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The "failing firm" defence

In his capacity as Commissioner for Competition, Mario Monti provides us all with open, interesting and thoughtful views on developments in the European Communities' competition policy. He surpassed himself in a speech to the American Bar Association in Washington DC on 14 November 2001; the subject was Antitrust in the US and Europe. Among the many subjects he covered was the "failing firm" defence (well-established in the United States), which may allow a merger to proceed - in spite of competition concerns - where the acquired firm would otherwise go out of business. The Commission's policy here is still evolving; but in the recent *BASF/Eurodiol/Pantochim* case the Commission widened the scope of application of the failing firm defence to one which is now much closer to the US approach than it was before. Indeed, the Commission, for the first time, acknowledged that, as in the US, one of the criteria necessary for the defence to apply is that, but for the merger, the assets of the failing firm would have left the market. In addition to that, however, the Merger Regulation requires the Commission to establish on a case by case basis that the deterioration of the competitive structure as a consequence of the merger is at least no worse than it would have been in the absence of the merger.

"Efficiency gains"

Mr Monti was at pains to refute the assertion that the Commission, when dealing with conglomerate mergers, was in fact applying what has been dubbed an "efficiency offence". The Commission distinguished clearly between, on the one hand, mergers leading to price reductions resulting from strategic behaviour on the part of a dominant firm, the purpose of which is to eliminate or marginalize competitors with a view to exploiting consumers in the medium term, and, on the other hand, mergers leading to significant and durable efficiency gains likely to be passed on to the consumer. "Efficiency gains" do not refer to any cost reductions resulting from the merger, but to the types of efficiencies which are relevant for anti-trust authorities that is, a long-term and structural reduction in the marginal cost of production and distribution, which comes as a direct and immediate result of the merger, which cannot be achieved by less restrictive means and which reasonably will be passed on to the consumer on a permanent basis, in terms of lower prices or increased quality. When the merging parties do not provide a clearly articulated and quantified defence in terms of efficiencies as they did not, for instance, in the *GE/Honeywell* case, it is much harder for an anti-trust authority to clear a transaction that is likely to lead to foreclosure effects, because if foreclosure takes place and competitors are marginalised, there is no guarantee that prices are going to be maintained, at least over the medium and longer term, at the low level at which the merged entity may strategically set them to foreclose competition. *[To be continued in our next issue.]* ■