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EDITORIAL COMMENTS

Judicial review and merger control

One year's experience with the EEC Merger Control Regulation (MCR) has sparked off analytical review of the Commission's decisions in this journal[1] and elsewhere.[2] On the whole, DG IV and the newly created Merger Task Force have been applauded for having done a good job. The actual number of notifications received within the first twelve months (somewhere around fifty) corresponds to what was expected. In five cases the Commission initiated proceedings according to Article 6(1)(c) MCR. In all other cases, the decisions were taken within the one-month-limit set by Article 10(1) MCR, either because the concentration did not fall within the scope of the MCR or because no serious doubts were raised as to its compatibility with the Common Market.

The Commission has fulfilled its task in such a smooth, not to say unspectacular, way that its decision-making could indeed be left to the analysis and critique of practitioners and scholars (who may, for instance, start to argue with the Commission about whether its implicit assumptions on competition and the competitive process in oligopolistic markets are realistic), had the Commission not handed down the *Aérospatiale/de Havilland* decision of 2 October 1991. Here, for the first time, the Commission gave the MCR a bite, declaring a concentration incompatible with the Common Market. As the case did not involve ordinary privately-controlled enterprises, but state-owned enterprises, the reactions from government officials from some of the Member States concerned were extremely emotional, ranging from the criticism that the Commission has misused the MCR, to the accusation that the interests of Europe and the Member States involved have been betrayed.

1. Siragusa and Subiotto, "The EEC Merger Control Regulation", 28 CML Rev. 877–934.

2. See e.g. the papers by Reynolds, Kleemann and Fox, submitted to the Fordham Corporate Law Institute 1991 (forthcoming 1992).

Certainly, some of the reactions can easily be exlained by the specific political circumstances in one of the Member States. What also comes to the surface is the basic ideological split between those who think that competition policy should serve the development of a strong European industry, and those who believe in preserving competitive market structures without an "industrial policy" bias. For a long time, this ideological split delayed the adoption of the MCR in the Council. Then it took refuge in the cryptic language of the Regulation's Article 2. Whereas Article 2(3) makes the decisive test whether or not a concentration creates or strengthens a dominant position in the Common Market or a substantial part of it, Article 2(1)(b) explicitly empowers the Commission to include in its appraisal the development of technical and economic progress promulgated by the concentration, at least as long as this progress does not form an obstacle to competition.[3]

This is not the place to ask whether the Commission has made a correct analysis of the relevant markets in *Aérospatiale/de Havilland*. Our attention should be directed towards the consequences that the intense reactions from the Member States may have on future decisions. Whether or not industrial-policy oriented considerations might be given a stronger weight (especially when "national champions" are affected).

It is hereby submitted that the availability of *judicial review* may work as an effective restraint on political pressure exerted from the Member States and on industrial policy considerations as well.

According to Article 173(1) EEC, the Court of Justice has competence to review the legality of acts of the Commission in an action brought by a *Member State*. The Member States may serve as a "watchdog" to counterbalance national political influence, thereby strengthening the autonomy of the Commission. Member States may attack any decision taken on the basis of proceedings initiated pursuant to Article 6(1)(c) MCR, including the fictitious decision of Article 10(6) MCR where the Commission has not met the deadline.[4]

3. For somewhat differing interpretations, see von der Groeben, Thiesing, Ehlermann(-Schröter), *Kommentar zum EWG-Vertrag*, 4th ed. (1991), vol. II, Art. 87 margin 270; Ehlermann, "Die europäische Fusionskontrolle – erste Erfahrungen", (1991) WuW 535, at 543.

4. Cf. Koch, "Die neuen Befugnisse der EG zur Kontrolle von Unternehmenszusammenschlüssen", (1990) *Europäisches Wirtschafts- und Steuerrecht* 65, at 72. Member

Judging from the past, one may expect *competitors* and other enterprises effected by a concentration, and not the Member States, to be primarily concerned with decisions taken by the Commission. At least one commentator, however, has argued that only persons who are involved in the concentration shall have standing to sue under Article 173(2) EEC.[5] It is hereby submitted that it is essential for the proper functioning of European merger control that other persons affected by a concentration shall have standing to sue as well.

The starting point has to be Article 173(2) EEC: "Any natural or legal person may ... institute proceedings against ... a decision which, although in the form of ... a decision addressed to another person, is of direct and individual concern to the former". Whereas a mere competitive relationship does not suffice to fulfill the criterium of "individual and direct concern",[6] the Court held in *Metro I* that persons who are given the right to initiate proceedings by the Commission on the basis of Article 3(2)(b) Regulation 17/62, shall have standing to sue under Article 173(2) EEC.[7] As the MCR does not contain a comparable provision, *Metro I* is not of much help for third parties.

However, in its *Cofaz I* judgment, the Court stated that other ways of participation in the pre-contentious proceedings may suffice for standing to sue, i.e. if the party has been heard and if its observations have materially influenced the conduct of the proceedings, provided that (in an Article 92 EEC case) the market position of the third party was materially affected[8] These criteria can be easily transferred to a concentration case to establish "direct and individual concern". Third parties who qualify to be heard in the proceedings according to Article 18(4) MCR,[9] who have applied to the Commission to be heard, and have contributed to the proceeding, should have standing to sue under Article 173 (2) EEC. Persons with "sufficient interest" to be heard are those that are materially affected by the concentration, i.e. competitors

States may, moreover, attack a decision of the Commission, based on Art. 6(1)(b) MCR, or a fictitious decision in case the time-limit has elapsed (Art. 10(6) MCR).

5. Koch, *supra* note 4, at 72.
6. Cases 10 and 18/68, *Eridania*, [1969] ECR 459, at 482.
7. Case 26/76, *Metro SB-Grossmärkte*, [1977] ECR 1875, at 1898.
8. Case 169/84, *Cofaz*, [1986] ECR 391, at 415.
9. "Natural or legal persons showing a sufficient interest ... shall be entitled, upon application, to be heard". Cf. Also Art. 15 Reg. 2367/90.

as well as enterprises on the demand and supply side.[10] Standing to sue under Article 173(2) EEC should extend to cases in which persons "with sufficient interest" who have applied to be heard have in fact not been heard, and to the ficitious decision of Article 10(6) MCR in case the time limit has elapsed.

The same principles should apply to a decision of the Commission based on Article 6(1)(b) MCR that a concentration does not raise serious doubts as to its compatibility with the Common Market. Though, at this stage of the procedure, the MCR does not provide for a mandatory right to be heard, Article 4(3) MCR requires that the notification of the concentration shall be published. It is submitted that enterprises that are substantially affected by the concentration should have standing to sue under Article 173(2) EEC if they have submitted written comments in due time. There are at least two reasons for this position. It is in the interest of a satisfactory administration of justice and a proper application of Article 6(1)(b) MCR that the procedural rights of third parties should not be made dependent on the Commission's decision to initiate proceedings or not. Moreover, workload and political pressure could induce the Commission to decide a case on the basis of Article 6(1)(b) MCR under circumstances that in fact raise doubts as to the concentration being compatible with the Common Market.[11] Giving third parties that are materially affected by a merger standing to sue may tend to offset some pressure on the Commission not to initiate proceedings and thereby contribute to a correct application of the MCR.

Judicial review initiated by third parties cannot make amends for a basic institutional discrepancy that is inherent in the administration of merger control by the Commission. Whereas the Commission has to apply legal concepts and legal criteria based on Article 2 MCR, the Commission is a political body shaping and developing socio-economic policies. At least in "hard" concentration cases it is to be expected that the Commission may act as a political body, with political considerations becoming prevalent with regard to the criteria of "technical and eco-

10. Cf. Heidenhain, "Zur Klagebefugnis Dritter in der europäischen Fusionskontrolle", (1991) *Europäische Zeitschrift für Wirtschaftsrecht* 590, at 594.

11. Case IV/M 017 – *Aérospatiale/MBB* and Case IV/M 004 – *Renault/Volvo* are decisions that are not beyond any doubt in this respect.

nomic progress'', referred to in Article 2(1)(b) MCR. In 1989, the German Monopoly Commission proposed a two-step merger control procedure that was meant to separate political decisions from antitrust analysis. An autonomous office should be made responsible for merger control based on purely competition-related criteria. Decisions of this office that would declare a concentration incompatible with the Common Market might then be taken to the Commission, who would decide on specific economic (efficiency-based) considerations[12] – maybe even with a certain qualified majority as a prerequisite for an exemption. The *Aérospatiale/de Havilland* decision and the reactions from the Member States following it should make us think once more about this proposal.

12. Monopolkommission, *Sondergutachten 17 – Konzeption einer europäischen Fusionskontrolle* (1989) at 85–87.