AIMS AND VALUES IN MERGER CONTROL

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Looking for governing patterns over 20+ years

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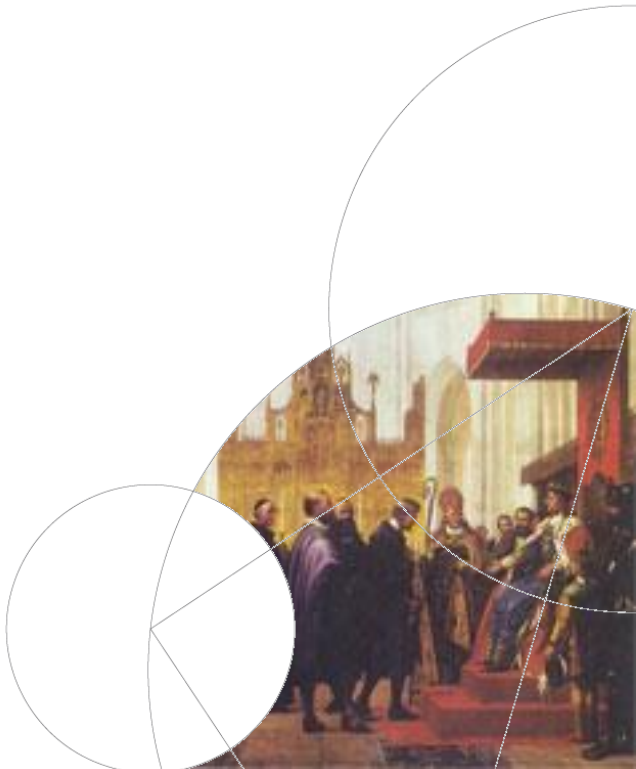

AIMS AND VALUES IN MERGER CONTROL

Not easy to identify a pattern across:

- >20 years of practice
- >6700 cases decided under the Merger Regulations
- 2½ different Merger Regulations + Article 101/Article 101 (3)

Nevertheless, make an attempt focusing on:

- efficiencies as the objective
- potential hidden regulatory objective and (ab)use of remedies in the pursue thereof
- the issue of Industrial Policy

Nothing conclusive in the texts

Viewed from a formalistic perspective, it is unclear what governs EU merger control:

- Neither the wording of EMR/Article 101 (3) nor their legal history offers anything conclusive
  - The initial (1973) proposal for EMR referred to ".. *objective… given priority…. in the common interest of the Community*" as a **dispersal reason**. This was developed into a "**balancing test**" in later drafts (1988 and 1989)
  - The adopted Regulations (4064/89 and 139/04) do not incorporate any dispersal rule, but refers to issues such as **effective competition, interest of consumers**, **technical and economic progress** and 139/2004 **efficiencies**. Further, references are made to the **objectives of Article 2 EC (130a EC) and Article 2 EU**
  - Article 101 (3) incorporates a from of **balancing test,** but does not allow a **market foreclosure**

Nothing conclusive in the texts

Viewed from a formalistic perspective, it is unclear what governs EU merger control:

- Neither the wording of EMR/Article 101 (3) nor their legal history offers anything conclusive
- However, it would be **plausible to presume** that the Commission **originally favored** a form of a **balancing test** "inspired" by Article 101 (3)
- A balancing test under which the Commission could **disregard impediment** to competition for **objectives given priority**
- The **adopted Regulation** did not incorporate a balancing test, but **utilized the "dominance test"** "inspired" by Article 102

Case law demonstrates ambiguity

Viewed from a formalistic perspective, it is unclear what governs EU merger control:

- Case law demonstrates ambiguity
  - In *Aerospatiale-Alenia/de Havilland* (1991), the identified **efficiencies** were initially **held against the merged entity** as likely to strengthen the dominance. **Later** when engaged in a form of balancing test, they were **labelled insufficient** and perhaps **not even relevant** to the assessment
  - *Boeing/McDonnell Douglas* (1997) is cited as an example where **domestic undertakings** (Airbus) came **before consumers**
  - In *Ford/Volkswagen* (1992), **social considerations** and **rural area benefits** were accepted under Article 101 (3) as dispersal reason as they were **within** the **objective of the Treaty**. The Commission has signalled (1990) that the **same** thing **would apply under EMR**
  - In the "*Nestlé/Perrier law suit*" (1995), the Commission (in my opinion) claimed to be **confined** to the straightjacket of the **"dominance test"** and thus **unable to embrace other considerations** except from on a general level

An economic welfare agenda?

It is submitted that the governing agenda is of an economic welfare nature

1. The experts (the academics) state this and so does the Commission:
    - *"…. Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources……"*

      Speech by Commissioner Neelie Kroes - SPEECH/05/512 – *Delivering Better Markets and Better Choices*

An economic welfare agenda?

It is submitted that the governing agenda is of an economic welfare nature

2. The **issued guidelines support** this as demonstrated by the embracing of **economic (welfare) arguments** and considerations in the issued guidelines on horizontal and non-horizontal mergers and Article 101/Article 101 (3)
3. The **strict stand against** pressure for accepting **impediments** to competition on the **ground of Industrial Policy** or **crisis considerations** renders it plausible. So does the **rigid enforcement of Article 21** (sole jurisdiction) against Member States' attempt to favour "**national solutions**"

However, there might be more to it

A submission subject to some difficulties

1. The statements should not shadow for neither the demonstrated **ambiguity in case law** nor the **novelty of the guidelines**. "Older" books tend to be more open to the issue
2. The use of **market shares as a proxy** for the impact on competition **indicates** a **negative stand** on monopolies regardless of any efficiencies
3. The welfare agenda in its purest form "the **efficiency defence**" is nothing more than a defence
4. The General Court (*Nestlé/Perrier)* has authorised **other considerations** than the narrow competition perspective. The Commission has, however, been **most unwilling to acknowledge** anything beyond the efficiency defence and has been unwilling to acknowledge this until recently

The market structure is held at a premium

Rather than rebutting the welfare agenda, I find it more accurate to submit that the **emerging pattern** would be one where the **market structure** is held at a premium. In particular as this would make a **link** between the **structure of the Merger Regulation,** it is **"dominance test"** and the actual **enforcement**

Other issues, including efficiencies, are only accepted **as** a **supplement** or perhaps more fitting as a **defence** to be conducted **subsequently**

In this light, it appears as if a variation of the original **"balancing test"** has been **introduced through the back door**, allowing the Commission to consider **objectives given priority** as a dispersal reason

The market structure is held at a premium

Rather than rebutting the welfare agenda, I find it more accurate to submit that the **emerging pattern** would be one where the **market structure** is held at a premium. In particular as this would make a **link** between the **structure of the Merger Regulation,** it is **"dominance test"** and the actual **enforcement**

This raises two questions:

1. Which objectives **holds priority** and could therefore be taken into consideration as a defence?
2. What is to be considered an **impediment** in the first place, and what are the associated policy consequences?

Which objectives holds priority?

In *Nestlé/Perrier,* the General Court refers to "social considerations", cf. Article 130a EC. Further, EMR refers to Article 2 EC and Article 2 EU

- Article 2 EC, Article 2 EU and Article 130a EC have been updated and expanded, but generally refer to:
  - establishment of a **common market**
  - balanced and **sustainable development** of economic activities
  - a high level of **employment** and of **social protection**
  - a high level of protection of the **environment**
  - economic and **social cohesion**
- Hence, relevant arguments incorporating these issues could (presumably) serve as a defense

What is to be considered an impediment?

Holding the market structure at a premium has policy implications:

1. A **negative stand** on concentrations creating horizontal or vertical **foreclosure** regardless of any implied efficiencies
2. A strong **preference for structural remedies** reducing the level of concentrations even when behavioural remedies would be available
3. An **ability** not only to **identify** new or further impediments as problematic, but also **pre-existing impediments**, e.g. monopoly rights or existing dominant positions

What is to be considered an impediment?

- ☑ Unproblematic to oppose to concentrations **creating** an impediment to the Common Market, e.g. by **establishing** a dominant position

- ☒ Less clear if it should be equally unproblematic to oppose to concentrations **involving existing** impediment to the Common Market, e.g. **pre-existing** monopolies as it would amount to a prohibition on dominance

- ☒ Regardless, the Commission has defined pre-existing impediments as "problematic" and (most actively) remedied these by commitments

Remedying pre-existing impediments?

Many examples of cases where pre-existing impediments are labelled as "problematic"

- *Atlas/Phoenix* (1996) - **legal monopolies** over the telecom infrastructure in Germany/France was held as problematic and requested remedied
- *Telia/Telenor* (1999) - **local loop unbundling** was identified as an requirement for clearance
- *VEBA/VIAG* (2000) - **insufficient national price regulation** of access to the grid in Germany was held problematic and remedied used to address this
- *Gas de France/Suez* (2006) - **unbundling** of the gas **transmission network** was adopted as a remedy
- *EDF/EnBW* (2001) - **extremely high market shares** in a **geographical separated marked** (France) was held against the acquisitions of German power plants, and divestures in France were therefore required

Remedying pre-existing impediments?

When identifying pre-existing impediments as "problematic", the Commission often:

- Claims that lacunas and regulatory deficits in national regulation warrant intervention under competition law
- However, in reality, lacunas and deficits might be in the adopted EU regulation drafting competition law into a regulatory role. The lacunas should either be remedied directly or as leverage in the political process when seeking to expand the Single Market regulation

Remedies and the Single Market

It is even possible to see a link between merger remedies and the Single Market

Case		Single Market issues
Atlas/Phoenix (1996) monopoly rights in Germany/France was considered problematic		Parallel to the case, the Commission tabled before the Council a proposal to liberalize the telecom infrastructure in general
Telia/Telenor (1999) was cleared against i.a. local loop unbundling		Shortly after the case, the Commission suggested that Local Loop unbundling by Regulation should be imposed in general
VEBA/VIAG (2000) insufficient national price regulation of access to the grid was considered problematic		The absence of national regulation was a consequence of the adopted EC Directive (1996) referring the issue to commercial negotiations. An option incorporated as part of the political process in the Council and thus accepted by the Commission
Gas de France/Suez (2006) unbundling of the gas transmission network was adopted as a remedy		The case identified shortfalls in the applicable energy regulation and was accompanied by the announcements of forthcoming Single Market initiatives
EDF/EnBW (2001) extremely high market shares in France was considered an obstacle to acquisitions in Germany		Did the Commission get tired of France and its persistently delayed implementation of adopted Single Market Regulation and decided to use the Merger Regulation to defrost the French energy market?

Remedies and the Single Market

The use of merger **remedies** to **pursue Single Market objective** follows indirectly from the dominance test and its link to the market structure. Therefore, it is **not per se problematic**

There is, however, other (more dubious) explanations:

- Undertakings are **easy prey** when involved in a concentration as the time factor plays to the benefit of the Commission
- Increased use of "fix it first remedies" and remedies in phase I **reduces** the quality of the **analysis,** making sectors with a high concentration and little competition prone to intervention and remedies
- Mergers are rarely challenged before the General Court, and the latter has allotted the Commission a (wide) **margin of discretion** even if it involves a quasi- regulatory agenda (cf. *EDP vs. Commission*)

Single Market smells like Industrial Policy

If accepted that the Commission occasionally pursues a regulatory agenda under the merger regulations, the issue of Industrial Policy might require some reconsideration

No single definition of Industrial Policy available. Presuming that Industrial Policy covers not merely the forming of "national champions" through protectionism or inducing innovation and development by public investments in R&D, but any fundamental restructuring of sectors and industries

Then, it could be submitted that Industrial Policy has been pursued in merger control in the form of the Single Market

Concluding on 20+ years of experience

Therefore, I submit the following:

1. The protection of the **market structure** has been the main concern under merger control and the issue of efficiencies **only a supplement**
2. The Commission has, **through the back door**, introduced a light version of the "**balancing test** suggested in 1973 and utilized in Article 101 (3) providing for a **number of defences**
3. The Commission has occasionally **used** (perhaps even abused) merger control to **pursue a regulatory agenda**
4. The Single Market could perhaps be labelled as the Commission's concept of Industrial Policy