

# Good Governance in European Merger Control: Due Process and Checks and Balances under Review

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## Introduction

In its judgment in *Airtours plc v Commission*,<sup>1</sup> the European Court of First Instance (CFI) delivered what is likely to be the harshest criticism a European court has to date inflicted on a decision of the European Commission.<sup>2</sup> The CFI reviewed in detail the Commission's analysis of the facts, the applied economic theory and the Commission's definition of the concept of collective dominance of the market.<sup>3</sup> It concluded that the decision was "far from basing its prospective analysis on cogent evidence" and was "vitiating by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be

created". The Commission had prohibited the transaction "without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position".<sup>4</sup> Following the *Airtours* judgment, the CFI continued to overturn further high-profile Commission merger decisions in *Schneider Electric SA v Commission*<sup>5</sup> as well as *Tetra-Laval BV v Commission*.<sup>6</sup> In both cases the CFI found errors "of a very serious character" in the Commission's assessment of the proposed transaction and of the potential effects thereof.

The implications of these judgments go far beyond the mere substantial issues of merger control relevant to the cases. By uncovering the grave errors the Commission made in the contested decisions, the judgments implicitly point at issues of due process and question whether there exists an effective system of checks and balances in European merger control.

In a critical review, this article concentrates on the state of procedural aspects of the European merger control regime. It analyses the protection of the interests involved in the merger control process by means of due process provisions and a system of checks and balances. It then turns to a discussion about possibilities of improvement of these rules in the light of the requirements of good governance and the best protection of interests involved in merger control procedures.

## Background

The discussion concerning the need for reform of the procedure of enforcement of competition law, including merger control, has a long history. Since the 1960s it has been debated whether to set up an independent European competition agency,<sup>7</sup> a debate which intensified in the 1980s during consideration of the introduction of a

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1 Case T-342/99 *Airtours v Commission* [2002] 5 C.M.L.R. 7.

2 *Airtours/First Choice* (2000/276/EC), September 22, 1999 [2000] O.J. L93/1; [2000] 5 C.M.L.R. 494. In the decision, the Commission had blocked the proposed merger of two British tour operators on the basis that the merger would lead to a collective dominant position in the market for short-haul foreign package tours in the UK.

3 The court used strong words to describe its findings. According to the judgment, the Commission's decision did not correctly define the concept of collective dominance. Further, the Commission only selectively took into account the facts of the case and so did not establish a sufficient level of evidence for its conclusion that the merger would create a dominant position which would impede competition. Finally, with respect to those facts that the Commission did take into account, the Commission did not reach the right conclusions.

4 Case T-342/99 *Airtours v Commission* [2002] 5 C.M.L.R. 7 at [294]. The CFI in its judgment used language most uncommon in a judicial review of an administrative decision. In para.91, for example, it states that some evidence the Commission cited in its decision did "not give the slightest indication that there is no competition between the main tour operators".

5 Joined Cases T-310/01 & T-77/02 *Schneider Electric SA v Commission*, October 22, 2002.

6 Joined Cases T 5 & 80/02 *Tetra-Laval BV v Commission*, October 25, 2002.

7 As early as 1965 in the Treaty merging the institutions of the then three European Communities, it was decided that the location of a potential future European Cartel Office was to be in Luxembourg: Claus-Dieter Ehlermann, "Reflections on a European Cartel Office" (1995) 32 C.M.L.Rev. 471-486, citing Art.3(2) of the decision of the representatives of the governments of the Member States on the provisional location of certain institutions and departments of the Communities.

European system of merger control. The arguments in favour of an independent agency, however, were not primarily oriented towards a better protection of the applicant for merger clearance.<sup>8</sup> The arguments of the advocates of an independent European competition agency centred basically around two concepts. First, to ensure that the application of competition law is independent of undue political influence. Thereby the proponents of the independent agency hoped to increase transparency in the criteria of decision-making. Secondly, to make the decision-making procedure faster and more efficient.<sup>9</sup> The first aspect has been addressed by the Commission by furthering transparency through, *inter alia*, publishing guidelines and notices on theoretical approaches to policy. The second has been addressed mainly with reforms of Reg.17/62, doing away with the requirement for notification of vertical agreements. Further reforms have been adopted in the new Council Regulation implementing Arts 81 and 82 EC.<sup>10</sup>

The discussion about a review of procedural provisions in European merger control then quietened down. In reviews marking the first 10 years of existence of the EC Merger Regulation (ECMR), commentators showed satisfaction with the working of the ECMR regime. They recalled that, prior to the creation of the ECMR in 1989, it was unclear whether the ECMR would work at all. In comparison to early scepticism, the reality looked impressive: the European Commission was widely praised to have managed to provide for a fast one-stop shop procedure, providing reasonable legal certainty; a task to which the Commission had dedicated considerable resources and which had led to the development of a wide body of case law and guidelines relating to all aspects of substantive and procedural law.<sup>11</sup>

However, the discussion has never quite ceased. Criticism continued, that under the ECMR's system there was no sufficient distinction between investigation and adjudication of a proposed merger. Due process, it was argued, would be greatly enhanced if

those who wrote the final decision were not the same individuals who investigated a case since the latter would be naturally biased towards their first suspicions, which led to the opening of an investigation in the first place.<sup>12</sup> The main problem, according to these views, was the accountability of administrators making decisions about proposed mergers. In December 2001 the Commission published a Green Paper on the Review of the ECMR in which it briefly discussed the subjects of due process and a system of checks and balances in European merger control,<sup>13</sup> which has been followed by a proposal for a revised Merger Regulation and some non-legislative measures extended to improve the Commission's decision making process in December 2002.<sup>14</sup>

The harsh criticism in the CFI's *Airtours*, *Schneider* and *Tetra-Laval* judgments has raised the issue of good governance in EC merger control once again. It raises the question of the reasons for the Commission's failure to deliver a decision of higher standards. The CFI's judgment has forcefully placed the issue of procedural reforms and more generally the issue of good governance in EC merger control back on the top of the agenda for review.

In this context, the task of this article is to give an overview of existing rules on due process and the provisions providing for a system of checks and balances and then to review concepts that could help to further develop European merger control procedure against the background of ever evolving economic and legal concepts.

## Existing provisions for due process and checks and balances in European merger control

The procedural arrangements for European merger control are contained in legislation such as the ECMR<sup>15</sup> and Reg.447/98<sup>16</sup> on the notifications, time-limits and hearings provided for in the ECMR. Further provisions can

8 See for an overall review of the debate (although with the suggestion to reject the idea): House of Lords, Select Committee on the European Communities, *Report on the Enforcement of Community Competition Rules* (1993).

9 For an overview of the debate of the early and mid-1990s, see, e.g. Peter Bartodziej, *Reform der EG Wettbewerbsaufsicht und Gemeinschaftsrecht* (Baden Baden, 1994); Claus-Dieter Ehlermann, Laraine L. Laudati, eds, *Robert Schman Centre Annual on European Competition Law 1996* (The Hague, 1997), pp.36-44; Karel van Miert, "The Proposal for a European competition agency" (1996) 2 *EC Competition Policy Newsletter*.

10 Council Regulation (EC) No.1/2003 of 16 December 2002 [2003] O.J. L1/1..

11 See, e.g. Paul Seabright, "Ten Years of European Merger Control", Beesley Lecture on Regulation, December 5, 2000.

12 Eleanor Fox, "Working paper IV—Decision Making at the Centre", in Ehlermann and Laudati, *op.cit.* p.76.

13 Green Paper on the review of Council Reg. 4064/89 of December 11, 2001, COM (2001) 745 final.

14 Com (2002) 745 final of December 11, 2002.

15 Reg.4064/89 on the control of concentrations between undertakings [1989] O.J. L395/1; [1990] 4 C.M.L.R. 286 (amended [1990] O.J. L257/13; [1997] O.J. L180/1).

16 Reg.447/98 on the notifications, time-limits and hearings provided for in Council Reg. 4064/89 on the control of concentrations between undertakings [1998] O.J. L61/1; [1998] 4 C.M.L.R. 542.

be found in formal Commission decisions such as the decision on the role of hearing officer (HO).<sup>17</sup> Finally, due process is protected by Commission practice, in some cases codified in "soft law" provisions such as Commission notices.<sup>18</sup>

The story of the ECMR has often been told, nevertheless a reminder of its troublesome birth will illustrate the reasons for some of the problems encountered today. The ECMR, as the central provision for EC merger control and rules on due process for merger review, only came into force in September 1990. Prior to its adoption in 1989, it was unclear whether the European Community had the competence for merger control under the Treaty provisions. Unlike Art.66 ECSC, the EC Treaty did not contain a specific legal basis for merger reviews. In its *Continental Can* decision,<sup>19</sup> the Commission took the view that the prohibition of the misuse of a dominant position under Art.82 EC (*ex* Art.86 EC) also prohibited already dominant firms from strengthening such dominance by means of acquisitions—with subsequent approval by the European Court of Justice (ECJ) accepting the Commission's legal approach to apply Art.82 as legal basis for a merger-review in this type of situation.<sup>20</sup> Regulation 17/62, which provided for the procedural rules in competition matters, however proved ill-suited for the specific requirement of merger control, not least since there was no legal requirement for merging companies to pre-notify a proposed merger. Therefore, the Commission was limited to reviewing cases only after the structural change to the conditions of competition had actually taken place. It took the Commission several years of unsuccessful lobbying for the introduction of a merger control regulation until the breakthrough came in the wake of the ECJ's judgment in *BAT and Reynolds*.<sup>21</sup> Therein the court strengthened the Commission's position in merger control and allowed it to apply Art.81, under certain limited conditions, to the acquisition of equity in a company if the effect of that acquisition would lead to

co-ordinated behaviour of competing companies on the markets.<sup>22</sup>

Under the ECMR, adopted in 1989, the Commission is now formally in charge of investigating a case as well as deciding whether the merger complies with the criteria set out in its Art.2. The merger review procedure in the ECMR is structured in two phases. Both phases analyse whether the concentration will lead to a structural change in the market which will lead to the creation or strengthening of a dominant position within the common market or a substantial part thereof that would significantly impede effective competition (Art.2(2) ECMR). The preliminary investigation in phase one may end with either of three decisions:

- First, the Commission decision that the ECMR is not applicable (Art.6(1)(a) ECMR).
- Secondly, that the concentration notified does not raise serious doubts as to its compatibility with the common market or that these doubts have been remedied by a modification of the proposed concentration (Art.6(1)(b), (2) ECMR). In this case the investigation will be closed.
- Finally, if the Commission has serious doubts as to the compatibility of the intended concentration with the common market, it will decide to "initiate proceedings" (Art.6(1)(c) ECMR). The initiation of proceedings opens "phase two" of its investigation which is conducted by the Commission in a more adversarial procedure than during "phase one". A decision declaring the concentration incompatible with the common market can only be issued after a phase two investigation (Art.8(3) ECMR).

Important amendments to procedural rules and safeguards were introduced in 1994 when the terms of reference of the HO, an institution originally introduced to European competition law in 1982<sup>23</sup> to safeguard the right of parties to a fair hearing, were laid down in a Commission decision.<sup>24</sup> Procedural rules are also contained in a regulation last amended in 1998 on notifications, time-limits and hearings in merger control procedures.<sup>25</sup> The ECMR was first amended in March

17 Commission Decision (2001/462/EC) on the terms of reference of hearing officers in certain competition proceedings, May 23, 2001 [2001] O.J. L 62/21; [2001] 5 C.M.L.R. 1409.

18 All these provisions serve to safeguard the general principles of EC law, which the ECJ and the CFI apply not only as a yardstick to review secondary legislation and Community institution's activities, but also as a means of interpretation of the Treaty provisions themselves. See Takis Tridimas, *The General Principles of EC Law* (Oxford, 1999), pp.31 *et seq.*

19 *Continental Can* (72/21/EEC), December 9, 1971 [1972] O.J. L7/25; [1972] C.M.L.R. D11.

20 Case 6/72 *Continental Can v Commission* [1973] E.C.R. 215; [1973] C.M.L.R. 199.

21 Joined Cases 142 & 156/84 *BAT and Reynolds v Commission* [1987] E.C.R. 4487; [1988] 4 C.M.L.R. 24.

22 Dieter Sedemund, Frank Montag, "Fusionskontrolle", in Manfred Dausen, *Handbuch des EU Wirtschaftsrechts* (Band 2, München, 2001), H. I. 255.

23 XIth Report on Competition Policy (1982), No. 36, 37.

24 Commission Decision (94/810/EC) on the terms of reference of hearing officers in competition procedures before the Commission, December 12, 1994 [1994] O.J. L330/67; [1995] 4 C.M.L.R. 115, amended by Commission Decision 2001/462/EC, n.17 above.

25 Reg.447/98, n.16 above.

1998,<sup>26</sup> reforming the reach of its jurisdiction.<sup>27</sup> *Inter alia* the process for referral of cases to Member States under Art.9 ECMR was made more flexible. Important changes to provisions on procedure have also been included by means of developing the role of the HO in merger control procedures.

### *Due process provisions in European merger control*

Next to the sources listed above, provisions on due process in merger procedures stem from "constitutional" provisions, secondary legislation, soft law and simple Commission practice. The term "due process" in this article is used in a wide sense. It includes provisions that are designed to, or actually do, safeguard the interest of the parties involved in a merger control investigation.

The assessment of the existing protection of due process will begin with timing issues. Since legal certainty is an especially vital interest it is essential for business to receive a binding decision within a short and predictable time-limit in order to be able to plan investment accordingly.<sup>28</sup> During this period of investigation and evaluation of the proposed concentration, the parties are obliged to abstain from taking any measures that would put the merger into effect. This obligation can be enforced by penalties reaching up to 10 per cent of the overall annual turnover of the (parent) companies involved in the concentration. Such penalties therefore can amount to punitive measures not easily reached in other areas of administrative law.

26 Reg.1310/97 [1997] O.J. L180/1; [1997] 5 C.M.L.R. 387.

27 In order to include more cross-border merger cases, the notification thresholds were lowered.

28 The ECMR requires a final decision to be made within one month after notification if the decision is taken within the first phase. The time limit is four months if the decision is taken in the second phase during which an in-depth investigation into the proposed merger will be undertaken by the Commission, which may lead to the decision to bar the concentration from being effected (Art.10(1), (3) ECMR). The time limits within which the Commission can reach a decision can be extended, if in the first phase the Commission receives a request from a Member State for referral of a case. Further, an extension is possible in cases in which the undertaking offers an undertaking that needs to be taken into account in the Commission decision on whether to open the second phase of the merger investigation or to declare the concentration compatible with the single market (Art.6(1)(b) ECMR). In practice, the Commission also has the option to stay the time limitations by means of declaring a notification incomplete and requesting further information or by ordering an investigation pursuant to Art.13 ECMR (Arts 10(4), 11, 13 ECMR). Only after the time limits have passed without a final decision by the Commission, is the concentration fictitiously regarded to have been declared compatible with the common market (Art.10(6) ECMR).

Although not strictly speaking "due process", the possibility of pre-notification contacts with the Commission is an additional instrument designed to help the business to overcome legal uncertainty when confronted with the regulatory regime of the ECMR. In order to avoid uncertainties such as the amount of information required by the Commission or the correct forum for notification, the parties to the concentration are encouraged by the Commission to seek contact with the Merger Task Force (MTF) prior to notification. The information parties receive within the pre-notification phase is, however, not legally binding.<sup>29</sup>

In merger procedures the parties not only have the right to submit their position in writing; parties in addition to their written comments on the statement of objectives have the opportunity to express their views orally in a formal hearing.<sup>30</sup> Articles 15 and 16 of the Implementing Regulation provide for the rules for conduct of oral hearings and the protection of business secrets discussed therein. In the interest of legal certainty and in order to reply effectively to an allegation in preparation of the oral hearing, parties have a well-developed right of access to the file.<sup>31</sup>

Provisions for transparency of decision-making can be found in the provisions on the collection and request of information. The Commission and Member States' authorities have rights to collect and request information as described in Arts 11 and 13 ECMR. The information gathered by these means as well as during hearings (Art.18 ECMR) according to Art.17 II ECMR can only be used for the purpose for which it was collected. Article 17 II ECMR therefore can be interpreted as containing a provision for the transparency of the use of information.

The parties which notify a concentration, obtain a copy of the reasoned decision (Art.6(1)(c) ECMR) from the Commission. Therein they are informed whether and why the Commission has decided to open a second phase investigation procedure.

In the second phase of the merger control, the proposed merger is investigated in greater depth and the

29 In practice, information received in pre-notification meetings is not always fully reliable. One reason may be that approximately one third of the MTF's staff is temporarily seconded from Member States' competition authorities. These are not always completely familiar with all the intricacies of the application of the ECMR in practice. (José Rivas, *The EU Merger Regulation and the Anatomy of the Merger Task Force* (Kluwer, 1999), p.53). This ratio might change due to an increase in the MTF's staff in recent years.

30 Art.14 of the Implementing Regulation.

31 Case T-221/95 *Endemol v Commission* [1999] E.C.R. II-1209, headnote 2; [1999] 5 C.M.L.R. 611.

procedure takes a more adversarial nature. Especially relevant here are the provisions on access to the file.<sup>32</sup>

### "Checks and balances"

Checks and balances are currently provided for by internal review during the merger control procedure within the Commission. Also, external review of a Commission decision may be sought in court.

When reviewing internal checks and balances during the Commission investigation and drafting of decisions, one needs to keep in mind that the European Commission is in itself not a monolithic institution. It is composed of several Directorate Generals (DG) and Services. In merger control procedures DG Competition is required to involve also the Commission's Legal Service and other DGs. A decision to ban a proposed merger is taken by the Commission as a collegiate, not a single Commissioner in charge of DG Competition alone.

Additionally, the ECMR and the general provisions on the administration of competition law in the European Union provide for the role of a HO to supervise and safeguard the procedural rights of the parties. The HO's role in the merger control proceedings is to safeguard the parties' rights to a due process.<sup>33</sup> The main role of the HO is to conduct the hearings during which he is obliged to ensure that the hearing is properly

conducted. He or she is required to ensure the "objectivity" of the hearing itself and later that, in the Commission's draft decision, due account is taken of all relevant facts, favourable or unfavourable to the parties.<sup>34</sup> Additionally, he may present observations on any matters arising out of any Commission competition proceedings.

In order to ensure his independence from the MTF and other parts of the DG Competition, the HO reports directly to the Commissioner in charge of DG Competition and for administrative purposes is directly attached to the Commissioner's staff.<sup>35</sup> He or she issues two different reports; the key report is the internal report to the Commissioner. This report is the full report containing all details of the hearing and detailed observations and preliminary conclusions of the HO and suggestions regarding how to proceed further. The second report is the one sent to the Commission collegiate in preparation of a Commission decision. It is also made available to the Member States' representatives in the Advisory Committee and is finally published in the *Official Journal* together with the Commission's final decision. For anyone interested in the procedure, these "Final reports of the HO" are disappointing to read. Their publication takes place several months after the decision and they generally avoid giving reasons explaining how the HO reached his or her conclusions.<sup>36</sup>

The Commission decision of May 2001 reforming the role of the HO addressed some often criticised issues. For example, it amended the officer's position *vis-à-vis* DG Competition. The HO no longer needs to have been a Commission official prior to nomination.<sup>37</sup> The debate on widening the scope of the HO's responsibilities resulted in the introduction of provisions in his mandate that indicate that the HO would have the

32 The parties to the proceedings have the right to access the file (Art.18(3), second sentence ECMR). Commission decisions may only be based on facts to which the parties had the right to comment on prior to the decision itself. In so far as Art.18(3) ECMR states that "the rights of defence of the parties shall be fully respected in the proceedings" the Commission is under the obligation to be co-operative with the parties. The Commission must investigate all aspects of the case, including those in favour of the parties' project. Article 18(4) ECMR allows third parties who can demonstrate sufficient interest to take part in the oral hearing in the second phase of a merger investigation. They also may send in their observations in writing. The Commission is increasingly inviting not only competitors and upstream or downstream business partners as well as employee representatives to make their position heard, but also encourages consumers' representatives to come forward and submit their observations to proposed mergers (Green Paper, n.13 above, para.243). However, all final decisions of the Commission under Art.8(2)-(5) ECMR by which a second phase investigation is closed must be published in the *Official Journal* (Art.20 ECMR) and therefore be made accessible to the broader public.

33 See Themistoklis Giannakopoulos, "The Right to be Orally heard by the Commission in Antitrust, Merger, Anti-Dumping/Anti-subsidies and State Aid Community Procedures" (2001) 24 *World Competition* 541-569. Practically, a hearing is conducted over one or two days when Commission staff develop their view of the case, the parties to the merger defend their proposed merger, third parties present their observations and Member State representatives ask questions of the Commission and the parties. The hearing is presided over by the hearing officer.

34 Commission Decision 2001/462/EC, n.17 above, Art.5.

35 *ibid.* Art.2(2).

36 See: Final report of the Hearing Officer in Case COMP/37.462 *Identrus* [2001] O.J. C263/21; Case COMP/36.693 *Volkswagen* [2001] O.J. L278/2; Case COMP/37.444 *SAS/Maersk* and COMP/37.386 *Sun-Air v Maersk Air* [2001] O.J. C281/6; Case COMP/29.373 *Visa International* [2001] O.J. C316/8; Case COMP/34.493 *DSD* [2001] O.J. C328/5; Case COMP/M.2498 *UPM-Kymmene/Haindl* and COMP/M.2499 *Norkse Skog/Parenco/Walsum* [2002] O.J. C206/8. Slightly more detailed are the reports in Case COMP 36.915 *Deutsche Post AG* [2001] O.J. C358/5; Case COMP/37.859 *De Post/La Poste* [2002] O.J. C55/32 and Case COMP/38.044 *NDC Health/IMS Health* [2002] O.J. C53/7. See also UK House of Lords Select Committee on the European Union, 32nd Report of July 23, 2002, HL 165, *The Review of the EC Merger Regulation* at no 263, 264.

37 Commission Decision 2001/462/EC, n.17 above, Recital 7. For an overview see Giannakopoulos, n.33 above; Libor Drabek, "A Fair Hearing Before EC Institutions" (2001) 4 E.R.P.L. 529-563; Marc van der Woude, "Hearing Officers and EC Antitrust Procedures" (1996) 33 C.M.L.Rev. 531-546.

competence not only to review procedural aspects but to also present observations on "any matter arising out of any Commission competition proceeding".<sup>38</sup> The HO, especially in the first report, has the opportunity to give observations on grounds of substance. These observations, however, will not be reflected in the published synopsis version. For the public scrutiny of the Commission, the HO's possibility of commenting "behind closed doors" is therefore not really effective as a means of checks and balances.

The Commission is under the obligation to submit to the Member States' competition authorities several documents at different steps of the procedure: notifications of mergers; decisions under Art.6(1)(b) ECMR (decision to declare a merger compatible with the common market) including possible commitments of the parties in the first phase; decisions under Art.8 II ECMR (decision to open a second phase investigation). The Commission liaises with the Member State's authorities, which have the right to inform the Commission about their observations.<sup>39</sup> These rights of the Member States in the first phase are not primarily aimed towards involvement of the Member States in the subject-matter of the single cases. They are designed towards giving the Member States the possibility of exercising their rights under Arts 9 and 22 ECMR.

In the second phase of the decision-making under Art.19(3) and (4) ECMR an advisory committee composed of representatives of the Member States' authorities needs to be consulted by the Commission prior to any final decision. The advisory committee consists of representatives of the national agencies in charge of competition and is, as all comitology committees,<sup>40</sup> chaired by a Commission official. The advisory committee in practice may not override a Commission decision but the Commission "shall take utmost account of the opinion delivered by the committee" and needs to inform the committee of the manner in which it has

taken account of the opinion.<sup>41</sup> The fact that the Commission needs to justify its policy approaches to the Member States' officials in every case puts a certain amount of pressure on the Commission. The Commission is therefore accountable to a peer group of competition experts. This pressure is enhanced by the fact that the advisory committee's opinion is published. However, the advisory committee does not avail itself of any formal powers to force the Commission to follow its opinion. Also, its report is of very limited value to the parties involved as these receive a summary of the opinions when they are published in the *Official Journal* at a later stage. Only during the oral hearing in phase two are the parties indirectly, from the questions the Member State representatives pose, made aware of the problems or need for clarification the Member States' competition authorities perceive in a case. In practice the advisory committee faces difficulties in effectively exercising its mandate for control, also due to the fact that the Member States' representatives have very little time to consider the merits of a case and the possible remedies offered by a party.

The Commission's Legal Service undertakes a review of all final decisions prior to them being suggested to the Commission. However such input and substantive, as well as procedural, review by the Legal Service does not remedy the problem that the resources of the Legal Service with respect to time and know-how are limited regarding the review of complex economic assessments. Also, the Legal Service, despite having expertise in legal matters, cannot sufficiently analyse and evaluate whether the application of one economic theory is to be preferred over another. Finally, the Legal Service is also hampered in its review by the tight deadlines of merger control.

The DG, during investigation and in drafting a decision, is assisted by and needs to consult other units within DG Competition (internal economists) and other sectorial DGs, depending on the nature of the individual case.<sup>42</sup> The technical, economic and industrial expertise is always evaluated and included with the evidence collected by the team of case handlers. The file remains their responsibility. The value of consultations between DG Competition and other Commission services as a means of checks and balances is further reduced since the parties generally have no access to internal communication documents within the Commission.

The final stage of internal review of a Commission decision comes when the Commission as a collegiate body decides on a final decision as suggested by DG

38 Commission Decision 2001/462/EC, n.17 above, Art.3(3). Further provisions of this Commission Decision which indicate a wide mandate for the hearing officer are Art.13(2) according to which he "may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections" and in Art.14: "[w]here appropriate the hearing officer may report on the objectivity of any enquiry conducted in order to assess the competition impact of commitment proposed . . .".

39 Under Recital 20 of the ECMR the Commission should in the enforcement of merger policy "act in close and constant liaison with the competent authorities of the Member States".

40 For procedure and working of an advisory committee see the Council Decision (1999/468/EC) laying down the procedures for the exercise of implementing powers conferred on the Commission, June 28, 1999 [1999] O.J. L184/23.

41 Art.19 V, VI ECMR.

42 Green Paper, n.13 above, para.247.



Competition. The collegiate decision is designed to avoid conflict with other policy objectives of the Community.<sup>43</sup> Under the aspect of due process in decision-making, the model of the Commission collegiate decision can be criticised for this reason: given the multi-layered hierarchical organisation of the Commission, the parties to a merger never plead their case to those people who finally decide the case. The Commission as collegiate body neither reads the original submissions, nor does it hear the parties. Although one may consider this is a normal problem in hierarchical systems,<sup>44</sup> this is an aspect to be taken into account with respect to evaluating whether the current system offers sufficient safeguards for due process and whether there are sufficient internal checks and balances. Possible remedies to this situation need to be reviewed in conjunction with overall reform considerations.

External legal review takes place in the courts.<sup>45</sup> Generally speaking, the CFI and the ECJ grant the European institutions a wide margin of discretion when it comes to legislative-type decisions. In review of administrative decisions, the courts first analyse whether the Commission has followed the rules of due process whilst conducting its control and, secondly, whether these facts are sufficient to establish the conditions to declare a proposed merger incompatible with the single market. Thereby the courts do not grant the Commission wide discretion unless complex economic assessments need to be undertaken by the Commission.<sup>46</sup> The courts have in the past been reluctant to review assessments of an economic nature.<sup>47</sup> The most recent judgments, including *Airtours*, *Schneider* and *Tetra-Laval*, however, show a more intense level of scrutiny. The CFI, in these cases, also analysed the Commission's application of microeconomic assessments to legal concepts of the ECMR.<sup>48</sup> The problem with these differing levels of review is that the level of review to which the court chooses to submit a Commission decision, depends on

its willingness to review complicated economic assessments.<sup>49</sup> This is unsatisfactory, especially since the application of the provisions of Art.2 ECMR clearly require the use of economic theory, with which courts are not usually familiar.

Practically, the value of seeking judicial protection against a decision in merger cases by the Commission has in the past been limited to the creation of principles, which can be applied to future proceedings. In the commercial reality of merger cases, the narrow time window which would allow for a merger to be economically viable has usually passed by the time a judgment is handed down in court.<sup>50</sup> The amendments to the Court's Rules of Procedure which included a new Ch.3a providing for an expedited procedure<sup>51</sup> are an attempt to make judicial review more effective. Two high-profile merger control cases have been decided so far by the CFI under the expedited procedure, both reaching a judgment after roughly nine months.<sup>52</sup> A state aid case was decided in as little as eight months.<sup>53</sup> Given the very limited recourses of the CFI and the wide discretion it enjoys under Art.76a of the rules of procedure, the fast-track will mainly be applied in cases in which the issues at stake can be limited to points of law.

### *Basic problems in the current procedure*

In asking for potential improvements in the field of rules on due process the fundamental question is: what qualifies good procedural rules for good competition law? Could a system providing for more safeguards of due process and better checks and balances provide for better results? How can the ever-changing economic and

43 See especially the requirement to take the so-called "horizontal protection clauses" of the EC Treaty into account, e.g. Art.6 EC (Environment), Art.152 I EC (Health Protection), Art.153 II EC (Consumer Protection).

44 Claus-Dieter Ehlermann, "Working Paper II—Decision Making at the Centre, in Ehlermann and Laudati, *op.cit.* pp.40, 41.

45 The CFI can annul any binding act of the Commission if the case is brought by an individual party. The ECJ is competent to hear a case if the case is brought to it by a Member State in an action for annulment.

46 e.g. Case T-102/96 *Gencor v Commission* [1999] E.C.R. II-753; [1999] 4 C.M.L.R. 971.

47 e.g. Joined Cases C 68/94 & 30/95 *France v Commission (Kali und Salz)* [1998] E.C.R. I-1375; [1998] 4 C.M.L.R. 829.

48 The Commission has appealed the CFI ruling on *Tetra Laval/Sidel* to the ECJ. It claims *inter alia* that the CFI has exceeded its role in reviewing the administrative decision for errors of fact or reasoning. See EU Institutions Press release IP/02/1952 of December 20, 2002.

49 Wassilios Skouris, "Die Kontrolle der europäischen Wirtschaftsverwaltung durch die Rechtsprechung des Europäischen Gerichtshofs" [2002] *Europarecht Beiheft* 2, 75.

50 A case in the CFI, according to ECJ statistics, is generally likely to take more than 24 months to reach a final decision (Annual Report of the ECJ 2001).

51 See Art.76 a § 1 of the CFI Rules of Procedure as amended [2000] O.J. L322/4.

52 Joined Cases T 80 & 5/02 *Tetra Laval v Commission*, October 25, 2002 in which the CFI annulled the Commission decisions in Case COMP/M.2416 *Tetra Laval/Sidel* [2001] 5 C.M.L.R. 1231 and Case COMP/M.2416 *Tetra Laval/Sidel* [2002] 4 C.M.L.R. 519; Joined Cases T 310/01 & 77/02 *Schneider v Commission*, October 25, 2002 in which the CFI annulled the Commission decision of Case COMP/M.2283 *Schneider Electric/Legrand*, October 10, 2001. The CFI conducted the hearings of both cases in July 2002.

53 See Case T 195 & 207/01 *Government of Gibraltar v Commission* [2002] 2 C.M.L.R. 33.

legal concepts of merger control be implemented into high quality decision-making?

A review of procedural provisions in European regulatory policies cannot take place today without reference to the principle of good governance enshrined in Art.41 of the European Charter of Fundamental Rights.<sup>54</sup> This provides minimum guarantees for decisions being taken in a transparent procedure after a fair hearing within a reasonable time. Applying these ideas to merger control means that decision-making as well as its underlying reasoning and influences need to be transparent and the structures must be designed to create the best possible law.<sup>55</sup>

In this light, the positive aspects of the current system are clearly that it provides for a reliable and fast process of reaching a final decision. The ECMR contains strict time-limits within which decisions need to be made. The Commission's proposal for a reviewed ECMR will introduce a certain degree of flexibility into the time frame for the conduct of merger investigations in more complex cases.<sup>56</sup> Most cases are cleared within a month after notification. Pre-notification contacts usually help to outline the problematic issues and allow for the businesses involved to devise potential undertakings in an early stage of the process. The Commission provides for notes and guidelines that outline its approach to economic and legal concepts governing the enforcement policy, bind its margin of discretion and thereby help business and their advisers to foresee the potential approach the Commission might take in a case.

The main problematic aspects in the current system can be summarised as follows:

#### *Mixing of investigative and adjudicative, legislative and administrative functions*

First, there is a concentration of not only investigative and adjudicative powers but also of legislative and administrative power in the hands of very few civil servants in a specific Commission department.

Repeatedly, especially from the side of lawyers from the common law jurisdictions, criticism has been raised that investigative and adjudicative functions are combined in the hands of the same civil servants.<sup>57</sup> Commission decisions in the area of merger control are investigated, formulated and finalised by one team of case handlers in both phases of the procedure. The "classical version" of the criticism states that it is more or less unavoidable that case handlers in the second phase of the investigation remain biased towards their initial findings in the first phase, which lead to the Art.6(1)(c) ECMR decision. In the whole process, there is only one instance of review of substantial issues by the advisory committee, but that committee has only an advisory function and needs to work under extremely tight deadlines. Also, the single representatives from the Member States have neither the staff nor the opportunity to analyse a complex deal reviewed in the MTF.

Despite the validity of this "classical version" of criticism, one must note that the problem goes beyond the mere mixing of *investigative* and *adjudicative* functions by the same team of case handlers. Taking a look at the bigger picture, merger control is one of the few areas of EU law in which the Commission, and within the Commission one department of a DG, plays a strong role in the *legislative* as well as the *administrative* procedure. The same civil servants in the Commission initiate legislation in the subject area of merger control (for example, the suggestions for an amendment of the ECMR which will follow the Green Paper of December 2001). These same civil servants, however, are also in charge of defining the general policy in the area of merger control by creating the soft law instruments interpreting the general legislative phrases.<sup>58</sup> Finally, the same team of civil servants screen the notified cases and negotiate undertakings in order to remedy concerns raised in the first phase. These decide whether a notified concentration "raises serious doubts as to its compatibility with the common market"<sup>59</sup> and therefore a second phase investigation needs to be opened, which they then conduct. At the end of this process these same civil servants then adjudicate the case after conducting

54 Although not yet formally a part of primary law, the Charter is nonetheless one of the sources of fundamental rights for the European courts: see Case T-177/01 *Jégo-Quéré v Commission* [2002] 2 C.M.L.R. 44 at [47].

55 Fox, n.12 above, pp.73 *et seq.*

56 The Commission's proposed key elements of a more flexible time frame can be summarised as follows (Com (2002) 711 final of December 11, 2002 at pp.15, 48): if remedies are proposed in phase I the deadline will automatically extend to 35 working days. In complex phase II cases the phase II deadline can be extended by up to 20 working days upon request or with consent of the parties. In phase II remedy cases the phase II deadline will automatically extend by 15 working days if the remedy has been offered at a late stage.

57 Fox, n.12 above, p.76; UK House of Lords Select Committee on the European Union, n.36 above, 231 *et seq.*; UK response to the Commission Green Paper on the review of the ECMR (March 2002), para.8, [www.dti.gov.uk/cp/pdfs/ukresponsetoecmegersgp.pdf](http://www.dti.gov.uk/cp/pdfs/ukresponsetoecmegersgp.pdf).

58 They serve to guideline the internal approach to economic questions and guide discretionary decisions. These soft law instruments also serve externally as guidelines for legal advisers of companies dealing with questions of merger control.

59 Art.6 I (c) ECMR.



the hearing together with the HO who presides over the process and safeguards due process.

### *Checks and balances*

The second point, is essentially a problem of accountability. The different "internal" (Community DGs and services as well as the HO) and "external" systems of checks and balances (the advisory committee and the courts) may not provide sufficient control. The Commission points out that several Commission internal checks and balances take place prior to the publication of a final decision, such as the HO reviewing the respect of due process, the Commission's Legal Service reviewing the legality of a proposed decision and other Commission DGs commenting on the substantive issues.<sup>60</sup> In its December 2002 procedural review it also announced the creation of an internal review panel whose task it is to scrutinise the investigation team's conclusions.

The only provider of external checks and balances involved on the administrative level is the advisory committee composed of representative Member States' competition authorities. But even the advisory committee has a strong "internal" aspect to it because it is presided over by a Commission official. The "internal checks and balances", including the HO, contribute their input to the decision-making by the case handlers in the MTF and their respective superiors in DG Competition. On the level of the final decision-making after a two phase procedure, the Commission acting in plenum has only a scant possibility of undertaking a fundamental review of a proposed decision.

The core problem of this situation is, that the HO practically reviews only procedural guarantees as far as they are provided and there remains very little independent substantial review of the basis on which decision-making takes place. When taking the language the CFI used in its *Airtours* judgment as criteria, which criticised the Commission decision as being far from based on "cogent evidence", the existing internal and external checks and balances were not sufficient to remedy shortfalls in the assessment of the Commission prior to the publication of the decision.

External, non-Commission based checks and balances of course exist on the level of judicial review of Commission decisions. The courts, as noted above, undertake an *ex post* detailed review of the Commission's decisions on the establishment of the factual basis as well as the discretionary decision of the Commission with respect to the legal and the economic assessment of

a case.<sup>61</sup> The court's review, in the case of merger decisions, however, to date has usually been too time-consuming to be able to effect the individual economic decision. It remains to be seen whether the use of the expedited procedure, which in the cases in which it is applied might reduce the time for judicial review to a duration of about eight months, will change this considerably.<sup>62</sup> Seeking interim relief against a Commission decision during court proceedings according to Art.242 EC is not a viable remedy for the parties.<sup>63</sup> In that procedure, parties face the difficulty of having to establish a *prima facie* case against the Commission's arguments. Additionally, the parties need to demonstrate the likelihood of serious and irreparable damage surpassing purely financial harm.<sup>64</sup> Finally, the court will balance the private interest in interim relief against the public interest in enforcing the Commission decision. Since a proposed merger usually aims at changing the structural conditions of certain markets, the private interest will not usually prevail. Exceptions might be possible in cases where interim relief is being sought against conditions attached to a Commission decision if these conditions are sufficiently separable from the exercise of the Commission's overall discretion in the main decision.<sup>65</sup>

### *The role of economic expertise*

The third problem with the current decision-making procedures has been an underlying theme in the discussion over a structure for merger control likely to produce the best competition law. The problem is how to incorporate economic expertise into the decision-making process. There are no clear rules regarding how

61 Full review of discretion takes place since the CFI reviews the Commission's discretion in administrative matters in a fundamentally different manner to decisions with a more legislative content. However, the distinction between the two categories remains difficult outside of such clear cut cases as merger control decisions: see Herwig Hofmann, "Hierarchy of Norms in European Community Law" in *Certain Rectangular Problems of European Integration*, Vol. II (European Parliament, Luxembourg, 1997) (also at [www.iue.it/AEL/EP/index.html](http://www.iue.it/AEL/EP/index.html)).

62 CFI Rules of Procedure, Art.76 a § 1.

63 See Rachel Brandenburger and Thomas Janssens, "European Merger Control: Do the Checks and Balances Need to be Re-set?" [2001] *Fordham Corporate Law Institute* 135-182, at 179.

64 Financial loss does not qualify under the CFI's test as long as it does not endanger the economic basis of a party. See Case T-342/00 R, Order of the President of the Court of First Instance of January 17, 2001, *Petrolensence and Société de gestion de restauration routière (SG2R) v Commission* [2001] E.C.R. II-67 at [46], [47].

65 Brandenburger and Janssens, n.63 above, p.179.

60 Green Paper, n.13 above, paras 232 *et seq.*

to "structure the interface"<sup>66</sup> between economic scientific expertise, rule-oriented implementation of legislation and political decision-making in the process.

Both the European Courts and the Commission are not outspoken about the fact that they apply economic theory when analysing the potential effect of a proposed merger on the future market structure. However, the criteria Art.2(1)(a)–(c) ECMR outlines require an investigation on the basis of econometric data and an evaluation of these data on the basis of economic theory. There is very little "pure" application of black letter law to a given situation in merger control. Practically, the Commission develops principles and then lays them down in guidelines and notices for public information. One example for this approach is the debate whether the European Community should move away from its current collective dominance test for mergers to a US-style "significant lessening of competition" test. Such change of approach would not only effect the formulation of Art.2(1) ECMR, but also the economic approach chosen.

The inclusion of scientific expertise into regulatory decision-making affects the understanding of the role of the Commission in European economic law. Traditionally, administration was in the Continental European tradition perceived more as the "attendant" to political decision-making. This was expressed especially in the German-speaking countries by subjecting administration to a particularly heavy concept of the rule of law.<sup>67</sup> In the European countries with a common law tradition the Anglo-American "transmission-belt" used to be a more widespread metaphor.<sup>68</sup> The CFI in *Airtours* follows more the former tradition, submitting the Commission's interpretation of the ECMR to a strict level of control. It thereby might have implicitly also acted in response to widespread criticism that the control of European regulatory activity did not effectively review the Commission's use of discretion. However, both for the Commission applying the law as well as for the court, two problems arise. Both the interpretation of the terms of Art.2(1) ECMR require additional expertise, also the use of the Commission's discretion when analysing the potential effect of a concentration on the single market relies heavily on non-legal concepts, for

which the Commission needs to include scientific knowledge. While the Commission may avail of this knowledge in house, the courts are restricted to reviewing the administrative decision on the basis of legal arguments.

In this respect it becomes very problematic that the ECMR procedure lacks provisions on how to determine which economic theory could be applied both to assess the factual situation, *i.e.* the prospective effect of a merger on the common market, and to decide about the correct implications of an investigation, *i.e.* the exercise of discretion as to the appropriate means to use. The choice is effectively left to the Commission, which has broad discretion in this matter.<sup>69</sup>

One might argue that the creation of the MTF, a specialised division within DG Competition dealing with merger control cases, is specifically designed to guarantee expert knowledge being applied within this field of market regulation. But the creation of the MTF did not lead to the definition of criteria for the inclusion of scientific expertise into merger decisions. As a result, the Commission neither clarifies from which scientific sources its general economic approaches originate, nor does it necessarily uncover the individual research into single markets when making a decision.<sup>70</sup> Also, the Commission's December 2002 announcement to create the position of a Chief Competition Economist within the DG Competition will remedy the problem, since it only creates a further internal economic view, although it will at least focus some attention onto the need for economic expertise in the area of competition law.

This approach to the inclusion of economic expertise into EC decision-making is neither in line with a more modern understanding of the boundaries between law-

69 The case law is full of examples of the courts taking on board economic tests which themselves are not undisputed in the economic literature. See, *e.g.* the first case of the assessment of the so-called "failing firm defence" in Joined Cases C 68/94 & 30/95 *Kali und Salz* [1998] 4 C.M.L.R. 829 at [109] *et seq.* See also the approach the CFI took in Case T-342/99 *Airtours v Commission* [2002] 5 C.M.L.R. 7 at [31], [32] for the assessment of the use of the correct calculation method when defining the relevant product market.

70 For criticism of the latter see Case T-342/99 *Airtours v Commission* [2002] 5 C.M.L.R. 7 at [132], [133]. Another example of an important merger decision being based on untested economic theory was the use of the highly disputed bundling/portfolio effects theory in the Commission's decision in the merger case *General Electric/Honeywell* which is currently pending in court (Commission Decision of July 3, 2001, Case No. COMP/M.2220, *General Electric/Honeywell*, especially [468]–[484]); OECD Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee, DAFFE/COMP (2002)5, Report of January 24, 2002 on Portfolio Effects; Matthias Pflanz, Christina Caffarra, "The Economics of G.E./Honeywell" [2002] 3 E.C.L.R. 115.

66 For a general review of this problem in European regulatory issues see Renaud Dehousse, "Misfits: EU Law and the Transformation of European Governance", Jean Monnet Working Paper No.2/02, p.15 ([www.jeanmonnetprogram.org/papers/02/020201.html](http://www.jeanmonnetprogram.org/papers/02/020201.html)).

67 Submitting administration to a *Vorbehalt* and *Vorrang des Gesetzes* (the requirement of having a clear legal authorisation to act and the priority of the delegating law).

68 Christian Joerges, "Governance of the European Market" in Christian Joerges and Renaud Dehousse, eds, *Good Governance in Europe's Integrated Market* (Oxford, 2002), p.20.

making and implementation, nor is it in line with the development in areas other than competition law.<sup>71</sup> In different contexts than competition law, the ECJ has underlined the importance of respecting procedural steps, which are designed to incorporate independent scientific expertise into an administrative procedure.<sup>72</sup>

### *Principle of proportionality and fundamental economic rights*

The issue of clear sources for scientific economic analysis in a merger decision is highly relevant to the assessment of Commission decisions with respect to the exercise of fundamental freedoms and the principle of proportionality. Fundamental rights language is not often used in relation to merger control, not even by the courts. However, fundamental rights play an important role when it comes to the justification of limitations to economic activities. Merger control takes place within the sphere protected by the rights to property and in some circumstances also the right to pursue a professional activity of the parties involved. Those rights, the court holds with respect to other areas of law, "are not absolute"; they may be subject to "restrictions which correspond to Community objectives of general

interest" as long as these restrictions do not violate the principle of proportionality as enshrined in Art.5 EC and would impair the very substance of the rights guaranteed.<sup>73</sup> Applying the three-part test that the ECJ adopted to analyse the proportionality of a measure,<sup>74</sup> in merger cases the Commission needs to analyse especially carefully whether declaring a merger incompatible with the single market is capable of serving the objective of safeguarding effective competition (first criteria of proportionality) and that no less onerous conditions could serve the same goal (second criteria). In regulatory areas of EC law other than merger control, the ECJ has found that these tests can only be satisfied if scientific expertise has been applied to analyse whether no other measure is less onerous than the one proposed by the Commission.

Even though, by creation of the ECMR, the European legislator has balanced the individual freedoms with the legitimate regulatory concern of society, the fundamental rights aspects of merger control point out the importance of sound review of the proportionality of measures undertaken with the aim of limiting the individual freedoms for the perceived public good of regulatory intervention. The courts, when reviewing Commission decisions, can improve the quality of their approach by analysing the proportionality and limitations to fundamental rights. In fact, one may even argue that the courts should develop a gradual approach to the level of review: the higher the regulatory impact on individual rights, the stronger the fundamental rights protection by procedural and substantial means necessary.<sup>75</sup>

71 See especially the formulation of Art.95 III EC according to which the Commission, when making a proposal in certain areas, is obliged to take into account "in particular any new development based on scientific facts". For a general overview see Christian Joerges, Karl-Heinz Ladeur and Elen Vos, eds, *Integrating Scientific Expertise into Regulatory Decision-Making* (Baden-Baden, 1997).

72 Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* [1991] E.C.R. 5469, [1994] 2 C.M.L.R. 187 at [10]-[23] in the area of import duties; Case C-212/91 *Angelopharm GmbH v Freie und Hansestadt Hamburg* [1994] E.C.R. I-171, [1994] 3 C.M.L.R. 573 at [31]-[36] in the area of cosmetics. The ECJ is particularly strict when it comes to the review of Member States' limitations on fundamental freedoms. There, the court requires the need for limitations be proven by scientific expertise; see the famous case law on the free movement of goods since Case 120/78 *Cassis de Dijon* [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494. The ECJ was especially explicit in Case 17/93 *Openbaar Ministerie v Van der Veldt* [1994] E.C.R. I-3537, [1995] 1 C.M.L.R. 621 at para [17], [18]: "... the risk must be measured, not according to the yardstick of general conjecture, but on the basis of relevant scientific research (see, in particular, Case 178/84 *Commission v Germany* 1987 E.C.R. 1227). In neglecting to produce scientific data on the basis of which the Belgian legislature would have been justified in enacting and retaining the measures at issue, the Belgian authorities have failed to demonstrate the risk ..."; Case C-314/99 *Netherlands v Commission*, June 18, 2002 where the ECJ annulled a Commission Directive on the grounds that the contested adaptation to technical progress of a Council Directive was made without the Commission being able to base that amendment on "sufficiently reliable scientific information to allow it to propose an adaptation".

73 Case C-200/96 *Metronome Musik v Music Point Hokamp* [1998] E.C.R. I-1953, [1998] 3 C.M.L.R. 919 at [21]; see e.g. the analysis of AG Fennelly in Case C-376/98 *Germany v Parliament and Council (Tobacco)* of June 15, 2000, para.148.

74 First, "[t]he principle of proportionality... requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question". Secondly, "when there is a choice between several appropriate measures recourse must be had to the least onerous," and finally, "the disadvantages caused must not be disproportionate to the aims pursued." Case C-189/01 *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] E.C.R. I-5689 at [81]; Case C-331/88 *R. v Ministry of Agriculture, Fisheries and Food Ex p. Federation Europeene de la Sante Animale (FEDESA)* [1990] E.C.R. I-4023, [1991] 1 C.M.L.R. 507 at [13]; Joined Cases C 133, 300 & 362/93 *Crispoltoni v Fattoria Autonoma Tabacchi* [1994] E.C.R. I-4863 at [41].

75 Herwig C. H. Hofmann, *Normenhierarchien im Europäischen Gemeinschaftsrecht* (Berlin, 2000), pp.103 et seq.; Herwig C. H. Hofmann, "Hierarchy of Norms in EC Law" in J.H.H. Weiler et al., *Certain Rectangular Problems of European Integration* (European Parliament (Project IV/95/02), Vol. I, II, Luxembourg, 1997).

## Solutions

The CFI's judgments in *Airtours*, *Schneider* and *Tetra-Laval* have had a deep impact on the perception of procedural rules of EC Merger Control. They have had the effect of putting procedural rules, which the Commission in its Green Paper of December 2001 addressed only superficially, back to the centre of attention of the reform debate. This article has thus found that careful consideration needs to be given not only to a reform of ECMR procedures themselves, but also possible improvements should be explored in a wider sense. The aim in merger review is to provide both fast (giving legal security by providing decisions within a business-oriented time frame) and high quality decisions.

Against this background, a reform of European merger control needs to address the question of how to integrate economic expertise in every phase of merger proceedings more effectively. Further, it needs to address how to increase checks and balances into the decision-making procedure and, finally, find a way to increase the value of judicial review to the parties. These requirements are by no means isolated requirements of merger control. Other areas of European regulatory intervention into markets have posed similar issues. A reform of merger control, therefore, may benefit not only from concepts adopted in other regulatory areas but also from experiences within other jurisdictions. In the following section, possibilities of reform of ECMR decision-making procedures will be analysed in two steps. In the first part, it will look at the possibilities for increasing the input of economic expertise into decision-making. In the second, it will analyse possibilities for structural and procedural reforms.

### Involving expertise

One of the shortfalls of the current system is the lack of a systematic approach to the inclusion of economic expertise.<sup>76</sup> Techniques need to be developed to improve the inclusion of scientific expertise first in formulating the general approach to, for example, the conditions under which one or more players on the market would be regarded as dominant. This refers to quasi "rule-making" activities of the Commission (in the formulation of guidelines or drawing up initiatives for amendments to the ECMR) on one hand and single case decision-making on the other. Both areas differ as to the conditions for inclusion. In the rule-making area, the

Commission has committed itself to a "culture of consultation", promising to include external expertise from the "civil society" including scientific sources.<sup>77</sup>

Techniques also need to be developed for inclusion of expertise in individual decisions. Thereby there is the need to maintain legal certainty and predictability of results. Business planning must be able to rely on stable parameters.

In the context of merger control the question arises as to how to structure the input of specialist advice in order to be able to achieve a workable result. Expertise can come from within the Commission services and from external sources. The inclusion of external expertise is especially viable when timing is not an essential factor. That is the case in the area of "rule-making". Yet the very nature of specialists' advice is that it will be controversial and often contradictory. This holds especially true when economic expertise is offered by parties to a case as part of their argument or in defence of a case.

On the European level, the inclusion of expertise from specialists is often constructed by means of "comitology" committees.<sup>78</sup> By these means a standing committee of external experts is an additional approach that could help the Commission with obtaining up-to-date economic expertise. Such a committee of experts could be included in the procedure next to the existing advisory committee. The advisory committee is composed of Member State representatives whose role is also to make the different views of the national regulators heard. A scientific committee could include the necessary independent economic advice similar to, for example, the scientific committees in food and health issues.

Including economic expertise with the help of committees, however, also requires the scientific deliberation to be organised in a certain manner. This begins with the

77 See Communication from the Commission, "Consultation document: Towards a reinforced culture of consultation and dialogue—Proposal for general principles and minimum standards for consultation of interested parties by the Commission", COM/2002/0277 final.

78 Comitology was originally developed in the EC as an instrument by which the Council, when delegating administrative competences to the Commission under Arts 202, 211 EC, could keep a certain amount of control over the Commission's activities. For an overview of the topic see Mads Adenars, Alexander Türk, eds, *Delegated Legislation and the Role of Committees in the EC* (Kluwer, 2000). Over time it has turned out that comitology committees were also extremely valuable institutions to create information and co-ordination networks between the EC and the Member States' administrations. There are now hundreds of committees in the EC, organised in three general types outlined by the "Comitology Decision". See the latest version of the Council's Comitology Decision (1999/468/EC) [1999] O.J. L184/23, which distinguishes between three basic types of committee following an advisory (I), management (II) or regulatory (III) procedure.

76 See, for general views on integrating scientific expertise into regulatory decision-making, Joerges *et al.*, n.68 above.

selection of experts. The selection procedure for members of scientific committees assisting the Commission in some areas is regulated.<sup>79</sup> Also, it needs to be regulated at the outset of the establishment of the committee under which circumstances the committee needs to be heard and how the questions are formulated.<sup>80</sup> A prominent example for this approach is the German *Monopolkommission*, a commission of experts from academic and practising backgrounds.<sup>81</sup> The *Monopolkommission* gives annual reports and comments on legislative initiatives and is in certain cases also called to comment on proposed single case decisions.<sup>82</sup>

With respect to individual decisions on merger applications, internal expertise might be required within the Commission since tight deadlines require fast action which conflicts with lengthy consultation procedures. Although the Commission has in the past increased its economic staff, their role is not sufficiently well-defined in the decision-making process. In its response to the Commission's Green Paper on the reform of Merger Control, the UK Government suggested increasing "peer review" of the Commission's economic arguments by including a "Chief Economist in DG Competition, supported by a unit capable of providing a centre of economic excellence within the DG".<sup>83</sup> That would introduce into DG Competition a structural element similar to the organisation of the US Federal Trade Commission with its separate board of economic experts, the Bureau of Economics. This helps the US Federal Trade Commission to evaluate the economic impact of its actions and provides economic analysis and support to antitrust and consumer protection investigations and rule-making. The Antitrust Division of the US Department of Justice, also engaged with competition law enforcement, has a similar structure with a distinct department dealing with the economic analysis of issues. It is not unlikely that this small but significant organisational issue might be one of the reasons that economic aspects of merger cases are generally more thoroughly analysed in US cases than they are in cases dealt with by the European Commission.

79 See, e.g. Art.3(4) of Commission Decision (97/404/EC) setting up a Scientific Steering Committee, June 10, 1997 [1997] O.J. L169/85 amended by Commission Decision (2000/443/EC), May 18, 2000 [2000] O.J. L179/13 according to which the Committee has the right to "select the most suitable candidates" for scientific committees.

80 See Annette E. Töller, Herwig C.H. Hofmann, "Democracy and the Reform of Comitology" in Adenars and Türk, *op.cit.* pp.45-50.

81 §§ 45, 46 of the German *Gesetz gegen Wettbewerbsbeschränkungen* (GWB, Law against restrictions of competition).

82 e.g. on a so-called *Ministererlaubnis* (ministerial permission for a merger which has been banned by the competition agency, the *Bundeskartellamt*) according to § 42 GWB.

83 UK response to Green Paper, n.57 above, para.8.

In December 2002, the Commission announced the creation of the post of a "Chief Competition Economist" in the DG Competition. The Chief Competition Economist will be a prominent economist on temporary assignment to the Commission. He will be involved in merger and other competition investigations and directly report to the Director General of DG Competition.<sup>84</sup>

The role of the Chief Economist in the Commission is, however, still unclear. In order to increase transparency, the specialist team of economists could, for example, be obliged to prepare an economic analysis of each case. That should become part of each statement of objections and each final decision adopted by the Commission in merger issues. This could be a contribution to an improvement in the use of economic expertise from an early stage in the merger control procedure.

The inclusion of economic expertise, albeit important, is only one necessary improvement of EC procedural and structural rules. It should not, therefore, be seen as a replacement for further procedural and structural reform to increase the checks and balances as discussed below.

### *Increasing checks and balances within an administrative procedure*

Checks and balances are generally built into a system of governance to avoid a concentration of power and to control its exercise. The discussion about increasing checks and balances in the decision-making system for merger control consequently centres around two aspects: First, a reform of the "administrative" procedures. This analyses how decision-making procedures within administrative forums could be improved. Secondly, consideration needs to be given to the system of judicial review of cases.

Models for more effective checks and balances in EC merger control can be found in different areas of European administrative law. Possible approaches could contain: introducing standard hearings of external experts into merger control procedures, involving an independent agency at certain stages of the procedure, amendments to the role of the HO or the creation of an appeals board within the administrative procedure.

84 EU Institutions Press release IP/02/1865 of December 11, 2002. Mario Monti, Speech 02/533, "EU Competition Policy", Fordham Annual Conference on International Antitrust Law & Policy, New York, October 31, 2002.



### *Internal Commission reforms*

One of the central requests by many observers of EC merger control is to introduce some sort of distinction between the investigative and the adjudicative phase of the review process. The intention is to avoid the potential bias of a team of case handlers reviewing cases in the first as well as in the second phase of an investigation.

One potential, easily implemented and often suggested solution to this would be to create two separate teams of case handlers. One would conduct the investigation in phase one, the other in phase two of a merger investigation. The MTF could for example be split into two "directorates". This structural change could be used to allow for a split between teams in charge of phase one and phase two. To make this an effective system of checks and balances, different teams in the MTF and DG Competition would need to be sealed off against each other by Chinese walls.<sup>85</sup> The Commission has announced plans to create a peer review panel made up of Commission officials from outside the Merger Task Force. This panel of "devil's advocates" will include the Chief Competition Economist.<sup>86</sup> However, those suggestions are far from an ideal solution to the problem. The main reason for such solutions not being ideal, however, is that they would not distinguish between investigation and adjudication. Being internal measures they would also not provide for the necessary transparency of decision making.

### *Agency models*

A more far-reaching approach would be for the Commission to farm out certain activities currently undertaken within the MTF to an independent agency. There has been intense debate about the possibility of creating a competition agency for decades. Suggestions in this debate are mostly concerned with creating an independent *competition* agency which would be in charge of administering the entire EC competition policy with respect to private parties. However, looking at the reform of procedure from the perspective of an increase in the amount of checks and balances inherent in the merger control procedure, a more limited role for an agency might be envisaged.

Currently, European agencies can be endowed with a multitude of tasks. The European legislator has, under the so-called "Meroni doctrine", the right to delegate administrative tasks to agencies as long as they do not

encroach upon the institutional balance as outlined in the Treaties.<sup>87</sup> A merger control agency could therefore be used to increase the checks and balances at various levels of the procedure.

A merger control agency could be conceived with the following functions. The first decision would be whether it should be in charge of only the first or of both phases of the merger review. In the latter case, it would additionally be necessary to decide who could make the final decision which would be subject to judicial review.

The most far-reaching approach was often suggested in the discussions of the 1990s. According to those suggestions a competition agency would also be in charge of the full two phase process of merger review and be in charge of making a final binding decision. Appeal could be made to the Commission in cases similar to the German *Ministererlaubnis*.<sup>88</sup> A recourse to the Commission could, in this model, help to remedy the disadvantage of isolating merger control from other areas of competition policy. A disadvantage of this approach, however, would be that the opportunity for the Commission to deal with a case would then depend on the parties' decision to appeal. Also, such an agency would not provide the guarantee of strengthened checks and balances during the decision-making procedure in the administrative process.

The less far-reaching approach would be to delegate the first and second phase of investigations as well as the drafting of final decisions to the merger control agency. The Commission itself would then adopt the final decision in its own name. This structure would be similar to decision-making in the European Agency for the Evaluation of Medicinal Products. In that model, the agency prepares a draft decision which the Commission may then adopt as a binding decision with external effect. If the Commission elects to depart from the agency proposal, it would be required to give a detailed

<sup>87</sup> This doctrine goes back to one of the early decisions of the ECJ in Case 9/10/59 [1958] E.C.R. 9, 51 in which the ECJ decided that the High Authority of the ECSC did not have the right to delegate decision-making power which contained discretionary decisions. This doctrine has over time become less rigid allowing for the delegation of further-reaching delegations. Agencies today fulfil functions which range from information management, network co-ordination between Member States' institutions, and taking over regulatory functions to providing auxiliary duties to Community institutions. See Dorothee Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft* (1999), pp.46 *et seq.*, 427.

<sup>88</sup> For references see n.9 above. A *Ministererlaubnis* under §§ 8, 42 GWB, however, is not exempt from judicial control, see OLG Düsseldorf E.ON/Ruhrgas.

<sup>85</sup> UK response to Green Paper, n.57 above, para.8.

<sup>86</sup> EU Institutions Press release IP/02/1865 of December 11, 2002.



reasoning.<sup>89</sup> Although the use of this approach for merger control issues would not address one of the major criticisms of the current situation (that phase one and phase two case handling teams are not separated), such an approach would allow for an internal review of a case by a different team, prior to the final externally effective decision being made. Also, at this stage the Commission could take into consideration aspects from other policy areas and fine tune the possible outcome with its general competition policy approach. An advantage of this approach would be that, within this model, the different phases of decision-making differentiating between economic assessment and political discretion could become very transparent.

The most thorough separation of first and second phase teams and therefore a strong increase of checks and balances could be achieved by the more narrow agency model in which the agency would be involved with only the first phase. If it decided to issue a statement of objections under Art.6(1)(c) ECMR, the second phase would automatically be opened at the Commission. This model would to a certain degree resemble the distinction between the Office of Fair Trading and the Competition Commission in the British system. The advantage of this approach would be a guaranteed distinction between two different sets of case handlers. Also, such a limited agency would avoid the Commission being barred from undertaking more complex assessments including other policy areas. The agency in this model would only be in charge of phase one procedures and would in itself serve as a body only concerned with screening the proposed merger and negotiating the first round of commitments in the more straightforward cases.

#### *Amendments to the role of the hearing officer*

Discussing the possibilities of a merger control agency directly leads to suggestions to further develop the role of the HO. To date, in practice the HO only observes whether the principles of due process have been safeguarded during the administrative procedure. Suggestions range from expanding the HO's role to making him or her preside over negotiations on undertakings, to giving the HO a mandate to report not only on procedural but also on substantial issues, to more substantial reforms making the HO an independent internal review board.

89 Art.10(1) of Reg.2309/93 [1993] O.J. L214/1, establishing the European Agency for the Evaluation of Medicinal Products (EMEA).

The least far-reaching suggestions would see the HO involved at later stages in the merger control procedure in the negotiation of commitments.<sup>90</sup> This would require the HO to take a more active stance with respect to the substantive issues of a case in order to be able to mediate actively between the Commission's competition concerns and the parties' interests. That approach could help the parties deal with the Commission, however it could not remedy the problem that the basis of the Commission concerns would have been formulated without being subject to sufficient checks and balances if such a reform were not accompanied by additional structural reform of the merger review procedures.

If the HO's role were expanded to comment regularly not only on procedural but also on material grounds, he or she would then take a position within the Commission, similar to that of an Advocate General at the ECJ<sup>91</sup> reporting directly to the Commissioner of DG Competition. Such reports could then be used as a second opinion to assess the validity of the MTF's findings.<sup>92</sup> Such an approach would require two changes in the current system. First, the HO would need to be equipped with the personnel resources to be able to undertake analysis of the substantive side of merger notifications. Secondly, the HO would need to be endowed with the rights to undertake independent research since otherwise the substantive analysis of the case would necessarily rely on the investigation and assessment undertaken by the MTF. However, an independent HO, fully equipped with the rights and resources to independently investigate, merger cases would come close to a fully fledged merger control agency as discussed above.

An alternative approach could be to introduce a clearing house for decisions within the administrative procedure. That approach in EC administrative procedures has been taken within the system of appeals in the

90 See Joseph Gilchrist, Submission to the hearing before the UK House of Lords Select Committee on European Affairs, n.36 above, para.209; Barry Hawk, James Venit and Henry Huser, "Recent Developments in EU Merger Control" (2001) 15 *Anti-trust* 24, 27.

91 The independence of the hearing officer and his or her staff could be strengthened by making the office a component of the Commission similar to the existing European Anti-Fraud Office (OLAF) (Commission Decision (99/352) establishing the European Anti-Fraud Office, April 28, 1999 [1999] O.J. L136/20). According to Art.2(1) of that decision, OLAF is technically part of the Commission, but it is independent and competent to conduct, *inter alia*, internal administrative investigations within the Commission.

92 In this sense see also UK response to Green Paper, n.57 above, para.9.

structure of the European Office for Harmonisation in the Internal Market.<sup>93</sup> According to the appeals procedure in that agency, a decision by the agency must, before the case can be brought to the ECJ, be appealed at the appeals body providing an internal review and acting as a kind of "filter" prior to court proceedings. The advantage for applying such a solution to European merger control would be that there would be a "second pair of eyes" within the Commission reviewing decisions. In the US system of competition law enforcement, the "Administrative Law Judge" within the Federal Trade Commission fulfils a similar role. In that system a so-called "complaint" by the Federal Trade Commission against an anti-competitive behaviour may be appealed before an Administrative Law Judge who will adjudicate the case in a trial-type proceeding. Upon conclusion of the hearings, the Administrative Law Judge issues an "initial decision" setting forth his findings of fact and conclusions of law, and recommending either entry of an order to cease and desist or dismissal of the complaint.<sup>94</sup>

If the HO's role were to be developed into a similar position, an appeal against the case handler's preliminary findings could be brought to the HO who would undertake a complete review of procedural and substantive issues and conduct a hearing in an adversarial procedure. Either side, the case handlers or the parties involved could appeal the HO's decision by requesting a formal Commission decision which then in turn could be subject to judicial review in the CFI. The advantages of such an approach could lie in the transparency of the procedure, due to the fact that the adversarial nature of the process would be strengthened. The case handlers would be aware of the fact that they would regularly be required to present their case to an independent body with decision-making power. For the parties involved, the additional advantage would be to have the benefit of an internal review process and to receive a hearing by the HO themselves. The disadvantage of such a procedure would again be the prolonged procedure which would be the trade-off for the increase in procedural safeguards for parties to a merger.

### *Court/judicial review*

The ECJ in one of the earlier competition cases held that the Commission, when applying competition law, is not viewed as a "tribunal" under Art.6 of the European Convention on Human Rights. That judgment will also apply to the role that the Commission currently plays with respect to merger control. Applying the ECMR therefore means that the Commission itself does not need to be organised as an impartial tribunal. That does not, however, mean that reforms could not touch upon the relation between the administrative and the judicial branches in the field of merger control. On the contrary, the discussion is active and vivid in this respect.

### *Reforms of judicial review*

Even if, on the level of the administrative system, the checks and balances would be enhanced, the main concern raised by many commentators from the business community<sup>95</sup> with regard to *ex post* judicial review is how, in light of the fast nature of the business world, judicial review might be given within a time-frame that could actually make a difference to the parties involved in a merger.

The procedural rules of the CFI have been recently amended to allow for expedited procedures which now allow for judgments in certain types of cases to be handed down within eight months after the initiation of proceedings.<sup>96</sup> A shorter time-frame will most likely not be realistic, given the translation requirement at the European courts. Also, not all merger cases brought to the CFI will be able to benefit from the fast track treatment, if the CFI itself is not reformed. Article 76a of the CFI Rules of Procedure, leaves to the court wide discretion as to which type of cases should be permitted to use the expedited procedure. Only if the CFI benefits from an increase in resources will it be capable to take on more fast track cases.<sup>97</sup>

### *Change to a court-based system*

The most dramatic change to the current system of merger control enforcement under discussion is the concept of changing from the current system centred around the administrative decision to an adjudicative system in which the Commission would no longer have the final decision whether to ban a proposed merger but

93 See Arts 57 *et seq.* of Reg.40/94 establishing the Office for Harmonisation in the Internal Market [1994] O.J. L11/1, and Reg.216/96 laying down the rules of procedure of the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) [1996] O.J. L28/11.

94 See the presentation of the procedure before the FTC ([www.ftc.gov/ogclbrfourvw.htm](http://www.ftc.gov/ogclbrfourvw.htm)). An appeal of the initial decision can be brought to the full Commission of the FTC, issuing a final decision against which appeal is possible in a regular court.

95 See, e.g. coverage of the *Airtours* ruling, *Financial Times*, June 7, 2002, p.9.

96 See n.50 above. According to observers this might be fast enough to permit the companies involved to finalise their deals if their appeals are successful in court. See Howry Simon Arnold & White, "Turbulent Times Ahead for EC Merger Control?" August 2002, *Antitrust Client Alert*, p.3.

97 The number of judges of the ECJ and CFI can be increased by unanimous vote in the Council under Art.221(4) EC.

growing importance in worldwide competition enforcement, forcefully place the question of the legitimacy, transparency and accountability of decision-making in merger control on the agenda. The CFI's judgments in the *Airtours*, *Schneider* and *Tetra-Laval* cases was a warning that European merger control procedures suffer from considerable deficiencies. This has added to the need for a review of the decision-making mechanisms and structural conditions thereof. The checks and balances currently incorporated in the Commission's merger assessment are not adequate. The Commission's proposals of December 2002 are not far reaching enough. This article therefore discussed several approaches to an improvement of the European merger control regime, starting from improving the input of economic expertise, various models of increasing internal checks and balances and reforms of the role of the

courts. It suggested that strengthening internal checks and balances would be especially effective if the different phases of merger control review were split between different actors and decision making would have a more adversarial nature. The HO could be developed to a key player in this respect. However, most effective would be a switch to a court-based system decision making. Merger control is highly time-sensitive. Administrative and judicial procedures derive their legitimacy not only from quality but also from the speed of decision-making. In this respect, reforming EC merger control can benefit from the experience gained in other areas of European administrative law and regulatory approaches in other jurisdictions. This article shows that there is great potential for improving the quality of decision-making without endangering the current effective working of the system.