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The New EC Merger Control Regulation: Guaranteeing the Effectiveness of the Architecture of Separate Jurisdictional Zones?

Merger control in the European Union is shaped by an architecture of separate jurisdictional zones: the European Commission vets all mergers where the competition concern is of Community interest whereas mergers lacking a Community interest come under the jurisdiction of the relevant member state. For this architecture to be successful an effective case allocating test is essential. Since the original 1989 Merger Control Regulation (MCR) the allocating test – the Community Dimension test(s) – and the corrective structures supporting it have not fully conformed to the architecture of jurisdictional zones in practice. Why has this been the case? Does the new 2004 MCR solve the underlying problems?

The architecture of separate jurisdictional zones shapes and drives merger control in the European Union. The original 1989 European Merger Control Regulation (MCR),[1] the amended version of 1997,[2] and the new 2004 MCR[3] embody and express this architecture. They have sought to make this architecture work in practice. The architecture of separate jurisdictional zones dictates that the European Commission vets all mergers where the competition concern is of Community interest, thereby safeguarding the Single Market and the level playing-field for business. Mergers lacking a Community interest come under the jurisdiction of the relevant member state. In this way the architecture not only accommodates the subsidiarity goal but is also integrationist at the Community level. Of course, the architecture of separate jurisdictional zones is only effective if the case allocating test (and any further corrective measures) guarantees that mergers with a Community interest reach the Commission and the remainder go to the relevant member state. Hence, a flawed test and ineffective corrective structures have the capacity to allocate cases to the wrong competition authority, as determined by the said architecture. In other words, an effective case allocation test with supportive corrective structures is essential to the success of the architecture.

Since the original MCR, the difficulty has been that the allocating test – the Community Dimension test(s) – and the corrective structures reinforcing this test have not fully delivered the architecture of jurisdictional zones in practice. The paper examines why this has been the case and why attempts prior to the new MCR have had limited success. Further, it reveals why the two form-based Community Dimension (CD) tests remain flawed, and why the opportunity provided by the new MCR to improve the tests' operational effectiveness was wasted. This failure to improve the two CD tests places greater weight on the corrective structures to re-attribute successfully cases that otherwise would be wrongly allocated by the tests. The paper reveals that this is intentional, for the new MCR has not only continued with the existing post-notification corrective structure but has also established a second corrective mechanism to complement the first.

The new pre-notification procedure[4] is the major innovation of the 2004 MCR and it will act as the primary corrective to the two CD tests, with the post-notification corrective dealing with cases missed by the new corrective. The paper reveals that the success of the two correctives to improve the working of the said architecture is dependent on a number of factors. For example, will the structure and sensitivity of the correctives' decentralisation and centralisation tests guarantee the optimal allocation of cases; will member states carry out their role, enabling the two correctives to work effectively; and, will business engage with

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[1] Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

[2] Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings.

[3] Council Regulation (EC) No. 139/2004 of January 2004 on the control of concentrations between undertakings.

[4] Ibid., Article 4.

the new corrective procedure, given business' role as the re-attribution or referral initiator. These are not straightforward matters. For example, the automatic engagement of business with the pre-notification corrective cannot be assumed as a given; it is probable that a concentration will weigh up the advantages and costs of engaging against the costs and benefits of not doing so. Further, if business fails to engage, then the pre-notification corrective will fail, and so will the architecture of separate jurisdictional zones.

The paper considers a new streamlined procedure for both correctives. Removing member states from the referral procedure would enable a reduction in the decision-making period, with the Commission alone determining case allocation. This may also help guarantee the architecture of separate zones. The paper reveals why such streamlining is unacceptable to the member states, hence the new MCR guarantees them a voice in determining the suitability of cases for referral. The concern is that member states will fail to exercise this voice as required by the effective working of the correctives, and thus undermine the said architecture. Already, this is the history of the post-notification centralisation procedure.[5] Therefore, the paper concludes by exploring the new MCR's attempt to get member states to engage with the correctives, namely, the new network of public authorities. If the network is successful, further developing the cooperative relationship between the Commission and member states' competition authorities, building trust and confidence, then it could, albeit in the longer term, sound the death knell of the very architecture it is supposed to guarantee. The enhanced cooperation envisaged by the network could act as the necessary precursor to a hub and spoke architecture, replacing the architecture of separate jurisdictional zones.

Community Dimension Tests

The original MCR established the architecture of separate jurisdictional zones in relation to merger control within the European Union. Namely, member states are limited to vetting mergers that lack a Community interest; mergers with a potential Community interest are the sole jurisdictional responsibility, on competition grounds, of the Commission. Hence, a concentration is either vetted by the Commission or a member state but not both – the so-called one-stop shop approach. This clearly benefits business. Moreover, the fact that the Commission itself vets all cases with a potential Community interest is seen as the way to guarantee consistency and certainty of decision-making, thereby safeguarding the Single Market and supporting the level playing-field for business. The architecture also complies with the principle of subsidiarity.

The allocation test that puts the architecture of separate jurisdictional zones into practice is the form-based CD test contained in Article 1 of the original MCR. The test requires that a number of sales turnover thresholds, including both global and Community-wide thresholds, have to be satisfied for the merger to have a CD. Specifically, a concentration has a CD when:

(a) the combined aggregate worldwide turnover of all the undertakings concerned exceeds €5 billion; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings involved exceeds €250 million, unless

(c) each of the undertakings concerned derives more than two-thirds of their Community-wide turnover within the same member state.[6]

A merger having a CD is deemed to have a potential Community interest and therefore, on competition grounds, comes under the jurisdiction of the Commission. A case lacking a CD is vetted by the relevant member state.

Two problems with the test became apparent. The first relates to the fact that the test is form-based and the second concerns the size of the global and Community-wide thresholds used. The original CD test and the later second CD test are form-based thresholds tests; each test simply tells us if certain aggregate turnover thresholds have been satisfied. In other words, they lack the diagnostic capability to determine if the merger in question will cause a competition concern, the product markets involved and the geographical scope of these markets. Yet this is exactly what the test must be able to do, thereby enabling an accurate determination of which cases are for Brussels and which are for member states. An effects-based test has this capability and was preferred by the Commission.[7] The original CD test, however, was the result of political bargaining between member states; for some member states already had their own competition instruments and therefore wanted to constrain Brussels'

[5] Commission of the European Communities: Green Paper on the review of Council Regulation (EEC) No. 4064/89, Brussels, 11.12.2001 COM(2001) 745/6 final, paragraph 86.

[6] Council Regulation (EC) No. 139/2004, op. cit., Article 1(2).

[7] Commission of the European Communities: Community Merger Control Green Paper on the review of the Merger Regulation, Brussels, 31.1.1996 COM(96) 19 final, paragraph 31.

competence in this field. This bargaining, for example, determined the size of the global and Community-wide thresholds in the test. Hence, the number and size of individual thresholds was not the outcome of economic modelling that sought to maximise the operational effectiveness of the architecture of separate jurisdictional zones.

In its 1996 Merger Green Paper, the Commission declared that indications suggested that a considerable number of mergers with cross-border effects,[8] and hence of Community interest, failed to satisfy the CD test. The architecture of separate jurisdictional zones required Brussels to vet these mergers; instead, they remained at national level, with some mergers facing the uncertainty and financial burden that multiple national filing or notification brings. This led the Commission, as a rule, to view multiple notification at national level as an indicator or proxy for potential Community interest in a merger case. The Commission in 1996 contended that, on the available information, a global threshold of € 2 billion and a Community-wide threshold of € 100 million would capture most mergers having a cross-border effect[9] (which in turn means that the multiple national notification issue would be largely solved). The concern, however, was that some of these mergers caught by the lower thresholds might only have a national competition concern but would still be allocated to the Commission. This would not be an issue if the number of cases remained relatively small, remembering that the MCR has a post-notification corrective that enables a case to be decentralised by the Commission to the relevant member state.

The Commission came very close to getting the reduction in the global and Community-wide thresholds but not in a revision of the original CD test. The 1997 amendment to the MCR brought in a second CD test to buttress the original test and make the architecture of separate zones more operationally effective. Under the second CD test, a concentration has a CD where:

(a) the combined aggregate worldwide turnover of all the undertakings involved exceeds €2500 million;

(b) in each of three member states, the combined aggregate turnover of all the undertakings involved exceeds €100 million;

(c) in each of the three member states included for the purpose of point (b), the aggregate turnover of at least two of the undertakings involved exceeds €25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community turnover in one and the same member state.[10]

The second CD test, having lower thresholds than the first, aims to capture concentrations with a potential Community interest missed by the first test. Moreover, the amended MCR gave the Commission a third opportunity for capturing a Community interest case even though the merger in question had not satisfied either of the two CD tests. The amended Article 22 MCR contained a new post-notification corrective, enabling member states jointly to request the Commission to vet a multiple national notification case. Thus, the second CD test and the new corrective procedure were specifically designed to improve the operational effectiveness of the architecture of separate jurisdictional zones.

The Commission, however, has openly stated that the second CD test has not lived up to its expectations.[11] The available data indicates that the second CD test had failed to capture the bulk of cases with a potential Community interest missed by the original CD test; that is, where potential Community interest is gauged in terms of the multiple national notification proxy. In the year 2000, for example, only 20 cases were caught by the second test while 75 multiple notification cases lacking a CD arose in three or more member states.[12] The Commission candidly admitted that the thresholds in the second CD test were set without a thorough investigation into their effectiveness. This lack of any rigorous testing to determine what thresholds should be included and their respective value partly explains why the second test has not lived up to expectations. Another factor behind the failure of the second CD test is the wording of the two new thresholds in the test-thresholds (b) and (c), the two linked three-country thresholds requirement. This linked three-country requirement means that a CD must involve a minimum of three member states. Dangerously, this automatically excludes all cross-border competition concerns with a Community interest involving only two member states.[13] In 2000, for example, the figure for two or more multiple national

[8] Ibid., paragraph 34.

[9] Ibid., paragraph 65.

[10] Council Regulation (EC) No. 139/2004, op. cit., Article 1(3).

[11] Commission of the European Communities: Proposal for a Council Regulation on the control of concentrations between undertakings COM(2002) 711 final, paragraph 12.

[12] Green Paper 11.12.2001 COM(2001) 745/6 final, op. cit., paragraph 24.

notifications was a staggering 217,[14] and the majority of mergers involved two member states only.

The Commission's solution to making the architecture of separate jurisdictional zones work more effectively was to change the nature of the second CD test. The test would become a multiple national notification test. Any merger failing the first CD test but meeting the notification requirements of at least three member states would be said to have a Community interest and therefore come under the jurisdiction of the Commission.[15] However, just because a merger is notified in three or more member states does not automatically mean that it has a cross-border competition concern; the concern could be national. Further, it is wrong to assume that a merger notified in two member states only automatically lacks a Community interest. Eventually, the Commission also reached the conclusion that the requirement to notify in three or more member states "is not a sufficient indication of the existence of a Community interest".[16] This resulted in the Commission looking elsewhere for a way to guarantee the architecture of separate zones in practice.

Davison[17] has argued that a single, simpler and more effective CD thresholds test could guarantee the said architecture. Research and modelling would determine the type of thresholds required and their individual values, and if two or more thresholds should be linked. Yet is this not a repeat of what already happened with the second CD test, and its record is one of failure. In fact, neither the second nor the original test underwent modelling to ensure that they would effectively carry out their function. Concerning the revision of the second CD test, the Commission has asserted that modifications to the current thresholds would not bring about the desired result. The Commission further claimed that "it is clearly impossible (and probably not very helpful) … to attempt any overly sophisticated study of what might be the ideal level and combination of these criteria".[18] Clearly such a study is possible and, indeed, necessary for the operational effectiveness of the tests, and therefore the delivery of the architecture of separate jurisdictional zones.

Improving the operational effectiveness of the CD tests reduces the need to use the corrective structures to achieve an optimal case allocation in line with the said architecture. The Commission appears to have given up on this, as the new MCR did not revise the two thresholds based CD tests; a wasted opportunity to fine-tune the CD tests effectiveness. Instead, the Commission has focused on the corrective structures as the way forward to guarantee that cases with a Community interest reach Brussels and the remainder are vetted at the member state level.

The Two Correctives

A corrective prevents or corrects the sub-optimal allocation of merger cases that would otherwise result from the two CD tests. In other words, it must guarantee that cases with a Community interest but lacking a CD go to Brussels; and cases without a Community interest, but with a CD, go to the relevant member state(s). Hence, a corrective is only as good as its ability to determine if the merger in question has a Community or national competition interest. The corrective will fail if it cannot accurately make this determination. The available correctives are the post-notification procedure and the pre-notification procedure. The latter is a major innovation made law by the new MCR and it specifically operates prior to the merger notification to either the Commission or competition authorities of the member states. On the other hand, the post-notification corrective is activated after the concentration has been notified either to the Commission or to member states. Notification refers to the requirement that a merger with a CD must tell or notify the Commission that this is the case prior to the merger's implementation but following the conclusion of the agreement, the announcement of the public bid, or the acquisition of the controlling interest. Mergers that lack a CD may meet the notifying requirements of one or more member states. The Commission now attaches great weight to these two corrective structures as the chosen method to correct the failings of the two CD tests, and hence ensure an optimal case allocation in line with the architecture of separate jurisdictional zones.[19]

The Post-notification Corrective

As its name suggests, this corrective structure is activated after the merger has been notified to the Commission or national competition authorities. Under the

[13] For a more detailed assessment of the second CD test see L. M. Davison, D. Johnson: A review of the revised EC Merger Control Regulation – a case of the curate's egg, in: European Business Review, Vol.12, No. 2, 2000, pp. 76-83.

[14] Green Paper 11.12.2001 COM(2001) 745/6 final, op. cit., Annex I, section A, page 60.

[15] Ibid, paragraph 32.

[16] Proposal for a Council Regulation in the control of concentrations between undertakings COM(2002) 711 final op. cit., paragraph 14.

[17] L. M. Davison: Reviewing the EC Merger Control Regulation – examining competing ways forward, in: European Business Review, Vol. 15, No. 5, 2003, pp. 303-304.

[18] Green Paper 11.12.2001 COM(2001) 745/6 final, op. cit., paragraph 35.

[19] Proposal for a Council Regulation in the control of concentrations between undertakings COM(2002) 711 final, op. cit., paragraph 18.

original MCR, however, half the corrective procedure was absent. Article 9 MCR allowed for the possibility of a merger with a CD but whose competition concern was national to be decentralised by the Commission to the relevant member state. No such possibility existed the other way round – from member state to Commission – until the 1997 amendment of the MCR. Article 22(3) of the amended MCR provided a vehicle whereby a member state, or member states acting in concert, can ask the Commission to vet a merger lacking a CD but having a dominant position that impedes effective competition within their territory and affects trade between member states. In other words, the procedure centralises to the Commission multiple national notification cases missed by the second CD test, helping to guarantee an optimal case allocation. The new MCR has retained the Article 9 and 22 post-notification mechanisms.

Arguably, the new MCR could have streamlined further the Article 9 mechanism, improving the clarity and efficiency of the procedure. This relates to both the referral request procedure and to the nature and number of decentralisation routes under Article 9. The Article 9 procedure requires the referral request to be made by a member state, with the Commission thereafter deciding if the case in question should in whole or in part be decentralised. A change under the new MCR is that the Commission can now invite a member state to request that a merger be decentralised. However, the right to initiate referral remains with member states alone, and it is voluntary. Further, if a member state fails to request referral, it could force the Commission to vet a case where the competition concern is essentially national. A more streamlined approach would abandon the cumbersome request procedure, with the Commission automatically decentralising a merger with a CD where it deemed the competition concern to be national: the so-called putting out system. This would guarantee an optimal case allocation under Article 9.

Presumably, in a putting-out case, the Commission would inform the relevant member state of its decision and the merger would therefore fall within the jurisdiction of the member state. This is in tune with both the architecture of separate zones and the subsidiarity principle. In the 2001 Merger Green Paper, the Commission argued for the right to refer cases on its own initiative[20] but the proposal failed to become law in the new MCR. However, an automatic putting out system may run foul of member state interests. In the streamlined system, unlike the Article 9 referral structure, the member states have no voice in deciding which cases are suitable for decentralisation. Hence, they have no voice in determining if a case falls within or outside their jurisdictional sovereignty. This power would reside with the Commission alone. This would not be acceptable to member states, and thus a putting-out system is no longer on the horizon.

The new MCR provided a rare opportunity to streamline the nature and number of decentralisation routes under Article 9 MCR, but this has not been fully realised. Instead of having one transparent decentralisation route, Article 9(2) continues with a choice of two competing routes. The specifications of each route are now given.

- Route 1 requires that a concentration threatens to affect significantly competition in a market within that member state which presents all the characteristics of a distinct market.
- Route 2 requires that a concentration affects competition in a market within that member state which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

The major strength of the two routes is that the effects-based conditions contained in their respective decentralisation tests have the sensitivity to ensure that case allocation is in line with the architecture of separate jurisdictional zones. Indeed, two of these conditions are common to both tests. For decentralisation to be considered, both stipulate that the concentration affects competition in a market within the requesting member state. Thus, this geographical scope condition excludes a market where the competition issues spill over into a second member state. That is, the market is distinct or isolated from the rest of the Community. Both routes have this distinct market condition. Of course, it is possible for a distinct market to arise where the geographical reference market equates to the whole territory of the member state. In such a situation, the within a member state condition could still be said to have been satisfied and this interpretational flexibility strengthens the architecture of separate zones.

In order to establish the geographical area of a reference market, and hence determine if the market is distinct within a member state, the Commission applies Article 9(7) MCR. Article 9(7) establishes the geographical area of the market in relation to the demand and supply of the parties' products in which the

[20] Green Paper 11.12.2001 COM(2001) 745/6 final, op. cit., paragraph 80.

conditions of competition are sufficiently homogenous (and thus appreciably different to the competition conditions in neighbouring areas). To make this determination, the test stipulates that the following should be taken into account: the nature and characteristics of the products concerned; existing barriers to entry and consumer preferences; and any appreciable differences of the parties' market shares between the area and neighbouring areas, or substantial price differences.

Differences also exist between the two Article 9 routes. One relates to the "affects competition" condition. Route 2 just requires that competition is affected but route 1 has a more rigorous test in that the concentration must threaten to affect significantly competition. If "affects competition" is satisfactory, as it is in route 2, then it should also be satisfactory for route 1. Hence, the higher standard of route 1 is disproportionate and unnecessary. A second difference concerns the use of the notion of substantial part of the common market in route 2 but not in route 1. It is puzzling that route 2 employs the distinct market condition and the substantial part test, as both notions effectively carry out the same function – to determine if a case is of Community or member state interest. (In relation to the notion of substantial part, if the competition concern is in a substantial part of the common market it goes to Brussels; but if it is in a non-substantial part, it is of member state interest.) Route 1 uses the distinct market condition alone. It is therefore arguable that both notions are not required in route 2. Moreover, a difficulty with the substantial part notion is the opacity of the legal test itself, as defined by the European Court of Justice in its 1975 Suiker Unie judgment.[21] The court ruled that in determining whether a specific territory is large enough to amount to a "substantial part of the Common market … the pattern and volume of the production and consumption of the product in question as well as the habits and economic opportunities of the vendors and purchasers must be considered".[22]

The new MCR, had it dropped the substantial part test from route 2, would have further increased the convergence between the Article 9 MCR decentralisation routes, with both routes then relying on the distinct market condition. This would also be in harmony with the equivalent referral mechanism in the pre-notification structure, as it employs the distinct market condition but not the substantial part test. Indeed, by making the changes suggested to the Article 9 MCR decentralisation routes both routes are no longer required. The resultant single decentralisation route would require that the concentration affects competition within the market of a member state presenting all the characteristics of a distinct market. This test has the necessary sensitivity to make optimal decentralisation decisions as required by the stated architecture. Further, it would be very close to the equivalent single decentralisation route used in the pre-notification structure.

The second arm of the post-notification corrective concerns the centralisation of cases under Article 22 MCR. It enables member states, acting together, to refer multiple notification cases that failed the CD tests back to the Commission for vetting. The Commission saw multiple national notifications as a proxy for potential Community interest, and hence the need for referral to the Commission to satisfy the stated architecture. A major strength of the mechanism is its effects-based test, for it is sufficiently sensitive to ensure that only multiple national notification cases with a Community interest competition concern are centralised. Specifically, for centralisation, Article 22(3) expressly requires that the concentration affects trade between member states and threatens to significantly affect competition within the territory of the member state or states making the request. Thus, the test employs the established "affects trade between member states" condition.

Since becoming law in 1998, the major weakness of the Article 22 procedure has been its lack of use by member states, with the Commission receiving only two joint referral requests prior to the agreement of the new MCR; and that this stands in sharp contrast to the considerable number of multiple notifications at member state level. The corrective has patently failed to uphold the architecture of separate jurisdictional zones. A partial explanation is that the use of the procedure by member states is voluntary. Therefore, being voluntary, member states have not attached sufficient importance to it. By definition, this would not be true of mandatory Article 22 referral architecture. However, Article 22 of the new MCR retains the voluntary referral structure: the power to request referral still resides with the member states alone, although the Commission now has the right to invite (not instruct) member state(s) to make a centralisation request.

Replacing the cumbersome voluntary referral procedure with a mandatory approach could guarantee that the bulk of multiple national notifications with a potential Community interest are centralised to the

[21] Suiker Unie and others v Commission Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 [1976] 1 CMLR, pp. 402-489.

[22] Ibid., page 451.

Commission. Indeed, the procedure could specify that all multiple notification cases be centralised, with the Commission then determining whether cases have a Community or national interest. The difficulty with this approach is exactly the same one faced by the Article 9 putting-out system, but this time the member states will have lost their voice in deciding which cases they deem suitable for centralisation. This is an erosion of their ability to determine which cases fall inside and outside of their national jurisdiction. Given the rejection of an Article 9 putting-out system and an Article 22 mandatory structure by the new MCR, the task is to ensure that the voluntary post-notification referral mechanisms are utilised as intended. Although, in guaranteeing the architecture of separate jurisdictional zones, the post-notification structure will now play a supporting role to the new pre-notification corrective.

Pre-notification Corrective

The new pre-notification corrective, devised and driven by the Commission, is contained in Article 4 of the new MCR. It exists to bring case allocation in line with the architecture of separate zones. If it is successful, it will prevent the sub-optimal allocation of cases that otherwise would result from the CD tests. It is radical in two ways: first, it is a "pre" as opposed to a "post" notification corrective and second, the referral request comes not from member states but from the merger party or parties acquiring control of the new entity.[23] This contrasts sharply with the post-notification corrective where member states have the sole right to initiate referral requests.

Pre-notification means exactly that – the concentration in question must not already have been notified to either the Commission or national competition authorities. Such notification automatically rules out the use of the procedure. Because the referral request is prior to notification, the new corrective operates before both the CD tests and the post-notification corrective. This is intentional. Operating prior to notification means that the pre-notification procedure can prevent the sub-optimal allocation of cases that otherwise would result from the CD tests. Hence, the new procedure is to act as the primary corrective mechanism and the post-notification corrective is simply there to capture the cases missed by the new corrective mechanism and wrongly allocated by the CD tests.

Under the new corrective procedure, the initiation of the referral request, for centralisation or for decentralisation, comes from the party acquiring control of the new entity alone and goes to the Commission. This stands in sharp contrast to the post-notification mechanism, where the member state(s) has the authority to start the request procedure. This change in initiator is defendable on the ground that, at the pre-notification stage, it is the acquiring party (and not the member state) who has the information needed to support the referral request. Moreover, the record of referral requests from member states is poor, albeit for the Article 22 MCR centralisation route. However, member states are not excluded from the procedure; quite the opposite, as they have the legal right to endorse or veto a referral request,[24] as discussed below.

The application of the pre-notification corrective is not risk free. If the corrective fails then this latest attempt to make the architecture of separate zones work in practice will have failed as well. The corrective's success is dependent on a number of factors. For example, will the corrective's centralisation and decentralisation tests optimally allocate cases in line with the said architecture? Even before this stage, business, as the referral initiator, must positively engage with the procedure for it to succeed. Moreover, the role member states play in the procedure can influence its success or failure. Therefore, it is important to assess these factors.

The pre-notification corrective decentralisation test is contained in Article 4(4) MCR and the centralisation test in 4(5). The strength of the decentralisation route is its effects based test, for the test has the sensitivity to allocate cases in line with the architecture of separate jurisdictional zones. Indeed, the test is very close to the route 1 decentralisation requirement of the Article 9 MCR procedure. The only difference, and possibly of little importance, is that Article 4(4) requires that the concentration *may*[25] significantly affect competition whilst the Article 9 route 1 requires that a concentration *threatens*[26] to significantly affect competition. (The Commission by using either "may" or "threatens" in both tests would have ensured that the tests are identical, further helping to secure the goal of consistency of approach across the decentralisation tests within the MCR.) In relation to the "pre" and "post" notification centralisation procedures, however, such consistency of approach is missing. Moreover, the design flaws within the Article 4(5) centralisation procedure will limit its effectiveness to allocate cases optimally.

The Article 22 and Article 4(5) centralisation tests are significantly different in two respects: the member-

[23] Council Regulation (EC) No. 139/2004, op. cit., Article 4.

[24] Council Regulation (EC) No. 139/2004, op. cit., Article 4.

[25] Italics used for emphasis.

[26] Italics used for emphasis.

state requirement and their respective nature. In Article 4(5), the centralisation request comes from the concentration itself but Article 22 requires that the request come from one or more member states. Specifically, the Article 4(5) procedure requires that the requesting concentration must lack a CD and is capable of being reviewed under the competition laws of at least three member states, but that their competition authorities have not been notified. For centralisation, none of the three or more member states must disagree with the request. Once centralised, the concentration has a CD and is of Community interest alone. Worryingly, the three or more member state condition means that concentrations having a cross-border competition concern involving two member states only cannot be centralised. This stands in contradiction to recital 16 of the new MCR, which declares, "… requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State".[27] The said centralisation condition needs rethinking to improve its effectiveness. However, such cases missed by the Article 4(4) test might later be centralised under the post-notification structure.

The second difference between the Article 22 and Article 4(5) centralisation procedures is the very nature of the deciding tests. These tests must have the necessary sensitivity to allocate cases to the correct competition authority as required by the architecture of separate jurisdictional zones. The drafting of the new MCR presented a rare opportunity to design one effective centralisation test for both Article 22 and 4(4) procedures, guaranteeing the said architecture in practice. This did not happen. The Article 22 MCR test, having both the "significantly affect competition in the requesting member states" and the "affects trade between member states" conditions, has the sensitivity to determine if a case is suitable for centralisation. The same is not true of Article 4(5). It is silent on these matters; it simply declares that for centralisation the concentration must be capable of being reviewed under the national competition laws of at least three member states. Hence, the Article 4(5) procedure has no diagnostic elements specifically designed to determine whether a concentration is suitable for centralisation. Yet these are precisely what are required to make effective the architecture of separate zones, and hence such elements are included in the Article 9 and 4(4) decentralisation tests, as well as in the post-notification centralisation test. In other words, without these diagnostic elements, and only having the "three or more member states" condition, Article 4(5) could potentially centralise cases that lacked a Community interest.

Aside from the correctives' tests and their ability to allocate cases optimally, a major issue is, will business engage with the new pre-notification procedure to guarantee its success. This cannot simply be assumed as given, for the procedure is non-mandatory. Further, if business, for the most part, decides against engagement – remembering that business alone triggers the referral request – then the procedure is dead. Thus, the latest attempt by the Commission to improve the workings of the architecture of separate zones will have failed. However, why should business engage with the procedure? The only obvious advantage is that the procedure will lead to a speedier decision as to whether or not the merger can go ahead; and this is viewed by business as important.[28] Specifically, the pre-notification procedure appears to have two time advantages over the post-notification mechanism. First, the pre-notification structure starts prior to the post-notification mechanism and secondly it requires fewer working days for the referral decision to be determined. The determination of a decentralisation case under Article 4(4) requires up to 25 working days whilst the Article 9 post-notification procedure may take 35 working days or, if the Commission has initiated a phase two investigation, 65 working days.[29] The same is true concerning centralisation, with Article 22 requiring more working days than the Article 4(5) centralisation route.[30]

As well as the "time" advantage, business must also consider the responsibility and task burden that comes with the pre-notification mechanism. The role of referral initiator requires much more of the requesting concentration than simply informing the Commission that the proposed referral should be either decentralised or centralised. For either case, the requesting party has to provide the Commission with a reasoned submission. Commission Form RS[31] details what is required in the reasoned submission and it necessitates the requesting party to act as a quasi competition authority, with the time demands and expense

[27] Council Regulation (EC) No. 139/2004, op. cit., Recital 16.

[28] Commission of the European Communities: Report from the Commission to the Council on the application of the Merger Regulation thresholds, Brussels, 28.6.2000 COM(2000) 399 final, paragraph 53.

[29] Commission Notice on Case Referral in respect of concentrations, paragraphs 49-50.

[30] Ibid., Annexes: Referral Charts, pp. 26 and 28.

[31] Commission Regulation (EC) No. 802/2004 of 7 April 2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, Annex III, pp. 31-39.

that this entails. Yet the matter is more complex, for a concentration must also assess the time demands and expense of not engaging with the procedure. Take decentralisation. If the concentration does not request decentralisation, it avoids the demands of Form RS. However, by having a CD, the concentration must notify the Commission. The concentration therefore will complete Form CO, and this has considerable overlap with the demands of Form RS. The picture is different for centralisation. If a concentration decides against initiating referral, it avoids Form RS. However, by lacking a CD, the concentration could face the notifying requirements of one or more member states' competition authorities. Thereafter, if it is centralised under the post-notification mechanism, the concentration may have to complete the CO Form.

Business must also take into account the fact that Form RS does have demands that do not arise in Form CO. These demands are specific to the decentralisation or centralisation request. Take decentralisation, for example. Here the requesting party must indicate the member state(s) to which the case is to be referred and whether all or part of the concentration is to be referred; and if it is a part, which part. If the request is for the referral of the whole case, then the requesting party must confirm that the affected market(s) is within the territory of the member state stated to receive the case. The next set of demands requires the requesting party to take on a quasi-competition authority role. Form RS explicitly requires the requesting party to explain if the affected market(s) in the request presents all the characteristics of a distinct market; in other words, the requesting party must be able to understand and apply the distinct market concept. Thereafter, the requesting party must explain in what ways competition may be affected in the said distinct market(s). These quasi-competition authority tasks could prove burdensome to the requesting concentration, particularly if it lacks the necessary expertise and experience, though they can be bought-in, albeit at a financial cost to the concentration.

The success of the pre-notification corrective is also dependent on member states carrying out their role, for they have the authority to determine if a case is suitable for decentralisation or centralisation. In other words, a member state has a voice in saying whether a case falls inside or outside of its sovereign jurisdiction. This is also true concerning the post-notification procedure, where member states, by initiating the referral request procedure, decide the cases to be considered for centralisation and decentralisation. In the pre-notification structure, the initiation of the referral request has passed to business but the procedure still guarantees member states a deciding voice. After business has initiated a request by completing the reasoned submission (Form RS), the Commission forwards the request to all member states immediately. In a decentralisation request, the member state(s) identified in Form RS has the power to express agreement or disagreement with the request. If such a member state expresses disagreement then the referral will not go ahead. In a centralisation request, the referral will only go ahead if each of the three or more member states capable of reviewing the request agrees to the request. If one disagrees, then referral will not take place. This could lead to a situation where two member states agree to referral, because they contend that the merger without a CD does have a Community interest, but the third sees the merger as a national matter, within its territorial jurisdiction, and therefore rejects the request. Thus, the merger is not centralised despite its having a Community interest. Moreover, the new procedure could fail if member states do not effectively carry out their role.

Conclusion

The new pre-notification corrective structure complements and reinforces the existing post-notification corrective structure, as both structures seek to prevent or correct the sub-optimal allocation of cases by the two CD tests. The correctives are therefore essential to guaranteeing the architecture of separate jurisdictional zones in practice. The new pre-notification structure acts as the primary corrective structure, operating prior to the post-notification procedure. However, as already explained, the pre-notification procedure is not a concern-free guarantor of this architecture. Concerns include, will the centralisation procedure work in practice to allocate cases optimally; and will business see the pre-notification procedure as attractive and engage with it. If the opposite happens, then the procedure is dead. An alternative way to improve the operational effectiveness of the architecture, to achieve a more optimal case allocation, would be to assess and re-model the thresholds of the two CD tests (or, alternatively, create one new simplified thresholds test). This could be in addition to the "pre" and "post" notification corrective structures, thereby reducing the pressure on the correctives.

Member states have a major role in the functioning of the pre- and post-notification correctives. By ending this role, a faster, more streamlined approach to operating the two correctives is possible. The post-notification corrective could adopt both the Article

9 MCR putting-out system and the Article 22 MCR mandatory centralisation approach. Regarding the pre-notification corrective, the Commission could simply determine case allocation without reference to member states' wishes. However, this increase in Commission power would be at an unacceptable cost to member states. This is because they would have no voice in determining whether a referral case fell within or outside their respective territorial jurisdiction, and hence such procedural streamlining is not part of the new MCR. The potential problem with guaranteeing member states this "voice" is that they, for whatever reason, fail to use it effectively. This is the history of the Article 22 MCR centralisation procedure and accounts for its past failure. To try and prevent a repeat performance, recital 14 of the new MCR orders that the Commission and member states' competition authorities form a cooperation based network of public authorities, employing efficient arrangements for information sharing and consultation, to ensure that the most appropriate authority deals with a concentration.[32] (This echoes the cooperating network at the heart of the new implementation architecture of Article 81 and 82 EC.[33]) In line with the network, Article 19(2) MCR expressly requires the Commission to carry out the procedures set out in the Regulation in close and constant liaison with member states' competition authorities. However, it does not require this of member states; nor is it mandatory for them to engage with the correctives.

Engagement is made more likely because the workings of the correctives – and hence the roles of the various parties and the timings within which they must act – are spelt out in a Commission Notice.[34] Moreover, the primary corrective has a fallback position should a member state decide not to carry out its role, yet this is not true of the post-notification structure. In the pre-notification procedure, member states capable of reviewing a request have 15 working days to respond to the Commission upon the receipt of Form RS. In an Article 4(4) MCR decentralisation request, if a member state fails to respond within the stated time, then its silence constitutes agreement to the request. Hence, the procedure is not derailed. Further, in an Article 4(5) request, a member state is forced to engage with the procedure (by an expression of disagreement) if it wishes to prevent centralisation. Not responding supports centralisation. Under the post-notification procedure, however, a relevant member state's failure to engage could undermine the corrective. This is because member states alone have the authority to request referral, but such a request is not mandatory. The Commission can now invite a referral request from a member state, but this is an invitation not an instruction.

Taking a positive view, the new network provides a vehicle for the cooperative partnership between the Commission and member states' competition authorities to develop further. By having such a network, the necessary cooperation, consultation and exchange of information between the Commission and member states' competition authorities, as well as between the competition authorities themselves can take place. This is vital to the successful working of the pre- and post-notification corrective structures, ensuring optimal case allocation, and thereby guaranteeing the architecture of separate jurisdictional zones. Further, by making them partners in the network, member states are more likely to see themselves as important stakeholders in the success of the correctives, as opposed to alienated bystanders if the Commission alone determined case allocation.

However, if member states do commit to and effectively support the network of public authorities, this could eventually signal the end of the architecture of separate jurisdictional zones, the very architecture the network is supposed to guarantee. This is because an effective network relationship between the Commission and competition authorities could act as a precursor to a hub and spoke type architecture for EU merger control, where all network members apply EU merger law. Such a cooperating network would be integrative and require a higher degree of shared ownership and shared responsibility, instead of the current architecture where the Commission alone vets concentrations with a Community interest. The replacement of the current architecture of separate jurisdictional zones with a hub and spoke type architecture is only defendable if it ensures effective protection of competition, and hence safeguards the Single Market. There is time to make this assessment, as the review of current architecture is not until 2009. The Commission, however, must have faith in a cooperating network's ability to protect effective competition and safeguard the Single Market, for it has already established such a cooperating network, albeit in the area of EU antitrust law, with all members having the right to apply Articles 81 and 82 EC.

[32] Council Regulation (EC) No. 139/2004, op. cit., Recital 14.

[33] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty of Rome, pp. 1-25.

[34] Commission Notice on Case Referral in respect of concentrations, op. cit., pp. 1-28.