Control of Mergers and Defense of Enterprises during Financial Crisis

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Abstract
The Merger Regulation has been imposed as a natural consequence of the need to provide a correspondent evolution of the market, as default of a perfect competition. The main purpose of the merger control aims to ensure a regulation of the exchanges occurring on the market, engendering its development, and in the same time, to protect it against anti-competitive practices. The European Standard outlines the legal framework of the defense of enterprises during financial crisis, the way they are characterized by means of the Guidelines regarding horizontal mergers, as particular application of the legal standard in art. 2 of the Merger Regulation no. 139/2004, in the same time embodying the causality relationship between any merger and the deterioration of the competitive circumstances on the emerging markets.

Key words: merger, emerging market, enterprise under crisis, competition
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Introduction
Merger Regulation imposed itself as a natural consequence of the need to ensure an appropriate evolution of the market, while lacking a perfect competition. The main purpose of the mergers was that to regulate the changes occurring on the market, in order to allow its development, and, in the same time, to protect it against antitrust behaviors. It is obvious that such thing could not have happened by prohibiting the mergers per se, taking into consideration the important contribution brought to the increase of the market's efficiency, by the implementation of a mechanism allowing the authorities to decide whether two or more companies can merge, combine or put together their activities.

Although mergers may lead to the achievement or the increase of the market power of a company, and consequently, the increase of the price of goods and services on the relevant market, the focus on the negative effects of mergers only represents a limited reasoning, which leaves outside discussion the complexity of the market and is unable to reflect the purpose of merger control.
Mergers present numerous advantages in what concerns the rationalization of the market, the strategies of launching on the market, the salvation of companies on the verge of bankruptcy or the entrance on the single market. Additionally, the reason most often referred to by the parties of the merger is the more increased efficiency the entity newly created compared to the merged companies. After the merger, companies can benefit from an economy of scale or from different operational or marketing rationalizations.

Despite that, there are also side effects of mergers imposing the introduction of a new control system. They refer to the deterioration of the competitive structure of the market through the effects of horizontal mergers, and of vertical ones, the occurrence of big companies, so that a too large economical concentration may limit the individual freedom or may prejudice the resources' distribution and the increase of unemployment. The complexity of the mergers control appears exactly from its purpose to establish coherent criteria in order to allow concentrations with benefic effects on the market, but in the same time, to prevent any concentration with adverse effects on the competition or the customers.

**Failing firms**

The defense of the companies in failure is not supported explicitly in the New Merger Control Regulation. Yet, according to the Guidelines on the assessment of horizontal mergers, paragraph 89 *"the Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger".*

The wording of the Guidelines reflects that the concept of failing firm is in essence a particular application of the legal standard under art. 2 of the Merger Regulation of casualty between any given merger and any deterioration of the competitive conditions in the market. This is the reason why, in the defense of the failing firms, for lack of causality between merger and any deterioration of the competitive conditions is at the heart of the analysis; a merger should at least be "neutral" concerning the development of the market compared to a scenario where the merger does not take place.

The Principle of defense of failing firms was used for the first time for the case *Kali und Salz/MdK/Treuhand* rising the question whether a company with a big market quota could put its activity together with that of it's only or main failing concurrent. Though the Commission statuted that such concentration would have had an enormous market quota, between 98% and 100% on the potassium carbonate market in Germany and on the magnesium products market, this would have concluded that the concentration does not lead to the creation or the consolidation of a dominant position. The justification of such decision was the fact that the deterioration of the competition on the market was not a consequence of the merger but of the critical situation.
In order for a failing firm defense to be accepted, three cumulative criteria are especially relevant as set out in paragraph 9 from the horizontal merger guidelines: „The Commission considers that the following three criteria are especially relevant for the application of the «exception of the failing firms».

Firstly:
the allegedly failing firm would, in the near future, be forced out of the market, due to its financial issues, if not taken over by a different company.

Secondly:
there is no less anti-competitive alternative purchase than the notified concentration

Thirdly:
"in the absence of the concentration, the assets of the failing firm would exit inevitably the market.”

The condition of the existence of certain financial difficulties, which would force the company to exit the market, is fulfilled if it demonstrated that it is unlikely to meet its financial difficulties in a near future. Such difficulties are at hand when no shareholder or other financial investor would be willing to provide the necessary capital for the business to remain in the market as a going concern. It is not required that bankruptcy proceedings or similar restructuring proceedings have been initiated for this test to be met, but rather that it is likely that, absent the merger, the company will enter into such proceedings in the near future. The Commission therefore does not follow a specific formula to assess the degree of financial difficulties, therefore a justification in such sense being the fact the liquidation or restructuring forms of the business varies significantly between the EU Member States.

The second condition proves that there is no less anti-competitive solution available, in order to save the failing firm better than the merger. In order to check if this condition is fulfilled, it is necessary to accomplish a counter-factual assessment of what the market structure would look like in the case of alternative purchasers.

Thus, when assessing whether any alternative less anti-competitive solutions is available, one must assess whether there are alternative purchasers available which would cause a lesser risk of restrictions to competition. Thus, a buyer which is less of a competitive constraint on the failed business would be the preferred option. In this assessment, efficiencies may also play a role; a merger between the failed business and a smaller actual competitor or a new entrant may not achieve the same efficiencies as a large competitor already active in the market. The most difficult part of the assessment is to ascertain which are the credible purchasers willing to buy the failed business and what efforts were made to reach an agreement with these investors. The requirement to enter into negotiations with other potential investors should be carefully balanced against time available before acute solvability problems arise.

The third condition of the test brings into discussion the question whether the company in financial difficulties would completely discontinue its business and
exit the market in the absence of the merger. In other words, it has to be assessed whether the production assets are likely to remain in the market in their current use or liquidated and re-allocated for another more efficient use.

The rationale for this part of the test is that the application of the two previous conditions does not address the possibility of a take-over by third parties of the various production assets of the failing firm in the course of bankruptcy proceedings. If these production assets remain in the market, the effects on competition may be similar to (or more beneficial than) the take-over of the entire failed business by an alternative purchaser.

It will therefore have to be assessed whether investors would be prepared to maintain the individual assets in their current use or whether they would prefer to re-allocate them for a better use elsewhere. In this connection it would have to be assessed whether such asset transfer would cause short term supply disruptions which are such as to cause more important harm to customers (and ultimately consumers) than the transfer of the business as a going concern.

An example of a defense case of a failing firm is that of BASF/Eurodiol/Pantochim. Briefly, BASF intended to acquire two of the subsidiaries of the SISAS group, Eurodial and Patoch, both active in the production of various specialty chemicals.

By means of the assessment conducted, the Commission concluded that the merger would lead to a single firm dominant position on several markets with combined shares over 40% and there were high entry barriers and capacity constrained competitors.

It was examined that both the SISAS group and its subsidiaries were in financial difficulties, since the target companies were subject to bankruptcy proceedings according to the Belgian law, thus the first condition is met.

Second, further to the restructuring efforts under the direction of the Court of Commerce in Charleroi no less anti-competitive solution was found as no company other than BASP was willing to make an offer for the business.

Through its market investigations, the Commission also verified that indeed no other buyer was interested. Thirdly, it was established that the firm's assets would inevitably exit the market, and other suppliers were not in the position to swiftly increase production and thus capture the failing firm's share of sales, producing a deficit of offer. Also, the loss of the target's production capacity was unlikely to improve through capacity expansion, at least for a considerable period of time because of costly environmental standards.

Finally, the Commission also took into consideration the importance of existing spare capacity, given the economical aspects of operating a capital intensive plant. Consequently, cost effective new entry would be difficult. On this basis, the Commission found that the deterioration of the competitive structure through the merger would be less significant than in the absence of the merger.
Conclusions
The analyses, realized in accordance to the procedures of defense inside the enterprises under crisis, have preponderantly in view the lack of causality between the merger and any deterioration of the competitive circumstances. In such sense, our interest is triggered by the mechanisms and procedures by means of which it is ensured the protection of the enterprises under crisis in the actual economical context, as well as the way in which the European Union's Court of Justice applies, concretely, the principles of defense of the enterprises during crisis.

References


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