EC Common Market 2002
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Merger Regulation

The topic of this essay is about the EC Merger Regulation. I will try to explain the base of the regulation and when it's used. The two pillars that forms the founding of merger legislation is Articles 81 and 82 of the EC Treaty and the Merger Regulation[1]. I will start by trying to explain the conjunction between the Articles 81, 82 and the Merger Regulation hereafter referred to as ECMR.

The direct difference between the EC Treaty articles and the ECMR is that the Articles regulates the undertakers in the present situation while ECMR also regulates the effect of a planned merging. ECMR is a control instrument for the EC which is used for indication on whether a forthcoming merge is going to result in a dominant position, and by that will disturb the Common Market. The definition of "dominance" is accordingly the same as stated in Article 82.

In order to find out whether or not a Community dimension (within the regulation) will arise the "two thirds test" are executed. If a merger should fall within the frames of the EC Merger Regulation, it must pass one of the tests, which address the turnover of the parties concerned. The test aims to find out whether a concentration is at risk or not. This concentration may be a merger, an acquisition or full-function joint venture, i.e. a joint venture which functions as an independent business.
Whether or not a concentration has a Community dimension depends on the turnovers of the undertakings concerned. These are normally the acquiring and acquired businesses (but not the seller) or the merging parties or the parents of a joint venture (as well as the joint venture itself).

A when only two Member States are concerned, three conditions must be fulfilled:

a) the aggregate worldwide turnover of the undertakings concerned is more than ECU 5 billion[2] and;

[1] Council Regulation No.4064/89 of 2 December 1989 originally came into force on 21 September 1990. The ECMR was amended by Council Regulation 1310/972 which came into force on 1 March 1998
[2] ECU stands for "European Currency Unit" which is the system that makes the Euro work today. One ECU equals one € (euro).

b) the aggregate Community turnover of each of at least two of the undertakings concerned is more than ECU 250 million, and;
c) where each undertaking realises at least one third of its Community turnover in another Member State.

OR

B when three or more Member States are concerned, a concentration that does not meet the above mentioned thresholds has nonetheless a Community dimension when:

a) the combined aggregate world-wide turnover of all of the undertakings concerned is more than ECU 2.5 billion;
b) in each of at least 3 Member States the combined aggregate turnover of all of the undertakings concerned is more than ECU 100 million;
c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million;
d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million; and
e) unless, each of the undertakings concerned achieves more than two-thirds of its aggregate within one and the same Member State.

In simpler words one could say that if two or more undertakings situated in the same Member State has no Community dimension when all of them achieve more than one third in that same Member State.

If these criteria's aren't fulfilled it will be subject to national jurisdiction. There is however a possibility for those mergers to ask the commission anyway. The Commission will then scrutinize the merge, and if the merge will have an affect in the Member State/States then the Commission prohibits the merge. Some of the factors the Commission scrutinize is first that the above given criteria's are fulfilled, second that a dominance will arise, whether or not this dominance will result in a negative situation for the costumers.

The other part we have do define is "concentration", it's best described as a strengthening of position. When this strengthening becomes too strong you have reached a dominant position. In ECMR Article 2 the ways of creating a strengthened position within the scope of the regulation is stated. In the following Article (3) the definition of concentration is stated.

The Commission assesses a concentration on the basis of the effect on competition. 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 a substantial part of it must be declared incompatible with the common market. Technical and economic progress can be taken into account so long as it is to the Consumers' advantage and does not pose an obstacle to competition.

Concentrations with a Community dimension must be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of a public bid, or the acquisition of a controlling interest, whichever is the earliest of these events. The notification should either have been delivered to the Commission or have been dispatched by registered letter within this one week deadline. If a notification fails to be made within the time limit it may affect the validity of the transactions leading to the merger and the Commission has extensive powers to impose fines on those who do not comply, or who supply incorrect or misleading information. A concentration must not be implemented until it has been declared compatible with the common market. The decision of the commission must be published in the *Official Journal* before the merge can proceed. If no decision is taken, the merge is deemed compatible.

However, even though this extensive regulation seems to tie up a lot of loose ends it generates a lot of discussions. In the recent case *Schneider Electric SA v Commision*[3], the Commission got a harsh reprimand from the Court of First Instance. The Court reprimands included statements like "several obvious errors, omissions and contradictions in the Commission's economic reasoning,". They also stated that there was a lack of "precise analyses" and "country-by-country examination of the markets affected." This clearly shows the difficulties of interpretation and concluding wise judgments based on the EC law.

[3] Cases T-310/01 and T-77/02