National and European Law Instruments for the Protection of Public Interest Considerations in the Framework of Mergers and Acquisitions.

CONTENTS

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1. Public interest as legal concept providing a basis for the torpedoing by States of [often/otherwise procompetitive] mergers.

The protection of the "public interest" (along with its variants of national security or public order) as a (sometimes slippery) justification has been historically resorted to by national governments under multiple forms to prevent undesired mergers and acquisitions in Europe.

The particular State measures based on broad notions of public interest seeking to interfere in economic concentrations have ranged from legislative provisions aimed at restricting ownership of specific companies or simultaneous holdings in companies acting in the same, or connected, markets (either by prohibiting ownership above given thresholds, or restricting economic or political rights in companies, or conditioning the acquisition to prior administrative authorisation), to *ad hoc* administrative action aimed at torpedoing specific merger transactions.

Under European Union (**EU**) law, the legality of State measures seeking to interfere in mergers and acquisitions has been considered under the EU rules on free movement of capital (Article 63 of the Treaty on Functioning of the EU or **TFEU**) and freedom of establishment of economic operators in another Member State (Article 49 TFEU), as well as under Article 21 of EC Regulation 139/2004, on the control of concentrations between undertakings[1] (**EUMR**).

Below we provide examples of Member State action having been dealt with under the legal principles set out above. Later, we refer to the recent *Siemens/Alstom* merger as spark for potential change in the form of a merger regime favouring the creation of "European champions". Finally, reference is made to the projected EU Regulation for coordinating the screening of foreign investments potentially impacting the security or public order.

2. Golden shares and sector ownership restrictions.

2.1 The concept of national interest has often been associated to the protection of "national champions", with EU Member States recurrently trying to protect, if not promote, their own national companies and the maintenance of the national ownership of those companies, therefore acting to prevent those companies becoming foreign property. Many of these national champions are the inheritors of the monopoly systems effectively in force in Europe in many sectors, particularly prior to the liberalisation Directives in network industries such as the telecoms and energy in the 1990s. Many various large national telecoms industries, energy companies, but also financial or airlines (the national or "flag" carriers, Air France, Iberia, Alitalia, etc.), were treated as national champions, which (at least prior to the legal developments depicted below) had a perceived *plus* component of public or national interest on top of their purely business role either because they operated in "strategic" sectors, because they represented an important component of the industrial and employment policies of a country; or simply because they embodied a national sense of pride.

The quintessential legislative measure protecting companies in strategic sectors has taken the form of statutory restrictions granting national governments legal rights to effectively veto undesired takeovers (the so called "golden shares"), which consisted of an authorization requirement for the acquisition of a given shareholding or a ceiling on the number of shares that can be acquired. These golden shares were broadly declared illegal by a wave of European Court of Justice Decisions (**ECJ**),[2] on the basis that they are contrary to the freedom of circulation of capitals and establishment in the EU.

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[1] Council Regulation 139/2004, of 20 January 2004, OJ L 24, 29 January 2004.

[2] For instance, European Court of Justice cases C-367/98 *Commmission v. Portugal*; C-483/99 *Commission v. France*; C-503/99 *Commission v. Belgium*; C-463/00 *Commission v. Spain*; C-98/01 *Commission v. United Kingdom*.

2.2 A second justification to introduce ownership restrictions is based on the desire to limit concentration of economic power on various grounds, for instance in economic sectors such as:

- Media: where simultaneous holdings of radio and television operators have been limited across Member States on grounds of media plurality;

- Telecommunications: on various grounds, including limitations to the ownership of simultaneous shareholdings in significant operators to avoid or minimize the risk of anticompetitive information exchanges;

- Energy: on the same grounds of trying to minimize anticompetitive information exchanges, but also on the grounds of avoiding excessive vertical integration between the various activities of the power generation/transmission/distribution by limiting shareholdings of the transmission grid company owned by power generation companies, for instance.

The public interest can be invoked as an exception to the fundamental freedoms when it seeks to protect public order, public security or public health. Generally, however, Member States are not completely free to establish ownership limitations based on the public interest. To the extent such limitations have potential to clash with the above mentioned economic freedoms of capital circulation and of establishment, Member States can be brought before the ECJ, who will generally apply a proportionality test to ascertain if the Member State measures are justified by a genuine threat to society which the public interest justification seeks to protect. Likewise, the case law of the ECJ seeks to ensure that no discrimination based on nationality takes place when seeking to protect the public interest. Administrative authorization requirements to acquire stakes in companies or assets (as opposed to minimum requirements in the operation of such companies or assets) have for instance been deemed disproportionate for the protection of public interest goals and therefore contrary to the fundamental economic freedoms described.[3]

3. Member State intervention in mergers and acquisitions with EU dimension (Article 21 EUMR).

Article 21 EUMR states that *(i)* the EUMR is the sole regulation applying to mergers with European Community dimension, effectively granting the European Commission sole and exclusive jurisdiction to review mergers with a Community dimension (subject to judicial review by the European Court of Justice and with the qualifications that may result from the streamlined referral system in the EUMR); *(ii)* Member States are precluded from applying national law to mergers with EU dimension. The exception to this rule refers to State measures aimed at protecting "*legitimate interests* compatible with EU law, such as *public security, media plurality and prudential rules*; *(iii)* any public interest on grounds other than the above must be communicated to the Commission by the Member State. The Commission must approve or reject the alleged public interest as legitimate interest within 25 working days.[4] Only in the latter circumstance (express Commission approval) can a Member State successfully invoke a legitimate interest to interfere in a merger with European Community dimension.

If a Member State does not notify an administrative measure based on a legitimate interest not expressly acknowledged in Article 21 EUMR and aimed at introducing additional requirements applicable to a merger with national dimension, such failure to notify amounts in itself to a breach of Community law, enabling the Commission to take legal action against the Member State responsible. In practice, even when the Member State concerned invokes one of the three "legitimate" interests listed in Article 21 EUMR the Commission may dispute that the national measure can fit into the actual legitimate interest relied upon (see *Endesa* case, below).

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3 ECJ Judgment C-207/07, *Commission v. Spain.*

4 Commission Decision of 5 December 2007, *Enel/Acciona/Endesa case*, COMP M.4685.

Examples of Member States attempting to meddle in mergers or acquisitions targeting national companies include the following:

(a) Toll motorways:

In August 2006, Abertis, one of Spain's top infrastructure companies and operator of many toll-motorways in various countries, including Spain and France, notified to the European Commission its projected acquisition of Autostrade. In September 2006, the European Commission cleared the transaction. From the very beginning, the Italian government regarded the takeover as undesirable and refused the sector authorization for the merger, which was required on the basis of the national regulatory framework applicable to operation of toll-motorways. At that stage the Commission intervened quickly and considered that the objections raised by Italy were not adequately motivated or could be easily addressed by the mechanisms contained in the concession held by Autostrade for the operation of toll-motorways. Italy backed up initially, but a few months later, in October 2006, Italy approved an urgent reform of the toll-motorway regulatory regime and granted ANAS (the Italian motorway regulatory Authority) wide powers to act upon concentrations such as the one between Abertis and Autostrade. The European Commission then initiated proceedings for breach of the EU rules on freedom of establishment and circulation of capitals, and gave Italy audience with a view to a possible Commission Decision declaring a breach of Article 21 EUMR. On December 2006, in view of considerable uncertainty and given that the sector specific authorization for the merger was not yet available, the parties abandoned the announced takeover offer. Though the Commission initially seemed to continue the procedure against Italy for breach of Article 21 EUMR, it later lost interest as the Italian government made some changes to the toll motorway regulatory regime. Ultimately, the Commission decided to close Article 21 EUMR proceedings against Italy in the fall of 2008.

The *Abertis/Autostrade* case is noteworthy because the companies ultimately seized the jurisdiction of the Community courts in what was the first attempt by a private party to seek judicial redress on the basis of Article 21 EUMR. This was a difficult case on procedural grounds: the ECJ (in this case the lower court, the General Court or **GC**) was confronted with the possibility of private litigants claiming on the basis of Article 21 EUMR; but before deciding on the issue of *locus standi* of private litigants in this matter, the GC dealt with the question of the reviewable nature of a Commission Decision to abort Article 21 EUMR proceedings. The GC decided on the basis of the factual point that the attempted acquisition of Autostrade by Abertis had been abandoned. In that regard, the GC notes that the Commission's powers under the EUMR depend on the conclusion of a merger; conversely, the Commission does not have decision powers under the EUMR from the moment the merger agreement is terminated, even if (the GC added) *the undertakings concerned continue negotiations with a view to concluding an agreement on a modified form*. Article 21 EUMR, the GC reminds, fulfils the role of protecting the interests of the parties to a proposed merger with a view to ensuring legal certainty and speed. If there is no longer a proposed merger, there ceases to be any interest of the parties in relation to it pursuant to the reasoning of the GC (which is probably debatable). Consequently, the Commission was, after the abandonment of the merger by the parties, devoid of competence to adopt a Decision pursuant to Article 21 EUMR. The Commission communication appealed by the parties, which was subsequent to the parties' abandonment of the merger had, according to the GC, no legal effects *vis-à-vis* the parties. The continuation of communications between the European Commission and the parties on the topic must be construed as the Commission having left the framework of Article 21 EUMR and having entered the domain of Article 258 TFEU (procedure for the declaration that a Member State has breached the law, in that case the provisions on freedom of establishment and movement of capitals).

The failed *Abertis/Autostrade* transaction had a sequel when the reverse operation was attempted in 2018. At that time, Abertis was the object of a public takeover offer in the Madrid stock market by Atlantia (new denomination of Autostrade), followed by a competing offer by ACS, another Spanish motorway and infrastructure provider. The offers ended with an agreement for the joint acquisition of Abertis by Atlantia and ACS. In that case the Spanish government was not keen on Atlantia taking over and expressed its intention to subject the merger to an authorisation by the Ministry of Infrastructures. Notably, however, the Spanish Securities and Exchange Commission (**CNMV**) considered that no such authorisation was required, and there was a potential clash between the government and the CNMV (the latter taking perhaps a more orthodox approach under EU law), which did not prevent the acquisition of Abertis (probably because the Spanish Government was aware that it had little leeway to interfere on the merger under EU law law after the prior experience with the *Endesa* deal, commented below).

(b) Power utilities. One of the highest profile (and perhaps the most productive in terms of formal European Commission Decisions and ensuing litigation) merger transactions was the public takeover for Endesa, at the time Spain's largest utility. Gas Natural (Spain) launched a hostile takeover offer for Endesa in 2005, followed by a competing offer by giant E.ON of Germany. The Spanish Government preferred Endesa to remain national, so it altered the sector authorization regime applicable to acquisitions of power generation companies in order to include non-Spanish companies (such as E.ON) in the scope of the required authorization regime. The Commission issued a Decision under Article 21 EUMR stating that Spain had breached its obligations under that provision by failing to notify beforehand the protective measure invoked. Spain retorted that security of supply was within the legitimate interests expressly named by Article 21 EUMR, but the Commission declared that, pursuant to the case law, in the context of energy supply, public security refers to security of supply in times of energy shocks; furthermore, Member States must also notify measures if there are reasonable doubts that these measures are not aimed at genuinely protecting a recognized interest under Article 21 EUMR or if the measures are disproportionate or discriminatory. The measures, clearly aimed at E.ON's offer, fell foul of the standard and the Commission considered that Article 21 EUMR had been breached.[5] The Commission also considered that Spain had breached the Treaty rules on freedom of establishment and free circulation of capitals and initiated proceedings against Spain for breach of the relevant TFEU provisions.[6]

Endesa was ultimately (jointly) acquired by Acciona (Spain) and ENEL (Italy), but also in that acquisition the Government imposed a number of conditions related to keeping the Spanish Statehood of Endesa, obligations of purchase of national coal and limiting its ratios of debt and dividends, all of which were considered by the Commission as obligations not justified under Article 21 EUMR (and which therefore formed the basis for yet another Commission Decision declaring those Government requirements to be illegal[7]).

(c) The Commission has also acted under Article 21 EUMR in other sectors of the economy ranging from banking[8] to cement manufacturing.[9]

4. Prospective law: merger control as tool to enable otherwise anticompetitive concentrations?

The possibility of using merger control as an instrument of industrial policy has also recently emerged with a variant of the national champion – the "European champion"; notably the recent

5 Commission Decision of 20 December 2006, M.4197, confirmed by ECJ Judgment C-196/07, *Commission v. Spain*.

6 Spain was formally condemned for the latter breach by ECJ Judgment C-207/07, *Commission v. Spain*.

7 Commission Decision of 31 May 2007, OJ C130.

8 Commission Decision of 20 July 1999, M. 1724 (*Banco Santander/Champalimaud* case).

9 Case ultimately decided by the ECJ in favor of the Commission (Judgment C-42/01, *Portugal v. Commission*).

Siemens/Alstom merger has staged a clash between Germany and France, on the one hand, and the European Commission and some national Competition Authorities (*e.g.*, Spain), on the other hand. Germany and France supported the merger with a general argument that the creation of a pan-European company should be allowed, to compete in the world markets with powerful foreign companies notably from China (and its train maker, CRRF). The European Commission supported by some other national competition authorities voiced concerns of excessive economic concentration within the EU which led to the prohibition of the merger.

The prohibition Decision in the *Siemens/Alstom* merger has sparked reactions (notably from French officials) advocating for possible merger control law reform in the EU, with a general argument that the EU has had a strong competition policy but no strong industrial policy. For instance, the possibility has been raised that Member States voting together could have the power to overrule a Commission Decision prohibiting a merger. This power is already contemplated in national merger control laws such as those of Germany and Spain. Here, mergers which are either prohibited or subject to conditions are referred to the Government who can choose to overrule the prohibition or conditioned merger decision on the basis of a number of non-competition (*i.e.*, *general interest*) grounds, *i.e.*, (a) defence and national security; (b) protection of the public security or health; (c) free circulation of goods and services; (d) protection of the environment; (e) promotion of research and development; (f) safeguarding the goals of sector regulation. The idea to insert such a possibility of veto to European Commission merger decisions blocking or conditioning mergers is not *prima facie* either simple to articulate, nor necessarily functional in view of the political complexities of the EU.

Additional ideas include *(i)* introducing changes to make it easier for the European Commission to approve mergers subject to behavioural remedies. These types of remedies have been used in the past and could provide for creative and new possibilities to approve mergers. Currently, however, the European Commission has a strong preference for structural remedies or divestments of entire, ongoing businesses having the potential to become sole-standing competitors on their own (this is the policy officially expressed by the European Commission on its Notice on remedies accepted under the EUMR[10]); or *(ii)* tweak the substantive merger assessment to better take account of potential competition, with focus on actual market shares but giving more weight to the notion of contestability.

5. Prospective (non-merger control) law: foreign investment screening in Europe.

A proposal Regulation establishing a framework for screening of foreign direct investments into the EU is currently on the table.[11] Whereas recognising that this is an area (common commercial policy) of EU action, the proposed Regulation leaves the power of decision to Member States (as they are responsible of protecting their own security interests) subject to strong mechanisms of coordination with the European Commission and the other Member States.

The screening system as currently envisaged is based on the following principles:

(a) Foreign investment refers to investments stemming from third countries (non-EU States).

(b) The mechanism being debated is one of cooperation between Member States and between them and the Commission.

(c) Member States may (not must) have national screening mechanisms for foreign investments in their territory, on the grounds of security or public order. When in place, national screening

10 OJ C 267, 22 October 2008, p. 1-27.

11 Proposal of 6 December 2018 for regulation of the European Parliament and the Council establishing a framework for screening of foreign direct investments into the European Union (COM (2017)0487 C8 - 0309/2017 - 2017/0224(COD)).

mechanisms must regulate the circumstances when they are activated and must not discriminate between third countries. Any national screening procedures must allow for comments by other Member States and the Commission.

(d) In determining whether a foreign direct investment is likely to affect security or public order, Member States and the European Commission may consider its potential effects on, *inter alia*:

   a. critical infrastructures (whether physical or virtual) including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, as well as sensitive facilities, and investments in land and real estate crucial for the use of such infrastructure;

   b. critical technologies and dual-use items including artificial intelligence, robotics, semiconductors, cybersecurity, quantum, aerospace, defence, energy storage, nuclear technologies, nanotechnologies and biotechnologies;

   c. supply of critical inputs, including energy or raw materials, as well as food security;

   d. access to sensitive information including personal data, or the ability to control such information; and

   e. freedom and pluralism of the media.

(e) In determining whether or not a foreign investment is likely to affect security or public order, Member States and the Commission may also take into account that investor's prior involvement in activities affecting security; the State ownership or control of the foreign investor; and whether or not there is a risk that the foreign investor engages in illegal or criminal activities.

(f) The draft Regulation establishes a coordination mechanism whereby Member States must inform in a detailed manner (ownership structure of foreign investor, value of investment, products/services affected, funding and its sources, time of the investment) the other Member States and the Commission of direct investments screened in their territory. The Commission and Member States may issue opinions and comments regarding the substantive assessment of foreign investments carried out in another Member State. The draft Regulation assumes that direct investment takes place in the territory of a Member State and that Member State is the one screening the investment. It also provides for coordination mechanisms in case a Member State or the Commission consider that a foreign investment being ignored by a Member State may affect security or public order.