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Michael Krakowski*

The Requirements for EC Merger Control

The need for a uniform European system to control mergers seems ever more urgent as the advent of the European internal market draws closer. What proposals and approaches already exist for European competition law? How should they be assessed?

With the approach of the magic date of 1993, when a single internal market involving the free movement of goods, persons, services and capital within the European Community should become a reality, the debate about an extension of European competition legislation has been re-opened. As long ago as 1973 the EC Commission tabled an initial proposal for a regulation on European merger control, but it was not adopted by the Council. Since then the Council has decided in principle that such a regulation would be desirable and the Commission has presented a further draft, which has itself undergone much amendment. Nevertheless, the ministers responsible have still not been able to reach agreement.

The Commissioner with responsibility for competition until the end of last year, Peter Sutherland, pressed quite forcefully for agreement at the meeting of the European Council on 21st December 1988. The proposal discussed at that meeting forms the basis of this article.¹ It became apparent that the member states still hold quite differing views and that the present version of the proposed regulation is still unacceptable to some countries, especially Germany and the United Kingdom. Nevertheless, uniform European rules for the preventive control of mergers remain an important element in a European internal market organised along competitive lines.

A decision of principle in favour of competition within the Community was taken when it was founded in 1956 and the Commission was given wide direct powers to protect competition. Under Article 85 of the EEC Treaty anti-competitive agreements or decisions are prohibited

and void, while Article 86 prohibits the misuse of a dominant market position. Other provisions govern national subsidies and state monopolies. Taken together, these articles are described as the competition rules of the EEC Treaty.

Articles 85 and 86 are the basis of the Commission's existing right to forbid concentrations. If an undertaking with a dominant market position takes over another, this can be interpreted as misuse of that position; in certain circumstances, the acquisition of a minority stake in one undertaking by another can form the basis for co-ordinated behaviour and can therefore be prohibited.² Up to now, the concentration controls under EC law have been of relatively little importance. The threshold for intervention under Article 86 is fairly high: one of the undertakings involved must already have a dominant position before the merger. There are also other difficulties. Under Article 85 the acquisition of parts of another undertaking is not sufficient of itself to prove co-ordinated behaviour. In both cases the criterion for prohibiting the concentration is that it impedes trade between member states. Mergers that are only of national significance do not come under the provisions of the EEC Treaty.

The law of the European Communities takes precedence over national law. Conflicts can emerge, especially if behaviour permitted under EC regulations is prohibited under national legislation. In such cases

¹ Commission for the European Communities: Amended proposal for a Council Regulation (EEC) on the control of concentrations between undertakings, document COM(88) 734 final – revised version, Brussels, 19th December 1988.

² This was clarified by the European Court of Justice in its ruling of 17th November 1987 (Morris-Rothmans).

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Community law takes precedence only if the Community has a positive, constructive policy. This is generally not the case with proposed concentration; the fact that a merger does not come under Article 85 or 86 of the EEC Treaty or is not taken up by the Commission should not be taken as a positive vote in favour of permitting it. Therefore, national authorities can examine a merger according to national law and, according to the circumstances, forbid it entirely or suspend its application within their country, regardless of the country in which the undertakings are registered.

National Regulations

The regulations on the control of concentrations in individual member countries differ widely as regards objectives and approach (see Table 1). Italy has no competition legislation at all. Other southern countries of the EC – Greece and Spain – introduced the relevant laws before joining the EC, but the two modelled their legislation on the competition rules of the EEC Treaty; consequently they also exhibit the same defects, such as the lack of a detailed preventive control over mergers. The Benelux countries and Denmark do not have merger controls either; there may be less need of a national system in these relatively small economies, however, since the relevant market is probably often larger than the country itself.

France, the United Kingdom, Ireland, Germany, and Portugal operate controls over mergers, the Irish system being closely modelled on the British one. In the first three countries it has a strong political orientation. In general, the new competition law passed in France in 1986 (Order No. 86-1243) transferred greater powers of decision from the government to an independent institution (the Competition Council), but it is still the Minister for Economic Affairs who decides whether to allow or forbid mergers. Kleemann therefore concludes "... that in French competition policy the exercise of structural control (i.e. control over mergers) ... should be viewed as a purely political decision, not the application of law".³

In the United Kingdom the Secretary of State for Trade and Industry has the power to refer a proposed merger to the Monopolies and Mergers Commission (MMC). Only if the MMC finds the merger to be against the public interest can the Secretary of State prohibit it; he has the power to allow it to go ahead in spite of an MMC recommendation to the contrary, but this rarely happens. In several cases considerations other than

competition appear to have played a role both in the referral of proposed mergers and in the assessment by the MMC.⁴

In Germany an authority with quasi-judicial independence – the Federal Cartels Office – decides whether to allow or prohibit a merger purely on competition grounds. Nevertheless, the Federal Minister for Economic Affairs can approve a merger prohibited by the Cartels Office or by a court of law if there is an overriding public interest or if the macro-economic advantages of the particular merger outweigh the harm caused by the restriction of competition. So far, ministers have invoked this power on very few occasions.

Not only are the procedures for regulating mergers highly politicised in most countries, the criteria by which mergers are judged also leave considerable scope for political discretion. In the United Kingdom public interest is the deciding criterion. In France the Competition Council weighs the merger's possible restrictive effects on competition against its contribution to economic and social progress, taking particular account of international competitiveness. In Germany, by contrast, the Federal Cartels Office only has to consider the foreseeable effect on competition.

Table 2 summarises the legislation of EC member countries on cartels and the abuse of a dominant market position, thereby also reflecting the criteria generally used under competition policy in those countries that have no merger controls. The table shows that here too the deciding factors are mostly general criteria such as the public interest. Competition legislation directed exclusively towards the maintenance of competition and leaving no latitude for industrial, regional or labour market considerations would therefore be a novelty for all member countries of the EC. Even in Germany a merger can be sanctioned by ministerial edict. However, the trend is in the right direction: all amendments to laws or the application of existing legislation have reduced the scope for abuse of national competition legislation.

European Solution Needed

Implementation of the fundamental decision in favour of competition in the EEC Treaty requires a Council Regulation on common merger controls. National arrangements are not sufficient and in any case they do

³ Dietrich Kleemann: Das neue französische Wettbewerbsrecht, in: *Wirtschaft und Wettbewerb*, 1987, pp. 628-635, here p. 633.

⁴ Nationalist motives often seem to have played a role. Cf. Donald Hay and John Vickers: The Reform of UK Competition Policy, in: *National Institute Economic Review*, 1988, pp. 56-68, here pp. 58 and 64 ff.

not exist in all countries. The need for European controls on concentrations has not been created by the move towards a single internal market, but this has certainly made it more urgent; the increasing harmonisation of the conditions for economic activity and the integration of business structures within the EC can be expected to intensify competition and in many industries to lead to a breaking-down of monopolies, which are often protected by government action. Trade within the Community will grow and the geographic size of the markets relevant for companies' competitive behaviour is likely to increase.

The Commission's predictions of a rise in prosperity in Europe as a result of the single market are based on this process; keener competition may cause the prices of identical goods and services within the Community to

converge towards a lower level and force enterprises to operate more efficiently, in other words to reduce organisational slack. The widening of the relevant markets will enable firms to exploit the advantages of mass production more fully, and thus to approach the minimum optimal scale of plant in industries in which this has not yet been reached.⁵

For the "Project 1993" to be a success, the opportunity for greater competition must not be stifled by the emergence of enterprises with a dominant market position at the European level, and obstacles to creating a more efficient production structure must be removed. The harmonisation of conditions in the European corporate market is important with regard to the latter point, with regulations on the control of mergers being one of the determinants of such conditions. Both of these requirements place demands not only on competition policy, but also and above all on trade policy; free trade is probably the best weapon against restrictions on competition.

⁵ See Directorate General for Economic and Financial Affairs: The Economics of 1992, in: European Economy, No. 35, March 1988, pp. 118-126 and 107 ff. The Commission's White Paper "Completing the Internal Market" (COM(85) 310 final) of 14th June 1985 laid insufficient emphasis on the central importance of competition policy.

Table 1
National Regulations on Mergers in the Member States of the European Community

	Independent control of mergers	Trigger threshold	Criterion	Notification requirement	Decision-making authority
Belgium	no				
Denmark	no			In certain cases notification can be required	
Germany	yes	More than 20 % market share, 10,000 employees or turnover of DM 500 million	Existence or reinforcement of dominant market position	Proposals are to be notified	Federal Cartels Office, exemptions authorised by Minister for Economic Affairs
Greece	no				
Spain	no			If market share over 30 %	
France	yes	Aggregate turnover over F 7 billion or market share over 25 %	Impairment of competition weighed against contribution to economic progress	yes	Minister for Economic Affairs
Ireland	yes	Assets of more than £ 15 million or turnover of more than £ 10 million	Public interest	yes	Minister for Economic Affairs
Italy	no				
Luxembourg	no				
Netherlands	no				
Portugal	yes				
United Kingdom	yes	25 % market share, take-over of assets of at least £ 30 million	Public interest	no	Referral: Secretary of State for Trade and Industry Appraisal: Monopolies and Mergers Commission Decision: Secretary of State for Trade and Industry

Sources: Commission of the European Communities: Reports on Competition Policy, 1972-1988; OECD: Guide to Legislation on Restrictive Business Practices, Paris (no year; looseleaf collection); Melchior d'Aramon: Droit de la Concurrence: Le Problème de la Diversité des Législations Nationales, in: Problèmes Économiques, 14. 9. 1988, pp. 18-20; Donald Hay, John Vickers: The Reform of UK Competition Policy, in: National Institute Economic Review, August 1988, pp. 56-68; Dietrich Kleemann: Das neue französische Wettbewerbsrecht, in: Wirtschaft und Wettbewerb, 1987, pp. 628-635; Joaquín de Soria y Plana: El Mercado Común y la Defensa de la Libre Competencia en España, in: Economía, 1986, No. 1.

A Council regulation on the control of amalgamations must meet certain requirements if it is to prevent a concentration of market power and standardise conditions in the corporate market.

Oriented towards Competition

The first and most important requirement for European merger controls is that they be orientated unequivocally towards the maintenance of competition within the Community. This means examining proposed amalgamations purely from the point of view of competition and not allowing decisions to be influenced in either direction by other arguments, such as the preservation of industry in particular areas. Nevertheless, provision would have to be made for exceptions in the rare cases in which important macro-economic considerations took precedence. However, the two procedures – appraisal on competition grounds and the granting of exemptions – should be carried out by different institutions.

⁶ See the judgement of 14th December 1987 (United Brands).

According to the current draft regulation, the Commission would first have to decide whether a concentration created or strengthened a position "as a result of which the maintenance or development of effective competition would be impeded in the common market or in a substantial part thereof" (Article 2 (2)). The concept of effective competition is based on the ruling of the European Court on the definition of a dominant market position.⁶ Even if a merger is found to impede competition, it can be authorised if its "contribution to improving production and distribution, to promoting technical or economic progress or to improving the competitive structure within the common market outweighs the damage to competition" (Article 2 (3)). In either case, in other words even if no impediment to effective competition is found to exist, the Commission may attach conditions and obligations to its authorisation "in order to ensure conditions of effective competition" (Article 8 (2) and (3)).

The possibility of imposing conditions on a merger even if no damage to competition is to be expected appears surprising at first, but it is based on a desire to

Table 2
Legislation Prohibiting Cartels and the Misuse of Dominant Market Positions in the Member States of the European Community

	Law	Cartels	Misuse of dominant market position	Criterion	Authority
Belgium	Law of 27.5.1960 (in practice not applied)				
Denmark	Law of 1955	Prohibition possible	Prohibition possible	Whether "justified"; case practice	Monopolies Control Authority
Germany	Law Prohibiting Restraints of Competition (4th amendment 1980)	Prohibition with exceptions	Prohibited	Prohibition of cartels, misuse of position according to competition criteria	Federal Cartels Office
Greece	Law of 26.9.1977 (modelled on EEC Treaty)	Prohibition with exceptions	Prohibited	Exceptions possible on public interest grounds	Committee in Ministry for Economic Affairs
Spain	Law of 20.7.1963 (modelled on EEC Treaty)	Prohibition with exceptions	Prohibited	Wide range of exceptions possible (e. g. ailing industries)	Independent competition court
France	Order of 9.12.1986	Prohibited	Prohibited	Competition	Independent Competition Council
Ireland	Law of 20.6.1972	Prohibition possible	Prohibition possible	List of grounds for prohibition	Competition Commission
Italy	No regulation				
Luxembourg	Law of 17.6.1970	Prohibition possible	Prohibition possible	Public interest	Committee in Ministry for Economic Affairs
Netherlands	Law of 28.6.1956	Prohibition possible	Prohibition possible	Public interest	Ministry for Economic Affairs
Portugal	Law of 3.12.1983 (modelled on EEC Treaty)	Prohibited	Prohibited	Exemption possible	Independent Competition Council
United Kingdom	Fair Trading Act 1973, Competition Act 1980, Restrictive Trade Practices Act 1976	Prohibition possible	Prohibition possible	Public interest	Dept. of Trade and Industry, Restrictive Trade Practices Court or Monopolies and Mergers Commission

Sources: See Table 1.

avoid loopholes in the controls; the European mechanism for regulating mergers relates only to significant parts of the overall market, whereas the domination of local markets can also have detrimental effects, as in the case of mergers between newspapers. Otherwise it could happen, for example, that the Commission would have to sanction a merger between two media companies which because of their size were subject to the European controls, although this would have adverse repercussions on market conditions in one or more local markets. In such a case the Commission could possibly require one of the companies involved to dispose of interests that were significant for a particular local market. In the ultimate analysis, the wording of this article is an attempt to overcome the limitation of European merger controls to amalgamations with a Community dimension affecting at least a significant part of the EC market and gives the Commission wide-ranging discretionary powers. This is unnecessary. It is sufficient to empower national authorities to use their rights if there is a danger of domination of a local market, a possibility for which the draft regulation also provides.

Dangers

The possible grounds for allowing a merger that impedes effective competition are too broad and allow almost any merger to be authorised if politically desired. The fear that merger controls based on this regulation could be misused for purposes of industrial policy is not unfounded; many member states of the Community have a record of frequent state intervention to influence the industrial structure of their economies. The opinions of the European Parliament⁷ and the Economic and Social Committee⁸ on the draft regulation also tend in

this direction. The article in question needs to be more tightly worded to prevent abuse of the exemption provisions for purposes of industrial policy.

More important, however, is the procedure. According to the draft, the same body would be responsible for assessing the effect of mergers on competition and considering possible overriding factors. There is a serious danger that the two aspects will not be kept clearly segregated – if a merger is desired because of an overriding aspect of importance to the Community, there will be no great incentive to look for impediments to competition. This would be comparable to the present situation in Germany, where the political intention to allow the proposed Daimler-MBB merger to go ahead has already been announced, whether or not it is prohibited by the Federal Cartels Office.

There is one important difference, however, in that the German procedure is in two stages. The decision as to the effects of a merger rests with the Federal Cartels Office or, if they become involved, the courts. Only if these have ruled against a merger, in other words have clearly ascertained that the proposal will harm competition, can the Minister for Economic Affairs nevertheless decide to grant approval on the basis of overriding considerations. Before doing so he must obtain the opinion of the Monopolies Commission. The duality of the procedure means that the Minister's political responsibility is clearly evident. In view of the quasi-judicial independence of the Federal Cartels Office, there is only a minor risk that it will be half-hearted in its examination of cases such as the Daimler-MBB merger because of the stated political intentions of the Minister. Despite the current case, experience with the German system of ministerial approval has generally been good.

It would therefore be desirable to copy this two-tier system at the Community level, although it would probably be extremely difficult to set up an independent European cartels office, which would probably require

⁷ Cf. European Parliament: Session Documents 1988-89, Series A, document A2-0197/88 of 30th September 1988.

⁸ Economic and Social Committee: Opinions and Reports, document CES(88) 588 of 2nd June 1988.

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an amendment to the EEC Treaty. There is no political will for such an amendment at present. A two-tier German-style system for approving exceptions – with a European cartels office, for example, to examine the competition aspect and the EC Commission to grant exemptions – may not be feasible, but ways of dividing responsibilities within the Commission as clearly as possible should be sought.

The Commission's draft regulation on European merger controls is not orientated sufficiently towards competition; the provision allowing the Commission to impose conditions even if competition is not impeded should be removed, the scope for granting exemptions narrowed and a two-tier procedure for dealing with exemptions introduced. In short, the scope for discretion that could be used for industrial policy purposes must be kept within narrower bounds.

Exclusivity

Since under current arrangements objections to proposed large-scale mergers can be lodged not only by the Commission but also by one or more national authorities, the companies concerned are burdened with considerable bureaucratic costs and legal uncertainty. For this reason alone it would make sense to give the Commission exclusive jurisdiction over European mergers above a certain size, with the consequence that a proposed merger that was acceptable under European law could not be prohibited under national law.

Another consideration also militates in favour of such an arrangement. Differences in national legislation lead to distortions in resource allocation on the European corporate market; hence in one country a poorly-run firm may not be a take-over candidate because the national cartels authority would not agree in view of the market shares involved, whereas a take-over would be possible in another country with less stringent merger regulations or no controls at all. It is therefore encouraging that the ministers responsible have agreed to work towards giving the Commission sole jurisdiction if European controls on concentrations are introduced.

For the same reasons it would be sensible to make European law apply not only to a particular group of so-called "concentrations having a Community dimension" but to all mergers, even if they are of only minor or regional importance. There are really no economic arguments against having a uniform European competition law with a central institution on the one hand and regional, decentralised bodies on the other, all deciding according to the same uniform law.

Such a system operates in Germany, for example, where the Federal Cartels Office and the Land authorities both work on the basis of the Law Prohibiting Restraints of Competition. Ultimately it is not the national frontier that is significant in economic terms but the geographically relevant market, which may be smaller or larger than the territory of a member state or that of the EC, as in the case of the world market. There is no possibility of introducing such a system at present, however, in view of the loss of sovereignty it would entail for member states.

Threshold for Referral

That being the case, proposed amalgamations that are to be subject to the European procedure must be distinguished from those that will remain under national jurisdiction. In the draft regulation this is done by stipulating that a concentration has a "Community dimension" where:

- "(a) the aggregate worldwide turnover of all the undertakings concerned is more than one thousand million ECU, and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than one hundred million ECU,

unless each of the undertakings concerned achieves more than three-quarters of its aggregate Community-wide turnover within one and the same member state" (Article 1 (2)).

The German and British governments, in particular, considered the threshold of ECU 1 billion as too low. Three arguments are advanced in this context: the large number of cases that would come under the proposed rule would overburden the Commission; with a threshold

Table 3
Concentrations¹ Involving at least One of the Thousand Largest Companies in the European Community

	1983/84	1984/85	1985/86	1986/87
Industry	85	92	108	171
Distribution	n.a.	21	10	21
Banking ²	n.a.	10	18	20
Insurance ²	n.a.	9	6	12
Total	n.a.	132	142	224

¹ Majority interests, including take-overs and mergers, in which the aggregate turnover of the undertakings concerned was at least ECU 1 billion.

² For banks, turnover corresponds to one-tenth of the aggregate assets of the banks involved and for insurance companies to total premium income.

Source: Commission of the European Communities: Seventeenth Report on Competition Policy, Brussels and Luxembourg 1988.

of ECU 1 billion, mergers that were not of truly Community-wide significance would also be subject to scrutiny; and the lack of a reference to competition criteria in the draft regulation would make it seem advisable to leave as few cases as possible to the Commission.

According to European Community statistics on mergers involving at least one of the thousand largest companies in the Community, the aggregate turnover of the merging companies was in excess of ECU 1 billion in 224 cases in 1986/87 (see Table 3). Take-overs in which the merged company had a turnover of less than ECU 100 million within the Community and mergers of purely national interest – in which the enterprises achieved more than three-quarters of their turnover within one and the same member state – have to be deducted in order to estimate the number of mergers that would come under the proposed Community controls. Mergers of purely national interest are likely to occur mainly in the services sector. On this basis, the number of mergers classified as having a Community dimension in accordance with the draft regulation can be put at between 100 and 150 a year, a substantial and no doubt rising number, the assessment of which would absorb considerable resources.

Although the outgoing Commissioner for competition repeatedly emphasised that probably only a few of the large number of notifiable mergers would be problematic and hence would need to be examined in detail, it is first necessary to determine which mergers give rise to problems, and to do so within the proposed time limit of one month, after which a further four months remain in which to decide the matter. If an institution is not in a position to examine all cases properly, there is a real danger that the appraisal will be superficial, in other words that mergers will simply be rubber-stamped. This danger could be lessened relatively easily by greatly expanding the staff of the Directorate-General for Competition over a fairly long transitional period.

The point at which a merger assumes a Community dimension is a controversial issue for which there are no objective criteria. If regulation under Community law is slanted distinctly in favour of competition, there is no reason why the threshold should not be at the relatively low level proposed by the Commission. Indeed, the EC mechanism would then also provide greater protection for competition in those countries that have not yet been able to introduce merger controls orientated clearly towards that objective. If the threshold were raised to ECU 10 billion, as the German and British governments have recently demanded, entire industries would be removed from the scope of the regulation.

Nor is a high threshold an effective means of curbing the effects of suspected tendencies on the part of the Commission with regard to industrial policy; indeed, it would be fatal if particularly large mergers could be carried out more easily under European law than small ones under national law. Hence a very high threshold would neither provide adequate protection for competition in Europe nor sufficiently standardise the rules in the take-over market.

Uniform Rules

The standardisation of the rules of the take-over market is a second, often neglected purpose of Community controls over mergers. The present situation leads to significant distortions in this important market, since decisions on corporate take-overs in the EC are influenced by different national regulations despite the fact that in many cases the relevant market already at least encompasses the EC, a trend that will become even more pronounced with the completion of the internal market.

Other regulations are also important here in addition to merger controls. The rules for take-over bids and the disclosure requirements for shareholdings differ very widely within the EC. Certain types of take-over bid are possible in some countries but not in others. For example, the attempt by the Italian industrialist Carlo Benedetti to take over Société Générale in Belgium would not have been possible in that form in other Community countries.⁹ Differences in accounting and taxation regulations also play a part. The allocational efficiency of this particularly important market in enterprises should be impaired less than in the past by differences in national regulations.

Conclusion

A regulation establishing prior European merger controls will be of tremendous importance for business expansion in the single internal market and its introduction is desirable. However, if it does not meet certain minimum requirements as described here, its approval should be postponed rather than an overhasty version becoming entrenched for years to come. The standardisation of conditions in the market for enterprises in the EC is important, but the maintenance of competition is even more important. Giving the Commission extensive powers over industrial policy would be too high a price to pay for achieving uniformity.

⁹ Since then the Commission has tabled a proposal for a directive on take-over bids.