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”.

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

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. 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 shield, to offset the Commission’s findings of harm to competition. In Sony/BMG, independent music labels voiced concerns over the reduction in cultural diversity arising from the joint venture between two large music majors.8

Selected bibliography

GALLOWAY J. [2007], “EC merger control: does the re-emergence of protectionism signal the death of the ‘one stop shop’?”, Draft Paper to the 3rd Annual CCP Summer Conference, 14th June, University of East Anglia, Norwich.


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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.
<table>
<thead>
<tr>
<th>Decision (case number &amp; date)</th>
<th>Sector</th>
<th>Type of concern (or “legitimate interest”)</th>
<th>Aim of concern</th>
<th>Origin of concern</th>
<th>Commission analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Google/Double Click COMP/M.4731 11.03.2008</td>
<td>Information and communication technologies Advertising</td>
<td>Data protection/privacy issues</td>
<td>Substantive – Invoked in support of prohibition (sword) absent anticompetitive concerns (or only limited ones)</td>
<td>Third parties during ECMR proceedings (competitors and customers) Consumer organizations MEPs</td>
<td>Irrelevant, not taken into account</td>
</tr>
<tr>
<td>Enel/Acciona/Endesa COMP/M. 4685 05.12.2007</td>
<td>Electricity</td>
<td>Security of energy supply</td>
<td>Jurisdictional – Invoked before and after EC clearance as a justification for the adoption of conditions by national authorities (National Energy Commission adopted measures that de facto hindered the achievement of the transaction)</td>
<td>Government (Spain)</td>
<td>Potentially relevant, but conditions disproportionate to achieve security of energy supply + lack of notification Infringement proceedings against Spain (alleged breach of Art 21 ECMR)</td>
</tr>
<tr>
<td>Sony/BMG COMP/M.3333 3.10.2007</td>
<td>Music recording Media</td>
<td>Plurality of media Cultural diversity</td>
<td>Substantive – Invoked in support of prohibition (sword)</td>
<td>Press (Europe, USA) Music Companies Associations MEPs FTC Officers</td>
<td>Irrelevant, not taken into account</td>
</tr>
<tr>
<td>Suez/GDF COMP/M.4180 14.11.2006</td>
<td>Energy, gas and electricity</td>
<td>Security of energy supply Industrial policy (national champion)</td>
<td>Substantive – Invoked in support of clearance (shield) in spite of anticompetitive concerns</td>
<td>Government (France) Press</td>
<td>Irrelevant, not taken into account</td>
</tr>
<tr>
<td>Abertis/Autostrade COMP/M. 4249 18.08.2006</td>
<td>Management of toll motorways</td>
<td>Industrial policy</td>
<td>Jurisdictional – Italian government seeks to jeopardize merger between a Spanish and an Italian company active in the management of toll motorways</td>
<td>Government (Italy) Press</td>
<td>Irrelevant, transaction not reviewed on those grounds under ECMR</td>
</tr>
<tr>
<td>Arcelor/Mittal COMP/M.4137 02.06.2006</td>
<td>Steel</td>
<td>Social issues Industrial policy (national champion)</td>
<td>Substantive – Invoked in support of prohibition (sword) absent anticompetitive concerns (or only limited ones)</td>
<td>Government (Poland and France) Press</td>
<td>Irrelevant, not taken into account</td>
</tr>
<tr>
<td>E.on/Endesa COMP/M.4672 25.04.2006</td>
<td>Energy, gas and electricity</td>
<td>National energetic safety Industrial policy (merger prevents the emergence of a future national champion)</td>
<td>Jurisdictional – Invoked after EC clearance as a justification for submitting the transaction to divesture requirements by the National Energy Commission</td>
<td>Government (Spain) Press</td>
<td>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)</td>
</tr>
<tr>
<td>Decision (case number &amp; date)</td>
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<tr>
<td>UniCredit/HBV COMP/M.3894 18.10.2005</td>
<td>Banking</td>
<td>Security of national Treasury (“protection of competition on the Polish market of financial and banking services”)</td>
<td>Jurisdictional – 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)</td>
<td>Government (Poland) Press (Poland)</td>
<td>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)</td>
</tr>
<tr>
<td>Abn Amro/Banca Antonveneta COMP/M.3780 30.03.05</td>
<td>Banking</td>
<td>Prudential interests</td>
<td>Jurisdictional – 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)</td>
<td>Government (Bank of Italy)</td>
<td>Potentially relevant, Commission sends requests for information to Bank of Italy and others</td>
</tr>
<tr>
<td>Sanofi/Aventis COMP/M.3354 26.04.2004</td>
<td>Pharmaceuticals</td>
<td>Industrial policy (National/European champion)</td>
<td>Substantive – Invoked in support of clearance (shield) Strategic goal: discouraging Novartis’ counter-bid</td>
<td>Government (France)</td>
<td>Irrelevant, not taken into account</td>
</tr>
<tr>
<td>News corp/Telepiu COMP/M.2876 02.04.2003</td>
<td>Broadcasting-media</td>
<td>Plurality of media Cultural diversity</td>
<td>Substantive – Invoked in support of prohibition (sword)</td>
<td>Press</td>
<td>Irrelevant, not taken into account</td>
</tr>
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<td></td>
<td>Failing firm defence</td>
<td>Substantive – Invoked in support of clearance (shield)</td>
<td>Parties</td>
<td>Relevant, taken into account</td>
</tr>
<tr>
<td>Volvo/Scania COMP/M.1672 14.03.2000</td>
<td>Automobile</td>
<td>Industrial policy (regional champion)</td>
<td>Substantive – Invoked in support of clearance (shield) in spite of anticompetitive concerns</td>
<td>Government (Scandinavian countries)</td>
<td>Irrelevant, not taken into account</td>
</tr>
<tr>
<td>Saab/Celsius COMP/M.1797 03.01.2000</td>
<td>Defence and military aerospace</td>
<td>Protection of essentials interests of public security (Article 296(1)b EC)</td>
<td>Jurisdictional – Invoked as a justification by Swedish Government for instructing the parties not to notify the defence aspects of the transaction</td>
<td>Government (Sweden)</td>
<td>Irrelevant, Commission requested the parties to submit information in relation to defence products</td>
</tr>
<tr>
<td>BSCH/A. Champalimaud COMP/M. 1616 20.07.1999</td>
<td>Banking Insurance</td>
<td>Strategic and national interests Violation of national procedural rules Prudential interests</td>
<td>Jurisdictional – Portuguese Minister of Finance forbids the transaction before EC notification Invoked during ECMR proceedings as a justification for the prohibition of the transaction</td>
<td>Government (Portugal) Press (Portugal)</td>
<td>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)</td>
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<tr>
<td>British Aerospace/GEC Marconi Case No IV/M.1438 25.06.1999</td>
<td>Military</td>
<td>Protection of essential interests of security (Article 296(1)b EC)</td>
<td>Jurisdictional – Invoked as a justification by UK Government for instructing acquirer not to notify information relating to the military aspects of the transaction</td>
<td>Government (UK)</td>
<td>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.</td>
</tr>
<tr>
<td>EdF/London Electricity COMP/M. 1346 27.01.1999</td>
<td>Electricity</td>
<td>Integrity of the regulatory system for the electricity sector</td>
<td>Jurisdictional – Invoked during ECMR proceedings as a justification by UK authorities to apply additional conditions to the parties</td>
<td>Government (United Kingdom)</td>
<td>Unfounded, proposed measures of UK authorities do not protect a legitimate interest.</td>
</tr>
<tr>
<td>GEC Marconi/Alenia Case No IV/M1258 28.08.1998</td>
<td>Military</td>
<td>Protection of essential interests of security (Article 296(1)b EC)</td>
<td>Jurisdictional – Invoked as a justification by UK and Italian Governments for instructing the parties not to notify the military aspects of the joint venture</td>
<td>Government (UK and Italy)</td>
<td>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.</td>
</tr>
<tr>
<td>Bertelsmann/Kirch/ Premier Case No IV/M.993 27.05.1998</td>
<td>Broadcasting-media</td>
<td>Plurality of media Cultural diversity</td>
<td>Substantive – Invoked in support of prohibition (sword)</td>
<td>Press</td>
<td>Irrelevant, not taken into account.</td>
</tr>
<tr>
<td>British Aerospace/Lagardère SCA Case No IV/M820 23.09.1996</td>
<td>Military</td>
<td>Protection of essential interests of security (Article 296(1)b EC)</td>
<td>Jurisdictional – Invoked as a justification by UK and French Governments for instructing the parties not to notify the military aspects of the joint venture</td>
<td>Government (UK and France)</td>
<td>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.</td>
</tr>
<tr>
<td>Sun Alliance/Royal Insurance Case No IV/M.759 18.06.1996</td>
<td>Insurance</td>
<td>Prudential rules (compatibility with &quot;requirements of insurance legislation&quot;)</td>
<td>Jurisdictional – Invoked during ECMR proceedings as a justification by UK authorities to apply national legislation concerning supervision of insurance companies established in the UK</td>
<td>Government (UK)</td>
<td>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”.</td>
</tr>
<tr>
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<tr>
<td>GEC/Thomson-CSF Case No IV/M724 15.05.1996</td>
<td>Military</td>
<td>Protection of essential interests of security (Article 296(1)b EC)</td>
<td>Jurisdictional – Invoked as a justification by UK and French Governments for instructing the parties not to notify the military activities of the joint venture</td>
<td>Government (UK and France)</td>
<td>Relevant, UK and France could instruct the parties not to notify the military aspects of the joint venture. Commission only reviewed the non-military aspects of the joint venture.</td>
</tr>
<tr>
<td>GEC/VSEL Case No IV/M529 07.12.1994</td>
<td>Military</td>
<td>Protection of essential interests of security (Article 296(1)b EC)</td>
<td>Jurisdictional – Invoked as a justification by UK Government for instructing acquirer not to notify information relating to the military aspects of the transaction</td>
<td>Government (UK)</td>
<td>Relevant, UK could instruct GEC not to notify the military aspects of the transaction. Commission only reviewed the non-military aspects of the merger.</td>
</tr>
<tr>
<td>British Aerospace-VSEL Case No IV/M528 24.11.1994</td>
<td>Military</td>
<td>Protection of essential interests of security (Article 296(1)b EC)</td>
<td>Jurisdictional – Invoked as a justification by UK Government for instructing acquirer not to notify information relating to the military aspects of the transaction</td>
<td>Government (UK)</td>
<td>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.</td>
</tr>
<tr>
<td>Newspaper Publishing Case No IV/M.423 14.03.1994</td>
<td>Media-newspapers</td>
<td>Plurality of the media (&quot;accurate presentation of news and free expression of opinion&quot;)</td>
<td>Jurisdictional – Invoked during ECMR proceedings as a justification for UK authorities to take measures regarding the aspects of the transaction that did not concern competition</td>
<td>Government (UK)</td>
<td>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.</td>
</tr>
<tr>
<td>IBM France/CGI Case No IV/M336 16.04.1993</td>
<td>Military (software)</td>
<td>Protection of essentials interests of public security</td>
<td>Jurisdictional – Invoked as a justification by French Government to impose conditions on the GCI subsidiaries that collaborated with the French ministry of defence</td>
<td>Government (France)</td>
<td>Relevant, France could impose conditions on GCI subsidiaries.</td>
</tr>
<tr>
<td>Aérospatiale-Alenia/de Havilland COMP/M.4382 2.10.1991</td>
<td>Aeronautics Military</td>
<td>Industrial policy (global champion)</td>
<td>Substantive – Invoked in support of clearance (shield) in spite of anticompetitive concerns</td>
<td>Governments (France and Italy)</td>
<td>Irrelevant, not taken into account.</td>
</tr>
</tbody>
</table>

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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