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National merger enforcement during the crisis: more flexible?

Éric Barbier de La Serre, Jones Day

Scope for relaxing

- At the national level, more scope for relaxing than at the EU level:
 - “National champions”
 - More influence of day-to-day politics and economic pressure
 - Legislation allowing authorities to take into account non-competitive concerns
- Current crisis = ideal opportunity
 - Intensity of the crisis
 - 2/3 rule
- Yet no evidence of widespread relaxing in the UK, Spain, Germany, France and Italy: (i) limited to certain sectors + (ii) sometimes even *toughens* merger analysis

Few – but spectacular – instances of legislative and political intervention

- Legislative intervention in specific fields:
 - Protection of the financial system: Ireland + Germany
 - Italy: “essential public services” (“*Alitalia law*”)
 - Other attempts: agriculture (Germany) and press (Germany)
- Limited political intervention
 - A number of countries provide for public interest exceptions (e.g.,: Germany, France, Spain, Italy, Austria), but very limited use
 - Main exception: *Lloyds TSB/HBOs* (UK)

No widespread relaxing by competition authorities (on the substance)

- Failing firm defence: no significant relaxing
 - Exists in most national merger laws
 - Since mid-2008:
 - No dramatic increase of number of applications (e.g., Spain: raised only once, and rejected)
 - No sign of relaxing on the substance
 - Caveat concerning the UK: no official relaxing, but accepted in 5 cases since mid-2008
 - Main reasons:
 - Not so many cases raising competition concerns
 - Test not fit for urgent proceedings
 - Distress may be taken into account under other, less demanding forms

No widespread relaxing by competition authorities (on the substance) (cont.)

- No signs of increased flexibility on the substance
 - Clear statements by Competition Authorities indicating that there would be no relaxing (e.g., UK, France, Germany)
 - Confirmed by decisional practice
 - Prospective analysis more difficult, but no relaxing
 - No use of public interest exceptions
 - Crisis taken into account as an economic fact (for instance because leads to overcapacity), but not as specific element justifying general relaxing
 - In certain cases, crisis sometimes taken into account to the detriment of merging parties, e.g., in France:
 - *Canal+/TPS* (increase of profitability in spite of crisis)
 - *TF1/AB* (decrease of prices does not prove lack of market power because is due to the crisis)
 - *BP/CE* (market less dynamic → barrier to entry)

Remedies and procedure: more pragmatism

- Remedies:
 - Difficulties to find buyers
 - Statement by Competition Commission (UK)
 - France: reflected in decisional practice → *BP/CE*
 - Difficulties to find buyer
 - Hold separate with crown jewel provision
- Procedural matters:
 - Derogation to standstill provision (e.g., France and Belgium)
 - Speeding up merger control review (e.g., Germany, France, UK, Spain)

Conclusion

- No increased leniency towards mergers
- Relaxing mostly confined to:
 - financial sector, with no significant spill over to other sectors (exception: Italy and Alitalia law)
 - remedies and procedure
- France: Gallois report
- True test stills lies ahead?