EUROPEAN COMMUNITY COMPETITION POLICY THE IMPACT OF GLOBALIZATION

paper presented at
the seminar organized by IBRAC
at Campos do Jordao (Brazil)
16-18 May, 1996

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GLOBALIZATION AND ANTITRUST POLICY SOME GENERAL COMMENTS

1. As the concept of "globalization" is used in a variety of meanings, it would appear useful to define it for the purposes of this paper. It refers to the evolving pattern of cross-border inter-firm and intra-firm operations which involves all functional areas of firm's activities, including technology development, dispersion of different phases of design, production, sourcing and marketing [1].

"Globalization" is thus something else than and at any rate short of "integration of the world economy". The European Community (hereinafter : the "EC") with its common institutions, its common foreign trade policy and common sectorial economic policies, having removed all tariff barriers and a great many of non-tariff barriers to intra-EC trade has created to a substantial degree the conditions necessary to integrate the markets of its Member States into a single market. Yet there still are areas in which distinct geographic markets continue to exist. This may be illustrated by the Procter & Gamble/Schickedanz merger, one of the cases referred to in this paper. One of the relevant product markets was the market for sanitory towels for ladies.

[1] A. Beviglia Zampetti and P. Sauvé, New Dimensions of market Access : An overview in OECD DOCUMENTS, NEW DIMENSIONS OF MARKET ACCESS IN A GLOBALIZING WORLD ECONOMY 13-22 (Paris, 1995)

The European Commission found that within the EC there were apart from other Member States two separate geographic markets : Germany and Spain. It found that parties to the merger were able to determine their competitive behaviour without significant competitive constraints from outside Germany and Spain. There were different consumer prices, different pricing patterns, supplier having home markets, different broad names were used, demand differed and there were market entry barriers.

One should also bear in mind that "globalization" is not a universal phenomenon. About 80 % of world trade is between 25 OECD countries. Foreign investments are made in a limited number of developing countries. Roughly 70 % of all investments are made by the five largest industrial countries [2].

2. The renewed interest for competition policy beyond the confines of national jurisdictions is at least in part the result of globalization, which itself has contributed to the Uruguay Round agreements and will be further stimulated by their implementation.

This renewed interest for competition policy is reflected in clauses of the Europe agreements concluded by the EC with Central-European countries.

On world-level too there is a renewed interest for competition policy as evidenced by the Draft International Antitrust Code produced by a group of eminent scholars [3] and by work started to bring about convergence of competition laws among OECD countries [4]. There have also been calls for including competition policy in the future work of the WTO and there already is a beginning of WTO competition rules in the Uruguay Round Agreement on Trade Related Aspects of Intellectual Property Rights.

3. These international efforts not only reflect the growing importance given to competition policy as such, which is linked to more stress being laid on the market economy. They also attempt to bring about an approximation of competition regulatory systems. The existence of differing systems is seen as a barrier to market access and as a multiplier of transaction costs for businesses that operate in the parts of the world involved in the globalization and that thus have to comply with the requirements of these differing systems.

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[2] The extent to which countries benefited from what the World Bank calls "increased integration of world goods and capital markets" has been highly uneven in the past five years. 1996 World Bank, Global Economic Prospects and the Developing Countries at 3 (The World Bank, Washington D.C., 1996)

[3] Published in 5 WORLD TRADE MATERIALS IL 7 (No 5, 1993)

[4] Several contributions in the book cited *supra* n. 1

4. Globalization does not appear to have led to lesser enforcement of national competition policy. While globalization may in certain circumstances impair the effectiveness of national policies (see infra para 6), it has led to more forceful assertion of jurisdiction over foreign conduct affecting national markets [5] or even over foreign conduct affecting national companies' interests on foreign markets. This now is the policy of the US Administration [6].

5. One may wonder why globalization has not led to less enforcement of competition policy at the national level, albeit that the competition analysis may in appropriate cases take account of the competitive situation on the world market (see infra examples from the EC practice). Unilateral disarmament in competition policy may be a handicap if other countries do not do likewise : precisely in light of globalization the country that refrains from enforcing its competition policy runs the risk of being subjected to the effects within its territory of another country's competition policy.

6. As matters stand, the absence of multilateral competition rules may lead to conflicting decisions with respect to the same conduct.

A few examples may illustrate this point.

In 1989 following a complaint by Consolidated Goldfields against a takeover bid for its shares by Minorco, the Commission of the European Communities agreed to a settlement effectively allowing the takeover bid to go ahead subject to undertakings by Minorco. Minorco undertook to sell within a specified period of time the platinum interests of Consolidated Goldfields and to refrain from selling them to the Anglo-American Corporation of South Africa, De Beers or parties associated with them[7].

However, a New York court had already issued a preliminary injunction preventing Minorco from continuing its takeover of Consolidated Gold Fields[8].Subsequently that court refused to lift this injunction and Minorco felt constrained to allow its bid to lapse[9].

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[5] The Court of Justice of the European Communities confirmed that EC competition rules apply to agreements of foreign companies entered into abroad as long as they are implemented within the EC. Ahlström Osakeyhtio v. Commission [1988] ECR 5193

[6] BNA, Antitrust & Trade Regulation Report, Vol. 67, No 1685 (Oct. 20, 1994)

[7] Commission of the European Communities, XIXth Report on Competition Policy para 68 (1990)

[8] Consolidated Gold Fields PLC v. Anglo-American Corp. 1988-2 Trade Cas. (CCH) # 68.294

[9] Minorco concedes defeat as US injunction remains, Financial Times 17 May 1989, p. 1

The acquisition by Gillette of a shareholding in Wilkinson Sword involved no less than eight competition authorities. In early 1990 US authorities filed for a consent decree with respect to American intellectual property and voting rights, while subsequently the UK authorities blocked the merger entirely[10]. The European Commission held that the complex arrangement between Gillette and Wilkinson Sword, involving an investment vehicle company, in which Gillette acquired a 22 % equity stake and to which it made an unsecured loan, and the geographical separation of ownership of the Wilkinson Sword trademarks, was contrary to Article 85 (1) EC Treaty on restrictive agreements. Moreover, it found that Gillette's acquisition of the interests in the investment vehicle company constituted an abuse of dominant position within the meaning of Article 86 EC Treaty[11].

In 1991 the European Commission prohibited the proposed acquisition of de Havilland by Aérospatiale/Alenia on the ground that this would create a dominant position on the world markets of commuter aircraft, which would not merely be temporary but would significantly impede effective competition[12]. The Canadian Bureau of Competition Policy also investigated the proposed acquisition. It, however, found that the transaction was not likely to substantially lessen competition within Canada. These conflicting results can be explained not by a lack of consultations between the two competition authorities, which were held, but by the differing nature of Canadian and EC merger control legislation[13]. But this is precisely the point that has to be made.

On 8 June 1994, following a notification, the European Commission cleared the creation by Montecatini and Shell of a joint-venture, to which Montecatini would transfer all its polyolefins interests and Shell most of its activities in this sector, with the exception of its interests in the US and in its joint-venture with BASF for polypropylene production. The European Commission was able to clear this after the parties amended the operation as originally conceived and made certain undertakings[14]. Concurrently the parties filed this operation with the US FTC. The FTC managed to approve it

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[10] G.N. Addy, International Coordination of Competition Policies in KANTZENBACH, SCHARRER, WAVERMAN (eds) COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 33 (Nomos, Baden-Baden, 1993) at 293 and 297

[11] Decision of 10 November 1992, OJ L 116/93

[12] Decision of 2 October 1991, OJ L 334/91

[13] G.N. Addy supra n. 10 at 298

[14] European Commission Press Release IP/94/509

subject to the conditions that Shell divest its polypropylene assets and the Director of the FTC's bureau of competition indicated at the time that this case demonstrated the agency's ability to work with foreign antitrust agencies in devising effective relief.

II. GLOBALIZATION AND EC COMPETITION POLICY

7. Arguably merger control is the area of EC competition policy in which it should be the easiest to analyze the impact of globalization. The analysis will thus be limited to some cases under the Merger Control Regulation [15].

Some general remarks

8. In a way the jurisdictional scope given to EC merger control takes account of globalization. It applies to mergers with a "[European] Community dimension", defined in terms of turnover thresholds (combined aggregate world-wide turnover of all undertakings concerned in excess of ECU 5,000 million, roughly USD 650 billion, and aggregate EC-wide turnover of each of at least two of the undertakings concerned in excess of ECU 250 million, roughly USD 330 million). Thus the sole condition on which EC jurisdiction depends under the Merger Control Regulation is a qualified turnover in the EC. Under this regulation whether or not parties to a merger are established in the EC is irrelevant [16].

9. The Merger Control Regulation provides that

"[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market" (Art. 2 (3).

It directs the European Commission to effectively prohibit what one could call a "qualified dominant position" and provides for a double test.

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[15] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings (Official Journal of the European Communities Nr. L 395 of 30 December 1989, p. 1)

[16] For further reading J.H.J. Bourgeois, EEC Control over International Mergers (1990) YEARBOOK OF EUROPEAN LAW 103 (Clarendon Press, Oxford)

First, the merger must create or strengthen a "dominant position"; second, the result of the creation or strengthening of the "dominant position" must be that "effective competition would be significantly impeded".

Legal writers have questioned whether the test provided by the Merger Control Regulation is a double test. After initial hesitations the European Commission seems to interpret and apply this provision as requiring a double test.

10. An analysis of what constitutes a "dominant position" within the meaning of the Merger Control Regulation is beyond the scope of this paper.

Suffice it to make three remarks in this respect.

First, although in practice having a share of the market in excess of 50 % puts one in the danger zone, there is no presumption of dominance built on thresholds of supply concentration or any other parameter [17]. Second, a review of the European Commission decisions shows that much, if not everything, depends on an analysis in each case of the circumstances and conditions prevailing in the relevant market. Third, neither the EC Merger Control Regulation, nor the European Commission in its decisional practice rely on the Herfindahl-Hirschman Index [18].

The relevant geographic market with respect to which the dominant position must be assessed is at most the whole of the EC. The European Commission is not mandated to control the creation or the strengthening of a "dominant position" in a market larger than the EC [19].

11. Whether a "dominant position" would have the result of significantly impeding effective competition depends on a number of factors which are listed in the Merger Control Regulation (Art. 2 (1)) :

- the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the EC;

- the economic and financial power of the undertakings concerned, the alternatives available to suppliers and users, their access to supplies or

[17] J. Briones, Oligopolistic Dominance : Is there a Common Approach in Different Jurisdictions ? A Review of Decisions Adopted by the Commission under the Merger Regulation, 6 ECLR 334 at 336 (1995)

[18] One authoritative commentary considers that the HHI "as a meaningful indications of likely challenge under the Merger Regulation is at best unreliable" (Ch. Jones/E. González-Díaz, The EEC Merger Regulation 136 (Sweet & Maxwell, London, 1992)).

[19] With the exception of the European Economic Area, at present an area comprising the EC and Iceland, Liechtenstein and Norway

markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

This list contains the factors which are used in most competition laws to determine whether there are "barriers to entry" in a given market in the usual meaning of these terms. The list also refers to actual or potential competition from undertakings located outside the EC as a factor to be assessed.

12. As of November 1995, 376 concentrations had been notified and 357 final decisions had been adopted under the Merger Control Regulation (31 decisions declaring that the operation falls outside of the scope of the Regulation; 303 decisions clearing the merger at the end of the first phase of investigation; 19 decisions clearing the merger at the end of the second phase of investigation; 4 decisions prohibiting the merger) [20]. Since then one more merger has been prohibited : Holland Media Group and Gencor/Lonrho.

13. It may be interesting to speculate as to why so few mergers have been prohibited. There probably are several explanations. Many companies are not (yet) operating on a EC scale and those that do generally have no high market shares in the EC as a whole. Moreover, there are two features of the European Commission practice that tend to prevent a situation where mergers are bound to be prohibited. First, the European Commission encourages parties to have "pre-notification contacts" with its staff in which, pending the negotiations of a merger, parties can "test the waters" and, if they so wish, abandon a contemplated merger or change aspects which, according to the European Commission staff, are likely to stand in the way of clearance of such merger by the European Commission. Second, the European Commission prefers settlements over negative decisions : where parties are willing to make certain commitments, the European Commission will clear the merger subject to conditions or obligations to ensure compliance with such commitments. As the cases analyzed in this paper show, these commitments are designed to remove the negative effects which a merger would otherwise have on the structure of competition within the EC. These commitments are thus only of a structural nature and typically relate to divestiture of part of the business involved.

[20] European Commission, Community Merger Control. Green Paper on the Review of the Merger Regulation (31 January 1996) para 12 (COM (96) 19 final)

Some cases

14. The cases which are mentioned hereinafter have been selected on the basis of two criteria : first, they concern mergers leading to a "dominant position", second, competition from undertakings located outside the EC played a role in the assessment.

(a) Aérospatiale-Alenia / De Havilland [21] concerned a merger between Aérospatiale-Alenia, through their joint venture ATR the largest commuter aircraft manufacturer in the world and in the EC, and De Havilland, established in Canada, the second largest commuter aircraft manufacturer in the world (and in the EC through sales from Canada into the EC).

The merger was prohibited by the European Commission. The European Commission assessed among other factors the actual competition from undertakings located outside the EC (i.a. from Embraer) as well as potential competition from undertakings located outside the EC which are potential entrants in one of the relevant commuter aircraft markets. It concluded from its analysis that there was "no realistic significant potential competition in the commuter markets in the foreseeable future" (para 63).

(b) In Du Pont/ICI [22] concerning the proposed acquisition by Du Pont of the world-wide nylon operations of ICI, the European Commission found that Du Pont would increase its market share in the EC to 43 %. It also noted that du Pont is the lowest cost producer in the world and one of the world's largest chemical companies. It concluded effectively that du Pont would acquire a dominant position (para 47).

It also found that there was some import penetration form Allied Signal, which had less than 5 % of the market, but that there was no indication that other large US nylon producers intended to export production to the EC in the foreseeable future (para 40). The European Commission did not take the assessment of actual and potential competition from outside the EC further. It cleared the proposed merger in view of undertakings entered into by du Pont inter alia (a) to reserve a certain capacity annually to produce nylon staple fibre for the benefit of an independent supplier of nylon fibres; (b) for a period of five years to manufacture for a fee or specific amount annually of such nylon staple fibre as may be requested by the third party beneficiary; (c) to transfer to such third party a carpet research and production facility.

(c) The stainless tube joint venture in Mannesmann / Vallourec / Ilva [23] was found by the European Commission to have a 36% share of the

[21] EEC Merger Control Reporter, Vol. 1, p. 401
[22] EEC Merger Control Reporter, Vol. 2, p. 915
[23] EEC Merger Control Reporter, Vol. 3, p. 1321

relevant product market in the EC while Sandvik, the other larger player, had 33% share of that market. The European Commission examined whether collective dominance would be created by the post-concentration market structure. It concluded that the structural market conditions created a strong incentive for the joint venture and Sandvik to engage in anti-competitive parallel behaviour.

As to actual competition within the EC and EFTA it was found that none of the remaining producers primarily active in Western Europe could realistically hope to increase their sales volume without exposing themselves to likely joint retaliation by the two leaders, i.e. Sandvik and the joint venture. The European Commission considered, however, that any price increase carried out in common by the joint venture and Sandvik was likely to provoke a significant entry onto the Western European market of Japanese suppliers and that, given the overall demand-price inelasticity, such entry would even with limited volumes quickly depress prices. As to potential competition, the European Commission thought that it was very likely that the Eastern European producers would have a more significant impact on the Western European market in the near future. The proposed joint venture was cleared.

The competition assessment made by the European Commission has met with strong criticism in the legal literature, while a majority of the Advisory Committee of Member States officials considered that the proposed joint venture would lead to a joint dominance which would significantly impede effective competition. The criticism is probably well founded. Without saying so in the decision, the European Commission cleared the operation for industrial policy reasons.

(d) The European Commission was also in a position to clear the Shell/Montecatini [24] joint venture in the polyolefins sector in light of undertakings entered into by the parties.

It nonetheless examined in its decision whether the "dominant position", which the joint venture as originally contemplated would have created, would significantly impede effective competition. It noted that transport costs were sufficiently high that customers did not consider producers from outside Western Europe, e.g. the US or Japan, to be alternative sources of supply. It also noted that the current import duties "insulate the Western European market to some extent" (para 48).

(e) Procter & Gamble / VP Schickedanz [25] concerned the acquisition by the former of the latter, a producer of household paper and sanitary

[24] EEC Merger Control Reporter, Vol. 3, p. 1467
[25] EEC Merger Control Reporter, Vol. 3, p. 1511

protection products. The European Commission found that the acquisition would create a dominant position for P & G for baby nappies and in the sanitary towel market. As far as the latter market is concerned it made an extensive investigation covering practically all barriers to entry by actual competitors, which had managed to acquire only minimal market shares. It also examined potential competitors located in Japan, Hong-Kong and the US. It concluded from this analysis :

"While there are thus several conceivable potential entrants, the question is whether any of them would be likely to enter the German or Spanish market within the next two to three years or as a timely response to excessive pricing in the market. As was discussed earlier with regard to Germany there have been several failed attempts at entry in the last 10 to 15 years which illustrate the difficulty of penetrating this market on any scale less than that undertaken by P & G with Always.

As explained earlier in the discussion of the barriers to entry in the towel market, successful entry is all or nothing and must combine a product which is perceived as innovative by the consumer with a huge advertising and promotion effort. This last point is necessary to build market share and distribution quickly. Competitors of P & G have estimated that the minimum viable market share is between 15 and 20 % if a supplier is to be able to generate the resources to fund the advertising necessary to obtain adequate weighted retail distribution (estimated by competitors for Germany to be at about 70 %) and retain market share once won. A minimum market share is also necessary to begin to be able to reap economies of scale, particularly in advertising. This requirement of a minimum viable market share limits further the potential for entry. A low-cost entry strategy based on undercutting the existing brands rather than out-promoting them would be unlikely to succeed, given not only the relatively low level of price sensitivity among consumers but also the need to fund the advertising necessary to persuade brand loyal consumers to switch brands and thus obtain retail distribution and any sales at all".

The European Commission cleared the acquisition in view of undertakings entered into by P & G.

(f) In its decision in Crown Cork & Seal / CarnaudMetalbox [26], relating to the acquisition by the former of the latter company, the European Commission found that the operation would create a dominant position in two of the affected markets : aluminium bottle closers and tin-plate aerosol cans.

[26] Official Journal of the European Communities, No L 75 of 23 March 1996, p. 38

The new firm would have a 45 to 55 % share of the aluminium bottle closers market. However, the European Commission found that this market was a declining one due to a shift from glass to plastic bottles; moreover there was a strong competitor on the market also active in plastic closures (Alcoa). The European Commission concluded that these factors appeared sufficient to constrain a threat of dominance by the new firm.

On the market for tin-plate aerosol cans, Crown / CMB would acquire a 60 to 70 % market share. The European Commission then examined whether the remaining competitors would be able to constrain the new firm's exercise of market power on that market. It concluded that this would not be the case : the only remaining multi-plant competitor did not have adequate excess capacity nor the geographical flexibility to compete effectively against the parties throughout the market place. It also examined whether there was adequate potential competition to constrain possible anti-competitive behaviour by the new firm. It concluded that this was not the case in view of the important barriers to significant entry (reliability of supply, flexibility of production, advanced technology, R&D and know-how). In view of undertakings entered into by Crown relating to divestitures and not to compete with the purchaser of the divested business, the European Commission cleared the acquisition.

(g) As notified, the merger between Kimberley-Clark and Scott Paper would have created the largest manufacturer of tissue products not only in the world but also in the EC. It would have combined the marketing and technical strengths of Kimberley-Clark and Scott Paper as well as their brands Kleenex (EC), Scottex (the European continent) and Andrex (UK). Early 1996, the European Commission cleared the merger subject to substantial modifications to it. These involved the divestiture of all of Kimberley-Clark's existing branded consumer toilet tissue business sold under certain Kleenex brands, of certain Scott's brands and of a Kimberley-Clark's 80,000 ton-per-year tissue facility in the UK. The result was that Kimberley-Clark would not be able to combine its own Kleenex and Scott's Andrex branded consumer tissue businesses in the UK and Ireland where the parties had market shares in excess of 50 % [27].

(h) The full text of the European Commission's prohibition of the merger of the platinum operations of Gencor and Lonrho is not yet available. The European Commission press release [28] indicates that this merger would have given the parties a 28 % market share; this would have resulted in a

[27] European Commission Press Release, IP/96/48

[28] The Commission opposes the merger of the platinum operation of Gencor and Lonrho IP/96/346

duopoly with Anglo American Platinum Corporation (Amplats) which has a 35 % market share, both producer groups controlling 90 % of the world platinum reserves.

This decision is significant from at least two points of view. First, it illustrates the jurisdictional reach of EC merger control. Second, it shows that the European Commission is determined to protect the competitive structure on the EC market also in a situation where a merger operation would create a dominant position on the world market.

TENTATIVE CONCLUSIONS

The brief description of these few examples does not do justice to the usually careful analysis by the European Commission, particularly in the cases which are dealt with in the second phase of the investigation.

Findings of "dominant position" are based on, or qualified by, more factors than market share.

In addition, for the purposes of assessing whether a "dominant position" created or strengthened by a merger would significantly impede effective competition, the European Commission verifies whether there are significant barriers to entry resulting from various technical, industrial, economic and financial factors and other market features. It also verifies whether barriers to imports into the EC are likely to limit access of potential competitors from outside the EC to the EC market.

Also in cases where the relevant market in economic terms is the world and a merger has world-wide implications, the European Commission appears to be determined to step in to limit anti-competitive effects in the EC.