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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by the European Union --

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EUROPEAN UNION

1. Introduction

1. This paper succinctly describes the European Union (EU) legal framework within which public interest considerations ('public interest clauses') may be taken into account in the context of EU merger control review. It describes the respective competences of the European Commission and EU Member States' authorities and provides some examples of past relevant cases.

2. Legal framework: the EU Merger Regulation and public interest considerations

2. The objective of the EU Merger Regulation («EUMR»)¹ is to ensure that competition in the EU internal market is not distorted.² To that effect, the EUMR establishes a «one-stop shop system», where transactions falling under its scope of application («concentrations of an EU dimension»)³ must be notified to the European Commission⁴ which will assess them exclusively on the basis of competition-related considerations.

3. Article 21(2) EUMR provides indeed that the European Commission “*shall have sole jurisdiction*” to control the compatibility of concentrations of an EU dimension.⁵ Furthermore, Art. 21(3) EUMR indicates that “[n]o Member State shall apply its national legislation on competition” (emphasis added) to any such concentration.

4. Articles 2(2) and (3) EUMR, in turn, set up the substantive test for the assessment of concentrations under the EU merger regime. Such test consists in whether or not an operation would significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position («SIEC» test).⁶

¹ Council Regulation N° 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Official Journal L 24, 29.1.2004, p. 1.

² Recitals 2 to 6 and 24 EUMR. For instance, Recital 24 indicates that «[i]n order to ensure a system of undistorted competition in the [internal] market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the [EU]».

³ Namely those transactions constituting a «concentration» for the purposes of the EUMR (cf. Article 3) and meeting the relevant turnover thresholds set forth therein [cf. Article 1(2) and (3)].

⁴ The obligation of mandatory prior notification of concentrations is set out in Article 4 EUMR. The related obligation of the suspension of concentrations until clearance by the Commission («standstill clause») can be found in Article 7 EUMR.

⁵ The EUMR sets up a system of referrals that allows, under certain conditions, the reallocation of cases between the European Commission and Member States' national competition authorities (cf. Articles 4(4), 4(5), 9 and 22 EUMR).

⁶ According to Article 2(1) EUMR, concentrations «shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the [internal] market. In making this appraisal, the Commission shall take into account: (a) the need to maintain and develop effective competition within the [internal] market in view of, among other things, the structure of all the markets concerned and the actual or potential

5. Therefore, under the system of the EUMR, public interest considerations other than competition policy are not to be taken into account in the assessment by the European Commission of a notified concentration with a view to declaring it compatible (either unconditionally or subject to commitments) or incompatible with the internal market.

6. This notwithstanding, the EUMR recognises that there are other legitimate interests worthy of protection and allows Member States' authorities to take appropriate measures, under strict conditions.

7. In particular, Article 21(4) EUMR reads as follows:⁷

« [...] 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.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.»

8. This provision allows thus Member States to adopt, with regard to concentrations of an EU dimension,⁸ measures to protect certain interests other than competition, for as long as these measures are necessary and proportionate to their aim and are compatible with all aspects of Community law.

9. Pursuant to Article 21 EUMR, Member States can ultimately block transactions or impose (additional) conditions. These actions constitute an added regulatory layer to the European Commission's competition assessment. Such national measures, however, cannot go against the European Commission's merger (intervention) decision: they cannot invalidate a European Commission's prohibition decision (i.e. they cannot authorise a deal that has been blocked by the European Commission) or waive one or more of the remedies imposed by the European Commission in order to protect competition. This would go against the very rationale of the EUMR and the European Commission's exclusive competence to safeguard competition through merger control.

competition from undertakings located either within or outwith the Community; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition».

⁷ Recital 19 EUMR provides that *« [...] the exclusive application of this Regulation to concentrations with a [EU] dimension is without prejudice to [Article 346 TFEU], and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.»*.

⁸ As indicated, Article 21 EUMR only applies to transactions for which the European Commission has jurisdiction, i.e. concentrations that fulfil the EU turnover thresholds or have been referred by Member States.

3. Substantive and procedural aspects concerning the protection of legitimate interests

10. Article 21 EUMR distinguishes between “recognised interests”, namely public security, plurality of the media and prudential rules, all of which are considered *prima facie* legitimate, and “other public interests”, which require *ex ante* review by the European Commission.

11. Ensuring public security, protecting the plurality of the media and enforcing prudential rules are thus explicitly recognised as legitimate interests. Accordingly, national measures genuinely aiming to protect one of these interests and clearly in compliance with the principles of proportionality and non-discrimination can be adopted and enter into force without prior notification to and approval by the European Commission.⁹

12. First, public security can be relied upon, provided that there is a genuine and sufficiently serious threat to a fundamental interest of society¹⁰. Two situations are envisaged, namely interventions in respect of a concentration connected with the production of or trade in arms, munitions and war material, and those concerned with security of supplies to the country in question of a product or service considered of vital or essential interest for the protection of the population’s health. In line with the case law of the European Courts, public security may justify measures related to the security of energy supply to the extent that they are necessary to ensure a minimum level of energy supplies in the event of a crisis¹¹.

13. Second, the protection of the plurality of the media refers to those measures aimed to maintain diversified sources of information for the sake of plurality of opinion and multiplicity of views.

14. Third, prudential rules relate to providers of financial services as applied by national bodies entrusted with the surveillance of banks, stock-broking firms and insurance companies.

15. Article 21 EUMR applies the grounds of justification for recognised interests strictly as far as their scope and/or application is concerned.¹² Even where grounds of justification apply, their application is subject to strict proportionality and non-discrimination requirements. In particular, for the proportionality test to be met, the measure under scrutiny should (i) be suitable for securing the objective which it pursues; and (ii) not go beyond what is necessary in order to attain it. In other words, the measure must be appropriate to achieve the stated interest and the objective that is sought could not reasonably be attained by less restrictive measures.

16. In contrast with the recognised interests described above, national measures aimed at protecting other public interests must be communicated to the European Commission before their adoption and entry into force and are subject the latter’s *ex ante* review. The Commission has 25 working days after that notification to decide and inform the Member State concerned on the conformity of the envisaged measures to the “*general principles and other principles of Community law*”.

⁹ The European Commission will require a notification pursuant to Article 21(4) EUMR whenever there are reasonable doubts as to the recognised interest and/or the ability of the measures to comply with the principles of proportionality and non-discrimination. Such notification system allows Member States to obtain legal certainty. The lack of notification of a State measure pursuant to Article 21(4) EUMR does not affect the European Commission’s competence to decide on the compatibility of that particular measure with Community law. In effect, the European Commission has sole jurisdiction to take all the decisions relating to concentrations with an EU dimension.

¹⁰ Article 346 TFEU relating to essential interests of security

¹¹ *Campus Oil v. Minister for Industry and Energy*, Case 72/83, 1984 E.C.R. 2727

¹² For instance, in *Secil/Holderbank/Cimpor*, the European Commission rejected the alleged need for compliance with prudential rules as a recognized interest since none of the notifying parties had activities in the field of banking or provision of insurance services that would be captured by such prudential rules (European Commission Decision of 11/01/2000 in Case COMP/M.2054 — *Secil/Holderbank/Cimpor*; 2000).

17. In its assessment under Article 21 EUMR, the European Commission is particularly vigilant as regards the need to safeguard the exercise of the freedom of establishment and the free movement of capital.¹³ State measures that “impede” or “render less attractive” cross-border investment can amount to an “*obstacle to trade*” for the purposes of Article 21 EUMR.¹⁴ The European Commission will scrutinise the Member State measures that may interfere with a concentration of an EU dimension and assess whether: (i) the measure forms an obstacle to trade; (ii) “overriding public interest grounds” can justify such obstacle and (iii) the measure is proportionate and non-discriminatory.

18. Whereas the EU Courts consider a broad range of “overriding reasons in the public interest” as possible justifications for raising obstacles to trade, they have consistently ruled out considerations of a purely economic nature as a possible justification for restricting the fundamental freedoms underlying the EU single market¹⁵. Also, the European Commission has consistently taken the view that the protection of national interests and strategic sectors for the national economy would lead to a violation of the principles of freedom of establishment and free movement of capital inside the EU.¹⁶ Hence, no justification on such grounds is in principle possible. In that respect, it should be noted that healthy competition is in itself a very important public interest.

4. Control of the respect by Member States of their obligations under the EUMR

19. The European Commission is empowered to open infringement proceedings against national measures adopted in violation of Article 21 EUMR, pursuant to Article 258 of the Treaty on the Functioning of the European Union («TFEU»).

20. Alternatively (and in practice more frequently), the European Commission may issue a decision concerning the legality of the national measure on the basis of Article 21 EUMR itself and, if necessary, order the Member State concerned to withdraw the contested measure.¹⁷ To protect the interests of involved parties, the European Commission may issue an interim decision ordering the suspension of the national measures at stake.

21. Should the Member State fail to comply with the European Commission's decision, the European Commission may start an infringement action under Article 258 TFEU and bring the Member State before the European Court of Justice (ECJ).¹⁸

22. Proceedings pursuant to Article 21 EUMR can only be initiated in relation to a Member State's interference with a particular transaction. In addition, the European Commission can initiate

¹³ Articles 49 and 56 TFEU.

¹⁴ E.g., in *E.ON/Endesa*, the European Commission considered that state measures liable to impede the acquisition of shares in undertakings and dissuade investors in other Member States from direct investments may restrict the free movement of capital (European Commission Decisions of 20/12/2006 and 26/09/2006 in Case COMP/M.4197 — E.ON /Endesa). Also, in *Enel/Acciona/Endesa*, the Commission found that a number of conditions amounted to “*obstacles to trade*”, including the requirements to maintain Endesa's registered office and decision-making bodies in Spain as well as the obligation to use domestic coal in Endesa's coal-fired power plants and to refrain from divesting Endesa's assets outside mainland Spain for a period of five years (European Commission Decision of 11/09/2007 in Case COMP/M.4685 — Enel/Acciona/Endesa).

¹⁵ See e.g. Müller-Fauré and van Riet, Case C-385/99, 2003 E.C.R I-4509

¹⁶ See e.g. European Commission Decision of 03/08/1999 in Case COMP/M.1616 — BSCH/Champalimaud.

¹⁷ Article 21 EUMR provides thus a faster and more direct instrument than that of the general infringement proceedings foreseen in Article 258 TFEU.

¹⁸ E.g. *Enel/Endesa* and *EON/Endesa*.

proceedings pursuant to Article 258 TFEU for the infringement of general internal market rules by other types of measures (such as those of more general application).¹⁹

5. Examples of cases applying Article 21 EUMR to public interest considerations

23. Decisions under Article 21 EUMR are relatively infrequent. Negative decisions have sometimes been the result of a procedure initiated by a complaint. In some instances, the European Commission has opened preliminary investigations but has not ultimately adopted a formal decision.

24. Some case examples of the European Commission's practice are described below.

25. First, among the examples of positive decisions approving a Member State's envisaged intervention (or indicating to a Member State that there was no need to notify a certain measure), we find a number of utilities cases (e.g. *UK water industry act*²⁰, *Lyonnaise des Eaux/Northumbrian Water*²¹, *EdF/London Electricity*²²) where the European Commission recognised the legitimacy of State measures taken to address concerns raised by a transaction and relating to the application of regulatory provisions governing the water or the electricity industries. Also, in 2010 the UK authorities prohibited the *News Corp /BSkyB*²³ transaction on the basis of media plurality rules, but not before the European Commission had cleared the transaction, albeit with the clarification that its decision was without prejudice to the UK's review of the deal on the basis of its rules governing media plurality.

26. Second, there have been a number of examples of investigations, negative decisions and/or warning letters, normally arising from Member States' attempts to seemingly "protect" national firms or otherwise intervene unjustifiably against certain transactions:

- *BSCH/A. Champalimaud* (1999)²⁴: The first case in which the European Commission relied on Article 21(4) EUMR to oppose a State measure dates back to 1999 when the Portuguese Finance Minister prohibited the acquisition of joint control of several Portuguese banks by the Spanish Banco Santander for prudential motives. That decision was not notified to the European Commission and resulted in the latter ordering the interim suspension and then the withdrawal of the Minister's decision.²⁵ The transaction ultimately went through after a negotiated solution was found between Banco Santander and the Portuguese authorities. This transaction was cleared by the European Commission.²⁶

¹⁹ These proceedings require the European Commission (lead by DG FISMA) to issue a letter of formal notice and a reasoned opinion before the matter is brought to the ECJ. Such infringement proceedings, where appropriate, may be initiated in parallel with an action under Article 21 EUMR against the application of the national measures to a particular transaction: see e.g. *Enel/Endesa*, *EON/Endesa* and *Abertis/Autostrade* (European Commission Decision of 04/11/2006 in Case COMP/M.4249 — Abertis/Autostrade).

²⁰ European Commission Decision of 29/03/1995, Water Industry Act.

²¹ European Commission Decision of 21/12/1995 in Case COMP/M.567 — *Lyonnaise Des Eaux/Northumbrian Water*.

²² European Commission Decision of 27/01/1999 in Case COMP/1346 — *EdF/London Electricity*.

²³ European Commission Decision of 21/12/2010 in Case COMP/5932 — *News Corp/BSKYB*.

²⁴ Cases M.1616, M.1724 and M.1799. One interim and one final decisions were ultimately adopted pursuant to Article 21 EUMR.

²⁵ European Commission Decision of 20 July 1999 in Case M.1724 — *BSCH/A. Champalimaud*. Press Release IP/99/774 of 20 October 1999.

²⁶ European Commission Decision of 11 January 2000 in Case M.1799 — *BSCH/Banco Totta y CPP/A. Champalimaud*.

- *Secil/Holderbank/Cimpor* (2000): The Portuguese Minister of Finance prevented the building materials companies Holderbank (Switzerland) and Secil (Portugal) from acquiring Cimpor, a cement company in which the Portuguese State retained special rights. That decision was not notified to the European Commission, which ultimately dismissed the alleged economic policy justifications as incompatible with EU law.²⁷ The European Commission's decision was confirmed by the ECJ.²⁸
- In the period 2005 – 2007, a number of banking mergers were held up because of national interests. *BBVA/BNL* and *ABN AMRO/Banca Antonveneta* (2005)²⁹: The Bank of Italy refused to authorize BBVA (Spain) and ABN AMRO (Netherlands) to acquire their Italian counterparts, respectively BNL and Banca Antonveneta, by openly preferring a “national consolidation” of the banking sector. The Commission did not open formal proceedings but sent a warning concerning a possible violation of Article 21 EUMR.³⁰ *Unicredito/HVB* (2006)³¹: After the European Commission had cleared the acquisition of HypoVereinsBank by Unicredito, the Polish Government prevented Unicredito from acquiring other Polish banks for a ten year period (“non-competition” clause). The European Commission considered that the Polish Government’s measure violated its exclusive competence to examine the impact of the merger on competition.³² A settlement was reached and the European Commission did not pursue the matter further.
- *E.ON/Endesa* (2006)³³: Gas Natural (Spain) launched a public bid for Spain’s electricity incumbent Endesa, together with a divestment of Endesa's assets to Iberdrola. As the merger was not of an EU dimension, the Spanish national competition authorities were competent for reviewing it. The European Commission was however competent to review the competing bid of E.ON (Germany) for Endesa. Spain’s Council of Ministers had, seemingly in reaction to the said bid, increased the power of the National Energy Regulator (“CNE”) to review acquisitions in the energy sector. The European Commission challenged CNE’s decision to subject E.ON’s bid to demanding conditions and ordered its withdrawal on the basis of Article 21 EUMR. The Spanish authorities replied that these conditions were motivated by security of energy supply considerations and therefore did not require notification pursuant to Article 21(4) EUMR. The Spanish Minister of Industry subsequently lowered the contested conditions instead of abandoning them, which led to a second decision pursuant to Article 21 EUMR.³⁴ Given the Spanish authorities’ failure to comply with its decisions, the European Commission brought Spain before the ECJ, claiming that the broad discretion that national administrative authorities applied represented a serious threat to the free movement of capital.³⁵ In March 2008, the ECJ concluded that Spain had failed to fulfil its obligations under the Treaty by not withdrawing the conditions as requested by the European Commission.³⁶

²⁷ Press Release IP/00/1338 of 22 November 2000.

²⁸ Portuguese Republic v. European Commission (“Cimpor”), Case C-42/01, 2004 E.C.R. I-6079.

²⁹ Cases M.3768 and M.3780 respectively.

³⁰ http://ec.europa.eu/competition/publications/cpn/2005_3_95.pdf

³¹ Case M.3894.

³² Press Release IP/06/277 of 8 March 2006.

³³ Case M.4197. Two final Commission decisions were adopted pursuant to Article 21 EUMR, followed by two judgements of the European Courts.

³⁴ See, inter alia, Press Release IP/07/296 of 7 March 2007.

³⁵ Press Release IP/07/427 of 28 March 2007.

³⁶ Kingdom of Spain v. European Commission, Case C-196/07, 2008 E.C.R. I-41.

- *Enel/Acciona/Endesa (2007)*³⁷: E.ON agreed to share Endesa's assets with ENEL (Italy) and Acciona (Spain); ENEL and Acciona would acquire joint control of Endesa and subsequently divest to E.ON certain ENEL and Endesa's businesses and assets in Spain and Italy. The CNE subjected the transaction to conditions, comparable to the ones previously imposed on E.ON when seeking sole control over Endesa, without prior notification to the European Commission. The latter adopted a formal decision on 5 December 2007, requiring Spain to withdraw the litigious conditions.³⁸
- *Abertis/Autostrade (2006)*³⁹: Italy attempted to frustrate the acquisition of Autostrade (management of toll motorways) by Abertis (Spain). The Italian public entity responsible for granting motorway concessions rejected Autostrade's application to merge with Abertis on the basis of a negative binding opinion by the Italian Minister for Infrastructure expressing doubts about Abertis' ability to invest in the Italian motorway network. After having cleared the transaction, the European Commission challenged the Italian decision for lack of prior notification and incompatibility with Community law, until the regulatory framework for the authorization of the transfer of motorway concessions was reviewed. The European Commission stressed in its communications that the failure of the Italian authorities to notify the State measure under Article 21 EUMR "*contributed to de facto blocking or, in any event, seriously prejudicing the completion of a concentration with a [Union] dimension*".⁴⁰

6. Conclusions

27. According to the EUMR, public interest considerations other than competition policy are not to be taken into account in the assessment by the European Commission of a concentration. However, Member States may take appropriate measures to protect other legitimate interests with regard to such transactions, under strict conditions.

28. In that context, Article 21 EUMR serves the double purpose of protecting the European Commission's exclusive competence for the review of mergers of an EU dimension and of providing an internal-market function preventing Member States from exercising undue interferences with cross-border transactions, without however precluding them from adopting proportionate measures aimed at protecting legitimate interests.

29. Attempts by Member States to interfere with transactions of a Community dimension in diverse sectors (e.g. energy, financial institutions, public infrastructure) have been investigated and where appropriate challenged by the European Commission pursuant to this provision.

³⁷ Case M.4685. A final Commission decision was adopted pursuant to Article 21 EUMR.

³⁸ Press Release IP/08/164 of 31 January 2008.

³⁹ Case M.4249.

⁴⁰ See, inter alia, Press Release IP/07/117 of 31 January 2007.