Universität Zürich

European Economic Law

Lesson 11

Merger Control

Merger Control

- Why merger control?
  - Effective competition shall be preserved.
  - If cartels are prohibited, but mergers not, cartel goals (e.g. to raise prices) would be implemented by concentration strategies.
- Rules on merger only apply to external growth, not to internal growth.
- Dominant positions or monopolies may also arise from success on the market (i.e. efficiencies).

Merger Control

- See recitals 3 – 5 EC Merger Regulation (ECMR)

- Commissioner Joaquín Almunia:

"What is merger control for? In a nutshell, merger control means that companies cannot simply avoid competition by buying their competitors."

Merger Control

- Rules on merger control often are adopted at a later stage of competition law development (USA: 1914 control *a posteriori*, 1976 preventive control; Germany: 1973; Switzerland: 1995)

- This can be explained by the particularly interventionist character of merger control.

- Often politics keeps an eye on merger control by reserving (exceptional) decision-making power to the government (e.g. France, Germany, Switzerland).

Merger Control

- Europe: First merger regulation in 1989 (entered into force 1990).
- Before, a kind of merger control was practised by the ECJ on the basis of (then) Art. 82 and 81 EC.
  - ECJ – *Continental Can* (1973): Art. 82 EC
  - ECJ – *BAT and Reynolds* (1987): Art. 81 EC
- Today, the text in force is:
  - Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation =ECMR)

Merger Control

- Other important texts are:
  - Regulation 802/2004 (Implementing Regulation)
  - Commission Consolidated Jurisdictional Notice of 2008 (concept of concentration, joint ventures, community dimension, turnover thresholds)
  - Guidelines on the assessment of horizontal mergers of 2004
  - Guidelines on the assessment of non-horizontal mergers of 2008
  - Commission notice on remedies of 2008

Merger Control

- The leading principle of EC merger control is that of "one stop shop":
  - As opposed to Art. 101 and 102 TFEU, there is no common competence of the European Commission and the National Competition Authorities (NCA's) to apply the ECMR.
  - Only the European Commission is competent to apply the ECMR.
  - The ECMR is only applicable to mergers having a "community dimension" (dependant on specific turnover thresholds).

Merger Control

- National rules on merger control only apply to mergers without a "community dimension".
- see Art. 21 (2) and (3) ECMR

➔ Advantage of "one stop shop": Instead of filing merger notifications at 27 NCA's (30 including EEA), only one notification is needed in the EU/EEA.

Merger Control

In merger control we distinguish:

- **Jurisdictional issues** ("Aufgreifkriterien")

  Under which conditions a merger must be notified to the competition authority for authorisation?

  ➔ formal criteria

- **Substantive issues** ("Eingreifkriterien")

  Under which conditions the competition authority has to prohibit or allow a merger, if necessary with conditions and obligations?

  ➔ substantive criteria

Merger Control

- **Jurisdictional issues**
  1. Concentration
  2. Community dimension
  3. "German" clause; "Dutch" clause

- **Substantive issues**
  1. SIEC-test ("significant impediment to effective competition")
  2. Conditions and obligations
  3. Ancillary restraints
  4. Failing company defence

Jurisdictional issues

1. Concentration: Definition in Art. 3 ECMR

- merger
  - by absorption
  - by combination

- acquisition of control
  - share deal (50% + 1; or less, upon circumstances, e.g. when shares are widely dispersed)
  - asset deal
  - contract conferring voting rights

- full-function joint venture

Jurisdictional issues

2. Community dimension: Definition in Art. 1 (2) and (3) ECMR

Does the following merger have a community dimension?

<u>Enterprise A:</u> turnover EUR 2 billion (EUR 100 million in F, 100 million in D, 100 million in I, the remainder outside EU)

<u>Enterprise B:</u> turnover EUR 2 billion (EUR 100 million in F, 100 million in D, 100 million in I, the remainder outside EU)

3. "German" clause, "Dutch" clause

- Art. 9 ECMR ("German" clause)
  - referral of a merger *with* community dimension to a NCA, if national markets are concerned which are "distinct".
- Art. 22 ECMR ("Dutch" clause)
  - referral of a merger *without* community dimension to the European Commission, if trade between Member States is affected.
  - This clause has been especially important for Member States without a national merger control regime (today only Luxembourg).

Substantive issues

1. SIEC-test ("significant impediment to effective competition")

- see Art. 2 (3) ECMR
- Until 1st may 2004, there was a dominant position test in EC law.
- Why the new test? Under the old law, it was not clear to what extent dangers to effective competition in oligopolistic markets were covered by the dominant position test (e.g. 3-to-2-mergers).
- convergence with the US SLC-test ("substantial lessening of competition")
- The creation or strengthening of a dominant position remains an example for a SIEC.

Substantive issues

Appraisal of mergers (Art. 2 ECMR)

- actual and potential competition
- economic and financial power
- alternatives to suppliers and customers
- barriers to entry (legal and others)
- development of technical and economic progress
- see other criteria in the context of Art. 102 TFEU (dominance)

Substantive issues

Three types of mergers

- horizontal mergers
  - between competitors
- vertical mergers
  - between undertakings operating at different levels of the production or distribution chain (upstream and downstream, e.g. between manufacturer and distributor)
- conglomerate mergers
  - between undertakings standing neither in a horizontal nor in a vertical relationship (e.g. suppliers of complementary products)

Horizontal Mergers

- The impact of the merger on market shares and concentration in these markets is at the heart of competition law analysis.

➔ increase in **market share**

see Art. 102 TFEU: presumption of dominance ≥ 50 %

➔ increase of **concentration level**

Herfindahl-Hirschman Index (HHI): sum of the squares of the individual market shares of all undertakings. Normally no competition concern ("safe-harbour") if post-merger:

- HHI < 1000
- HHI between 1000 and 2000; delta HHI < 250
- HHI ≥ 2000; delta HHI < 150

Horizontal Mergers

- coordinated effects
  - collective dominant position
  - e.g. raising prices without agreement or concerted practice (*tacit collusion*)
  - *Airtours* criteria: market transparency, incentive to comply with the common strategy, no risk from competitors or consumers

- uncoordinated ("unilateral") effects
  - elimination of competitive restraints
  - see recital 25 ECMR (the SIEC-test especially extends to this effect)

Vertical Mergers

- ➢ The integration of activities on upstream or downstream markets may create efficiencies to the benefit of consumers.
(see Craig/de Búrca, p. 1067-68)

➔ Many vertical mergers are pro-competitive.

- ➢ Concern: input and customers foreclosure
(see Art. 101 TFEU – Vertical Agreements)

Substantive issues

Conglomerate Mergers

- ➢ The integration of activities on neighbouring markets may create efficiencies to the benefit of consumers.

- ➔ Most conglomerate mergers are pro-competitive.

- ➢ Concern: risk of leveraging
  - By tying or bundling different products, a dominant position may be transferred to other markets.

Substantive issues

Efficiency Defence

(Horizontal Merger Guidelines, n. 76-88, Non-horizontal Merger Guidelines, *passim*)

The efficiency defence is accepted in European law. Conditions:

- Efficiencies have to be substantial and timely, and they have to benefit consumers. Consumers must not be worse off as a result of the merger.
- Efficiencies have to be merger-specific (causal link between merger and efficiencies).
- Efficiencies have to be verifiable.

2. Conditions and obligations

Conditions

Requirements imposed by the Commission which need to be fully complied with by the parties concerned, in order to allow the Commission to declare an otherwise incompatible concentration compatible with the common market.

Obligations

Requirements the Commission imposes on undertakings in order to be able to declare a notified concentration compatible with the common market (*Conditions*). The breach of such obligations may result in the revocation of the Commission's decision.

European Commission, Glossary

➔ see Art. 6 and 8 (2) ECMR

Substantive issues

3. Ancillary restraints

Art. 6 (1) b and 8 (2) ECMR

"A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration."

➔ e.g. a non-competition clause imposed by the buyer of an enterprise on the vendor for a transitional period of time

➔ see the Commission Notice on restrictions directly related and necessary to concentrations of 2005

Substantive issues

4. Failing firm defence

If one of the parties is a failing firm, there is no causal link between a merger and a SIEC if the competitive structure of the market would deteriorate anyway.

Substantive issues

The case law and the European Commission's Horizontal Merger Guidelines (n. 90) specify the following conditions for the failing firm defence:

1. The allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking.
2. There is no less anti-competitive alternative purchase than the notified merger (e.g. a "white knight").
3. In the absence of a merger, the assets of the failing firm would inevitably exit the market (e.g. because the market share of the failing firm would accrue to the other merging party).

Procedure

- **When to notify a merger?**
  - The ECMR 2004 does not contain a deadline for the notification of a merger agreement (under previous law, the deadline was one week).
  - In any event, the merger may not be implemented before authorisation.
- **Phase I: Initial Examination**
  - 25 – 35 working days; in case of serious doubts as regards the compatibility of the merger project:
- **Phase II: In-depth Examination**
  - 90 – 125 working days; if the time limits are not respected, there is a fiction of authorization (Art. 10 (6) ECMR).

Procedure

- **Final decision of the Commission, Art. 8 ECMR**
  - approval
  - approval with conditions and/or obligations
    (preference for structural remedies over behavioural ones)
  - prohibition
  - divestiture in case of illegal implementation of the merger
  - revocation of a clearance decision in case of incorrect information or breach of obligation
- **Appeal to the General Court** (two months from the date of the decision)
- **Review by the ECJ**