EC merger control: does the re-emergence of protectionism signal the death of the 'one stop shop'?

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Introduction

The European Community Merger Regulation (the 'ECMR')[1] purports to offer a 'one-stop-shop' for mergers and acquisitions, provided that the transaction has a 'Community dimension' and the European Commission asserts jurisdiction. Indeed prior to the first ECMR entering into force in September 1990, Sir Leon Brittan commented that:

> 'The future of the major players in European business who are involved in mergers is now in [the Commission's] hands…They will benefit from a one stop shop, where there is one analysis by one authority on the basis of competition criteria which takes one month and is binding throughout the European Community. If there are serious doubts about a concentration compatibility with the Common Market, a further analysis becomes necessary…And, once again, subject to only two exceptions, the Commission's decision is final throughout the Community and is reviewable only by the Community's courts.'[2]

There have been several key changes to EC merger control since the adoption of Regulation 4046/89[3], not least it being replaced by Regulation 139/2004, but the jurisdictional basis for merger review within the internal market has remained substantively the same as was introduced almost 17 years ago. The two exceptions to the Commission's exclusive jurisdiction remain i) the existence of a distinct market within a Member State that makes it more appropriate for the Member State to review the merger, in accordance with either Article 4(4) or Article 9 of the ECMR, and ii) action by a Member State to protect legitimate interests in accordance with Article 21(4) of the ECMR.

In light of the exclusive jurisdiction, the 'one stop shop' has been held out as offering significant benefits to the merging parties. The parties to a 'concentration' with a 'Community dimension' should benefit from efficiencies and the greater legal certainty that flows from having the one authority review the transaction and taking a decision that is legally binding in the 27 EU Member States. The centralised *ex ante* review reduces the notification burden upon merging firms and importantly sets out a clear timescale for

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[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] O.J. L24/1.

[2] Sir Leon Brittan, *Hersch Lauterpacht Memorial Lectures: Competition Policy and Merger Control in the Single European Market*, (Cambridge, Grotius, 1991) at p.35, 38. Also see discussion in C. Bright, 'The European Merger Control Regulation: Do Member States Still Have An Independent Role In Merger Control? Part 1' (1991) 12 *ECLR* 139.

[3] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] O.J. L395/1, revised at [1990] O.J. L257/13.

the investigation within a transparent framework. Navarro, Font, Folguera and Briones suggest these benefits result from the 'administrative efficiency' of the ECMR, which is a key characteristic alongside the principle of having a level playing field, which ensures 'fairness among undertakings that operate in different Member States'[4]. Certain aspects of EC competition law and policy reflect the wider political and legal context of the European Union within which EC competition law exists[5], and the ideal of 'fairness among undertakings' reflects the fundamental principle of non-discrimination in EC law, and is tied into the single market objective and the accompanying freedoms. The twin benefits of administrative efficiency and fairness are however being undermined by the protectionist instincts of several European governments, which have shown a readiness to interfere in M&A activity (particularly over the last three years), and challenge the Commission's exclusive jurisdiction, in order to ensure politically desirable results. This paper will initially consider the legal basis for challenging national protectionism as well as a brief consideration of how society views such activity. Recent examples and possible responses to protectionist behaviour will be discussed, before focusing on the impact of protectionism upon the rationale and efficacy of the ECMR. The paper will also offer some thoughts on whether and how to avoid conflict as a result of protectionism in the future.

The legality of protectionism

In recent years, there has been an apparent upsurge in government intervention in M&A, motivated by protectionist intent. The 'economic patriotism'[6] has resulted in public conflict between the European Commission and France, Italy, Poland and Spain, and others. Many, although not all cases, involve a twin strategy on the part of the Member State. In addition to discouraging or actively hindering foreign firms bidding for, or merging with a domestic firm, governments often attempt to identify and encourage a domestic suitor to acquire or merge with the target firm, so as to create a 'national champion'. While governments tend to argue that intervention is necessary for apparently plausible reasons, such behaviour has been shown to be capable of breaching both EC free movement and competition law. The legality of protectionist behaviour is difficult to discuss in the abstract as it can take many forms, such as the issuance and exercise of golden shares by Member State governments[7]. Nonetheless, Member State interference in a transaction with a 'Community dimension' will often prompt accusations of a breach of

[4] E. Navarro, A. Font, J. Folguera & J. Briones, *Merger Control in the EU*, (2nd Ed, Oxford, Oxford University Press, 2005) at 1.06 – 1.08.

[5] Indeed Recital 23 of the ECMR states 'the Commission must place its appraisal within the general framework of the achievement 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', see also discussion in J. Galloway, 'The pursuit of national champions: the intersection of competition law and industrial policy' (2007) 28 *ECLR* 172.

[6] As described in a Speech by Gordon Brown to the CBI President's dinner, 5 June 2006 (38/06). Available from http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2006/press_38_06.cfm, accessed on 11 June 2007.

[7] See Cases C-483/99 *Commission* v. *France* [2002] ECR-I 4781 and C-98/01 *Commission* v. *UK* [2003] ECR-I 4641. Also see discussion in B.J. Rodger, 'Case C-42/01, *Portuguese Republic* v. *Commission*, judgment of the Court of Justice, 22 June 2004, Full Court' (2005) 42 CML Rev. 1519 at 1527 – 1531.

Article 21(4) of the ECMR, as well as Articles 43 and 56 EC Treaty, providing for the right of establishment and free movement of capital respectively[8]. Restrictions upon the economic rights within Articles 43 and 56 are capable of justification on strictly interpreted grounds, although justification is more likely if the restrictions are non-discriminatory in nature. Article 21(4) of the ECMR also provides a limited opportunity for Member States to justify interference in a transaction that has been or will be subject to competition scrutiny by the Commission. Article 21(4) states that Member States are entitled to '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'. However, unless these 'legitimate interests' fall within the narrowly defined categories of public security, plurality of the media or prudential rules[9], authorisation must be requested from the Commission before taking any measures. Hence, when Member States wish to intervene in a transaction with a Community dimension, they should be prepared to either:

a) argue that action is necessary, proportional and consistent with EC law in order to protect public security, plurality of the media or prudential rules; or

b) communicate the 'public interest' rationale for action to the Commission and request authorisation to take action. The Commission will then assess whether the proposal is 'appropriate, proportional and non-discriminatory'[10] before reaching a decision.

The morality of protectionism

Philip Lowe has jokingly referred to national champions as being illegal, immoral and fat[11], and it is interesting to consider whether this could accurately describe protectionist activity in general. The legality of economic patriotism has been considered above, and without engaging in the economic discussion involving efficiencies and innovation that would underpin an analysis of whether protectionism leads to 'fat' companies, it is useful to briefly consider whether protectionism can be considered 'immoral'. There are potentially two distinct ways in which protectionism may be considered immoral. Firstly,

[8] See the Commission communication on certain legal aspects concerning intra-EU investment, [1997] O.J. C220/15, which states 'the acquisition of a controlling stake in a company is governed not only by the provisions on the free movement of capital but also by those on the right of establishment'.

[9] As specified in the second paragraph of Article 21(4) ECMR. See discussion of cases involving the interpretation of these provisions in M. Furse, *The Law of Merger Control in the EC and the UK*, (Oxford, Hart Publishing, 2007) at pp.58-61, and C.M. Borges, 'The Legitimate Interests of Member States in EC Merger Law' (2003) 9 *European Public Law* 345.

[10] This was the wording the Commission used to describe its function under the third paragraph of Article 21(4) of the ECMR in the *Lyonnaise des Eaux/Northumbrian Water* case (then Art. 21(3) of Regulation 4064/89), when the UK Monopolies and Mergers Commission requested authorisation to conduct an investigation under the industry regulatory framework. Paragraph 6 of the European Commission Article 21(3) Decision of 29 March 1995 (*Application by the United Kingdom of 6.3.95 for the recognition of a legitimate interest under Article 21(3) re certain provisions of the Water Industry Act 1991 (as amended by the Competition and Services (Utilities) Act 1992)*).

[11] Speech by P. Lowe, European Commission Director General for Competition, 'What is Wrong with National Champions?', to the Enforcing Competition Law Conference at Chatham House, London, 23 June 2006.

to the extent that protectionist behaviour in a particular case results in the creation or subsistence of an inefficient and stagnant firm (i.e. a 'fat' firm), it could be regarded as depriving consumers of lower prices and/or greater choice. Neelie Kroes has stated that 'those who put up barriers, or who don't want to take them down, need to know that they are acting against the interest of their economy and their citizens'[12], thus it may be argued that it is immoral to act against the medium or long term interests of consumers, for short-term political gain. Secondly, in light of the principle of non-discrimination in EC law[13], the commitment of all Member States to the EU and particularly the internal market, and the commitment to solidarity within the Maastricht Treaty, it may be possible to consider Member States as having moral obligations to act in a non-discriminatory manner with regards to other EU Member States, citizens and firms.

The two possibilities are somewhat remote however, as morality is surely defined according to society's sense of right and wrong. Furthermore, while discrimination on the grounds of nationality may be regarded as socially unacceptable in a general sense, there are doubts as to whether this sense of wrongdoing would extend to situations where domestic firms are protected or favoured over foreign ones. It is also arguable that society's view of protectionism varies between Member States, and while such behaviour may be commonly regarded as wrong in the UK for example, it could equally be regarded as the right decision in other European countries. There are several examples where the UK has rejected the economic patriotism argument and endorsed the analysis of a proposed merger on the bases of a transparent competition-orientated assessment, by independent competition authorities[14]. The free trade argument has not been as successful in the EU Member States.

It may be that considering protectionism as immoral is too great a leap, although the arguments are undoubtedly there. Nonetheless there is a vigorous debate that is something of an undercurrent in the conflicts between the European Commission and Member States on this issue, as to whether protectionism is fundamentally right or wrong. In a sense, the conflicts represent a point of policy divergence between the EU and several Member States; competition advocacy is failing at a governmental and consumer level if protectionism is regarded as the right choice vis-à-vis free trade and non-discrimination in the internal market. The morality of protectionism may appear to be an irrelevant consideration in the debate concerning the legality of Member State intervention in transactions with a Community dimension, yet it is insightful to question

[12] Speech by N. Kroes, EC Competition Commissioner, 'European competition policy facing a renaissance of protectionism – which strategy for the future?' (SPEECH/07/301). St. Gallen, 11 May 2007.

[13] See discussion in C. Hilson, 'Discrimination in Community Free Movement Law' (1999) 24 EL Rev. 445.

[14] See e.g. the UK government's response to the rumoured Gazprom (the Russian state-owned energy company) takeover of Centrica (the leading UK gas supplier which succeeded British Gas post-privatisation), when the UK prime minister ruled out government interference, reported in the Financial Times, J. Blitz & S. Wagstyl, 'Blair rules out blocking Gazprom bid for Centrica', 25 April 2006. It is also interesting to note that non-competition concerns arising as a result of foreign bids for the London Stock Exchange, have been considered in a transparent and impartial manner, indeed the UK Secretary of State for DTI, Alan Johnson, commented that 'the prospect of the stock exchange being taken over by Nasdaq has scarcely raised an eyebrow', reported in the Financial Times, M. Green, 'UK trade minister hits out at European protectionism', 3 April 2006.

whether the conflicts would exist if Member States and their citizens could be persuaded of the rights and wrongs of protectionist behaviour.

Some examples

The cases involving Sanofi/Aventis[15], Suez/Gaz de France[16], Abertis/Autostrade[17], Telecom Italia[18], UniCredit/HBV[19], and E.on/Endesa[20] provide clear examples of conflict between the Commission and EU Member States, with some leading to proceedings under Article 226 EC Treaty, and several still ongoing. There has even been a warning to the Dutch central bank (DNB) to avoid discriminating against foreign bidders in the ongoing ABN Amro case[21]. In order to consider the implications of government intervention upon the efficacy of the ECMR, it is useful to consider a recent case in greater depth.

[15] Prior to the merger between French pharmaceutical firms Sanofi-Synthélabo and Aventis, which was cleared by the European Commission (Case No.COMP/M.3354, 26 April 2004), the French government publicly discouraged Swiss drugs group Novartis from launching a counter-bid for Aventis. The French Prime Minister argued that maintaining French ownership of a vaccines producer was a matter of 'national interest', see article in the Financial Times: J. Johnson, 'A poor prescription for French national champions' 27 March 2004.

[16] The merger between Franco-Belgian Suez and Gaz de France was facilitated by the French government's opposition to a merger between Suez and Enel of Italy, reported in the Financial Times, 'Companies International: the deals they didn't like', 20 April 2007. The Commission approved the GdF/Suez transaction, subject to conditions, on 14 November 2006, *Gaz de France/Suez* Case No.COMP/M.4180.

[17] Abertis/Autostrade was cleared by the European Commission on 22 September 2006 (Case No.COMP/M.4249).

[18] See the Financial Times articles by A. Michaels, 'Rome's approach scares Telecom Italia suitors', 18 April 2007, and 'Ambassador for US blasts Rome on Protectionism', 20 April 2007.

[19] The dispute between the Commission and Poland concerned the proposed merger between Italian bank Unicredit and German bank Bayerische Hypo-und Vereinsbank AG (HVB) due to their control of Polish subsidiaries, Pekao and BPH respectively. In spite of the Commission clearing the merger (*UNICREDITO/HVB* Case No.COMP/M.3894, 18 October 2005), the Polish Treasury required the disposal of the shares in BPH on 20 December 2005, but failed to request that the Commission take account of legitimate interests under Article 21(4) ECMR. The Commission responded by claiming that Poland had breached Article 21(4) of the ECMR, as well as Articles 43 and 56 EC Treaty, See European Commission Press Releases 'Mergers: Commission Launches Procedure Against Poland for Preventing Unicredit/HVB Merger' IP/06/277 Brussels, 8th March 2006, and '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).

[20] See the latest Commission Press Release, 'Mergers: Commission refers Spain to Court for not lifting unlawful conditions imposed on E.ON's bid for Endesa', 28 March 2007 (IP/07/427). There is also some interesting discussion of the case and the issues that arise in F.M. Salerno, 'Current issues of EU merger control in the energy sector: a proposed framework to foster dialogue' (2007) 28 *ECLR* 65.

[21] See the Financial Times article by T. Buck & I. Bickerton, 'McCreevy warns Dutch central bank over ABN', 19 April 2007.

Abertis of Spain and Autostrade of Italy (recently renamed Atlantia SpA) announced a €24billion merger on 23rd April that would create a pan-European company, mainly focused upon motorway infrastructure management[22]. The companies planned to complete the merger towards the end of 2006, and pointed out in their June press release, after gaining shareholders' approval, that their next step was gaining 'authorisation from the European competition authorities and the Italian Government'[23]. Abertis and Autostrade notified the European Commission on 18th August 2006, in accordance with Article 4 ECMR. The Commission initiated a Phase I investigation and cleared the proposed concentration under Article 6(1)(b) ECMR on 22nd September 2006[24], at the expiry of the 25 working day time limit[25]. The Italian government however, made public its unease at a merger that it viewed as a disguised Spanish takeover of vital Italian infrastructure services. The Italian Infrastructure Minister and Highways Agency (ANAS) have sought to couple the issue of merger clearance with concerns over future investment in the motorway network, to address previous years of underinvestment (before the current Prodi government came to power)[26]. The competition and internal market commissioners, Neelie Kroes and Charlie McCreevy, both warned Italy against interfering in the transaction and the initiated proceedings under Article 226 EC Treaty on 14th November 2006, by sending a letter of formal notice to the government. The Commission then sent Italy a further preliminary conclusion that the government had breached Article 21 ECMR[27], and a reasoned opinion appears to be the most likely next step, after which the Commission could refer Italy to the Court of Justice. In spite of the Commission's involvement, the Italian government and ANAS have delayed issuing authorisation for the transaction and have caused additional uncertainty by reviewing the conditions of the concession under which Autostrade maintains the Italian toll-motorways. The lack of authorisation and persistent obscurity as to the timetable and criteria for authorisation lead the firms to abandon the merger on 13 December 2006[28].

The case is not the clearest example of economic patriotism as the Italian government has not encouraged an alternative Italian suitor for Autostrade, so as to create a national champion. Nonetheless the central motivation behind the Italian government's actions is the belief that a Spanish owned company is less likely than an Italian owned company to provide significant levels of investment in the Italian motorways. Furthermore, the belief appears to be held without any real consideration of the investment record of Abertis. The presumably bona fide interest in securing further investment and reconsidering the terms

[22] See Abertis press release, 'News: abertis and autostrade announce plans for merger of equals', 23 April 2006. Available at http://www.abertis.com/en.

[23] See Abertis press release, 'abertis and autostrade approve their merger, which will create the world leader in infrastructure management', Barcelona, 30 June 2006. Available at http://www.abertis.com/en.

[24] *Abertis/Autostrade*, Case No.COMP/M.4249, 22 September 2006.

[25] Time limits for merger investigations are provided within Article 10 of the Regulation 139/2004.

[26] See press accounts of the Italian governments involvement in the transaction, and underlying motivation, e.g. article in the Financial Times, M. Mulligan & T. Barber, 'Abertis upbeat in spite of tensions over Autostrade', 12 December 2006.

[27] See Commission Press Release, 'Mergers: Commission sends new preliminary assessment to Italy on measures blocking Abertis-Autostrade merger' (IP/07/117), 31 January 2007.

[28] See Abertis press release, 'Abertis and Autostrade joint statement', Barcelona/Rome, 13 December 2006. Available at http://www.abertis.com/en. Also see commentary in the Financial Times, A. Michaels, 'Rome's killer blow to roads deal exposes fear of improper meddling', 14 December 2006.

of the current concession to Autostrade are crucial in the case. While they can be viewed as legitimate issues, the crux of the Commission's argument appears to question the relevance or appropriateness of coupling them with the merger authorisation decision, and indeed the Commission has refused previous requests under Article 21(4) on the basis that the objective in question could be achieved by exercising regulatory powers post-merger[29].

What happened to 'administrative efficiency' and 'fairness'?

In light of the aborted Abertis/Autostrade merger and other cases that have been mentioned, particularly E.on/Endesa, it is questionable whether the ECMR continues to generate its purported benefits for these firms. Indeed if the Commission is powerless to prevent protectionist behaviour (whether ultimately proven to be justifiable or not), the efficacy of the EC merger control regime is vulnerable to the protectionist instincts of any one Member State. The 'administrative efficiency' of the pre-merger notification regime and 'one stop shop' review process should operate to significantly reduce the burden upon merging firms, who are often subject to multi-jurisdictional merger review. It is widely recognised however, that "during the time that transactions are delayed, the parties may lose savings, synergies, and efficiencies that motivated the transaction"[30]. It is for this reason that Article 10 of the ECMR imposes strict time limits upon the Commission when conducting merger reviews. Indeed due to the time sensitivity of commercial circumstances motivating transactions, it is not uncommon for deals to collapse if a second phase review is initiated[31]. 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

[29] For an example see the *EdF/London Electricity* decision, Request dated 8 January from the United Kingdom for the recognition of a legitimate interest under article 21(3) (Case No.IV/M.1346), 27 January 1999.

[30] International Competition Network Report on the costs and burdens of multijurisdictional merger review, November 2004 at p.16. Available at: http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf.

[31] See discussion by P. Willis & G. Young citing some examples in the context of UK competition law: 'Proposed merger transactions that are made conditional on clearance from the OFT may lapse following a reference to the [Competition Commission] (where the purchase agreement is conditional on the OFT not deciding to refer the transaction to the CC). Even where there the transaction is not conditional on clearance, the parties may agree to back out of it when faced with the prospect of a lengthy and expensive inquiry by the CC. For example, between April 2005 and March 2006, six CC merger inquiries were cancelled, because the parties abandoned the transactions shortly after referral. All six were proposed rather than completed transactions' in 'UK Merger Law', Chapter 55 of *Global Competition Review Special Report: The European Antitrust Review 2007*.

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 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. The International Competition Network (ICN) has recommended that the principle of transparency should apply generally in merger control with regard to the policies, practices and procedures within each jurisdiction, as well as at a case-by-case level with regard to the assessment undertaken, thus ensuring that the bases for any adverse decision is clear and understood[32]. The OECD has produced a similar recommendation[33], and it is notable that all of the Member States involved in the cases discussed above are members of the OECD, and their competition authorities are members of the ICN. Member States appear willing to ignore the principle of transparency in protectionist disputes and, when coupled with delays resulting from the national intervention, clearly increases the burden upon merging firms and further erodes the faith in the one stop shop, and the 'administrative efficiency' it should generate.

As discussed above, Navarro *et al.* suggest that providing a level playing field[34] is a key principle of the ECMR, so as to ensure 'fairness' between undertakings irrespective of their country of origin. In this sense, the ECMR can be seen to be implementing the principle of non-discrimination, yet M&A interference by Member States with protectionist intent is a clear challenge to this principle. The Commission's exclusive jurisdiction to review concentrations with a Community dimension does not appear to provide any guarantee of 'fairness' or non-discriminatory treatment, which is arguably an economic right under EC law. It is suggested that the concept of independent regulatory decision making (i.e. independent from government influence and control), which is gaining greater recognition in competition law and beyond[35], should be pursued by the European Commission. The ICN has said that 'competition agencies should have sufficient independence to ensure the objective application and enforcement of merger control laws'[36]. The UK Enterprise Act 2002 provides a good example of reform that is

[32] The principle of transparency is one of eight 'guiding principles for merger notification and review', produced by the ICN mergers working group. The document is available at: http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/icnnpworkinggroupguiding.pdf.

[33] OECD Recommendation of the Council on Merger Review, 25 March 2005 – C(2005)34 at A1.2.2 and A2. Available from http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c(2005)34.

[34] *Op. cit*. note 4.

[35] See discussion in 'Aspects of Independence of Regulatory Agencies and Competition Advocacy – a Getúlo Vargas Foundation (NGA) Contribution', submitted to the ICN competition policy implementation working group; subgroup 3: competition advocacy in regulated sectors, 6. Available from: http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/NGA_Submission_Aspects_of_Independence.pdf.

[36] The ICN recommended practices for merger notification procedures, *op. cit.* at note 141, at XII.C.

designed to depoliticise regulatory decision making[37]. Independent regulatory decision making can probably not be described as a principle of competition law or EC law as yet, but there is some evidence, particularly from the E.on/Endesa case, to suggest that regulatory bodes have and are being pressurised by Member State governments to reach a politically desirable outcome[38], and a truly independent analysis and decision would lessen the likelihood of economic patriotism.

Conclusion

It is tempting to simply state that there is a need for the European Commission to take decisive action against Member States that interfere with the proper functioning of the ECMR, so as to deter other Member States from engaging in similar activities, yet that avoids addressing the legal and political difficulties the Commission faces in doing so. Additionally, it is clear that the Commission has inadequate powers to challenge Member States so as to secure the benefits of the ECMR for all transactions under its jurisdiction. Hence, any Commission enforcement action in protectionist disputes with Member States is likely to be of little more than symbolic significance, and could not offer any protection to merging firms wanting to secure the 'administrative efficiency' and 'fairness' of the ECMR. It is possible however, that the ECMR has been 'oversold', and that neither it nor the Commission could ever fully generate or guarantee the benefits suggested. It may be that M&A, particularly those of such scale that they have a Community dimension, must pursue legal as well as political strategies to gain clearance for the proposed transaction. In such circumstances, it may simply be part of the 'cost of doing business' in a particular Member State to negotiate with governments for merger clearance. Nonetheless it is surely the responsibility of the Commission, and indeed the Member States to diminish the burden of 'doing business' within the internal market, and to promote and adhere to the principles of legal certainty, proportionality and transparency.

The first step to address the rising number of protectionist disputes and the policy divergence between the Commission and several Member States is surely for the Commission to actively re-engage in competition advocacy. Competition advocacy should take place not merely at governmental and competition authority level, but also at the consumer level, so that protectionism begins to be perceived as being wrong. While it may be setting too high an expectation to try to label protectionism as immoral, the arguments are nonetheless clear in order to counter the view that protectionism is necessary and in a country's best interests.

In conclusion, and in answer to the question posed in the title of this paper 'does the re-emergence of protectionism signal the death of the 'one stop shop'?'. The answer is

[37] See discussion of the UK reforms in a speech by P. Freeman, Chairman of the UK Competition Commission, '"A wise man proportions his beliefs to the evidence": scepticism and competition policy', David Hume Institute, 3 May 2007.

[38] In the final stages of the E.on/Endesa case, when the Spanish government encouraged and facilitated alternative bids for Endesa, the Spanish stock market regulator resigned due to the government 'eroding the independence of its regulatory agencies'. See the interesting report in the Financial Times, L. Crawford, 'Spain's market regulator resigns over Endesa bid', 25 April 2007.

probably not, but protectionism certainly poses a strong challenge to key principles that underlie the ECMR, and will weaken the EC merger regime gradually over time if these issues are not resolved and conflicts better managed.