

National Champions and the Two-Thirds Rule in EC Merger Control

May 2006

National
Champions and
the Two-Thirds
Rule in EC
Merger Control

CCP Policy Briefings

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia is the leading UK Centre for research in the economics and law of Competition Policy. Its members undertake high quality, independent, academic research into competition and regulation and its impact on companies and society.

BACKGROUND

- The proposed takeover of Endesa by Gas Natural raises important questions regarding the role of the Commission, its role in competition policy and its relationship to national governments which go to the heart of the entire European Project. The two-thirds rule provides a “bright-line” for businesses but it also means that the Commission does not always get to see the cases that it should.
- It also provides some Member States with the opportunity to use the merger laws to create national champions at the expense of an effective competition policy. In the short to medium term, Member States are however unlikely to cede further power to the Commission to make decisions about national markets.
- The 1990 European Commission Merger Regime (ECMR) created policy to deal with mergers that would cause “significant structural changes the impact of which...[went] beyond the national borders of anyone member state”¹ This policy was tempered by the introduction of the two-thirds rule - where each of the undertakings concerned achieved more than two thirds of its aggregate community-wide turnover within one member state, their merger would acquire a community dimension and thus would be dealt with by the Commission. A review by the Commission in 1996 found that these jurisdictional thresholds were not operating effectively. This led to a change in the definition of turnover from “any one member state” to “each of three or more member states” In the most recent review of the Merger Regime the Commission found that while the second set of jurisdictional criteria had had little impact on the allocation of multi-national cases to it, it had functioned effectively.
- In November 2005, the EC confirmed that a proposed merger between Gas Natural and Endesa of Spain did not have a community dimension and was therefore passed to the national competition authority. Tribunal de Defencia de la Competencia (TDC) recommended that the transaction be blocked. However, the Spanish government passed the merger early this year subject to conditions.

KEY FINDINGS

Issues

- The quantitative jurisdictional test provides a “bright-line” determinant of jurisdictional competence lies “in a context where speed of assessment is imperative in sustaining business opportunities and confidence”.² Inevitably therefore some mergers that have community effects remain within the remit of national authorities. This especially seems to be the case with energy mergers. Despite Endesa’s challenges to the way in which Gas Natural had calculated turnover, the Commission was clear in its view that the two-thirds rule meant that the issue had to be addressed at a national rather than supranational level.
- However this blunt tool has meant that cases are often reallocated before and after notification in a somewhat arbitrary fashion with the very real risk that different authorities may reach disparate results on equivalent cases. The fact that Gas Natural

¹ Recital 8 ECMR

² Scott A (ed), *Encyclopedia of Competition Law* (London: Sweet & Maxwell), para. 1-1014.

sought to have the case determined by TDC while Endesa claimed that the merger fell within the competence of the Commission is a marker of this perceived divergence.

- Determining whether a merger should be considered at a national or supranational level is traditionally one of the most fraught areas of European merger control. At its heart, the Commission's concern centres on the propensity of some Member States to use their national merger control regimes to foster or sustain "national champion companies" in contravention of the overall objectives of the EC and the widely acknowledged lessons of economic history.
- The Gas Natural/Endesa case has led the Competition Commissioner to moot the repeal of the two-thirds law with her describing its as "no longer reflect[ing] an optimal allocation of competence between the national and Community level, and even constitutes in some instances and obstacle to the consistent treatment of cases."³ The law now risked the creation of firms able to foreclose national markets to competition from other Community member states.
- The prospects for a successful overhaul of the two-thirds rule are, however, constrained by *real politik*. Member States are unlikely to cede further control over the one lever by which they remain able to give effect to their industrial policy of creating and maintaining "national champions". Reform of the two-thirds rule would eradicate the opportunity for such misbehaviour.
- The political imperative for national champions is on the face of it attractive to politicians. Cultivating national champions tends to favour firms that are already large with well-established political connections. The social welfare implications of the decline or failure of such firms can leave it difficult for politicians to resist intervention at home to achieve competitiveness abroad. It is also the case that no industrial policy has been more comprehensively discredited.

CONCLUSIONS

- While the decision that there was no community dimension to the Gas Natural/Endesa case is somewhat mundane it raises profound issues. At the heart of the debate that is likely to ensue, is a clash between competing perspectives on the best approach to achieving economic development both within and across the Member States of the EC.
- It is clear that some national governments appear to value the rule for the freedom it allows them to use domestic merger laws to groom domestic flag-bearing businesses capable of competing on the international stage. Unless and until the futility of protectionist industrial policy is more widely and deeply appreciated by Europe's political classes, it would seem best to be sanguine regarding the Commission's likelihood of success in persuading all Member States of the need to reform the two-thirds rule.

FOR MORE INFORMATION:

The full working paper - CCP Working Paper 06-6. Scott, A (2006) "National Champions and the Two Thirds Rule in EC Merger Control" - and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

ABOUT THE AUTHOR

Dr Andrew Scott

Andrew is a member of CCP and Senior Lecturer within Norwich School of Law.

His main area of research is in mergers and collusion, and he is also interested in the application of competition law in the media sector. He has recently published a book, 'Merger Control in the United Kingdom' (with Morten Hviid and Bruce Lyons), through Oxford University Press.

³ Neelie Kroes quoted in Financial Times by Tobias Buck, 16 November 2005