Competition Policy in the Single European Market

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Abstract

This paper first discusses the main strategies adopted by large companies in the post-1992 perspective: internal restructuring strategies but also, externally, mergers, acquisitions and cooperation agreements. The second section deals with European competition policy. As far as the agreements are concerned, the approach is very pragmatic and particularly promotes cooperation in R & D, including joint exploitation of results. With regard to mergers, the policy adopted is stricter in that it does not justify the creation of a dominant position because it would contribute to improving technical or economic progress.

The key role of business in meeting the challenges of the large market is widely recognized. And in fact, in recent years, the functioning of the European economies has been increasingly marked by strategies to anticipate the conditions of the single market after 1992.

The game consists of cooperating with rivals in areas of common interest while maintaining competition at the finished product stage; to raise credible barriers against new players likely to enter the market; to control products that might be substitutes for their own activity; to focus to accelerating processes learning; to change the balance of power between suppliers and customers; to increase the costs of certain inputs for competitors, through long-term contracts or by controlling upstream transactions; to affect the balance of power by launching strategic offensives and anticipating change.

From this point of view, competition does not consist of a series of simultaneous interactions between passive actors who consider comparative advantages, market structures and behaviours as so much data. On the contrary, it is a sequential game in which the implementation of new forms of organisation, the opening of new markets and the introduction of new products and processes continually challenge the possible balance and modify the rules of the game (Stiglitz and Mathewson, 1986, Jacquemin, 1985).

This implies that although liberalisation in 1992 should lead to static and dynamic efficiencies (Emerson et al, 1989 Baldwin, 1989), the spontaneous market forces in the Community post-1992 European are unlikely to produce an optimal result in production, by a strong differentiation of products, by incomplete information and by various forms of collusive and non-collusive behavior. This imperfect nature of competition in the single market stems from the exogenous characteristics of demand and cost functions as well as strategies adopted by private and public actors.

The purpose of this paper article is to examine, in this context, the strategies adopted by large firms, including cooperation agreements, mergers and acquisitions and then to analyse the options taken by Community competition to regulate such strategies.

The strategies adopted by large companies reveal a number of trends. Two aspects must be emphasized (Buigues and Jacquemin, 1989):

- new product-market combinations;

- the increased role of external growth, through cooperation, mergers and acquisitions.

In recent years, many large companies have sought to strengthen or acquire a 'leader' position at the product level and expand their geographic scope. With respect to the product line, the strategy is to focus on the main product lines and to emerge from other activities. The interest in refocusing on a limited number of major trades is confirmed by econometric studies covering European as well as American companies. They show that business profitability is much greater in their core business than in diversified activities. Thus, in the food industry, BSN has gradually abandoned certain areas before developing its 'mineral water' activities (BSN being the leader in this type of product in France), Italy and Spain. Ferruzzi, the leading Italian producer in the sugar sector, has extended its empire to other member countries (France, Germany and the United Kingdom) and is pursuing this type of strategy for all maize products. Similarly, companies like Volvo, Unilever or Philips are trying to strengthen their specialisation in activities where they excel and separate from assets engaged in activities where their competitiveness is low.

In addition, large companies plan to organise themselves at the level of the whole of Europe. The convergence of consumption patterns and technological developments, plus transportation and more flexible distribution and less expensive systems, require firms to define a geographical transnational strategy. Companies tend to replace the multiple regional or national locations with centralised production and marketing structures at European level, but with more destinations: for example, Kodak and Colgate have reduced the number of locations of their warehouses in the Common Market, Unilever and Suchard the number of their production units, Colgate-Palmolive and Petrofina the number of their marketing and distribution units.

More generally, parent companies are required to relocate and concentrate their existing network in Europe, while selling or rationalising subsidiaries. These subsidiaries, which were originally created to be located within segmented national markets (telecommunications, pharmaceuticals, electrical construction), are of less interest in an integrated continental market.

This means that large companies prefer to focus on their 'leading' products, and expand their geographic coverage, rather than diversifying their products in a limited geographical area. This can lead to asymmetries between large (multinational or multi-local) multinational companies and small local firms in the same industry that have to meet differentiated local needs and provide products and services tailored to these heterogeneous consumer preferences.

Further processing is foreseeable with regard to foreign direct investment. The single market is increasingly an integrated based system on European transport networks, transmission data, technology transfer, norms and standards. Non-EEC firms will have an increasing interest in being located within the system. This suggests a tendency to supplement (or replace) exports with direct investment, even in the absence, if any, of barriers to entry, because such direct investments make it possible to better capture the benefits of the system; moreover, the specific nature of these investments and the fact that they often lead to irrecoverable costs mean that their commitment to the European market is more irreversible than in the case of exports (Jacquemin 1989). In fact, recent years has such an attraction effect being observed. For example, the share of total US industrial exports destined for Europe has been relatively stable (20%). As against the share of direct investment to Europe, which has grown rapidly, so much so that in 1990 the Community received nearly 50% of these investments. As regards Japan, the share of exports to the Community has increased significantly. But it is only very recently that the relatively low percentage of direct industrial investments made in the Community has increased rapidly.

Inter-company agreements, mergers and acquisitions play a major role in the restructuring process in Europe, as a response to the intensification of competition. Recent years have seen a significant increase in the number of inter-enterprise agreements, particularly through the establishment of joint ventures. These joint ventures are concentrated in capital-intensive industries characterised by strong research activities. Partners from non-countries member, especially American and Japanese, are preferred to the partners of the Community.

Cooperation leads to a combinations of skills and resources of companies that allow reconfigurations and redefinitions of activities. According to various business surveys (Camagni, 1988, Lemettre, 1990), one of the advantages of co-operation is to speed up entry into new markets or into new, lower-risk productions. On the one hand, what often matters is the speed with which companies can deploy the resources they need to enter: taking advantage requires the ability to act faster than competitors. On the other hand, joint actions make it possible to spread the risks, that is to say to share the gains and costs of a project between a certain number of companies, and to put the risks in to explore more leads and develop more independent projects.

In addition, resource pooling can, when capital markets are imperfect, provide financing on more favourable terms; it can also be used to spread high fixed and often irrecoverable of development; finally, it can produce complementary effects through the combination of research information, technological know-how and marketing ability (Kirrane 1990 November).

Finally, the multiplication of strategic alliances between firms belonging to different countries decreases the probability of protectionist measures, given the high level of global interdependence that results from this cooperation and the difficulty of identifying a national or European origin, for example, in terms of local content of products.

In spite of the preceding arguments, cooperation agreements are often fragile and unstable, particularly in Europe. They experience various types of difficulties that usually lead to early failures, redemptions or mergers. This is particularly the case for cooperation in R & D. This is because the results of joint efforts cannot easily be appropriated and the speed of ownership varies from one company to another. In fact, there is often a close relationship between the effectiveness of basic research, that of R & D resources and that of productive and commercial resources. The full exploitation of the results of cooperative research often involves concerted developments at the level of production and marketing to be able to sell products incorporating these results. Achieving research advantage depends on the ability to quickly bring new products or processes to the market with the highest potential for return. To limit cooperation to R & D activities or the so-called ‘pre-competitive level’ could therefore have the effect of discouraging the emergence of such cooperation agreements.

Finally, let us say that agreements are not a panacea, not only from a private point of view, for the management and organisational costs they entail, but also in terms of collective interest: cooperation between competitors, especially if they are dominant firms, often results in defensive attitudes, price control, lack of innovation and various forms of protectionism.

Mergers and acquisitions are also an important instrument of restructuring. It has become increasingly evident in recent years that this is happening in Europe, in sectors such as chemistry, metal production, construction of machinery and electrical equipment, electrical and electronic construction but also in sectors such as the food industry, paper and printing.

More specifically, the Community witnessed an impressive wave of mergers and acquisitions that involved at least one of the first 1 000 enterprises in the EEC (from 330 in 1986/87 to 622 in 1989/90). These mergers are mainly horizontal, and national operations have long been the majority. This is an attempt to strengthen the positions of the national champions. However, in recent years, the importance of trans-national European operations has increased, to the point of exceeding the number of national operations in 1989/90.

Mergers are one of the possible ways to restructure efficiently, especially in sectors with significant economies of scale, scope and learning. The resulting reallocation of capital between firms can lead to three types of effects that are likely to lead to significant gains in these sectors: an increase in the total output of the industry, a new distribution of output between companies and a reallocation of productive assets (capital physical, patents, management capacity ...) for the benefit of companies that make the best use of them. However, important reservations are needed. In view of the frequent failure of horizontal mergers and more frequent failures of conglomerate diversification, beware of operations that are based solely on financial or personal links and which do not lead to any kind of integration as part of an overall strategy. Some mergers ultimately result in combinations that lack internal coherence and may only be a desperate attempt at survival by companies in difficulty, which no longer have the capacity to make new investments. Studies by management consultants lead to this type of conclusion: Coley and Reinton (1988) examined the first Fortune (250) and Financial Time (500) companies in the United States and Britain, which in the past removals to enter new markets. They conclude that only 23% of the 16 firms analysed were able to recover capital costs, or even funds invested in the acquisition programme. It is also clear that the higher the degree of diversification, the lower the chances of success. On the other hand, in the case of horizontal mergers in which the size of the absorbed firm is small, the success rate is 45%. The causes of failure are mainly: the price paid is too high for the acquisition, the overestimation of the potential offered by the acquired company in terms of synergies and market positions, and the inadequate management of the integration process after the acquisition. From the point of view of the shareholders, the contrast is striking between the studies made ex-ante of the gains to be ex-ante expected from the merger and the evaluations of the results actually obtained. In his introduction to a special issue on mergers and absorptions, Mueller (1989) indicates that before mergers, the shares of acquiring firms tend to perform above average. At the time of the announcement of the transaction, the action of the acquiring company is not affected. After the acquisition, the performance of the acquiring company's stock is lower than it was before and, according to some studies, below average. Post-merger performance corresponds to stationary earnings or decreasing of units acquired, in terms of profitability, market share or productivity. This type of phenomenon is representative of the mergers and acquisitions process in the United States, for at least 60 years and probably for a century. It is probably also characteristic of the merger processes in Europe and Japan. While mergers can sometimes be useful, they are far from a panacea for improving competitiveness.

Finally, it should be remembered that mergers and acquisitions are also a means of acquiring dominant positions, thanks to the integrated use of previously independent productive assets and the reduction in the number of autonomous firms, which reduces the transaction costs of collusion.

The expected effects of corporate strategies anticipating the Single Market are ambiguous. In some respects, they aim to achieve sound restructuring and rationalisation, leading to real competitive advantages. But other traits suggest the intention to regain control of competitive dynamics after 1992, through various forms of concentration and cooperation. In this case, competition policy should play a privileged role, since it represents the most impersonal and least discriminatory means of social control of an economy. As noted by the Economic Council of Canada (1969): "When competition is such that it promotes the efficient use of labor, capital and natural resources, it eliminates or diminishes the need for other forms of interventionist control, such as price regulation or public ownership of the industry. " However, the role and application of competition policy varies from country to country, and within the same country, from decade to decade, depending on changes in economic conditions and social as in academic thought. A good example is the treatment of concentrations, whether by merger or other forms of agreement. In the 1960s, Community policy tried to exploit the presumed positive link between size and competitiveness and this meant that the green light was given to merger operations that transformed the business world in Europe. But during the economic crisis of the 1970s, very large European companies proved too rigid and too slow to initiate change or to respond to it. Economic thinking on the effects of concentrations and cooperation has changed even more than government policies. It is only recently that research in industrial economics has shown that simple efficiency tests, such as the impact of a merger on the quantity produced by the new entity, were quite unsatisfactory. As soon as we abandon the neoclassical paradigm, we no longer have, to appreciate the effects of strategic competition, the kind of general theorem concerning the Pareto optimum that characterises perfect competition.

This situation led to two attitudes. On the one hand, there is a recent consensus in Europe in favour of the general assumption that there is a positive relationship between the intensity of competition and the growth of social well-being defined as the sum of consumer surpluses and producers; this presumption is a justification for an effective competition policy. On the other hand, because of various types of ‘market failure’, most regulators consider that behavior that significantly restricts competition may be exempt to the extent that there are sufficient beneficial effects. The more weight is given to this ‘defense for efficiency’, the greater the discretion of the anti-trust authorities and the greater the danger of confusion between competition policy and industrial policy.

It is in this context that we will examine the policy adopted by the Community authorities. In the First Report on Competition Policy (1972), the Commission wrote: "Even if the functioning of market forces is an irreplaceable factor of progress and the most appropriate means of ensuring the best possible allocation of production, situations may nevertheless arise in which this is not sufficient to obtain the desired results without too much delay and without intolerable social tensions "(p.17).

This way of thinking reflects the pragmatic policy that has been adopted by the European competition authorities. The basic idea is not to seek the illusory realisation of perfect competition, but to promote "effective competition", that is, processes of rivalry under conditions of uncertainty.

We will illustrate this option by examining the policy adopted with respect to R & D co-operation agreements and mergers and acquisitions. Page 2.1. Article 85 of the Treaty of Rome contains a general prohibition of explicit and tacit agreements where they may affect trade between member countries and have the intention or effect of eliminating, restricting or distorting competition within the European Common market. Such agreements are prohibited unless, notified to the EC Commission, they benefit from an exemption.

Contrary to the tradition of the US, arbitration is also explicitly accepted by the Treaty of Rome in Article 85 (3), according to which an agreement significantly limiting competition can be exempted due to enough beneficial effects. Four conditions are required:

a) the agreement must contribute to improving the production or distribution of products or promote technical or economic progress.

(b) it must provide the end consumers with a good deal of the benefits that result.

(c) the restriction of competition must be necessary to achieve the objective.

(d) the firms concerned must be unable to eliminate competition for a substantial part of the product in question.

One way of applying this system has been to grant group (or block) exemptions, i.e. exemptions for important types of agreements for which a situation of "market failure" may be prejudged. This system of exempting categories of agreements from the notification requirement avoids the need for a detailed analysis of each behaviour. It creates codes of conduct that are likely to increase the credibility of the policy and limit the discretionary powers implied by the Treaty Article. At the same time, it safeguards the useful message of the Article that competition policy must be sensitive to efficiency, gains and that cooperative behaviour, while significantly reducing competition, can nonetheless produce socially desirable benefits.

Some applications are questionable (e.g. in distribution) but an interesting illustration is provided by the block exemption of R & D agreements, which entered into force in March 1985. In order to appreciate the content, it is necessary to examine quite precisely the role of cooperative R & D.

The main argument in favour of the beneficial social effects of cooperative research is based on a problem of market failure, linked to the appropriability of the results. The starting point is that the volume of research carried out by private firms and the resulting dissemination of knowledge may be socially inadequate for a set of market structures including competitive ones. This type of situation leads to compromises. The firm's incentive to do R & D requires a sufficient degree of appropriability of the results, and consequently a limited diffusion of the knowledge produced; but on the other hand, almost total appropriability (resulting either from the circumstances, or the policy) prevents the impact of the results of R & D in other firms and other industries at zero cost (Arrow, 1962). Empirical research on the positive externalities of technology at the intra and inter-industrial level is, from this point of view, revealing (Torre, 1990).

Co-operative R & D can be seen as one way to internalise the externalities resulting from significant R & D spillovers - thus a means of improving the incentive problem and reducing costly duplication - and to ensure a more efficient sharing of information between firms.

Katz (1986), of Aspremont and Jacquemin (1988), established the conditions under which a cooperative agreement makes it possible to increase the social well-being thanks to its effects on the equilibrium level of the R & D and the cost of realization for a certain level of R & D. One of the conclusions is that when R & D results are sufficient, firms that cooperate in R & D but not in production, do more R & D than non-enterprises cooperative, and produce more, their activities thus being closer to the socially optimal level.

As for the useful role of the collection and sharing of information within cooperative groups Vives (1990) suggests, on the basis of a simple model, that the gathering of information creates competitive advantages and that government action to encourage systems for collecting and disseminating information may be of interest.

In contrast to these potential advantages of cooperative R & D, it is necessary however also to consider the possibility of effects resulting in a reduction of harmful competition (for further analysis, see Jacquemin, 1988). Although it is possible to limit the scope of agreements only to R & D activities and to exclude collusion at the level of the final product (precompetitive level), the danger is that cooperative R & D is only a means for a dominant firm to guard against competition by innovation, by co-opting potentially very innovative rivals and by controlling and slowing down the pursuit of innovations; this cooperation can also create barriers to entry downstream and exclude from certain segments of the market firms that are not part of the agreement. In addition, coordinating R & D activities to avoid duplication can lead to limiting initiatives, increasing rigidity and wasting resources in research without outcomes.

A second type of situation involves extensive collusion between the partners, resulting from their R & D activity and leading to common product policies (competitive level). For example, R & D discussions can lead to illegal pricing discussions.

What makes such dangers real is once again the difficulty of appropriating radical technological innovations. As was mentioned above, when partners have developed an invention, they want to control processes and products that incorporate the results of their cooperation to recover together, and as quickly as possible, their investments in R & D. If firms are banned from such joint exploitation and if the benefits of cooperative R & D are likely to be exhausted quickly due to intense product competition, firms will be forced to either refuse R & D cooperation and to maintain the ruinous competition that existed before, or to use their cooperation to excessively limit their R & D activities. If this is correct, a regulation of R & D cooperation that excludes cooperation at the end product level could discourage or destabilise many interesting agreements. However, accepting the extension of R & D cooperation to that of production and distribution would encourage collusive behaviour that limits competition. This is the dilemma that the Community Anti-trust Authorities have had to face.

The text of Regulation 418/85 expresses the adopted compromise. It covers the joint research and development of products or processes and the joint exploitation of the results of this R & D.

Article 1 (2) (d) states that "the exploitation of results" means the production of the product resulting from cooperation and the granting of licenses for the exploitation of intellectual property rights to third parties.

The exemption applies if:

a) the work is done within a defined programme.

(b) all parties have access to the results.

(c) where there is no joint exploitation, each party is free to exploit the result independently.

(d) the know-how and the patents resulting from the research contribute substantially to the technical and economic progress and are indispensable for the production of the product resulting from the cooperation.

By also imposing conditions as regards the duration of the operation and the market shares, the regulation aims to avoid agreements which could result in the elimination of competition in the market concerned. If the joint operation is of the conglomerate or vertical type, that is to say if the participants cannot compete in the market concerned, the exemption applies for five years, whatever the market shares. If the joint operation is horizontal, the exemption also applies for five years, but only if the sum of the market shares in the relevant market does not exceed 20%. A complete list of eligibility clauses (the so-called white list) and prohibition (the so-called black list) is also included.

The main feature of the Regulation is that the European authorities, faced with the dilemma mentioned above, consider that, in many cases, R & D cooperation cannot be limited to R & D activities alone and that it must generally lead to exploitation of results in order to stabilise the agreements and to resolve the problems of ownership. In addition, the Regulation gives priority to basic research, and aims to ensure effective sharing of information. Finally, it rejects agreements likely to lead to a monopolisation of the market.

There are hardly any articles in the Treaty of Rome dealing specifically with mergers. However, the Commission and the European Court of Justice have interpreted Articles 85 and 86, which are the two pillars of Community competition policy, so as to make them partially applicable to mergers.

Article 86 prohibits any abuse of a dominant position. It is clear that many factors come into play in establishing the existence of a dominant position. In their decisions, the Commission and the Court of Justice mainly take into account market shares and barriers to entry. This implies the specification of the product and the relevant geographic market, taking into account various aspects of the problem: - product differentiation and foreign competition, the characterisation of the entry conditions according to the possibilities of substitution on the part of the supply as demand, the state of contractual practices and the exchange of information on production. On the other hand, and in contrast to the US approach, there is virtually no recourse to numerical indicators, such as a change in the Herfindhal Index or the ability, after the merger, to raise the price a certain percentage above the existing level. The European approach is both more complete and more pragmatic, which, in the light of the recent theoretical literature, is probably more reasonable.

It is not illegal to acquire a dominant position: only the abuse of this position is prohibited. Some examples of such abuses are given in Article 86 itself: setting unfair prices, restricting production, discriminating and imposing tied selling. Such practices correspond to a direct abuse of the dominant position that affects the interests of consumers. But the Commission and the European Court have adopted a broader conception of abuse in the Continental Can case (1973). This interpretation takes into account not only the direct effect of a behaviour on business performance, but also the indirect dynamic effects, through the feedback loop from behaviour to market structure. In this perspective, Article 86 can be used to attack corporate strategies that modify, in a more or less irreversible way, the conditions of supply and demand in such a way that in the end the social welfare situation is affected. This interpretation means that a merger may constitute an abuse of a dominant position.

More recently, the relevance of Article 85 in relation to cartels has been affirmed for the merger policy. The article condemns agreements between companies that may affect competition within the Common Market. In the case of Philip Morris (1987), the Court held that an agreement to acquire a minority interest in a competitor may fall within the scope of Article 85. The Court found that this would be the case, in particular, where, as a result of the acquisition of an interest or because of clauses additional in the agreement, the acquiring enterprise acquires legal or de facto control over the commercial behaviour of the other company. The Court also pointed out that conduct does not cease to be anti-competitive simply because it refers to the legal form in which it is presented.

While on the basis of these judgments, the Commission has gained some control of mergers and takeovers, the power remained limited and somewhat effective. With Article 86, the control concerns only already firms dominant and applies in principle only after the event. The economic, financial costs and social of a possible dismemberment after the operation has been carried out would generally be prohibitive. In addition, the absence of clear rules on powers and procedures gives companies a state of legal uncertainty, including possible conflicts between national jurisdictions. As for Article 85, it has a limited scope, insofar as it requires the existence of an agreement and excludes cases of total control.

This explains why the Commission has already proposed in 1983 a specific regulation on Community merger control. Looking ahead to 1992 and the corresponding wave of mergers and acquisitions, the urgency of such regulation has further increased.

The new text adopted in December 1989, which is now in force, contains two main points:

a) The pre-merger notification regime applies to European-size mergers (the total sales of all the firms concerned exceed 2 Million of ECU).

Unlike the text of Article 86, the aim is to prevent the creation of a dominant position and not just its abuse.

(b) According to the letter of the regulation, a Community-type merger can be assessed only on the basis of its effects on effective competition: an operation which prevents effective competition can in no way be justified on the basis of a defense based on the efficiency gains of the operation.

This second question, which is decisive from the point of view of the post-1992 relationship between competition policy and Community industrial policy must be examined more closely.

As mentioned earlier, some efficiency gains are likely to result from mergers, particularly in the context of the restructuring required for the completion of the Single Market: static and dynamic economies of scale, as well as imposed by the existence of a "market for the control of enterprises" can increase the surpluses of producers and consumers. On the other hand, empirical evidence experiences prior from the past does not support the idea that mergers would generally be an effective means of achieving the goal of increasing business productivity. In addition, the negative effects of increased monopoly powers must be taken into account.

In a static context, the corresponding arbitrations are already difficult. According to the analysis of Farell and Shapiro (1990), the change in total welfare resulting from a merger is the sum of changes in profits of merging firms, changes in the profits of other firms in the market, and variation in consumer surpluses. Several cases are therefore possible: a merger can have "external effects" beneficial to consumers and for the other firms and be profitable for the companies concerned; it may also have negative externalities for consumers and/or other firms and yet increase total surplus; it can be profitable but socially undesirable; it could even be unprofitable for the companies involved but be socially beneficial.

In a dynamic context, things are even more complicated. One aspect in particular is important in the European perspective, namely the role of mergers in advanced technology activities.

In recent years, the Community has seen its global market share dwindle in several of these sectors (electrical and electronic equipment, computer technologies, etc.). These activities are characterised by a high intensity in R & D. This is due to the indivisibility of R & D below certain thresholds and the fact that companies need a sufficient level of activity to undertake research programmes. Many other economic reasons exist, for which groupings between large companies can be useful in this type of industry. They increase the resources available and thus encourage the launch of more ambitious and riskier projects that individual firms cannot achieve. They also help reduce duplication, and can encourage technology transfer, thus accelerating the diffusion of innovations. In their analysis of mergers in advanced technology industries, Ordover and Baumöl (1988) conclude that "mergers in advanced technology industries in which technologies and products have shorter lifetimes, should worry less that similar mergers in industries that have reached their stable phase. This suggestion is valid only so long as mergers in the advanced technology sectors do not include companies with large volumes of substitutable R & D assets, which also require large volumes of specific commercial assets for their operation". (page 32).

In general, the message is that when there is an arbitration problem between static efficiency and dynamic efficiency, it is reasonable to favour long-term dynamic performance, which is expected to ultimately compensate for any static loss. . However, one can question the existence of such arbitration problems in most industries. Evidence suggests that R & D is not characterised by substantial economies of scale and that monopoly powers are likely to restrict R & D activities and long-term technological progress (Neumann, Böbel and Hald, 1982, Geroski, 1987). Moreover, as we have seen, certain results such as the elimination of ruinous duplication, the externalisation of external effects and the very wide dissemination of knowledge could be obtained by less dangerous means than complete mergers, like pre-competitive R & D cooperation. We could at best argue that, other things being equal, in the short-lived and high-growth demand-side advanced technology industries, the prospects for efficiency gains are greater and the dangers of more limited monopoly powers. However, we observe that, in the European context, the number of mergers and acquisitions involving companies in the top 1 000 has increased much less rapidly in the high-tech and high-growth sectors than in the rest of the industry, and that the mentality of the ‘national champions’ is still dominant.

Faced with these complex analyses and arbitrations, the Regulation, which entered into force on 21 September 1990, adopts a very clear position: it leaves the Commission with no possibility to accept an anti-competitive merger on the pretext that it provides collective benefits. Contrary to what some commentators have claimed (see eg Hölzler, in Montagnon, 1990), the text is clear. The European merger control system is perhaps the least ambiguous of all existing regulations in this area, including EU, Canada and Great Britain.

In fact, the latest versions of the Regulations included a ‘defense of efficiency’. According to the Explanatory Memorandum (point 16), it was stated that "authorisation should be granted in the case of mergers which, even if they prevent effective competition, contribute to the achievement of the basic objectives of the Treaty, of such so that, overall, economic gains outweigh the harm to competition ". But in the adopted Rules, this text has disappeared.

Similarly, in Article 2 of the provisional text of the Regulation, it is stated that "concentrations which create or strengthen a position such as the maintenance or development of effective competition are prevented in the Common Market or in a substantial part of it and shall be declared incompatible with the Common Market unless they are authorised on the ground that their contribution to the improvement of production and distribution, the promotion of technical or economic progress, or the improvement of the competitive structure within the Common Market more than compensates for the harm to competition ".

In the adopted Rules, Article 2 no longer contains this paragraph. Only is a reference to technical and economic progress maintained in paragraph 1 of Article 2. Among the criteria used to determine whether a merger creates or strengthens a dominant position is "technical and economic progress, provided that it plays the consumer's advantage and does not constitute an obstacle to competition". This wording confirms that the Regulation contains no "defense by efficiency" and that effective competition is the only reference. The criterion of technical and economic progress can only be used if it is fully compatible with effective competition and the interests of consumers. It is therefore difficult to imagine how an operation which creates or strengthens a dominant position, which by definition affects effective competition, could be accepted on the basis that its negative anti-competitive effects would be offset by the positive effects of a progress achieved. The first applications, including the "de Havilland" case, conformed to this interpretation.

Even if, from a welfare point of view, the surpluses of producers and consumers should be taken into account equally when calculating the effects of the merger, the wording of the Regulations also implies that some sacrifice of surplus consumers in favour of higher profits cannot be accepted.

Of course, the view that competition policy should not be used to implement an industrial policy does not exclude the existence of the latter, as evidenced in particular by the Community's science and technology policy. What would be desirable is a clearer division of powers, as it exists in the German system.

Conclusion

Anticipating a state of a completed single market, European companies are implementing strategies to create or strengthen their competitive advantages for post-1992. They have increased their core competencies, reach, geographic R & D capabilities and skilled human capital through internal restructuring, sales, acquisitions and agreements. Many of these strategies have the effect of generating structural efficiencies, which can be maintained even in the context of a recession.

On the other hand, these agreements, mergers and removals can also lead to the emergence of dominant positions, barriers to the entry of new firms, market sharing, abusive pricing and disguised forms of protection.

Faced with these complex situations, the European authorities have followed a realistic path. Even though they are far from perfect, the regulations adopted have avoided the dangers of a rigid approach:

they seem globally well adapted to establish a pragmatic competition policy, while limiting the dangers of confusion with the necessary industrial policy.

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