

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



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Regulation 139/2004



- One stop shop for M&A that have a ‘Community dimension’, when the European Commission asserts jurisdiction
- Generates big benefits for business
- Sir Leon Brittan:
 - ✦ ‘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’ (Cambridge, 1990)

Big benefits for business?



- Synergies and greater legal certainty
- Navarro *et al.*
 - ✦ ‘administrative efficiency’
 - ✦ ‘fairness’
- Principle of non-discrimination
- Single market objective and accompanying freedoms

The 'renaissance of protectionism'



- Key issues
 - ✦ Legal bases for challenging protectionism in the EU
 - ✦ Is it important to consider how society views protectionism – is it immoral behaviour?
 - ✦ Consider some examples
 - ✦ Impact upon the rationale and efficacy of the ECMR
 - ✦ Thoughts for the future

The legality of protectionism (1)



- Many MS employ a twin strategy:
 - ✦ Oppose/discourage the involvement of a foreign suitor for a domestic firm
 - ✦ Encourage/facilitate the creation of a ‘national champion’
 - ✦ MS have many tools to hinder the consummation of an undesirable merger
- Potential conflict with general principles of EC law, competition law and free movement law

The legality of protectionism (2)



- **Free movement grounds for challenge:**
 - ✦ Article 43 EC Treaty – right to freedom of establishment
 - ✦ Article 56 EC Treaty – prohibition on the free movement of capital
 - ✦ Commission communication concerning intra-EU investment [1997] O.J. C220/15

The legality of protectionism (3)



- Competition law grounds of challenge:
 - ✦ Article 21(4) ECMR (previously 21(3))
 - ✦ 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’

The legality of protectionism (4)



- Article 21(4) ECMR – Member States must argue either:
 - a) Action is necessary, proportional and consistent with EC law in order to protect public security, plurality of the media or prudential rules; or
 - b) Another ‘public interest’ rationale and request authorisation from the Commission to take action. Is the proposal ‘appropriate, proportional and non-discriminatory’?

The morality of protectionism (1)



- Are national champions illegal, immoral and fat?
- Question of morality?
 - ✦ Creating and maintaining an inefficient and stagnant firm?
 - ✦ Neelie Kroes: ‘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’
 - ✦ Breaching moral obligations?

The morality of protectionism (2)



- Society's view of right and wrong
- Discrimination on the grounds of nationality
- Variation between Member States
- Failure of competition advocacy?

Some examples since 2004



- Sanofi/Aventis
- Suez/GdF
- Abertis/Autostrade
- Telecom Italia
- UniCredit/HVB
- E.on/Endesa
- ABN Amro?

Abertis/Autostrade (Atlantia SpA) (1)



- 23rd April 2006 – merger announcement with timetable for completion final quarter of 2006
- 4th & 5th August – decisions by Italian Infrastructure minister and ANAS to refuse immediate authorisation for transaction
- 18th August – Pre-merger notification submitted to DG COMP
- 22nd September – Article 6(1)(b) decision

Abertis/Autostrade (Atlantia SpA) (2)



- 18th October 2006 – Commission sends preliminary assessment to Italy concerning infringement of Article 21(4) ECMR
- 14th November – Commission initiates Article 226 EC Treaty and sends formal notice
- Italian government withdraws previous decisions but reiterates merger concerns with no clear timetable or criteria for authorisation:
 - ✦ Possibility of under-investment post-merger
 - ✦ Review of concession announced (had been granted until 2038)

Abertis/Autostrade (Atlantia SpA) (3)



- 11th December 2006 – Abertis warns of deal collapse prior to shareholder meeting
- ANAS says insufficient time to reach decision
- 13th December – Abertis/Autostrade merger abandoned
- 31st January 2007 – Commission sends Italy second preliminary assessment of infringement

Impact upon rationale and efficacy of ECMR?



- ‘administrative efficiency’ and ‘fairness’?
- Burden upon merging firm
 - ✦ ‘during the time that transactions are delayed, the parties may lose savings, synergies, and efficiencies that motivated the transaction’ (ICN, 2004)
- Effective enforcement?

‘administrative efficiency’ & ‘fairness’



- Opaque nature of influence and decision making
- Principle of transparency (ICN, OECD)
- Level playing field
 - ✦ Depoliticised decision making
 - ✦ Competition advocacy
 - ✦ ‘competition agencies should have sufficient independence to ensure the objective application and enforcement of merger control laws’ (ICN)

Conclusion



- Addressing the realities of merger review
- MS control whether firms can benefit from the principles underlying the ECMR
- Policy divergence
- Death of the ‘one stop shop’?