UNICE
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GREEN PAPER ON THE REVIEW OF THE MERGER REGULATION

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UNICE COMMENTS

1. INTRODUCTION

On 11 December 2001, the Commission adopted a Green Paper on the review of Council Regulation (EEC) No. 4064/89 (the Merger Regulation). The Green Paper aims to launch a debate on how the Merger Regulation functions and suggests a wide range of possible reforms to the present system.

UNICE commends the Commission for adopting a comprehensive and balanced discussion paper in which it raises a variety of issues relevant to the functioning and improvement of the present merger control system. UNICE considers the Green Paper a welcome contribution to the important and increasingly invigorating debate on the Community's merger control rules and practice, and highly appreciates the way in which the Commission has consulted interested parties. UNICE recommends that such an approach is followed whenever proposals for significant reform are made.

UNICE is firmly in favour of developing and sustaining a competitive commercial environment in the European Union and is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice. It is therefore of the utmost importance for industry that merger control is of good quality, fair, transparent, effective and efficient. Overall, UNICE has been a strong supporter of the Merger Regulation and the way it has been implemented by the Commission, however, as indicated below, there are several shortcomings to the system which are increasingly causing companies considerable concern. UNICE hopes that the current review will help resolve these shortcomings and welcomes taking part in discussions on how best to shape future policy and improve the present system.

UNICE's views and recommendations are set out below.

2. JURISDICTIONAL ISSUES

2.1 *Community dimension*

UNICE has always strongly supported the one-stop-shop and believes that multiple filings should be avoided wherever possible. Multiple control procedures are costly and burdensome for business and hinder industry consolidation and reorganisation, which are of crucial importance for European competitiveness in global markets. Application of the one-stop-shop principle results in lower costs, less complication and less delay where the alternative would have involved multiple applications to national authorities, which would apply their domestic legislation. In addition, it generally ensures consistent application of the rules and provides

legal certainty in the form of strict adherence to timetables, speedy decision-making and final decisions which are legally binding throughout the Union.

In view of the above, UNICE supports the Commission reviewing a case once two or more Member States have jurisdiction over a case. Whilst strongly preferring clear objective criteria in the Merger Regulation itself which would do away with a substantial number of multiple filings and on which parties could rely without having to assess national provisions (possibly with the help of local advisers) with a view to determining whether a proposed transaction has a European or national dimension, UNICE could support the introduction of a simple rule allowing parties the option to request the Commission to review a case as soon as the relevant national jurisdiction criteria of two or more Member States are met.

Given the fact that some Member States apply non-mandatory systems of merger notification, it is important that such a new rule focuses on national jurisdiction criteria and not on national notification requirements. Otherwise the Commission would not be competent if filings were to be made to both a mandatory notification system and a voluntary system. It is equally important that the new rule gives the parties the option (rather than the obligation) to notify to the Commission, since national jurisdiction criteria can be unclear and open to interpretation (*e.g.* based on market shares). In situations where the rules on jurisdiction are unclear, parties may, entirely in good faith, come to the conclusion that notification to a particular national competition authority is not necessary, and this conclusion may subsequently turn out to be incorrect. If notification to the Commission were to be made mandatory, these parties would risk being exposed to sanctions provided under the Merger Regulation for failure to notify if it were to transpire that, contrary to the parties' *bona fide* initial assessment, the jurisdiction test of a particular Member State is met. Alternatively, there should be no penalties in these circumstances. In addition, parties should not be prevented from notifying their transaction to several national competition authorities, and not to the Commission, if they wish to do so, for instance because it would be more efficient for reasons related to information or linguistic requirements, or because the authorities concerned have particular knowledge about the markets concerned.

UNICE considers that the administrative procedure for invoking the new rule must be as simple as possible. Parties should be entitled to set out in brief terms, in a separate Jurisdictional Form, or in the Form CO itself, why the jurisdictional requirements of the Member States involved have been satisfied. If necessary, the Member States could be given the opportunity to oppose the analysis of the parties within a short period of one week. Such a procedure should be quick and efficient and save companies the burden of having to approach national authorities themselves. At the request of the parties, it should be possible that the period for the Commission's investigation starts from the date on which the deadline for the non-opposition procedure has expired instead of the date of notification of the full Form CO.

2.2 *Referrals*

Generally, UNICE considers that referrals to Member States, which will apply national competition law, increase uncertainty and cause procedural difficulties and delays. For example, the parties may have to re-draft the notification to meet national requirements and pre-notification work may lose its value. Consequently, UNICE would view with concern any significant increase in the use of referrals back to Member States. Such increase could also lead to inconsistent application in decision-making, which could potentially undermine the integrity of the internal market.

Considering the possibility of increased referrals to Member States, cases should only be referred where a national authority makes a reasoned, substantiated case that there is a real danger that dominance would be created or strengthened which significantly impedes competition in a distinct market. It is important that referrals do not take place where the

relevant market is *prima facie* wider than national. Importantly, in UNICE's view, any rules regarding referrals to Member States should be accompanied by harmonisation of the national procedural rules (*e.g.* regarding time limit and language used) along the lines set out in the Merger Regulation. If a case is referred to more than one Member State, the national authorities dealing with the case should do so under the substantive rules of the Merger Regulation.

Having said this, UNICE believes that transactions which are unlikely to have anti-competitive effects, such as those subject to the simplified procedure, should not be referred. This would allow the Commission to adopt clearance decisions within a much shorter time frame. In addition, the Commission should not refer part of a case to a national authority. The Commission and national authorities simultaneously handling parts of a case would undermine the one-stop-shop principle and cause disproportionate problems for the parties.

UNICE considers that the time period for a referral request should be limited to two weeks as from notification, in order to reduce delays and uncertainties in the review process. The parties and the Member States should be informed immediately of any request for referral. The Commission should have one week to make its decision whether it will refer the case or not, and inform the parties and the Member States immediately.

Lastly, UNICE considers that both the merging parties and the Member States concerned should give their consent to the referral and suggests that the Commission establishes guidelines which set out in detail when and how referrals will take place. Adequate safeguards should be included to ensure that the Commission closely monitors the review by the national competition authorities and, if necessary, takes corrective action.

2.3 *The concept of "concentration"*

UNICE considers that at this point it is not necessary to make changes to the Merger Regulation as regards minority shareholdings, strategic alliances and cooperative full-function joint ventures. The first two can be satisfactory dealt with under Articles 81 and 82, and, in particular as regards minority shareholdings, UNICE would oppose any weakening of the threshold of a change in control. UNICE would like to underscore, though, that, following modernisation in the area of Articles 81 and 82, it is highly important that the Commission will be obliged in this context to issue decisions and/or reasoned opinions, carrying legal weight, if novel issues of law or fact or significant financial investments are involved. Companies should also be entitled to approach the Commission on an informal basis for guidance as to the likely compatibility of their transactions with Community competition rules. The need for more legal certainty is even more compelling as regards certain partial-function production joint ventures. These operations involve substantial investments, are difficult to unravel and bring about structural changes. UNICE considers therefore that the parties to such transactions should have the possibility to opt into the Merger Regulation if certain thresholds relating to the size of the investment and the assets to be contributed are fulfilled. Such a system would allow those parties who wish to have *ex ante* legal certainty to obtain it.

As regards multiple transactions, UNICE would support companies being given the option to file multiple transactions which are linked as a single notification to resolve problems related to multiple filings having to be made over a period of several months. As regards venture capital investments, UNICE believes that exclusion of such transactions from the scope of the Merger Regulation would indeed involve difficulties in defining the scope of the exemption and that exemptions should not have as a consequence that these transactions would be subject to multiple notification requirements at national level.

3. SUBSTANTIVE ISSUES

3.1 The substantive test

UNICE welcomes the Commission opening a full debate on the substantive test on which European merger control is based. UNICE believes that European merger control should be implemented on a sound economic basis, reflecting business reality, and facilitating constructive coordination with the US and other jurisdictions. It should also be applied in a transparent, consistent and predictable manner. UNICE notes that application of the test is much more important for shaping merger control policy than the wording. The wording of both the European *dominance* test and the *substantial lessening of competition* tests applied by the US, Canada and Australia, leave considerable scope for interpretation and both tests have been subject to different enforcement policies over time. The differences in approach between the two tests are also not entirely clear-cut. There are many similarities between the two tests, and in the vast majority of cases dealt with by the Commission and the US the outcome has been the same. UNICE notes that to some extent the *substantial lessening of competition* test is more open-ended which could lead to more uncertainty, especially considering that the existing case law of the European Court would cease to provide guidance if the *dominance* test were to be replaced. Already, there is concern about the Commission stretching the *dominance* test to include theories of competitive harm that do not obviously involve dominance as a result of which effective competition would be significantly impeded in the common market (*e.g.* theories related to collective dominance, bundling and portfolio effects). UNICE is increasingly concerned about the lack of clarity and uncertainties in relation to the substantive decision-making and would urge the Commission to publish a Notice on these issues as soon as possible with a view to furthering legal certainty and not to harm the performance of European companies at global level, by preventing them from consolidating on a rational basis.

In view of the above, UNICE favours maintaining the *dominance* test provided it involves dominance as a result of which effective competition would be significantly impeded in the common market. The test lies also at the basis of existing jurisprudence and replacing it could produce a substantial period of uncertainty. Also, the *dominance* test is more suited to the kind of structural analysis required for merger control than a *substantial lessening of competition* test, especially given the requirement that effective competition is significantly impeded. In addition, most Member States (as well as the applicant countries) have aligned their merger control legislation on the current *dominance* test. Consequently, keeping that standard is sensible.

3.2 Merger-specific efficiencies

In UNICE's view, the Commission should to a greater extent take efficiency considerations into account when assessing transactions. The current review provides a good opportunity to clarify the scope of efficiency defences, which already have a legal base in Article 2 (1) (b) of the Merger Regulation. It can be argued that the US competition authorities are more prepared to make a balance between efficiencies and anti-competitive effects despite a situation where competition is substantially lessened. A change of Commission policy in this context could improve constructive coordination with the US and other jurisdictions.

In situations where markets are rapidly evolving, dominance is often temporary. In such cases, the Commission should adopt a dynamic analysis and long-term view of the markets when appraising dominance and considering remedies. UNICE urges the Commission to outline in a Notice how and when it will take into account efficiency considerations, and also the standard of proof required by companies seeking to demonstrate that a particular concentration is likely to lead to efficiency gains.

3.3 Simplified procedure

The simplified procedure is useful, although the length of such procedures is not always significantly shortened and the information requirements should be more limited. One of the advantages of the simplified procedure is that parties can obtain a clearance decision which is legally binding throughout the EU. In order to further streamline procedures, UNICE would strongly favour the Commission devising even simpler Form CO requirements for transactions that qualify for the simplified procedure which would render notification less burdensome.

In addition, as stated above, UNICE considers that transactions subject to the simplified procedure should not be referred to national competition authorities. This would enable the Commission to adopt clearance decisions much more quickly.

The Commission raises the possibility of introducing rules which would exempt from notification transactions subject to the simplified procedure. UNICE would like to underscore that such rules should not contain some form of market share cap as a basis for exemption and not allow national competition authorities to withdraw the benefit of the exemption. Given the difficulties which can arise in determining with precision market shares, companies might have considerable problems assessing whether a transaction is exempt or not. This would be highly problematic considering the suspensory effect of the Merger Regulation and the fact that, in the absence of notification and a legally binding clearance decision, transactions would risk being challenged by national courts and/or authorities.

4. PROCEDURAL ISSUES

4.1 Notification – Triggering event

UNICE would favour companies having the option to notify prior to conclusion of a legally binding agreement. UNICE considers that it should be left to the parties when to notify; the current rule is too inflexible and may block optimal coordination with other procedures to which the transaction is subject. Whilst the Commission should continue to use a binding agreement as the final cut-off date, it should not be the start-date for notification. Instead, a non-binding clear understanding (*e.g.* a letter of intent or memorandum of understanding) should be sufficient to allow notification to be made and for the clock to start ticking, especially considering that the need to fill in the Form CO will prevent parties from notifying too early. This would be closer to current practice and it would also resolve problems with procedures of other jurisdictions and assist convergence in this context.

4.2 Suspension of concentration

UNICE suggests that the Commission outlines in a Notice how and when it will grant a derogation from the 'stand-still obligation'.

4.3 Calculation of time limits

UNICE would favour a simpler method of calculation of deadlines using a concept of working days provided the time period chosen were 21 days. The average month lasts between 20-22 working days and any longer period would be unacceptable since it would significantly increase the time required for a Phase I clearance. The same reasoning would apply to a Phase II clearance.

4.4 Administrative efficiency

UNICE would strongly oppose submission of copies of notifications directly to Member States by the parties themselves. It is more appropriate and less burdensome for the Commission to continue to submit such copies to the Member States.

UNICE would favour allowing parties to submit their notification in electronic form, since this would enhance efficiency and allow the Commission to submit notifications even more easily to the national competition authorities. It should be clarified, though, that parts of a notification that are more readily available in paper form could still be submitted in the traditional way.

4.5 Completeness of notification

UNICE would favour the introduction of a deadline for declarations of incompleteness. Given the critical importance of timing in merger cases, late declarations of incompleteness should be avoided. UNICE considers that a two-week period from the date of notification is an appropriate time-limit for declarations of incompleteness. UNICE suggests that the Hearing Officer should give his approval to a declaration of incompleteness. In addition, UNICE suggests that parties should be entitled to request to 'stop the clock' before a decision on a declaration of incompleteness is taken. This would allow the parties to supplement information without having to withdraw and re-file.

4.6 Commitments procedure

UNICE welcomes more flexibility for submission of commitments both in Phase I and II. Although clear time-limits ensure speedy decision-making and legal certainty, they can be inflexible, lead to concentrations being prohibited only for reasons related to procedure rather than substance, impede on a proper assessment of proposed undertakings, and make it difficult for parties to revise their offer. In order to improve this situation, UNICE would support inclusion of a 'stop the clock provision' which would allow the parties to a concentration more time for devising appropriate proposals. It is important that effective safeguards to avoid abuse and delays accompany such a provision. The 'stop the clock provision' should only be applied at the discretion of all the parties concerned. Considering the special nature of a Phase I investigation, the option should only be available once during this phase, for a limited period of maximum three weeks. During Phase II, it is important that the option is also available after the parties have received a clear indication about the Commission's findings regarding the proposed commitments so that the additional time can be used to revise their proposals.

UNICE would welcome the Commission taking a more active role in identifying the measures it deems necessary not to oppose a concentration. UNICE suggests that special arrangements are devised which allow the parties to obtain concrete guidance for proposing commitments and, if appropriate, information on the reasons for rejection of proposed commitments.

4.7 Enforcement provisions

UNICE would welcome the Commission undertaking more general studies, such as post-merger studies, to increase understanding of the effects of decisions and shape future policy. It believes that, especially in a merger control context, the companies concerned have sufficient incentives to cooperate and provide information voluntarily. There is thus no need to increase sanctions and extend the powers of the Commission for obtaining information. The Commission already has sufficient tools at its disposal to investigate markets and suspected anti-competitive behaviour and it should be borne in mind that the Merger Regulation is different

from the rules on anti-trust which rely on fines as a deterrent to anti-competitive behaviour. Besides, as stated in its comments on the Commission's Modernisation proposals, UNICE considers that insufficient safeguards are put in place to counterbalance application of the far-reaching proposals of the Commission to give itself new investigating powers and extend old ones significantly. UNICE underscores that fairness and due process should be ensured and that the rights of the defence must be observed.

4.8 Filing fees

UNICE would oppose the introduction of filing fees for European merger control. Fees would be an additional burden on business which already faces considerable costs for obtaining clearance from the Commission and numerous other competition authorities worldwide.

4.9 Due Process and "checks and balances"

UNICE welcomes the Commission opening a debate on due process and on how to improve the current procedural framework and enhance judicial review of merger case decisions. In UNICE's view, one of the greatest shortcomings of the Merger Regulation and the present procedural framework is the lack of due process and proper checks and balances in the system. UNICE is not convinced by the Commission's argument that existing controls are adequate given current transparency requirements and the involvement of the Member States, the Legal Service and other Directorates-General. These internal checks are limited and do not involve a complete and impartial re-examination of both the procedural and the substantive aspects of a case. Moreover, access of the parties to these bodies is highly limited. Consequently, UNICE considers that there is a lack of both effective external and internal controls in Community competition proceedings, where the Commission acts in fact both as investigator and decision-maker. The current system of judicial review of merger decisions is unsatisfactory and ineffective. The length of the proceedings clearly discourages and frustrates litigation and the Court's review of complex economic appraisals made by the Commission is limited. It is important that the Commission's authority is not undermined by a lack of effective controls. Effective controls would contribute to a more evident separation of investigating and decision-making responsibilities and an impartial re-examination of the legal and economic arguments relevant to a case.

In view of the above, UNICE calls on the Commission to launch a broad debate aimed at finding solutions for the perceived defects which is not curtailed by the need to respect the limits imposed by the present Treaty system and the Commission's current working methods. In this context, UNICE could envisage a valuable debate taking place on the advantages and disadvantages of an administrative procedure as opposed to a judicial procedure, and ambitious suggestions being put forward for improving the current judicial review procedure.

Having said this, UNICE believes that, in the meantime, safeguards could be enhanced by further increasing the powers and resources of the Hearing Officer. Welcome attempts have been made to strengthen the role of the Hearing Officer, but, in UNICE's view, more should be done to ensure adequate protection. Parties should be entitled to address the Hearing Officer throughout the procedure and not only at the hearing. The Hearing Officer should be specifically empowered to assess both the procedural and the substantive aspects of a case and the outcome of this exercise should be published. Any decision taken by the Hearing Officer should be reasoned and made subject to review by the Court of First Instance. The Hearing Officer should be made more independent from DG Competition and required to report to the President of the Commission. He must be given proper resources to carry out his tasks. The Commission should establish clear and transparent appointment procedures for the post, enabling suitable candidates from outside the Commission to apply and his term should be fixed for a maximum period of five years. Thought could be given to appointing

secondments of the Court of First Instance. UNICE believes that strengthening the role of the Hearing Officer along the lines set out above, making him an effective impartial arbiter throughout the proceedings, would reinforce substantially protection and public confidence in the fairness of the Commission's decisions. At a time when more and more companies have doubts regarding the usefulness of a hearing and their chances of influencing the appraisal of the facts, UNICE strongly believes that this issue deserves to be favourably addressed by the Commission.

The Commission also asks for suggestions as to how consumer groups and employees might be enabled to express more actively and effectively their views in relation to mergers falling within the scope of the Merger Regulation. UNICE notes that consumers and employees are already entitled to make their views known and that it would be unjustified to grant specific organisations preferential treatment; all interested parties should have the right to be heard and treated equally. UNICE would like to underscore that when reviewing proposed transactions under the Merger Regulation, the Commission rightly operates a competition-based test which involves assessment of the market impact of a proposed transaction and enables the Commission to establish whether a dominant position is created or strengthened which would restrict competition, leading to inefficiency and misallocation of resources. Effective competition will bring about innovation, cost reductions and production efficiencies, which are passed on to consumers and which will make companies stronger to compete, enabling them to create sustainable jobs. UNICE considers that existing rules on involvement of consumer and employees are adequate. It is therefore unnecessary to change those rules as this could risk undermining the competition focus of the Commission's analysis and cause uncertainty and delay.

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