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I. INTRODUCTION

Article 21 of EC Regulation 139/2004, on the control of concentrations between undertakings ("ECMR") is a provision which application appears to be relatively dormant in the last few years. Yet, it is not devoid of force and, in fact, we may see a reawakening of its application if the economic recovery much chanted by our politicians finally takes hold.

Article 21 ECMR establishes the exclusive jurisdiction of the European Commission ("Commission") to review mergers with Community dimension. As an exception to that general rule, the ECMR allows Member States to adopt the measures they deem appropriate to protect legitimate interests such as those listed in Article 21 ECMR (*i.e.*, public security, media plurality, and prudential rules). Legitimate interests other than the three mentioned must be notified to the Commission prior to the Member State concerned adopting any national measure to safeguard those interests.

II. THE *ABERTIS/AUTOSTRADE* CASE

There are various examples in the last few decades of Member States trying to protect "national champions" (normally incumbent companies or former national monopolies active in what are often characterized as "strategic sectors" ranging from banking and energy to telecommunications and infrastructures) from acquisitions by foreign firms. A good example of this kind of conduct by a Member State is the *Abertis/Autostrade* case, which is noteworthy because the parties to that (failed) transaction ultimately seized the competence of the Community courts in what was the first attempt by a private party to seek judicial redress on the basis of Article 21 ECMR.

In August 2006, Abertis, one of Spain's top infrastructure companies and operator of many toll-motorways in various countries, including Spain and France, notified to the European Commission its projected acquisition of Autostrade. In September 2006, the European Commission cleared the transaction.

From the very beginning, the Italian government regarded the takeover as undesirable and refused the authorization for the merger, which was required on the basis of the regulatory framework applicable to operation of toll-motorways. At that stage the Commission intervened quickly and considered that the objections raised by Italy were not adequately motivated or could be easily addressed by the mechanisms contained in the concession held by Autostrade for the operation of toll-motorways. Italy backed up momentarily.

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However, a few months later, in October 2006, Italy approved an urgent reform of the toll-motorway regulatory regime and granted ANAS (the Italian motorway regulatory Authority) wide powers of discretion to act upon concentrations such as the one between Abertis and Autostrade. The Commission then initiated proceedings for breach of the EU rules on freedom of establishment and circulation of capitals, and gave Italy audience with a view to a possible Commission Decision declaring a breach of Article 21 ECMR.

On December 2006, in view of the fact that the regulatory (sector specific) authorization for the merger was not yet available, the parties abandoned the announced takeover offer. Initially, the Commission purported to continue the procedure against Italy for breach of Article 21 ECMR. Nonetheless, the Commission gradually lost interest in the affair as the Italian government made some arguably cosmetic changes to the toll motorway regulatory regime. Ultimately, the Commission decided to close Article 21 ECMR proceedings against Italy in the fall of 2008.

III. THE "LEGITIMATE INTEREST" QUESTION

As it has been already indicated, Article 21 ECMR establishes the sole jurisdiction of the Commission to review mergers with Community dimension. Concordantly, Member States may not apply their national laws to the notified transaction unless Member States see a threat to a legitimate interest. If that legitimate interest is not one of the three expressly acknowledged in the wording of Article 21 ECMR (see above), then the Member State concerned must notify this to the European Commission, who will decide, within 25 working days, if it agrees or not to the characterization of that national interest as "legitimate." If a Member State does not notify an intended measure in connection with a legitimate interest not expressly acknowledged in Article 21, this failure to notify amounts in itself to a breach of Community law and legitimates the Commission to act against the Member State concerned for breaching EU law.

In practice, the Commission applies a strict test when accepting that a legitimate interest may provide support for a national measure encroaching upon the Commission's exclusive competence. Even when the Member State concerned invokes one of the three "legitimate" interests listed in Article 21 ECMR the Commission often disputes that the national measure can find coverage under that alleged legitimate interest.

Therefore, it sometimes happens that the Member State concerned invokes one of the three legitimate interests mentioned by Article 21 ECMR, with the Commission not agreeing. In those cases where doubts may arise, the Commission has expressly stated that Member States should notify the purported protective national measure to the Commission prior to putting it into effect in order to guarantee the correct application of Community law (point 25 of the Commission Decision of 5 December 2007, *Enel/Acciona/Endesa* case, COMP M.4685).

Finally, if the Member State applies internal law to a projected merger in a way that contradicts Article 21 ECMR the Commission is empowered to issue a Decision with legal basis on Article 21 ECMR. The Commission does not need to resort to the general procedure against Member States for breach of Community law under Article 258 of the Treaty on Functioning of the EU or TFEU (*e.g.*, Judgment of the European Court of Justice of 22 June 2004, *Portugal v. Commission*, C-42/01).

IV. THE *ENDESA* CASE

The outcome in the *Abertis/Autostrade* case contrasts with that of another great public takeover, i.e. Endesa, which was, at the time, Spain's largest utility. Gas Natural, a far smaller company, launched a hostile takeover offer for Endesa in 2005. There was a subsequent competing offer by giant E.ON of Germany. The Spanish Government did not like the idea of Endesa being taken over by a German operator, so it altered the sector authorization regime applicable to acquisitions of energy companies in order to include foreign companies such as E.ON in the scope of the required authorization regime.

The Commission issued a Decision under Article 21 ECMR stating that Spain had breached its obligations to notify the protective measure. Spain retorted that security of supply was within the legitimate interests expressly named by Article 21 ECMR, but the Commission did not accept that argument—according to the case law, in the context of energy supply, public security refers to security of supply in times of energy shocks.

What Spain was doing largely exceeded the protection of that interest. The Commission therefore considered that Article 21 ECMR had been breached (Commission Decision confirmed by ECJ Judgment of 6 March 2008, *Commission v. Spain*, case C-196/07); and the Commission also considered that Spain had breached the Treaty rules on freedom of establishment and free circulation of capitals and initiated proceedings against Spain for that reason. Spain was formally condemned for the latter breach by ECJ Judgment of 17 July 2008, *Commission v. Spain*, case C-207/07. Endesa was ultimately jointly acquired by Enel of Italy and Acciona (another Spanish listed company which ultimately relinquished its stake in Endesa).

V. THE PROBLEM WITH ABANDONING THE MERGER

In the *Endesa* case, Community law arguably did a better job than in the *Abertis/Autostrade* case: the acquisition of Endesa by the Spanish player, Gas Natural (the option preferred by the Spanish Government) was frustrated. In the case of Autostrade, the transaction was abandoned by the parties, who ultimately resorted to suing the European Commission for not having issued an Article 21 ECMR Decision.

This was the first time that private litigants seized the jurisdiction of the European courts in Luxembourg seeking a judicial declaration that the Commission had breached Article 21 ECMR due to its decision not to pursue (under Article 21) a Member State. This was a difficult case on procedural grounds: the European Court of Justice (in this case the lower court, General Court, "GC") was confronted with the possibility of private litigants claiming on the basis of Article 21 ECMR; but before doing so, the GC dealt with the question of the reviewable nature of a Commission Decision to close Article 21 ECMR proceedings.

The matter had been settled in the GC Order of 2 September 2010, *Schemaventotto/Abertis v. Commission* (case T-58/09), which touches upon various issues, but ultimately decides on the basis of the factual point that the intended merger between Abertis and Autostrade had been abandoned by the parties. In that regard, the GC notes that the Commission's decision powers under the ECMR depend on the conclusion of a merger.

Conversely, the Commission does not have decision powers under the ECMR from the moment the merger agreement is terminated, even if (the GC adds) "the undertakings concerned

continue negotiations with a view to concluding an agreement on a 'modified form." Article 21 ECMR, the GC reminds, fulfills a subjective function, *i.e.*, that of protecting the interests of the parties to a proposed merger with a view to ensuring legal certainty and speed. As the proposed merger ceases to exist, it is no longer necessary to protect the interests of the parties in relation to it.

Consequently the Commission was, after the abandonment of the merger by the parties, devoid of competence to adopt a Decision pursuant to Article 21 ECMR. The Commission communication appealed by the parties, which was subsequent to the parties' abandonment of the merger had, according to the GC, no legal effects *vis-à-vis* the parties. The continuation of communications between the European Commission and the parties on the topic must be construed as the Commission having left the framework of Article 21 ECMR and enter the realm of Article 258 TFEU (procedure for the declaration that a Member State has breached the law, in this case the provisions on freedom of establishment and movement of capitals).

The GC Order leaves a lot of questions unresolved (since it decides on the basis of a preliminary issue such as that of reviewability of the contested act). One of the questions raised, i.e., the possible direct effect of Article 21 ECMR or capacity to invoke Article 21 ECMR before national courts, is not dealt with by the GC.

VI. CONCLUSION

In conclusion, we will have to wait for a lawsuit filed with the GC by parties to a merger with an EU dimension which has not yet been abandoned, and who have suffered the interference of a Member State. Likewise, the direct effect of Article 21 ECMR remains to be tested before national courts.

As stated at the beginning, Commission action under Article 21 ECMR has been rarer in recent years. Notwithstanding the foregoing, Member States have, in various occasions, voiced protectionist concerns that make it very likely that Article 21 ECMR will find new uses in times to come. A good example of that is provided by the very recent regulation introduced by the Spanish Legislature on the Act of Parliament merging various network industries regulatory agencies with the Competition Authority in one single agency (Ley 3/2013, of 4 June). In particular, authorization requirements are introduced in cases of acquisitions of shareholdings in companies that carry out activities in the oil and gas sectors.

Mainstream press sources have indicated that this reform is intended to protect Spain's Repsol from foreign takeover offers (*e.g.*, *El Mundo*, 21 June 2013). This looks like the type of regulation that could be on collision course with the Community obligations to ensure freedom of establishment and capitals circulation. And it looks like the kind of regulatory power that, if used in the context of a merger or acquisition with EU dimension, has the potential to trigger Commission action under Article 21 ECMR much in the same manner as happened in the cases commented above.

The temptation or political pressure on Member States to preserve the national ownership of strategic companies can be strong. As the recent legislative reform in Spain shows, Member States continue to move in grey areas. Whether or not the Community interest shall prevail will depend on how strong the political will of the affected parties is to enforce the applicable rules. Article 21 ECMR is bound to play a decisive role in times to come.