

# THE REFORM OF EC AND GREEK COMPETITION LAW

*Mergers – National champions and other jurisdictional issues  
under Article 21 of ECMR*

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strictly personal*

# “national champions” - what is the idea?

- The words “national champions” are very rarely mentioned publicly but are frequently in the mind of many Member States.
- They denote a certain view on industrial policy and its interface with competition policy.
- The underlying idea is that certain important public interests can be best advanced by coordinated action at national level that favors the creation or maintenance of big companies controlled by the state or by natural or legal persons of that state.

# “national champions” and cross-border mergers\*

- “National champions” are predicated on the idea that it is the structure of the market that influences the performance of the companies.
- But the idea ignores the principle that what is big at national level is not necessarily efficient and may not be able to resist competitive pressures from liberalised markets at EU and global levels (although the effects of the size of the company on innovation and performance are contested in theory)

*\* («cross-border » in this context means mergers between companies with their seat located in different countries)*

# “national champions” and nature of public interests pursued

- The public interests frequently pursued at national level are:
  - Protection of employment;
  - Protection of state participation in important strategic or commercial sectors (defence, energy, high technology, transport, health, banking, insurance, etc.);
  - Favour a commercial policy carried out through state-controlled companies;
  - For national security, prudential reasons, plurality of media, etc.

# **“national champions” and types of national protective measures**

National measures that may restrict cross-border mergers may take several forms:

- Creation of public undertakings (but less frequently nowadays);
- Granting undertakings in sensitive sectors with special or exclusive rights;
- Privatisation rules and regulations;
- “golden shares” provisions;
- Rules on foreign direct investment;
- Competition rules on mergers, stock exchange regulations, company law restrictions, other regulatory restrictions.

# Some statistical data

- **In the EU:**
  - between 1997-2004: 2.068 mergers were notified to EC Commission; 105 of these raised competition concerns; 12 were prohibited; and 54 were cleared with commitments in phase II;
  - in 2006, there were 277 cross-border mergers out of a total of 356 notified;
  - cross-border mergers represent about 70% of all notified mergers to the Commission;
  - of all these notified mergers, intervention by the MS affects only a very-very small number of mergers (but which are of politically high profile).
- **In the USA:**
  - between 1997 and 2004: 24.000 mergers were filed; 449 of those raised competition concerns; in 31 of those, the federal and state authorities acted in cooperation;
  - of the total number, the States' Attorney-Generals challenged only 17 mergers which none of the federal agencies challenged.

# Comparison with other jurisdictions

- In the USA federal merger regime:
  - Federal agencies and State actors enjoy concurrent powers of enforcement;
  - State Attorney-Generals have the authority to challenge mergers under federal law before federal courts by seeking e.g. injunction or partial or total divestitures (which may potentially diverge from the position taken by the federal agency that dealt with the merger);
- This kind of possibly conflicting outcomes and delays are avoided under the EECMR by the referral mechanisms of Article 4(4) and (5), Article 9 and Article 22. Article 21 plays also an important role in this respect.

# Legal provisions applicable to state measures restricting cross-border mergers in the EU

- EC Treaty provisions, in particular:
  - Free movement of capital (art. 43)
  - Right of establishment (art. 56)
  - General principles and other provisions of Community law (e.g. proportionality)
- Article 21 of Regulation 139/04 on mergers (ECMR)

# Principle of precise allocation of competence

This principle of allocation – based on Articles 1, 3, 5 and 21 ECMR - means that:

- Concentrations with community dimension come within the Commission's competence.
- Concentrations not having community dimension come within the jurisdiction of the Member State control authorities

# Article 21 ECMR: principle on exclusive jurisdiction

- Article 21(2) provides:  
Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.
- Article 21(3) provides:  
No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

# Article 21: nature of legitimate interests

Article 21 (4) provides:

- Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect **legitimate interests other than those taken into consideration by the ECMR** and compatible with the general principles and other provisions of Community law.
- **Public security, plurality of the media and prudential rules** shall be regarded as legitimate interests within the meaning of the first sub-paragraph.

*(see also the notes attached to ECMR for clarifications)*

## Article 21(4): legitimate interests – the procedure to follow

- **Any other public interest must be communicated to the Commission** by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law **before** the measures referred to above may be taken.
- The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

# Cimpor = Secil + Holderbank (1)

- Cimpor (an important Portuguese construction and cement producer):
  - for a long time a wholly-owned state enterprise, was in the final stage of its privatisation in 2000;
  - Portugal still held 12.7% of its capital at that time, but “golden shares” provisions gave Portuguese state the power to veto strategic decisions and amendments to its statutes;
  - Privatisation law provided that no shareholder other than the state or other public bodies could cast a vote exceeding 10% of the total voting capital.

# Cimpor = Secil + Holderbank (2)

- 15/6/2000: Portuguese company Secil (through a Spanish subsidiary Secilpar) and the Swiss group Holderbank made a takeover bid to acquire 100% of Cimpor's shares on, *inter alia*, the following three conditions:
  - a) Acceptance of offer by shareholders holding at least 67% of capital of Cimpor;
  - b) Removal of special rights held by the Portuguese Government;
  - c) Removal by the general assembly of Cimpor of the limitations on the exercise of voting rights (the 10% cap)

# Cimpor = Secil + Holderbank (3)

- 5/7/2000: Portuguese Minister refused to grant the authorisation making it clear that neither the special rights of the Government nor the limitation on the voting rights will be removed.
- 7/7/2000: Secil and Holderbank submitted to the Minister a new request for authorisation without the condition (b) above and agreed that the sale of the state holding would be in accordance with Portuguese privatisation law

# Cimpor = Secil + Holderbank (4)

- 11/9/2000: Minister refused again to authorise the acquisition of more than 10% of the share capital in Cimpor with voting rights, claiming that the acquisition runs counter to the “objectives of the privatisation” and, in particular, that:
  - acquisition would have removed Cimpor from the national capital market;
  - the applicants’ industrial project was incompatible with the Government’s strategies concerning the restructuring of that sector in Portugal;
  - acquisition would have prevented the transfer of the state’s holding under optimum economic and financial conditions;
  - acquisition would have infringed the principle of equal treatment in the last phase of the privatisation process.

Cimpor = Secil + Holderbank (5)

- 11/8/2000: Portuguese stock market Commission ordered the parties to withdraw the takeover bid

# Cimpor = Secil + Holderbank (6)

- 4/7/2000: parties notified the planned acquisition to the EC Commission under the ECMR;
- Notification was found to be incomplete and Commission invited the notifying party to complete it by 15/9/2000;
- 16/8/2000: Portuguese Minister notified to Commission his decision of 11/8/2000 that refused the authorisation.

# Cimpor = Secil + Holderbank (7)

- 21/9/2000: Commission sent preliminary assessment to Portugal claiming that Minister's decision possibly violated article 21ECMR and other provisions of EC law.
- 3/10/2000: Portugal replied that it did not apply Portuguese competition law to the take over and that its privatisation would soon be completed, thus removing the Government's special rights as a shareholder, but failed to notify the interest(s) pursued by the Minister's decisions in the specific case at hand.

# Cimpor = Secil + Holderbank (8)

- 22/11/2000: Commission adopted a final decision declaring that the interests underlying the Minister's refusals to grant the authorisation, which were not notified to the Commission, cannot be regarded as designed to protect legitimate interests and so were incompatible with the general principles and other provisions of Community law and, in particular, Article 21 of ECMR.
- 11/1/2001: the notification of the concentration by the parties to the EC Commission was finally withdrawn.

# Cimpor = Secil + Holderbank (9)

- The final Commission decision stated that the Portuguese Minister's decisions of 5 July and 11 August 2000 that refused the authorisation had found that:
  - the declared objectives of privatisation law no 380/93 was the "development of shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus in a way that is consistent with the economic policy guidelines in Portugal" (*at para. 50*).

# Cimpor = Secil + Holderbank (10)

- The final Commission decision found – on the basis of a very brief analysis - that the two decisions of the Minister opposing the concentration constituted:
  - barriers to the freedom of establishment and free movement of capital enshrined in the EC Treaty;
  - were not warranted under any grounds of public interest recognised in the case-law of the Court of Justice;
  - in any event, the Portuguese Government had not advanced nor notified any such grounds;
  - the general principle of equal treatment, which is relied on by the Portuguese Government in the first decision, did not add anything of substance to the above grounds (at para. 58).

# Cimpor = Secil + Holderbank (11)

- 1/2/2001: Portugal appealed the Commission decision (*case C-42/01, Portugal v. Commission [2004] ECR I-6079*);
- 22/6/2004: The ECJ rejected the appeal of Portugal holding, *inter alia*, that:
  - Commission was entitled to adopt the Article 21 ECMR decision in order to preserve the “*effet utile*” of that Article;
  - Commission can declare by an Article 21 decision a public interest to be incompatible with Community law even in the absence of its prior communication to the Commission by the Member State concerned under Article 21(4);
  - Commission is entitled to order, by decision based on Article 21, the withdrawal of the state measure declared to be incompatible with that Article and other provisions of Community law.

## Cimpor = Secil + Holderbank (12)

- 4/6/2002: The ECJ found in another case, initiated in 1998 by the Commission against Portugal for failure to fulfil its obligations (under Article 226 of EC Treaty), that the Portuguese system of administrative authorisation relating to privatised undertakings violated Article 56 EC on free movement of capital (*case C-367/98, Commission v. Portugal [2002] ECR I-4731*).

# Cimpor = Secil + Holderbank (13)

- In the Article 226 case (C-367/98), the ECJ found *inter alia* that:

As regards the need to safeguard the financial interest of Portugal, the general financial interests of a Member State cannot constitute adequate justification... This reasoning is equally applicable to the economic policy objectives reflected in Article 3 of privatisation Law No 11/90 and the objectives mentioned by the Portuguese Government in the present proceedings, namely choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production... Such interests cannot constitute a valid justification for restrictions on the fundamental freedom of capital movement.

# Cimpor = Secil + Holderbank (14)

- Outcome in the Cimpor case:
  - The parties withdrew the take over bid despite the rapid Commission intervention;
  - Portuguese privatisation law was declared incompatible with Community law (Article 56 on free movement of capital);
  - Specific application of the privatisation law that led to the abandonment of the merger was also declared incompatible with Article 21 ECMR.

# Conclusions (1)

- Article 21 enables the Commission to:
  - decide whether the interests claimed to be pursued by a state measure are justified under the ECMR and with the general principles and other provisions of Community law;
  - decide on the public interest(s) pursued even if they are not notified beforehand to the Commission, after giving the MS concerned the opportunity to express its views;
  - decide against a state measure that either blocks or imposes additional conditions on a merger, irrespective of whether the parties to the merger – for business reasons – agree not to challenge the additional conditions imposed, if the evidence is clear that the merger is affected;
  - act rapidly by adopting a decision, which is directly applicable before national courts, against a national measure affecting a merger notified to the Commission.

# Conclusions (2)

- As Commissioner N. Kroes said recently (St. Gallen, 11/5/07):
  - most significant cross-border mergers approved by the Commission go ahead without any interference from national governments;
  - the value of Article 21 ECMR is that it gives the Commission the power to adopt binding decisions about the legitimacy and proportionality of state measures that may adversely affect such cross-border mergers;
  - but Article 21 is not only a coercive instrument; it also offers the possibility of a dialogue about how best to protect legitimate public interests genuinely threatened by a merger, without removing the *raison d'être* of the merger itself.