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## Some aspects of merger control in the EC

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□ Transport is neither an end in itself nor the "servant" of the economy. It has to fulfil an independent function within the whole economic process. This overall view is particularly necessary in European traffic and transport, in order to avoid isolated action which would be detrimental to the whole community.

□ At the same time the part traffic and transport play in the spheres of regional planning, regional policy, social policy, and environment protection must be defined. Here, too, the overriding significance of a global view becomes evident. Since the conceptions of the importance of the factor traffic and transport are very often still rather hazy and even exaggerated, science and practice

are called upon to deepen their knowledge of the problems and to come to appropriate conclusions.

□ The fact that traffic and transport have to fulfil an important international function must lead to the European transport policy being more and more characterized by the aspect of Europe as a whole, which means that it should be so conceived as to comprise as many countries as possible, even if every question has to be examined as to whether and in how far absolute uniformity is necessary.

If we follow these guidelines, we shall be able to create a realistic basis for more efficiency in traffic within Europe and shall at the same time also strengthen its worldwide connections.

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### Economic Concentration

## Some Aspects of Merger Control in the EC

by Dr Heinrich Hölzler, Berlin \*

**The author elucidates the basic features of the EC Commission's guidelines proposal for a European merger control and examines the various problems which may arise.**

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The Commission of the European Communities July 20, 1973, submitted to the Council of Ministers a "Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings"<sup>1</sup>, and this was approved by the European Parliament and the Economic and Social Committee in February 1974. Since then the draft has been discussed several times in committees, but it has evidently given rise to such wide differences of opinion, and not only on questions of detail, that the guidelines proposal cannot be expected to pass the Council of Ministers in the near future.

In view of the progressive trend towards concentrations in Europe since the beginning of the sixties it is, on the other hand, realized that the European merger control must be rendered effective as quickly as possible if this instrument of merger control is not to prove futile when it is eventually adopted because the market structures in important sectors will by then have been oligopolized and the control will come too late. The

situation may be illustrated by an example: in Great Britain, as also in the Federal Republic, the 100 largest industrial enterprises were in 1970 already accounting for over 50 p.c. of all industrial sales<sup>2</sup>.

The Explanatory Memorandum which accompanied the proposal contained (on page 6) this passage about the need for a European merger control: "This development should not continue uncontrolled. . . . The effects of business concentrations are particularly serious because the concentration brings about an irreversible alteration of the market structure. If a dominant position is attained, no real competition from the other suppliers is, as a rule, any longer to be expected, unless there are far-reaching changes in market

\* Federal Cartel Office. The author expresses his personal views which are not necessarily identical with the official opinion.

<sup>1</sup> COM (73) 1210 final, Brussels, July 18, 1973.

<sup>2</sup> Cf. F. M. Scherer, *Europäische Fusionskontrollpolitik. Die Rule of Reasons und die Regel der Verschwiegenheit* (European Merger Control Policy. The Rule of Reasons and the Rule of Secrecy), International Institute of Management (ed.), Berlin 1973, p. 2.

conditions. Further, dominant undertakings are often in a position to prevent new suppliers from entering the market. This is especially the case if they operate simultaneously on several markets and thus have additional scope for their practices, especially in regard to price-fixing."

In the following it is intended to subject some problem areas deriving from the draft guidelines presented in 1973 to a brief analysis in which it will also be made clear on how many levels questions arise in relation to the national merger control instruments already in existence. The study will however focus on the problem areas which may in the present state of development involve controversies with potentially relevant economic implications for the use of the instrument of European merger control in the future.

### Basic Features of the Guidelines Proposal

The basic provisions indicating in which cases the control of concentrations shall apply are contained in Art. 1 (1): "Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings, at least one of which is established in the common market, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, is incompatible with the common market insofar as the concentration may affect trade between Member States.

The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods and services."

As a general exception to these rules Art. 1 (2) provides that they shall not apply in cases in which two requirements are met, namely first, that the aggregate turnover of the participating undertakings is less than 200 mn Units of Account (UA)<sup>3</sup>, and secondly, that the share of the market of these undertakings does not exceed 25 p.c. in any one member country. Further, the regulations do not apply if the merger serves an objective which is given priority in the common interest of the Community (Art. 1 [3]), as for example the common industrial, technological, social and regional policy in the EC.

The definition of concentration in Art. 2 corresponds broadly to the well-known Art. 66 (1) of

<sup>3</sup> One Unit of Account is equivalent to about three Deutschemark (February 1976).

the ECSC Treaty of 1954. Its terms have been applied for more than 20 years, and a large number of decisions have been taken, so that no major problems seem to arise on this side. The definition refers to an economic concept of control over another undertaking, and the power to determine in which way the controlled undertaking shall operate. One important point for discussion is that the Commission is to be empowered to declare a concentration to be incompatible with the Common Market when a concentration is covered by Art. 1 (1). In like manner as under the German national law concentrations have to be notified to the Commission before being put into effect whenever the aggregate turnover of all participating undertakings is 1,000 mn UA or more (Art. 4 [1]). This has to be done at least three months before the concentration is effected. No notification however is required if the turnover of the undertaking to be acquired is less than 30 mn UA. Any plans for concentrations which do not fall under Art. 1 (1) may, on the other hand, nevertheless be notified to the Commission. The following articles of the Draft Regulation give more detailed information about the calculation of the turnover and market share, about the commencement and closure of proceedings, a suspension of the effectuation of the concentration, lodging of objections and hearings, and requests by the Commission for requisite information from, and investigations by, the authorities of the member states. Art. 13 provides for fines of up to 1 mn UA (for breach of the duty of notification under Art. 4) or up to 10 p.c. of the value of the merged assets if a concentration is effected contrary to the decision of the Commission or before the expiry of the time limit provided for in Art. 6 (2). Penalty payments of up to 50,000 UA can be imposed for each day of delay in implementing a decision of the Commission.

A highly controversial point arises in connection with Art. 19 (Liaison with the authorities of the member states). According to this Article an "Advisory Committee on Restrictive Practices and Monopolies", consisting of officials from the member states (each state shall appoint one official), with responsibility for restrictive practices and monopolies *shall be consulted* before any decision is taken by the Commission.

### Cumulative Reference Criteria?

The efficaciousness of the European merger control will decisively depend, first of all, upon the quantitative reference criteria in Art. 1 (1) as ultimately fixed and upon the question whether the two criteria of turnover and market share are to be applied cumulatively or independently from each other as the requisite for the institution of

control procedures. If the opening of procedures is made contingent on one criterion alone, mergers of undertakings with a fairly small turnover would be liable to control if they operate in specialized markets where they command a relatively high market share. This could have the result that the number of annual merger cases coming before the EC Commission would constitute a great "bulk problem".

On the other hand, this cannot and must not be taken as an argument for cumulation. If it is the objective of the European merger control to bring concentrations under control, if — as stated in the Explanatory Memorandum — the attainment through a merger of a dominant market position enabling an undertaking to avoid exposure to competitive pressures is to be prevented, this objective is bound to be relevant also in specialized markets. Further, the cumulative criteria application will offer a lesser chance of bringing conglomerate mergers under control than the alternative solution because the market shares do not change quantitatively in the case of "pure conglomerate mergers". To judge market domination solely by reference to the criteria of turnover and market share means in any case that all the other factors which may be of equally crucial importance for the market power of an undertaking, such as financial reserves, research capacities, barriers to market access, etc., are ignored.

The cumulation of criteria therefore reduces the chances of substantiating the existence of market power as a result of mergers still further. It must also be borne in mind that the exemption clause for small aggregates excludes all concentrations in which the turnover of the transferred undertaking does not exceed 30 mn UA, i.e. about DM 90 mn, from control. Nevertheless there seems to be a disposition to favour the alternative of cumulative reference criteria.

#### Criteria Levels

Misgivings may also be felt about the quantitative determination of the criteria of turnover and market share. While 200 mn UA was still suggested as the turnover criterion in the guidelines draft, the preference now seems to be for a higher threshold. The "small" member countries will presumably tend to prefer lower figures which would enable them to subject the relatively smaller undertakings in their countries to merger control and to protect "their" undertakings, on the other hand, from falling under foreign control; the strong industrial nations, such as France, Great Britain and the Federal Republic, on the other hand, may well, in view of the advanced state of concentration in these countries, prefer

a higher threshold. To set different turnover thresholds depending upon the plane of concentration (whether horizontal, vertical or diagonal) does not seem to be advisable because the increasing product diversification of modern industrial undertakings makes it no longer practicable to draw a sharp line between *purely* horizontal and vertical mergers, quite apart from the fact that any turnover threshold will necessarily be arbitrary. Further, it is not easy to understand why market domination by means of a merger which allows the participating undertakings to avoid competition should be in less need of control if the merger was on one plane rather than on another.

The quantitative determination of the market share as the second criterion for merger control is insofar problematic as it is not in general the absolute size of the market share which matters for the appraisal of market power but the relative market share compared with other competitors and precedent and subsequent market stages. It follows that the entire market structure existing in a demand market affected by a merger is the essential point and not just a random figure viewed in isolation. The guidelines draft selects a market share of 25 p.c. in any one member country as significant, but following the German law a lower rate would be preferable so as to "catch more fish in a finer net".

At this point there arises the basic question whether the market share criterion should logically apply to *one* member country, to a *significant part* of the Common Market or to *the whole* Common Market. According to the guidelines proposal a merger would not be liable to merger control if the relevant market share in all member countries after the merger were to amount to, say, 20 p.c. A provision that the market share of, say, 20 p.c. should apply to the *whole* Common Market cannot be regarded as satisfactory either because the merger control would in this case not become effective even if the merger resulted in a market share of 90 p.c. in *one* member state because the percentage share for the whole of the Common Market would be below the fixed threshold figure. It would therefore be reasonable to fix several alternative criteria for intervention — e.g. a 25 p.c. market share in *one* member country or a 20 p.c. market share in the *whole* Common Market or in a — however defined — *significant part* of it. Even if the criteria were tightened in this way, systematic market concentration by means of a series of small step-by-step mergers (falling under the exemption clause for small aggregates) could not be ruled out. So there is all the more reason to fix the threshold for merger control as a general rule as low as

possible. It must be feared however that a combination of turnover and market share figures will be chosen in the end on grounds of practical convenience rather than because of the experience gained in the field of competition. Such figures could be calculated in advance so that a previously planned number of mergers would each year be subjected to control.

### **Problems of the Exemption Areas**

The exemption areas raise another question. The demand that undertakings which are not liable to merger control under the national regulations concerned should be exempted from the European merger control is certainly justified. The traditional public undertakings such as transport, public utilities, endowments and corporate bodies may be mentioned in this context. It cannot be ruled out however that some member countries in which important industries traditionally run as private enterprises are already wholly or mainly in public ownership will enter reservations about control of mergers involving public undertakings of this kind. In such cases the control would be greatly eroded even before it has been adopted.

Put in more general terms, the problems of the exemption areas pose the question whether the control regulations should as a general rule apply only to supranational mergers or, alternatively, also to mergers inside one sovereign territory. Contradictory decisions could arise in the latter case for instance if a merger is allowed under the national law but barred by the European merger control regulations. Such conflicts would be avoidable if the national authorities would cooperate with the EC Commission in cases in which several legal orders are applicable. As far as the question of cartels and dominant market positions in connection with Art. 85 and 86 of the EEC Treaty is concerned, there are definitely possibilities for cooperation although conflict situations are often unavoidable in the context of the group clearance under Art. 85 para 3 of the EEC Treaty. Until the question of precedence has been clarified by law, it must be assumed that Community law takes in principle precedence. One final possibility would be a provision that mergers are permissible only if no objections are evinced in national *and* Community procedures pursued independently from each other.

This question however involves much more important issues under the aspects of the *policy* on competition, for a regulation leaving national mergers outside the scope of the European merger control could lead to preferential treatment for national undertakings in the national interest instead of *integration* of European markets and undertakings. The end result would be

to encourage mergers which restrict competition rather than mergers which are consistent with the aim of preserving competition. It must not be overlooked either that the yardsticks applied in the various member countries as criteria for decisions in favour of or against the acceptability of a particular merger differ widely. Whereas in the Federal Republic for instance only criteria with a bearing on competition are taken into account (apart from ministerial authorizations in exceptional cases), the authorities in France and Great Britain give consideration also to aspects which are unrelated to competition, such as anti-cyclical measures, economic growth, foreign trade, social and structural aspects. It is not possible to analyse these evaluation problems in the available space but they show how important it is for common European progress that the European merger control should cover mergers on a purely national level in order to achieve the desired objective of preserving market structures in Europe which allow of competition.

### **A National Right to Consultation?**

The question of competence in regard to decisions in merger control procedures is likely to prove crucial for the functioning of merger control. Art. 19 of the draft guidelines provides for consultative and advisory procedures between the Commission, the competent authorities of the member states and the Advisory Committee on Restrictive Practices and Monopolies but whether the EC Commission should have an ultimately unlimited power of decision is a matter for argument. The problems involved here are similar to those relating to the restriction of merger control to supranational concentrations. A national right of veto could, if the criteria based on the aim of preserving competition are neglected, lead to a renationalization of the control procedures which, if handled unwisely, would doom the instrument of European merger control to failure. There can be no doubt therefore that the sole competence to take decisions must as an indispensable prerequisite rest with the EC Commission.

It is quite understandable that the search for appropriate solutions for problems of competition on the European Community level is always attended by a wish on the part of the representatives of the various governments to insist in their national political interests, but these interests must not be overemphasized lest they should lead to irreparable negative developments in regard to the structure of competition in the European markets. Efforts to maintain and safeguard effective competition in the EC should be regarded as an outright political decision in favour of the market economy.