Changes in Competition Policy over the Last Two Decades

Edited by Dr Małgorzata Krasnodębska-Tomkiel

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Plac Powstańców Warszawy 1

00-950 Warsaw, Poland

www.uokik.gov.pl

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*Jacques Bourgeois and Cormac O'Daly**

HARD TIMES: EMPLOYMENT ISSUES IN EU MERGER CONTROL

1. INTRODUCTION

This contribution aims to highlight a somewhat neglected area of study in EU merger control, namely the reference in the EC Merger Regulation (the "Merger Regulation") to the fundamental objectives of the Treaty establishing the European Community ("EC") and the Treaty on European Union.[227] One of these fundamental objectives is a high level of employment, yet the Commission's decisional practice has not openly squared this objective with what it considers to be a purely competition-based test for assessing a transaction's legality. Nor are we aware of extensive scholarly research on this issue, at least in the areas of mergers; the interaction of competition and other EU policy objectives has been studied.[228]

The orthodox view of EU merger control is that the Commission must base its assessment of whether a merger is compatible with the internal market on exclusively competition grounds.[229] Nonetheless, since its entry into force, the Merger Regulation has also contained the references to other goals pursued by the European Community. Rejecting these goals' relevance in the Commission's analysis of mergers, Sir Leon Brittan, the Competition Commissioner at the time of the introduction of the Merger Regulation, wrote as follows:

> "*Furthermore, the [Merger] Regulation provides a series of factors of which the Commission shall take account in making its analysis. The interplay between these various factors and between them and the dominant position test itself has already*

* The views expressed are personal to the authors who bear sole responsibility for errors.

227 The subject was raised at the Commission and IBA's jointly hosted conference on the reform of the EU's merger control system in 2003. See: Loughran, Competition Policy Newsletter, Number 1-Spring 2003, at page 81. The subject has also arisen in European Parliament resolutions – see, for example http://www.europarl.europa.eu regarding the ABB-Alstom merger.

228 For background, see, for example, Ehlermann and Laudati ed., European Competition Law Annual 1997: The Objectives of Competition Policy, Hart Publishing, 1998; Mische, Nicht-wettbewerbliche Faktoren in der europäischen Fusionskontrolle, Nomos Verlagsgesellschaft, 2002.

229 This of course assumes that these grounds can be identified and are not themselves controversial. While beyond the compass of this paper, this is not necessarily straightforward with, for example, conflicting views on what competition policy ought itself to be.

> *given rise to comment.* ***Let there be no doubt: the fundamental analysis to be carried out by the Commission is whether the merger impedes competition.*** *(…) In other words, as is always the case in competition policy our concern will be whether the merged entity could raise prices, discriminate unfairly or restrict output with impunity or in a way which would not be possible in normal competitive conditions. The factors listed in Article 2 of the Regulation provide assistance to the Commission in making that analysis*."[230] (emphasis added)

Following this theme, a leading textbook also states, "EU merger control is based on purely competition criteria to the exclusion of social or industrial policy considerations".[231]

Thus there would appear to be a dichotomy between competition considerations, on the one hand, and social and industrial ones on the other. Moreover, this dichotomy reportedly was a reason for the – eventually successful – move to have Article 3(g) EC removed by the Treaty of Lisbon.[232]

This contribution challenges whether such a clear delineation can be made between competition and "other" factors in merger analysis. We maintain that given the wording of the EU's founding treaties and the Merger Regulation, the Commission cannot simply – at least – ostensibly ignore the relevance of such other factors. Analysis of such other factors may, we recognize, be difficult to accommodate in the Commission's current framework and procedure for assessing mergers but this alone should not prevent their being analysed in appropriate cases. What constitutes an appropriate case is, of course, a different – and difficult – question as is the level of impact on employment that the Commission would be expected to take into account. The answer to these questions is beyond the scope of this paper. But we would submit that the number of cases in which the Commission would have to take account of employment issues will be very few and exceptional, although in the current political and economic climate, the issue may arise more than it has in the past.

230 Sir Leon Brittan, QC, "The Law and Policy of Merger Control in the EEC", 15 EL Rev, (1990) 351, at page 352.

231 EU Competition Law, Volume II, Mergers and Acquisitions, Drauz and Jones ed., Claeys and Casteels, 2006, at page 262; See also Immenga/Körber in Immenga/Mestmäcker ed., EG-Wettbewerbsrecht, Verlag C. H. Beck, 2007, Art. 2 (1) of Regulation 139/2004, para. 211.

232 See EU deal drops 'free competition' at http://news.bbc.co.uk/2/hi/business/6229300.stm, reporting on tensions between social and competition objectives in intergovernmental discussions on The Treaty of Lisbon.

We begin by examining the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union. Then we comment briefly on how employment and other non-competition goals have influenced the interpretation of what is now Article 101 of the Treaty on the Functioning of the European Union (TFEU). Turning more specifically to mergers, Section 4 examines the text of the Merger Regulation, Section 5 comments on the only time this issue has reached the European Courts before we wrap up our conclusions in Section 6.

2. THE TREATY PROVISIONS

While the main provisions on competition law were in Articles 81 to 86 EC, other articles of the Treaty establishing the European Community must also be recalled.[233]

Article 2 EC provided as follows:

> "*The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.*"

The aforementioned Article 3(g) stated that "the activities of the Community" shall include "a system ensuring that competition in the internal market is not distorted". The Treaty of Lisbon deletes Article 3(g). The Protocol on the Internal Market and Competition, however, provides that the internal market "includes a system ensuring that competition is not distorted". Overall, although this has been debated, the Treaty of Lisbon's entry into force does not therefore change the central role of competition policy in the EU.[234]

233 This section mainly refers to the treaties pre their amendment by the Treaty of Lisbon. This retrospective review of the EU's founding treaties is necessary as these are the versions of the treaties referred to in the Merger Regulation.

234 See comments of the former Director General of the Legal Service of the European Commission, Michel Petite, in "La place du droit de la concurrence dans le futur ordre juridique communautaire", in Concurrences N°1 – 2008, at page 17.

Article 3(i) EC also numbered among the Community's activities "the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment".

Employment was the subject of a separate title in the Treaty. While the relevant articles did not grant the Community substantive legislative powers in this area, Article 127(2) EC stipulated that "The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities".

Article 2 of the Treaty on European Union also referred to promoting a "high level of employment".

The Treaty of Lisbon amends some of these provisions. The aim of having a high level (or even "full") employment is, however, retained in Articles 3(2), 5(2) and 9, and Titles IX and X of the TFEU and in Article 3(3) of the Treaty on European Union.

While the EU does not have the same competences in the area of employment as in other fields – such as competition – it does set itself the goal of a high level of employment as one of its aims and, under Article 147(2) TFEU, this objective must always be taken into account, whenever the EU is implementing its policies and activities. Given all of this, it is difficult to conclude that any area of EU policy, including merger control, can be oblivious to the consequences of a decision, or other act, on employment.

3. ARTICLE 101 TFEU (FORMERLY ARTICLE 81 EC)

Before examining mergers specifically, it should be recalled that the relevance of employment, and other interests referred to in what have been termed the "policy-linking clauses",[235] in the Treaty have been considered quite extensively under Article 101 TFEU.

235 See C. Townley, "Is Anything more Important than Consumer Welfare (in Article 81 EC)?: reflections of a Community lawyer", (2007-2008) 10 Cambridge Yearbook of European Legal Studies 345, at page 352. This article reviews alternative analytical methods that the Commission and Courts have deployed when taking account of non-competition objectives under Article 81 EC. See also, by the same author, Article 81 EC and Public Policy, Hart Publishing, 2009. In addition, see Monti, "Article 81 EC and Public Policy", CML Rev 39, 1057, which provides a comprehensive review of cases in which the Commission had taken public policy considerations into account under Article 81 EC. Written when discussions regarding the decentralization of Article 81(3) EC were taking place, the author advocates redrafting Article 81(3) EC and inserting an Article 81(4) to make the granting of an exemption from Article 81(1) EC more justiciable, see page 1099.

Article 101 TFEU's bifurcated structure traditionally has involved a balancing exercise under which *prima facie* restrictions on competition under Article 101(1) TFEU are examined to see if they qualify for an exemption or exception under Article 101(3) TFEU. The Commission's *Guidelines on the Application of Article 81(3) [now 101(3)] of the Treaty* specify that, while Article 101(3)'s four conditions are both cumulative and exhaustive, "Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)".[236] Even though the Guidelines recognize that other Treaty objectives may be relevant to the availability of an exception under Article 101(3) TFEU, they consider that this will only occur in exceptional cases.

On a number of prominent occasions the Commission, or Courts, have ruled that what would be regarded as non-competition considerations, are relevant in deciding whether or not a practice infringes Article 101 TFEU. Sometimes this has been done by finding that an agreement does not fall within Article 101(1); other times the agreement has been found to satisfy the conditions of Article 101(3).[237]

As early as in 1977, in *Metro I*, when the European Court of Justice was considering the legality of a selective distribution system, it stated that "(…) the establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article 85(3)".[238]

In *Metro II*, the same court considered the importance of "safeguarding of objectives of a different nature" to competition and stated that provided any restrictions on competition were proportionate to the attainment of these different objectives, account could be taken thereof under Article 85(3) EC".[239]

236 Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97, 27.4.2004, at paragraph 42. This may be an overly narrow reading of Article 81(3) EC – see Bourgeois and Bocken, "Guidelines on the Application of Article 81(3) of the EC Treaty or How to Restrict a Restriction", Legal Issues of Economic Integration, Kluwer Law International 2005, Vol. 32, Issue 2, 111, at page 120.

237 For other prominent examples, see cases such as Laurent Piau, COMP/37.124 and Case C-519/04P, Meca-Medina v Commission, [2006] ECR I-6991 concerning taking account of regulations regarding sport as a wider social good to be considered under Article 101 TFEU and Townley and Monti supra.

238 Case 26/76, Metro SB v Commission, [1977] ECR 1875, at paragraph 43.

239 Case 75/84, Metro SB v Commission, [1986] ECR 3021, at paragraph 65.

More recently in *Wouters*, a preliminary reference from a Dutch Court, the Court of Justice found that Dutch bar rules that prohibited interdisciplinary partnerships did not infringe Article 101(1) TFEU when their positive effects – such as providing guarantees of integrity and experience to consumers of legal services – were balanced against the negative and anti-competitive effect of being "liable to limit production and technical development".[240] For the Court the "overall context" of the bar association's decision and its objectives had to be taken into account and the "consequential effects restrictive of competition [were] inherent in the pursuit of those objectives".[241]

As for the Commission, among other cases, it has taken wider social reasons into account under Article 101(3) TFEU when considering agreed output restrictions in so-called "crisis cartels" (i.e. when an industry is experiencing particularly difficulty times).[242]

Thus there is little doubt that – at least on some occasions – non-competition goals have influenced the interpretation of Article 101 TFEU. Whether there should be any difference for merger review might, in the first place, depend on the text of the Merger Regulation, to which we now turn.

4. THE EC MERGER REGULATION

The substantive test for the compatibility of a merger with the internal market is in Articles 2(2) and 2(3) of Regulation 139/2004, which stipulate that the Commission must authorize transactions unless they "significantly impede effective competition in the common market or in a substantial part of it" (the SIEC test). On the face of it, this establishes a wholly competition-based test but other parts of the Merger Regulation are, at the least, more ambiguous on this point.

Recital 4, for example, provides that corporate reorganizations "are to be welcomed to the extent that they are (…) capable of (…) improving the conditions of growth and raising the standard of living in the Community". More significantly perhaps,

240 Case C-309/99, Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten, [2002] ECR I-1577.

241 At paragraph 97. For a discussion, see Whish, Competition Law, 6th ed., Oxford 2009 at page 126 et seq.

242 See, for example, Motta, Competition Policy Theory and Practice, Cambridge University Press, 2004 at page 15 and Roth and Rose ed., Bellamy and Child European Community Law of Competition, 6th ed., Oxford 2008 at page 338. See by analogy Case 240/83, Association de défense des brûleurs d'huiles usagées, [1985] ECR 531, at paragraph 12 where the Court of Justice stated that the principle of freedom of trade is "subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired".

Recital 23 states that the Commission "must place its appraisal [of a merger's compatibility with the internal market] 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". Recital 45 states that "This Regulation in no way detracts from the collective rights of employees, as recognized in the undertakings concerned, notably with regard to any obligation to inform or consult their recognized representatives under Community and national law". Article 18(4) accordingly provides that, *inter alia*, recognized representatives of employees have a right to be heard if the Commission holds a hearing as part of its investigation into a merger's legality. Unless the Commission is supposed to take these views into account later in its merger analysis, it is difficult to see what purpose this article would serve.

Most significantly, the very text of Article 2(1) states that the Commission is to appraise transactions both "in accordance with the objectives of this Regulation" and with "the following provisions", which include Article 2(2) and 2(3)'s SIEC test. So while Articles 2(2) and 2(3) set out what appears to be a pure competition-based test, and while these articles are phrased in mandatory terms ("shall be declared (...)"), the Commission is also bound, under Article 2(1), to take account of the Regulation's objectives, which, given the mention there of in the recitals, also include the objectives of Article 2 of both the Treaty establishing the European Community and the Treaty on European Union. Therefore, under the very text of the Merger Regulation, read in harmony with the founding treaties, employment is a factor that the Commission it seems must consider when analyzing a merger's legality under EU law.

5. CASE LAW – VITTEL AND PIERVAL

The recitals and articles of the Merger Regulation discussed in the preceding section were central to two substantively identical cases before the European Court of First Instance. Both the *Comité Central d'Entreprise de la Société Anonyme Vittel*[243] and *Comité Central d'Entreprise de la Société Générale des Grandes Sources*[244] cases concerned trade union challenges to the Commission's clearance of the *Nestlé/ Perrier* merger. The Commission's decision was subject to a number of conditions including the divestment of certain plants and brands. The trade unions argued

243 Case T-12/93, Comité Central d'Entreprise de la Société Anonyme Vittel and others v Commission, [1995] ECR II-2147.

244 Case T-96/92, Comité Central d'Entreprise de la Société Générale des Grandes Sources and others v Commission, [1995] ECR II-1213.

that the Commission had failed to consult them properly and thereby violated the Merger Regulation by failing to take employees' rights into consideration.

The Commission argued that former Recital 13 (now Recital 23 but its text has been amended somewhat) did not impose any obligation to examine a merger's impact on employment. The Court, while ultimately holding that the applicants only had *locus standi* to challenge respect of their procedural guarantees during the administrative procedure, did not agree and stated as follows:

> "*(…) the primacy given to the establishment of a system of free competition may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the common market, with the taking into consideration of the social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty.* The Commission may therefore have to *ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees in the undertakings in question, such as to affect the level or conditions of employment in the Community or a substantial part of it.*"[245] (emphasis added)

The Court continued that "Article 2(1)(b) of Regulation No 4064/89 requires the Commission to draw up an *economic balance for the concentration in question*, which *may, in some circumstances, entail considerations of a social nature"* (emphasis added).[246] In the Court's view, the then 13th recital confirmed this conclusion – that the "Commission may therefore have to" take account of impact on employment – as did Article 18(4), which "manifests an intention to ensure that the collective interests of those employees are taken into consideration in the administrative procedure".[247]

As to when the entitlement to take account of wider objectives might arise, the Court stated this would happen "in certain cases" but provided no greater detail than that this could occur if the proposed merger was "to affect adversely the social objectives referred to in Article 2 of the Treaty" or "such as to affect the level or conditions of employment in the Community or a substantial part of it". Perhaps realizing the enormous sensitivity of the potential intrusion of wider policy issues into merger control, the Court did not go further. Arnull therefore comments on the judgments as follows:

245 Case T-12/93, paragraph 38.
246 Case T-12/93, paragraph 39.
247 *Ibid.*

> *"The CFI does not specify when it will be appropriate for the Commission to take into account the social effects of a concentration. Its rulings allow the policy pursued by the Commission to be influenced by the political complexion of the Commissioner responsible for competition and that of the college of Commissioners. Such an outcome is hardly conducive to the legal certainty which undertakings are entitled to expect."*[248]

We could not but concur that if merger control is to involve consideration of wider policy goals, these ought to be set out in a transparent manner to provide legal certainty to merging companies. Moreover, one fears that the Commission already sometimes takes account of other policy considerations, which exacerbates the sense of lack of legal certainty. The reality is that whatever DG COMP's approach to transactions, the most controversial merger decisions are ultimately debated, discussed and adopted by the college of Commissioners (or if not by the college of Commissioners itself, at least by members of the Commissioners' cabinets or private offices), which may be more open to considering wider non-competition objectives.[249] As has been noted, "Despite regular official protestations to the contrary, it is apparent that broader social and economic issues such as employment, "national champions" and other industrial policy factors influence the final Commission decision in some cases, although it is admittedly difficult to assess to what extent such factors are outcome determinative and in which cases".[250]

This all said, it would be wrong to consider that even pure competition-policy based merger assessment has always proved entirely predictable. Cook and Kerse, for example, caution that "[I]t has to be recognized that many of the key factors in the appraisal decision are incapable of precise measurement or prediction and there may be not one but many finely balanced judgments to be made in carrying out the appraisal process before reaching a final decision".[251] Nonetheless, through the increased number of published decisions, the greater experience

248 Arnull, Case Law, CML Rev. 33 (1996), 319, at page 328.

249 For discussion on this, see Jones and Sufrin, EC Competition Law Text, Cases and Materials, 2nd ed., Oxford, 2004, at page 975 where the authors speculate that other policies may have been central to the Commission's decisions in, among other cases, Aérospatiale-Alenia/de Havilland, MSG/Media Services GmbH and Mannesmann/Vallourec/Ilva.

250 Hawk and Huser, European Community merger control: a practitioner's guide, Kluwer Law International, 1996, at page 213. The authors speculate that the Commission's clearance in the Kali+Salz case was at least partly motivated by employment issues. See also Völcker in Immenga/Mestmäcker ed., EG-Wettbewerbsrecht,. Verlag C. H. Beck, 2007, Internationales Wettbewerbsrecht, Wettbewerbsrecht und seine internationale Durchsetzung: Kartellbehörden in Drittstaaten und ihre Beziehungen zur EG-Kommission am Beispiel des EG-US-Kartellrechtsabkommens, paragraph 40.

251 Cook and Kerse, EC Merger Control, 4th ed. Sweet & Maxwell, 2005, at page 270.

of regulators and external counsel, the publication of guidance documents and notices, legal certainty in mergers is steadily improving. Similar steps, such as the publication of a Commission Notice concerning when employment might be considered as a factor in merger analysis, could be envisaged to clarify the role of other policy objectives in merger control.

6. CONCLUSION

This contribution does not call for impact on employment to become central to the Commission's merger control analysis. Used incorrectly, it could be a cloak for protectionism, preservation of the *status quo* and ultimately deny consumers the benefits of innovation and dynamic market evolution. Defending competition has served Europe well as the primary goal of EU merger control. As former Director General at DG Competition, Alexander Schaub has cautioned, competition policy should not be "burdened with too long a list of objectives".[252] The same goes for merger control.

This contribution's modest aim was to demonstrate that the Commission cannot dismiss the relevance of a transaction's impact on employment in all cases. To do this runs counter to the wording of the treaties and the Merger Regulation. We would therefore submit that in cases where, per the Court of Justice in *Vittel*, a deal will have a significant, positive or negative, impact on employment – be this at Member State or exceptionally potentially at Community level – this must be taken into account along with the competition-based arguments. This conclusion should not be regarded as controversial,[253] as Cook and Kerse comment, "[I]t is understandable that when a case is finely balanced, the Commission will look to wider EC objectives recognized in the Recitals to the Regulation".[254]

There may well be a tension between a competition policy perspective and arguments based on the impact on employment. In some cases the Commission, having properly weighed everything up in a transparent manner, may reject the effect on employment in favour of countervailing "pure" competition arguments that promote wider consumer welfare. However, in other decisions, impact on

252 Quoted during a panel discussion at the European University Institute at Fiesole, June 1997 in Ehlermann and Laudati ed., *supra*, at page 9.

253 It would not, moreover, be unusual for non-competition issues to influence merger control. Other legal systems, including some in the EU Member States, permit a government minister to intervene in merger control in the name of defined public policy considerations.

254 Cook and Kerse, *supra*, at page 271.

employment may tip the balance and sway the Commission in one direction or the other.

As indicated in the introduction to this contribution, concluding that a merger's impact on employment should be examined in certain merger cases is but a first step. The precise level of impact that might be considered relevant in the Commission's assessment (one might think of specifying a particular percentage impact) also needs to be analyzed. This raises the question how the transaction's effect on employment might be measured. Here, however, at least some parallels could be drawn from the way in which DG COMP, often with the aid of its Chief Economist's Team, has when appropriate taken account of merger-related synergies. Answers to these questions need to be developed in response to what we have hoped to have shown is the Commission's duty not to ignore the relevance of employment (and indeed other factors) in its merger control review.