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Non-competition concerns under the ECMR – An overview

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Abstract

This table lists the EC merger cases where non-competition concerns were raised (industrial policy, social concerns, personal data protection etc.). A short article summarizes the issues raised by non-competition concerns in the ECMR.

Le tableau ci-après recense les affaires ayant donné lieu, dans le domaine du contrôle communautaire des concentrations, à l'invocation d'arguments ne relevant pas, sensu stricto, du bilan concurrentiel (politique industrielle, préoccupations sociales, protection de la vie privée, etc.). La courte note qui l'introduit s'efforce de tracer les lignes de force de la problématique en droit communautaire de la concurrence.

1. Under the European Community Merger Regulation (the “ECMR”), the European Commission (the “Commission”) cannot review mergers on the basis of considerations other than the protection of “effective competition”.¹ Articles 2(2) and 2(3) of the ECMR confine the Commission’s assessment to the question whether (or not) a merger transaction leads to a “significant impediment to effective competition”.² Hence, the Commission cannot forbid a pro-competitive merger that raises, for instance, employment concerns (expected cuts in the workforce). Conversely, the Commission cannot clear an anticompetitive merger that is employment-friendly.

2. In practice, however, mergers repeatedly raise concerns alien to the protection of effective competition and the Commission might be tempted (or pressured) to take them, at least informally, into account. The recent *Google/DoubleClick* merger, which led a number of third parties (including the European Parliament) to voice concerns regarding privacy rights, is a case in point.³

3. The following table identifies the leading cases where non-competition concerns were raised in the context of merger proceedings and seeks to ascertain whether these concerns have altered, in one way or another, the outcome of the Commission’s assessment. To that end, it focuses on the formal decisions adopted by the Commission under the ECMR.⁴ It seeks to provide information on the following set of parameters:

- The *economic sector* concerned (e.g., energy, steel, banking, etc.);
- The *type of non-competition concern* raised during the proceedings (e.g., security of energy supplies, cultural diversity, data protection issues, etc.);
- The *source* of the non-competition concern (e.g., competitor, government, customer, etc.) and its purported goal; and
- The *analysis* carried out by the Commission.

4. The table suggests that non-competition concerns are typically raised in two different settings. First, non-competition concerns may be invoked by Member States for *jurisdictional purposes*. Member States will seek to assert jurisdiction over certain aspects of merger transactions (pursuant to Articles 4 and 9 of the ECMR)⁵ and/or

1 See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22. Of course, Recital 4 of the Preamble of the ECMR provides that: “Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.”

2 See Articles 2(2) and 2(3) of Council Regulation (EC) No 139/2004, *supra* at note 1: “A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”

3 See Commission Decision, 21 September 2007, M.4731, *Google/DoubleClick*.

4 It does not cover subsequent rulings handed down by the Community Courts. Nor does it mention cases where the transaction was aborted and, accordingly not reviewed by the Commission (e.g., European Commission, 11 July 2001, M.2054, *Secil/Holderbank/Cimpor*. See also, *Pepsi/Danone*, which never gave rise to a merger filing before the Commission).

5 See Article 4 and 9 of Council Regulation (EC) No 139/2004, *supra* at note 1, which provide the possibility for the Commission to refer mergers with a Community dimension to the Member States.

*The table that follows was realized with the active support of three students of the LL.M. in competition and IP law (S. Jozwiak, K. Peysmans and G. Royer), in preparation for the conference on “Non-competition concerns under the ECMR” that took place in Brussels on 25 April 2008.

remove certain aspects of the transaction from the Commission's exclusive jurisdiction (pursuant to Article 21(4) of the ECMR).⁶

5. Second, non-competition concerns may be invoked by a variety of parties (e.g. merging parties, competitors, customers, trade associations, etc.) for *substantive purposes*, i.e. influencing the Commission's assessment of a notified merger. On the one hand, non-competition concerns may be raised as a *shield*, to offset the Commission's findings of harm to competition. In the *Suez/GDF* case, for instance, the parties and various stakeholders sought to argue that the merger would lead to the creation of a European energy champion.⁷ On the other hand, non-competition concerns may be raised as a *sword*, in order to formulate additional theories of harm and induce the Commission to prohibit a transaction (or to order remedies).⁸ In *Sony/BMG*, independent music labels voiced concerns over the reduction in cultural diversity arising from the joint venture between two large music majors.

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⁶ Article 21(4) provides that: "Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law". This provision must be read in conjunction with Articles 21(2)-(3): "2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation. 3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension."

⁷ See Commission Decision, 10 May 2006, M.4180, *Suez/GDF*.

⁸ This is what happened in the *Google/DoubleClick* case. See Commission Decision, 21 September 2007, M.4731, *Google/DoubleClick*. Table prepared by N. PETIT, with the support of S. JOZWIAK, K. PEYSMANS and G. ROYER, 7 June 2008

Decision (case number & date)	Sector	Type of concern (or “legitimate interest”)	Aim of concern	Origin of concern	Commission analysis
<i>Google/Double Click</i> COMP/M.4731 11.03.2008	Information and communication technologies Advertising	Data protection/privacy issues	<i>Substantive</i> – Invoked in support of prohibition (<i>sword</i>) absent anticompetitive concerns (or only limited ones)	Third parties during ECMR proceedings (competitors and customers) Consumer organizations MEPs	Irrelevant, not taken into account
<i>Enel/Acciona/Endesa</i> COMP/M. 4685 05.12.2007	Electricity	Security of energy supply	<i>Jurisdictional</i> – Invoked before and after EC clearance as a justification for the adoption of conditions by national authorities (National Energy Commission adopted measures that <i>de facto</i> hindered the achievement of the transaction)	Government (Spain)	Potentially relevant, but conditions disproportionate to achieve security of energy supply + lack of notification Infringement proceedings against Spain (alleged breach of Art 21 ECMR)
<i>Sony/BMG</i> COMP/M.3333 3.10.2007	Music recording Media	Plurality of media Cultural diversity	<i>Substantive</i> – Invoked in support of prohibition (<i>sword</i>)	Press (Europe, USA) Music Companies Associations MEPs FTC Officers	Irrelevant, not taken into account
<i>Suez/GDF</i> COMP/M.4180 14.11.2006	Energy, gas and electricity	Security of energy supply Industrial policy (national champion)	<i>Substantive</i> – Invoked in support of clearance (<i>shield</i>) in spite of anticompetitive concerns	Government (France) Press	Irrelevant, not taken into account
<i>Abertis/Autostrade</i> COMP/M. 4249 18.08.2006	Management of toll motorways	Industrial policy	<i>Jurisdictional</i> – Italian government seeks to jeopardize merger between a Spanish and an Italian company active in the management of toll motorways	Government (Italy) Press	Irrelevant, transaction not reviewed on those grounds under ECMR
<i>Arcelor/Mittal</i> COMP/M.4137 02.06.2006	Steel	Social issues Industrial policy (national champion)	<i>Substantive</i> – Invoked in support of prohibition (<i>sword</i>) absent anticompetitive concerns (or only limited ones)	Government (Poland and France) Press	Irrelevant, not taken into account
<i>E.on/Endesa</i> COMP/M.4672 25.04.2006	Energy, gas and electricity	National energetic safety Industrial policy (merger prevents the emergence of a future national champion)	<i>Jurisdictional</i> – Invoked after EC clearance as a justification for submitting the transaction to divestiture requirements by the National Energy Commission	Government (Spain) Press	Potentially relevant, but conditions were not notified to Commission + violation of EC rules on freedom of establishment and free circulation of capital Infringement proceedings against Spain (alleged breach of Art 21 ECMR)

Decision (case number & date)	Sector	Type of concern (or “legitimate interest”)	Aim of concern	Origin of concern	Commission analysis
<i>UniCredito/HBV</i> COMP/M.3894 18.10.2005	Banking	Security of national Treasury (“protection of competition on the Polish market of financial and banking services”)	<i>Jurisdictional</i> – Invoked after EC clearance of the merger as a justification for the adoption of conditions by Polish authorities (Polish government requires UniCredit to divest its shares into Polish bank BPH)	Government (Poland) Press (Poland)	Potentially relevant, but conditions unduly aim to protect competition Infringement proceedings against Poland (alleged breach of Art. 21 ECMR and of Art. 43 and 56 of the EC Treaty)
<i>Abn Amro/Banca Antonveneta</i> COMP/M.3780 30.03.05	Banking	Prudential interests	<i>Jurisdictional</i> – Invoked after EC clearance of the merger as a justification for the adoption of conditions by Italian authorities (organise counter bid and minimum share acquisition for foreign companies)	Government (Bank of Italy)	Potentially relevant, Commission sends requests for information to Bank of Italy and others
<i>Sanofi/Aventis</i> COMP/M.3354 26.04.2004	Pharmaceuticals	Industrial policy (National/European champion)	<i>Substantive</i> – Invoked in support of clearance (<i>shield</i>) Strategic goal: discouraging Novartis’ counter-bid	Government (France)	Irrelevant, not taken into account
<i>Newscorp/Teletiu</i> COMP/M.2876 02.04.2003	Broadcasting-media	Plurality of media Cultural diversity	<i>Substantive</i> – Invoked in support of prohibition (<i>sword</i>)	Press	Irrelevant, not taken into account
		Failing firm defence	<i>Substantive</i> – Invoked in support of clearance (<i>shield</i>)	Parties	Relevant, taken into account
<i>Volvo/Scania</i> COMP/M.1672 14.03.2000	Automobile	Industrial policy (regional champion)	<i>Substantive</i> – Invoked in support of clearance (<i>shield</i>) in spite of anticompetitive concerns	Government (Scandinavian countries)	Irrelevant, not taken into account
<i>Saab/Celsius</i> COMP/M.1797 03.01.2000	Defence and military aerospace	Protection of essentials interests of public security (Article 296(1)b EC)	<i>Jurisdictional</i> – Invoked as a justification by Swedish Government for instructing the parties not to notify the defence aspects of the transaction	Government (Sweden)	Irrelevant, Commission requested the parties to submit information in relation to defence products
<i>BSCH/A. Champalimaud</i> COMP/M. 1616 20.07.1999	Banking Insurance	Strategic and national interests Violation of national procedural rules Prudential interests	<i>Jurisdictional</i> – Portuguese Minister of Finance forbids the transaction before EC notification Invoked during ECMR proceedings as a justification for the prohibition of the transaction	Government (Portugal) Press (Portugal)	Potentially relevant (prudential interests), but interests were not notified to Commission + violation of EC rules on freedom of establishment and free circulation of capital Infringement procedure against Portugal (alleged breach of Art 21 ECMR)

Decision (case number & date)	Sector	Type of concern (or “legitimate interest”)	Aim of concern	Origin of concern	Commission analysis
<i>British Aerospace/GEC Marconi</i> Case No IV/M.1438 25.06.1999	Military	Protection of essential interests of security (Article 296(1)b EC	<i>Jurisdictional</i> – Invoked as a justification by UK Government for instructing acquirer not to notify information relating to the military aspects of the transaction	Government (UK)	Relevant, UK could instruct British Aerospace not to notify the military aspects of the transaction Commission only reviewed the non-military aspects of the merger
<i>EdF/London Electricity</i> COMP/M. 1346 27.01.1999	Electricity	Integrity of the regulatory system for the electricity sector	<i>Jurisdictional</i> – Invoked during ECMR proceedings as a justification by UK authorities to apply additional conditions to the parties	Government (United Kingdom)	Unfounded, proposed measures of UK authorities do not protect a legitimate interest
<i>GEC Marconi/Alenia</i> Case No IV/M1258 28.08.1998	Military	Protection of essential interests of security (Article 296(1)b EC	<i>Jurisdictional</i> – Invoked as a justification by UK and Italian Governments for instructing the parties not to notify the military aspects of the joint venture	Government (UK and Italy)	Relevant, UK and Italy could instruct the parties not to notify the military aspects of the transaction. Commission only reviewed the civil use products and the non-military applications of the “dual use” products of the joint venture
<i>Bertelsmann/Kirch/Premiere</i> Case No IV/M.993 27.05.1998	Broadcasting-media	Plurality of media Cultural diversity	<i>Substantive</i> – Invoked in support of prohibition (<i>sword</i>)	Press	Irrelevant, not taken into account
		Failing firm defence	<i>Substantive</i> – Invoked in support of clearance (<i>shield</i>)	Parties	Irrelevant
<i>British Aerospace/Lagardère SCA</i> Case No IV/M820 23.09.1996	Military	Protection of essential interests of security (Article 296(1)b EC	<i>Jurisdictional</i> – Invoked as a justification by UK and French Governments for instructing the parties not to notify the military aspects of the joint venture	Government (UK and France)	Relevant, UK and France could instruct the parties not to notify the military aspects of the transaction. Commission only reviewed the non-military applications of the “dual use” products of the joint venture
<i>Sun Alliance/Royal Insurance</i> Case No IV/M.759 18.06.1996	Insurance	Prudential rules (compatibility with “requirements of insurance legislation”)	<i>Jurisdictional</i> – Invoked during ECMR proceedings as a justification by UK authorities to apply national legislation concerning supervision of insurance companies established in the UK	Government (UK)	Relevant, UK Department of Trade and Industry can apply the relevant provision of the Insurance Companies Act UK authorities shall “maintain liaison with the Commission”

Decision (case number & date)	Sector	Type of concern (or “legitimate interest”)	Aim of concern	Origin of concern	Commission analysis
<i>GEC/Thomson-CSF</i> Case No IV/M724 15.05.1996	Military	Protection of essential interests of security (Article 296(1)b EC)	<i>Jurisdictional</i> – Invoked as a justification by UK and French Governments for instructing the parties not to notify the military activities of the joint venture	Government (UK and France)	Relevant, UK and France could instruct the parties not to notify the military aspects of the transaction. Commission only reviewed the non-military aspects of the joint venture
<i>Lyonnaise des Eaux SA/Northumbrium Water Group</i> Case No IV/M.567 21.12.1995	Water industry	Compatibility with sector-specific legislation	<i>Jurisdictional</i> – Invoked during ECMR proceedings as a justification for UK authorities to apply sector-specific provisions to the transaction	Government (UK)	Relevant, UK can apply the relevant provisions of the Water Industry Act UK shall inform the Commission of any measure taken
<i>GEC/VSEL</i> Case No IV/M529 07.12.1994	Military	Protection of essential interests of security (Article 296(1)b EC)	<i>Jurisdictional</i> – Invoked as a justification by UK Government for instructing acquirer not to notify information relating to the military aspects of the transaction	Government (UK)	Relevant, UK could instruct GEC not to notify the military aspects of the transaction Commission only reviewed the non-military aspects of the merger
<i>British Aerospace/VSEL</i> Case No IV/M528 24.11.1994	Military	Protection of essential interests of security (Article 296(1)b EC)	<i>Jurisdictional</i> – Invoked as a justification by UK Government for instructing acquirer not to notify information relating to the military aspects of the transaction	Government (UK)	Relevant, UK could instruct British Aerospace not to notify the military aspects of the transaction Commission only reviewed the non-military aspects of the merger
<i>Newspaper Publishing</i> Case No IV/M.423 14.03.1994	Media-newspapers	Plurality of the media (“accurate presentation of news and free expression of opinion”)	<i>Jurisdictional</i> – Invoked during ECMR proceedings as a justification by UK authorities to take measures regarding the aspects of the transaction that did not concern competition	Government (UK)	Relevant, UK Secretary of State can apply the relevant provisions of the Fair Trading Act UK authorities shall inform the Commission of any additional conditions attached to the transaction
<i>Kali und Salz/MdK/Treuhand</i> COMP/M. 308 14.12.1993	Potash and rock-salt activities	Industrial policy (national/European champion) Failing firm defence	<i>Substantive</i> – Invoked in support of clearance (<i>shield</i>) in spite of anticompetitive concerns	Government (Germany) Parties	Relevant, partly taken into account
<i>IBM France/CGI</i> Case No IV/M336 16.04.1993	Military (software)	Protection of essentials interests of public security	<i>Jurisdictional</i> – Invoked as a justification by French Government to impose conditions on the GCI subsidiaries that collaborated with the French ministry of defence	Government (France)	Relevant, France could impose conditions on GCI subsidiaries
<i>Aérospatiale-Alenia/de Havilland</i> COMP/M.4382 2.10.1991	Aeronautics Military	Industrial policy (global champion)	<i>Substantive</i> – Invoked in support of clearance (<i>shield</i>) in spite of anticompetitive concerns	Governments (France and Italy)	Irrelevant, not taken into account

Nota 1: The table encompasses cases where concerns other than the protection of effective competition were raised directly within ECMR proceedings, but also indirectly through the press and other medias, before and after the adoption of the decision.

Nota 2: The expression “not taken into account” means that the transaction was not assessed on such grounds under the ECMR.

Nota 3: The concern is labelled “jurisdictional” when it seeks to *legitimate national jurisdiction* to take certain measures over a given transaction. The concern is labelled “substantive” when it seeks to *influence the European Commission’s substantive assessment* under the ECMR.

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