the same time, to make public oversight of mergers more effective by giving the European Commission the means with which to proceed to an overall assessment of the competition issues liable to be raised by cross-border mergers, instead of the necessarily "fragmented" analysis that could be performed by the competition authority of each Member State and the multiplicity of national decisions resulting thereof.

The creation of this "one-stop shop" was also intended to close a loophole in the European competition rules, in comparison with those in place in other countries such as the United States. The regulation put in place in the early 1960s[6] to flesh out the competition rules contained by the Treaty of Rome[7] indeed provided Europe with an integrated mechanism aimed at controlling anti-competitive practices, while leaving aside the need to control mergers, even though certain transactions could be covered by the existing antitrust rules[8].

Since the "one-stop shop" was introduced a quarter of a century ago, nearly 5400 cross-border mergers have been notified to the European Commission, totalling an average of about 230 cases per year[9].

In reality, the number of cases handled by Brussels has increased for most of the period, with two upward jumps following legislative reforms intended to expand the European Commission's jurisdiction (1997[10] and 2004[11]), and two marked declines, the first one resulting from the explosion of the "internet bubble" in the early 2000s and the second from the financial and subsequently economic crisis of 2008/2009 (see graph 1 below). The high point has been reached in 2007, when 402 cases were submitted to the European Commission. Since then, the mark has stabilised around 280 cases per annum.

[5] Council regulation (EEC) No 4064/89, of 21 December 1989, on the control of concentrations between undertakings, hereinafter the "initial merger regulation"

[6] Council regulation (EEC) No 17, of 6 February 1962, first regulation implementing articles 85 and 86 of the Treaty

[7] Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). These articles were numbered 85 and 86, then 81 and 82, in the previous versions of the Treaty

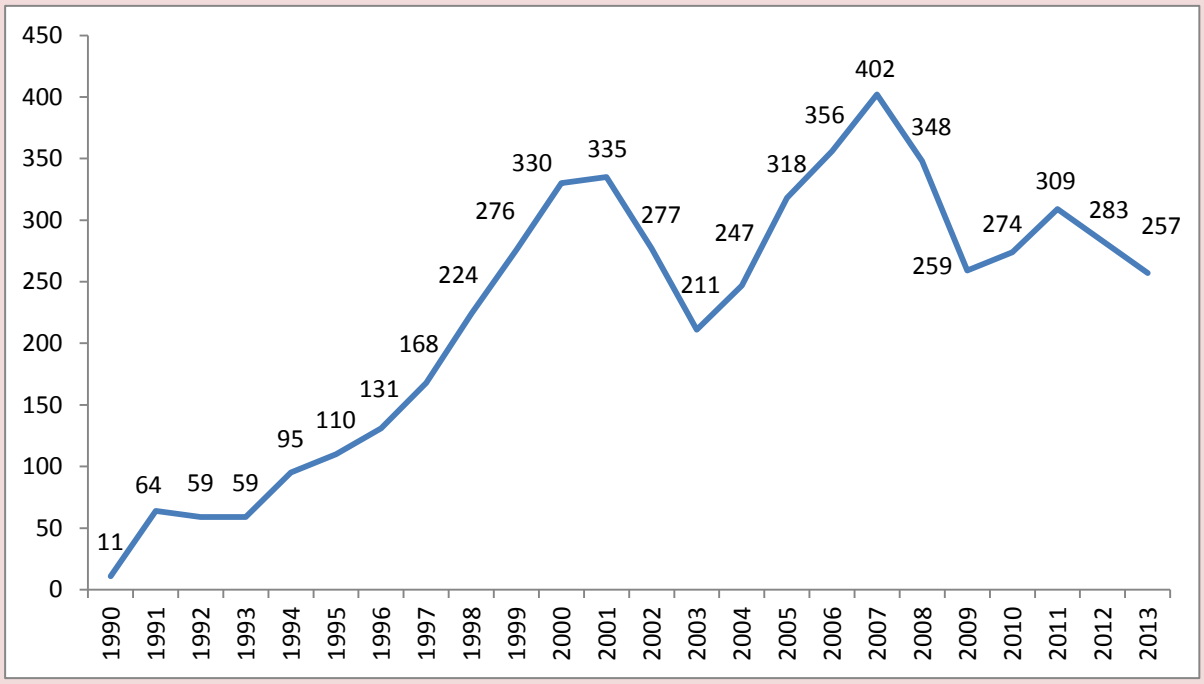
[8] See the judgements of the European Court of Justice of 21 February 1973, *Europemballage and Continental Can vs. Commission* (6/72, Report 1973, p. 215) and of 17 November 1987, *British-American Tobacco (BAT) and R. J. Reynolds Industries vs. Commission* (142/84 and 156/84, Report 1987, p. 4566)

[9] Source: statistics published by DG COMP on 30 November 2013 (http://ec.europa.eu/competition/mergers/statistics.pdf). The average represents 225 cases per annum for the whole period, and 233 if one excludes the two incomplete years at each end of the period (1990 and 2013)

[10] Council regulation (EC) No 1310/97, of 30 June 1997, amending regulation No 4064/89 on the control of concentrations between undertakings

[11] Council regulation (EC) No 139/2004, of 20 January 2004, on the control of concentrations between undertakings, hereinafter the "merger regulation"

Graph1: Cross-border mergers handled by the one-stop shop since its creation*[12]



(N.B.: statistics for the year 2013 end on 30 November)*

The merger regulation nevertheless limited the exclusive jurisdiction of the European Commission to merger transactions that were considered to be the most significant, for various reasons which remain valid today:

– reasons of a political and legal nature, first and foremost, stemming from the principle of subsidiarity[13] which requires jurisdiction to be assigned to the European authorities or to national authorities depending on which ones appear to be best placed to take action in view of "*the scale or effects of the action [in question]*";

– but also reasons of economic efficiency and administrative sustainability, which combine with the previous ones: while some cross-border mergers or acquisitions clearly deserve to be examined by the European Commission in view of their strategic nature, of their important size and/or of their possible effects on competition within the Internal Market, the Commission does not have sufficient resources to examine all mergers occurring in Europe, even when they have a cross-border dimension or impact; moreover, national authorities are *prima facie* better placed than the Commission to deal with cases that are only national, regional or *a fortiori* local in scope.

Consequently, all the merger transactions that did not meet the turnover thresholds enabling them to be considered as having a "Community dimension" have not been subjected to the European "one-stop shop" and have instead continued to be reviewed by the competition authorities of the Member States[14].

[12] Source: statistics produced by DG COMP on 30 November 2013

[13] From a strictly legal point of view, the principle of subsidiarity set forth by article 5 of the TEU does not apply to the exclusive competences of the European Union, that include the competition rules necessary for the functioning of the internal market, but only to the competences that it shares with the Member States. From a wider political point of view, this principle has nevertheless served as a "guide" for the authors of the Treaties even before it was formally introduced into the said treaties, as illustrated for example by the fact that the European competition rules apply uniquely to practices or measures that may "*affect trade between Member States*"

[14] Hereinafter the "national competition authorities" (NCAs). It should be noted that, in several Member States, certain strategic merger cases may exceptionally be "evoked" by the government (generally the minister or secretary of State responsible for economy) on grounds of public interest other than competition policy, most of the time after the NCA has reached a decision on the basis of competition law.

In view of the level at which these thresholds were fixed, for the reasons mentioned in the previous paragraph, a tension has emerged in the system from the outset: although the "one-stop shop" was designed to centralise the handling of cross-border mergers in Brussels, it is in reality not intended to deal with all of them, nor does it have the capability to do so in view of the administrative and human resources available to it. The authors of the merger regulation have clearly sensed this tension, which three of the regulation's recitals capture rather well (see box 1 below).

Box 1: the guiding principles applicable to the handling of cross-border mergers in Europe*

"*(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. [...]*

(12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed. [...]

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. [...]"

(: recitals extracted from the merger regulation, underlining and bold added)*

In order to manage this tension, as well as to alleviate the disadvantages that may result from too rigid an allocation of competences between the two existing levels of regulation – European and national –, various corrective mechanisms have been included in the system from the outset, and subsequently improved in the light of experience acquired [15].

Since 2004, companies have in particular had the option of asking for a merger case to be referred to the European Commission, prior to its notification to the competent national competition authorities ("upward referrals")[16]. Symmetrically, they are allowed to request that a case falling within the jurisdiction of the European Commission be handled instead by one or more national competition authorities ("downward referral")[17]. Once the notification(s) has(ve) been made, the competition authorities themselves may proceed to referring the case upwards or downwards[18].

[15] As stated above, two revisions have taken place in 25 years. The first one occurred in 1997, nearly 10 years after the adoption of the initial merger regulation. The second one was launched in 2000 / 2001 and finalised in 2004
[16] Article 4, paragraph 5, of the merger regulation
[17] Article 4, paragraph 4, of the merger regulation
[18] Articles 9 and 22 of the merger regulation

The conditions under which these various referrals may be made are specified by the merger regulation (see box 2 below) and their practical operation is further detailed in a notice published by the European Commission[19].

Box 2: the referral mechanisms between European competition authorities*

– *The pre-notification "upward" referral (article 4, paragraph 5, of the merger regulation)*: mandatory upon request of the parties, for the whole case, if the transaction is a merger within the meaning of the regulation + if it liable to be assessed by at least three Member States + if no competent Member State expresses its disagreement with the referral.

– *The pre-notification "downward" referral (article 4, paragraph 4, of the merger regulation)*: possible upon request of the parties, for all or part of the case, if the transaction is a merger within the meaning of the regulation + if it is liable to significantly affect competition on a distinct market within a Member State + if this Member State does not express its disagreement with the referral.

– *The post-notification "upward" referral (article 22 of the merger regulation)*: possible upon request of one or more national competition authorities if the transaction is a merger within the meaning of the regulation but does not have a Community dimension + if it affects trade between Member States + if it threatens to significantly affect competition within the territory of the Member State or States concerned.

– *The post-notification "downward" referral (article 9 of the merger regulation)*: possible upon request of a national competition authority, for all or part of the case, if a merger within the meaning of the regulation threatens to significantly affect competition on a distinct market within a Member State or if it affects competition on a distinct market within a Member State + if this market does not constitute a substantial part of the common market.

(N.B.: formal requirements and deadlines are also specified in the applicable provisions)*

Contrary to the referral mechanisms available during the pre-notification period, the operation of which is detailed subsequently in the report, the referral mechanisms available after the notification have never given rise to a significant implementation, from a statistical point of view, probably due to their inconvenient ("break-up" in the handling of the case due to the change of legal regime and case team in the course of the proceedings, increased time taken to deal with the case, etc.). Cases redirected to the European Commission in accordance with these mechanisms have amounted on average to two per annum over the past ten years, while those redirected to the national competition authorities can be counted each year on the fingers of one hand[20] or, very exceptionally, one and a half hand. These corrective mechanisms therefore only play a marginal adjustment role.

[19] Commission notice No 2005/C 56/02, of 5 March 2005, on case referral in respect of concentrations
[20] Source: statistics published by DG COMP on 30 November 2013

Finding 1. The European one-stop shop 25 years later: a clear progress

The hindsight and experience acquired since the initial merger regulation was introduced nearly 25 years ago and its latest review nearly 10 years ago have led most of the stakeholders encountered in the course of the mission – businesses, competition lawyers and economists, other qualified individuals, etc. – to make a very positive assessment of the operation of the European "one-stop shop".

From a general standpoint, this centralised mechanism of merger review has undeniably made business life easier by enabling companies that intend to embark on a major cross-border merger transaction in Europe to benefit from a single supervisory procedure resulting in a single decision.

From a technical point of view, the reform implemented in 1989 has led to the development of an abundant decision-making practice and case-law, which offer significant guidance to market players by setting out in detail the conditions under which contemplated mergers can be deemed beneficial – or problematic – for competition. The existence of a unified regulatory framework and body of law have also guaranteed a genuine equality of treatment to market players throughout Europe, irrespective of where their merger occurs within the Internal Market. In turn, all this has greatly fostered legal and business certainty, and contributed to the legitimacy of merger control.

More recently, the improvements brought to the operation of the "one-stop shop" in the mid-2000s[21], following a series of somewhat critical judgements issued by the Court of the First Instance and the Court of Justice of the European Union[22], appear to have borne fruit: they have led in particular to a significant fine-tuning of the economic and legal analysis of merger cases, as well as of the procedural and material conditions under which they are handled.

It must also be stressed that the work performed by the services of the European Commission (be they the experts of the Directorate General for Competition [DG COMP] or the specialist teams of the Legal Service and the Chief Economist), is very largely praised.

All that being said, some issues have been raised by a number of stakeholders met in the course of the mission. Four elements are often cited:

– firstly, companies and their advisers point to the increasing duration of the informal "pre-notification period" of merger transactions: they acknowledge that it permits a useful preparatory discussion with the regulator, but stress that it may also tend to circumvent the strict deadlines to which the legislator had submitted merger control in 1989[23];

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[21] By regulation No 139/2004

[22] These cases are the following: Airtours / First Choice (judgement of the Court of First Instance of 6 June 2002, *Airtours vs. Commission*, T-342/99, Report 2002, p. II-2585), Schneider / Legrand (judgements of the Court of First Instance of 22 October 2002, *Schneider Electric vs. Commission*, T-310/01 and T-77/02, Report 2002, pp. II-4071 and II-4201) and Tetra Laval / Sidel (judgements of the Court of First Instance of 25 October 2002, *Tetra Laval vs. Commission*, T-5/02 and T-80/02, Report 2002, pp. II-4381 and II-4519, and judgements of the Court of Justice of 15 February 2005, *Commission vs. Tetra Laval*, C-12/03 P and C-13/03 P, Report 2003, pp. I-987 and I-1113)

[23] Pre-notification periods that extend over several weeks or months have been mentioned by certain stakeholders, who consider that such deadlines are understandable in complex cases, but add that the cases concerned are not equally complex. In fact, some of the measures taken by the European Commission as part of its recent "*simplification package*" are intended to accelerate the pre-notification period and to focus it on the cases that justify one (see note 78 below). By way of reminder, the best practices published by the Directorate General for Competition (DG COMP) on 20 January 2004 state the following in this respect: "*Pre-notification contacts should preferably be initiated at least two weeks before the expected date of notification. The extent and format of the pre-notification contacts required is, however, linked to the complexity of the individual case in question. In more complex cases a more extended pre-notification period may be appropriate and in the interest of the notifying parties*" (DG Competition best practices on the conduct of EC merger control proceedings, paragraph 10)

– secondly, the extent of the information required by the case teams is often stated as being too onerous;

– furthermore, the significant complexity of the case referral mechanisms between the European Commission and the national competition authorities is frequently underlined: these mechanisms are unanimously regarded as being more efficient today than in the past, but at the same time they are often experienced by businesses as being the source of extra formalities, additional delays and legal uncertainty;

– finally, and despite the genuine efforts made over the past 15 years to develop a so-called "more economic" analysis of the anti-competitive effects of contemplated mergers, the way in which the efficiency gains liable to compensate these anti-competitive effects are taken into account can sometimes be a source of incomprehension for companies as well as for their legal and economic advisors.

The Vice-President of the European Commission responsible for competition policy, Mr Joaquín ALMUNIA, and his services, share some of the diagnosis whereby "the system works quite well, but could work even better", since they have taken the very positive initiative of launching, during the summer and autumn of 2013, two public consultations intended, *inter alia*, to discuss possible procedural improvements with interested stakeholders[24]. The written observations produced in this context and recently made public by the European Commission[25], as well as the points of view collected by the rapporteur in the course of the mission, converge on the fact that these initiatives are welcome and that the improvements contemplated at the present stage overall represent a move in the right direction, from a technical point of view.

The envisaged improvements include, in particular, measures intended to prune the "red tape" that currently burdens the existing referral mechanisms, notably by lightening and speeding up the operation of the "upward referral", towards the European Commission, of merger cases that are notifiable to at least three national competition authorities.

There is no doubt that these proposals – which include doing away with separate referral submissions that partially duplicate notification forms, as well as an earlier assessment of the merits of the cases concerned – would increase the incentives of companies and competition lawyers to request such upward referrals.

These very useful measures taken by the European Commission are however not intended to meet the longer-term challenges facing merger control, which will need to be addressed at some point by the European legislator and the Union's Member States.

[24] Public consultation launched by the European Commission on 20 June 2013 (press release No IP/13/584, "*Mergers: Commission consults on possible improvements to EU merger control in certain areas*", and staff working document No SWD (2013) 239 final, "*Towards more effective EU merger control*")

[25] See the European Commission's website (http://ec.europa.eu/competition/consultations/2013_merger_control/)

Finding 2. The proliferation of merger control at national level: a model victim of its own success?

Indeed, if the stakeholders are questioned, not merely on the way the European "one-stop shop" is operating, but on how the various national merger control regimes work together (in the many cases where deals do not meet the conditions triggering control by the European Commission, but are nevertheless reviewable in a number of Member States), one receives a much more nuanced feedback.

In this respect, it must be emphasised that the present mission and report focus exclusively on the interaction between the various national systems, and in no way on the merits of each national system taken in isolation.

From this point of view, the judgement made by a majority of stakeholders interviewed is that we are faced with a regulatory model that is endangered by its own success.

During the 25 years that have lapsed since 1989, merger control has been rolled out throughout the entire European Union. There are now about 30 European competition authorities[26], as opposed to 3 in 1989[27] and 14 in 2000... this represents about 25% of the total number of competition authorities in the world (approximately 125[28])!

This fantastic boom has had a two-pronged effect. On the one hand, it has triggered a progressive and partial movement of convergence towards the European "model". The Member States of central and eastern Europe have set up a system that is relatively similar, at least at first sight, to the European "one-stop shop" when they joined the Union, even if a closer look may show that there are in reality differences of varying magnitude with respect to the administrative requirements expected from the merging parties, to the procedural rules governing the intervention of the authorities and to the legal and economic concepts that frame the implementation of their national merger control rules[29]. But the attractiveness of the European "standard" is also visible in the historic Member States and those of northern and southern Europe, if one looks at the legislative reforms that have been introduced during the last decade, such as those that occurred in France in 2001[30] and in 2008[31], as well as in several other countries[32].

At the same time, legal and practical differences of varying importance have multiplied as national merger laws blossomed over the entire continent. A number of these differences are no doubt justified for reasons linked to the existence of different legal cultures, administrative organisations and political heritage in each Member State; others may be inevitable in a Union composed of 28 Member States.

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[26] Precisely 28 if one considers the European Commission and the national competition authorities of the 27 Member States of the European Union out of 28 that have a system of merger control (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom), and even 31 if one adds the members of the European Free Trade Area (EFTA) which have a similar system (Iceland, Norway) and Switzerland. Liechtenstein and Luxembourg do not have their own merger control

[27] Only France, Germany and the United Kingdom had a national merger control system at the time

[28] The *International Competition Network* (ICN), an informal international network specialising in competition matters created in 2001 for the purpose of stimulating voluntary consensus on, and convergence towards, good practices concerning competition law and policy, counted 126 member authorities in the summer of 2013. More information relating to the organisation, operation and activities of the ICN since its creation is available on its website (http://www.internationalcompetitionnetwork.org/)

[29] The main technical characteristics of the merger control systems of the various Member States of the European Union are summarised in *The European Antitrust Review 2014* and *Getting the deal through – Merger Control 2014*, *both* published by *Global Competition Review (GCR)*

[30] Law No 2001-420, of 15 May 2001, on new economic regulations (NRE)

[31] Law No 2008-776, of 4 August 2008, concerning the modernisation of the economy (LME) and order No 2008-1161, of 13 November 2008, relating to the modernisation of competition regulation

[32] For example Belgium (2006 and 2013), Germany (2012), Portugal (2003 and 2012) and Spain (2007 and 2013)

The question arises, however, as to whether all of these differences are justified and whether the time has come to guarantee greater consistency and simplicity. The current "multi-jurisdictional" system has in any case produced a somewhat paradoxical result: large-scale mergers benefit from a smooth and consistent treatment thanks to the existence of the European "one-stop shop", while deals of smaller magnitude, which do not have a Community dimension, are subject to a swarm of national rules that inevitably creates artificial complexity for companies and their advisers.

Granted, various provisions featured in the merger regulation, starting with those relating to case referrals between authorities described above, have increased the overall flexibility of the system.

Granted also, the European Commission and the national competition authorities have taken a number of very welcome initiatives aimed at enhancing their coordination (see box 3 below), both on general issues ("good practices") and in relation to the handling of individual merger cases.

Box 3: voluntary coordination between competition authorities

– 2001: *Procedures Guide of the European Competition Authorities (ECA) concerning the exchange of information between members on multi-jurisdictional mergers* => creation of a system of exchange of information notices between authorities concerning cases that give rise to a "multi-filing" in Europe.

– 2005: *Principles on the application, by national competition authorities within the ECA, of articles 4, paragraph 5, and 22 of the EC merger regulation* => agreement on (non-binding) good practices concerning the joint implementation of the mechanisms of referral to the European Commission in cases that give rise to a "multi-filing" in Europe.

– 2010: *Creation of an ad hoc merger working group* => setting up of a discussion and experience-sharing forum intended to explore possibilities of enhancing consistency, convergence and cooperation between European competition authorities on various substantive and procedural issues, within the existing legal framework.

– 2011: *Best practices of the merger working group on cooperation between EU national competition authorities in merger review* => agreement on (non-binding) best practices concerning the handling of cases that give rise to a "multi-filing" in Europe, as well as to the interaction of competition authorities with the merging parties.

Granted, finally, the term "*network*" indeed appears in the merger regulation, in a recital that formulates a wish for the future ("*should*") rather than describing the existing system ("*shall*")[33].

In reality, the coordination mechanisms that currently exist mainly deal with the vertical relationship between the European Commission and the national competition authorities, as opposed to the horizontal relationship that could be set up between the national competition authorities themselves. There is thus a "liaison mechanism" by virtue of which the European Commission must inform the national competition authorities of the merger notifications that it receives, must collect their observations and, more generally, must give them the opportunity of expressing their point of view at every stage of the proceedings before taking a decision on the transactions that fall within its jurisdiction[34]. In addition to this opportunity for bilateral exchanges of views, the European Commission is required to convene a multilateral forum, taking the form of a "consultative committee" composed of representatives of the national authorities prior to adopting

[33] Quoted in box 1 above
[34] Article 19, paragraphs 1 and 2, of the merger regulation

certain types of decisions[35]. Finally, the merger regulation allows the Commission to request the assistance of the national competition authorities in individual cases[36].

But there is no mechanism of "collective governance" comparable to those that exist or that are currently being discussed in neighbouring areas such as the control of anti-competitive practices (with the European Competition Network [ECN] instituted in 2003)[37], the regulation of telecommunications (a field in which a dedicated body linking together the various national regulators was created in 2009)[38], prudential supervision (a sector in which the main rules and deadlines applicable to the intervention of the national authorities have been harmonised)[39] or data protection (a subject in relation to which a draft regulation aimed at creating a consistent regulatory framework is currently under discussion)[40].

The governance arrangements adopted in these various sectors are different because the institutional, legal and technical conditions that existed at the outset were themselves different (allocation of competence, powers granted to the supervisory authorities, procedural deadlines, etc.).

Nevertheless, the European legislator and the Member States have in all of these domains sought to achieve consistency within the Union and to guarantee that the "whole" of the puzzle (the various authorities taken together) functions as well as the "pieces" (each authority considered individually).

By way of contrast, nothing of the sort exists in an area that is as sensitive for the European economy as merger control.

[35] Article 19, paragraphs 3 to 7, of the merger regulation

[36] Article 12, article 13, paragraph 5, and article 17 of the merger regulation

[37] Council regulation (EC) No 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in articles [101] and [102] of the Treaty

[38] See regulation (EC) No 1211/2009 of the European Parliament and of the Council, of 25 November 2009, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office. The tasks and activities of the BEREC are presented on its website (http://europa.eu/legislation_summaries/information_society/legislative_framework/si0015_en.htm)

[39] See, for example, directive 2007/44/EC of the European Parliament and of the Council, of 5 September 2007, amending Council directive 92/49/EEC and directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings in the financial sector, which proceeds to harmonise the main rules of procedure, deadlines and substantive provisions applicable to the intervention of the national authorities

[40] See the proposal No COM(2012) 11 final of the European Commission, of 25 January 2012, for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (in particular its chapter VII, "co-operation and consistency"), which includes a set of provisions intended to enhance coordination and consistency between the national authorities in this area, and creates a reinforced governance body, the European Data Protection Committee (EDPC)

Finding 3. The risks linked to the "multi-jurisdictional" system: the issue of conflicts of decisions

The consequence inherent in the current "multi-jurisdictional" system, highlighted by numerous experts for several years, is that it results in complications and risks in the light of which we might want to remind ourselves of the vision that the creators of European merger control had in mind two decades ago.

To quote them: "*Let me start by supporting what yesterday Peter Sutherland and Leon Brittan said about the original role of the Merger Regulation. This is an instrument that was designed in order to ensure that the European economy obtains the most from mergers and acquisitions. European companies need to restructure to adapt to the challenges of the Single Market and Economic and Monetary Union. The European economy benefits from the efficiencies that these restructuring processes will bring about. And the Merger Regulation must allow us to quickly make a distinction between the majority of these deals, which are beneficial, and should be allowed to proceed quickly and smoothly and those, the few, which are harmful to the consumer. As Peter Sutherland put it at this conference: We must look positively and constructively at mergers; find ways to do things, rather than stop them*"[41].

The first Sword of Damocles that the "multi-jurisdictional" system hangs over business deals that fall within the jurisdiction of several national competition authorities is the risk of diverging analyses, and even of conflicting decisions.

Such cases may arise in various circumstances, that can be summarised in Table 1 below. This presentation is simplified, since a given transaction can affect several product markets, each of which can have a different geographical dimension.

Table 1: various types of cross-border mergers*

Number of Member States where the deal is reviewable	Geographical market(s)	Possible result
1	National, regional or local	No possible conflict
	Supranational	No possible conflict in practice
2 or more	National, regional or local	Possible conflict, but explainable if the competitive situation of each market is different
	Cross-border	Possible conflict
	Supranational (European or worldwide)	Possible conflict

(: not considering the case of mergers falling within the jurisdiction of the European "one-stop shop")*

To date, such conflicts have remained rare (see box 4 below and the following paragraphs), but it is symptomatic that two of them have occurred a few months ago, thus putting in question conventional wisdom in two respects:

– first, the belief that the degree of convergence achieved currently by the various national merger control regimes would avoid the risk of conflicting decisions;

[41] Mario MONTI, *The main challenges for a new decade of EC merger control*, conference on "EC merger control tenth anniversary", Brussels, 14 and 15 September 2000, p. 2

– and second, the belief that voluntary coordination and cooperation between national competition authorities would at any rate ensure a consistent result, if not in all "multi-notified" mergers, at least in the simplest hypothesis in which only two authorities are reviewing it.

Without going too far back in time, three fairly recent examples can be quoted, each of which illustrates the risk of conflicting decisions to which the current system exposes undertakings.

Box 4: reading guide

The present report is in no way intended to take sides on the respective merits of the various decisions rendered in the cases provided as examples. It only shows that a system in which conflicting outcomes are possible cannot be considered satisfactory, be it from the point of view of stakeholders (companies, legal and economic advisers), of competition authorities themselves or more generally of public policy-makers.

In the earliest case, Pan Fish / Marine Harvest, the United Kingdom's *Competition Commission* considered in December 2006, after an in-depth procedure ("phase 2"), that the acquisition of Marine Harvest N.V. by Pan Fish A.S.A. did not give rise to competition issues on the market for the production and sale of farmed Atlantic salmon and on certain related markets[42]. It therefore authorised the deal without remedies. Other competition authorities, notably in Norway and in Spain, had reached a similar conclusion during the previous months.

By contrast, in October of the same year, the French *Conseil de la Concurrence*, consulted by the Minister for Economy, considered that the deal was liable to result in anti-competitive effects on the market for the production and sale of farmed Atlantic salmon. It therefore recommended that the parties submit undertakings to the minister, in order to enable him to clear the transaction[43]. In his decision issued in December, the minister indeed cleared the deal subject to the implementation of commitments taking the form of a sale of assets ("structural remedies")[44]. The discrepancy between the decision of the French authorities and the ones of all the other authorities concerned caused notable concern at the time for two reasons. Firstly, they involved one and the same market (that of farmed Atlantic salmon), considered as extending throughout the European Free Trade Area [EFTA] and presumably characterised by a single competitive situation; secondly, the various regulators had exchanged evidence and diagnoses throughout the entire proceedings.

More recently, in the Akzo Nobel / Metlac case, the United Kingdom's *Competition Commission* decided in December 2012, again at the end of a "phase 2", that Akzo Nobel N.V.'s plan to acquire Metlac Holding S.r.l would result in a significant lessening of competition on the market for metal packaging for beer cans and other drinks, and that the only possible remedy to this problem was to prohibit the deal[45]. Its report was fully confirmed by the United Kingdom's *Competition Appeals Tribunal* in a judgement rendered in June 2013[46], against which an appeal is currently pending before the *Court of Appeal of England and Wales*.

By contrast, in a decision issued in April 2012, the German *Bundeskartellamt* considered in the same case that the deal was not of such a nature as to adversely affect competition and thus cleared it unconditionally[47].

[42] Competition Commission (CC), 18 December 2006, *Pan Fish A.S.A. / Marine Harvest N.V.*
[43] Conseil de la concurrence, 20 October 2006, *Pan Fish A.S.A. / Marine Harvest N.V.*, No 06-A-20
[44] Ministre de l'Économie, des Finances et de l'Industrie, 1 December 2006, *Pan Fish A.S.A. / Marine Harvest N.V.*, No C2006-47
[45] Competition Commission (CC), 21 December 2012, *Akzo Nobel N.V. / Metlac Holding S.r.l.*
[46] Competition Appeals Tribunal (CAT), 21 June 2013, *Akzo Nobel N.V. / Competition Commission*, No 1204/4/8/13
[47] Bundeskartellamt (BkartA), 24 April 2012, *Akzo Nobel N.V. / Metlac Holding S.r.l.*, No B 3/187-11

Technically, this discrepancy can be explained at first sight, for specialist jurists, by the fact that the competition rules applicable at the time by virtue of British law and German law were not exactly the same from a formal point of view. German law was based on a "test" that required the competition authority to determine whether or not contemplated mergers result in the creation or reinforcement of a dominant position, with British law relied on a "test" aimed at determining whether transactions are, more generally, of such a nature as to significantly damage competition ("*substantial lessening of competition*" [SLC] or "*substantial impediment to effective competition*" [SIEC]). The situation has changed since: German law was reformed in October 2012 in order to incorporate the "test" used by most of the other Member States of the European Union.

However, a comparative reading of the two decisions rendered in the case tends to indicate that the formal differences that existed at the time between the two legal systems were not decisive and that it was mainly a divergence of factual and economic assessment that led the two regulators to opposite conclusions. This feeling is reinforced by the judgement rendered in the English case[48], in paragraphs 138 and following of which the judge compares the respective assessments of the two authorities.

Regardless of the actual origin of the divergence of views that emerged between the two regulators, it is in any case difficult to admit, putting oneself in the shoes of the businesses concerned, that a same merger case concerning the same product market and geographical market (defined as including the entire EFTA) could produce two diametrically opposite outcomes.

The last case to date, Eurotunnel / MyFerryLink, is even more problematic to the extent that it resulted in the same conflicting outcomes in a situation where the substantive rules applicable by each of the competent authorities cannot even be said to differ.

In November 2012, the French *Autorité de la concurrence* had decided, following a summary procedure ("phase 1") and thus without opening in-depth proceedings ("phase 2") reserved for cases that raise serious competition doubts, to clear the takeover of the assets of the former SeaFrance S.A. company by Groupe Eurotunnel S.A.[49] In order to reach this result, it first dismissed the risk that the transaction would damage competition on the market for the transportation of passengers on the cross-Channel line between the ports of Calais and Dover. Second, it reached the conclusion that the deal could harm competition on the market for the transportation of freight on the same route, since Eurotunnel was able to make multimodal offers (ferry and train) that were liable to lead competing ferry operators to reduce the frequencies of their crossings or even to close their shipping lines. The *Autorité de la concurrence* nevertheless considered that the behavioural commitments taken by Eurotunnel alleviated its concerns regarding such "conglomeral" anti-competitive effects. Finally, the regulator considered that the planned merger would not lead Eurotunnel to increase its prices or reduce the quality of its Shuttle services ("unilateral" effects), since its customers would in such a case be able to move to competing ferry operators, given the latter's overcapacities.

For its part, the United Kingdom's *Competition Commission*, to which the case had been referred for a "phase 2" by the *Office of Fair Trading* (OFT), considered a few months later that the existing overcapacities on the Calais-Dover line rendered it unlikely that all of the operators present on the market would remain active thereon, that one of Eurotunnel's competitors would be led to exit in the short or medium term and that Eurotunnel would then be in a position to increase its market share and prices[50]. Consequently, it prohibited Eurotunnel from continuing to offer its ferry services on the Calais-Dover route.

[48] See note 46 above
[49] Autorité de la concurrence, 7 November 2012, *Groupe Eurotunnel / SeaFrance*, No 12-DCC-154
[50] Competition Commission (CC), 6 June 2013, *Groupe Eurotunnel S.A. & SeaFrance S.A.*

On appeal, the United Kingdom's *Competition Appeals Tribunal* rendered a judgement[51] in early December in which it rejected the grounds on which Eurotunnel and the SCOP SeaFrance criticised the procedure conducted by the *Competition Commission*, its competitive analysis and the proportionality of the remedies imposed on the parties. The report was however quashed and the matter referred to the regulator on another issue, that of determining whether or not the transaction constituted a "merger" within the meaning of British law. In its decision, the *Autorité de la concurrence* had examined this issue and concluded, like its counterpart, that it constituted a "merger" within the meaning of French law.

While the decisions rendered by the two competition authorities raised the issue of the consistency of the competition analyses conducted on each side of the Channel, the judgment thus uncovers an additional question of consistency: a deal considered as being a "merger" within the meaning of French law may not constitute a "merger" within the meaning of English law. "*To be or not to be a merger, that is the question*"...

Ultimately, four elements emerge from a comparative reading of the decisions rendered in this last case:

– just as in the previous example, two national authorities have reached conflicting outcomes in a case involving one and the same (cross-border) market;

– unlike the previous case, these results can in no way be explained by the existence of (formally) different substantive rules, since each law requires the regulator to apply the same "test" (SLC or SIEC) in order to assess the impact of proposed mergers on competition;

– in reality, it is the actual implementation of the rules that diverged, and more specifically, to use the technical jargon, the situation of reference (or so-called "counterfactual situation") chosen by the authorities to assess the impact of the transaction on competition (each one having reasoned in comparison to a different point in time);

– this different implementation may itself be explained by two series of factors: on the one hand, the applicable rule is, by its very nature, relatively general insofar as the analytical framework that it spells out must be adapted to the specific situation of each case; this inevitably leaves some room of interpretation for the authorities responsible for implementing it; on the other hand, the actual implementation of this rule occurs in two different procedural contexts, and each one of these parallel proceedings may clearly take a different course depending on different factors such as the documents that each authority has in its case-file or the discussions that it has about the case with the merging companies and with different third parties (competitors, customers, suppliers, etc.).

This brief overview of the "map of foreseeable risks" facing cross-border mergers that give rise to multiple notifications and parallel procedures within the European Union leads us to a threefold conclusion:

– firstly, the differences that have been mentioned are inherent to the conduct of parallel procedures, in one and the same case, by different authorities applying different (national) rules in different timeframes;

– secondly, it is clear that neither the gradual convergence of national rules nor the efforts of cooperation between national competition authorities, although they are rightly presented as an element of progress, are sufficient on their own to insulate companies from the potentially lethal effects of the "fragmentation bomb" which the current "multi-jurisdictional" system may sometimes resemble. On the contrary, the cases used as examples are symptomatic to the extent that the applicable rules were similar and that the authorities involved had cooperated with one another via exchanges of information, joint meetings and so on;

[51] Competition Appeals Tribunal (CAT), 4 December 2013, *Groupe Eurotunnel S.A.* and *Société Coopérative de Production (SCOP) SeaFrance S.A. v Competition Commission*, case No 1216/4/8/13 and 1217/4/8/13

– thirdly, the mere fact that straightforward conflicts of decisions have so far not occurred more frequently is not a sufficient reason to be satisfied with the *status quo*. Quite the contrary, the three recent cases taken as examples have each one revealed increasingly blatant problems.

One may thus doubt that the current "multi-jurisdictional" system is optimal in terms of "results". And this is even more so if one looks not just at the tip of the iceberg, but considers more generally the "processes" at work within this system.

Finding 4. The burdens and costs linked to the "multi-jurisdictional" system: the issue of multiple filings

A mere glance at all the texts concerning merger control in Europe, be it the successive versions of the merger regulation, their preparatory work, the assessment reports regularly published by the European institutions or other documents on this subject (public speeches, academic articles, etc.)[52] shows that all the stakeholders have had an ongoing concern since the "multi-jurisdictional" system was introduced a quarter of a century ago, namely that of solving the irritating problem of "multiple filings", i.e. the requirement imposed on companies to notify their merger projects to a multiplicity of national competition authorities when they do not fall within the remit of the European "one-stop shop".

The feedback provided on this issue by a large number of individuals interviewed in the course of the mission is fully consistent with what the European institutions themselves and various competition experts have been saying for the past 20 years. Let us hear them, while underlining the persistence of the problem:

– "*multiple filings: companies whose turnovers do not reach the currently high thresholds have to deal with 13 national merger control systems throughout the EFTA. Multiple national notifications increase the uncertainty, the efforts and the costs for companies and can result in contradictory decisions. A reduction in the thresholds [fixed by the merger regulation] would largely solve this problem*" (preface to the green paper published by the European Commission in 1996, i.e. prior to the 1997 legislative reform)[53];

– "*of particular concern is the trend indicating an increase in multiple filings to three or more Member States, and the fact that enlargement of the Community must be expected to exacerbate this trend. The Commission's proposal therefore focuses on the amendment of article 1(3) [of the merger regulation], which should be operational before the enlargement of the Community. Having analysed various numerical modifications to the combination of thresholds and other requirements of article 1(3), the Commission invites comments on the possibility of introducing an automatic Community competence over cases subject to multiple filing requirements to three or more Member States*" (summary of the green paper published by the European Commission in 2001, i.e. after the 1997 legislative reform and prior to that of 2004)[54];

– "*it is recalled that the existing Merger Regulation was adopted in December 1989, removing the need to seek clearance for mergers and acquisitions exceeding certain turnover thresholds in a large number of national regulatory regimes. This Regulation was last amended in 1997, when a second set of lower turnover thresholds, designed to address the problem of 'multiple filings' to national competition authorities was introduced*" (minutes of the Competitiveness Council of 2003)[55];

– "*[t]he history of the ECMR has been one of a permanent search for the appropriate allocation of cases between the European Commission and the [national competition authorities]. Against the background of a proliferation of national merger control regimes, lawyers and industry have over the years insisted that the architecture be*

[52] See the bibliography enclosed as Appendix 4 to the present report

[53] Green paper No COM(96) 19 final of the European Commission, of January 1996, on the review of the merger regulation, translation by the rapporteur (see also its paragraphs 4, 14 to 58 and 72 to 88)

[54] Green paper No COM(2001) 745 final of the European Commission, of 11 December 2001, on the review of Council regulation (EEC) No 4064/89 (see also its paragraphs 54 to 68, as well as the report No COM(2000) 399 final of the European Commission to the Council, of 28 June 2000, on the application of the merger regulation thresholds, especially its paragraphs 3 to 11, 34 to 48 and 52 to 63, as well as its two appendices)

[55] Minutes of the 2505th meeting of the Council (Competitiveness) of 13 May 2003, p. 26

reviewed in order to deal with multi-jurisdictional filings of non-Community merger dimensions" (article published by competition lawyers 1 year after the reform of 2004)[56];

– *"the Commission's analysis of cases reported by the NCAs indicates that there are still a significant number of transactions which need to be notified in more than one Member State. In this regard, available data for 2007 indicate that there were at least 100 transactions which were notifiable in three or more Member States. These concentrations together required more than 360 parallel investigations by the NCAs. [...] the negative consequences of parallel proceedings and the potential for a contradictory outcome are particularly important for those cases which raise substantive competition issues*" (report of the European Commission to the Council in 2009, i.e. 5 years after the 2004 reform)[57];

– "*[d]ifferences in merger control rules within Europe create an uneven playing field in a single market*" (article published by a competition lawyer in 2010)[58].

– "*the [Eurotunnel / SeaFrance] case is emblematic of the current shortcomings of the European merger system. It is not acceptable that in 2013, in the European Union, such an outcome can be reached*" (editorial published by a competition law and international law professor in 2013)[59].

What these quotes and many more perceive is that the "problem of multiple filings", to use the words of the Council of Ministers, has never really been tackled, and in any case has never been dealt with satisfactorily to date.

The first review of the merger regulation, which occurred in 1997, had as its main objective the eradication or at least the reduction of this phenomenon. It did so by setting up, in parallel to the initial thresholds triggering the European Commission's jurisdiction (see box 5 below), additional thresholds intended to enable Brussels to centralise the handling of a greater number of cross-border mergers[60].

Box 5: the thresholds triggering the jurisdiction of the European "one-stop shop"

– *The "main" thresholds created by article 1, paragraph 2, of the merger regulation*: total worldwide turnover of the parties > €5 billion + total European turnover of at least two of the parties individually > € 250 million.

– *The "ancillary" thresholds (or "small thresholds") added by article 1, paragraph 3, of the merger regulation*: total worldwide turnover of the parties > € 2.5 billion + total turnover of all the parties in each of three Member States > € 100 million + individual turnover of at least two of the parties > € 25 million in each of these three Member States + total European turnover of at least two of the parties individually > € 100 million.

[56] Gerwin VAN GERVEN and Tom SNELS, *The new ECMR: procedural improvements*, Legal Issues of Economic Integration, No 32(2), March 2005, p. 200

[57] Report No COM(2009) 0281 final of the European Commission to the Council, of 18 June 2009, concerning the operation of regulation No 139/2004 (paragraphs 12 to 14), and working document No SEC(2009) 808 final, of 30 June 2009 (paragraphs 3, 44 to 55 and 79 to 83)

[58] Dirk SCHROEDER, *The merger control patchwork*, Legal Issues of Economic Integration, No 37(1), April 2010, p. 11

[59] Laurence IDOT, *Un réseau pour le contrôle des concentrations dans l'Union européenne?*, Europe, No 11, November 2013, p. 4, translation of the rapporteur

[60] Report No COM(2000) 399 (paragraphs 8 to 10).

With more than a decade of experience, the least that can be said is that the added value of this arrangement is not proportionate to its sophistication. According to public data[61] and to more recent information provided to the rapporteur, these additional thresholds represent 10 to 15% of the deals notified annually to the European Commission. When compared to the total number of cases reviewed by Brussels, which amounts to approximately 280 per annum since the beginning of the current economic crisis (259 in 2009, 274 in 2010, 309 in 2011 and 283 in 2012), this represents 30 to 40 cases per annum. This proportion is not particularly high.

In any event, it is admitted that these additional thresholds have not fully met their purpose, to say the least. On the one hand, they have allowed a few more cases to benefit from the European "one-stop shop" (among which a number of cases which probably deserve to be handled by the European Commission in view of the scope of the geographic markets that they affect and/or of the cross-border competition issues that they raise)[62]. On the other hand, it is not certain that all of these cases would have led to a "multiple filing" absent the 1997 thresholds (some of them may have only been reviewable by a single national competition authority). In any case, what is certain is that the issue of multiple filings has not gone away[63].

What is more, given the complexity of this provision, it has proved impossible to determine exactly which ones of its aspects did not live up to the legislator's expectations and deserved to be improved. The Commission acknowledged it clearly: "*modifications to the current criteria in article 1(3) are unlikely to provide the envisaged results. Any modifications would most likely, on the one hand, not provide a guarantee against continuing multiple filings in three or more Member States, and, on the other, most likely confer Commission jurisdiction over a number of cases that today are not subject to such multiple filings*"[64].

In view of this relative lack of success, the second amendment introduced to solve the problem of "multiple filings", in 2004, consisted in allowing companies to request the referral of merger cases liable to be handled by at least three national competition authorities prior to their notification to these authorities. Since its inception, this mechanism has resulted in 249 referrals to the European Commission. This represents an average of 24.9 referrals per annum over the whole period (2004-2013) and 22 referrals per annum for the last 5 years for which comprehensive information is available (2008-2012)[65]. As stated above, a small number of cases (between 1 and 3) are also referred to the European Commission every year once they have been filed to the national competition authorities.

By making it possible to avoid a potentially far greater number of national "multiple filings", this upward referral has proved to be a clearer success than the previous reform. As emphasised by Commissioner Neelie KROES a year after it was introduced, "*the 35 referrals between May 2004 and September [2005] would, under the old regime, have resulted in 239 separate national reviews – that is a lot of red tape saved for merging parties*"[66].

However, even if these successive reforms are knit together, the current effectiveness of the "multi-jurisdictional" system remains doubtful for at least three reasons.

The first one relates to the relatively large number of cases which remain subject to a "fragmented" review due to multiple filings and parallel national procedures.

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[61] Report No COM(2009) 0281 (paragraph 37)
[62] Report No COM(2009) 0281 (paragraphs 37 to 43)
[63] Report No COM(2009) 0281 (paragraphs 44 to 55 and 79 to 81)
[64] Green paper No COM(2001) 745 (paragraph 51)
[65] Source: statistics published by DG COMP on 30 November 2013
[66] Neelie KROES, *One year in: continuity, concentration and consolidation in European competition policy*, annual competition conference by the International Bar Association (IBA), Fiesole, 21 October 2005, p. 3

The information available to the French *Autorité de la concurrence*, which is probably incomplete, shows (see table 2 below) that the number of deals that give rise to a "multiple filing" each year over the recent period ranges between 230 and 240; this figure is not significantly lower:

– than the total number of upward referrals to Brussels since 2004 (which amounts to 249),

– and than the number of cases dealt with each year by Brussels (which ranges between 280 and 300).

Table 2: number of "multiple filings" over recent years[67]			
Year	2011	2012	2013*
Number of filings to the Commission	309	283	257
Number of national "multiple filings"	237	226	133
Number of Member States concerned involved (average)	3.42	3.41	3.08

(N.B.: statistics for the year 2013 end on 30 November with respect to filings made to the European Commission and on 13 November with respect to national multiple filings)*

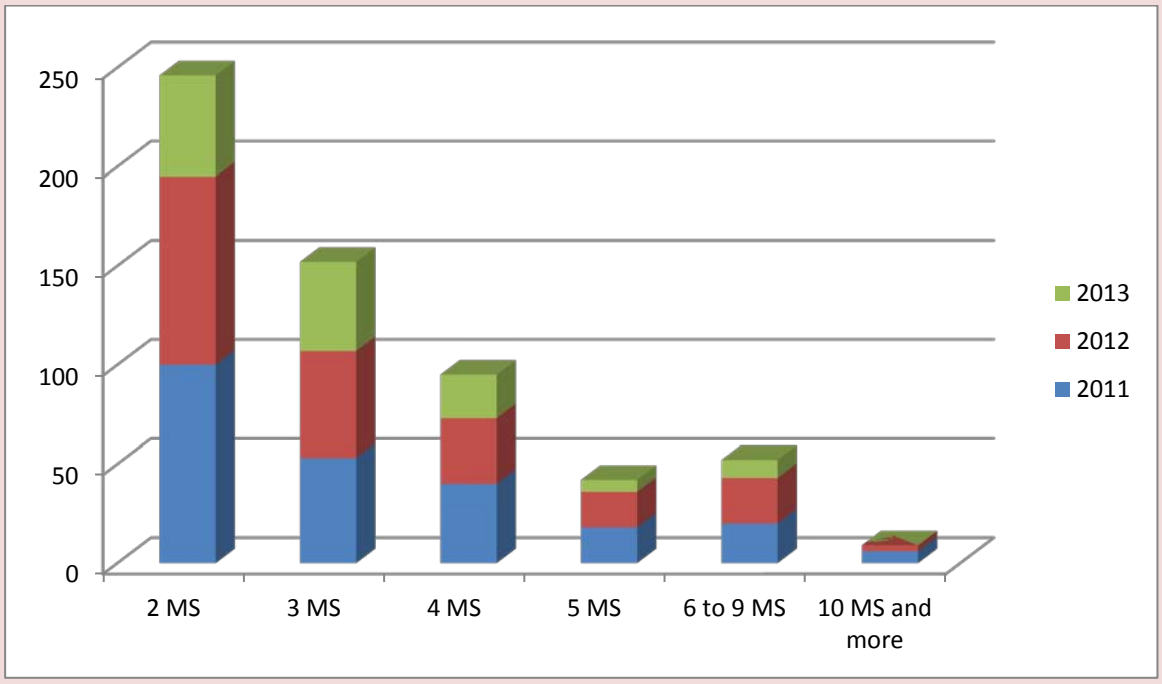
These figures only cover recent years, but there is nothing new in the problem. In its assessment report for 2000 and its 2001 green paper, the European Commission for instance noted the existence of 364 "multiple filings" for the period going from March 1998 to December 1999 and of 217 "multiple filings" for the year 2000[68]. More recently, in its 2009 report to the Council and its public consultation of June 2013, it noted likewise that there had been "*at least 241*" "multiple filings" for the year 2007[69].

The second reason is linked to the huge number of parallel proceedings that result from these multiple filings.

Graph 2 below ranges the "multiple filings" that have occurred in the European Union over the last three years according to the number of Member States in which the deals concerned have been reviewed.

[67] Sources: statistics published by DG COMP and statistics collected by the *Autorité de la concurrence* via the ECA notice system
[68] Report No COM(2000) 399 (paragraphs 35-36) and appendix I of the green paper No COM(2001) 745 (paragraphs 4 and 5)
[69] Report No COM(2009) 0281 (paragraphs 45 and 52) and document entitled "*Roadmap: Towards improving EU Merger Control*" of 20 September 2013, p. 2 (http://ec.europa.eu/competition/consultations/2013_merger_control/roadmap_en.pdf)

Graphic 2: Breakdown of "multiple filings" by number of Member States involved*



(: statistics for the year 2013 end on 30 October)*

The above statistics reveal the existence of "peaks" going up to 14 or 15 national competition authorities competent to review one and the same merger deal. As a result, the 576 "multiple filings" that have occurred over the period have translated into 1994 separate national proceedings.

The last reason is of a more qualitative nature: the continued large number of "multiple filings" occurring year after year is not merely a problem that flies in the face of the goals that led the European legislator to set up a "one-stop shop" in 1989, namely ensuring a consistent implementation of the law and an equal treatment of companies operating throughout the Single Market. The "fragmentation" of merger control that it leads to is also a source of difficulties for all of the stakeholders involved:

– be they businesses, for which it involves artificial administrative burdens and transaction costs (filings and information to be submitted to each regulator, legal and economic advice, etc.), and ultimately greater legal and commercial risks (delayed timetables, diverging analyses, etc.);

– or regulatory authorities, which cannot satisfy themselves from a situation in which the swarm of applicable rules prevents them from fully coordinating their interventions and sometimes results in contradictory decisions.

A final and very recent example may be mentioned to illustrate the fact that the current system sometimes looks like an inextricable Gordian knot[70]. Two large corporations, the Mexican company Cemex and the Swiss firm Holcim, announced last August that they intended to make parallel deals: Cemex intended to take over Holcim assets in the Czech Republic and Spain, while Holcim would receive Cemex assets in the Benelux, France and Germany. These transactions were notified, depending on the case, to the European Commission as well as to the Czech and Spanish competition authorities. Since then, the Spanish authority has

[70] Sources: articles published in the specialised press (Community Week, 25 October 2013, "*No EUMR one stop shop for linked cement transactions*", and Mlex, 28 October 2013, "*Cemex, Holcim deal attracts in-depth Czech probe*") and information provided to the rapporteur

asked for its case to be referred upward to the European Commission, a request which the Commission granted. Meanwhile, the German authority requested a downward referral of a part of the European case, a request which the European Commission did not grant. As for the Czech authority, it appears to have retained its part of the case and opened a "phase 2".

There is certainly no reason to blame the various authorities involved for taking the course of action that each of them decided to take in this case. Their respective competence is determined by objective rules; likewise for the case referral mechanisms.

That being said, such a situation cannot be considered as providing evidence of a "smooth" and "swift" regulatory environment. It is thus understandable that many stakeholders met in the course of the mission have expressed the view that some progress must be made in this respect, as the European Commission itself previously did[71].

[71] Report No COM(2009) 0281

The recommendations: a policy in need of consistency and simplification

The current fragmentation of the "multi-jurisdictional" system set up to oversee mergers in Europe is not simply a regulatory problem; it has broader economic consequences insofar as merger control is the key that opens – or closes – the door through which commercial deals must pass.

In a globalised world in which innovation plays a decisive role, corporate competitiveness depends more than ever on the ability of companies to adapt quickly to change and to seize opportunities to grow where and when they arise.

In this context, merger control must guarantee that take-overs and other acquisitions occur under conditions that do not adversely affect competition and consumer welfare in the long-run. At the same time, its institutional design should not hamper the initiatives of entrepreneurs who, if they are disinclined from moving forward today will not do so tomorrow or will do so elsewhere, with other partners. Merger deals handled by the national competition authorities cannot be dealt with less favourably, from this point of view, than those handled by the European Commission.

On the basis of the findings presented in the first part of the report, the second part makes recommendations organised along four courses of action:

1. better preventing conflicts, to the benefit of companies and national competition authorities;

2. increasing convergence and coordination by creating a genuine "Union of law(s)";

3. reinforcing collective governance and cooperation between competition authorities;

4. making case management simpler and more strategic.

From the point of view of the rapporteur, these courses of action taken together make a whole.

A strategic and not a merely technical challenge

The current organisation of merger control in Europe raises two challenges:

– a regulatory challenge in a crucial area for businesses, who may find it difficult to understand (and even more to accept) that the intervention of competition authorities remains so "fragmented" throughout the Single Market;

– a competitiveness challenge, because the administrative burdens, transaction costs, inconsistent deadlines and other legal and business risks that are inherent to multiple filings can at the end of the day inhibit merger projects that could be beneficial for innovation, growth and ultimately job creation in a Europe which is in need of all the economic fuel that it can take.

In this respect, a point should be made which has not been assessed in detail because it is beyond the core scope of this report, but which arose repeatedly in discussions with a number of stakeholders interviewed by the rapporteur, including some with an institutional background: it is not because a merger case has economic and commercial significance that it necessarily raises major competition issues. It is vital to avoid the risk of bureaucratisation that would lead to handle "minor" competition cases with the same amount of care, precautions and time as "major" ones.

Most frequently quoted among the possible manifestations of such a risk are: the lengthening of pre-notification periods over the years; the multiplication of the information and data requested by the case-teams, although their relevance does not always seem clear to business people or their advisers; and the increasing complexity of the procedures. These criticisms can be taken with a "pinch of salt" because regulatory controls are inevitably perceived by business people as a hindrance. But this does not prevent regulators from taking a step back and asking themselves whether the rules and procedures are always as swift and targeted as they could be.

If certain aspects of the "regulatory ecosystem" are considered to be problematic even by large firms, as was recalled in a recent public intervention by a stakeholder who has the dual hat of legal officer of a global company and member of a national competition authority, Mrs Carole XUEREF[72], it is even more so for medium-size businesses, i.e. those that, according to so many public reports, experience difficulties in their attempts to grow in scale in Europe, and in France in particular[73].

Public oversight in the field of competition, which for so long has been an incarnation of European integration through law and economy, should not become an impediment to the Single Market.

[72] "*The inaugural global merger control conference – Navigating unchartered waters of global merger regimes*", conference organised by *Competition Review* and Paul Hastings LLP, Paris, 29 October 2013, Second Roundtable, "*Timing: playing the clock?*", interventions of Carol XUEREF, group legal officer, Essilor International, Kaarli EICHHORN, senior counsel for European competition law, General Electric, and Andreas STARGARD, partner, Paul Hastings

[73] See, for example, Mario MONTI, *A new strategy for the Single Market, at the service of Europe's economy and society*, report submitted to President José Manuel Barroso on 9 May 2010 (pp. 27, 48-49 and 96-97); Louis GALLOIS, *Pacte pour la compétitivité de l'industrie française*, report submitted to Prime Minister Jean-Marc AYRAULT on 5 November 2012; Commissariat général à la stratégie et à la prospective (CGSP), *Quelle France dans dix ans? Contribution au séminaire gouvernemental*, Paris, 19 August 2013, and *Quel modèle pour l'Europe* and *Quel modèle productif? Introductory notes to the national debate*, Paris, Autumn 2013

In this context, the concern linked to the risk of conflicting decisions requires priority treatment in view of its "pathological" – and frankly, unacceptable – nature in a regulatory system that aspires to be integrated and should genuinely be so. It is both the most problematic issue and the one that could be solved most easily from a technical point of view.

In this respect, the findings of the first part of the report have shown two things: on the one hand, the risk of a divergence of positions between national competition authorities is not hypothetical, even though such conflicts have remained rare until recently; on the other hand, existing mechanisms do not suffice to prevent them, even with the best will in the world.

In particular, article 22 of the merger regulation does not provide an adequate solution. In theory, it enables national competition authorities to request the referral of a cross-border merger to the European Commission once proceedings have started. In reality, it is saddled with all possible disadvantages: the mechanism cannot be activated until after national competition authorities have already devoted some time and resources to the case; the referral request gives rise to an additional delay; if accepted, it only applies to the Member State(s) whose authority(ies) has(ve) agreed to waive its(their) right to handle the case; it triggers a change in the legal regime that is applicable to the case as well as in the case-team that investigates it, and thus additional deadlines and burdens.

The improvements considered by the European Commission in its recent public consultation[74] are a move in the right direction and deserve to be supported and rapidly implemented. They do not, however, solve all of the problems underlined. In particular, the referral would continue to occur while proceedings are already in progress and it would still not cover the entirety of the deal concerned, although the current "*opt-in*" mechanism would be replaced by an '"*opt-out*" system[75].

It would be more efficient to enable companies to ask for a referral earlier. As previously stated however, the pre-notification referral arrangement set out in article 4, paragraph 5, of the merger regulation currently only applies on condition that a minimum of three national competition authorities are competent to examine a case.

In earnest, either a merger is cross-border or it is not. When it is, i.e. when it is notifiable to more than one competition authority, there is no objective reason to treat it differently whether two or three authorities are involved. Despite the commonly accepted idea that cooperation and coordination are easier to ensure when only two authorities are competent to review the deal, undertakings are left in a "loophole" when this cooperation and coordination do not result in a shared analysis of the case. It is therefore recommended to lower the threshold for triggering an upward referral to the European Commission from three national competition authorities to two.

At the very least, this should be done for deals that concern inherently cross-border markets such as transportation routes or network connections between Member States (as opposed to markets that are simply larger than national). It is in this type of case that the risk of a conflict of decisions is least acceptable and less legitimate, since it is in respect of a single and same cross-border market, characterised by a single and same competition situation, that the various competent authorities are required to intervene.

[74] See note 24 above

[75] See document No SWD (2013) 239 final of the European Commission of 25 June 2013, *"Towards more effective merger control*", p. 17. An "*opt-in*" mechanism implies that the national competition authorities must take the explicit decision of joining the referral; an "*opt-out*" system has the consequence that, unless they decide not to join the referral, they are considered to be supporting it

This reform is liable to result in the shift of a number of cases from national competition authorities to the European Commission[76], but both sides have the means of handling its importance and its impact on their portfolio and resources.

National competition authorities will retain their existing power to disagree with case referrals to the European Commission, in accordance with article 4, paragraph 5, of the merger regulation. This instrument should allow them to regulate the flow of outgoing cases; at the same time, the limited use of this power to date[77] tends to indicate that it will not be used to systematically block upward referrals.

For its part, the European Commission could neutralise the influx of cases referred by national competition authorities by stepping up its latest efforts of case prioritisation. In addition to its recent "package" of simplification measures (e.g. increasing the market share thresholds below which cases are allowed to benefit from a simplified procedure, waiving the obligation imposed on the parties to supply certain data)[78], other measures could be envisaged[79]. For instance, when cross-border merger cases are referred to it by national competition authorities, the European Commission could focus its competition analysis solely on the national markets on which they would have been reviewable but for the referral, unless specific circumstances warrant a broader examination.

The European Commission could also make more frequent use of "downward" referrals than it does at present.

Subject to the in-depth legal analysis to be performed by the services of the Council and Commission, an amendment of the merger regulation such as the one envisaged above could be made by a qualified majority vote, in accordance with article 4, paragraph 6, thereof ("*at the Commission's proposal, the Council, deciding by a qualified majority, can revise paragraphs 4 and 5*").

Such an amendment could be put on the table soon after the European elections and the start of the new College's term of office (2014 / 2019), on the basis of a proposal intended to follow-up on the European Commission's recent public consultation on referral mechanisms[80] and on the policy paper that has just been announced by Vice-President Joaquín ALMUNIA[81].

Recommendation 1:

– Allow businesses to request the referral of cross-border mergers to the European Commission when two or more national competition authorities are competent to control them, instead of three authorities or more currently, at least in the case of deals concerning interconnection markets (transports, networks, etc.).

Even though the measure contemplated above can help prevent possible conflicts of decisions, it will not suffice to ensure the consistency of a regulatory system whose main characteristic is – and will likely

[76] See the statistics concerning the number of cross-border mergers notified to two national competition authorities during recent years on page 33 below

[77] Six requests for referral under article 4, paragraph 5, of the merger regulation have been rejected by Member States since the mechanism was created in 2004 (source: statistics published by DG COMP on 30 November 2013). However, one cannot exclude the parties having been dissuaded upfront from requesting a referral, after having informally sought the opinion of the authorities concerned and having obtained a negative reaction on their part

[78] Press release No IP/13/1214, "*Mergers: Commission cuts red tape for business*" (http://europa.eu/rapid/press-release_IP-13-1214_en.htm), and memo No 13/1098, "*Mergers: Commission adopts package simplifying procedures under the EU Merger Regulation*" (http://europa.eu/rapid/press-release_MEMO-13-1098_en.htm)

[79] See page 42 below

[80] See note 24 above

[81] Mlex, "*EU Commission to launch policy paper on reviewing minority stakes*", 10 December 2013

remain – the existence of two levels of supervision (European and national), and consequently of thirty different authorities.

This is why the following recommendations explore avenues of further cooperation and coordination.

Action 2. Increasing convergence and coordination by creating a genuine "Union of Law(s)"

To guarantee greater consistency within the existing "multi-jurisdictional" system, it is recommended, first of all, that all cross-border mergers be assessed in light of a unified set of substantive rules.

In the current system, the scope of application of European merger law is limited to merger cases that fall within the jurisdiction of the European Commission. The national laws of the 28 Member States therefore apply to all mergers that are not scrutinised by the Commission. Consequently 2, 3, 10 or even 28 national laws are potentially applicable to cross-border mergers. The detailed statistics available to the *Autorité de la concurrence* show how much fragmentation and complexity this leads to[82]:

– out of a sample of 61 cross-border mergers known in 2010, 24 were notifiable in 2 Member States, 19 in 3 Member States, 9 in 4 Member States, 3 in 5 Member States, 3 in 6 Member States and 3 in 8 Member States;

– out of 237 cross-border mergers that occurred in 2011, 100 were notifiable in 2 Member States, 53 in 3 Member States, 40 in 4 Member States, 18 in 5 Member States, 13 in 6 Member States, 4 in 7 Member States, 2 in 8 Member States, 1 in 9 Member States, 3 in 11 Member States and 3 in 13 Member States;

– out of 226 cross-border mergers that occurred in 2012, 95 were notifiable in 2 Member States, 54 in 3 Member States, 33 in 4 Member States, 18 in 5 Member States, 10 in 6 Member States, 7 in 7 Member States, 4 in 8 Member States, 2 in 9 Member States, 1 in 10 Member States, 1 in 14 Member States and 1 in 15 Member States;

– out of 113 cross-border mergers that have occurred at the date of completion of the report in 2013, 51 were notifiable in 2 Member States, 45 in 3 Member States, 22 in 4 Member States, 6 in 5 Member States, 8 in 6 Member States and 1 in 7 Member States.

These "multi-notifications" are not evenly distributed between all national competition authorities: a number of them occurred in a limited number of Member States (including Austria, Germany and Italy) due to the low thresholds fixed in their respective legislation[83].

Two options could be considered to remedy this fragmentation. From a technical point of view, the simplest one would be to reduce the thresholds triggering the jurisdiction of the European Commission. However, apart from the fact that many stakeholders interviewed in the course of the mission found such a solution undesirable, it would most likely encounter the same reluctance that led to its rejection each time it was suggested in the past. Furthermore, it would raise a number of legal, policy or administrative issues including overloading the European "one-stop shop" and dis-incentivising national competition authorities from enforcing merger control, to name the most obvious.

To preserve the current institutional and administrative balance, the recommendation is to favour a different solution, namely that all merger cases[84] liable to be reviewed by several national competition authorities[85] be assessed in the future in light of one and the same law, the European merger law, instead of a multiplicity of national laws. This measure, which has no effect on the European Commission's current scope

[82] Statistics collected by the Autorité de la concurrence via the ECA notice system on 30 October 2013
[83] Italy having significantly increased its thresholds from 1 January 2013, it ought to be less concerned by this phenomenon in the future.
[84] Within the meaning of the merger regulation
[85] Whether by virtue of a compulsory system of prior notification such as the one that exists in most Member States or of an optional system such as that which exists in the United Kingdom

of competence, would allow the consistent interpretation and implementation, throughout the European Union, of the two concepts on which merger control rests, namely:

– the definition of mergers, characterised by the takeover of one business by another[86];

– the "test" applicable in order to assess the effects of mergers on competition.

A "2 +" system of this type has already been envisaged in the 1990s[87], but abandoned in light of the insufficient convergence of the rules in force in the various Member States at the time.

One could even go further by applying European law to all merger cases that may have cross-border effects, irrespective of whether they are notifiable to one or more national competition authorities ("1 +" system), as is being routinely done in the neighbouring field of antitrust since the entry into force of regulation No 1/2003 a decade ago.

In view of the degree of formal convergence achieved today (much greater than 20 years ago, but still insufficient to ensure the absolute consistency needed by companies), this reform would not change much from a legal point of view. Only Austria and Italy currently continue[88] to apply a "test" based on the creation or reinforcement of a dominant position, as opposed to the "test" based on a significant lessening of competition[89].

At the same time, the application of European law instead of national laws would have a huge "disciplining" effect in practice:

– the cases detailed in the first part of the report show that, even when national laws have a fairly similar content, national competition authorities may diverge considerably in their interpretation and application, in particular in cases that raise complex or novel competition issues (in other words in sensitive cases);

– once the law becomes uniform and not merely similar, national competition authorities will have much greater incentives to reach a common conclusion, if only in order to avoid the risk that national and European review courts step in order to say who is right and who is wrong.

This harmonisation of national merger laws, similar to the one that took place in 2003 in the field of antitrust[90], could be achieved through a European regulation or directive. The former instrument would ensure greater legal certainty for market players and national authorities and judges alike.

In view of the time required to prepare and negotiate such an instrument, and in order not to delay the implementation of recommendation 1 above, this reform ought in any event to be drafted independently of the current merger regulation.

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[86] An harmonisation of the definition of mergers for the purpose of applying European law does not necessarily prevent Member States from imposing the notification of transactions that do not constitute mergers within the meaning of European Union law (such as certain minority shareholdings). Member States could, on the contrary, continue to control such transactions under their national law. A similar system, involving the coexistence of a concept that has been harmonised at European level and the option for Member States to maintain a stricter national system in parallel exists in the field of antitrust (article 3, paragraph 2, of regulation No 1/2003)

[87] With a sizeable difference however, since at the time it was planned to transfer the review of "2 +" cases to the European Commission (see green paper No COM(96) 19, paragraphs 59 and 72 to 86; see also report No COM(2000) 399, paragraphs 5 and 62), while the present report recommends that they be handled by national competition authorities for reasons of subsidiarity and case prioritisation

[88] Source: report No C(2013)72 of the Competition Committee of the OECD, of 24 and 25 October 2012, on country experience with the 2005 Recommendation of the Council on merger review [C(2005)34] (updated version published on 9 December 2013, p. 55)

[89] The shift is almost complete from this point of view in comparison with the situation that prevailed in 2002, when a small minority of Member States, including France and the United Kingdom, applied the "test" of a significant lessening of competition, while the majority, including the European Commission, favoured the test of a dominant position

[90] See note 37 above

Recommendation 2:

– Require national competition authorities to apply the substantive rules of European merger law in all merger cases reviewable in two Member States or more.

This "accelerator of consistency" will however not work without a minimum of procedural coordination between the various authorities that handle a cross-border case in parallel: it is impossible for two authorities to talk to one another if one completes its proceedings when the other is just starting its assessment.

The creation of a genuine "Union of law" thus involves, secondly, a standardization of basic national procedural rules. In this respect also, the legal adjustments that are recommended do not require an insurmountable effort for two reasons:

– the current procedural frameworks are already much closer than they were 15 or 20 year ago. Almost all of the national systems are based on a compulsory system of *ex ante* notification of merger projects followed by a two-steps procedure, with a "phase 1" (summary analysis of all notified deals) and a "phase 2" (in-depth examination of cases raising competition issues that cannot be solved during "phase 1" due to its relative brevity);

– furthermore, where merger cases are the subject of "downward referrals" from the European Commission to national competition authorities, the existing merger regulation has already provided for a basic procedural standardisation in order to guarantee the same equality of treatment and legal consistency to market players as would have existed if the European Commission had kept the case. Article 9, paragraph 6, of the merger regulation provides that in such cases, each national competition authority "*shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take*" "*within 45 working days*" from the date of referral[91].

In practice, the coordination of parallel national procedures in cross-border merger cases involves four priority adjustments. They are presented below, beginning with the procedural stage at which a divergence between national authorities risks becoming "incurable" and then looking at the prior steps of the procedure.

Firstly, minimal consistency must be guaranteed as concerns the duration of the "phase 1" of merger control procedures, in other words the phase during which competition authorities perform a summary analysis of merger cases in order to determine whether they can be approved forthwith or if an in-depth procedure ("phase 2") must be opened. It is key for the various authorities that investigate the case in parallel to be able to coordinate themselves at this stage because its brevity leaves no room for error. At present, the length of this "phase 1" varies from single to double in the various Member States, and even more (with a minimum of 25 working days in certain countries and a maximum of 60 working days in others).

Coordination could be made easier, as a minimum, if all national competition authorities dealing with a cross-border case were bound by a common maximum period, modelled on the maximum deadline already provided by article 9, paragraph 6, of the merger regulation in cases where the European Commission refers a deal of Community dimension to the Member States.

Standardising the duration of the "phase 2" of the procedure in the various Member States is probably more difficult and less of a priority. More difficult because this step of the procedure raises complex legal questions that the Member States may not necessarily approach in the same way (e.g. is an oral hearing needed

[91] Note that the previous version of this provision seemed to be more prescriptive than the current one, since it provided that "*the publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected no more than four months after the Commission's referral.*"

or not, should the same body or a different body within the authority be in charge of it, etc.). And less of a priority because this phase is in any event longer, thus leaving more time for the various authorities involved to coordinate with one another.

A maximum period would nevertheless be useful at this stage as well. At the very least, a possibility of suspending the procedure should be made available to all national authorities dealing in parallel with a cross-border merger, on the model provided in the field of antitrust by article 13 of regulation No 1/2003.

The standardisation of national deadlines will however only make sense if the event that triggers the proceedings occurs simultaneously in the various Member States involved.

It is therefore necessary, secondly, that companies and their advisers notify their deals to all competent authorities at the same time, to the greatest extent possible. Such an effort is the inevitable counterpart – and even a prior condition – for a more coordinated intervention of competition authorities[92].

In order for companies and their advisors to be able to make such an effort, it is essential, thirdly, to guarantee greater consistency in the data that they are requested to submit in the course of the various national procedures. The various European competition authorities (or the Member States to the extent that this issue is governed by national law) should therefore agree on a standardised set of basic information and documentation to be provided in the notification file.

Such a measure may seem relatively minor, but it would greatly simplify the life of businesses involved in the preparation and management of a merger case, to the extent that such a "model notification form" is kept to the necessary minimum required in order to start the procedure, and does not purport to anticipate all of the possible competition issues that may surface at a later stage. German notifications, which are rather streamlined and focused, are often given as an example from this point of view.

The information to be submitted at this stage should in any case include the identity of all national authorities competent to review the deal[93].

A more radical solution suggested by a number of stakeholders heard in the course of the mission would consist in notifying cross-border mergers to a single "mailbox" operated by all European competition authorities. Such a radical development is however dependent, *inter alia*, on the creation of a genuine European Merger Network[94].

Fourthly, it is necessary that the "thresholds" that govern the controllability of cross-border mergers in the various Member States be put in line with the international best practices that have long recommended favouring thresholds expressed in terms of turnover in view of their objective nature[95].

If countries throughout the world are gradually converging on this point, there is no reason for European countries not to join the movement and to retain market share thresholds that lend themselves to all sorts of discussions and uncertainties. Member States should therefore be required not to impose more demanding thresholds than those provided by European law. With the recent abandonment of any reference to market share criteria by

[92] The coordination of national procedures raises specific issues with respect to the United Kingdom, where the notification of merger deals is optional rather than compulsory as elsewhere in the European Union. In order for the UK competition authority to review a cross-border deal in parallel to its European counterparts, it is thus necessary that the merging parties take the initiative of notifying it without waiting for the authority to eventually decide to assess it

[93] Whether notification is compulsory or optional

[94] See the recommendations made on page 41 below

[95] Recommendation No C(2005)35 of the Council of the OECD, of 23 March 2005, on merger review, point I.A, and "*recommended practices for merger notification procedures*" published by the *International Competition Network (ICN)* on 28 and 29 September 2002

Member States such as the Czech Republic or Poland, these only subsist today in a few European countries such as Portugal, Spain and the United Kingdom[96].

For its part, the level of these thresholds can vary from one country to another for legitimate reasons, such as the size of the national economy or the level below which the legislator considers mergers to be too small to warrant an investigation (*de minimis* deals).

All of the above recommendations could be implemented via the same legal instrument as the one intended to implement recommendation 2 above, with the exception of the "model notification form" which could be agreed upon through best practices shared by all European competition authorities.

Recommendations 3 to 5:

– Harmonise the types of thresholds above which mergers are reviewable in the various Member States (but not their level), by retaining only thresholds expressed in terms of turnover.

– Introduce a "model notification form" listing standard information to be provided by companies when they notify a cross-border deal, or even a "single notification" system to the European Competition Network.

– Set up a maximum period applicable when national competition authorities handle a cross-border merger, on the model of the maximum period that is already applicable when the European Commission refers a merger of Community dimension to national authorities.

[96] Source: report No C(2013)72 of the Competition Committee of the OECD, p. 18

Action 3. Reinforcing collective governance and cooperation between competition authorities

As shown by the findings made in the first part of the present report, the current organisation of merger control poses a problem due not only to the proliferation of national rules, but also to the absence of genuine collective governance. The interaction of national competition authorities with the European Commission is ensured by the merger regulation, contrary to the interaction of national authorities among themselves. Their laudable efforts to set up best practices of cooperation are insufficient, insofar as this "*soft law*" is hampered fairly quickly by the diversity and inconsistency of the rules applicable in each Member State ("*hard law*").

In order to remedy this fragmentation, it is recommended to capitalise on the success of the "Network" implemented a decade ago in the neighbouring area of antitrust enforcement[97], by extending it to merger control.

The organisation of such a Network should however be adapted to the specific features of merger control. In particular, the quantity of merger cases to be dealt with annually by national competition authorities and the European Commission is incomparably greater than the number of cases of cartels and abuses of dominance that they investigate at the same time, with fairly limited resources. In addition, merger cases must be handled within strict deadlines which do not exist in the field of antitrust.

In view of these elements, it does not seem appropriate to set up, in relation to merger control, an arrangement similar to the one provided in the field of antitrust enforcement, whereby the European Commission can "take-over" cases handled by national competition authorities when they risk reaching diverging solutions[98]. Such a "take-over" mechanism would create more problems than it would solve (e.g. change of case-team in the middle of the procedure, risk that the case is re-examined *ab initio,* additional delays and judicial uncertainty) and would be acceptable neither for the merging parties nor for the authorities involved.

Instead, it is recommended to envisage two specific mechanisms.

When a cross-border merger case is notified to a number of national competition authorities (or to the Network), a mechanism a case-allocation could be introduced so that a single "best-placed" authority handles it on behalf of all the authorities concerned. The appointment of such a "lead authority" may not be possible in all cases but can be envisaged, for instance, where a given deal has its "centre of gravity" in one of the various Member States in which it is reviewable. A comparable system is part of the options that are currently being examined in the context of the discussions relating to the creation of a unified regulatory framework for the protection of personal data[99].

The allocation of cross-border cases could depend, for example, on the breakdown of the turnover made by the merging parties in the various Member States where the transaction is notifiable. Such a criterion (which could be fixed, for example, at a proportion of 75% or two-thirds of the turnover) would not be very different from the so-called "two-thirds" rule that is already provided for by the merger regulation[100]. It would enable companies and national competition authorities to know in advance which regulator is likely to handle a given case.

Where no national competition authority appears to be better placed than the others because the turnover is spread too evenly, and where the parallel intervention of several authorities is thus unavoidable, it would be

[97] See note 37 above
[98] Article 11, paragraph 6, of regulation No 1/2003
[99] See article 54a of proposal No COM(2012) 11, as amended by the Civil Liberties, Justice and Home Affairs Committee (LIBE) of the European Parliament
[100] Article 1, paragraphs 2 and 3, of the merger regulation

necessary to require the various authorities dealing with the case to keep each other informed of the decision that they are planning to take towards the end of the "phase 1" of the procedure[101].

If this exchange of information on planned decisions reveals the existence of a serious risk of divergence (for example, because an authority is considering clearing the deal while another is about to open a "phase 2"), the authorities concerned would be required to convene urgently[102] within a "joint committee", that would have to agree swiftly on a common position. The discussions would have to be held at a high level, between the presidents or director generals of the various authorities involved, and not only between the case teams. In the absence of a consensus, the committee, which could be assisted by the European Commission, would have to vote, as would do a national competition authority that operates as a board or panel[103].

Such a mechanism builds on the "good practices" followed by competition authorities that examine parallel cases (i.e. holding joint meetings, exchanging evidence and so on[104]), while supplementing them with a measure that guarantees – and not simply makes it possible – that a common outcome is reached.

The decisions taken subsequently by the various authorities concerned would of course have to comply with the joint position reached by the committee[105].

The other measures required in order to "extend" the European Competition Network to the field of merger control are more or less equivalent to those that already exist in the field of antitrust enforcement. They are therefore only reported briefly:

– first of all, it is suggested to secure the arrangement that allows European competition authorities to keep each other informed of the notification of cross-border mergers, currently based on an informal exchange of information notices set up on the basis of "best practices" dating back to the early 2000s[106]; it would be useful to collect these information notices in a comprehensive database accessible to all authorities; it would further be legitimate to operate this system in a transparent way vis-à-vis the merging parties, by providing them with a copy of the notice relating to their case;

– secondly, it is necessary to allow the competition authorities that investigate a cross-border merger case in parallel to assist each other to the extent necessary, through measures such as joint investigations, as they can already do vis-à-vis the European Commission[107];

– thirdly, the competition authorities that investigate a cross-border merger case should all be allowed to exchange information (whether confidential or not) collected as part of their investigation with one another, in compliance with the requirement of professional secrecy; they should by way of consequence be able

[101] This mechanism is inspired by the existing article 11, paragraph 4, of regulation No 1/2003 in the field of antitrust

[102] For example 10 working days. This additional delay does not need to be particularly long given that the various authorities involved are already familiar with the case. It is inherent to such a conciliation mechanism, and in any case much more preferable than a conflict of decisions which is liable to trigger court litigation and thus further delays and uncertainty, as illustrated by the *Eurotunnel / MyFerryLink* case examined on pages 19 and 20 of the present report

[103] A comparable system is envisaged for the European Data Protection Committee (see proposal No COM(2012) 11)

[104] See, for example, the best practices of the European Union - United States merger working group, of 14 October 2011, on cooperation in merger investigations, as well as the cooperation protocol of the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC), of 4 August 2006, for merger review

[105] Another solution would be for the joint committee to take the formal decision on the case and not simply to agree on a common position. It would however be more complicated to implement institutionally and technically, because it would require formalising the existence of the committee and giving it an autonomous decision-making power. This would in turn raise, *inter alia,* the issue of the competent court to review an appeal against this decision

[106] See box 2 above

[107] Article 12 and article 13, paragraph 5, of the merger regulation. A similar assistance mechanism between national competition authorities also exists in the neighbouring area of antitrust enforcement (article 22 of regulation No 1/2003)

to use this information for the purpose of applying European Union law, in compliance with the procedural rights of the merging parties[108];

– lastly, it is necessary to ensure that all the authorities benefit from a consistent toolkit, including the power to accept commitments put forward by the merging parties at all stages of the procedure, to impose remedies and conditions to the extent necessary, and to supervise the implementation thereof.

A Network organised along these lines would ensure greater "interoperability" between national competition authorities when they handle cross-border cases... under the condition that its members genuinely talk to each other and work together.

But such a Network should also be used a forum for more general discussions between regulators, as has been the case in the field of antitrust enforcement thanks to the European Competition Network set up a decade ago. This point is of major importance, since merger law is a "living law" whose actual interpretation and implementation is as essential as the wording of the legal provisions themselves.

For instance, the members of the Network could take advantage of their increased proximity in order to initiate projects of mutual interest. Those could include benchmarking their respective approaches to strategic issues (e.g. studying new sectors or complex markets before they are confronted with an actual merger case), creating a consistent database relating to market definitions (on the basis of the existing NACE codes[109]) and more generally thinking together at issues such as the assessment of efficiency gains, the conception of appropriate remedies, etc. These may appear to be technical issues in the eyes of non-specialists, but may cause major headaches in practice.

In other words, cooperation between European competition authorities should not be seen as an end in itself, but as a means of moving forward towards consistent "best enforcement practices".

This work does not need to be conducted in a closed environment: the dialogue with competition academics, and especially economists, should be encouraged given the significant added value that it has produced when the European Commission embarked itself on the modernisation of antitrust rules more than a decade ago[110].

In conclusion, if the legislator makes the reforms that are needed in order to create a "simpler and more consistent" regulatory framework for merger control, a large part of the success of these reforms will depend on the work undertaken by the European Merger Network and its member authorities. As Mr Ulf BÖGE, who is a former President of the German *Bundeskartellamt* and one of the most eminent representatives of competition authority presidents, once stressed: "*the main task for us as the representatives of the competition authorities in the Community should be to develop and apply fine-tuning and cooperation mechanisms that facilitate a non-contradictory, relevant and cogent practice of decision-making*"[111].

[108] Article 12 of regulation No 1/2003

[109] See the list available on the website of DG COMP (http://ec.europa.eu/competition/mergers/cases/index/nace_all.html)

[110] This could be done by convening the Economic Advisory Group on Competition Policy [EAGCP], whose work is accessible on the website of DG COMP (http://ec.europa.eu/dgs/competition/economist/eagcp.html)

[111] Ulf BÖGE, *Dovetailing cooperation, dividing competence: a Member State's view of merger control in Europe*, conference organised by the International Bar Association (IBA), "EC merger control: ten years on", London, 2000, p. 3

Recommendations 7 to 10:

– Officialise the “notice” mechanism enabling all European competition authorities to inform themselves of the existence of cross-border mergers, and make it transparent for the parties.

– Enable the competition authorities that review a cross-border merger to assist each other, on the model of the assistance that they can already provide to the European Commission.

– Enable the competition authorities that review a cross-border merger to exchange information gathered in the course of their proceedings and to use this information in order to apply European merger law, in compliance with the requirements of professional secrecy and with the parties’ procedural rights.

– Where a cross-border merger that could not be allocated to a “lead” authority risks to result in conflicting decisions, refer it immediately to a joint committee bringing together the national competition authorities concerned and the European Commission.

Action 4. Making case management simpler and more targeted

Independently of the above recommendations, most of which cannot be implemented without legislative amendments, a measure of a practical nature would be highly desirable in order to enable national competition authorities to better prioritise their resources and to allow companies to concentrate their efforts of regulatory compliance on significant merger cases.

It would consist in requiring all European authorities to set up a genuinely simplified procedure in order to expedite deals that do not pose serious competition problem in a swifter and less cumbersome fashion. The eligibility criteria for such a procedure should remain as simple, clear and objective as possible. The use of a simplified notification form, currently used in only a handful of Member States[112], should also become widespread.

European agencies could even cut red tape further by setting up, if anything at all, a system of mere administrative declaration for transactions that are not liable to produce anti-competitive effects on their national markets. Joint ventures set up abroad and not making any sales in European States are regularly cited as examples of deals that give rise to unnecessarily bureaucratic procedures. The recent legislative reform introduced in Germany was aimed specifically, among others, at "*reliev[ing] concentrations that do not affect Germany of unnecessary bureaucracy*", by "*provid[ing] companies with clear rules and increas[ing] legal certainty*" so as "*to avoid the need for mergers without significant effects in Germany to be notified to and reviewed by the Bundeskartellamt*", as stressed by the President of the *Bundeskartellamt,* Mr Andreas MUNDT[113].

In order for such an effort of simplification and prioritisation to translate into a genuine lightening of the administrative burden with which regulators and operators are sometimes unnecessarily saddled, European agencies will then have to resist the temptation of taking precautions that would result in re-complicating the handling of simple cases (volume and nature of the information requested, stage of the proceedings at which it is requested, etc.).

Recommendation 6:

– Require all national competition authorities to set up a genuinely simplified procedure and notification form for mergers that are unlikely to raise competition issues, or even a system of mere declaration for foreign-to-foreign mergers that do not affect their territory.

[112] Source: report No C(2013)72 of the Competition Committee of the OECD (p. 21, citing Denmark, Estonia, Greece, Italy and Spain)
[113] § 130 (2) of the GWB (*Gesetz gegen Wettbewerbsbeschränkungen*, law on restraints of competition). See the guidelines published on 5 December 2013 on this subject by the *Bundeskartellamt*, "Guidance on domestic effects in merger control", and the related press release (http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/05_12_2013_Inlandsauswirkungen.html)

Conclusions: which scenario for the future?

Which scenario for merger control?

The feedback collected during the mission shows that, for a large number of stakeholders, whether private or institutional, the *status quo* is not an option.

On the one hand, the European "one-stop shop" has reached a certain degree of maturity and operates fairly well, as probably does each national system taken in isolation, even if there is always an opportunity for progress. On the other hand, the overall fragmentation of the system renders merger control artificially complex, imposes unnecessary burdens on companies and creates significant risks of divergence (procedural timetables, substantive analysis, remedies and so on), which can go as far as conflicts of decisions in extreme cases. The welcome initiatives taken by competition authorities in order to increase cooperation cannot, on their own, solve all the difficulties that are inherent in the coexistence of 30 different regimes. Merger control remains fragmented within the Single Market.

The stakes may appear technical at first glance, but they are actually strategic: merger control is literally a key element of the "regulatory ecosystem" facing companies in their quest for competitiveness. Without consistent decisions from competition authorities, both on the merits and time-wise, a merger will quite simply not go ahead. Yet 15 years after the divergence that surfaced between Brussels and Washington in the General Electric / Honeywell case, many stakeholders consider that the transatlantic partnership operates more smoothly than the thirty "locks and bolts" of the European "multi-jurisdictional" system.

Several avenues of reform are open in order to make merger control simpler and more consistent in Europe, while respecting the existing political balance between the EU and national level.

– Reform 1: create a mechanism of conflict-prevention between national competition authorities. This is the "minimum minimorum" that businesses are entitled to expect in a Single Market.

– Reform 2: unify the basic concepts of national merger laws. This reform, coupled with the previous one, would be a "great step forward", which would increase consistency and simplify the regulatory framework to the benefit of businesses and competition authorities.

– Reform 3: formalise the existence of the European Merger Network. This reform, combined with the previous two, would ensure a greater "interoperability" between regulators.

According to the rapporteur, these avenues are not alternatives, but cumulative. The European "one-stop shop", which was a pioneering measure in 1989, has been overtaken by its success and history, which have resulted in a multiplicity of national merger controls. In this changed context, it cannot alone be expected to ensure a satisfactory level of consistency and collective governance throughout Europe. The system will thus sooner or later have to be modernised, in light of the reforms that have been introduced or that are currently being introduced in other regulatory fields.

The choice to be made therefore concerns less the principle of a reform than its timetable, the alternative being to deal with the subject all in one go or more sequentially, with the risk of taking 25 years to achieve something that could be done in 5. The year 2014, which will mark the tenth anniversary of the current merger regulation, is in any case a good opportunity for considering the issue.

Following the MONTI report of May 2010[114], the Vice-President of the European Commission responsible for competition policy, Mr Joaquín ALMUNIA, launched a clear invitation to do so: "*as to the relations between national and European agencies; I am happy to report that our cooperation is very good; in particular, the referral mechanisms function well. However, companies are calling for more convergence on procedures, substantive tests, and remedies. So, I would like to launch a debate by asking how we can strengthen our partnership in merger control, perhaps adapting the pattern of the existing ECN structure for antitrust*"[115]. A number of his peers, including the Presidents of the Belgian and French competition authorities, Mr Bruno LASSERRE [116] and Prof. Jacques STEENBERGEN, have already supported the initiative.

France played an important role in the conclusion of the negotiations that led to the creation of a "one-stop shop" in the field of merger control, during its 1989 European Presidency.

It could legitimately suggest that its European partners continue the teamwork begun at the time, as soon as the next session of the Council on this subject in the spring of 2014.

Such a proposal, that would be strategic for businesses, could be based on three ideas of common sense: making national laws consistent, ensuring the interoperability of national regulators and moving towards simpler and more targeted procedures.

What about judicial control and public interest?

The introduction of a genuinely consistent European merger control raises the issue of what happens downstream of the intervention of competition authorities.

More than 10 years after the creation of a European Competition Network in the field of antitrust, experience however shows that an integrated mechanism of competition enforcement can work well without necessarily having to modify national systems of judicial control. The existing mechanisms – including the possibility given to competition authorities to act as *amicus curiae* in court proceedings[117] and the right open to national judges to request preliminary rulings from the Court of Justice[118] – make it possible to have a satisfactory dialogue between the various players involved.

A second issue is more specific to merger control: as has been stressed by some stakeholders met in the course of the mission, the governments of some Member States have the possibility to intervene in exceptional

[114] See note 73 above

[115] Joaquín ALMUNIA, "*EU merger control has come of age*", conference organised jointly by the Competition Committee of the International Bar Association (IBA) and the European Commission, "Merger Regulation in the EU after 20 years", Brussels, 11 March 2011, p. 6

[116] See in particular Bruno LASSERRE, "*Merger control in Europe"*, conference organised jointly by the Competition Committee of the International Bar Association (IBA) and the European Commission, "Merger regulation in the EU after 20 years: past, present and future", Brussels , 10 March 2011, "*The future of the European Competition Network*", 5th Intertic Conference on Competition Policy organised by the *Autorità Garante della Concorrenza e del Mercato* (AGCM), Rome, 16 May 2013, and "*Navigating merger regimes across the globe*", conference organised jointly by *Competition Review* and Paul Hastings LLP, "The Inaugural global merger control conference", Paris, 29 October 2013

[117] Article 15, paragraphs 3 and 4, of regulation No 1/2003

[118] Article 267 of the TFEU

merger cases that involve issues of public interest other than those connected with competition enforcement. Arrangements of this type exist in Germany (since 1973)[119], in the United Kingdom (since 2002)[120] and in certain other Member States of the European Union[121]. France has inspired itself of these experiences in 2008, when it modernised its own competition enforcement system[122].

Where they exist, such arrangements are designed to enable governments to balance the need to guarantee that markets remain competitive with other concerns of public interest (public security, security of energy supply, stability of the prudential and financial system, or plurality of the media, for instance). Merger cases involving such issues are very rare in practice, if one looks at the British or German statistics in this respect[123]. The existence of a balancing mechanism is nonetheless legitimate in order to deal with such cases.

When cross-border mergers are reviewable in several Member States, it is important to make sure that such mechanisms do not result in divergent interventions, as is already the case with respect to cross-border mergers that fall within the jurisdiction of the European Commission[124] – although this issue might seem less pressing in view of the relatively infrequent deals giving rise to questions of public interest.

It is vital to guarantee three points in this respect:

– firstly, such mechanisms should be reserved for exceptional cases that really justify them in light of the strategic issues of public interest that they raise, as is the case for the mechanism that exists under French law as well as for the one provided by the TFEU with respect to State Aid[125];

– secondly, such mechanisms should operate on the basis of objective and precise criteria, determined in advance by the law and applied in a non-discriminatory and proportionate fashion;

– finally, the private parties liable to be affected by the implementation of these mechanisms must be given an opportunity to defend their position before a decision is taken, under the ultimate supervision of the European courts.

What now?

Given the interests at stake, it will most probably prove necessary for all of the stakeholders involved to take a step towards one another in order for the reform contemplated in the present report to go ahead:

– the European competition authorities of course, which may have to accept that the "best practices" designed in common do not exactly reflect their own national laws and practices, and which are more likely to do so if they are genuinely involved in the discussions by European and national legislators;

– the business and legal community, without whom no serious progress will be possible;

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[119] § 42 of the GWB; for a short presentation in French of this mechanism, see Joseph DREXL, *L'expérience allemande du contrôle des concentrations*, Revue Lamy de la competition (RLC), January/March 2009, pp. 144–147

[120] Sections 42 ff. and 54 of the Enterprise Act

[121] Especially Spain, the Netherlands and Poland. Note that some Member States that had such a mechanism have recently abolished it, such as Belgium (in 2013) and Greece (in 2011)

[122] Article L. 430-7-1 of the code of commerce

[123] In the case of Germany, see the article by Joseph DREXL *op.cit.*: out of the 34,884 merger cases notified between 1973 and 2006, the *Bundeskartellamt* ordered 164 prohibitions (a rate of less than 0.5%); the parties requested that the case be looked at by the minister in charge of the economy in 19 cases; the minister allowed the merger to go ahead in 7 cases, in general subject to certain conditions. In the case of the United Kingdom, the secretary of State intervened 11 times according to the information collected by the rapporteur

[124] Article 21 of the merger regulation

[125] Article 108, paragraph 2, of the TFEU

– the European legislator and the Member States finally, who will be called upon not only to determine the degree of importance that they assign to the creation of a regulatory framework that is more favourable to competitiveness, but who will also need to show enough will and sense of compromise in order to agree on a way to ahead.

Summary of the main recommendations (EN)

– Reform 1: create a mechanism of conflict-prevention between national competition authorities. This is the "minimum minimorum" that businesses are entitled to expect in a Single Market.

– Recommendation 1: allow businesses to request the referral of cross-border mergers to the European Commission when two or more national competition authorities are competent to control them, instead of three authorities or more currently, at least in the case of deals concerning interconnection markets (transports, networks, etc.).

– Reform 2: unify the basic concepts of national merger laws. This reform, coupled with the previous one, would be a "great step forward", which would increase consistency and simplify the regulatory framework to the benefit of businesses and competition authorities.

– Recommendation 2: require national competition authorities to apply the substantive rules of European merger law in all merger cases reviewable in two Member States or more.
– Recommendation 3: harmonise the types of thresholds above which mergers are reviewable in the various Member States (but not their level), by retaining only thresholds expressed in terms of turnover.
– Recommendation 4: introduce a "model notification form" listing standard information to be provided by companies when they notify a cross-border deal, or even a "single notification" system to the European Competition Network.
– Recommendation 5: set up a maximum period applicable when national competition authorities handle a cross-border merger, on the model of the maximum period that is already applicable when the European Commission refers a merger of Community dimension to national authorities.
– Recommendation 6: require all national competition authorities to set up a genuinely simplified procedure and notification form for mergers that are unlikely to raise competition issues, or even a system of mere declaration for foreign-to-foreign mergers that do not affect their territory.

– Reform 3: formalise the existence of the European Merger Network. This reform, combined with the previous two, would ensure a greater "interoperability" between competition authorities.

– Recommendation 7: officialise the "notice" mechanism enabling all European competition authorities to inform one another of the existence of cross-border mergers, and make it transparent for the merging parties.
– Recommendation 8: enable the competition authorities that review a cross-border merger to assist each other, on the model of the assistance that they can already provide to the European Commission.
– Recommendation 9: enable the competition authorities that review a cross-border merger to exchange information gathered in the course of their proceedings and to use this information in order to apply European merger law, in compliance with the requirements of professional secrecy and with the parties' procedural rights.
– Recommendation 10: where a cross-border merger that could not be allocated to a "lead" authority risks to result in conflicting decisions, refer it immediately to a joint committee bringing together the national competition authorities concerned and the European Commission.

Récapitulatif des principales recommandations (FR)

– Réforme 1 : créer un mécanisme de prévention des conflits entre régulateurs. C'est le « minimum minimorum » que les acteurs économiques sont en droit d'attendre au sein du Marché Unique.

– Recommandation 1 : permettre aux entreprises de solliciter le renvoi de dossiers de concentration transfrontalière à la Commission européenne quand deux autorités nationales de concurrence ou plus sont compétentes pour les traiter, au lieu de trois autorités ou plus actuellement, à tout le moins s'agissant des affaires portant sur des marchés d'interconnexion (transports, réseaux, etc.).

– Réforme 2 : unifier les notions de base des droits nationaux des concentrations. Cette réforme, combinée avec la précédente, constituerait un « grand pas en avant » en termes de cohérence et de simplification, au bénéfice des entreprises et des autorités de contrôle.

– Recommandation 2 : demander aux autorités nationales de concurrence d'appliquer les règles de fond prévues par le droit de l'Union dans toutes les affaires de concentration notifiables dans deux États membres ou plus.
– Recommandation 3 : harmoniser les types de seuils conditionnant la contrôlabilité des opérations de concentration dans les différents États membres de l'Union (mais pas leur niveau), en ne conservant que des seuils exprimés en chiffres d'affaires en raison de leur caractère objectif.
– Recommandation 4 : mettre en place un « formulaire modèle » énumérant un socle d'informations standardisées à fournir par les entreprises lors de la notification d'opérations de concentration transfrontalière, voire un système de « notification unique » au Réseau européen de la concurrence.
– Recommandation 5 : encadrer la durée des procédures nationales par un délai maximal commun lorsque les autorités nationales de concurrence traitent une concentration transfrontalière, à l'image du délai maximal applicable lorsque la Commission européenne leur renvoie une concentration de dimension communautaire.
– Recommandation 6 : demander à toutes les autorités nationales de concurrence de mettre en place une procédure et un formulaire véritablement simplifiés, voire un système de simple déclaration administrative, pour les affaires de concentration non susceptibles de soulever des problèmes de concurrence sur leur territoire.

– Réforme 3 : formaliser l'existence du Réseau des autorités européennes de contrôle des concentrations. Cette réforme, combinée avec les deux précédentes, assurerait une coopération et une conciliation « optimales » entre régulateurs.

– Recommandation 7 : officialiser le dispositif permettant à l'ensemble des autorités européennes de concurrence de s'informer de la notification de concentrations transfrontalières, de manière transparente vis-à-vis des parties.
– Recommandation 8 : permettre aux autorités de concurrence compétentes pour contrôler une concentration transfrontalière de se prêter assistance, comme elles peuvent déjà le faire vis-à-vis de la Commission européenne.
– Recommandation 9 : harmoniser la possibilité donnée aux autorités de concurrence compétentes pour contrôler une concentration transfrontalière d'échanger les informations recueillies dans le cadre de leur instruction, dans le respect du secret professionnel, et d'utiliser ces informations aux fins de la mise en œuvre du droit de l'Union, en assurant le respect des droits des parties.
– Recommandation 10 : prévoir le recours immédiat à un comité de conciliation réunissant les autorités nationales de concurrence concernées, et assisté en tant que de besoin par la Commission européenne, dans le cas où l'examen d'une concentration transfrontalière n'ayant pas pu être confiée à une autorité « tête de file » menace de déboucher sur des décisions divergentes.

Appendices

1. Commissioning letter

2. List of individuals interviewed

3. Questionnaire (EN)

3 bis. Questionnaire (FR)

4. Bibliography

Appendix 1: commissioning letter

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RÉPUBLIQUE FRANÇAISE

LE MINISTRE

Paris, le 09 OCT. 2013

Monsieur le Président,

L'ouverture des marchés et l'intensification des échanges commerciaux conduisent un nombre croissant d'entreprises à chercher à se développer à l'international et à acquérir une taille suffisante pour peser dans la compétition internationale. Les concentrations entre acteurs économiques sont un moyen légitime de parvenir à cet objectif, dès lors qu'elles ne donnent pas naissance à des situations qui pourraient ultérieurement s'avérer préjudiciables à l'économie dans son ensemble et aux consommateurs.

Bon nombre de ces opérations impliquent aujourd'hui des entreprises opérant dans différents États membres de l'Union européenne ou sont, plus largement, susceptibles d'avoir une incidence dans plusieurs pays. Or, le contrôle des concentrations repose en Europe sur un système dans lequel les rôles sont partagés entre la Commission européenne – chargée d'appliquer le droit de l'Union aux opérations de très grande envergure – et les autorités instituées par les différents droits nationaux.

Le principe d'une répartition des rôles entre l'autorité européenne et les autorités nationales est conforme au principe de subsidiarité et le système communautaire a globalement prouvé son efficacité, chaque niveau de régulation se focalisant sur les affaires qu'il est le mieux placé pour traiter.

En revanche, la coexistence de près de trente régimes nationaux différents pour les opérations qui ne sont pas de dimension communautaire peut soulever des interrogations dans les cas où une même opération est contrôlable dans plusieurs États membres – coût des multi-notifications pour les entreprises concernées, différences possibles dans le calendrier des procédures, risque de divergence entre les analyses suivies, voire de contrariété entre les solutions retenues, notamment.

En particulier, et sans préjudice de la décision à venir du *Competition Appeal Tribunal*, la récente affaire concernant le rachat d'actifs de SeaFrance par l'entreprise franco-britannique Eurotunnel, qui a donné lieu à une décision d'autorisation sous engagements de l'Autorité de la concurrence française le 8 novembre 2012, puis à une décision par laquelle la *Competition Commission* britannique a interdit à l'opérateur d'exploiter MyFerryLink au départ de Douvres, le

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6 juin 2013, a montré que ce système pouvait parfois placer les entreprises dans une position très délicate.

Une telle situation n'est pas seulement de nature à rendre plus difficiles ou coûteux des projets de concentrations qui seraient porteurs de gains d'efficacité et de croissance, et à créer dans certains cas des incertitudes plus larges sur l'investissement et l'emploi ; elle pousse aussi à s'interroger sur l'efficacité et la cohérence de nos mécanismes de régulation économique.

Compte tenu de ces enjeux, il m'apparaît nécessaire de disposer d'un audit documenté sur le traitement actuel des concentrations « multi-juridictionnelles » dans l'Union européenne, et examinant les voies de progrès possibles en la matière. Je sais tout l'intérêt que vous portez à ce sujet, qui concerne la politique économique dans son ensemble, mais relève également du cœur de compétences de l'Autorité de la concurrence. Vous m'avez indiqué pour mener à bien cette mission être disposé à désigner votre collaborateur, M. Fabien Zivy, eu égard à l'expérience acquise dans ses fonctions successives au sein des institutions européennes puis du Conseil et de l'Autorité de la concurrence.

A la lumière de l'affaire MyFerryLink, mais aussi d'autres dossiers impliquant des entreprises françaises qui auraient soulevé des questions de même nature, la mission devra identifier les différents éléments susceptibles d'engendrer des divergences d'analyses ou de résultats lorsqu'un projet de concentration est soumis au contrôle de plusieurs autorités de concurrence dans l'Union européenne, et analyser leurs conséquences. Elle devra aussi expertiser les scenarios envisageables pour résoudre les difficultés mises en lumière par ce diagnostic, ainsi que pour accroître la coordination et la convergence dans le respect des différents niveaux de régulation existants.

La mission pourra s'appuyer sur les services du ministère, en particulier sur la Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF), à laquelle le responsable de la mission rendra compte de l'avancement de ses travaux.

Les conclusions de la mission sont attendues pour le 16 décembre 2013.

Je vous prie de croire, Monsieur le Président, à l'assurance de ma très haute considération.

Pierre MOSCOVICI

Autorité de la concurrence

Le Président

Paris, le 10 octobre 2013

Objet : lettre de mission sur les concentrations transfrontalières.

Monsieur le Chef de service,

Ainsi que je vous l'avais dit à l'issue de nos échanges, je me suis entretenu cet été avec le ministre de l'économie à propos des sujets de la mission qu'il me paraissait opportun de vous confier à compter du 1er septembre.

La question du contrôle des concentrations transfrontalières a retenu toute son attention. Comme je le lui ai indiqué, plusieurs initiatives prises par les autorités de concurrence au cours des dernières années ont permis d'approfondir la coopération dans le traitement de ces opérations, lorsqu'elles ne revêtent pas une dimension communautaire et ne relèvent donc pas de la compétence de la Commission européenne. Ces progrès importants ne peuvent toutefois pas répondre à toutes les questions susceptibles de se poser dans un contexte juridique marqué par la coexistence de près d'une trentaine de régimes nationaux différents de contrôle des concentrations. La récente affaire *MyFerryLink* a mis en lumière certaines de ces limites.

Le ministre m'a réitéré, par un courrier que vous trouverez en pièce jointe, son intérêt pour une mission destinée à expertiser le sujet et à explorer de possibles voies de progrès à cet égard.

J'ai donc le plaisir de vous confirmer que je vous confie cette mission. Vous pourrez bénéficier, pour la poursuite de vos travaux, du soutien du service du président et du service des concentrations de l'Autorité. Votre rapport est attendu pour la mi-décembre.

Je vous prie d'agréer, Monsieur le Chef de service, l'expression de ma meilleure considération.

Bruno Lasserre

Monsieur Fabien Zivy
Autorité de la concurrence
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Appendix 2: list of individuals interviewed

I. Public authorities

1. Government, Parliament, administrations and other French bodies

a. Ministerial offices and related services

– Secretariat-general for European affairs (SGAE): Mr Pierre HEILBRONN, deputy secretary-general, and Mr Bertrand JEHANNO, head of the "internal market – consumer – competition – state aid" (MICA) sector.

– Office of Mr Frédéric CUVILLIER, Deputy Minister of Transport, Sea and Fishing: Mr François LAMBERT, adviser for the sea, overseas, ports and reserved matters

b. Parliament

– Mr François BROTTES, president of the Economic Affairs Commission of the Assemblée Nationale, member of Parliament for Isère

– Mrs Natacha BOUCHART, senator for Pas-de-Calais, mayor of Calais

– Mr Yann CAPET, deputy for the 7th Pas-de-Calais constituency

c. Ministries

– Foreign Affairs Ministry – legal affairs directorate (DAJ) : Mr Géraud SAJUST DE BERGUES, deputy director, foreign affairs adviser, Mr Diégo COLAS, assistant deputy director for European Union law and international economic law, foreign affairs adviser, and Mrs Julie BOUSIN, editor

– Ministry for Economy and Finance – directorate general for competition, consumer affairs and fraud control (DGCCRF): Mr Stanislas MARTIN, head of service for consumer protection and market regulation

– Ministry for Economy and Finance – directorate general of the treasury (DG Trésor): Mrs Sandrine GAUDIN, deputy director for European affairs, Mrs Cécile TASSIN, deputy head of the "coordination and European strategy" unit (EUROPE2) and Mrs Jehanne RICHET, deputy head of the "services and competition activities" unit (POLSEC2)

– Ministry for Production Recovery, Ministry of Small Businesses, Trade and Tourism – directorate general for competitiveness, industry and services (DGCIS): Mr Thierry LANGE, assistant to the head of service for competitiveness and development of SMEs

d. Other authorities and public bodies

– General Investment Commission (CGI): Mr Thierry FRANCQ, deputy commissioner-general, and Mr Jean-Luc MOULLET, director of the "competitiveness, industry and transport" programme

– General Commission for Strategy and Prospective (CGSP): Mr Jean-Paul NICOLAÏ, head of the finance and economy department

– National Commission for Data Protection and Freedoms (CNIL): Mr Edouard GEFFRAY, secretary-general, and Mrs Clarisse GIROT, adviser to the president and secretary-general

– Calais Promotion (Agency for the economic development of the Calais district): Mr Claude DEMASSIEUX, head of coordination, Mr Jean-Yves LHOMME, project manager, Mr Marc LEGRAND, project leader, and Ms Cyrielle DECHERF, project leader

2. European Institutions

a. European Parliament

– Mrs Pervenche BERÈS, member of the European Parliament, president of the Employment and Social Affairs Commission (EMPL), former president of the Economic and Financial Affairs Commission (ECON)

– Mr Jean-Paul GAUZÈS, member of the European Parliament, member of the Economic and Financial Affairs Commission (ECON)

– Mrs Sylvie GOULARD, member of the European Parliament, member of the Economic and Financial Affairs Commission (ECON)

– Mr Jacky HENIN, member of the European Parliament, member of the Industry, Research and Energy Commission (ITRE)

b. Cabinet of members of the European Commission

– Office of Mr Joaquín ALMUNIA, vice-president responsible for competition policy: Mr Guillaume LORIOT, deputy chief of cabinet

– Office of Mr Michel BARNIER, commissioner responsible for the internal market and services: Mr Olivier GUERSENT, chief of cabinet, and Mr Olivier GIRARD, member of the cabinet

c. Services of the European Commission

– Legal Service: Mr Theofanis CHRISTOFOROU, director, competition team

– Directorate general for competition (DG COMP): Mr Bernd LANGEHEINE, deputy director-general for mergers, and Mr Carles ESTEVA MOSSO, director, directorate A "policy and strategy"

– Mr Wouter WILS, hearing officer

3. National competition authorities

– Autorité Belge de la Concurrence (ABC): Pr. Jacques STEENBERGEN, president

– Bundeskartellamt (BKA): Mr Konrad OST, director, "general competition policy" directorate, and Andreas BARDONG, head of section, "German and European merger control", "general competition policy" directorate

– Competition Commission (CC) and Office of Fair Trading (OFT): Mrs Carole BEGENT, deputy chief legal adviser and head of international (CC), Mr Tim GEER, deputy director, mergers (OFT) and Mrs Jennifer ARCHER (CC)

II. Stakeholders

1. Representative organisations

a. Business organisations

– American Chamber of Commerce to the EU (AmCham EU): Mr Kaarli EICHHORN, vice-chair of the competition policy committee, senior counsel for European competition law and government relations (General Electric), Mr Pierre KIRCH and Mr Andreas STARGARD, partners (Paul Hastings), and Mr Pierre BOUYGUES, policy officer (AmCham EU)

– Association française des entreprises privées (AFEP): Mrs Emmanuelle FLAMENT-MASCARET, adviser for competition law and intellectual property, Mrs Marie-Helène HUERTAS, vice-president for competition (Vivendi), Mr Robert BRARD, legal director (Bouygues), Mr Jacques GAUTHIER, "economic and social law" director (Peugeot), Mr Jean-Claude LE NECHET, "companies and development" legal director (Carrefour), Mrs Sybille BOSE-TARSIA, "competition law" assistant legal director (Technicolor), Mr Jean-Yves TROCHON, deputy legal director (Lafarge), Mr Georges CHALOT, director for "competition law", legal directorate (Total), Mrs Charlotte BEAUCHATAUD, compliance legal manager (Imerys), Mrs Alexandra DEEGE, senior legal counsel (Lafarge), Mr Marc-Antoine DE CARBONNIÈRES, group secretary-general (Bouygues), Mr Hubert ARMANDON, jurist (Lagardère), Mr Alexandre CARPENTIER, "competition" jurist (BNP Paribas), Mrs Anouk FALGAS, jurist (BNP Paribas), Mrs Charlotte GRASS, jurist (Vallourec), Mrs Marie-Pascale HEUSSE, jurist (BNP Paribas), Mrs Maryvonne JOUYET, "competition" jurist (Credit Agricole), Mrs Claire-Line JUAN, "corporate affairs" adviser (LVMH), Mrs Florence KRAMER, jurist (Orange), Mrs Aurélie PAUL, jurist (Robert Bosch France), Mr Fabrice SCHIEBEL, jurist (Sequana), and Mr Edouard SIMON, researcher (EADS).

– BusinessEurope: Mr Guido LOBRANO, senior adviser, legal affairs department

– The Business and Industry Advisory Committee to the OECD (BIAC): Ms Lynda MARTIN ALEGI, chair of the competition committee, of counsel (Baker & McKenzie), Mr Pascal DURAND-BARTHEZ, of counsel (Linklaters), and Mrs Anne PERROT, partner (Mapp Economics)

– Cercle Montesquieu: Mr Denis MUSSON, president, Mr Frederic MANIN and Mr Bruno LEBRUN, partners (De Gaulle Fleurance and associates)

– Chamber of Commerce and Industry (CCI) for the Paris–Île-de-France region: Mr Pierre-Antoine GAILLY, president, Mrs Anne OUTIN-ADAM, director for regulatory and legal affairs, and Mr Alain RONZANO, author of the "creda-concurrence" newsletter of the Centre de recherche sur le droit des affaires (CREDA) of the CCI

– French Committee of the International Chamber of Commerce (ICC-France): Mr François BRUNET, chairman of the "competition" commission of ICC-France, partner (Cleary Gottlieb Steen & Hamilton), Mr Patrick HUBERT, president of the "premerger control regimes" task-force of the International Chamber of Commerce (ICC), partner (Clifford Chance), councillor of State, former general rapporteur of the French Competition Council, Mr François GEORGES, general delegate of ICC-France, Mr Orion BERG, attorney (White & Case), Mr Alain RONZANO Chamber of Commerce and Industry for the Paris–Île-de-France region), and Mrs Blanca Cecilia TAPIAS-RIVIÈRE, legal director for competition (Alstom Holding)

– Mouvement des entreprises de France (MEDEF): Ms Sandra LAGUMINA, president of the "competition law" committee of MEDEF, managing director of GrDF, Mrs Joëlle SIMON, director of legal affairs for MEDEF, and Mr Franck AVIGNON, project leader at the legal affairs directorate

b. Specialist legal practitioners

– Association des avocats pratiquant le droit de la concurrence (APDC): Mr Robert SAINT-ESTEBEN, partner (Bredin Prat), legal representative of the APDC, Mr Pierre ZELENKO, partner (Linklaters), general secretary of the APDC, Mr Philippe GUIBERT, partner (De Pardieu Brocas Maffei), Mr Emmanuel REILLE, partner (Gide Loyrette Nouel), Mr David TAYAR, partner (Willkie Farr & Gallagher), Mrs Mélanie THILL-TAYARA, partner (Norton Rose Fulbright), Mr Joseph VOGEL, partner (Vogel & Vogel), and Ms Rita EID, attorney (Gide Loyrette Nouel)

– International Bar Association (IBA): Mr Thomas JANSSENS, managing partner (Freshfields Bruckhaus Deringer), and Mr Marc REYSEN, attorney, co-chairs of the merger policy team of the legal practice division, and Mrs Sarah BIONTINO, managing director, Biontino Consultants

c. Other associations of competition experts

– Association française d'étude de la concurrence (AFEC): Professor Michel BAZEX, Mr Michaël COUSIN, counsel (Ashurst), Mrs Sylviane BARTHOLOMEEUSEN, jurist (GDF-Suez), Mr Thierry BOILLOT, business director (Lafarge), and Mr Georges CHALOT, director of the "competition law" department, legal directorate (Total)

2. Qualified individuals

– Mr Götz DRAUZ, partner, Wilson Sonsini Goodrich & Rosati, former director of the merger task-force (MTF) at the directorate general for competition (DG COMP) of the European Commission

– Ms Laurence IDOT, professor of law at the Université Pantheon-Assas (Paris II), co-director of *Europe* review, president of the scientific committee of *Concurrences* review, president of the Association française d'étude de la concurrence (AFEC), member of the Autorité de la concurrence

– Mr Frederic JENNY, professor of economics and director of international relations at ESSEC, president of the competition committee of the OECD, co-director of the European Centre for Law and Economics (CELEC), former vice-president and general rapporteur of the French Competition Council

– Mr Jean-Patrice de LA LAURENCIE, attorney, chairman of the study group for competition policy attached to the Ministry for Economy and Finance

– Mr Patrick REY and Mr Paul SEABRIGHT, members of the Institute for Industrial Economics (IDEI), professors of economic sciences at Toulouse School of Economics (TSE)

3. Other stakeholders

– Groupe Eurotunnel: Mr Jean-Alexis SOUVRAS, director of public affairs, and Mr Frédéric SUDANT, project leader

Appendix 3: questionnaire (EN)

The list below is a compilation of the main questions put to the various organisations and persons interviewed in the course of the assignment. Not all questions were asked of all stakeholders, in order to focus the interviews in light of the specific positions and experience of each stakeholder.

I. Questions put to stakeholders involved in merger control (competition authorities, businesses, competition lawyers and economists, qualified individuals, etc.)

1. What do you think of the current organisation of merger control in Europe (EU and national systems), in terms of:

– simplicity?

– coordination as well as of procedural and substantive consistency?

– efficiency?

2. The successive reviews of the merger regulation of 1989 have *inter alia* had as their objective the limitation of the number of multiple applications within the EU. Do you think that this aim has been achieved, or does this problem remain unresolved, or has it even increased (due e.g. to the enlargement of the EU, to increased cross-border trade, etc.)?

3. What are your points of view and practical experience (or those of your members) on the current handling of multiple applications within the EU?

4. What are the main difficulties that you (or your members) have faced in relation to multiple applications (in terms e.g. of costs and administrative burdens, of coordination of the various national procedures and deadlines, of consistency in decisions taken and remedies implemented by the various authorities involved, etc.)? Can you provide actual examples or even statistical elements in relation to such difficulties?

5. Do you think that the only question to address in the event of a review of the current system is the risk of different/conflicting decisions being taken by various authorities (e.g. the *Eurotunnel* or *Akzo* cases), or that there are other or more important issues to address? If so, which ones are they?

6. The first solution implemented to date in order to limit the occurrence of multiple applications has been to increase the exclusive jurisdiction of the European Commission ("one-stop shop"), by reviewing the thresholds provided by merger regulation. Do you think that it might be necessary to review them again? Do you think that this would be warranted in terms of sharing responsibilities between the EU and the Member States?

7. If yes, how could this be achieved? Would it be by lowering the “general” thresholds of article 1, paragraph 2, of the merger regulations? And/or by an amendment to the “ancillary” thresholds of article 1, paragraph 3, of the Regulation?

8. The second solution implemented to date has been to set up “corrective mechanisms” in the form of referrals, either upwards (to the European Commission: article 4, paragraph 5, and article 22 of the Merger Regulation) or downwards (to the national competition authorities: article 4, paragraph 4, and article 9 of the Regulation). What is your point of view on how these referrals should be handled?

9. If you (or your members) have faced difficulties connected with the way in which these referrals have been conducted, what are these difficulties (conditions for obtaining a referral; length of the referral process; predictability of the results of the request for referral; existence of partial referrals; downward referrals to various national competition authorities; etc.)? Can you provide actual examples?

10. In light of this experience, do you think that the referrals could or should be simplified or reviewed with respect to aspects other than those envisaged by the European Commission in its latest public consultation? If so, which are the priority issues that should be addressed?

11. Do you think that a solution other than those implemented to date could or should be envisaged in order to prevent (and not merely seek to limit) multiple applications? What do you think of the following possibilities:

– increasing the exclusive jurisdiction of the European Commission? For instance, by extending it to applications made to three national competition authorities (“three+”)? Or even to applications made to two national competition authorities (“2+”)? If so, should such an extension be general or restricted to the cases in which a single (cross-border) market is being assessed by various national competition authorities (e.g. communications markets in network industries such as transport, energy, etc.)?

– retaining the current allocation of jurisdictions between the European Commission and the national competition authorities, but drawing on the reform implemented in 2003 in relation to antitrust legislation, by separating the issue of the applicability of EU merger control (that could for instance be extended to “three+” or “2+” merger applications) and the issue of the authorities competent to apply the law (e.g. either the Commission, a “well-placed” authority within the network, or a set of authorities that would have to coordinate their procedures or decisions)?

12. What are, in your view, the required conditions for such a network to operate efficiently and to minimise administrative burdens, delays and risks of different outcomes from the various authorities?

13. Do you think, in particular, that the following possibilities could be explored?

– standardisation of the content of application forms (generalisation of the form “CO”, list of shared data to be included in national application forms, single application to the network followed by an allocation of the case to the authority or authorities concerned, etc.) in the case where EU merger law would be applicable?

– harmonisation of the triggering event for the application (notion of concentration, thresholds, etc.)?

– generalisation of a simplified procedure (or even the creation of an “exemption” or “information” mechanism for certain types of mergers, e.g. certain types of joint ventures)?

– convergence of procedural deadlines (application date, duration of phase 1, maximum length of phase 2, etc.)?

– increased convergence of substantive rules applicable to the assessment of mergers (generalisation of the “SIEC” test? Adoption of model guidelines on general issues such as market definition or remedies, etc.)?

– setting up of a mechanism of “prevention/resolution of conflicts” such as:

– “ex ante” allocation of a case to the European Commission (or allocation where there is a likelihood that conflicting decisions might be taken, for instance at the end of phase 1):

– either limited to truly “cross-border” cases (communications markets in sectors such as transport, energy, etc.)?

– or applicable to all “multi-jurisdictional” cases?

– “ex post” allocation in case of conflicting decisions?

14. If the exclusive jurisdiction of the European Commission were to remain as it is and if no network of authorities were created, which aspects of national merger laws would, in your view, warrant a closer alignment (e.g. content of application forms, notion of concentration, substantive tests, etc.)?

15. Are there in your view other issues that could or should be addressed in order to achieve greater simplicity, consistency and efficiency in the handling of mergers throughout the EU?

16. From an economic standpoint, what assessment can be made of the current work-sharing arrangement as it applies to merger control in Europe (one-stop shop for major cross-border transactions and national shops for other cases, even when these are liable to have spill-over effects)?

17. In particular, should the continued use of multiple applications be considered a problem in terms of regulation or more broadly of competitiveness (transaction costs, external effects, deterrent effects, notably for medium-size companies), or is their current level “acceptable”?

18. What economic analysis can be made of the following possible reform scenarios?

i. creation of a conflict-prevention or conflict-resolving mechanism designed to eliminate the risk of different outcomes being reached by different authorities (example: the *Akzo/Metlac* and *Eurotunnel/MyFerryLink* cases)?

ii. standardisation of the basic concepts of national merger laws (e.g. procedural deadlines, substantive tests)?

iii. setting-up of an integrated network intended to ease cooperation and coordination between national merger control authorities, as well as with the European Commission?

iv. extension of the EU one-stop shop (European Commission)?

19. In particular, what economic assessment can made of a solution consisting in applying the same substantive rules to all merger deals having interstates effects (defined for instance as deals filed in at least two Member States), but at the same time keeping, below the thresholds triggering the EU one-stop shop, a decentralised decision-making power to national authorities? What mechanisms of governance would be necessary for such a system to operate efficiently?

II. Questions asked to other stakeholders interested in merger control (EU institutions, national administrations, qualified individuals)

Merger control is currently shared between the European Commission ("one-stop shop" open to larger mergers) and the competition authorities of the various Member States (other mergers). A reform of this "multi-jurisdictional" system should take into account, *inter alia*:

– the pros and cons of the current system for businesses and competition authorities;

– the current degree of divergence of national merger laws, which is less marked than 15 years ago as regards the main issues of procedural and substantive law, but which remains significant when it comes to more specific practical, technical and legal issues;

– the principle of subsidiarity (sharing of competence between the EU and the Member States).

1. What is your point of view on the current transaction of the system, in light of any feedback received from businesses, competition lawyers and economists, or other stakeholders?

2. If a review of the current system was deemed useful or necessary, which broad "policy" options should in your view be favoured:

i. <u>focusing on the setting up of a mechanism of "conflict prevention or resolution"</u> intended to deal with the risk of divergent decisions being taken by different competition authorities?

ii. or going beyond such a mechanism and considering:

– <u>an alignment of the basic notions of national merger laws</u> (procedural deadlines, criteria used in order to analyse mergers, etc.)?

– or the creation of an integrated "network" intended to facilitate the cooperation between national merger authorities and the European Commission, as it has been done in the field of antitrust law in 2003?

– or a radical simplification of the allocation of jurisdiction aimed at centralising more cases at EU level ("one-stop shop", i.e. European Commission)?

3. In the preparation of such a reform, are there, in your view, any lessons to be learned and/or difficulties (either technical or political) to be anticipated, in light of the reforms recently enacted or in progress, at EU level, in other fields of economic regulation (financial regulation, data protection, telecoms, etc.)?

4. In your view, what role could or should governments and parliaments (European and national) play in the launching such a reform?

Appendix 3 bis: questionnaire (FR)

La liste ci-dessous compile les principales questions posées aux différentes organisations et personnes auditionnées dans le cadre de la mission. Toutes les questions n'ont pas été posées à toutes les parties prenantes, compte tenu du ciblage des auditions effectué en fonction de la position et de l'expérience propres à chacune d'entre elles.

I. Questions posées aux acteurs impliqués dans le contrôle des concentrations (autorités de concurrence, entreprises, conseils juridiques et économiques, personnalités qualifiées, etc.)

1. Que pensez-vous de l'organisation actuelle du contrôle des concentrations en Europe (système communautaire et différents systèmes nationaux), en termes :

– de simplicité?

– de coordination entre autorités et de cohérence juridique?

– d'efficacité?

2. Les révisions successives du règlement communautaire sur les concentrations de 1989 ont notamment eu comme objectif de limiter le nombre de notifications multiples à plusieurs autorités nationales de concurrence de l'Union européenne. Pensez-vous que cet objectif a été atteint ou au contraire que ce problème demeure, voire qu'il s'est accru (du fait par exemple de l'internationalisation des entreprises, de l'élargissement de l'Union, etc.)?

3. Quels sont votre expérience concrète et votre point de vue (ou ceux de vos membres) concernant le traitement actuel des notifications multiples dans l'Union européenne?

4. Quels sont les principales difficultés auxquelles vous (ou vos membres) avez été confrontés de ce fait (en termes de charges et de coûts administratifs liés aux notifications multiples ; de coordination des procédures et de gestion des délais ; de cohérence de l'analyse concurrentielle effectuée par les différentes autorités compétentes, des décisions prises et le cas échéant des engagements ou remèdes conditionnant l'autorisation de la concentration ; etc.)? Pouvez-vous fournir des exemples de cas concrets ou des éléments statistiques à ce sujet?

5. Estimez-vous que la seule question à traiter dans le cadre d'une amélioration du système actuel serait celle du risque de décisions divergentes ou différentes entre autorités nationales de concurrence (p. ex. affaires *Eurotunnel* et *Akzo*), ou qu'il y a d'autres sujets aussi ou plus importants à traiter? En ce cas, lesquels?

6. La première solution retenue jusqu'à présent par le législateur européen pour limiter les notifications multiples a consisté à accroître la compétence exclusive de la Commission européenne (« guichet unique ») en adaptant

les seuils prévus par le règlement communautaire. Pensez-vous qu'il soit nécessaire de poursuivre dans cette voie? Pensez-vous que ce soit opportun en termes de partage des rôles entre l'Union et les États membres?

7. Dans l'affirmative, comment : par une baisse des seuils « généraux » prévus par l'article 1, paragraphe 2, du règlement communautaire? Et/ou par une adaptation des seuils « complémentaires » prévus par l'article 1, paragraphe 3, de ce règlement?

8. La solution complémentaire retenue par le législateur communautaire a consisté à instaurer des « mécanismes correcteurs » sous la forme de dispositifs de renvoi ascendants (vers la Commission européenne : article 4, paragraphe 5, et article 22 du règlement communautaire) et descendants (vers les autorités nationales de concurrence : article 4, paragraphe 4, et article 9 de ce règlement), soit avant soit après la notification des projets de concentration. Quel est votre point de vue sur le fonctionnement de ces renvois?

9. Si vous (ou vos membres) avez été confrontés à des difficultés liées à la mise en œuvre de ces renvois, quelles sont-elles (adéquation des conditions de renvoi ; durée des procédures ; prévisibilité de l'issue des demandes de renvoi ; existence de renvois partiels ; existence de renvois descendants vers plusieurs autorités nationales de concurrence ; etc.)? Pouvez-vous fournir des exemples de cas concrets ou des éléments statistiques?

10. Compte tenu de cette expérience, pensez-vous que les mécanismes de renvoi devraient être simplifiés sur d'autres points que ceux envisagés par la Commission européenne dans sa récente consultation publique? Dans l'affirmative, quelles questions seraient selon vous à traiter en priorité?

11. Pensez-vous qu'une autre solution que celles évoquées ci-dessus peut (ou doit) être recherchée pour éviter (et non seulement chercher à réduire, comme cela a été fait jusqu'ici) les notifications multiples? Que pensez-vous spécifiquement des possibilités suivantes :

– accroître la compétence exclusive de la Commission européenne : par exemple en l'étendant aux cas de notification à trois autorités nationales de concurrence ou plus (« 3+ »)? Voire à deux autorités nationales de concurrence ou plus (« 2+ »)? Une telle extension devrait-elle selon vous être générale ou limitée au cas où c'est un seul et même marché qui est examiné par plusieurs autorités nationales (p. ex. secteurs des transports ou des industries de réseau : liaison transfrontalière, interconnexion, etc.)?

– conserver la répartition actuelle des compétences entre la Commission européenne et les autorités nationales de concurrence, mais s'inspirer de la réforme intervenue en 2003 en matière de pratiques anticoncurrentielles, en dissociant la question de l'applicabilité du droit de l'Union (qui pourrait par exemple être étendue aux cas de notifications « 3+ » ou « 2+ ») et celle de l'autorité compétente pour appliquer ce droit (qui pourrait être soit la Commission, soit une autorité nationale « mieux placée », soit encore plusieurs autorités nationales ayant l'obligation de se coordonner)?

12. Quelle(s) sont selon vous les conditions à remplir pour qu'une telle mise en réseau des autorités de concurrence fonctionne efficacement, en minimisant les charges pour les entreprises et en évitant le risque de décisions divergentes?

13. Pensez-vous en particulier que les pistes suivantes mériteraient d'être explorées (indépendamment de leur faisabilité politique) :

– standardisation du contenu des notifications (généralisation du formulaire « CO », mise en place d'un « socle » commun d'informations à inclure dans les notifications nationales, notification unique au réseau suivie d'une allocation à l'autorité ou aux autorités les plus concernées, etc.) dans les cas d'application du droit de l'Union?

– convergence accrue de l'élément déclencheur de la notification (notion de concentration, seuils de contrôlabilité, etc.)?

– généralisation d'une procédure simplifiée (voire mise en place d'un mécanisme d'« exemption par catégorie » ou de simple « déclaration » pour certains types d'opérations : certaines prises de contrôle par des fonds d'investissement, certaines joint-ventures, etc.)?

– convergence totale ou partielle des délais de procédure (moment de la notification, durée des phases 1, date maximale d'aboutissement des phases 2, etc.)?

– convergence accrue des règles de fond applicables à l'examen des concentrations (généralisation du test « SIEC »? publication de lignes directrices communes aux autorités de concurrence sur des questions générales comme la définition des marchés pertinents, les remèdes, etc.)?

– mise en place d'un mécanisme de prévention ou de règlement des conflits tel que :

> – attribution « ex ante » d'un dossier à la Commission européenne (ou évocation en cours de procédure, par exemple en cas de risque de décisions contradictoires en fin de phase 1) :
>
> > – soit limitée aux cas véritablement « transfrontaliers » (liaison de transport, interconnexion de réseaux, etc.)?
> >
> > – soit élargie à tous les cas « multi-juridictionnels »?

– évocation « ex post » en cas de décisions contradictoires?

14. À défaut d'extension de la compétence exclusive de la Commission européenne et de mise en réseau des autorités nationales, quels aspects des droits nationaux des concentrations mériteraient selon vous d'être mieux coordonnés, voire standardisés (p. ex. convergence du contenu des notifications, mise en place d'un registre de notification paneuropéen unique, harmonisation de l'élément déclencheur de la notification, convergence du test de fond, etc.)?

15. Quels sont les autres éléments méritant selon vous une réflexion pour assurer davantage de simplicité, de cohérence ou d'efficacité entre les systèmes nationaux actuels de contrôle des concentrations?

16. D'un point de vue économique, quel jugement peut-on porter sur l'organisation et le fonctionnement du système actuel de contrôle des concentrations en Europe (guichet unique pour les grandes affaires transfrontalières et guichets nationaux pour les autres affaires, même lorsqu'elles sont susceptibles d'avoir des *spill-over effects*)?

17. En particulier, faut-il considérer que la persistance des « multi-notifications » constitue un problème en termes de régulation ou plus globalement de compétitivité (coûts de transaction, externalités, *chilling effects*, notamment pour les entreprises de taille moyenne et intermédiaire, etc.), ou que leur niveau actuel est « acceptable »?

18. Quelle analyse économique peut-on faire des différentes pistes de réforme suivantes :

i. mise en place d'un mécanisme de prévention/règlement des différends destiné à gérer les risques de *conflicting outcomes* (exemple : cas *Akzo/Metlac* et *Eurotunnel/MyFerryLink*) entre autorités de concurrence?

ii. standardisation des concepts de base des droits nationaux (délais de procédure, « test » d'analyse des concentrations, etc.)?

iii. création d'un *network* intégré permettant de fluidifier la coopération et la coordination entre les autorités nationales de contrôle des concentrations, ainsi qu'avec la Commission européenne?

iv. élargissement du champ de compétence du *one-stop shop* (Commission européenne)?

19. En particulier, quelle analyse économique peut-on faire de la solution consistant à appliquer, en dessous des seuils déclenchant la compétence du *one-stop shop*, les mêmes règles de fond (européennes) dans tous les cas de fusion susceptibles d'avoir des effets *interstates* (définis par exemple comme les cas notifiables dans au moins deux pays), mais dans lequel un pouvoir de décision décentralisé serait laissé aux autorités nationales? Quels mécanismes de gouvernance seraient nécessaires pour faire fonctionner efficacement un tel système?

II. Questions posées aux autres acteurs intéressés par le contrôle des concentrations (institutions européennes, administrations nationales, personnalités qualifiées)

Le contrôle des concentrations est aujourd'hui partagé entre la Commission européenne (« guichet unique » pour les opérations de grande envergure) et les autorités de concurrence des différents États membres (autres opérations). Une éventuelle réforme de ce système « multi-juridictionnel » doit notamment tenir compte des éléments suivants :

– les avantages et les inconvénients du système actuel pour les entreprises et les autorités de contrôle ;

– le degré de divergence actuel des droits nationaux, moindre qu'il y a 15 ans sur les grandes notions de procédure et de fond, mais significatif sur les détails juridiques et techniques ;

– le principe de subsidiarité (répartition des compétences entre l'Union européenne et les États membres).

1. Quel regard portez-vous sur le fonctionnement actuel du système, compte tenu des retours éventuels que vous pouvez avoir de la place?

2. Si une réforme des mécanismes actuels vous paraît utile ou nécessaire, quel est selon vous l'axe politique de réforme à privilégier :

i. se concentrer sur la mise en place d'un mécanisme de type « prévention/règlement des différends » pour éviter les risques de conflits de décisions entre autorités de concurrence?

ii. ou s'orienter, au-delà d'un tel dispositif, vers :

– une standardisation des notions de base des droits nationaux (durée de la procédure, critères de contrôle et d'analyse des concentrations, etc.)?

– ou la création d'un « réseau » intégré permettant de fluidifier la coopération et la coordination entre les autorités nationales de contrôle des concentrations, ainsi qu'avec la Commission européenne, comme cela a été fait pour les pratiques anticoncurrentielles en 2003?

– ou encore une simplification radicale du système de répartition des compétences passant par un élargissement du champ de compétence du « guichet unique » européen?

3. Y a-t-il selon vous des enseignements à tirer et/ou des difficultés (techniques ou politiques) à anticiper, dans la préparation d'une telle réforme, des réformes récentes ou en cours, au niveau européen, dans d'autres domaines de régulation (supervision financière et bancaire, protection des données personnelles, télécommunications, etc.)?

4. Quel rôle les gouvernements et les parlements (européen et nationaux) pourraient/devraient-ils selon vous jouer dans la mise en chantier d'une telle réforme?

Appendix 4: Bibliography

I. Official European documents

1. Legislative and other public European documents concerning merger control

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