

EU MERGER CONTROL AND THE PUBLIC INTEREST

A LEGAL MAPPING REPORT

BY THE LENDÜLET-HPOPs RESEARCH GROUP IN SPRING 2016

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Introduction

It is the European Commission's exclusive competence to scrutinise concentrations under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EMCR)¹ having a Community dimension. The threshold of Community dimension is rather high and therefore many concentrations fall outside the scope (Community dimension) of EU merger control.

Lee McGowan and Michelle Cini were the first academics who recognised the importance of merger control as an example of economic regulation, and therefore, as an interventionist tool used by governments to structure the operation of markets.²

In this report, first, rules of the ECMR will be scrutinised, later, the EU rules applicable to concentrations falling outside the scope of Union merger control will be touched upon.

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p.1-22.

² Lee McGowan- Michelle Cini: Discretion and Politicization in EU Competition Policy: The Case of Merger Control, Governance Vol.12, No.2., April 1999, pp.176-200.

1 The ECMR

Community (Union) dimension defines its scope based on the worldwide, Community and national turnover of concentrating companies.³ In smaller markets, companies acting locally usually do not reach this high threshold. Besides this, under the so-called ‘two-thirds rule’ cases are left within the competence of national competition authorities where all the undertakings concerned achieve two thirds of their turnover in a single Member State⁴. Under Article 21 (2) and (3) ECMR the Commission shall have sole jurisdiction to take decisions provided for in the Merger Regulation and no Member State shall apply its own national legislation on competition to any concentration that has a Community dimension. This so-called one-stop-shop rule renders the notification procedure easier and quicker. ‘EUMR’s one-stop-shop principle has significantly reduced the burden on business and on the competition authorities’. ‘Centralised enforcement had also provided greater predictability for businesses and militated against contradictory decisions being reached by different authorities.’⁵

The jurisdictional thresholds are also complemented by a case referral system that allows re-allocation of individual cases when the test fails as a proxy for the European or cross-border dimension of a merger. A distinction has to be made between pre-notification and post-notification referrals. Originally the ECMR provided only for rules of post-notification, where the

³ ECMR Article 1:

1. Without prejudice to Article 4 (5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

⁴ The two-thirds rule is a corrective mechanism for the crudeness of the turnover threshold.

⁵ Review of the Balance of Competence between the United Kingdom and the European Union. Competition and Consumer Policy, 2014, <https://www.gov.uk/government/consultations/review-of-uk-and-eu-balance-of-competences-call-for-evidence-on-competition-and-consumer-policy>

already notified transaction was re-allocated between authorities. (In case of the Dutch clause (Article 22) from the national authority to the Commission, in cases of the German (Article 9) and English clauses (Article from the Commission to the national authority). Pre-notification request for referral made by the notifying parties was enacted only in 2004 by Regulation (Article 4 (4) and Article 4 (5)).

Under the Dutch clause, Member States or the notifying parties refer the case for scrutiny to the Commission. This possibility is only briefly explained in this report as it does not allow for more room for the Member States to pursue national interest, on the contrary, Member States voluntarily transfer the exercise of their retained competences to the Commission.

1.1 The Dutch Clause

Referral to the Commission by the Member State under Article 22 is not very frequent. This provision was enacted in the ECMR originally at the request of those Member States which did not have a national merger control regime and the provision is referred to as the 'Dutch clause'. Since its introduction, almost all Member States (except for Luxembourg) enacted its own national merger control law. Since 2004, Member States have referred only 13 mergers to the Commission under Article 22. It is a common pattern that Member States join the referring MS's request.⁶ The referral system was evaluated by the Commission in 2009 and it concluded that 'a significant number of cross-border cases remain subject to reviews in three or more Member States (in 2007, 100 cases resulted in more than 360 investigations by NCAs). In addition, available data suggested that around 6% of the cases notified in at least three Member States gave rise to competition concerns.'⁷ In the White Paper the Commission proposed to streamline the case referral system to render the procedure less cumbersome and time-consuming. Most of the cases referred under Article 22 ECMR concerned either EEA-wide markets or multiple affected national markets. In post notification referrals, the Commission does not have the competence to scrutinise the merger for the entire EEA, it investigates the effects of the transaction in the respective territories of the Member States asking for the referral or explicitly joining it. Cases that require cross-border remedies imposed by the Commission are most appropriate for the Commission's jurisdiction.⁸

⁶ White Paper: Towards a more effective EU merger control, COM (2014) 449 final, Commission Staff Working Document Accompanying the document White Paper: Towards more effective EU merger control, Brussels, 9.7.2014, SWD (2014) 221 final.

⁷ Commission Staff Working Document Accompanying the document White Paper: Towards more effective EU merger control, Brussels, 9.7.2014, SWD (2014) 221 final, para 128.

⁸ para 142,

Under Article 4(5) ECRM the pre-notification referral to the Commission by the parties is possible. This provision that provides for the possibility to ask for the referral of a case to the Commission before the official notification is made turned out to be successful. In these cases the merger does not meet the Community dimension threshold of the ECRM, but it has to be notified in at least three Member States. If no Member State vetoes the referral, the notification has to be submitted to the Commission. 'Since its introduction in 2004, a total of 269 requests for pre notification referral to the Commission were made; roughly 26 a year on average. This represents around 8% of all cases notified to the Commission and several of these were significant cases which posed competition problems or allowed the Commission to look into nascent markets. Out of these 269 cases, only 6 were vetoed by a Member State and therefore not referred to the Commission.'⁹ The pre-notification referral system shows that although Member States are not ready to lower the threshold of the Community dimension, in the majority of cases are willing to accept the jurisdiction of the Commission if notifying parties request it.

1.2 The German Clause

Under Article 9 referrals (so-called 'German clause'), Member States may request the Commission to refer a case having a Community dimension to be decided under national merger control law.

Recital 11 of the ECRM recognises that 'the rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the 'one-stop shop' principle.'

Under Article 9 (1) the Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

Under Article 9 (2) within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

Cableuropa and others v Commission (Case T-346/02 – T-347/02) [2003] ECR II-4259

⁹ para 4.1.1.1, point 1.

(a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market¹⁰, or

(b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in accordance with this Regulation; or

(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

Under Article 9 (8) the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

The distinction between Article 9 (a) and (b) cases are obvious. If the Member State cannot provide evidence to convince the Commission that the concentration affects competition in a distinct market which does not constitute a substantial part of the internal market (narrow geographic scope), then the Commission is not under an obligation to refer whole or part of the case relating to the distinct market.¹¹

¹⁰ T-346/02 and T-347/02 *Cableuropa and others v Commission* [2003] ECR II-4259., para 114-116. The General Court rules that the distinct market is the same as the relevant market.

¹¹ Article 9 (b) was applied in the following cases. M.2446, *Govia/Connex South Central*, where the operation affected competition on specific railway routes in the London/Gatwick-Brighton area in the United Kingdom; in M.2730, *Connex/DNVBVG*, where the transaction affected competition in local public transport services in the

The German clause is a vehicle for the Commission to refer those cases to Member States that raise specific concerns or affect regional and local markets.

Notwithstanding the turnover thresholds, there are cases in which firms have much higher markets shares on some local markets, thereby affecting the local/regional market more than the rest of the relevant market.¹²

The General Court ruled in 2003 that Article 9 references should be made only in exceptional circumstances.¹³ The Court relied on the declaration of the Council and the Commission after the adoption of the ECMR:

[...] when a specific market represents a substantial part of the common market, the referral procedure provided for in Article 9 should only be applied in exceptional cases. There are indeed grounds for taking as a basis the principle that a concentration which creates or reinforces a dominant position in a substantial part of the common market must be declared incompatible with the common market. The Council and the Commission consider that such an application of Article 9 should be confined to cases in which the interests in respect of competition of the Member State concerned could not be adequately protected in any other way.¹⁴

As the referral may give rise to contradictory decisions and acts against the one-stop-shop principle, the Commission conducts a thorough analysis whether to refer part of the case to a national competition authority. Merging parties are concerned about the referral and often view the possible referral as undesirable, because of the risk to fragment the examination of the concentration and leading to the loss of legal certainty.¹⁵ Notwithstanding

Riesa area (Saxony, Germany); and in M. 3130, Arla Foods/Express Diaries, where the transaction affected competition in the market for the supply of bottled milk to doorstep deliverers in the London, Yorkshire and Lancashire regions of the United Kingdom. For the purpose of defining the notion of a non-substantial part of the common market, some guidance can also be found in the case-law relating to the application of Article 82 of EC Treaty. In that context, the Court of Justice has articulated quite a broad notion of what may constitute a substantial part of the common market, resorting inter alia to empirical evidence. In the case-law there can be found, for instance, indications essentially based on practical criteria such as ‘the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers’, see Case 40/73, Suiker Unie v Commission, [1975] ECR 1663. See also Case C-179/90, Porto di Genova [1991] ECR 5889, where the Port of Genova was considered as constituting a substantial part of the common market. In its case-law the Court has also stated that a series of separate markets may be regarded as together constituting a substantial part of the common market. See, for example, Case C-323/93, Centre d’insémination de la Crespelle [1994] ECR I-5077, paragraph 17, where the Court stated ‘In this case, by making the operation of the insemination centres subject to authorization and providing that each centre should have the exclusive right to serve a defined area, the national legislation granted those centres exclusive rights. By thus establishing, in favour of those undertakings, a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, those national provisions create a dominant position, within the meaning of Article 86 of the Treaty, in a substantial part of the common market’. Case referral notice footnote 34.

¹² M.180, Steetley plc/Tarmac. Other cases from the construction industry: M.1779, Anglo-American/Tarmac, M.1030, Redland/Lefarge

¹³ T-119/02, Royal Philips Electronics v Commission [2003] ECR II-1433., para 345.

¹⁴ Merger control law in the European Union, European Commission, Brussels-Luxembourg, 1998, p. 54.

¹⁵ T-119/02, Royal Philip Electronics v Commission [2003] ECR II-1433

the cautious approach of the Court, since the entry into force of the ECMR, 105 requests were made from national competition authorities. In 43 cases the Commission referred part of the cases to national competition authorities, in 41 cases the merger was fully referred and in only 12 cases did the Commission reject the request for referral.¹⁶ In its Notice on case referral in respect of concentrations¹⁷ the Commission sets out in more detail the conditions for accepting a request.

Practice shows that there are sectors (mostly liberalised) where the Commission is unwilling to refer a case to the national competition authorities. In the telecom or energy sectors the Commission considers that it is better placed to deal with a case given its extensive experience in assessing cases in this sector and the need to ensure consistency across the EEA.¹⁸ Sometimes these affects are not purely national or sub-national (cross-border mergers or spill-over effects) or if they are, the Commission has experience to deal with national markets in these sectors.¹⁹ Another factor taken into account by the Commission is whether coordinated investigation or remedial actions is needed in the specific case, favouring the jurisdiction of the Commission. The Commission prefers full referral instead of a partial one to avoid the risk of conflicting decisions and enhance administrative efficiency.

1.3 The English Clause

Under Article 21(4) (the so-called English clause) Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the ECMR and compatible with the general principles and other provisions of Community law. The underlying requirement is that national provisions are different (other than those connected with competition) those taken into consideration by the Commission under the ECMR.²⁰

¹⁶ Merger statistics available on the Commission's website. http://ec.europa.eu/competition/mergers/overview_en.html

¹⁷ OJ C 56,5.3.2005.

¹⁸ see the M.5549, EDF/Segebel merger in which the request was refused. Faull & Nikpay mention that the refusal was made amid seemingly protectionist concerns expressly voiced by the Belgian ministry for the economy. Faull and Nikpay: *The EU Law of Competition*, Oxford University Press, 2014, p. 598

¹⁹ M.7612, Hutchison 3G UK/Telefonica UK, M.7499 Altice/PT Portugal, M.7421. Orange/Jazztel

²⁰ According to Article 2 (2) In making this appraisal, the Commission shall take into account:

- (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential 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.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interest. 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. The Commission has interpreted Article 21 as not allowing the approval of an arbitrary discrimination or a disguised restriction to the freedom of establishment or of the free movement of capital.²¹ It does not reserve for the Member State's authority to authorise a merger which the Commission has already prohibited.

In order to ensure the effet utile of Article 21(4), second indent, of the Merger Regulation, read in conjunction with Article 10 EC (obligation of loyal cooperation), that provision should apply whenever there are reasonable doubts as to whether national measures, which are liable to affect and, in particular, prohibit, submit to conditions or prejudice a concentration with a Community dimension genuinely aim to protect a 'recognised interest.'²²

Member State action to protect the recognised interests (media plurality, public security and prudential rules) can be adopted by the Member States without sending a notification to the Commission as far as the action is compatible with the general principles of Union law (non-discrimination, proportionality, no restriction on fundamental freedoms). Member States can adopt stricter rules compared with the Commission's decision (Member State prohibition or additional conditions are attached), but cannot authorise the merger prohibited by the Commission.

Public security as a derogation is available to the Member States to exempt their measures restricting the free movement of goods and capital alike. Drawing from the practice of internal market law jurisprudence, it is suggested that the concept of public security includes internal and external military security and also the security of supply in relation to a product that is paramount importance for Member States, for example energy and telecommunications.

Commission v Belgium (Case C-503/99) [2002] ECR I-4809; Commission v Spain (Case C-463/00) [2003] ECR I-4581

(2.) A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

(3.) A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

²¹see below the decision against Spain in the E.ON/Endesa takeover

²²M.4197, E.ON/Endesa, para 27.

The requirements of public security, as a derogation from the fundamental principles of free movement of capital and freedom of establishment, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.²³

With regard to the energy sector, the Court of Justice specified that measures necessary to ensure a minimum level of energy supplies in the event of a crisis may fall under the notion of public security²⁴. In general, either appropriate regulation of general application or measures permitting an adequate specific reaction by the public authorities to forestall a given threat to public security will be sufficient to safeguard this interest and will, provided that such measures are proportionate and nondiscriminatory, be less restrictive than the establishment of prior conditions as to ownership of relevant undertakings.²⁵

In practice the English clause has been relied on only in few cases.

Media plurality was the concern of the United Kingdom to scrutinise a merger (Newspaper Publishing²⁶) falling into Community dimension and cleared by the Commission. Member States usually consider that media ownership may require a different approach from that applied in competition law. In the UK, the Secretary of State can intervene in media cases on public interest grounds. Intervention by the Member State has to comply with the EU general principle of proportionality.²⁷ Media plurality touches upon the legitimate interest to maintain diversified sources of information for the sake of plurality of opinion and multiplicity of views.

Public security was relied on again by the United Kingdom in merger Thomson CSF/Racal (II)²⁸ between firms active on the defence electronics markets. In GE/Smiths Group the Commission on the one hand approved GE's proposed acquisition of Smiths Group's aerospace division, but the UK Secretary of State requested undertakings from the parties relating to the protection of sensitive information. Public security was relied on again by the United Kingdom in merger Thomson CSF/Racal (II)²⁹ between firms active on the defence electronics markets. In GE/Smiths Group the Commission on the one hand approved GE's proposed acquisition of Smiths Group's aerospace division, but the UK Secretary of State requested undertakings from the parties relating to the protection of

²³ C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraph 47, C-483/99, *Commission v France*, [2002] ECR I-4781, paragraph 48, and C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraph 72.

²⁴ C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraphs 46 and 48, and C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 71 and 73. See also 72/83 *Campus Oil* [1984] ECR 2727, paragraphs 34 and following.

²⁵ C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraph 49.

²⁶ Case M.423, *Newspaper Publishing*. The UK regulatory authorities were concerned to maintain product differentiation. The proposed transaction involved issues such as the accurate presentation of news and free expression of opinion. Under the UK Fair Trading Act consent was required from the regulatory authority.

²⁷ Alison Jones- Brenda Sufrin: *EU Competition Law*, Oxford University Press, 2014, p.1165

²⁸ Case M.1858

²⁹ Case M.1858

sensitive information.

Prudential rules, specifically UK insurance legislation was applied in Sun Alliance/Royal Insurance.³⁰ Borges highlighted that prudential rules typically relate to the supervision of undertakings in the financial sector and provide for supervision of certain aspects (including ownership and control, transparency) connected to companies in that field.³¹ In its interpretative statements the Commission refers to the 'surveillance of banks, stockbroking firms and insurance companies' in respect of 'the good repute of individuals, the honesty of transactions and the rules of solvency.' Capital adequacy is another possible standard for prudential supervision and the Commission has equally mentioned, in Sun Alliance/Royal Insurance 'criteria of sound and proper management'. The issue of whether 'prudential rules' extend beyond the financial sector, where the underlying aims are the protection of investors or policyholders, to other companies (where the relevant interests may be shareholder or consumer protection) is uncertain, although this has been described as an area where the Commission would like to restrict Member State intervention. Other prudential concerns that might be affected by concentrations are capital depletion, as a result of the merger, or transparency of a group's structure. The latter, as seen above, was rejected in BSCH/Champalimaud as a valid prudential motive. Borges finally noted that the ongoing process of harmonization of prudential rules in the Community, which aims at guaranteeing a minimum degree of uniformity, also bears on this category of legitimate interest.³²

Other interests can be communicated to and approved by the Commission. Altogether, Article 21(4) limits the Member States autonomy considerably, because the Commission is reluctant to recognise a wide range of interests as public interests, so we cannot find many positive Commission decisions under Article 21 (4). The Commission has consistently applied the Court's case-law on the free movement of capital and freedom of establishment to reject the recognition of interests relied on by the Member States. Only justified exceptions to the free movement of capital, freedom of establishment can be considered as acceptable under Article 21 (4) ECMR. Jones and Sufrin cite the legitimate interest of the UK water industry in case *Lyonnaise des Eaux SA/Northumbrian Water Group*³³. In this case the maintenance of sufficient number of independent providers was the legitimate goal recognised by the Commission.³⁴

Essential interests of security can be invoked outside the ambit of the ECMR by relying on Article 346 TFEU which provides in paragraph (1) (b) that the Treaties shall not preclude the application by a Member State of measures it considers necessary for the protection of the essential interests of its security which are

³⁰ M.759

³¹ Gançalo Machado Borges: Legitimate Interests of Member States in EC Merger Law, 2003 (9) European Public Law 345-358. p.351.

³² Gançalo Machado Borges: Legitimate Interests of Member States in EC Merger Law, 2003 (9) European Public Law 345-358., p.351. See also M.2054, *Secil/Holderbank/Cimpor*

³³ M.567

³⁴ Alison Jones-Brenda Sufrin: EU Competition Law, Oxford University Press, 2014, p. 1165.

connected with the production of or trade in arms, munitions and war material.³⁵ In these cases the Commission assesses only the non-military aspects of the merger and ensures that measures will be taken by the Member State to avoid spill-over effects on the non-military products involved in the merger. In *British Aerospace/GEC Marconi*³⁶ the UK Government instructed the notifying party not to notify information which relates to the military aspects of the operation (trade in arms, munitions and war material). In the absence of instruction from a Member State, the merger between undertakings active in the defence industry will be assessed by the Commission under the normal ECMR procedure.

Other interests not communicated to or not approved by the Commission cannot be taken into account by the Member States. In *BSCH/A.Champalimaud*³⁷ Portugal intended to block the acquisition of several Portuguese banks and insurance companies by Spanish Banco Santander Central Hispano (BSCH). The Commission came to the conclusion in its decision that the opposition to the acquisition is not legitimate under the ECMR, because it is neither based on prudential rules nor on other legitimate interests communicated to the Commission. The Portuguese Finance Minister's decision on the suspension of voting rights had to be revoked within a very tight time limit. The protection of national interests or strategic sectors is not accepted as a legitimate interest in the practice of the Commission. The Commission held that the decision by the Portuguese government vetoing the proposed acquisition, was an unjustified reaction to the parties' failure to notify that acquisition to the supervisory authority for the insurance sector, as required by Portuguese legislation. The Commission stated that, in accordance with the principle of proportionality, Member State measures must limit themselves to 'the minimum of action necessary to ensure protection of the legitimate interest in question' and suggested the use of injunctions or the suspension of voting rights as less restrictive means of obtaining compliance with the notification.³⁸

In *Cimpor*³⁹ the Commission decided that the public interests in reinforcing national entrepreneurial capacity and the efficiency of the productive issue

³⁵ Recital 19 to the ECMR further clarifies that the regulation does not affect a Member State's ability to act under Article 346.

³⁶ M.1438. See also M.820, *British Aerospace/Lagardère SCA*, M.528, where certain of the products manufactured by the parties also had non-military applications (dual use products). *British Aerospace/VSEL*. British Aerospace is principally engaged in the design, development and manufacture of defence equipment and civil aircraft. VSEL is principally engaged in the design, development and production of submarines, surface warships and armaments. M.1258- *GEC Marconi/Alenia*, however in M.1797, *Saab/Censius*, M.1413, *Thomson-CSF/Racal Electronics*, the Commission has dealt with all the aspects of the merger.

³⁷ M.1616

³⁸ Discussed by Borges: *Legitimate Interests of Member States in EC Merger Law*, 2003 (9) *European Public Law* 345-358.

³⁹ M.2054, *Secil/Holderbank/Cimpor*

could not be considered legitimate. Cimpor was a former state-owned enterprise and the Portuguese government had a remaining 12.7% of the firm's share capital. The Commission stated that the two decisions by the Portuguese Minister of Finance denying authorization for the acquisition of more than 10% of Cimpor's share capital constituted 'restrictions on freedom of establishment and free movement of capital' and could not be considered justified by reference to any ordre public reasons as construed in the case-law of the ECJ.

In *EdF/London Electricity*⁴⁰ the French wholly state-owned group acquired London Electricity. The Commission concluded that there is no need to make a derogation as requested by the UK, because the national energy regulator concerns the application of regulatory provisions governing the electricity industry and these measures are not precluded by the ECMR. The Regulation does not, however, preclude the application by a Member State of regulatory provisions under its national law governing the industry in question, in so far as such application is aimed not at the concentration itself but at the conduct of undertakings on the market.⁴¹ The proposed modifications ensured the effective continuation of the public electricity supply companies' existing obligations after the concentration.

⁴⁰ M.1346

⁴¹ para 11.

2 Commission action against Member States violating its exclusivity

Under Article 21 (2) and (3) ECMR, subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in the Regulation and no Member State shall apply its national legislation on competition to any concentration that has a Community dimension. Article 21 (4) is violated in case the Member State subjects a merger having a Community dimension to conditions base in national law (except for media plurality, public security and prudential reasons, discussed above). From a procedural law point of view, Member States breach their communication and stand-still obligation, from a substantive law aspect they are not allowed to impose any conditions or restriction to a merger in the competence of the Commission.

Portuguese Republic v Commission (C-42/01) [2004] ECR I-6079

The Commission can adopt decisions establishing the violation under the ECMR and in case of non-compliance launch infringement proceedings against Member State's violating its exclusivity. The Commission is entitled to adopt a decision even if no notification was made by the Member State on its national interests.⁴²

In these cases the Commission invites the Member State to submit its reasons, and adopts its decision. Non-compliant Member States face the lengthy infringement procedure before the Court under the Article 258 procedure. In the jurisprudence the E.ON/Endesa merger and the Albertis/Autostrade mergers are important in this regard and merits deeper examination.

2.1 The E.ON/Endesa merger

The Spanish Energy Regulator blocked the E.ON/Endesa merger by imposing unlawful conditions to a proposed merger that has already been cleared by the Commission.⁴³ E.ON is a company constituted under German law that has made a competing offer with Spanish company Gas Natural for the takeover of Endesa, the Spanish Electricity operator. E.ON launched its offer over Endesa on 21 February 2006. However, a few days after the announcement by E.ON of a public bid over Endesa, the Spanish Council of Ministers adopted a new urgent legislative measure, the "Royal Decree", increasing the supervisory powers of the Spanish Energy

⁴² C-42/01 Portuguese Republic v Commission [2004] ECR I-6079.

⁴³ M.4110

Regulator. Pursuant to this Royal Decree, the acquisition by any company of more than 10% of the share capital, or any other participation conferring significant influence, in a company (directly or indirectly) active in a regulated sector or in certain other activities has to be previously approved by the Regulator.

On 26 September 2006, the Commission adopted a decision under Article 21 ECMR by which it declared that the decision of the Spanish Energy Regulator of 27th July 2006, subjecting E.ON's bid for Endesa to a number of conditions breached Article 21 of the EC Merger Regulation.⁴⁴ On 18 October 2006 the Commission has opened its infringement procedure against Spain.

The Commission considered that the modified conditions imposed by the Spanish Minister of Industry, Tourism and Trade requiring that:

Endesa maintains its brand for a five years period.

the companies owning electricity assets outside mainland Spain are kept within the Endesa Group for a period of 5 years.

Endesa's power plants using domestic coal continue to use such an energy source as foreseen in the national mining plans.

E.ON does not adopt strategic decisions, regarding Endesa and affecting security of supply, contrary to the Spanish legal order.

are incompatible the EC Treaty's rules on free movement of capital (Article 56) and on freedom of establishment (Article 43). The condition on the use of domestic coal is also incompatible with the EC Treaty's rules on free movement of goods (Articles 28).⁴⁵

The violation of procedural law obligation does not deprive the Commission of its power to assess the conditions imposed by the Member State to establish whether they are compatible with EC law.

Commission v Belgium (Case C-503/99) [2002] ECR I-4809; Commission v. France (Case C-483/99) [2002] ECR I-4781; Commission v Spain (Case C-463/00) [2003] ECR I-4581

In the Spanish case the Commission has emphasised that public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.⁴⁶

⁴⁴ IP/06/1265

⁴⁵ IP/06/1853

⁴⁶ Case C-503/99 Commission v Belgium [2002] ECR I-4809, paragraph 47, C-483/99, Commission v France, [2002] ECR I-4781, paragraph 48, and Case C-463/00 Commission v Spain [2003] ECR I-4581, paragraph 72.

Commission v Belgium (Case C-503/99) [2002] ECR I-4809; Commission v Spain (Case C-463/00) [2003] ECR I-4581; Campus Oil (Case 72/83) [1984] ECR 2727

With specific regard to the energy sector, the Court of Justice noted that measures necessary to ensure a minimum level of energy supplies in the event of a crisis may fall under the notion of public security.⁴⁷

Commission v Belgium (Case C-503/99) [2002] ECR I-4809

In general, either appropriate regulation of general application or measures permitting an adequate specific reaction by the public authorities to forestall a given threat to public security will be sufficient to safeguard this interest and will, if such measures are proportionate and non-discriminatory, be less restrictive than the establishment of prior conditions as to ownership of relevant undertakings.⁴⁸

2.1.1 Corporate requirement

By the first condition, Spain required E.ON (a) to maintain Endesa as the parent company of its group for a period of 10 years, (b) to maintain the companies of Endesa group as they stand now (i.e. without merging them with any company of E.ON's group or reorganising the structure of Endesa's group); and (c) to keep Endesa's registered office and board of directors in Spain. The Commission considered that these requirements amount to a restriction of the free movement of capital and freedom of establishment and reiterated that these restrictions are prohibited even if of limited scope or minor importance. The Commission has rejected as unsubstantiated the Spanish argument that if Endesa becomes the subsidiary of E.ON may create risks or negative effects for the public interest regarding security of supply. It has pointed out that Community regulation in effect at that time provided for mechanisms to protect security of supply. Thus, the Commission has suspected, that in the absence of any objective justification to impose the corporate requirements established by CNE's decision, it appears that these requirements simply aim at ensuring, for economic policy reasons, that Endesa's headquarters and decision making centres remain within the Spanish territory and are not transferred to another Member State. Such requirements constitute a means of arbitrary discrimination or a disguised restriction to the free movement of capital and freedom of establishment.⁴⁹

⁴⁷ Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraphs 46 and 48, and Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 71 and 73. See also Case 72/83 *Campus Oil* [1984] ECR 2727, paragraphs 34 and following.

⁴⁸ Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraph 49.

⁴⁹ para 58.

2.1.2 Financial and investment requirements

CNE imposed on E.ON a number of financial and investment requirements. The financial requirements: (i) impose on Endesa the obligation to maintain a certain debt service ratio; and (ii) allow the companies of Endesa's group active in regulated sectors or holding what are described as strategic assets to distribute dividends only if the earnings they generate are sufficient to cover their planned investment and the financial debt amortization and expenses.

The investment requirements concern the realisation by E.ON of a number of investments related to electricity and natural gas activities and what are described as strategic assets. In particular, CNE imposed on E.ON the obligation to maintain the investments included in Endesa's investment plans. The Commission considered these requirements as discriminatory because Endesa was not subject to such obligations and the regulatory authority would not have the power to impose such requirements on other. The conditions were found unnecessary and disproportionate for the protection of public security and of security of supply. The reporting requirement on future investments, requirement concerning the life of power plants and supply of gas, concerning the disposal of assets and the transfer of management were found be discriminatory, unjustified and disproportionate. The Commission viewed these requirements to be motivated by energy policy considerations, the need to keep nuclear plants under the control of a Spanish company, due to what is described as their strategic importance for the country. The considerations invoked by Spain could have been addressed by general sectoral measures less restrictive. The condition on the disposal of power plants using domestic coal violates the free movement of goods.

In Case Commission v Spain⁵⁰ the Court declared that by not withdrawing the conditions attached to the concentration Spain has violated its obligations.

Commission of the European Communities v Kingdom of Spain (Case C-196/07) [2008] ECR I-41

Despite the victory at the Court, in the meanwhile the transaction was modified. In late January 2007, the Spanish stock market regulator lifted the suspension on both the Gas Natural and E.ON bids. Nevertheless, in April 2007, E.ON announced the withdrawal of its bid for Endesa. During the suspension of the bids, the Italian energy firm Enel and the Spanish construction firm Acciona had built up stakes in Endesa of 25 and 21 % respectively and themselves announced a bid for Endesa. Before so doing they had reached a friendly agreement with E.ON to split up Endesa's assets. The Spanish regulator, CNE, has, however, imposed conditions upon the bid, with the right to veto strategic decisions which might be contrary to Spain's national interests.

⁵⁰ C-196/07 [2008] ECR I-41.

Harker notes that "The Endesa saga would not be complete without commenting on E.ON's position as a "national champion". Accusations have been made against Germany that it has pursued a national champion policy, since E.ON's strong market position in Germany - and hence its ability to stalk other smaller European energy firms - resulted from a merger with Ruhrgas. The concentration was initially blocked by the German Bundeskartellamt (BKA), but cleared after the intervention of German government. The Spanish government, here, was arguably intervening in order to facilitate a domestic merger and pursue essentially the same policy.

What is abundantly clear from this case (and others) is that while the Commission has the formal powers to order the suspension of national measures likely to frustrate a transborder merger, in reality Member States have the ability to modify and even frustrate such a merger. Time being at a premium for the merging parties, Member States do not appear phased by the prospect of infringement proceedings before the ECJ several years down the line."⁵¹

2.2 The Albertis/Autostrade merger

In the Albertis/Autostrade merger Italy sought to block the planned merger, already authorised by the European Commission. The Spanish company, Albertis merged with Italian Autostrade, both companies active in the management of toll motorways. Italian ministers responsible for the sector issued a binding opinion and the Italian public entity responsible for the granting of motorway concessions blocked the merger. The claim raised was that the merged entity might not be able to properly carry out the investment required to maintain and improve the motorway network, and to comply with the security standards. The Commission came to the preliminary assessment that

the factual and legal basis for these generic concerns is not clearly defined.

the public interest that would be harmed is not clearly specified.

any such public interest can be adequately protected under the terms of the existing motorway concession agreement.

neither the measures nor the reasons for taking them have been communicated to the Commission for assessment under Article 21 of the Merger Regulation.⁵²

After one month Italy has removed the unjustified obstacles and undertook to respect in full the EU Merger Regulation and that any further

⁵¹ p.518.

⁵² IP/06/1418, Brussels, 18 October 2006

authorisation measures would not be implemented without first obtaining authorisation from the European Commission in accordance with Article 21 ECMR.⁵³

In the Unicredit/HVB merger⁵⁴ the Polish Treasury instructed Unicredit to sell its shares in BPH, a Polish bank, despite the Commission's approval of the merger. The Commission has opened infringement proceedings against Poland and stated that the obstacle relied on by Poland was itself a violation of the free movement of capital and freedom of establishment rules.⁵⁵ Shortly after, the Polish government announced an agreement with Unicredito/HVB, allowing the merger of two Polish banks, subject to the divestment of almost half of BPH's branches and an agreement not to cut jobs at the merged bank until March 2008,

Despite launching proceedings against Member States, the European Commission is slow to act against Member States violating its exclusive jurisdiction. Galloway noted in its paper the inefficiency of the Commission procedure as a reason causing significant time delays in the closure of a transaction.

"Hence if Member States are able to delay the consummation of a proposed merger after it has received Commission clearance, it jeopardises the commercial rationale underlying the transaction. The indeterminable delay period and legal uncertainty in the Abertis/Autostrade case, caused by the Italian government and highway agency, is a good example of such a result. The time factor places Member States in a very powerful position vis-à-vis the Commission in protectionist disputes, as passivity and inaction may produce the desired result of preventing the proposed merger as easily as actively blocking the merger. The Commission's powers to enforce Article 21(4) ECMR and Articles 43 and 56 EC Treaty against Member States rest upon the slow enforcement procedure established by Article 226 EC Treaty, and thus places the Commission in a weak position to protect the merging firms from undue interference from Member States. One further element in these protectionist disputes, which can increase the burden upon merging firms is the often opaque nature of the Member State decision making process, or procedure involved for gaining clearance, particularly when the government in question is directly involved. Protectionist activity tends to

⁵³ Other cases: France tried to block the Sanofi/Aventis merger (cleared by the Commission under M.3354) by arguing that maintaining French ownership of vaccine producer was a national interest. M.4180 was another case in the energy sector: Suez/Gaz de France, M.1346 EdF/London Electricity in which UK asked for the referral under Article 9 (2) a and b and Article 21(3)

⁵⁴ Free Movement of Capital: Commission Opens Infringement Procedure Against Poland in Context of UniCredit/HVB Merger' IP/06/276 Brussels, 8 March 2006. The dispute appears to have been resolved by an agreement between the Polish Ministry of Treasury and Unicredit on 19 April 2006. Strict conditions were imposed upon the merging parties, including a requirement for the disposal of part of BPH within 30 months (See Financial Times article, 'Pekao, BPH Tie-Up is Cleared', 20 April 2006 and Unicredit Press Release 'Signing of the Agreement between the Ministry of Treasury and Unicredit', available on www.unicreditgroup.eu).

⁵⁵ IP/06/276. The merger was cleared by the European Commission M.3894 Unicredit/HVB

stem either from direct government involvement or from the involvement of a sectoral regulator, and not from the national competition authority, yet it is useful to consider the international recognition afforded to the principle of transparency in merger review.”⁵⁶

Harker also drew attention to the clashes between Member States and the Commission aided by the ECJ.

‘The Commission's enforcement strategy under both Article 21 ECMR and Article 56 EC has, with the aid of an acquiescent Court, significantly emasculated Member States' "levers" of control over key strategic industries. Under the ECMR, the Commission has taken a narrow approach in defining what is a "legitimate interest" and guarded against any infractions by Member States of the exclusivity principle. Nevertheless, as the cases discussed in section B demonstrate, several Member States have appeared more than willing to use domestic ex ante controls over key industries-in the face of opposition by the Commission and eventual condemnation by the Court secure in the knowledge that they can achieve significant modifications to transborder mergers, and in some cases frustrate them completely. In so doing, the cases appear to suggest that some Member State governments are willing to weigh in the balance the adverse political consequences of a foreign acquisition against the cost of being held to account before the Court for an infraction of Community law several years in the future.’⁵⁷

‘Nevertheless, on several notable occasions, Member States have been willing to use such powers, seemingly judging the political costs of standing by and permitting the merger to outweigh the (future) costs associated with infringement proceedings before the ECJ. In so doing, Member States have been able to modify transactions with a Community dimension significantly, and even on occasions frustrate them.’⁵⁸

⁵⁶ Jonathan Galloway: 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 2007. University of East Anglia, Norwich, page 7-8. Available at www.competitionpolicy.ac.uk

⁵⁷ Michael Harker: Cross-border mergers in the EU: The Commission v. the Member States, *European Competition Journal* pp.503-535., at page 534.

⁵⁸ p.503.

3 EU Commission's appraisal of mergers having a Community dimension

As regards mergers having a Community dimension, non-competition aspects are not taken into consideration by the decision-maker, notwithstanding Recital 23 of the ECMR according to which 'the Commission must place its appraisal within the general framework of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.'

Industrial (e.g. creation of national champions⁵⁹), social (e.g. keeping employment) or other considerations are not taken into account by the Commission.

In merger cases the College of Commissioners has the competence to take decisions, comprising each Commissioner. Lobbying to members of the Commission in high profile cases was frequent in the past.⁶⁰ The Commission has resisted pressure in most of the cases.⁶¹

⁵⁹ the Commission for example prohibited the Volvo/Scania merger, which would have created a national champion. See M.1672

⁶⁰ McGowan and Cini cite the Aerospatiale/De Havilland merger in which the French and Italian government lobbied for the creation of an Euro-champion in the aircraft manufacturing

⁶¹ M.53., Aérospatiale-Alenia/de Havilland, M. 469, MSG/Media Services GmbH and M. 1672, Volvo/Scania

4 Concentrations outside the scope of Community dimension

For cases not coming under the scope of the ECMR, Article 102 prohibits abuse of a dominant position. This provision requires that the undertaking acquiring a majority shareholding already has a dominant position. The circumstances under which the Commission can intervene are therefore quite narrow. Furthermore, Regulation 1/2003 offers less legal certainty for merging undertakings, because they have to self-assess the legality of the transaction. Moreover, the Commission could intervene in lasting structural relations without a time-limit. The advantage of the ECMR is that it provides an ex-ante framework within which the Commission can assess the likely effects on competition within a short deadline.

Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities (Case C-6/72) [1973] ECR 215; British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities (Case C-142 – 156/84) [1987] ECR 4487

In early case-law predating the adoption of the ECMR, the ECJ dealt with mergers under the antitrust rules. In the Continental Can case the merger strengthened the pre-existing dominant position of the firm.⁶² In the Philip Morris case the ECJ used Article 85 to regulate mergers.⁶³

Despite the legal base in substantive law the problem of enforcement come to the fore of the question. Regulation 139/2004 excludes the application of Regulation 1/2003 to concentrations.

According to Article 21 (1) ECMR this Regulation shall apply to concentrations as defined in Article 3⁶⁴ and Council Regulation (EC) No 1/2003 shall not apply. Jones and Sufrin note that “the difficulty is that the regulation cannot disapply the application of Article 101 and 102, which are Treaty provisions; the regulation disapplies only the implementing legislation, which delegates responsibility for the enforcement of the rules to the Commission.”⁶⁵

⁶² C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215.

⁶³ C-142 and 156/84. *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities* [1987] ECR 4487.

⁶⁴ Article 3, Definition of concentration (1.): A concentration shall be deemed to arise where a change of control on a lasting basis results from:

- (a) the merger of two or more previously independent undertakings or parts of undertakings, or
- (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

⁶⁵ p.1171

They came to the conclusion that in theory, national courts could apply Article 101 and 102 to concentrations not having a Community dimension, because of the direct effect of these provisions. The other route would be the application of Article 105 by the Commission and Article 104 by the national competition authorities.⁶⁶

⁶⁶ Article 104: Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105:

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103 (2)(b)