Mergers, Acquisitions and Takeovers: The Challenges Raised Within the European Context - 20 Years of Experience -

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To my family, Maria, Stefan and Alina.

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- CFI – Court of First Instance
- DG – Directorate General
- DG IV – European Commission, Directorate General for Competition
- EC – European Communities
- EEA Agreement - The Agreement creating the European Economic Area
- E(E)C Treaty – Treaty establishing the European (Economic) Community
- ECJ – European Court of Justice / Court of Justice of the European Communities
- ECSC Treaty – Treaty establishing the European Coal and Steel Community
- EU – European Union
- EU Treaty – Treaty on European Union
- *HHI - Herfindahl / Hirschman Index*
- OECD – Organization for Economic Co-operation and Development
- SIEC – Significant Impeding of Effective Competition
- SLC – Substantial Lessening of Competition
- WTO – World Trade Organization
- WWI – World War I
- WWII – World War II

Chapter 1

Introduction

1. Preliminary Issues

This contribution aims at studying the fundamental challenges that shape the very essence of the European Merger Control System. At first it is important to correctly identify these challenges, from the multitude of tensions that occurred during the twenty years of European merger control enforcement experience. In this respect, we are referring to the rationale behind enacting a merger control mechanism in the European legal system and the goals that it is meant to achieve. Secondly, they need to be placed in the appropriate frame of assessment. From this standpoint, the contribution's recurrent theme will gravitate around concepts such as legal certainty, effectiveness and welfare enhancement. These principles are acknowledged to be essential to the generic functioning and development of the European construction and, more particularly, to the appropriate operation of the competition and merger control policies.

Departing from Levy's findings from his 2003 contribution, *EU Merger Control: from Birth to Adolescence*, one may identify four periods of the European Merger Control System's evolution from 1989 onwards:

- The years of discovery and adaptation: during this period procedures and tools had to be developed in order to ensure the workability of the merger control system for the Commission, the parties involved in a concentration transaction and the lawyers advising them. It was during this period that the Commission for the first time prohibited a transaction, in the *Aerospatiale-Alenia / de Havilland* case[1].
- The period of consolidation: during the consolidation period certain procedural, substantive and regulatory shortcomings of the Merger Control Regulation were addressed. The Commission showed increasing maturity and confidence in its approach to assessing concentration and started to invest more time and effort in enhancing the cooperation with US authorities.
- The period of crisis: the 10th anniversary of the Merger Control Regulation witnessed an increasingly forceful, confident and creative approach to its application, which consequently attracted comments and criticisms. The number of notifications has significantly increased and the flexibility and informality which characterized the merger control procedure were overshadowed by bureaucracy.
- The years of reform: the period at hand is characterized by the EU's attempt to foresee the consequences of the enlargement of the European Union and to adapt the rules of merger control to the economic realities of the future business environment. (Levy, 2003)

The chronology presented above not only summarizes the evolution of the merger control phenomenon in Europe but also reveals the fact that this evolution came across a number of challenges. One may find it interesting that the *Aerospatiale-Alenia / de Havilland* case was mentioned here, but this case is more than a peculiar statistical merger control record. This is because its features, and more generally speaking, the features of many other cases like it, come to substantiate the assertion above, in the sense that they

[1] Case IV/M.53, Commission Decision of the 2nd of October 1991, (1991) OJ L334/4.

emphasize some of the challenges that merger control faced throughout twenty years of existence. The *Aerospatiale-Alenia / de Havilland* case reveals that the appraisal process involves finely balanced judgments that have to be made before a decision is reached (Cook & Kerse, 2000). Some of the key factors of the appraisal process may be more susceptible to precise measurements than others, which constitute the object of prediction exercises. The case also highlights the complexity of the political environment that surrounds the merger control phenomenon, as well as the industrial policy / competition policy clash. On the same note, more examples could be provided: the *Mannesmann / Vallourec / Ilva* case[2] for instance, although it was regarded as an exceptional example, discloses how the Commission's prediction exercise (with regard to the likelihood of future market entry) may be shaped in accordance with the framework of achieving certain economic goals.

Mentioning these two cases has a simple illustrative purpose. Numerous other practical instances / events / circumstances, some of which will be tackled in a more detailed manner in the chapters to follow, confirm one fact: twenty years of experience have posed varied types of challenges and tensions in the enforcement of the European Merger Control System. Furthermore, observing the fundamentals (i.e. goals, objectives) of the merger control phenomenon in Europe divulges the fact that some of these challenges date further back in time and pertain to the substance of enforced merger control. These challenges take various shapes and entail diverse degrees of complexity. To exemplify, the dominance appraisal test / the significant impeding of effective competition test debate relates to the substantive side of the merger control system. The triple role that the Commission took upon itself while approaching merger control ('investigator, prosecutor and judge') pertains to the institutional setup of the merger control system and reflects on the credibility and transparency of the system.

Some of these challenges have been faced, some have been solved and some remain latent. When dealing with these challenges, we consider the year 2004 a key moment in the development of the merger control phenomenon in Europe. The merger review package adopted during 2004[3] approached challenges such as those briefly illustrated in the previous paragraph. However, it has missed on the opportunity to tackle those challenges which relate to the rationale behind, and the roots of merger control in Europe. They are closely connected to the goals that the concentration control system aims for and the means used to achieve them. We will refer to these as fundamental challenges, because their weight and importance influence every aspect of the merger control enforcement.

2. Thesis Statement

We are interested in the rationale which lies behind the enactment of the concentration control regime in Europe. The reason for engaging in such a discussion is that behind the existence of merger control at the Community level lie certain goals or objectives.

[2] Commission Decision of the 31st of January, 1994, (1994) OJ L102/15.

[3] A more detailed outline of the merger review package's contents will be provided in Chapter 3 of this contribution.

Understanding these goals constitutes the first step in allowing one to state whether the case of European concentration control is justified or not. Merger control is not to be viewed as isolated from the economic, social, political and regulatory realities of the EU. Therefore, it must be established that the European Merger Control System embodies a dual purpose: attaining consumer and societal welfare. The inter-dynamics of these goals have to be observed at all times. What we are interested in is how these welfare standards fit in the European construction and furthermore whether merger control enables or on the contrary, prevents their attainment.

The question which follows naturally is whether the current shape of the control system is capable of attaining these goals. The tensions between the *ex-ante* and the *ex-post* approaches to merger control reveal interesting aspects which inevitably relate to the appropriateness of the Commission's intervention. To this end, we may formulate our next query as follows: is the Commission able to correctly predict the outcome of any given concentration transaction and thus rightfully aim to attain the established welfare goals?

While analyzing these challenges, the contribution's main statement identifies certain disruptions and inconsistencies. First, we believe that the goals of merger control are not correctly followed up in practice. The relationship between attaining consumer and societal welfare is not clearly and entirely reflected in the Commission's concentration appraisal process. Second, the *ex-ante* shape of merger control, although designed with a view to facilitating European integration, exhibits flaws which impinge on the realization of fundamental principles which lie at the basis of the European construction, i.e. legal certainty, transparency, welfare enhancement, etc.

A reconstruction of the merger control system maybe deemed necessary. On conceptual grounds, we propose a departure from the current approach of sole hard core (*a priori*) prevention towards a more complex construction entailing lighter *ex-ante* scrutiny combined with consistent *ex-post* monitoring. We believe that by contemplating the integration of *ex-post* considerations in the appraisal process, at least with respect to certain elements of the concentration transactions assessed (i.e. efficiencies, commitments), the system will be more susceptible to appropriately test the attainment of its goals. Consequently, a proper concentration transaction follow-up procedure will alleviate the core of the 'legal certainty realization' critique; a great deal of the current system's inherent prediction shortcomings will be resolved; last but not least, the disruptions mentioned above will be ameliorated and thus the merger control phenomenon will contribute in a more active and effective manner to the expansion of the European construction.

3. The Plan of Action

We will begin with a preliminary discussion of what we consider certain interesting challenges that the Commission or the EU institutions have tackled in the past (Chapter 2). The choice of the topics discussed (institutional, substantive or transparency related topics) is exemplifying in nature, rather than exhaustive. The analysis is meant to

illustrate the nature of the tension / challenge dealt with, just as much as the way it has been handled and the consequences that have followed. Chapter 3 returns to the roots of merger control. At the same time it commences the fundamental discussion of the thesis statement. It is here where we investigate why the merger control system was enacted in a certain particular shape, what were the drivers, obstacles and goals behind Brussels' actions. Also, at this point we will place the discussion in the wider frame of the functioning and attainment of the ultimate goals of the European Communities. We continue by posing a more in-depth question in Chapter 4, namely whether the choice of an *a priori* or *a posteriori* method of intervention, correctly aims at achieving the system's goals as described in Chapter 3. Once one understands the reasons and the intricacies of the *ex-ante* merger control method as embraced by the European concentration control system, it is time to scrutinize its very essence. In this respect, Chapter 5 aims at establishing if the 'future market structure prediction process', embedded in the *a priori* approach, can deliver sufficient certainty, or it is essentially flawed. Based on the findings so far, we will conclude our research (Chapter 6) by emphasizing the consequences that the prediction exercise shortcomings have as to the attainment of the merger control set of objectives. We will discuss possible alternatives which may ameliorate the realization of the concentration control goals and the manner in which these recommendations should be integrated within the functioning framework of the European construction.

4. Methodology, Disclaimers and Relevance

The contribution at hand contains several different approaches to the subject matter. First we will thoroughly analyze the relevant pieces of legislation and binding or non-binding documents connected to the topic at hand, issued by the competent European and domestic authorities. In this context we refer to the applicable articles and chapters of the founding and subsequent European Treaties, the secondary European legislation concerning competition and merger activity, domestic competition laws, adjacent guidelines, notices or action plans, etc. It is important to grasp the contents of these legislative documents taken in conjunction with each other. This allows a clearer understanding of the general policy directions adopted at European or domestic level.

A literature review was performed, departing from classic textbooks focusing on the institutional aspect of the European construction such as Craig, de Búrca (2002/2003). Publications which focused in a deeper manner on competition, merger control and corporate law aspects, such as Navarro, Font, Folguera, Briones (2005), Verloop, Landes (2003), Cook, Kerse (2000), Neven, Nuttall, Seabright (1993), Faull, Nikpay (1999), etc were investigated in order to better understand the features which define the outlook of the European competition policy, the functioning of the European Merger Control System or the peculiarities of domestic relevant policies of the Member States. Furthermore, publications such as Bavasso, Lindsay (2007), Botteman (2006), Schenk (2006), DePamphilis (2005), Walker (2005), etc directed our focus towards the economic side of merger control, economic rationale, econometric analysis performed by the Commission, companies' drivers to merge, etc. Last but not least, in-depth analytical contributions, directed at issues such as policy-making, regulation, standard of proof and so forth were

used to acquire deeper insights in the intricacies of such key elements which shape the current essence and form of the European Merger Control System.

However, few, if any of the leading textbooks or academic articles out there touch upon the fundamental research questions of this thesis. The majority of the publications in the merger control field depart from the pre-given issue that merger control exists at a European level and then commence with the analysis, without questioning the very rationale behind the concentration control phenomenon. Few publications, such as Boyer (1992), tackle issues concerning the prospective nature of merger control. However, that is done only in a collateral manner without framing it in the wider discussion of societal / consumer welfare. On the same note, there are certain publications, on the border of economics and law, for example Kokkoris (2006) and Walker (2005), investigating the functionality of merger simulation models and other econometric tools, from the perspective of their accuracy and recommended use. However, these fail to clearly state whether the Commission's prediction exercise is flawed or properly workable.

Although literature review constitutes a proper informative departure point, it does not, by itself, provide the answers that our research questions call for. Consequently, detailed inferences were drawn from the interpretations of the legislative texts mentioned above and mostly from the analysis of competition law reviews, statements of intentions, draft legislative attempts and speeches on the enactment and purpose of merger control, stemming from Community institutions or officials. Such items contain useful references, for example, to the *travaux preparatoires* which preceded the enactment of the founding treaties and competition related regulations and laws. They also reveal the general attitudes, trends and conceptions of the idea of merger control throughout time. Additionally, the Member States' views concerning European merger control, as expressed at a European level during Council negotiations for example, also provide useful insights in this specific discussion.

Analyzing aspects of the practical applicability of the European Merger Control System also adds a consistent contribution to our findings. Therefore, when appropriate, we substantiated our assertions with case law examples. Moreover, where the analysis reached aspects essentially built through or developed through jurisprudential means, a closer examination of the relevant, specific case law was performed. The influence of the doctrines arising from cases such as *Continental Can*[4], *Phillip Morris / Rothmans*[5] and the *Airtours*[6], *Schneider*[7] and *Tetra Laval*[8] trilogy, on to the development or stagnation of merger control, has been therefore closely investigated.

We also chose to further our research by observing and participating in the day-to-day application of European and domestic competition matters. We have attended sessions

[4] Case 6/72, (1973) ECR 215.
[5] Cases 142 and 156/84, ECR 1987/4487.
[6] Case M.1524, OJ C124.
[7] Case COMP/M.2283.
[8] Case COMP/M.2416.

conducted at various merger control / cartel investigation stages by the Dutch Competition Authority. Additionally, during a two-month internship carried on at a Brussels law firm, we have provided legal counselling to EU and non-EU companies dealing with the application of the European competition rules. As a result, we have expanded our experience regarding the practical application of competition rules. More importantly for our research, we have collected opinions and approaches concerning the functioning of domestic and European competition systems from different actors involved in this phenomenon: lawyers, competition authorities' officials, CEO's etc.

The contribution also made use of the officially available concentration related statistics for the purpose of further substantiation. Finally, we have used comparisons with different merger control systems from other jurisdictions, meant to illustrate the diverse approaches to the concentration control phenomenon.

The subject matter has been limited to dealing mainly with fundamental, substantive questions concerning the European Merger Control System. Procedural questions are therefore left outside the scope of this contribution and will only be mentioned when this is necessary to clarify the legal context.

Structured as such, the contribution may be found relevant with respect to varied interests and purposes. It may constitute an academic guide with respect to the roots and rationales of the European Merger Control System. Furthermore, the study may be of interest for practitioners, lawyers or economists, dealing with the day-to-day intricacies of merger control enforcement. Lat but not least, the contribution could serve decision makers and merger control law enforcers as a raw guide for remodelling the European Merger Control System.

This study was concluded on August 15th, 2009.

Chapter 2

Substantive and Institutional "Surface" Challenges in EU Merger Control

Substantively speaking, the European Merger Control System has reached maturity. Institutionally speaking, however, it has experienced a slower development pace.

1. Introduction

This chapter is meant to illustrate certain challenges that the European Merger Control System has faced, and the way that they were tackled. In the previous chapter we referred to the year 2004 as a key moment in the development of the European concentration control phenomenon. The challenges that will be portrayed in the next paragraphs have been dealt with through the adoption of the 2004 merger review package. However, the way these challenges have been approached and the consequences differ. The choice of the challenges that will be addressed in the lines to follow has the following rationale. First, we aim at detailing challenges which pertain to different aspects of merger control, namely substantive and institutional. Second, our goal is to provide an example of a challenge that has been solved (i.e. the substantive challenge) and an example referring to challenges which although approached, they have not been resolved in their entirety (i.e. the institutional challenge). Throughout this chapter, the analysis will often refer to the main pieces of legislation which postulated the changes brought to the functioning of the European Merger Control System, such as Regulation 4064/89[9], Regulation 1310/97[10], Regulation 139/2004[11], relevant Green Papers, etc.

The nature of this chapter often calls for a comparative approach with the substantive and institutional approach used by the US concentration control system[12]. In this respect, in the lines to follow we will take a glimpse of the US system's approach to these two features of merger control.

The US Merger Control System has its origins in the 1890 Sherman Antitrust Act and in the Supreme Court decision in *Northern Securities Co v. United States*[13], where a merger between two railroad companies was held to be a restraint of trade under the Act.

Institutionally speaking, the US Merger Control System reveals the nature of the legal tradition it belongs to. The American system is deeply rooted in the common law tradition, which places a deal of importance with regard to its functioning on the role of the judiciary / court system. In this respect, the US model may be characterized as a judicial-based rather than administrative system. The US antitrust agencies (The Federal Trade Commission and The Department of Justice) do not authorize concentrations transactions. Rather, they review them and, for those concentrations likely to lessen competition either negotiate conditions upon which they will not litigate in court or challenge the merger before a judge who decides whether to approve or prohibit the transaction. For concentrations found unlikely to lessen competition, the US agencies simply refrain from challenging these transactions.

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[9] *Council Regulation (EEC) 4064/89 of December 21st, 1989 on the control of concentrations between undertakings*, OJ L 395, 30.12.1989.

[10] *Council Regulation (EC) 1310/97 of June 30th, 1997 amending Regulation (EEC) 4064/89 on the control of concentrations between undertakings*, OJ L 180, 09.07.1997.

[11] *Council Regulation (EC) No 139/2004 of January, 20th, 2004 on the control of concentrations between undertakings,* OJ L 24, 29.01.2004.

[12] For more detailed insights concerning the US concentration control system, see contributions such as: Horn, 2001, Fairburn & Kay, 1989, etc.

[13] 193 US 197, 1904.

From a substantive point of view, the US Merger Control System uses the 'substantial lessening of competition' (SLC) appraisal test. The SLC has its origins in Section 7 of the Clayton Antitrust Act of 1914 (amended in 1950), enacted to remedy deficiencies in antitrust law created under the Sherman Act, the first Federal Act outlawing practices harmful to consumers. The test was enclosed in the 1982 Horizontal Merger Guidelines, which stated that their purpose was to articulate the analytical framework the regulator applies in determining whether a merger is likely to substantially lessen competition. Of course, the test's interpretation shifted over time, but it became more stable after the 1982 Merger Guidelines were issued.

The SLC test detaches the substantive test for mergers from the control of abusive behaviour, as the purpose of merger control is not to prevent future abuses of a dominant position, but to ensure that the market structure will not be less competitive post-merger. To this end, a multi-stage analysis is run in order to determine whether to challenge a merger or not:

- Assessment of whether the merger would significantly increase concentration (using the *Herfindahl / Hirschman Index*)
- Assessment of whether the merger, in the light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects (analysis of unilateral effects and coordinated interaction)
- Multi-step assessment of barriers to entry (the temporal factor, the profitability factor etc.), assessment of possible efficiency and 'failing firm' defence.

The SLC test allows emphasis to be placed on inter-firm competitive dynamics, on empirical evidence and on economic analysis. To this end, it enables the identification of the competition problems and associated remedies. Furthermore, the SLC test focuses on how much competition is lost as a result of a transaction rather than on the creation or strengthening of a dominant position. Being directly grounded on economic analysis, and on the impact of the merger on competition, the SLC test can effectively deal with cases where one cannot state that there is a risk of concerted practices, but where concentration enables the company to act to the disadvantage of the consumer. (Kokkoris, 2005, p. 43)

2. Substantive Challenges Relating to the Assessment Test

The first challenge we will address pertains to the substantive appraisal test used in EU merger control procedures. This is important because the substantive test, by its very nature, lies at the heart of any merger control investigation. The substantive test in the European Merger Control System has been a very controversial issue and the subject of immense debate in recent times owing primarily to the following aspects:

- The inappropriateness of using dominance criteria only when qualifying a merger to be pro or anti-competitive.
- The alleged divergence from the US substantive test. The divergence has led to several conflicting decisions on either side of the Atlantic, creating wide ranging discussions on the pros and cons of the dominance test (used in the EU, until 2004) and of the SLC test (used in the US).
- The growing internationalization and the prospective enlargement of the EU

emphasized the need for a change in the way the EU merger control substantive test is conceptualized. These issues have also been addressed over time by the Organization for Economic Co-operation and Development and the International Competition Network.

2.1. The Dominance Test and Its Layout

The appraisal test enclosed in Regulation 4064/89 is known as the dominance test and it was formulated as follows: "A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it shall be declared incompatible with the Common Market" (Article 3, par. 2 of Regulation 4064/89).

The roots of the dominance test can be traced back to the ECSC Treaty[14], Article 66 of which provided for *ex-ante* control of concentrations in the relevant sectors. The wording of the test resembled the test which was later on included in Regulation 4064/89, although its construction was more basic. Also, the test built up by the 1989 Regulation follows the concept of dominance previously embedded in Article 82 of the EC Treaty[15]. It is not entirely clear what motivated the Commission to opt for the concept of dominance while formulating the appraisal test as it appeared in Regulation 4064/89. It seems most likely that, as the notion was already present in Article 82 of the EC Treaty, the reason was the degree of familiarity with its meaning and the large body of Commission and Court precedent concerning the concept. However, in order to ensure a smooth practical application of the dominance test to merger transactions, the Commission and the Community Courts have emphasized that it should be applied in a teleological / result-oriented manner so as to give effect to the Merger Control Regulation's purpose, namely, the preservation of the system of undistorted competition as envisaged by the EC Treaty's provisions. Thus, both the Commission and the Courts hoped that a practical separation between the way dominance is applied under Article 82 of the EC Treaty and under Regulation 4064/89 will be provided[16].

The dominance test consists of two limbs: the assertion referring to the creation / strengthening of a dominant position and the assertion referring the subsequent finding of a significant impediment of competition. The functioning of each of these two limbs entails the application of different criteria and techniques of assessment such as the determination of the relevant market and of the market shares, evidence of past behaviour

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[14] Treaty establishing the European Coal and Steel Community, signed in 1951.

[15] Treaty establishing the European (Economic) Community, signed in 1957, consolidated text, OJ C 325 of December, 24th, 2002.

[16] For the purpose of clarification, dominance pertains to market power both under Regulation 4064/89 and under Article 82 of the EC Treaty. However, the way these concepts are applied in practice may be different. To elaborate, when talking about Article 82, a static analysis of the market structure leading to the conclusion that such power exists may suffice as a precondition for the application of the abuse rule. With regard to Regulation 4064/89 a more dynamic approach may be regarded as appropriate, also taking into account the contents of the second limb of the test. One other important distinction is that the concept of dominance is applied *ex-pos*t when dealing with Article 82 matters and *ex-ante* with regard to merger control.

of the undertakings concerned, consumers' preferences, etc. The definition of the concept of dominance was put forward by the European Court of Justice in the *Hoffmann La Roche* case[17], while the purpose of the significant impediment of competition concept was set out in the *France v. Commission* case[18]. The extent to which these two limbs of the dominance substantive test are independent of each other was always a matter of some uncertainty, as there were different theories developed in order to explain the construction of the test (Fountoukakos, Ryan, 2005, p. 280, Whish, 2001, p. 772):

- The limbs may be two elements of a single assessment, with the second limb merely qualifying the first. This approach may be used to argue that the concept of dominance in the Merger Control Regulation is not identical with the concept of dominance as set up in Article 82 of the EC Treaty. Still, it seems really unlikely that the European legislative bodies may have intended the same word to denote two different competition law concepts.
- The limbs may represent two distinct steps in assessing whether a merger is incompatible with the Common Market, as provided in the *Aerospatiale-Alenia / de Havilland* case. These steps may be assessed separately if necessary. This approach places in an explicit manner an examination of whether a merger is likely to result in significant competitive harm at the centre of the analysis. To this end, the second limb of the test provides a *de minimis* exception, conferring a margin of discretion for the Commission: a concentration which strengthens the dominant position, but only to a marginal extent, may escape the prohibition, as it does not hinder competition significantly. Conceptually speaking, where the requirements of the first limb are not met, the second limb could not be used to challenge the concentration. Therefore, according to this view, which was confirmed by the Court of First Instance in the *Kayserberg v. Commission* case[19], the dominance test was regarded as a cumulative two-part test. However, as the Commission's practice emphasized, once the creation / strengthening of a dominant position has been established, the second limb of the test is very rarely used[20]. This leads us to a third possible theory.
- The second limb was often regarded as superfluous, as it was argued that a significant impediment of competition almost invariably results from the creation / strengthening of a dominant position.
- Finally, the second limb may entail that the Commission should take a dynamic view of the market and consider whether harm to competition is likely to be transitory or permanent, and consequently take action in the latter situation[21].

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[17] Case 85/76, 1979, ECR 461, par. 38: The Dominant position … relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

[18] Case 68/94, 1998, ECR I-1375, 1998 4 CMLR 829, par 115: The second limb of the test is… intended to ensure that the existence of a casual link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed.

[19] Case T-290/94, 1997, ECR II-2137.

[20] For case law examples, see Selvam, 2004, p. 62.

[21] See the *Aerospatiale-Alenia / de Havilland* case, cited above.

2.2. The Problem with the Dominance Test. Mind the Gap

A significant number of critics (such as Baxter, Dethmers, 2005, Volker, 2004) emphasized the fact that certain gaps may be located in the functionality of the dominance test. The core of the critique revolved around the gap between the policy aims of catching all anti-competitive mergers, and the ability to detect them through the use of the concept of dominance, even as extended and applied in a flexible manner, to embrace, for example, situations of tacit co-ordination between undertakings or unilateral effects[22] in situations of oligopolies.

First, the dominance test focused only on whether a proposed merger would create or strengthen a dominant position. It was argued that this situation could result in the clearance of anticompetitive mergers. Although the Commission interpreted the concept of dominance as being equivalent to the concept of substantial market power, the fact that some of the mergers which hinder the competitive structure of the market could not be properly challenged (a concentration may not create or strengthen a dominant position, but may still damage the competitive conditions through different other means), led to a certain degree of legal uncertainty. An extensive interpretation of the dominance test may cover some, but not all of these so-called 'blind spots'[23].

Second, it may be argued that the dominance test failed to ask the right question: will a given merger really harm the consumers? On the other hand, the US SLC test refers to a reduction in consumer welfare or facilitating the exercise of market power to the detriment of consumer welfare. In this respect, the dominance test may not be capable to cover this broad range of effects on the market.

Further arguments in this respect may also refer to the 'spill over' effects ensuing from the fact that Article 82 of the EC Treaty uses the concept of dominance too. In the context of using the dominance test for the purpose of merger control, the frontiers of the dominance concept as enshrined in the Merger Control Regulation are being stretched far beyond their limits, leading to what may be called 'cross-contamination' (Selvam, 2004, p. 60). Broadening the concept of dominance in merger cases is simultaneously broadening the category of companies to whom the rules enshrined in Article 82 of the EC Treaty apply.

The 1999 *Airtours / First Choice* case was most probably the event which caused appropriate action to be taken with regard to the amendment of the dominance test and triggered the debate which surrounded it. The implications of this case will be debated

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[22] The European Commission uses the 'non-coordinated effects' terminology to nominate 'unilateral effects'. For the purpose of this analysis, we will use these two concepts interchangeably.

[23] To exemplify, let us imagine a market setting with a number of incumbent firms where e new entrant appears with new technology thus threatening the existing companies in that given market. If one of the non-dominant companies in this market buys out the new entrant, which may be a very small company, and thus not leading to the creation or strengthening of dominance, the dominance test may prove ineffective. A change in the structure of the market has occurred and competition may be hindered. However, since there is no dominance created or strengthened, the concentration transaction may not be blocked employing the dominance test. For developments of this hypothesis, see Selvam, 2004, p. 59.

more extensively in Chapter 5 of this contribution. For now, it will suffice to summarize its features which are relevant for the current topic. In *Airtours / First Choice* the Commission investigated a proposed hostile acquisition in an already concentrated market, where four large undertakings had over 80% of the market share and several smaller undertakings occupied the rest. The takeover would have led to three firms having a collective dominant position. The Commission took the view that the ability of firms to engage in tacit collusion is not essential, as it is sufficient that the concentration makes it rational for firms having adequate market power to act independently of competitors and customers; therefore the proposed concentration was blocked. Through this decision, the Commission extended the concept of collective dominance from duopoly to a merger reducing the number of post-merger firms to three. Regardless of the outcome of this case it may be emphasized that the Commission, while assessing the merger, tried to follow an underlying rationale similar to the SLC test. However, the composing elements of the decisions were not properly built up and therefore it was argued on several occasions that, instead of clarifying the notion of collective dominance, the Commission managed to blur it even more. Put in a different perspective, it may be argued that the Commission in its decision undermined the credibility of the concept of collective dominance and, by extending its scope managed to induce a greater degree of legal uncertainty.

The Court of First Instance, overturning the Commission's decision, found that the Commission did not prove the three necessary conditions for a position of collective dominance to be reached, listed in par. 62 of the CFI judgment: an adequate degree of market transparency so that firms are able to monitor other firms' conduct and detect deviations[24]; the existence of a retaliation mechanism for deterring and punishing deviation[25]; impossibility of current and potential competitors to counterbalance a collective dominant position by increasing their capacity in response to a reduction in supply by the post-merger dominant firms[26]. The Court of First Instance also emphasized that while assessing a concentration transaction which is likely to lead to collective dominance, the Commission should not simply reflect the normal economic conditions of the markets, but should convincingly indicate the anti-competitive impact of commercial links, as well as the likelihood and sustainability of the undertakings' common policy. (Kokkoris, 2005, p. 40)

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[24] The Court of First Instance argued that it is not sufficient for each member of the oligopoly to be aware that interdependent market conduct is profitable. There must be an adequate degree of transparency so that firms are able to monitor other firms' conduct and detect deviations. The above mentioned degree of transparency depends on the undertakings' ability to observe transaction prices and levels of sales of competitors and on the degree of concentration of the market.

[25] In order for tacit co-ordination to be sustainable over time, there must be a credible incentive not to depart from the common conduct in the market: for example, the parties must be aware that highly competitive action on anyone's part will provoke identical action by the others. However, the threat of punishment may not always be credible due to the high costs that the punishment's implementation may entail.

[26] The presence of a strong buyer power may have a positive impact on the sustainability of tacit collusion. However, a significant factor influencing the power of buyers is the cost associated with switching suppliers. The countervailing buyer power, which entails switching to other competitors as a reaction to price increases introduced by the dominant merged entity may induce entry of new firms in the relevant market and motivate deviation from the common conduct in the market.

Although the outcome of the *Airtours / First Choice* case has emphasized the shortcomings of the dominance test, it has failed to clarify and close its gaps. The Court's unwillingness to correct, through jurisprudential means, the appraisal test's limits left only one available option: filling in the dominance test's gaps constituted a process which needed the amendment of the Merger Control Regulation.

2.3. Resolving the Challenge

2.3.1. The Debate

The challenge pertaining to the substantive test refers first of all to covering the functional gaps discussed in the previous paragraph. However, as stated at the beginning of paragraph 2 of this chapter, reformulating the appraisal test had to go beyond these functional shortcomings, and take into account the internationalization of merger control. References in this respect will be provided in the paragraphs to follow.

Against the background described above, the review of the substantive test was launched. First, the topic was approached in the 2001 *Green Paper* o*n the Review of Council Regulation 4064/89*[27]. However, the feedback received was minimal and it did not focus on the dominance test's gaps. Still, in November - December 2002, Commissioner Mario Monti forwarded to the College of Commissioners a proposal aimed at clarifying the substantive test and an Explanatory Memorandum, so as to make it clear that the dominance test covers also situations of non-collusive oligopolies. This policy objective was reflected in the proposed new Regulation's recitals as well as in the proposed new Article 2, par. 2 which stated that "one or more undertakings shall be deemed to be in a dominant position if, with or without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition".

The European Commission's original aim was therefore to clarify the scope of the dominance test rather than to radically alter it. Thus, adopting such an approach would improve legal certainty, would widen the scope of intervention to all anti-competitive mergers and would focus the merger assessment more on the economic impact that a concentration brings about. Furthermore, adapting the dominance test rather than switching to the SLC test would have the advantage of not hampering the already existing extensive body of case law, built over the years.

However, it is interesting to investigate how different is this interpretation of dominance from the definition provided in *Hoffmann La Roche*. The reference to economic power seems to be similar to the reference to economic strength under the *Hoffmann La Roche* doctrine. However, the ability to influence appreciably and sustainably the parameters of competition may be interpreted in a different manner from the *Hoffmann La Roche* reference to the ability to prevent effective competition. The use of the term 'appreciably' seems to be a deliberate attempt to mirror the concept 'substantial' of the SLC test. At the

[27] COM/2001/0745 final.

same time, using the word 'appreciably' instead of 'substantial' places no pressure on the European authorities to conform with the US case law on the interpretation of the term 'substantial'. It may be that the difference between the two concepts fuelled the arguments of those arguing for full convergence between the EU and US merger control substantive tests, but at the same time one has to bear in mind the fact that convergence and consistent analyses should not come at the expense of the loss of regulatory and judicial independence in either regime (Selvam, 2004, p. 64).

Also, the introduction of the concepts 'one or more undertakings' and 'with or without coordinating' was aimed at extending the scope of the test to non-collusive oligopolies, in an attempt to fully cover the test's gaps.

Despite its innovative approach, the proposal was still regarded by many critics as sub-optimal, from a legislative point of view, as it rendered the original dominance appraisal test overly-prescriptive and inflexible, thereby foreclosing its adaptability to unforeseen scenarios of competitive harm that might be encountered in the future (Fountoukakos, Ryan, 2005, p. 286). Although detaching the new concept of dominance under the Merger Regulation from the interpretations that the European Courts may give to the concept of dominance under Article 82 of the EC Treaty is laudable, it may have been perceived as an attempt to redefine dominance under the Merger Control Regulation, thus creating legal uncertainty concerning the merger control assessment test.

Discussions upon the above briefly described proposal were launched in the Council and later on boosted by the Greek and Italian Presidencies' contribution, which pushed to reach political agreement on the matter before the enlargement of the EU from 2005. The drawbacks of the proposal were highly debated. Two main aspects were well established. First, although there was a division of opinions on the layout of the new test (dominance, SLC, hybrid-type test), it was commonly agreed upon that non-collusive oligopolies were a legitimate merger control concern and therefore the Merger Control Regulation should be capable of tackling them. Second, the fact that there has been a gap in the dominance test with regard to tackling non-collusive oligopolies transposed the discussions in the Council on a different level: the discussion was mostly focused on how the change should look like and not on whether there should be a change at all.

2.3.2. The Arguments

The hypothetical arguments for the EU not opting for the SLC test may be best summarized by the maxim: 'If it isn't broken, don't fix it' (Fountoukakos, Ryan, 2005, p. 283). Given the above stated, the EU decided not to adopt the SLC test in its entirety, having regard to the following reasons:

- The flexible / teleological approach to the dominance test enabled the prevention of most of the possible post-merger scenarios detrimental to competition and there was not foreseeable risk for this approach to be ineffective, as dominance is a malleable and evolving concept. To this end, a switch to the SLC test would not have been necessary, if greater emphasis would have been placed on elements such as barriers to entry, buyer power and efficiencies, if the finding of

dominance and the importance of market share would have been de-emphasized and if a better use of the second limb of the dominance test would have been provided.

- The adoption of a radically new test (in language to say the least) would arguably undermine the existing body of case law emanating from the Commission and the European Courts, built up on the dominance test. Also, the SLC concept is very much based on very strong jurisprudential backing that, with regard to its application in the European context, is so far inexistent. However, the already established legal precedence of the SLC test in USA and Canada, for example, may be regarded as a possible useful reference.
- A high degree of unpredictability and uncertainty would arise regarding the interpretation of new standards of the SLC test, as this test lacks established EU case law precedence and due to the fact that the enhanced discretion that the Commission might have in adopting an interventionist approach to mergers.
- Nearly all EU Member States and the candidate countries before 2004 adhered to the dominance test as formulated in Regulation 4064/89. Therefore, a radical switch to the SLC test would have severely hampered the harmonization of national competition laws, enhancing legal uncertainty (Kokkoris, 2005, p. 42-44), although it would allow an alignment of the Merger Regulation's appraisal criteria with those applied in other major jurisdictions, such as the US.
- Also, it may have been believed that the European version of the SLC test may be too vague, too discretionary and too uncertain in its scope, thus resulting in an effective lowering of the intervention threshold.
- The SLC test may lead as well to uncertainty, as the term 'substantial' is capable of various interpretations. Nevertheless, the SLC concept is an evolving one: whether along the time substantial lessening of competition was held to refer to an increase in overall market concentration, a reduction in the number of competitors, etc, lately it is said that it refers to a reduction in consumer welfare or facilitating the exercise of market power to the detriment of consumer welfare. Therefore, it may be argued that the SLC concept is a flexible one, allowing different interpretation in accordance with the current economic and political ideologies. (Selvam, 2004, p.61).
- Last but not least, it may be contended that the first reaction of any regulator to a new economic or legal concept is to test its limits. Therefore, a sudden change from the dominance test to the SLC test would have probably resulted in an excessively stringent approach on the Commission side, leading to lack of consistency in its merger control practice.

The arguments for moving to an explicitly effects-based test like the US SLC test, tended to be generally framed in terms of the desirability of the wording of a competition test reflecting plainly and unambiguously the purpose of merger control. Therefore it was argued that:

- The dominance concept in Regulation 4064/89 while applied in a flexible manner was being stretched far beyond its plain language meaning (Fountoukakos, Ryan, 2005, p. 284). In this respect, an interpretation as such did not lead to legislative clarity.

- An SLC-based type of test, already used in other jurisdictions (US, UK, Ireland) is better able to take into consideration synergies and efficiencies resulting from a merger, as, unlike the dominance test, it is focused on more issues than just structural aspects of the concentration. The SLC-based type of test allows emphasis to be placed on inter-firm competitive dynamics, on empirical evidence and on economic analysis, permitting greater identification of the competition problems and associated remedies.
- The SLC test is better able to take into consideration synergies and efficiencies resulting from a merger.
- The SLC test does not encounter the same problem like the provisions of the old Merger Control Regulation referring to the assessment test do when it comes down to possible spill-over effects ensuing from the fact that Article 82 of the EC Treaty uses the concept of dominance.
- Adopting the SLC test in the EU would have paved the way to global convergence in the substantive aspects of merger control. However, this convergence is very much dependent on the way the European authorities would choose to interpret and apply the SLC concept. If the Commission would choose a stringent approach, thus pushing the limits of the test as far as possible, in order to block a far greater number of anti-competitive mergers than the number of mergers prohibited under the dominance test, consistency with regard to merger control decisions in the EU and US would be hard to achieve.

2.3.3. The Outcome

Discussions on the Commission's proposal were carried on in the European Parliament, in the Economic and Social Committee and generally in business communities. It is imaginable that heavy lobbying was directed towards the Commission and the Council in order to influence the final layout of the test. The Council was not persuaded of the wisdom of re-defining the dominance test proposed by the Commission, as it perceived it as an inappropriate cure for the disease the dominance test was suffering from. The final compromise was eventually reached after several other discussions carried on in the Committee of Permanent Representatives and after last-minute adjustments have been agreed upon. The wording of the new test, also known as the SIEC test ('significant impeding of effective competition'), along with recitals 23 to 29 of Regulation 139/2004 provide a taste of the reasons why the change was operated.

Article 2 of Regulation 139/2004 states: "a concentration which would significantly impede effective competition in the Common Market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the Common Market". One may notice that in Regulation 1310/97 amending Regulation 4064/89 the order of the two criteria of assessment was reversed: a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market. The difference between the two legislative provisions is evident, since under Regulation 1310/97 a dominant position was not prohibited where it did not significantly impede

effective competition, whereas under Regulation 139/2004 effective competition can be significantly impeded even where a dominant position is neither created, nor strengthened[28]. Therefore, it may be concluded that under the new Merger Control Regulation the creation or strengthening of a dominant position is only an example (however, the most common) of significantly impeding the effective competition on the market.

All in all, the scope for intervention under the Merger Control Regulation has been widened and brought somehow closer to the spirit of antitrust law as applied in the US. Recital 25 of Regulation 139/2004 states that the notion of 'significant impediment to effective competition' should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

It is interesting to note the wording resemblance between the test enclosed in Regulation 4064/89 and the new one. This reflects the underlying wish of the EU legislature to preserve the language with which the Commission, the Courts and the companies are familiar. It is also interesting to observe the fact that the contents of the SIEC test return to the Commission's original conception of the basic standard for merger control (as enclosed in the 1973 proposal[29]), as one encompassing all scenarios of market power and not merely those viewed through the lens of a dominant position. This approach is also consistent with the one enshrined in the relevant articles of the ECSC Treaty. Therefore, although the test was brought somehow closer to the spirit of the SLC test, this does not amount to an 'Americanization' of the EU's approach, but more to an improvement consistent with the philosophy that has been underlying the European approach to competition policy since the end of the Second World War (Fountoukakos, Ryan, 2005, p. 296).

The new test is in keeping with the ECJ teleological view of the merger control substantive test, namely that the Merger Control Regulation applies to mergers of Community dimension insofar as they are likely to prove incompatible with the system of undistorted competition as envisaged by the EC Treaty. Furthermore, even though the European Commission has rejected the label of SLC, the analytics come out the same. The difference however from a plain adoption of the SLC test is that such a reform of the old dominance test avoids the vagueness of the SLC test, a concept which was thought to be quite unsafe in the hands of the European regulators (Selvam, 2004, p. 67).

2.4. Some Final Remarks Concerning the Substantive Test

Having run through the process of reform of the EU Merger Control System substantive test one may draw a few conclusions regarding the adoption of the SIEC test[30]:

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[28] *ARD / BSkyB - Kirch Pay TV*, CFI, 30.09.2003, T-158/00.

[29] Discussed thoroughly in Chapter 3 of this contribution.

[30] For further details see also The Review of the EC Merger Regulation, 32nd report of the House of Lords Select Committee on the European Union, HL Paper 165, Session 2001-2002.

- The new test is a culmination of a long legislative history commencing in the 1950's with the adoption of merger control specific rules in the ECSC Treaty, continuing with the adoption of the 1989 Merger Control Regulation and culminating with the recent debate on the efficacy of the dominance test.
- The SIEC test is an effects-based competition test which focuses on the issues essential to an analysis of the impact concentrations have on competition.
- The new test extends in a disciplined way beyond dominance while closing any perceived gap and covering all possible anti-competitive merger scenarios resulting in higher prices, reduced output, less choice or innovation, etc.
- The SIEC test preserves continuity by ensuring the continued relevance of the case law and practice under the dominance test.
- The new test also avoids unnecessary confusion between merger analysis and the analysis under Article 82 of the EC Treaty.
- The new substantive test does not entail a lowering of the intervention threshold.
- Introducing the SIEC test aims at solving the issue of legal certainty. Furthermore, the adoption of the Horizontal Mergers Guidelines explores the manner in which the Commission will apply the SIEC test in the future.
- The adoption of the SIEC test aims at consolidating international convergence with regard to merger control, aligning to an appraisal standard used in many other jurisdictions worldwide.

Summing up, one may notice that by adopting the 'significant impeding of effective competition' substantive test, the EU managed to solve the substantive challenge concerning the appraisal test. A fair compromise has been reached, combining the appropriate standards already existing in other jurisdictions, without altering the existing body of jurisprudence or bypassing the previous dominance test experience. The Commission's movement towards an effects-based approach in merger control has been gradual and started some time before adopting the new test. For example, even before launching the Merger Review the Commission published several studies on the issue of efficiencies and the 2001 *Green Paper* hinted at the need to take efficiencies more explicitly into account. This indicates that the Commission has increasingly deviated from a structural approach to merger enforcement towards a closer attention being devoted to the competitive effects of concentration transactions. In practice, even though the Commission had gradually embraced an effects-based approach under the old test, the SIEC test has reinforced this trend.

3. Institutional and Transparency-Related Challenges

3.1. The Commission's Original Structure

It seems appropriate to first briefly describe the Commission's original structure (viewed from a competition policy standpoint) before investigating the institutional challenges surrounding its merger control-related functioning.

The Commission is an administrative body responsible for ensuring compliance with certain rules in the public interest of the Community (Blanco, 1996, p. 42, cited in

Camesasca, 2000, p. 208). Originally, the enforcement of the competition rules contained in the EC Treaty and in the secondary Community legislation were principally the responsibility of Directorate – General for Competition of the European Commission, also known as DG IV. The DG IV is made up of a number of directorates, each with a designated sectoral or other functional responsibility. Before the adoption of the 2004 merger review package, concentration-related legal provisions were applied by the Merger Task Force also known as Directorate B, which was not to be perceived as a separate agency, but as a unit within the Commission's construction. The Merger Task Force comprised aproximativelly 50 staff members (mostly lawyers and economists) led by a director and divided in four interconnected[31] Operating Units, all afforded with clerical and secretarial support staff. If necessary, the Merger Task Force made use of outside expert or specialized knowledge.

3.2. Commission's Powers Concerning the European Competition Policy

3.2.1. Policy Making Issues

While most of the Internal Market issues are tackled through the codecision procedure the competition policy regulatory provisions are usually adopted through the consultation procedure. When applying this procedure to competition matters or to objectives of the EU which relate to the Common Market but which lack an explicit legal basis in the treaties, Article 83 and respectively 308 of the EC Treaty should be considered the legal basis for adopting the necessary legislation. This procedure can be sketched as follows: the European Commission sends its proposal to both the Council and the European Parliament, but it is the Council that officially consults the Parliament and other bodies such as the Economic and Social Committee and the Committee of the Regions. The Council is held only by the obligation to consult the Parliament but it is not bound by the Parliament's position, neither by any other body's opinion. Therefore, the Parliament can only delay the adoption of the legal text. However, if the Parliament asks for amendments, the Commission will consider all the changes the Parliament suggested. If it accepts any of these suggestions it will send the Council an amended proposal. The Council further examines the amended proposal and either adopts it or amends it further. Still, if the Council amends a Commission proposal it must do so unanimously.

Therefore, concerning the adoption of competition legislation, it may be argued that the Commission plays multiple roles: first, legislative initiative, when referring to the regulatory proposal sent both to the Council and the European Parliament and second, the Commission plays a buffer role, in the Council – Parliament consultation, as it is required to present an amended legislative proposal if the Parliament asks for certain amendments. Thus, from a policy-making point of view, the Commission holds a considerable amount of power in its relationship with the other EU institutions on one hand and the governments of the Member States, on the other hand.

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[31] The Operating Units also drew on the sectoral knowledge of the other operational directorates in the Competition Directorate, through the so-called inter-directorate consultative meetings, while also keeping in touch with Directorate A, responsible *inter alia* for overall policy and coordination or other Directorates, depending on the particular nature of the case assessed. See also Cook, Kerse, 2000, p. 91.

3.2.2. The Commission's Role in Assessing Concentration Transactions

3.2.2.1. The Critique

The Commission's powers go well beyond its policy-making prerogatives of initiating legislative proposals and defining the general policy in the area of merger control. A quick glance at the functioning of the merger control system reveals a rather curious situation: the same civil servants who assess the evidence, state the case against a notified concentration, determine how far that case is proven and decide whether to approve or prohibit a transaction. This peculiar situation was characterized as the Commission's tripartite role when assessing a concentration transaction: 'investigator, prosecutor and judge'. In other words, we are dealing with a concentration of investigative, adjudicative and administrative powers, entrusted in the hands of the Commission (Levy, 2003). The consequences that flow from approaching merger control with such an institutional setup are paramount. In this respect, concerns regarding the poor transparency of the appraisal process, political capture and inefficient checks and balances have been put forward. Let us elaborate.

The basic design of the European Merger Control System was built on administrative, rather than judicial grounds. The reason for this lies in the roots of the legal systems functioning in Europe and in their underlying philosophies. The European Merger Control System draws heavily on the (civil law tradition) experience achieved in the Community's Member States (especially Germany and France). The European legal system is different than the American system with respect to the role of the judiciary in the overall functioning of law enforcement. Therefore, the European Competition Policy chose to place its confidence with regard to antitrust enforcement in one single administrative institution (the Commission) which, along time achieved tremendous practical experience in this field.

However, the Commission's internal functioning mechanism, for the purpose of managing the concentration control phenomenon faced severe critique. From an organizational point of view, it may be noticed that most of the Commission officials, specialized in the merger control process, were appointed for temporary periods. Therefore, it was argued that it is difficult in such circumstances to build up the continuity and sense of collective professional identification that may be needed, for example, to resist the national pressure (most of the time political in nature) that surrounds the Commission (Neven, Nuttall, Seabright, 1993, p. 225). Furthermore, the decisions were taken not by officials but by the Commission itself[32], either by the Commissioners' college, or by an individual Commissioner under delegated authority. Except where a clear distinction was made between the Merger Task Force and the

[32] This fact has been confirmed by the Court of First Instance in the *Cimeteries CBR SA v. Commission* case, T-25/95, 2000 *ECR* II-491.At par. 721 the Court stated that the contested decision was not taken by the official who carried out the investigations, acted as rapporteur, drew up the Statement of the Objections and prepared the draft decision, to whom the parties referred to, but by the college of Commissioners. Furthermore, the procedural guarantees provided for by Community law do not require the Commission to adopt an internal organization precluding the same official from acting as investigator and rapporteur in the same case. For further details see van de Gronden, de Vries, 2006, p. 37.

Commissioners themselves, reference was made to the European Commission to cover both decisions made under the delegated authority procedure and those reserved for the Commissioners. The system as sketched above invited to criticism coming from different perspectives. First, given the multi-layer hierarchical construction of the Commission and the procedural steps that need to be followed, the Commission as a collegiate body does not have contact with the parties (Hofmann, 2003, p.118). Although specific to hierarchical structures, this situation questions whether sufficient safeguards for due process and sufficient internal checks and balances are afforded. Second, allegations concerning the system being prone to political capture have been put forward. If political interference occurs, proper, objective and transparent functioning of the merger control system would be at stake.

In this context, one of the main institutional weaknesses of the European Merger Control System originated from the fact that the decisions were not taken by competent judges but by political Commission members who may or may not be familiar with the economic and legal problems of a transaction to be assessed[33]. Furthermore, being a political body, the Commission is prone to be surrounded by political lobbying and this may have an impact on the opinions expressed by the Merger Task Force members with regard to a concentration transaction being cleared or blocked (Schmidt, in Mueller, Haid, Weigand, 1999 p. 193).

Political capture is however a difficult thing to prove as the low number of prohibitions under the European Merger Control System may equally infer either that the system is not that restrictive, either that the Commission has been quite successful in dissuading firms from putting forward anti competitive proposals (Neven, Nuttall, Seabright, 1993, p. 152). All in all, The European Merger Control System seems to fit the description of a system where the inevitable political element operates mostly behind close doors. From this point to exerting decisive political pressure there's a small step. If the competition and political stages are not kept separated and outside each other's reach, any decision clearing a concentration transaction may be susceptible of being based on political grounds.

Checks and balances regarding the merger control procedure are provided for, either through an internal review within the Commission or an external review sought in court. However, the effectiveness of some of the internal checks and balances has been questioned[34]. One has to keep in mind that the Commission is in itself not a monolithic institution; it is composed of several DGs and the decision to block or clear a concentration involves the consultation and assistance of several DGs of the Commission's Legal Service (Hofmann, 2003, p.118). The technical, economic and industrial expertise is evaluated and included with the evidence collected by the case handlers. Still, the value of the consultation between the DG Competition and other Commission services as a means of checks and balances was reduced, since the parties

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[33] Schmidt, Ingo, *Jurisdictional Problems of Merger Control. An International Comparison*, in Mueller, Haid, Weigand, 1999, p. 193.

[34] *The Review of the EC Merger Regulation, 32nd report of the House of Lords Select Committee on the European Union*, HL Paper 165, Session 2001-2002, par. 4.

generally have no access to internal communication documents within the Commission. Furthermore, the Commission's Legal Service undertook a review of all final decisions prior to them being suggested to the Commission. However, such input and substantive, as well as procedural review by the Legal Service did not seem to remedy the problem that the resources of the Legal Service with respect to time and know-how were limited regarding the review of complex economic assessment. Also, the Legal Service, despite having the expertise in legal matters, cannot sufficiently analyze and evaluate whether the application of one economic theory is to be preferred over another. (Hofmann, 2003, p. 119)

The Court of First Instance and the European Court of Justice ensure external control with regard to the Commission merger decisions, but only isolated cases were referred to the courts. The drawback in this respect lies in the fact that the proceedings take a long time and they are confined only to limited grounds of annulment.

The institutional foundations for effective internal and external control may be therefore categorized, to a certain extent, as inadequate. However, as we will detail in Chapter 5 of this contribution, the outcomes of the *Airtours, Schneider* and *Tetra Laval* cases enhanced the CFI's ability to provide effective judicial review at least in some types of merger cases. The CFI's strict review of the Commission's factual findings in these cases created the impression that the Court is both willing and capable of engaging into a *de novo* review of mergers, thus improving to a certain extent the merger control checks and balances. Still, the outcome of these cases fuelled further criticism concerning the need for a separation of the investigative and adjudicative functions concerning merger control.

Last, but not least, transparency in connection with antitrust enforcement is also essential, especially since the merger control issue is nowadays more than ever a predominantly bureaucratic phenomenon. For the purpose of merger control, the concept of transparency refers to the ability of the public to see and understand the workings of the merger review process; in other words, transparency refers to the fair and responsive explanations of the anti-trust enforcers' action and inaction (Pitofsky, 2003, p. 995). To this end, transparency contributes to achieving consistency, predictability and fairness in applying merger norms, thereby enhancing credibility and effectiveness of merger enforcement. Transparency pertains to the jurisdictional scope of the concentration assessment norms as well as to the procedures applicable to merger review. Also, the concepts of transparency and legal certainty are related with the institutional design of the authorities that handle concentration control.

Generally speaking, there are several ways in which transparency for the purpose of merger control may be promoted; to take just a few examples, reference should be made to publishing the basic pieces of legislation as well as general guidelines and notices regarding substantive matters, procedural matters, as well as the analytical standards employed in merger review, publishing individual decisions, issuing press releases and statements on key matters that signify changes in enforcement policies, delivering speeches and publishing informational materials and/or other tools to disseminate

information regarding precedential interpretations of statutes, regulations, policies or practices, or regarding the basis for the agency's conclusions with respect to high profile or important cases.

Still, these methods may have a softer impact than prospected, as usually the antitrust agencies enjoy a certain degree of discretion in choosing exactly how detailed the information delivered to the public may be.

In practice, the Commission has developed certain practices regarding its disclosure procedures. For cases in which the Commission clears transactions without any conditions, it issues statements identifying the parties and the nature of the transaction as well as discussing the relevant product and geographic markets, the degree of overlap of the participating firms, and other pertinent facts. These statements are often limited in detail but still, they typically provide at least some basic information about the Commission's view of the companies and markets involved in the transaction. In cases that are resolved after in-depth investigations, the Commission issues detailed public decisions whether it blocks the merger, allows the merger with conditions, or allows it to proceed without conditions. In Phase II analysis, the Commission has access to significant amounts of information, data, and internal company documents; it has access to staff recommendations which outline the relevant markets, the competitive issues, and possible remedies; also, it has often conducted extensive economic analyses and has talked to industry participants, such as customers and competitors.

The Commission's practice seems to be a bit more transparent than the US system, as it reveals how the agency views the relevant markets and dynamics of competition in a broad range of industries, as opposed to selectively announcing the agency's analysis when it believes that the decision deserves a public explanation.[35] Supporting this assertion is the statement issued by Deputy Assistant Attorney General of the Antitrust Division Thomas O. Barnett, while explaining the *Arch / Metrocall* merger: "Regarding the goal of increased transparency, the European Commission and others have been ahead of the U.S. when it comes to explaining the reasons behind decisions not to bring challenges[36]."

From a transparency point of view, the Commission managed to achieve in the past more or less fair results. However, certain opinions (Camesasca, 2000, p. 246) underline the fact that retuning the Commission's institutional design would also one improve the transparency of the process.

3.2.2.2. Possible Solutions

Possible solutions have been put forward in order to reform the merger control system so as to:

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[35] For further details, see Gelfand, Calsyn, 2005, p. 3, 6.

[36] Thomas O. Barnett, Deputy Ass't Atty Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement Priorities: A Year in Review, Address Before the Fall Forum of the ABA Section of Antitrust Law 5 (Nov. 19, 2004).

- Avoid having a single body fulfilling investigative, adjudicative and administrative tasks;
- Ameliorate the lack of transparency that characterizes the appraisal proceedings;
- Improve the system's checks and balances.

Three preliminary observations have to be made as to the limits that reforming the concentration control system faced: first, certain proposals of changing the way the system functioned ask considerable institutional reorganization, a goal difficult to achieve as the consent of all the Member States would have been required. Second, it was argued (van de Gronden, de Vries, 2006, p. 65-66) that the proper functioning of the Internal Market as a core aim of Community law at least partly explains the position of the Commission (independence relating to the relationship with the Member States' governments and the Commission's collegiate character) and the institutional structure of Community law[37]. Third, if the EU were to opt for a separation of the different stages of the merger control procedure the speed and the flexibility of the system might have been compromised. Brussels regarded this outcome as highly undesirable.

One solution put forward was assigning the responsibility of handling Phase I and Phase II of the appraisal procedure to two separate teams of officials within the Commission. For example, the Merger Task Force could have been split into an investigative body and a decision making branch. Alternatively, the investigative powers could have been left to the Merger Task Force, while the decision making task entrusted with another different entity within DG IV. The entity at hand may become a real and effective internal check on the soundness of the investigators' preliminary conclusions, although may still fall short on the transparency issue. However, it would be crucial that both of the branches had the same level in the organizational hierarchy. This solution would have left much of the existing structure in place, thus not requiring prior institutional reorganization (Kuhn, 2002, p.19). DG Competition took into account such solution and has actually created an internal system of peer review panels to reinforce internal scrutiny. In complex and high-profile cases, a panel composed of experienced officials scrutinized the case team's conclusions with a 'fresh pair of eyes' at key points of the investigation. This resulted in a second opinion as to the strengths and weaknesses of a case, independent from the position of the case team, which increases the legal and economic solidity of the final decision. Still a clear separation between investigative, adjudicative, administrative and legislative tasks was not provided by such an option, notwithstanding the real advantages that the creation of the peer review panels has brought about.

Another solution put forward entailed the delegation of the investigation, prosecution and decision making to a new independent agency ('European Cartel Office', 'European Competition Agency', 'European Antitrust Office')[38], with a right of evocation before a political institution and a possibility to appeal its decisions before a separate judge. Thus,

[37] According to van de Gronden, de Vries, competition law is an integral part of EU law and fulfils similar functions such as the free movement rules, harmonization measures and the rules on state aid do. For reasons of coherence, the application of EC competition law should therefore not be separated from other areas of Community law.

[38] For in-depth analysis of the model at hand see also Hofmann, 2003, p.127-128 and Ehlermann, 1995.

the case assessment stage and the political stage are kept separated, assuring that any possible final decision to permit a merger on political grounds is transparently seen as such, and is not confusingly presented as the legal outcome of the case (Camesasca, 2000, p. 246-247). However, in order for the change not to be just a cosmetic one, certain hurdles, some more problematic than others, need to be overcome. First, legal arguments stand against the setting up of such an independent agency given that, as provided above, the aim of establishing an Internal Market explains the institutional structure of Community law. Second, according to Article 201 of the EC Treaty[39], the European Parliament can control the Commission with respect to its task to enforce Community law, including the EC competition rules, through motions of censure. Third, according to the *Meroni* and the *Alliance for Natural Health* judgments[40] the Community legislature is not allowed to delegate discretionary powers to bodies other than those that have been established by the Treaty (van de Gronden, de Vries, 2006, p. 66). Fourth, the goals and tasks set for the above mentioned agency at each stage of the procedure must be extremely clearly defined and distinct from each other, thus avoiding possible dangerous influences of lobbyism. The agency would have to be completely independent and freed from the Commission's political influence, while the agency's head would have to be appointed for a fixed term, by the Commission as a whole and the agency's officials would also have to have secure appointments. However, the DG IV constantly opposed such a model, as it would have constituted a major departure from the traditions and habits of the Commission. At the same time this would have amounted to a serious erosion of the Commission's prestige, fact that may have had a negative impact on overall legitimacy. Furthermore, it is hard to imagine how an agreement may be reached between the Member States on how such an agency should be set up and what its criteria of assessment should be, considering the fact that when discussed at the Intergovernmental Conference in 1996-1997, the proposal was considered inappropriate and found few supporters. (Neven, Nuttall, Seabright, 1993, p. 249)

A third option for change was regarded as quite a radical one: there were suggestions (Kuhn, 2002, Lawsky, 2002) that the Commission should consider handing over its authority to block mergers to the Community Courts, following the US example. Of course the issue just mentioned raises questions regarding the amendment of the EC Treaty, the fundamental alteration of the Commission's functioning, as well as questions of justiciability, institutional balance and resources. Whether a court is better suited to analyzing and taking decisions on the economic issues arising in a merger case is still

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[39] In this respect, the relevant part of Article 201 of the EC Treaty states the following: If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote. If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the Members of the European Parliament, the Members of the Commission shall resign as a body.

[40] *Meroni / ECSC High Authority*, Case 9/56, 1957-1958, ECR 133 and *Alliance for Natural Health,* Joined Cases C-154/04 and C-155/04. At par. 90 of the *Alliance for Natural Health* judgment the Court stated that when the Community legislature wishes to delegate its power to amend aspects of the legislative acts, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria because otherwise it may confer on the delegate a discretion which, in the case of legislation concerning the functioning of the Internal Market in goods, would be capable of impeding, excessively and without transparency, the free movement of the goods in question.

arguable[41]. There are opinions in favour and against such an approach, both sides acknowledging the fact that any approach requires further reflection, more extensive consultation and possibly further review of the experience acquired in different other jurisdictions. Nevertheless, choosing the US-model judicial-based system would have saved the Commission the bundle of criticism regarding its tripartite role while assessing a merger transaction and would considerably boost the transparency, objectivity and credibility of the Merger Control System. However, implementing a US-model judicial-based system could be troublesome in the long run as the US has a much speedier court system than that the EU. Adjusting the institutional framework as well as the procedures may take time and may raise unpredictable obstacles in the functioning of the European Merger Control System.

The Commission has strongly resisted adopting a judicial-based system, where it would act as a prosecuting agency that would have to take a case to court in order to have a merger transaction prohibited. Still, the Commission indicated willingness to work with the Community Courts in order to speed up the handling of cases. It suggested a restructuring of the Community Courts system entailing the creation of a specialized chamber for competition matters within the Community Courts, meant to deal with merger appeals in an accelerated manner, thus ensuring more efficient external checks and balances[42].

More specific solutions directed at resolving more punctual institutional issues were put forward. For example, expanding the Hearing Officer's responsibilities, providing him / her with rights and resources to independently investigate merger cases, would come close to a fully fledged merger control agency model as described above (Hofmann, 2003, p. 128). The Hearing Officer's role may also be developed into a position responsible for undertaking a complete review of procedural and substantive issues as emerged from the case handlers' preliminary findings. Such a model would ensure transparency of the procedure as well as an extra layer of functional internal control, meant to balance, to a certain extent, the mixture of investigative and adjudicative powers entrusted with the Commission.

Having regard to the solutions to improve the functioning of the merger control system, presented so far, one may conclude that enhancing the objectivity and fairness in the functioning of the European Merger Control System pertains both to massive institutional rearrangements, and to improving the procedural safeguards and the checks and balances system.

3.3. The Commission's Response

Despite the proposals presented above, the Commission chose a different path in handling the institutional challenge. The changes were progressive and culminated with the adoption of the 2004 merger review package.

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[41] *The Review of the EC Merger Regulation, 32nd report of the House of Lords Select Committee on the European Union*, cited above, par. 239 and Hofmann, 2003, p. 130.

[42] See Monti, Mario, *Commission Adopts Comprehensive Reform of EU Merger Control*, 2002.

First, the role of the Hearing Officer has been reformed in 2001. However, the changes brought about are mainly cosmetic in nature and the Hearing Officer's reformulated tasks do not serve as the most effective type of checks and balances. Currently, the Hearing Officer's role with regard to merger control is to supervise and safeguard the procedural rights of the parties to a due process. The Hearing Officer's role is still confined to dealing with procedural matters and not substantive issues or legal arguments, situation which does little in order to get over the criticism on the tripartite role of the Commission[43].

After the outcomes of the *Airtours, Schneider* and *Tetra Laval* cases, the Commission acknowledged the fact that its enquiries with regard to concentration transactions should be more extensive and detailed (Monti, *EU Competition Policy*, 2002). Therefore, in order to increase the Commission's capacity and resources devoted to dealing with merger investigations and remedies enforcement and, in particular, its economic capabilities[44], the Commission aimed at boosting its economic expertise. To this end the proposition to create the position of Chief Economist and the setting up of an Enforcement Unit were launched.

Shortly afterwards, the Commission commenced the search for an eminent economist, in touch with the latest thinking in the field of industrial economics (Monti, *Europe's Merger Monitor*, 2002). This economic function was carefully defined. From the very beginning it has to be stated that the mandate of the Chief Economist entails acting as a focus for economic debate within DG IV, in liaison with other Commission services and in association with the academic world[45]. The Chief Economist is meant to give guidance on analytical methodology, giving upstream advice on the direction of investigations and to give direct assistance in the most complex cases. In practice, the Chief Economist should provide the Competition Commissioner with an independent opinion on the economic aspects of a case (checks and balances function), before a proposition for a final decision is issued to the Commission. Furthermore, the Chief Economist and his team are part of the Commission's DG Competition, providing not only guidance to individual competition cases, but also contributing to the development of general competition policy instruments. The inclusion of economic expertise (either through the setting up of the position of Chief Economist, either through the possibility of creating comitology committees[46]), albeit important, is only a welcomed improvement of merger control procedural and structural rules.

Also in 2001, the Commission created an Enforcement Unit in DG Competition

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[43] See also Levy, 2004.

[44] Lowe, Philip, *Future Directions for EU Competition Policy*, International Bar Association, Fiesole, Italy, the 20th of September, 2002, cited in Levy, 2003, p. 215.

[45] The Chief Economist also coordinates the activities of the Economic Advisory Group on Competition Policy. The Economic Advisory Group on Competition Policy is a group of approximately 20 leading academics working in the area of industrial organisation with a keen interest on Competition policy. Its mandate is to provide input from leading academics into important policy issues facing EU competition policy.

[46] For details on the possibility of inclusion of economic expertise in merger control through setting up comitology committees, see Hofmann, 2003, p. 125.

responsible for advising on the acceptability and implementation in merger cases. In its regular meetings the Unit discusses and compares experiences and developments in remedies cases to ensure consistency and best practice. The enforcement team was created from members of the Merger Task Force and it may request involvement in the assessment of a concentration transaction, even at an early procedural stage, when remedies enforcement may not even be put forward (Holmes, Turnbull, 2002, p. 503). Given the increasing complexity of remedies employed in merger cases, the influence of the team became increasingly important, as the parties to a merger transaction which poses clear competition problems are encouraged to give thought, at a very early stage in the merger process, to possible remedies that may be employed. The Enforcement Unit developed best practice guidelines on remedies and model texts for commitments and trustees' mandates, also taking into account the experience achieved by competition authorities in Member States, as well as in the US. This approach added a great deal to increasing the European Merger Control System's transparency.

The reforms of 2004 reorganised the Competition Directorate General. But the new organisation of DG Competition does not entail the major institutional reform proposed by the alternatives presented above. Instead, it is based on integration of both merger control and antitrust enforcement in directorates responsible for the various sectors of the economy. This change took place progressively, the Merger Task Force staff being re-deployed to four merger units within the sector antitrust directorates. The re-organisation aimed at enhancing sector specific knowledge. Also the re-organization established a new different basis for the co-operation with national competition authorities in view of the critical importance of dialogue with them on important sector developments.

The above shows that the European Union has moved to a rather peculiar institutional arrangement with regard to merger control in the sense that the competition agency is an integral part of the European Commission. The Commission claims that the current shape of the EU antitrust institutional system does not limit the independence of the competition decisions. Quite on the contrary, the Commission argued in its *Competition Policy Reviews*, it has the advantage that the Competition Commissioner finds himself among twenty Commissioners of the European Union and that the Directorate-General for Competition participates in all inter-service consultations. The reason for enforcing such a system relates to the Commission being eager to exercise not only preventive persuasion but actually preventive participation in the decision-making concerning the directives and regulations in other areas decided by the European Commission which may have unintended anti-competitive side effects.

The 2004 reforms also touched upon the role of the Advisory Committee on Concentrations[47]. Having mainly consultative prerogatives, the Committee is composed by up to two representatives of each Member State, at least one of which being required to be competent in competition matters. Although some of the reforms may be procedural in nature, they affected the functioning and the setup of the Advisory Committee.

The opinions delivered by the Committee are usually short although there are situations

[47] Recital 46 and Articles 18-20 and 23 of Regulation 139/2004.

when more substantial information is provided. Although the Commission is urged to take account of the opinions delivered by the Committee, the Advisory Committee's opinion is not binding for the Commission. However, the opinions of the Advisory Committee may be to a certain extent influential in shaping the Commission's views as, according to Article 19, par. 6 of the Merger Control Regulation, the Commission must take the utmost account of the Committee's opinion. Therefore, the Commission may see itself accountable, to a certain extent, to a peer group of competition experts, fact which may put a certain amount of pressure on the Commission, although the Committee does not avail itself of any formal powers to force the Commission follow its opinion. Still, the role of the Advisory Committee may be further reconsidered and improved, so as to increase its involvement in the assessment of a concentration transaction, fact which can bring about a great deal of benefits to the merging parties, increasing the functionality of the checks and balances system.

From a transparency point of view, the 2004 reform was consistent. At the start of the reform discussion leading to the adoption of the 2004 merger review package the Commission believed that the increase in transparency should be a central benefit of the new merger era.

The *Best Practice Guidelines on Merger Control Proceedings* provide for earlier and better disclosure of Commission concerns. They unmask third party complainants by requiring three-way meetings among the Commission, the merging parties and interested third parties. Merging parties may also request state-of-play meetings with the directorate general of competition to better understand the basis for any competitive concerns. These changes significantly improve transparency. This greater flexibility should prove valuable to merging parties, by enabling them to better co-ordinate their actions. Furthermore, the possibility to extend deadlines in Phase II cases provides parties with additional time to negotiate remedies where necessary. It also enables parties involved in global mergers to co-ordinate the offering of commitments in the EU with those offered in a different jurisdiction. However, the conversion of deadlines into working days is a disguised extension of the Phase I deadline for initial merger decisions by two to three days. Companies that frequently engage in non-controversial transactions may find their transaction further delayed.

3.4. Has the Institutional Challenge Been Solved?

The 2004 reforms were meant to contribute to a better decision making process and guarantee that the relevant elements and points of view are properly taken into account in the final decision on individual case. Transparency (both procedural and regarding the relationship within the Commission's internal mechanisms) has been increased in many respects. The new Competition Directorate General organization, entailing the Merger Task Force staff being re-deployed to four merger units within the sector antitrust directorates, is supposed to allow pooling the market knowledge that flows from both types of enforcement - antitrust and merger - in one and the same structure where cross-fertilization is much simpler. It should also facilitate the spread of the best practices developed in the Merger Task Force over the years to the whole Directorate General and

is also designed to ensure effective use of the Competition DG's scarce staff resources and increase flexibility in their allocation between merger and antitrust work. However the 2004 reforms did not manage to solve the institutional challenge in its entirety.

Let us elaborate. The systematic appointment for second phase cases of internal peer review panels composed of experienced officials that scrutinize the case team's conclusions, may have reinforced the Commission's objectivity as a regulator by strengthening the internal checks on the soundness of the investigators' preliminary conclusions; however, the new institutional structure is still working under one and the same body, namely the Commission.

The role of the Advisory Committee and of the Hearing Officer is still rather soft and it should be further improved; to exemplify this assertion we may observe that although the Commission is urged to take account of the opinions delivered by the Advisory Committee, its opinion is not binding for the Commission. Further on, the Hearing Officer practically reviews only procedural aspects, as far as they are provided and there remains very little independent substantial review of the basis on which decision-making takes place (Hofmann, 2003, p. 122).

Creating new levels of scrutiny is laudable, but the value of the checks and balances thus provided may still be questioned since they stem from within the Commission and not from an external independent body. In any case, a 'fresh pair of eyes' may positively influence the likelihood of committing decision-making errors; but the models described in the lines above may leave room for hard core critics to suggest that the workability of these checks and balances would provide more legal and economic solidity of the final decision if they would have been set independently from the Commission's tutelage.

Pursuing the 2004 institutional reforms, the European Union implicitly acknowledged the need for a change in its antitrust enforcement system. However, at the same time, it proved that, probably due to its legal culture heritage and the legal hurdles that need to be overcome for a radical institutional change to take place, is not ready yet to adopt a model where the investigation, prosecution and decision-making steps are separated and entrusted with different independent bodies / institutions. The Commission is still reluctant to hand over to the EU Court System, at least a part of its authority when dealing with antitrust cases. Whether an approach as briefly portrayed above would one day become reality, the European Merger Control System may gain a great deal of credibility, from an institutional and transparency-related point of view to say the least.

4. Could More Transparency Be Afforded in the EU - US Merger-Related Relationship?

Speaking of transparency with regard to the EU – US merger related activity, one has to acknowledge that complete transparency and predictability is extremely difficult to achieve, given the differences between the two systems. Companies who intend to cross-border merge, or companies which are aware that a double clearance would be required for their concentration transaction often find it confusing and difficult to juggle with two

different merger control systems. At least from their point of view, a higher degree of transparency in the EU – US merger control relationship may be of great help.

Several models and proposals have been put forward in order to increase trans-Atlantic transparency in merger control[48]; some of them relate to increasing communication and exchange of information between the reviewing agencies. Others are more radical going as far as achieving total convergence between the concentration control systems in EU and US. After all, the EU and the US appear to use methodologies that are similar in many ways, but come to a discordance of conclusions due to different fundamental economic models, assumptions and values. The 2004 reforms of the EU Merger Control System managed to bring the two systems closer, at least from a transparency and methodology point of view. However, till reaching total convergence there is a long way to go. On the other hand, one may notice a peculiar issue: the European Commission planned the 2004 reforms before both US political and international media pressure for change began, thus proving that the European Merger Control System is evolving individually rather than being pressured to adapt to different other systems. Furthermore, the fact that these changes attempt to remedy the differences between the EU and US systems proves the EU's willingness to achieve a great degree of transparency and objectivity in the EU – US merger control relationship.

In the following lines we will sketch a few models which may help increasing trans-Atlantic merger control transparency, outlining the benefits and the drawbacks which characterize each of them.

The first step towards substantive harmonization between the EU and US merger control systems has been taken. The transition from the dominance test to the 'significantly impeding of effective competition' test attempted, among other things, to clear the muddy waters in which a transaction requiring double clearance was swimming. The SIEC test cannot be considered a perfect match to the SLC test. Therefore substantive convergence has to be supported by the jurisprudential activity of the Community Court system. An approach as such may further improve transparency in trans-Atlantic merger control.

Second, doubling the above substantive efforts with considerable cooperation and convergence of the EU and US merger control procedures, also supported through a thorough practical application of the already existing cooperation agreements[49], may add

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[48] See also Akbar, Suder, 2006, p.679.

[49] The European Commission cooperates with the US competition authorities primarily on the basis of the 1991 Cooperation Agreement and the 1998 "Positive Comity Agreement". The main elements are mutual information about enforcement activities, coordination of enforcement activities and exchange of non-confidential information. The European Commission adopted a text setting forth administrative arrangements between the competition authorities of the EU and of the United States concerning reciprocal attendance at certain stages of the procedures in individual cases involving the application of their respective competition rules. However, The Administrative Arrangement on Attendance is not a new agreement but simply an understanding about administrative arrangements to apply the 1991 Agreement. Finally, the Best practices on EU/US cooperation in merger cases put in place a more structured basis for co-operation in reviews of individual merger cases. For further details, see http://europa.eu.int/comm/competition/index_en.html, as displayed on the 16th of March, 2006.

to the current level of transparency. Given that serious substantive amendments to both the EU and US systems are unlikely to happen in the near future, the likelihood of the two merger control systems converging procedurally should be rather high. In such a perspective, the need for double notification would still exist, but both companies involved and the reviewing agencies would face greater certainty, transparency and procedural familiarity, while the bureaucratic difficulties would be considerably limited.

Third, the most appropriate solution for the purpose of increasing transparency in the EU – US merger control relationship would be the timely, but completely harmonize the two systems, through the creation of an *International Merger Control Code*. The likelihood of an approach like this is extremely low, given the reluctance of both sides to compromise on a common body of law regulating concentration control. After all, the political implications of handing in part of both sides' sovereignty are greater that they appear at first sight. However unlikely it seems for a situation like this to take place, one cannot overlook the advantages that it may bring about; just to mention a few: such a system would bring about the level of transparency required by an objective and efficient concentration control process; the companies involved in international concentration transactions would face a seriously reduced level of legal uncertainty and would have their procedural tasks significantly limited; time and important resources would be saved and the low level of legal uncertainty provided by such a system would stimulate the cross-border concentration activity; the need for multiple notification and double clearance would be eliminated; the reviewing agencies in the US and in Europe would apply the same principles and work with the same procedures. Such a model would not necessarily require a hierarchically superior institution for reviewing the eligible concentration transactions. Not only that reaching consensus and drafting the legal basis for such an institution would be extremely difficult, but a step in this direction would be unnecessary given that the existing reviewing agencies would use the same body of rules and concepts for transactions that would be notified to them.

Opposing the assertion made above, there were proposals directed to creating such a supranational antitrust agency under the aegis of the World Trade Organization[50]. However, the likelihood of any consensus on this matter is extremely remote, given the significant incompatibilities and differences between the concepts and methodologies used by the two merger control systems on one hand and the methodologies and procedures employed by the WTO on the other hand. An approach like this does not seem appropriate both because institutional WTO reasons, such as the WTO lacking both the particular institutional expertise and the resources to staff merger control operations, and as provided above, because of pragmatic reasons relating to sovereignty and national competition regimes. Nevertheless, there do seem to be a number of more modest functions that the WTO could usefully perform in order to increase transparency in international merger activity, such as the implementation of an internationally enforceable requirement of transparency in merger review, streamlining transaction costs and diluting the potential for conflict between and among merger review jurisdictions.

[50] For details concerning this approach, see Fisher, 2005.

5. Final Remarks

The analysis at hand is meant to illustrate some of the surface challenges that the European Merger Control System has faced since its enactment and the manner in which they were dealt with.

The substantive features of merger control have been assertively strengthened. The switch from the dominance test to the SIEC test suggests that the substantive challenge has been solved.

Still, more is still left to be done with respect to the institutional and transparency challenges. Steps towards increasing transparency have been taken. However, as we have seen, there are still critics who argue that the transparency level in EU merger control is below the desired one. Institutionally speaking though, the European Merger Control System suffers from the same disease since day one. No clear separation of the different stages of merger assessment would continue to impinge on the objectivity of the process, despite the procedural, cosmetic or internal structural reforms undertaken. The importance of these reforms cannot be undermined. After all, both the substantive and the institutional reform processes have been acknowledged to be gradual. It is in this respect expected that the European Merger Control System will further pursue these institutional concerns, in an endeavour to render more transparency and legal certainty for the benefit of all the legal subjects benefiting from it.

Chapter 3

Why and How Was the European Merger Control Policy Enacted?

Merger control is about consumer welfare just as much as it is about the welfare of the society as a whole.

1. Introduction

A natural inquiry when dealing with the rationale behind merger control is why the concentration control system was enacted in Europe. The straightforward answer that follows is that behind an action as such stemming from the European decision makers lie goals and objectives that needed to be fulfilled. In other words, as we will detail below, it may be noticed that policy makers from every allegiance have turned to competition in order to achieve goals as diverse as economic growth, political stability and integration, thereby propelling it into functioning as a primary public tool for structuring political and economic activity, and becoming a major influence on many types of private decision making (Camesasca, 2000, p. 188). Determining the causes of the European Merger Control System's emergence entails a detailed multi-fold analysis and ultimately requires a return to the overall picture of competition policy and its place and role appointed by the European Treaties in the context of the Community goals set to be achieved.

The chapter at hand is meant to investigate the drivers behind the creation of the European merger control policy, especially given the fact that the last decade of the twentieth century brought about a proliferation of systems of competition law around the world, whereas more than 80 countries in the world have enacted competition laws and at least 50 of these systems include merger control provisions[51]. In the following paragraphs we will try to pinpoint the arguments which guided, as well as the critique levelled at the approach adopted by the European regulators with regard to the emergence of the merger control policy. To this end, we will attempt a chronological approach of the main events that shaped the European concentration control mechanism to what it is today, the focus being mainly directed to the progress of the events which lead to the enactment of the Merger Control Regulation and their significance from different perspectives: the long term / short term goals aimed for and the development of the interests involved. However, where the assessment will call for a more analytical approach, slight departures from the chronological pattern will be adopted.

2. Where Did It All Start?

In Europe, the intellectual foundation for protecting competition took shape in the cradle of demising Habsburg Vienna around the turn of the 20th century, assembled around a bureaucratic public interest standard (Camesasca, 2000, p. 188-189) and embodied in administrative procedures. The first competition oriented regulation was enacted in Germany, after World War I, as a reaction to the increasing inflation crisis. This regulation was not to last long, as during the Nazi period it was eliminated; it has however re-emerged after World War II in the shape of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) which reflected the ordo-liberal vision of society[52] with economic freedom and competition sources not only

[51] For detailed information check http://www.internationalcompetitionnetwork.org/media/archive0611/mergercontrollaws.html, as displayed on the 6th of March, 2008.

[52] The concept of ordoliberalism pertains to an entire political and economic philosophy. It became a key element of post-war thinking in Germany, envisaging a new relationship between law and the economic

of prosperity but also of political freedom. Both these principles represented the 'economic constitution of society', to be implemented and protected as such by law (Peacock, Willgerodt, 1989). Consequently, a timely shift within the functionality methods took place with regard to approaching competition problems, from an administrative discretion approach to competition procedures, to mainly legalistic principles.

The introduction of merger control in the German legislation may be explained through different reasonings: on one hand, support for merger control came from the ordoliberal school, on the ground that mergers, just as cartels, might give rise to monopolistic market power and should therefore be inhibited. On the other hand, from a more interventionistic perspective, the introduction of merger control could have provided for an active structuring and restructuring of the economy. A dual approach to competition policy and merger control may be spotted here: tool for controlling economic concentration and incentive to merge and enhance productivity both on a qualitative and quantitative scale.

Why is this important in the context of our research? While most of the domestic competition provisions and concepts from the Member States remained for a fair period of time rather marginal components of the general economic policies, the German model has developed a clear focus in its regulation and has supported this focus with solid legal principles. Thus, the German model came to provide the main source of economic inspiration for competition policy embraced during the creation of the European Economic Community in the late 1950's. This assertion may be drawn from observing one of the main tasks / focus that the Community's competition policy was charged from the very beginning with, namely to create the conditions for an effective European market, through the elimination of the obstacles to trade. In other words, as we will detail below, the process of European integration starting with the creation of the European Communities has infused competition policy with roles which extended beyond economic decision making, similarly to the German model. Competition policy at European level is aimed at protection not only against restraints of competition. Unlike most domestic competition concepts, its aim went beyond obtaining the standard benefits associated with competition, such as lower prices and technological progress. Instead, European competition policy and consequently later on, merger control, as we will further detail, have to be understood as fundamental elements of a wider programme with varied extensive goals and objectives pertaining to the general functioning of the society.

All in all, it may be reasonably argued that the European Competition Law in general and consequently the European Merger Control System grew mostly out of the liberal thinking as conceived in the German tradition of law and economic freedom, reflecting at

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system and holding that competition is necessary for economic well-being and that economic freedom is necessary for political freedom. It advocated for competition and economic freedom to be embedded in the law so that there is neither unconstrained private power, nor discretionary governmental intervention in the economy. Ordoliberalism held that competition is a value in itself and not just a means by which purely economic objectives are to be achieved. An ordoliberal approach to competition policy leads to the protection of competitors and small and medium sized enterprises, rather than the protection of competition, as it prizes the freedom of all citizens to be able to enter and compete on markets. For further details, see Jones, Sufrin, 2008, p. 35.

the same time the concerns of European societies in the twentieth century for social equity, freedom from exploitation and consumer welfare.

3. Placing Competition Policy / Merger Control Policy in the European Context. Competition Policy and the 1992 Single Market Programme

The starting point when assessing the emergence of competition policy at European level should be a brief analysis of the relevant legal provisions assigning the functionality tasks of competition. To this end one has to investigate the meaning of and the reasoning behind the elements enclosed in the founding Treaties and in the relevant expanding legislative acts. Assessing the emergence of the European Merger Control Policy pertains a return to the overall picture of competition policy, its relationship with other Community policies and its place and role appointed by the Treaties. In this context, the following lines will depart temporarily from the chronological approach we adopted, in order to explain in a clearer manner the concepts that will be dealt with from here onwards. We will return to the chronological pattern in paragraph 4 of this chapter.

Generally speaking, there are different categories of goals that certain types of policies may aim for. These goals may be translated into different types of welfare standards, depending on the weights given to the interests of different market parties such as consumers, producers, etc. The existing extensive literature distinguishes between these different merger control welfare standards. According to Renckens' (2007) categorization, the following merger control standards are the most commonly used throughout the world, of course, applied differently from jurisdiction to jurisdiction[53]:

- The price standard entails that a merger can never be approved if it results in post-merger price increases.
- Consumer surplus standard: although most authors[54] do not make a difference between the price standard and the consumer surplus welfare standard, some opinions[55] argue that the latter takes into account considerations which go beyond the mere price variable, considerations which pertain to product quality, service, and innovation. Therefore a merger raising prices might still be cleared if the overall advantages to the consumers, in terms of quality and service, outweigh the price effect. Given the strong inclination of both the old and the new European Merger Control Regulation as well as of the Horizontal Merger Guidelines towards the attainment of consumers' interests, it may be suggested that the

[53] Besides the enumeration above, many other types of standards may be identified in the doctrine: to give just a few examples, the doctrine identifies the whole citizen standard, the national welfare standard, the productivity growth standard, etc. For further details see Renckens, 2007, p. 155-160.

[54] Roller Lars-Hendrik Roller, Johan Stennek and Frank Verboven, *Efficiency gains from mergers*, 5 European Economy 31, 2001, Miguel De la Mano, *For the customer's sake: the competitive effects of efficiencies in European merger control*, EC Enterprise Papers No. 11, 2002 and Lin Bian and Donald G. McFetridge, *The efficiencies defence in merger cases: implications of alternative standards*, 33(2) CAN. J. ECON. 297, 2000, all cited in Renckens', 2007.

[55] Ann-Britt Everett and Thomas W. Ross, *The treatment of efficiencies in merger review: an international comparison*, Delta Economics Group Inc. (2002), available at http://strategis.?ic.gc.ca/pics/ct/ct02516e.pdf (as displayed in October 2006) and James S. Venit, *The role of efficiencies in merger control*, in Gotz Drauz &Michael Reynolds (eds), *EC Merger Control: A Major Reform in Progress*, Richmond: Richmond Law & Tax 2003, all cited in Renckens', 2007.

European Commission tends to apply a consumer surplus standard. However, the case law examples of *Aerospatiale-Alenia / de Havilland* and *GE / Honeywell*[56] let us to believe that the Commission's focus may not necessarily be directed at all times solely at consumer welfare *per se,* but also at promoting rivalry in a given industry. Hence, as we will detail below, other welfare standards do indeed fit in the picture.

- Under the *Hillsdown* standard transfers from consumers to producers are seen as a cost of the merger and may not be treated as neutral. The interests of producers are recognized under this standard (as opposed to the previous standards), but not entirely. One could say that less weight is given to producer surplus compared with consumer surplus.
- The weighted surplus standard gives antitrust authorities discretion to define their own weights to consumer and producer surplus according to the value they assign to the interests of either consumers or producers. Therefore wealth transfers are initially neutral but can be reweighed on a case-by-case basis to reflect social values. Gains to producers would typically be given less weight than gains to consumers.
- Under the total surplus standard a merger resulting in higher prices to consumers can still be approved if it generates efficiency gains. The merger is cleared if the unweighted sum of consumer and producer surplus is positive, or put otherwise, if the amount of cost savings is greater than the deadweight loss. This welfare standard is often referred to as Williamson's standard. Out of the standards enumerated here, this is the only standard where the effect on producers is fully taken into account. Canada is one example of jurisdictions which enforce the total welfare standard. A mixture of the total surplus and consumer surplus standards is applied in the US, because on one hand, consumer welfare is still at the heart of merger policy, but on the other hand efficiencies are recognized as an important factor to mitigate the anticompetitive effects of a merger.

It is self-evident that the outcome of the decision-making process of the competition authority may differ, depending on the type of welfare standard applied in the merger assessment. It is at this point where we have to stress that different nuances of welfare standard application may be found even within one and the same jurisdiction. To this end, it may be argued that it is not always clear which exact standard is used, because the welfare standard defined by legislation might differ from the standard used in case law. Differences between case law and competition policy legislation might result from discretion of antitrust enforcers, but it might also be the case that specific circumstances make a modified application of the standard, or better yet a different standard, appropriate. What has just been said above may very well be the case of the European Competition and Merger Control policies. As we will detail below, the European Merger Control Policy has been invested with a dual role which serves on two separate channels different welfare standards.

[56] Case COMP/M.2220.

Indeed, competition policy, traditionally focused on attaining consumer welfare[57], was invested with roles which extended far beyond economic decision making, in the context of a wider European programme with varied extensive goals and objectives. The process of achieving these goals and objectives resembles the shape of a pyramid. Observing the pyramid from its top, a chain of downward events / elements is revealed. These so-called events, amongst which, the enactment of the merger control policy has its own place, are actually the means to achieve the goals set at the top of the scale. The solving of the whole puzzle starts with the objectives set by the EEC Treaty[58] back in the 1950's which were afterwards expanded in the EC Treaty. Article 2 of the EC Treaty spells out these goals and objectives as being to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. We consider it is appropriate to incorporate these high goals in a broad, *sui generis* term such as societal / social welfare, which we believe appropriately embodies the thrust of the totality of the Community's objectives.

These goals are situated at the top of the pyramid. The means to achieve these aims are listed in Articles 2, 3 and 4[59] of the EC Treaty and, in our model, are located towards the bottom of the pyramid. What interests us in the context of analyzing the emergence of the merger control system is the establishment of a Common Market and an Economic and Monetary Union and the implementation of (common) policies or activities, such as a system ensuring that competition in the internal market is not distorted. Turning back to the pyramid model, different other events occur at different heights / levels of the scale, in order to fulfil the same goals, but approaching the issue from different perspectives and focusing on different specific fields. Reference in this context has to be made to matters relating to industrial policies, commercial policies, agricultural policies and so forth.

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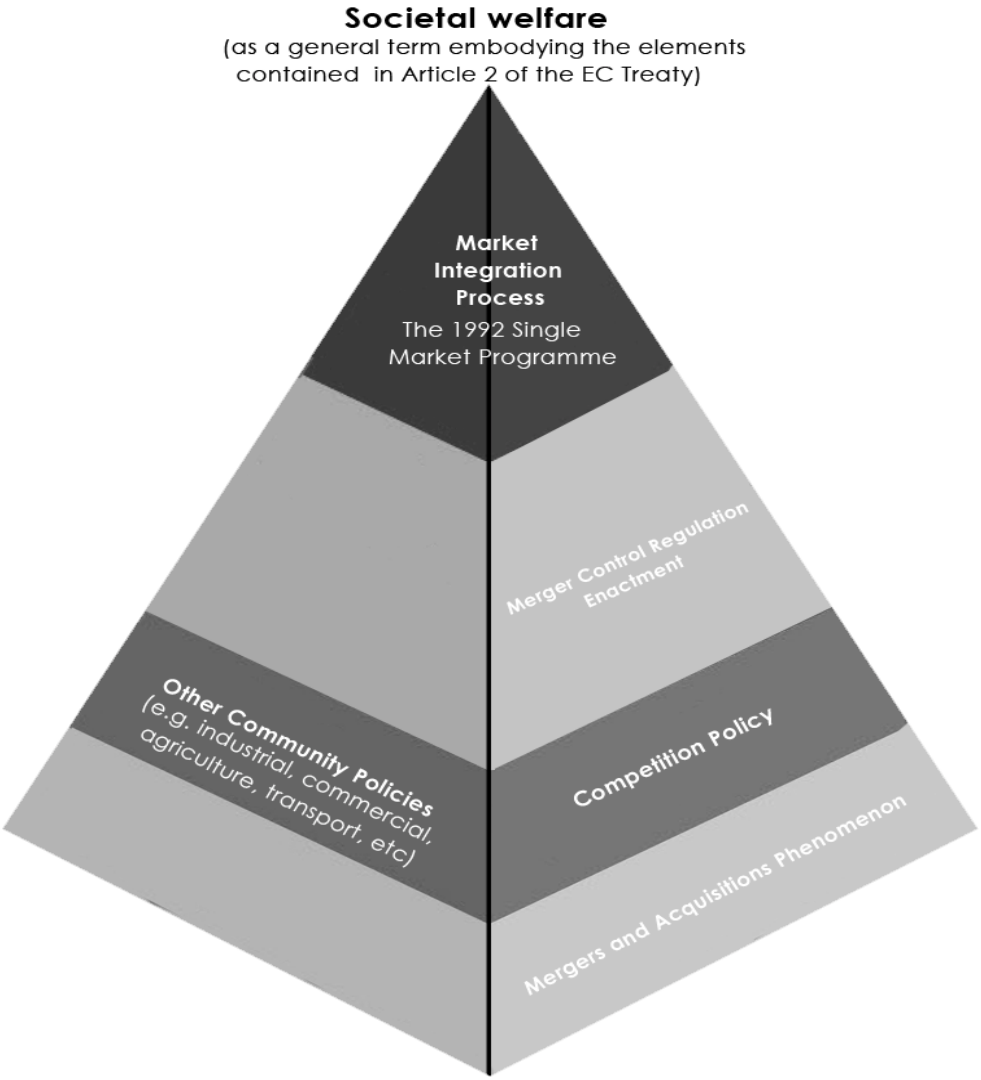
[57] We will detail the traditional consumer-oriented approach of competition policy in paragraph 5 of this chapter.

[58] Article 2 of the EEC Treaty sates the following tasks to be completed by the Community: by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

[59] The relevant provisions of these articles are as follows: Article 2 of the EC Treaty states the following: The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. Article 3, par. 1, (g) of the EC Treaty states the following: For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: … (g) A system ensuring that competition in the internal market is not distorted.

After all, the Maastricht Treaty institutionalized new goals and values sometimes vying with those of competition law. Also, the Community institutions then being authorized to initiate policies aimed at improving the competitiveness of the Community's industry (Article 157 of the EC Treaty), a clearer preoccupation towards increased support for industrial and other policy measures may be observed. The relevance of the above assertions in the context of concentration control is the way these events intertwine. When speaking of merger control it is interesting to note the influence and repercussions that these policies and actions have on each other, the interests involved in thoroughly pursuing each and every one of these activities and the effects that they produce with respect to achieving the higher goals mentioned above. We will try to observe these aspects through the lens of the importance that enacting a European-size merger control policy had for the achievement of the goals as set by the EEC Treaty.

To visually portray the above, the following scheme may be a useful tool to portray the role merger control serves in the context of achieving the goals set through the creation of the European construction:



The scheme above reveals a structure of several layers where merger control may be viewed as serving for the achievement of rather more remote goals (market integration[60] and through that the realization of the Community objectives referring to welfare enhancement) or more immediate goals previously familiar to domestic competition policy concepts, such as counteracting market failures stemming from market power abuse. Of course, as provided above, conflicts between the two approaches have occurred, but at the same time it may be noticed that a complete detachment of one set of goals from the other is rather impossible. After all, preserving competition coupled with the assurance of the freedom of movement of goods, services, capital, etc allows for smoother market unification which furthermore leads to the realization of the objectives set in Article 2 of the EC Treaty[61]. Viewed as such, merger control at a European scale seems unavoidably linked to the Community's wider aims and settings (Camesasca, 2000, p. 219).

In this context, the merger control policy along with the European competition policy are not to be regarded only as ends in themselves, as in tools to combat abusive behaviour or to obtain the standard benefits associated with competition, but also as means of achieving higher goals which in the end reflect the concerns of European societies for social equity. Thus, viewed from a different angle, policy makers have apparently turned to competition in order to achieve other goals, thus overriding the guiding principles of ordoliberalism which are claimed to form, at least partly, the basis of what competition policy at European level is today. As we will detail below, the Community opted for a trade-off in this respect, preferring to aim for higher goals while relegating competition policy as a double purpose tool: consumer welfare watchdog and means to achieve the above mentioned higher goals. Whichever these goals may be: economic growth, public welfare, political stability and integration, etc the European policy makers must have always had in the back of their minds the objectives as set in the EEC Treaty and later on developed or put in practice through different further programmes embodied either in new treaties (see for example the Single European Act), action plans or the 1992 Single Market idea.

After all, ever since the ECJ's *Consten and Grundig* ruling, the coherence between the ultimate Community task of furthering economic efficiency (Article 2 of the EC Treaty) in the Internal Market and the policy means thereto of market integration (Article 3.1.c of the EC Treaty) has been clearly established. The ECJ further spelled out the interpretation of the Treaty's competition stipulations in the *Italy v. Commission* case[62]*:* Article 85 as a whole should be read in the context of the provisions of the preamble to the Treaty which clarify it and reference should particularly be made to those relating to 'the elimination of barriers' and to 'fair competition' both of which are necessary for bringing about a Single Market. Further on, competition law must be understood in the context of the need to

[60] Market integration may be defined as the elimination of economic frontiers between two or more economies. In other words, the outcomes of economic decisions become less dependant on the existence of borders. For further details, see Camesasca, 2000, p. 238.

[61] See the ECJ ruling in the *Consten – Grunding*, Joined cases 56 and 58/64, ECR 1966, and the contents of the 1992 Competition Policy Report which clarifiy the relationship between competition policy and the 1992 Programme.

[62] Case 32/65, ECR 1966, CMLR 1969, p. 39.

break down national boundaries between Member States, and to complete the unification of the Internal Market, under the Single Market project[63]. But one should bear in mind that the market integration is never a goal in itself but a policy means to achieve the Community's goal of welfare enhancement.

As to the issue of mergers and acquisitions phenomenon, concentration transactions have the ability both to promote and to hinder integration. The European Commission has recognized this as a guiding principle of the Merger Control Regulation: therefore, concentrations which bring about necessary corporate reorganisation in the Community will be allowed and encouraged, while concentrations which are likely to result in lasting damage to effective competition in the Common Market or a substantial part of it will be prohibited or modified[64]. Therefore, it may be argued that the European Merger Control Policy's dual role entails two antagonistic characteristics, at least viewed from the perspective of the companies involved in a concentration transaction.

- First, should the Merger Control Policy be viewed as a part of the European Competition Policy, focused on attaining consumer welfare, a negative connotation may be attached to merger control. We are referring to the situations where anti-competitive mergers, leading to negative repercussions on consumer welfare, will not be allowed.
- Second, should the Merger Control Policy be viewed as a part of the European integration platform, focused on attaining societal welfare, a positive connotation is attached to merger control, in the sense that companies are encouraged to (cross-border) merge, innovation and technological progress are stimulated, etc. Of course, it may further be contended that part of the benefits resulting from attainment of social welfare will refer to enhancement of consumer welfare as well.

Helpfully, for the purpose of merger control, the relation between competition policy and the Single Market Programme has been made explicit by the Commission: merger control occupies a central place in Community Competition policy; it aims to reconcile two imperatives: it facilitates the adaptation of industrial structures to the Single Market and it prevents transactions likely to compartmentalize the Common Market[65].

However, as we will detail below, the matter is not as straightforward as it may seem, as other crucial circumstances had to be taken into account. For now, a reference in this context to concepts and currents such as globalization, international competitiveness of industries, etc, which moulded the shape of the European policy-makers' actions, will suffice.

3.1. Was the *Laissez-Faire* Approach to European Concentration Control Inadequate?

One may observe that by enacting a Community-wide merger control policy, the

[63] See Competition Policy Report XXVIII, 1998.
[64] Commission of the European Communities, *Community Merger Control,* COM (93) 385.
[65] See the Twelfth and Twentieth Competition Policy Reports.

European regulators chose to rule out the *laissez-faire* approach to merger control, thus eliminating the possibility of completely allowing the private sector to employ its own so-called 'police force' (Neven, Nuttall, Seabright, 1993, p. 10). However, this is not to be interpreted in the sense that the criticism brought about by the *laissez-faire* approach supporters with regard to naive interventionism is not valid. The process of deciding the exact degree of interventionism entailed major and subtle value judgements in order to prevent possible policy failures. One question may be posed in this context: why did the European regulators choose to reject the *laissez-faire* approach? The answer that follows tends to be to a certain extent speculative since there is no specific *laissez-faire* statement stemming from the European decision makers on the issue of merger control. However, a closer look at the *laissez-faire* issue may be useful in the wider context of the emergence of the European Merger Control Policy, as it may indirectly emphasize in a clearer manner some of the motives behind the enactment of a specific merger control mechanism.

Despite its alleged importance, it may be noticed that merger control has been until quite recently absent from competition laws of most economies. One possible, however speculative, explanation of this fact would be the rejection of an absolute value of competition approach that prohibits the creation of market structures which tend to create anti-competitive results. Although such an attitude may create efficient results in some situations, especially where there existed a large number of firms which have already realized economies of scale and scope, it may have been believed that adopting an interventionist approach could have lead to policy errors. In this context, the *laissez-faire* tactics started from the assumption that leaving merger control to the market forces would create more efficient results than an absolute value of competition approach. Still, factors such as the lack of sufficient regulatory power or insufficient insights on the workings of the economy may also be relevant when talking about the emergence of the *laissez-faire* doctrine.

It's doubtful that the approach portrayed before could stand when talking about the European context. First, some argued that given the fast Europeanization of national markets the sole domestic control of industrial activity becomes clearly inadequate, as competition regimes operating within national frontiers alone would clearly allow anti-competitive behaviour to run riot where markets cut across the borders, thus undermining the establishment of the Common Market (McGowan, Cini, 1999, p. 176).

Second, as we have briefly mentioned above and we will further detail, competition is supposed to be also a tool shaped to achieve other ends valued in a more direct manner. It follows that developments which diminish competition (such as some concentration transactions) may nevertheless be desirable if they bring about other benefits. This does not however imply that competition policy or merger control policy is at odds with the goals of other policies, such as industrial policy. On the contrary, well-conceived industrial policy interventions are motivated by particular market failures, which may be addressed by a direct response. Adopting a lax approach towards competition and merger control policy is a risky path to follow and was characterized as follows: at best an indirect and at worst a counterproductive response to such problems, since there is

nothing to insure that the monopoly rents it confers on firms will indeed be invested in the desired activities rather than dissipated in other ways (Neven, Nuttall, Seabright, 1993, p. 13).

Third, the mere fact that, as already shown above, the European Community tried to employ the use of Articles 85 and 86 of the EC Treaty for the purpose of tackling anti-competitive concentration transactions emphasizes the Community's intent to intervene and attempt to ensure a competitive environment in the Common Market.

Thus, one thesis could be that the lack of certainty created by the absence of clear rules and of a timetable dealing specifically with merger control at the European level constitutes one of the drivers for the European Community to develop its merger control policy.

Comparing the interventionist approach to the *laissez-faire* solution may be to a certain extent unnatural because, as provided in the previous lines, no government / regulator in history has ever undertaken complete *laissez-faire*. To this end it may be argued that an absolute non-interventionist approach may have seemed rather unrealistic given the political, economic and social context at European level; and this is so because governments have always showed a tendency to intervene for varied purposes ranging from supporting a state-owned monopoly in a key sector to taxation purposes.

As already stated above, the process of deciding the exact degree of interventionism entails serious value judgements; on behalf of the regulators and enforcers this translates in an extremely difficult task of fine-tuning the intervention process. Therefore, the view that these authorities had upon the competition phenomenon in the entirety of the existing economic, social and political context, had to be a dynamic one. Regulators and enforcers of a competition policy needed to carefully balance many interests, either politically represented, or underrepresented. Furthermore, once a certain degree of intervention was settled, the enforcing authorities had to draft principles and employ procedures which will further on constitute the core of the system's functionality.

4. Competition and Merger Control Policy in the Context of the Start of the European Integration Construction

The European construction, exhibited first in the shape of the European Communities and then further on developed into the European Union, represents the environment in which competition and merger control policies have been drafted, developed and applied. Certain periods and events throughout the process of building the European Union to what it is today constitute real landmarks in the process of enacting a European-wide merger control policy. In the next paragraphs we will return to our chronological pattern of assessing these key moments / events in the following paragraphs, focusing on the goals and the features that characterize the policy-makers' actions, their relevance as to the European integration process and the interests involved in adopting certain policy approaches.

4.1. The Period Preceding the Adoption of the ECSC Treaty and the Early 1950's

The post World War II period was marked by important events which constitute to a large extent the basis of what Europe has become today. The 1951 European Coal and Steel Community Treaty signed in Paris aimed at securing the Franco-German reconciliation after World War II and ensuring a workable equilibrium in the coal and steel markets. In other words, establishing a European Coal and Steel Community was mainly aimed at preventing potential German revanchist actions. Given the fact that coal and steel were particularly symbolic as they were the resources necessary to wage war, placing the Franco-German production of coal and steel as a whole under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe may have seemed at the time to be the proper tool to serve the purpose of maintaining peace in Europe. Also, creating a common market for coal and steel between the signatory States may have been projected to result in a considerable boost of these industries' health.

Whether these were the surface reasons why the European Coal and Steel Community was created one may inquire why was a competition chapter containing merger control mechanisms enclosed in the ECSC Treaty and what were its goals[66]? Were there political reasons behind this decision? Of course, as just stated above, the coal and steel industries were regarded as sensitive fields, due to the potential accumulation of power that they may facilitate. However, the wider picture of the events going back even before the First World War reveals more complex circumstances which should be taken into account. One has to recall that the first five decades of the 20th century were characterized by fierce cartelization, detected especially in key industries like the ones mentioned above. The widespread network of trade organisations that had developed from the last decade of the nineteenth century onwards had laid the foundation for numerous agreements and lobbies between businessmen with similar interests. Though it is hard to prove a direct link, one can reasonably suppose that a number of these associations evolved into cartel-like agreements.

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[66] The essence of Article 66 of the ECSC Treaty is embedded in its first two paragraphs which state the following:
1. Any transaction shall require the prior authorisation of the High Authority, subject to the provisions of paragraph 3 of this Article, if it has in itself the direct or indirect effect of bringing about within the territories referred to in the first paragraph of Article 79, as a result of action by any person or undertaking or group of persons or undertakings, a concentration between undertakings at least one of which is covered by Article 80, whether the transaction concerns a single product or a number of different products, and whether it is effected by merger, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control. For the purpose of applying these provisions, the High Authority shall, by regulations made after consulting the Council, define what constitutes control of an undertaking.
2. The High Authority shall grant the authorisation referred to in the preceding paragraph if it finds that the proposed transaction will not give to the persons or undertakings concerned the power, in respect of the product or products within its jurisdiction:
- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or
- to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

With the outbreak of World War I, when the industrial system of the 19th century was destroyed and financial instability and uncommon and ambiguous diplomatic and economic relations characterized the world economy, the principle of *laissez-faire* or free trade made way for new ideological frameworks and guiding principles. Among the chief manifestations of this trend was the expansion of cartels.

In this very insecure and rapid changing world, businessmen tried to eliminate risks and chose cooperation above competition. Many governments approved and supported this change of concern and moreover showed increased interest towards the national economy, introducing new legislation and a wide array of trade distorting policies. In their view, cartels could be affirmative to the international competitiveness of domestic producers and furthermore they could have facilitated standardisation and rationalisation of products, which would have resulted in more efficient production and in the end lower prices. Furthermore, businessmen, financial institutions, courts and the public opinion shared the general attitude that unrestricted rivalry among firms could be detrimental for business and that cartels bore a responsibility for the well being of the overall economy. Opponents of the cartelization phenomenon however argued that cartels were set up by the producers to protect markets, consolidate prices and maximize margins to the consumers' detriment (Bouwens, Dankers, 2007, p. 9).

World War I not only stirred governmental interference with the economy, but also contributed to the collaboration between the government and the industry. As the administrative apparatus was still in its infancy, governments had to rely to a large extent on the support from companies to effectuate its policy. In fact the existing trade associations and other cooperative bodies in the industry served as an important platform for governmental action. At the same time the governmental policy compelled the industry to look for further cooperation and to constantly seek agreements. The companies were forced to meet and discuss the governmental measures, either to oppose or to execute them. In this way companies learned to know each other and discovered how they could work together more efficiently (Sluyterman, 2005, p. 75). This kind of consultation that was stimulated by the government in fact cleared the way for all sorts of cooperation and concentration actions, but also for other forms of collusion and new cartel agreements.

During the interwar years, cartels played an ever-growing role in domestic and international trade and by 1939 had become a major factor in the world economy. Cartels came to be perceived as a form of economic organization far superior to unrestricted competition. The policy of governments within different business systems started to converge with respect to collusion reaching a point where, in some states the acceptance of cartels was a real institutional revolution[67]. This was a long-winded process in which, as we have stated above, both businessmen and politicians played a role (Bouwens, Dankers, 2007). The scars World War I left increased the caution that governments were manifesting towards internationalization of their economies. In this context, many governments stressed the importance of manufacturing to national defence and last but

[67] See for example, the 1935 Business Agreement Act that was enacted in order to regulate cartelization in the Netherlands.

not least hoped that cartels would coordinate modernisation of industries. Cartelisation was used, on one hand, by businesses as an instrument to neutralise the effects of competition and, on the other hand, by governments as useful tools to obtain economic and political goals; given the institutional tolerance manifested towards the cartelization phenomenon, doubled by insufficient enforcement mechanisms, or lack of motivation to act against cartels, a significant process of concentration of power started to emerge.

However, we believe that after the Second World War, the idea that the protection of industries through cartelization could actually produce negative impacts on the international competitiveness of industries started to take shape. The relationship between businesses forming cartels started to slowly erode and governments sensed that cartelization could not offer anymore the same comfort in achieving their desired goals. What used to be a "one hand washes the other" state of affairs, slowly transformed in a situation which required regulatory action to prevent undue concentration of power.

In an economic context as briefly portrayed above, the ECSC Treaty was enacted. What is important to observe is that this treaty is a *traite-loi*, which specifies the regulatory content and does not specifically require further legislation necessary for the functioning of the principles enclosed in it. The reason for inserting the section / chapter on competition issues in the 1951 European Coal and Steel Community Treaty may be two-fold: it might have been linked to the need of spurring rivalry in the low-competitive, cartel-dominated coal and steel markets in order to boost these industries' health as previously mentioned; also, this action was meant to better control the concentration of power which was contouring due to the heavy cartelization process discussed above. Furthermore, if one attempts to compare Articles 65 and 66 of the ECSC Treaty and Articles 85 and 86 of the 1957 EEC Treaty from the perspective of the lack of merger control provisions in the latter articles, it should be kept in mind that the two treaties had considerably different goals. If the ECSC Treaty aimed at maintaining a peaceful balance within the representative economies in Europe, the EEC Treaty designed more complex goals going beyond the scope of and fields dealt with in the ECSC Treaty, goals that required further developing legislation to be enacted for the purpose of their achievement.

4.2. The Late 1950's

The late 1950's brought about new significant steps towards shaping the European construction. The EEC Treaty, later on metamorphosed into the EC Treaty laid down ambitious goals to be achieved through the development of the European Communities. Competition policy had and continues to have its specific place in the pyramidal construction previously described. The question that may be raised in this context is why was competition policy modelled in the shape embodied in the EC Treaty? Further on, why was a merger control mechanism not enclosed in the European Economic Community Treaty? Is it because the view upon concentrations / amalgamations was different on the eve of the EEC Treaty than it was before signing the ECSC Treaty? In this respect, could it be that mergers and acquisitions may have been viewed as useful means of assisting in European industry's effort to recover international competitiveness? Or was it just plain politics and negotiations?

A first glance over the ECSC and EC treaties' texts emphasizes that Articles 65 and 66 of the ECSC Treaty previewed to a certain extent the forthcoming Articles 85 and 86 (currently 81[68] and 82[69]) of the 1957 EC Treaty, which proved to be the twin pillars of the competition law of the European Community. One striking fact is that whilst Article 66 of the ECSC Treaty dealt explicitly with issues regarding concentrations of undertakings, Article 86 / 82 of the EC Treaty was silent on the question of mergers, thus leaving the impression that those responsible with the drafting of Articles 85 / 81 and 86 / 82 did not intend or had no means to assign the merger control within the application scope of the above mentioned articles. Another explanation would lie in the fact that the EC Treaty is a *traite-cadre,* that establishes a framework of action, but which compels further legislation to apply the principles. Given its extensive application to different sectors, the adoption of the EC Treaty as a general policy treaty would have been rather difficult, also given some Member States' sensitivity concerning different policy issues. It is in this context that the political argument may be brought up. Negotiations for the adoption of the EEC Treaty must have been considerably tougher than the ones leading to the adoption on the ECSC Treaty, one would expect. This assertion may very well be valid given the complexity of the EEC Treaty, the variety of areas dealt with, the extensive and, viewed through the lens of the 1950's economic thinking, somehow courageous objectives set.

To this end, the omission of merger control from the contents of the EEC Treaty should not be regarded as simply a result of some oversight. No EEC level merger control was

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[68] Article 81 of the EC Treaty states the following: 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[69] Article 82 of the EC Treaty states the following: Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

introduced, probably because at that time the Member States saw no need for it other than in the politically important steel and coal industries. If there was any predominant view on mergers, it was that these were a useful of assisting in European industry's effort to recover international competitiveness (Woolcock, 1989, p. 2). Furthermore, many European policymakers were opposed to economic decentralization due in part to its similarity to the measures imposed by US occupation forces after World War II. Hence, because the Allies had imposed measures to decentralize industries and break up industrial empires that had supported the Axis powers, policymakers of competition law were less concerned with the dangers of economic concentration of power than with the abuse of that power once concentration was achieved. Consequently, mergers have been viewed as legitimate tools to achieve economic efficiency through economies of scale rather than tools designed to intervene in order to preserve market structures (Hamner, 2002, p. 393).

The remains of the similar attitude concerning cartels, during the first five decades of the century, may easily be detected here. The focus was mainly directed towards actively promoting concentration in certain strategic industries with the belief that this would lead to the strengthening of domestic businesses which later on should be able to face international competition. This approach is understandable to a certain extent, given the fact that the European construction project has officially just commenced during the early 1950's. Mentalities were still shaped by the consequences of the two world wars and last but not least, in such a context thinking 'national' seemed safer and more realistic than thinking 'European'.

This last assertion is very much valid with regard to the Member States' business communities' view on the newly established regulatory environment, as companies still seemed very much preoccupied with becoming "bigger" at a national level. The new European framework was however starting to present them with new challenges, as once the European Communities were formed new business opportunities may arise at a European scale. Therefore, the future Europeanization of markets was perceived from the perspective of increasing businesses' size with the purpose of more accurately competing with other foreign businesses at an international level. Business communities were not necessarily opposing the newly emerged European regulatory environment, as in time it was meant to bring about clear purposes to European economies and certainty and clarity with regard to cross-border economic activities. However, tangible support was not shown either, as the main concerns were expressed with regard to the limitations that the European legislation will impose on the companies' behaviour in the market (Woolcock, 1989); but this was something to be expected given the rather stress-free regulatory settings they were accustomed to.

4.3. The 1960's, the 1966 Memorandum on Concentrations and Its Follow-Ups

Starting with the 1960's Member States started contemplating developing and some even enacted coherent concentration control mechanisms[70]. The reasoning behind this trend

[70] For example, the competition aspects of mergers have been regulated formally in the United Kingdom since 1965, when the Monopolies and Mergers Act extended the jurisdiction of what was then the

has, at least in some cases, probably much to do with the overall tendency to promote economic concentration in certain strategic fields with the belief that an approach as such encourages international competitiveness. After all, most of the Member States were placing a great deal of emphasis on their domestic industrial policies.

However, a solid incentive for governments to reflect upon domestic concentration control tools had to be the European challenge. The establishment of the three European Communities and the clear sets of objectives set by the founding Treaties had the potential of raising new regulatory challenges; furthermore, companies started directing their focus to a greater extent towards cross-border activities. In a context as such, governments seemed reluctant to the idea of having their jurisdiction become host environments for severe economic concentration stemming from abroad. One may argue that indirectly this trend would amount to an "armouring" approach on behalf of the respective economies. Whether this is a direct intention or a reaction to the Europeanization and internationalization of companies phenomenon is rather irrelevant in this case. One has to take into account that back in the 1960's mentalities regarding the European realities, concerns and challenges were not what they are today. After all, the liberalization of trade and the four freedoms could have been perceived, in certain contexts, as economic opportunities, just as much as threats upon domestic industries. Viewed in such a light, the tendency of promoting 'national champions' and building up solid domestic policies as manners to approach international competition, may have been considered appropriate.

Brussels did not remain idle though, as policy makers were continuously working on further developing the European construction initiated during the previous decade. In this respect, in 1965 the Commission engaged academics to study the prospects of controlling the amalgamations which affected the Community level (through the use of Articles 85 / 81 and 86 / 82 of the EC Treaty), in order to better learn the different approaches and views on the concentration phenomenon. After considering the feedback received the Commission published a Memorandum on concentrations[71], which discussed the research findings and announced the Commission's conclusions as to the future policy. The Commission found that although the dividing line between restrictive practices and mergers is often blurred, a fundamental distinction could still be drawn. The Commission rejected the academics advice to apply Article 85 / 81 of the EC Treaty to mergers by agreement for several reasons, amongst them worth mentioning being the following: Article 85 / 81 was not applicable to structural changes in the market, through agreements the purpose of which was the acquisition of total or partial ownership of undertakings or the reorganization of their ownership; furthermore, mergers may be beneficial in more instances than restrictive agreements and Article 85 / 81, par. 1 may be regarded to this end as too harsh; the conditions for exemptions under Article 85 / 81, par. 3 may be considered as ill-suited and too restrictive with regard to concentration transactions, as

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Monopolies Commission. The basic principles laid down in 1965 were subsequently confirmed in the Fair Trading Act 1973. In Germany, the Act against Restraints of Competition came into force in 1958; since then it has undergone several amendments, including provisions for effective merger control in 1973.

[71] *Commission's Memorandum on the Problem of Concentrations in the Common Market*, the 1st of December, 1965, SEC (65) 3500.

mergers and acquisitions are usually carried out under great time constraints and require legal certainty, whereas the Commission's decision-making process under Regulation 17/62[72] is slow and exemptions may be granted for only a limited period of time, subject to renewal (Van Bael, Bellis, 1994, p. 363-364). The Commission underlined the fact that the main legal provision for assessing mergers would have to be Article 86 / 82 of the EC Treaty, previously applied only to mergers strengthening a dominant position, leaving Article 85 / 81 of the EC Treaty to be applied only in certain restrictive situations such as joint ventures. Moreover, the Memorandum clarified that the assessment of mergers through Articles 85 / 81 and 86 / 82 of the EC Treaty should be undertaken on a case-by-case basis and that prohibiting a projected merger should be the exception, not the rule. (Camesasca, 2000, p. 261)

This is yet another proof that the Commission's concerns with regard to competition policy in general were multi-fold: in order to use competition policy as a mean to achieve the Community objectives the Commission seemed very much preoccupied with furthering the European Competition Policy through the adoption of a concentration control policy; at the same time, the Commission acknowledged that certain benefits from "being big" may arise and also that the continuously rising competitive pressures on the world market demand a higher level of growth from European firms. In this respect solid industrial policy considerations seemed to be strongly involved in shaping the Commission's approach to what will later on be the European Merger Control Policy.

In essential respects, the approach set forth in the 1966 Memorandum represents the Commission's general thinking on the application of the existing legislation to mergers at that certain stage of development of EC law. This view, as well as the further developments that occurred[73], raised concerns and gave birth to major controversy amongst the Member States which had different takes on the purpose of competition and merger control policies and their relationship with industrial and other policies.

To be more precise, the positions of the French and Italian governments were very much similar on this issue. Whether at first a specific European merger control tool was strongly opposed on the grounds that it may impede the domestic authorities ability to pursue national industrial policy objectives, this approach slowly started to shift towards both these Member States supporting the idea that the European competition policy and the future merger control policy, embodied either in the existing legal provisions (Articles 85 / 81 and 86 / 82 of the EC Treaty), or in the shape of a new legal mechanism, as long as it would take on board the need for European industry to compete internationally. And this shift of views may have very well been triggered by the fact that decision makers began to realize that stiff competition is more likely than protectionist measures to result in companies able to compete internationally.

A different stance was taken by the German government. Germany has always been consistent in its approach to competition and merger control policy in general. The case

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[72] *EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty,* OJ 13, 21.2.1962.

[73] The *Continental Can* Case which will be briefly portrayed in the paragraph to follow.

of a potential European Merger Control Regulation was no different: throughout the debates surrounding the European concentration control issue, Germany has supported a policy based on competition criteria alone. After all, at the time Germany was the only Member State which had a national policy tougher and more firmly based on competition criteria than the Regulation which was eventually agreed upon in 1989. However, although it seems wrong to qualify the German policy of the time anything but competition based, it may be argued that even the Federal Ministry of Economics engaged on few occasions in industrial policy[74].

What is interesting to notice is the approach that the British government had though: if at the beginning reluctance has been shown towards a European concentration control mechanism, during the early 1970's the British joined along the German stance with regard to a European Merger Control Regulation based on purely competition criteria, although, at national level they kept on retaining public interest criteria as the legal basis for the British competition policy. Britain pursued at a national level a mainly non-interventionist merger policy, this stemming to a great extent from ministerial self-restraint rather than from any domestic legal arrangements. The interesting fact about this policy is that although interventions were done mostly on competition basis, it was argued that for the effective application of the policy, the flexibility associated with public interest was necessary. In other words, although the UK was picturing a competition based merger control mechanism, arguments in favour of taking into account genuine cases of national public interest may have come from the British side[75].

4.4. The 1972 *Continental Can* Case. The Application of Article 86 / 82 of the EC Treaty to Concentration Transactions

Given the importance that the *Continental Can* case had with regard to the overall development of the merger control phenomenon in Europe, we will briefly address its facts and relevance in the following lines. The *Continental Can* case's past relevance with regard to concentration transactions and seminal importance for the construction of Article 82 (Craig, P.; de Burca, G., 2003, p. 1010) are undoubted, despite the mixed reception and criticism received with regard to the reasoning as well as the outcome of the case. The European Court of Justice upheld the Commission's view that concentrations may fall under Article 86 / 82 of the EC Treaty. The Court confirmed that concentrations which strengthen an existing dominant position are caught by Article 86 / 82, but the question whether a concentration which creates a dominant position could be assessed through the application of the same legal provision was not considered. This strongly implied that a specific regulation would be needed to block such mergers.

The case concerned the acquisition of a Dutch meat and fish can manufacturer, *Thomassen & Drijver - Verblifa NV*, by *Continental Can*, a US food can manufacturer which operated in the European Community through various subsidiaries. The Commission found that *Continental Can* held a dominant position in the German market

[74] See for example the stance taken in the *Daimler – Benz* takeover of *MBB,* Decision of September 8th, 1989.

[75] For further details see Camesasca, 2000, Woolcock, 1989 and Shea, Chari, 2006.

through its affiliate *Schmalbach - Lubeca*, which was also a strong potential competitor in the Benelux countries. The Commission concluded that the elimination of a strong Dutch competitor in the relevant market which comprised of North-West Germany and the Benelux countries, constituted an abuse prohibited by Article 86, because it strengthened *Continental Can's* dominant position in the market. It was noticed that the abuse did not lie in the fact that the acquiring company might have used its dominance in order to bring about the concentration, but in the fact that the competition in the market, which was presumably already dominated, would have been further limited. Consequently, *Continental Can* was required to submit proposals for reversing the transaction. The Court of Justice affirmed the Commission's contention that Article 86 / 82 prohibited structural abuses of a dominant position by merger or takeover, in the sense of action that weakened the competitive market structure, but it reversed the Commission's decision because of shortcomings with regard to the definition of the relevant product market. Thus, although the Commission's decision was overturned by the Court, on the main issue of principle it still gained a surprising victory, the Court choosing to interpret Article 86 / 82 so as to give effect to the spirit of the EC Treaty and to ensure consistency in the application of the relevant legal provisions. To the same end, one may notice that the list of abuses mentioned in Article 86 / 82 is not exhaustive. Thus, strengthening an existing dominant position may be regarded as an abuse caught by Article 86 / 82. Drawing the lines together, in *Continental Can* the Court underlined the need not to allow any breaches in the structure of the EC competition law that might jeopardize the proper functioning of the Common Market.

All in all, after the *Continental Can* case the Commission was able to use this precedent in order to exert a certain degree of influence over concentrations. Although starting from 1990 mergers are dealt with under a specific regulation, the Commission considers that the *Continental Can* judgement continued to be an authority for the proposition that it can be an abuse under Article 82 of the EC Treaty to alter the competitive structure of a market where competition is already weakened as a result of the very presence of the dominant undertaking on it (Whish, 2001, p. 738). For example, the *Continental Can* doctrine was applied in cases such as *Tetra Pak I (BTG Licence)*[76], *Gillette / Wilkinson*[77] and *Metaleurop*[78]. Despite the paucity of the formal decisions applying the *Continental Can* doctrine, the Commission intervened informally in a number of other cases either at the request of the parties contemplating a concentration or at the request of complainants. However, given what is already an abundance of case law under the Merger Control Regulation, these cases are largely of historical interest (Van Bael, Bellis, 1994, p. 365-366) and we will not draw upon them at this point of our study.

What is the relationship between the *Continental Can* doctrine and the further legislative developments concerning merger control? Independently of whether this relationship is more psychological than substantive (Goyder, 2003, p. 337), as we will see below, the *Continental Can* case built on the idea that a specific regulation was needed to assess concentration transactions.

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[76] OJ 1988, L272/27, ECR II – 309.
[77] OJ 1993, L 116/21.
[78] OJ 1990, L 179/41.

4.5. The 1973 Moment

Prior to 1973, development in merger control involved principally questions of legal interpretation. The issue had not yet taken on a political identity. However, beginning in 1973, merger control would become politicized. The Commission, spurred in part by the halting progress in expanding its authority *de facto* through creative interpretation of Treaty articles, began a process whereby it sought to acquire greater *de jure* authority through legislative action.

The year 1973 brought about the European policy-makers' first clear statement on their intent to enact an *ex-ante* merger control mechanism, embodied in a Draft Regulation[79]. Before detailing the features of this legislative proposal, let us look back at its regulatory background and the economic context in which it emerged. By 1973, the European competition policy has already accumulated nearly two decades of experience in its application. In this time span it has started to claim more and more assertively its specific place in the puzzle that describes the European construction, as an important tool for regulating anti-competitive conduct by preventing the creation of market structures that are prone to increase the potential for such conduct, which is not justified by social gains (Gal, 2003, p. 194, 247). Furthermore, competition policy grew more and more to be regarded not only as an end in itself to be pursued dogmatically, but as important instruments for achieving agreed Community objectives such as economic integration, cohesion, improved standards of living, sustainable growth, social welfare and protection of the environment.

It is in this context that the section on competition contained in the EC Treaty, and especially Articles 85 / 81 and 86 / 82 have to be regarded as sort-to-say constitutional provisions for the European competition law and, it is in this respect that their use started to be employed in order to control concentration activity in Europe. Going further with the argument, competition law built up to be regarded as crucial to what constitutes the "economic constitution" of the European Community as sketched in Articles 2,3 and 4 of the EC Treaty. But an assertion as such with regard to competition policy has to be viewed in the wider context of all the other developing European policies and activities (the four freedoms, harmonization, trade, industry etc.) which may complement or, on the contrary, conflict with each other.

The rationale for the draft merger regulation proposal was outlined in the *First Report on Competition* published by the Commission in 1973. In it, the Commission highlighted the fact that a sizable increase in cross-border mergers was likely to be underway. According to Commission figures the annual number of mergers in the Community had grown over threefold between 1962 and 1970, from 173 to 612. Moreover, the rate of increase between 1966 and 1970 was almost double that between 1962 and 1966. As a consequence, the concentration of market power in some sectors increased markedly,

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[79] *Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings*, submitted to the Council by the Commission on 20 July 1973 (OJ C 92/1, 31.10.1973). The draft provided a basic scheme of control, significantly referring not to Article 82 and 83 (previously 86 and 87), but to Article 308 (previously 235) of the EC Treaty as the authority for its prospective enactment.

sometimes by as much as half. In a few industries the top four largest firms controlled between 80% and 90% of sales or production. Thus, the Commission reasoned, as merger activity continued to increase, more potential competitors would be squeezed-out. On this basis, the Commission argued that a Merger Regulation would provide the legal tools required to ensure that Community markets remained competitive. All in all, when compared with the 1966 Memorandum, one can notice that the tone on merger control has been changed, as the idea of merger control as a possible part of an industrial policy concept started to take clearer shape. To detail, the lengthy recitals of the draft referred to the importance of preventing concentration in the markets within the Community and stressed the relevance of a procedure concerning the prior notification of large mergers[80]. However, the scope of the proposed regulation was undoubtedly too broad. It would have brought within its scope of application a very large number of mergers, far more than the staff of DG Comp, either in 1973 or even in their increased number of later years, could have dealt with within the time limits proposed. (Camesasca, 2000, p. 261)

In parallel, the 1973 Draft Regulation emerged in the context of some Member States' efforts to develop their own domestic merger control mechanisms. As we pointed out in the previous paragraph of this chapter, starting from the 1960's some Member States contemplated enacting such legislative provisions, mostly with the goal of enhancing their businesses' international competitiveness. The result of enacting such policies may have been a slight increase of cross-border activity, facing the risk of double assessment of a concentration transaction, using different standards; but what interests us in this context is the attitude that these Member States developed with regard to the possibility of enacting a European-wide merger control mechanism. The possible enactment of the Merger Control Regulation was viewed through the lens of the domestic interests pursued by the Member States. The promotion of industrial cooperation at a national level was seen as an important instrument of structural policy and thus national governments may have not been prepared to see EC competition authorities given powers which might be used to block certain types of mergers. Therefore, the reaction of the Member States to the 1973 Proposal varied between indifference and obvious hostility. Those states with on average smaller economies were concerned with the details and not with the principles of the merger control at the Community level. On the other hand, the three major Member States (Germany, France and the UK) which previously applied their own merger control procedures were sceptical about abandoning theirs in favour of a single control procedure, fact which necessarily should have entailed the transfer of important attributes of power from the national authorities to the Commission. Furthermore, the proposal was set against the backdrop of economic recession following a considerable oil crisis. The same three Member States showed stiff opposition in the Council concerning the adoption of a merger control regulation (McGowan, Cini, 1999, p. 179). Having regard to these issues, launching the proposal created wide controversy, as opinions differed substantially, in some cases even between these three Member States, on the existence at all or on the form and substance of the future European Merger Control System. Thus, one may notice that it was the political opposition raised by some of the Member States that ensured that the original version of the draft was not adopted, as Germany and UK argued in favour of a competitive approach of the merger control system, whilst France

[80] We will detail the arguments in favour of the prior notification approach in the following chapter.

for example, pressed for the additional application of social and industrial policy issues.

With regard to the European business organizations and industrialists, their reactions were not unexpected. The main concerns were expressed with regard to the issue of legal certainty. The possibility of applying several domestic mechanisms to a given concentration transaction that they may be involved in, as well as the insecure atmosphere created by the now increasing possibility of applying in an *ex-post* manner Article 86 / 82 of the EC Treaty according to the *Continental Can* ruling, has created a certain degree of distress with regard to the undertakings' behaviour on the market. Therefore, a potential unitary European merger control mechanism was regarded as a solid gain on the legal certainty part. However, undertakings in vulnerable sectors viewed the prospective regulation as a competitive disadvantage, given the fact that foreign, stronger competitors may take better advantage of the benefits that the future Europeanization of markets may bring[81].

The 1973 moment benefited from the crucial momentum built up by the *Continental Can* case. The potential challenges raised by cross-border transactions and the problems that the application of different domestic merger control mechanisms to a given concentration transaction pointed to a certain inappropriateness of controlling large scale cross-border concentration through the national concentration control mechanisms. Was this inappropriateness of the domestic rules an impetus to search for European workable alternatives? Has the Commission started to realize by the late 1970's that Article 86 / 82 of the EC Treaty, although applicable to concentration transactions, is not properly equipped to deal with all the foreseeable situations that a concentration transaction may raise in practice and furthermore, may jeopardize the viability of the so-called realistic integration goal? Apparently the answer may be yes. The *Continental Can* case, on top of the above issues, emphasized possible disruptions between the shapes in which competition law was embodied in so far: tool for integration and mechanism for protecting competition. Apparently such a conclusion could have been reached given the fact the *Continental Can* ruling[82] emphasized that the Commission might not accomplish its pro-integration goals without a tool to combat excessive economic concentration. Disruptions as such slowly led to a potential shift in goals: while the general support for the pro-integration activities remained, this was seen no longer as the only long run solution for retaining and expanding Community prosperity (Camesasca, 2000, p. 193). Instead, short-run actions to protect Europe's national economies and to strengthen the competitiveness of its firms submerged as fresh means of change. Still, at the same time with these industrial policy oriented actions, the idea of a singular merger control mechanism as a means of achieving the market integration discussed above was however continuing to consolidate, but without "holding the headlines". Since a *laissez-faire* policy did not constitute an option, given the Commission taking action in the *Continental Can* case, the choice of enacting a certain type of merger control was not an easy one, as it may be argued that there are fundamental tensions inherent to the concept of competition policy itself, as competition assumes the freedom of economic agents, while laws restrict their freedom to a certain extent, thus appearing inconsistent with the

[81] For further details see Woolcock, 1989.
[82] See par. 24 of the *Continental Can* ruling.

very concept to be regulated. The matter at hand is an extremely complex one and it brings us back to the same question: why enact a merger control system at all in the European Community?

All in all, the 1973 draft was not well received by the Council and the matter of merger control gradually slipped from the political agenda until 1982 when in a sudden flurry of activity new drafts were proposed (Elland, William, 1990, p. 111).

4.6. The 1980's

4.6.1. M&A Activity and Globalization

There is evidence pointing to a significant increase in M&A activity during the 1980's, both domestic and cross-border. The yearly competition reports issued by the European Commission provide figures which support the previous assertion. Let us detail these statements: figures provided by the European Commission in the *17th Competition Policy Report*, involving the top 1000 EC companies by turnover, show annual increases of 17% in 1985/1986 and 27% in 1986/1987. The greatest increase up to 1987 was in domestic mergers, which accounted for 70% of the total in 1986/1987, up from 65% in 1983/1984. Throughout this period, cross-border mergers and acquisition in the Community also seem to have shown a steady growth and accounted for 24% in 1986/1987, compared to 19% in 1983/1984. In the overall pattern of national and cross-border mergers and acquisitions in the Community, cross-border links, both intra-EC and international have normally accounted for about 30-35%, ranging between about 40% for Germany, to about 30% in France and the UK and to 10% in the Netherlands (Woolcock, 1989, p. 6).

The trend throughout the 1980's has been a strong growth in concentration transactions in all OECD countries. If the share of cross-border concentration activity in these states has been more or less constant, in the European Community however, there is an overly increased cross-border activity noticed towards the second half of the decade, especially since the 1992 Single Market idea became a credible target. For example, the late 1980's saw a sharp increase in the number of British acquisitions in the rest of Europe reaching the stage where the activity of British companies in Europe has closely matched that of French and German companies. The same period witnessed besides a dramatic increase in the number of mergers and acquisitions as a whole, also a much clearer Europeanization of the French and German companies with a view of strengthening their position in the international market. If the intra-Community M&A activity has become more visible as a result of the 1992 idea taking shape, or if, as in the past, cross-border concentrations were merely increasing in line with the general increase in mergers worldwide, due to various motives and drivers, is difficult to assess. We are tempted to state that the 1992 target prompted businesses from the Member States with a strong Europeanization challenge. New cross-border business opportunities seemed likely to occur; therefore a great deal of thought has been put in improving companies' status on the market, in view of improving the capacity to draw the most out of the potential future opportunities that may occur in the European market. In this respect, the 1992 Programme seems to have had at least the effect of challenging companies to think ahead and improve their market position.

Economic and industrial globalization has increased international competition. A number of trends have contributed to the accelerated globalization of industry and the integration of international economies[83]. However, when mergers and acquisitions occur, the relevant industry generally has fewer competitors, which may in some instances harm the competitive structure of the industry. This consequently raises questions with regard to the investigation of the possible consequences that such a process brings about. From here to the need for an increasingly coherent and evolving legal regulation of concentration transactions there is just one step.

All in all, is globalization one of the arguments meant to explain the development of competition and merger control regimes throughout the world? To a certain extent, yes. As national economies become increasingly global and as firms shift their strategic focus from domestic to multinational and eventually global, competition laws will naturally tend to develop in line with the expansion of legal systems scopes. After all, globalization of business has blurred the lines between domestic and international business, thus increasing the need for extraterritorial jurisdiction as well as convergence within separate bodies of competition law.

Given the growth of concentration activity as sketched above, what are the new challenges that the European policy-makers face in this context? First, as more and more jurisdictions embrace a market economy the number of competition authorities increased. Second and consequently, economic globalization had the effect of increasing the number of investigations of mergers, cartels, and abuses of dominance that transgress jurisdictional boundaries. This involves two risks, that of sub-optimal enforcement, if agencies which each have a partial picture of the situation do not cooperate with each other, and that of divergent outcomes, if different jurisdictions reach different conclusions about the same practice.

This phenomenon was indeed to be observed at the European level. The difficulties raised by the increasing possibility of multiple assessments of a single transaction placed the European policy makers in guard. Furthermore, enacting merger control for the purpose of fulfilling the integration goal mentioned above may have been regarded by Brussels also as possible efficient means to address the intricate challenges that globalization would increasingly bring about. One may notice in this respect that Brussels' tactics and concerns were twofold: first of all, taking one more step in the endeavour of achieving the Community's objectives through integration; second of all, one important question

[83] For instance, the growing similarity in available infrastructure, distribution channels, and marketing approaches has enabled companies to introduce products and brands to a wider international marketplace. These trends have triggered significant changes in the structure of entire industries, from policy making to regulation patterns to firm behaviour. Speaking of firm behaviour, a tendency to restructure the focus on international or even global industries and markets rather than domestic markets may be observed. This shift, accompanied by a heavy tendency towards the elimination of trade barriers had the potential to lead to increased industrial concentration on an international scale. As such, mergers and acquisitions are used not only as a means to achieve market penetration in international markets, but also to achieve greater economies of scope and scale to serve a global customer base more efficiently, without having to build duplicative infrastructures (Hamner, 2002, p. 388).

raised was whether or not the existing mixture of national specific merger control instruments and the Community policy instruments (Articles 85 / 81 and 86 / 82 of the EC Treaty) were raising up to the tasks' expectations, namely maintaining a workable competitive level within the Community.

Viewed from a different perspective, as we will see below, the European Commission and business leaders felt the need for a supranational merger regulation because market consolidation went hand in hand with globalisation and resulted in an exponential growth of mergers throughout the 1980's, as we have previously pointed out (Eberlein, 2001, cited in Shea, Chari, 2006, p. 9). And this is so also because of the constraining policy effects of globalisation throughout the 80's and 90's, namely increasing competition in international goods and services markets and the ability of the holders of capital to move money around the world in search of higher rates of return; these effects forced a re-evaluation of the need for merger control by both the Commission and economic actors. And this, not to mention that as globalization takes clearer and clearer shapes and reveals international dimensions that competition systems need to deal with, cooperation among antitrust agencies started to call for serious attention.

Fighting on two main fronts, the European decision makers were facing complex challenges that needed to be address in a timely manner, given that the 1992 moment was in sight.

4.6.2. Chronological Progress and the *Phillip Morris / Rothmans* Case

In 1981, the Commission submitted a revised draft[84] of its 1973 proposal to the Council of Ministers, seeking to address the concerns expressed by the opponents of the earlier proposal. However, the proposal was not a success, as again, member governments in the Council did not manage to reach the required[85] unanimity. Germany and the smaller countries generally supported the general thrust of the proposal, while France, Italy and Britain opposed it, expressing their concern over the commitment to the use of pure competition criteria. They insisted that the Commission integrate a more expansive public interest dimension (a position that the Germans and the Benelux countries loudly resisted).

The failure of the 1981 proposal would be followed by two more proposals, one in 1984[86] and the other in 1986[87]. Changes to the 1981 proposal were few, but noteworthy, the language of the 1973 proposal being reiterated. Neither these proposals ended up better than the 1981 draft. The fault lines between governments were by now becoming familiar. Germany and the smaller Member States generally supported the proposals. France, Italy and the UK continued to resist. Prospects of giving merger control a community dimension seemed as remote as ever.

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[84] OJ C 36, 12.2.1982.

[85] Article 308 (previously 235) of the EC Treaty required unanimity of votes in the Council for the Regulation to be adopted.

[86] OJ C 51, 23.2.1984.

[87] OJ C 324, 17.12.1986.

The renewed interest in merger control would emerge, at least in part, in the dawn of the ratification of the Single European Act (signed in 1986 and entered into force in 1987). Although the Single European Act did not directly address the question of merger policy, its preparatory works recognized that strengthened antitrust enforcement - including a robust policy towards mergers - was a necessary requirement to liberalization. Indirectly, the pro-integration role of competition policy and consequently merger control policy was once again acknowledged. Commission officials reckoned that nearly half of the economic benefits of Single Market project would be realized through industrial restructuring, the likely result of which would be a massive upsurge in trans-European mergers, acquisitions and joint ventures. The anticipated rise in the scale of business raised concern that the resulting market consolidations would result in some transactions whose effect would be decidedly anticompetitive. Firms wishing to exploit the opportunities presented by the Single Market might find their behaviour encouraged in one Member State while simultaneously prohibited in another. Governments who previously resisted calls for a Community-wide merger regime had to confront the fact that it would be clearly contradictory to the principle of free market to have widely different systems of merger control (Doleys, 2006).

The Member States' previous failures to achieve political consensus on the Merger Control Regulation matter strongly redirected the Commission to the sole alternative of relying on EC Treaty provisions for the purpose of merger control. The *Phillip Morris / Rothmans* case expanded the applicability of existing European Competition law tools on mergers, this time through Article 85 (currently 81) of the EC Treaty, greatly boosting the Commission's case for an independent Merger Regulation, as it was argued that a merger control system based on a regulation may be regarded as more functional than reliance on the unpredictable consequences of a judgment (Camesasca, 2000, p. 264-265, Goyder, 2003, p. 338-339).

The *Phillip Morris / Rothmans* case involved an agreement through which *Phillip Morris* was meant to acquire 30% interest in its competitor, cigarette manufacturer *Rothmans*, from its South African owners *Rembrandt*, though the voting rights to be obtained by *Philip Morris* were limited to 24.9%. Mention should be made that the agreement at hand is the result of the changes requested by the Commission to the original agreement that entailed a 50% - 50% ratio for the division of shares between *Rembrandt* and *Phillip Morris*. Both groups kept the right of first refusal should the other wish to sell, and there were also other arrangements to ensure that *Philip Morris* had neither board representation nor managerial influence over *Rothmans*. The Commission gave exemptions for these proposals, but they were challenged by competitors *BAT* and *R. J. Reynolds*, under the current Article 230 of the EC Treaty. However, the European Court of Justice upheld the Commission's decision, ruling that the acquisition of an equity interest in a competitor did not in itself constitute a restriction of competition, but it may serve as an instrument to that end.

The Court's decision left many unsolved problems with regard to the merger control issue in the European Community, as did the *Continental Can* decision. It caused great concern in the legal and business communities, the lack of legal certainty with regard to tackling

merger transactions being highly debated, thus adding to the pressure to adopt a regulation specifically dealing with concentration transactions. Therefore, it can be argued that the most important outcome of the case was not expanding the applicability of the EC Treaty provisions for the purpose of merger control, but the *Phillip Morris / Rothmans* judgement's effect on concentrating the minds of the more unwilling Member States, now fearful of the use of the *Phillip Morris / Rothmans* precedent to attack mergers under Article 85 / 81, on the terms of the draft Regulation (Camesasca, 2000, p. 266, Goyder, 2003, p. 339). Still, one should not overlook the authority that the *Phillip Morris / Rothmans* doctrine was afforded, as the Commission tested it in the cases such as *BT / MCI*[88]. However, just as it is the case with the *Continental Can* doctrine, following the entry into force of the Merger Control Regulation, the significance of the application of this judgement to concentration transactions has been severely reduced.

In 1988, five months after the *Phillip Morris / Rothmans* ruling was delivered, the Commission launched a new draft regulation[89] which embodied further concessions to reticent Member States. However, despite the near universal recognition that some progress on merger control was necessary, member governments again gave the proposal a lukewarm reception. France, Germany and Britain wanted only the largest and most potentially market distorting mergers to fall under Community control (a position that is unsurprising since these countries held a disproportionate share of the firms most likely to be covered by any regulation). France and Italy had long insisted that a provision considering industrial, regional and social policy concerns when assessing mergers should be included in the draft regulation. They were supported by Portugal and Spain, after their accession to the Communities. However, Germany now joined by Britain, regarded the notion of diluting competition rules in this way as anathema. They opposed the inclusion of such a provision out of the fear that the Commission would use it as a tool to pursue an activist industrial policy (Woolcock, 1991, p. 17). Furthermore, while the Germans and the French desired to centralize control in the Commission (albeit for different reasons), the British opposed this approach. The Germans felt it was imperative to establish a single administrative entity beyond the political control of national governments. For their part, the British government, deeply distrustful of what it perceived as Brussels' industrial policy bent, lobbied hard for decentralized control where national competition authorities would remain dominant. The smaller Member States, for their part, supported centralized control. Growing economic interdependence coupled with the absence (in most cases) of effective domestic merger control regimes inclined smaller countries to favour more, not less, Commission control.

Also in 1988, the Cecchini Report[90] was issued, containing a range of strong recommendations for the further integration of the Common Market, which also touched upon the merger control issue. The report underlined the fact that by 1992 the latest, when the Single Market Plan was meant to be fully completed, the European Community would have to be equipped with an appropriate tool to control structural developments, also considering the fact that a merger wave took place in Europe during the late 80's. To

[88] Case M.353, 1993.
[89] OJ C 130, 19.5.1988.
[90] SEC (88) 524 final, 13.4.1988.

this end, the Cecchini Report added more pressure on the European Community institutions to adopt such an instrument.

Sir Leon Brittan's appointment as the new Competition Commissioner certainly brought new impetus for the adoption of a coherent merger control instrument. Furthermore, in June 1989 France took over the Council presidency, making it clear that reaching an agreement upon the final text of the draft regulation on merger control was a high priority. A new change in the tone of the draft text was spotted, as mergers would have to be assessed starting from a principally neutral attitude, undertaking an overall trade-off between the anticompetitive effects of a given merger and their contribution to societal welfare through technical and economic progress. However sound this principle may have been constructed, there was still no chance of surviving the massive critique (directed mainly to the reference to technical and economic progress as a gateway to industrial policy) levelled especially from Germany and to a lesser extent, from the UK (Camesasca, 2000, p. 267). Furthermore, the issue regarding the transfer of control from national to supranational level, the thresholds for European-level jurisdiction as well as the relationship between the national and the European authorities were still quite controversial. Political hurdles seemed to obstruct once again reaching the agreement for the adoption of the Merger Control Regulation. In order to achieve the purpose of enacting a proper tool to control mergers, compromises had to be made so as to reach the exact dosages of competition policy and industrial policy principles to be enclosed in the text of the regulation.

After a last minute succession of changes brought to the Draft Merger Regulation, as a result of the hard bargaining that went on between the Commission and the Member States on one hand and between the Member States among themselves on the other hand, the crucial breakthrough came late in 1989. The long-awaited Merger Control Regulation was finally adopted by the Council of Ministers, on the 21st of December 1989. Regulation 4064/89[91] entered into force nine months later, on the 21st of September 2009 and in ostensibly built pursuant to Articles 83 (previously 87) and 308 (previously 235) of the EC Treaty as the authority for its enactment. From its entry into force[92], the Regulation started to apply to all industries, including, starting from the 20th of July 2002, to the coal and steel sectors[93].

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[91] OJ 1989, 395/1, as corrected by OJ 1990, L 257/13 and as amended by the Act of Adhesion of Austria, Finland and Sweden.

[92] It is beyond the scope of this chapter to extensively narrate the further chronological developments of the European Merger Control System, once its entry into force took place. However, it may be appropriate to pinpoint the main landmark follow-ups to the Regulation's enactment, in order to emphasize that the Regulation's prescriptions were and are continuously developed through further supporting legislative measures. After all, it is an established fact the provisions of the Merger Control Regulation provide for periodic reviews. In this respect, we direct the reader's attention to the enumeration provided in Annex 1 of this contribution.

[93] According to the Commission's Communication, 2002, OJ C 152/5, mergers in the coal and steel sectors are no longer subject to the ECSC Treaty provisions, but to the Merger Control Regulation. The *Commission Notice on the Alignment of Procedures for Processing Mergers under the ECSC and EC Treaties*, 1998 OJ C 66/36, had already unified the procedures for assessing concentration transactions. See also the *Usinor / Arbed / Aceralia*, 2003, OJ L 88/1 and *Verband Freier Rohrwerke*, T-374/00 cases.

4.6.3. The State of Affairs

At this point of our contribution several questions previously asked may be gathered and linked to the previous assertion regarding Brussels' merger control related objectives: was the Commission realizing by mid 1980's that counting only on Articles 85 / 81 and 86 / 82 of the EC Treaty will render the integration goal rather unachievable? If so, does the shift to shorter term goals such as the protection of Europe's national economies and the strengthening of its firms' competitiveness bypass or postpone the initial integration goal, or these new short term goals run in parallel with the higher integration goal? Did the Commission have the sufficient resources (of legislative and logistic nature) to complete the integration goal and to maintain the basic competition related goals achievable?

First, the distress in firms' behaviour caused by the *Continental Can* ruling and the disruption emphasized by the same ruling between the shapes in which competition law was embodied in so far may have rendered the Commission restless with regard to the concentration phenomenon in Europe. Second, the series of failed draft proposals up until 1986 started to point more and more seriously towards a certain degree of difficulty in managing the situation; the fact that the 1985 *White Paper on the Creation of an Internal Market* contained no noticeable mention of merger control may seem to emphasize the above. Could it be argued that some sort of salvation came from the 1987 *Phillip Morris / Rothmans* judgement in the sense that the Commission acquired one more Treaty enacted tool to combat anticompetitive mergers? What is pertinent for the purpose of answering the questions listed above is that besides the material and procedural consequences brought about by this judgement, it also added to the distress in firms' behaviour already created by the *Continental Can* ruling. On top of this, achieving the pro-integration goals only through case law, such as *Continental Can* and *Phillip Morris / Rothmans* is indeed an impossible task to achieve given the legal framework established by the founding Treaties which call for legislative action. After all, creating law through case-law / jurisprudence is not a specific particularity of the legal system established by the founding Treaties; case law serves as useful guidance providing coherence to the decision makers' future actions and consistency in the application of the law. It cannot however substitute the legislative normative acts required to fulfil the treaties' provisions. In other words, for the purpose of integration being achieved through the 1992 programme, jurisprudence cannot substitute a merger control mechanism embodied in a legislative act.

Is this to be interpreted in the sense that achieving integration was relegated from the main target that the Commission was aiming for to a no longer realistic objective? The emergence of other short term goals, such as protecting Europe's national economies and strengthening the competitiveness of its firms tempts one to point towards an affirmative answer. However, as we have pointed out before, the higher goal of fulfilling the EC Treaty objectives could not have done away without the integration tool. Metaphorically speaking, one could argue that the integration goal was left to "marinate" for as long as the political environment could not handle the pace of the 'Europeanization' process, rather than completely abandoned. Instead, the focus has been redirected towards actions

which just as well may be regarded as different channels of achieving, through different other policies mechanisms, the founding treaties' goals. Are these new short term goals at odds with the integration goals or do they serve the same higher purpose as the integration goal. In other words, do these goals run in parallel with the integration objective towards the same end? The pyramid model described above entices us to argue that the Community policies are indeed meant to reach the same goal; however, the methods employed may be different and sometimes contradictory. But, as to the reasoning behind these policies we believe it to be singular – fulfilling the directions set in Articles 2, 3 and 4 of the EC Treaty.

Time comes to support the above assertion, as this so-called shift in goals is not a singular example in the Commission's pattern of action. As briefly provided above, the Treaty Establishing the European Union institutionalized new policy goals and values vying with those of competition law; these new policy goals installed an assertion of competition as an autonomous fundamental principle and the adoption of industrial policy at Community level which is understood no longer as a haven from competition, but as a restructuring of the economy on competitive lines, according to Article 157 of the EC Treaty (Amato, 1997, p. 45). Although it is provided that this should not result in a distortion of competition, the emphasis is clearly shifted towards increased support for industrial policy measures.

What does this situation amount to? On one hand, competition policy eliminates trade obstacles and consequently and remotely serves consumer interests, as one of the beneficiaries of enhanced competition by increasing the actual number of competitors; at the same time, competition policy furthers integration by unifying the markets. On the flipside, these other policies mentioned above aim at strengthening domestic firms which will possibly eliminate a part of the competition, for the higher purpose of competing internationally. At first glance these views clash with each other, at least from the consumer welfare perspective. For the purpose of societal welfare approach however, the two approaches aim to the same target. A clearer discussion on this topic will follow in one of the next paragraphs of this chapter, where we will try to answer the question what is merger control all about.

4.6.4. Managing the Interests Involved in Enacting a Merger Control Mechanism

In order to properly understand the process which led to the establishment of the European Merger Control Policy one has to be familiarized with the basics of European politics and at least some of the concepts it employs, as well as with the institutional context in which policies are crafted and implemented. After all, most of the social, economic and environmental regulations applicable in the Member States are adopted through the EU policy process.

Every Community legislative procedure includes the conventional involvement of the competent European institutions; however policy-making has not only sources from which it draws inspiration but also surrounding circumstances and factors which represent interests and which may shape the policy-makers' actions. The discussion on

the balance between the benefits and negative effects brought by pressure / opinion groups activity is besides the point of this contribution. It suffices for now to say that the existence of negotiations between different interests groups have been present throughout the negotiations leading to the emergence of the European Merger Control Policy[94]. But it is not only for the selfish reason of following one's own interest. It is also because Brussels' desired and valued policy networks and policy communities' input[95] in this process. Aware of the difficulties it was encountering with regard to fulfilling its merger control related pro-integration goals, the Commission chose to allow access to economic leaders and capital actors to policy negotiations in order to benefit from their expertise. The European Round Table of Industrialists was formed and economic leaders had the unique opportunity to have access to information such as standards of service cultures, employment practices and price traditions and to work at shaping the rules of the market in which they would operate. However, it is still difficult to assess with certainty the if shape of the Community's policy agenda, embodied in the *White Paper* which was the basis for the Single European Act has been taking into account the say of policy networks and policy communities as such.

From the outset two main sets of actors forming a policy community have to be acknowledged: officials of different Directorates in the European Commission and representatives of capital - that acted jointly at this stage of policy development. The relationship between these two groups was complex and to a certain extent exclusionary: complex due to the autonomous character of each group as well as to the conflict and cooperation features that defined their interactions; exclusionary due to the fact that actors representing specific sectors / companies which activate in the market did not have a proper say in the establishment of the policy, while being involved in the implementation of the policy. Thus we may observe a dynamic relationship between different communities both at the creation and implementation stages of the policy. What may be argued is that the Commission intended to consolidate its power without necessarily isolating the very object of their regulation - industrial interests - if the Single Market was to reach its fullest potential. On the other hand, European industry leaders also realized that if the Internal Market was to become a tangible entity, massive corporate mergers and restructuring are likely to become reality and thus sought to gain a foothold in its regulatory policy-process (Shea, Chari, 2006, p. 9). One of the upshots of the existence of different standpoints was the emergence of a fruitful debate around the merger control issue. Given the relationship and contacts presumably previously established in the build-up to the Single Market Programme and the fact that both actor groups shared the goal of making European industry globally competitive, it is not surprising that the Commission felt comfortable involving capital in the form of the European Round Table of Industrialists in subsequent merger control policy establishment negotiations, especially given the Commission's valuing the capital's expertise and also since the costs of this process will be eventually partly supported by

[94] For detailed analysis of the negotiations process and the institutional procedures followed with a view of enacting the Merger Control Regulation, see McGowan, Cini, 1999.

[95] Policy networks, policy communities etc., are defined as a complex of organizations connected by resource dependencies and distinguished from each other by breaks in structure, mainly viewed in the context of the existence of horizontal relations between government, administration and organized interests.

the firms and individuals who have to comply with the future legal provisions.

It was also contended that in order to explain the development of these communities, attention must be focused on the overlapping, self-supporting private interests of both sets of actors, which ultimately served as a strong foundation for working together, while preventing other social actors such as organized labour from participating. In order to better grasp the dynamics between these actors an analysis of the events related to the adoption of the Single European Act is necessary. The Single Market Programme led to a massive repositioning of firms' focus and market approach within the Community because multinationals realized that centralization of market regulation is likely to significantly reduce business transactions costs. Individual companies as well as Euro-groups were consequently some of the most vocal proponents of the 1992 Programme and these actors' demands for a privileged policy-making access have been well documented (Cowles, 1996).

The Commission was aiming to set policy where it has been unable to before. Also, by involving business leaders in the negotiations, the Commission attempted to establish some form of 'European credibility.' By appearing to accommodate capital actors' demand for the creation of a 'level playing field' and a 'one-stop shop' for merger control, the Commission was successful in securing a strong policy partner and expanding its policy competence via a new area where it would be the sole EU institutional actor. On the other hand, the 'codification' of merger control in the Community would not only aid capital in attaining its goals of reorganization and consolidation in the global economy, but also, more importantly, limit potential abuses of Commission power over economic actors that may have otherwise occurred in absence of clearly defined rules. With regard to potential abuses, businesses' fears were based on the *Phillip Morris* decision, which gave the Commission the authority it was seeking to use the Community's pre-existing antitrust laws to prohibit *ex-post* certain types of mergers. The *Phillip Morris* case worried capital because specific powers granted to the Commission to deal with supranational merger control remained unclear, subsequently offering an uncertain regulatory environment for businesses. Based on the *Phillip Morris* doctrine, and the idea that companies considered it inefficient and costly to gain the approval of various national competition authorities when merging, capital felt that a supranational merger regime offered a more simplified and predictable regulatory environment (Shea, Chari, 2006, p. 10-11).

In other words, industrialists have argued that the logic of a single market necessitates a single EC merger policy, also having regard to the increasing business internationalization / globalization phenomenon (Woolcock, 1989, p. 10). One may inquire what were the motives behind the shifts in industrialists and business organizations' approach from indifference or opposition back in the 1960's and 1970's, to support for the regulation. An answer may be the fact that industrialists considered Articles 85 / 81 and 86 / 82 of the EC Treaty as being inappropriate for the purpose of merger control. Furthermore, after the outcomes of the *Continental Can* and the *Phillip Morris* cases, namely the likelihood of extensive use of these two articles for concentration control, the business community seemed to opt for an approach which

provided a less confused legal environment for concentration control. Thus, legal certainty was high on the agenda for the business community, along with the already mentioned challenges and opportunities that a wider free European market would bring about in the future.

In the context of adopting the Regulation, the European Parliament was consulted according to the procedure that needed to be followed. Nevertheless the feedback that it provided was minimal as it did not want to jeopardize the accomplishment of the Single Market Programme. It is also significant to note that the tightness of the Community during the Regulation formulation is illustrated not only by the virtual exclusion of policy advice from Community institutions beyond the Commission and to a limited extent the Council and the Economic and Social Committee, but also the exclusion of organized labour. Acknowledging the fact that while fulfilling the goal of adopting a merger control policy might not benefit some categories of individuals, the Commission actually stated later the following: "it may be that, in the short term, efforts to improve the competitiveness of firms by means of mergers or acquisitions will involve restructuring and thus loss of jobs. However, this does not change the fact that improving firms' competitiveness on the global market is one effective way to ensure the growth needed to create business"[96]. The reasons for excluding organized labour from the negotiation stage of the merger control policy development are rather complex ranging from the objectives of the Merger Control Regulation to regulate the consolidation of firms seeking to compete in Europe and ultimately, globally, regardless of costs to workers, to its power position *vis-à-vis* the other actors, namely capital and the Commission's Directorates. After all, capital representatives and the Commission's Directorates were respective of each other, not only because their overall goals were self-supporting, but also because they represented a threat to each other should a satisfactory solution to both not be found. However, this was not the situation for organized labour. On the one hand, its goals of employment maintenance were particularly at odds with capital and were irrelevant to the goals of the Merger Task Force who desired the extension of its institutional power. On the other, labour did not particularly pose any threat to either party if a solution inconsistent to its goals were achieved. (Shea, Chari, 2006, p. 13, 20)

One last issue to be touched upon in this paragraph deals with Member States' governments' interests as represented in the Council. It is a known fact that earlier draft proposals for a merger control regulation sent to the Council did not pass this legislative step due to the stiff opposition of some Member States, the most vocal governments in this respect being those of Germany, France and the UK. The opposition showed in the Council has to do with the fact that early merger control draft proposals did not match an acceptable standard according to the Member States' governments' views. Furthermore, the Member States were not willing to neglect their own interests. With respect to the last assertion, some Member States governments may have regarded the Merger Control Regulation enactment as an issue of power, where reluctance to cede control over merger activity was shown.

To briefly summarize what we have already provided above we may state the following.

[96] European Commission, DGIV, 2001, *European Competition Policy and the Public*.

The most evident example in this respect is Germany, closely followed by Denmark, Ireland and the Benelux countries[97] which supported a competitive approach to merger control and backed up the Commission's views in this respect. However, Germany did not hesitate to signal inconsistencies in the drafts' texts and tried to retain some of the merger control power through imposing the 'German clause'. On the other hand, France's reluctance towards the European merger control project, also shared by Italy, may be mainly translated to a certain extent in the fear that enacting a European wide merger control regulation would be at odds with the promotion of diverse policies at a national level which were seen as an important instruments of structural policy. The UK opposed the transfer of authority on the grounds that it already possessed a domestic legal framework for the evaluation of mergers and it had little desire to transfer sovereign control to the Commission.

As we have pointed out above, the concept of Europeanization took time before it crystallized. The benefits of a potential unitary standard of assessing concentration transaction were not portrayed in a sufficiently clear and evident manner so as to convince Member States already employing specific merger control mechanisms to renounce a part of their sovereignty and to centralize authority in the hands of a body they could not really control. This state of affairs seems to be latent since the adoption of Regulation 17/62, when the negotiations leading up to its passage were illustrative of a feature that would also be common in subsequent negotiations over merger control: it illustrated that member governments were far from united in how desirable they regarded the exercise of Commission authority.

All in all, balancing the Member States' interests so as to obtain their vote in the Council entailed negotiations not only on the merits of the drafts' texts but also on the importance of the European Community body of law as a whole and eventually the repercussions that a Single Market with unitary regulations would bring about. Eventually, the realization of the Single European Market ended up being seen by governments and industry alike as a means of ending the fragmentation of the European market which has hindered economic growth and competitiveness (Woolcock, 1989, p. 1).

5. What Is the Merger Control Policy All About?

After chronologically observing the steps towards a common merger control policy and after assessing the main interests involved in the process, it is time to answer the question why exactly the merger control policy was enacted at the European level? In other words, what are the exact goals of designing a merger control system? The answer to this question reveals that the problem at hand involves complex assessments, which entail taking into account numerous social or political goals that may impinge on merger policy. From the very beginning it may be stated that an absolute complete 'correct' set of goals for merger policy cannot be established; and this is because of the endless number of few lines we will try to pinpoint the guiding principles according to which the merger control

[97] The support from Denmark, Ireland and the Benelux countries can be more appropriately interpreted as a pro-integrationist gesture since few Irish or Benelux firms were of sufficient size to trigger a Commission review.

policy outlines its goals.

The Merger Control Regulation was raised on three key propositions:

- The completion of the Internal Market and of Economic and Monetary Union, the enlargement of the European Union, and the lowering of international barriers to trade and investment will continue to result, *or more appropriately, is likely to result* in major corporate reorganisations, particularly in the form of concentrations[98];
- Mergers and other concentrations should be "welcomed" where they are "in line with the requirements of dynamic competition and are capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community"[99];
- "Community law must…include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it."[100]

Let us deepen our inquires and pose the following question: what exactly is merger control policy about?

Societal welfare

From the outset, it may be observed that the above three propositions translate the basic philosophy of the Treaty of Rome, i.e. the merger control policy has to be viewed through the lens of the Community objectives and the means to achieve them, set in Articles 2, 3 and 4 of the EC Treaty and the course of action followed as depicted in the pyramid model provided in paragraph 3 of this chapter.

Some opinions (Whish, 2001, p. 728 for example) provide that merger control in general should be carried out in the public interest. Furthermore, it was argued that once the European Merger Control Policy has been enacted, decisions have been taken by reference to the welfare of the Community as a whole (Camesasca, 2000, p. 197). We believe the public interest goal or the welfare of the Community as a whole match what we may name the European-tailored concept of societal welfare placed at the top of the pyramid model provided above as the commendable goal of enacting the European Merger Control Policy. Consequently, we argue that the attainment of societal welfare constituted a fundamental driver of the Regulation's enactment and it continues to be a commendable goal of merger control in Europe.

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[98] See Recital 3 of Regulation 4064/89.

[99] Recital 4 of the Merger Control Regulation. See also XXIst Report on Competition Policy (1991), par. 5: "Mergers may be carried out in the interests of economic efficiency, permitting improved exploitation of economies of scale and the pooling of expertise, and may thus help Community industry adjust its structure to the challenge posed by the integration of the internal market and the internationalization of the economy".

[100] See Recital 5 of Regulation 4064/89.

Maintenance of a competitive market structure

As we have pointed out in the previous chapters of this contribution, the development of the European law regarding competition and consequently merger control, rendered their goal as being to protect competitors, focusing on how much competition is preserved after the concentration transaction is done, as opposed to the traditional US approach which protects competition, focusing on the issue of how much competition is lost. And this is so because the European policy makers, by choosing to protect competitors, are implicitly providing them with further incentive to compete against, for example, the concentrating undertakings having their transaction assessed by the Commission. If these competitors are profiting of this incentive, the Community will reach its (Article 2 of the EC Treaty) endeavour of ensuring a competitive environment in its markets.

It is important to understand that within the European context, merger control is concerned with the maintenance of a competitive market structure. Merger control is not only about preventing a merged entity from abusing its dominant position; especially after the adoption of the 2004 merger review package, it is more about maintaining a market structure that is capable of delivering the benefits that may follow from the existence of a competitive environment. These assertions are consistent with later statements and evidence stemming from the European Commission: from its inception the Commission has viewed the merger regulation as a "vital additional instrument made available…to ensure a system of undistorted competition in the Community."[101] The key term in this last statement is *additional*; and this is because it fits in the pyramid model we have discussed in the above lines, where different regulatory provisions / policies / actions / circumstances, one of which being merger control policy, contribute to the setting up of this pyramid of goals and sub-goals. To be clearer, we believe the meaning of par. 20 of the XXth Report on Competition Policy should be the following: …a vital instrument additional *to the diverse set of already existing ones (control of concerted practices, cartels, state aids, etc)*, made available…to ensure a system of undistorted competition in the Community.

Global competition

Often merger control policy may be viewed within the big picture of global competition. In some respects the goals of some merger control policies may be to enable firms to merge in order to increase their international competitiveness. Viewing the other side of the spectrum, it can be argued that an over-rigid merger policy might drive firms offshore, thereby preventing the development of entities strong enough to compete with other undertakings at a global level. Again, this issue entails a sensitive and careful balance between preventing concentration of economic power and maintaining a competitive environment characterized by the equality of chances conferred to all the actors in the market. Therefore, the 'national / European champion' argument should be analyzed with extreme caution as in many industries, size or power is not a prerequisite for international competitiveness, as these are not the only criteria for a firm to be competitive on a larger scale. After all, domestic rivalry is more likely than national

[101] *XXth Report on Competition Policy*, 1990, par. 20.

dominance to breed businesses that are internationally competitive as it provides stimulus for efficiency and innovation. In other words, national or European champions free from the disciplining effect of competition on the domestic / European markets may lack the skills necessary to succeed in the wider world. (Gal, 2003, p. 201-202, Whish, 2001, p. 725) We believe that the European Merger Control Policy has no specific inclination towards supporting the European champion argument, since this will contravene the fundamental principles (such as equality of chances, fair and competitive market environment) on which this very policy is built on.

Consumer welfare or general welfare?

An important debate focuses on whether merger policy should maximize consumer welfare or general welfare. Some authors have provided arguments in the sense that the primary purpose of competition law is to maximize the economic welfare of consumers by, among other things, eliminating barriers to market entrance and eliminating the abuse of market dominance by cartel behaviour and monopolistic strategies (Fox, Eleanor, cited in Hamner, 2002, p. 402-403). Indeed, the full text of both the old and the new Merger Control Regulation reveals a clear inclination of the Commission towards postulating consumer welfare as the applicable standard of appraisal[102].

Still, arguments for both theories are numerous and many of them are rather convincing. The consumer welfare approach strives to maximize consumer surplus, which is the difference between what the consumers would willingly have paid for the product / service and the actual price paid; the consumer welfare approach aims to reassert the value of the individual consumer over that of the large conglomerate firm (Hylton, 2003, p. 37). The general / total welfare approach starts from the view that the market itself cannot maintain a competitive system and therefore public intervention is called for (Hylton, 2003, p. 37). The total welfare approach assumes that a concentration transaction will be cleared if it increases total surplus, which includes consumer surplus and producer / provider surplus. Therefore, it may be argued that the consumer welfare standard sets a higher threshold for approving mergers than the total welfare standard. However, it has to be understood that fulfilling the total welfare standard is not easy to achieve, especially if within the given circumstances, market power is pre-existent, as efficiency gains that are larger in magnitude are rather difficult to realize.

One vital observation in this context is that the consumer welfare approach may conflict

[102] Commissioner Mario Monti, in a speech held in London, on June 9th, 2001 stated the following: "Actually, the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer. Our merger policy aims at preventing the creation or strengthening of dominant positions through mergers or acquisitions. Such a market power produces competitive harm, which manifests either directly through higher post-merger prices or reduced innovation or, indirectly, through the elimination of competitors, leading ultimately to the same negative results in terms of prices or innovation. Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare."

with the goal of enhancing the international competitiveness of firms, as increasing the competitiveness of certain undertakings is most of the time realized at the cost of increased prices for the products / services that the consumers were acquainted with. Furthermore, it may be argued that the consumer welfare approach does not necessarily achieve distributional goals. This approach implies that the loss to each consumer and the benefit to each shareholder should be treated equally (Gal, 2003, p.204). Still, this situation depends a great deal on the social and economic standards which pertain to each group mentioned above and total equality of treatment is difficult to implement. The total welfare approach, on the other hand, leaves the distributional tasks in the hands of governmental instruments such as taxation and social insurance or welfare systems, which are specifically designed for this purpose and whose activity can easily be monitored.

The total welfare approach has its price as well, depending for example on the features of the market where the merging undertakings perform their activities and the identity of the shareholders. If the merging parties are controlled by only foreign shareholders, an approach that maximizes total welfare and ignores the nationality of the shareholders, may well increase global welfare, but not necessarily local / domestic / regional welfare, since the profits of the given transaction may be redirected elsewhere then where the companies operate. However, as often there are problems, as often there are solutions, if for example, incentives are created for the beneficiaries of such transactions to reinvest their profits in the same market.

All in all, while the adoption of a qualified total welfare approach may raise problems as we have just seen above, the adoption of a consumer welfare standard may have harsher consequences upon domestic welfare-enhancing concentration transactions (Gal, 2003, p.205). If one opts for the total welfare approach as being the least damaging to competition goals and the most consistent with promoting economic efficiency, this does not mean that it is so because it is the easy way out. The total welfare standard entails difficult analytical and qualitative issues that the regulators need to overcome as well. It is probably in contexts as such that proposals towards balancing approaches between the two standards may be the path to follow, again depending on the social, economic and political features that define a given economy.

To conclude, the total welfare approach, nuanced and shaped in the *sui generis* form of societal welfare, may not be ignored from being a path chosen by the European decision makers, although it has never been explicitly acknowledged. This assertion is also consistent with the pyramid model described above, where the higher goal placed on the top of the scale is societal welfare as translated in the objectives set by Article 2 of the EC Treaty. This does not however bypass the consumer welfare enhancement endeavour that merger control should bear. As we have already pointed out and we will further detail, merger control should be able to ensure the attainment of these two standards through different channels: competition policy – consumer welfare, integration – societal welfare.

Public v. private interests?

One observation has to be drawn at this point, especially in connection with the discussion provided in paragraph 4.6.4 of the current chapter, namely, the role that policy communities have played and the interests that these communities followed in this context of supranational governance. Regarding these policy communities, it may be argued that an important element in explaining why communities develop and persist over time lies is the actors' own private interests, coupled with their own fears, which refer to other policy communities / institutions actions or inactions. Such interests and fears guide actors while also constrain them from acting alone. It has also been argued that these groups of actors may seek to pursue outcomes that extend their own power position and not necessarily seek to maximize public / general welfare; and economic actors will not necessarily ignore intermediary solutions if an altogether negative outcome against their interests is foreseeable. Therefore, consensus is not only a product of having similar or shared values, but also, perhaps more importantly, based on the fear that other actors may pose a threat to the realization of private desires.

It was contended that although the European Community's stipulated goal may have been enhancement of welfare-related, policy makers and interest groups or communities involved in the emergence of the merger control policy at a European level cannot detach themselves from their own interests. This assertion, as dangerous and as troublesome it may be, has had its supporters in the doctrine, impersonated by hard-core Commission critics for capture and politicization of competition decision-making.

These critics argued that achieving a common agreement upon what the goal of a soon to be enacted merger control policy should have entailed several types compromises: first, compromises with regard to which standard the future policy should adhere to - an absolute value approach, a balancing approach, a *laissez-faire* approach, etc - , compromises with regard to the own private interests of pressure groups / communities, which for the reasons described above in this chapter are co-opted in the policy-making process and finally one should not leave aside the Member States' interests as represented in the Council's final vote upon the legislation which may be enforced.

If a *laissez-faire* approach, despite its claimed benefits, was not opted for by the European Community, one can actually detect the seeds of the same 'survival of the fittest' concept in the current merger control policy: reference has to be made in this context to the negotiation process described just above, during which the negotiators aimed at imposing their approaches on the whole merger control phenomenon, in the view of the future application of the rules to be enacted. Defining whether the main goal of the policy adopted in the late 1980's in the European Community is indeed total /general / societal or consumer welfare or just a mixture emerged from the negotiations of interests and fears is a difficult task to accomplish; however, the analysis of the public / private interest debate, regardless of its inherent sensitivity, has the merit of providing an "outside the box" picture of the somehow mysterious institutional dynamics which animate the enactment and functioning of the EU Merger Control System. Furthermore, it casts new questions on whether public interest is able or not to be the dominating

motivation of enacting a certain policy as long as there is room of manoeuvre for private interests and as long as this private interest keeps itself separated from the public one.

Shareholders interests?

It has been argued that concentration transactions may affect the interests of individual shareholders. Also, some commentators have argued that some mergers and acquisitions, far from promoting economic efficiency, may have a disruptive effect upon the management of one or both of the concentrating undertakings and may be detrimental for their long term prospects. Reference has to be made in this respect to hostile takeover bids, where it is possible that the management of the target company will either be removed by the new shareholders or will resign rather than stay on in the new conditions.

We believe that protecting the interests of the individuals mentioned above (shareholders, management teams) should not be the goal of enacting a merger control policy, as there are other branches of a legal system that deal specifically with issues as such. To exemplify the previous assertion one may be aware of the fact that company law is concerned with issues such as the protection of minority shareholders and also providing comprehensive provision which serve the purpose of general protection of shareholders[103].

However, should the discussion be placed in terms of societal welfare, shareholders being at a loss due to a concentration transaction should have the possibility of formulating claims under the merger Control Regulation. We will further detail this issue in the second-to-last chapter of this contribution, where we will dwell on the intricacies of the *Comite Central d'Entreprise de la Societe Anonyme Vittel v. Commission* case[104], which entailed a similar hypothesis to the one described a few lines above. We believe that for such claims to be possible under the societal welfare cap beyond the specific enforced legislation on shareholders' protection, these individuals will have to prove their *locus standi* by demonstrating an interest as to the essential purpose of the Merger Control Regulation.

6. Final Remarks

Glancing at the above arguments and discussions one may reflect upon the complexity which the adoption of a merger control policy process exhibits. First off all, the drivers which respectively lead to the adoption of such a policy are extremely vast. Just as vast are the obstacles which stood in the way of enacting the merger control regime. Also, one may notice the fact that these grounds / events / circumstances / obstacles / drivers often intertwine and influence the manner in which one or the other develops. Second off all,

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[103] In this respect relevant provisions are contained in the *Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies*, OJ L 295, 20.10.1978, the *Tenth Directive on cross-border mergers of limited liability companies 2005/56/EC,* OJ L 310, 25.11.2005 and the *Thirteenth Council Directive 2004/25/EC of 21 April 2004 on takeover bids*, OJ L 142, 30.4.2004.

[104] Case T-12/93, 1995 ECR II-1247.

the implications of adopting a merger control policy are just as diverse and their features vary depending from which point of view the matter of merger control is observed: an economic perspective, a social standpoint, a political approach, etc.

The chapter at hand has observed and analyzed a comprehensive number of the possible drivers and obstacles which altogether shaped the process that lead to the emergence of a merger control policy and also has attempted to design a basic functionality model for a merger control enforcement system. Gathering up the arguments which support each and every one of these drivers and obstacles emphasizes once more the complexity of the merger control policy emergence process.

With regard to the European example several questions were asked, the one dominating this section of our contribution being: why did the European policy makers enact the European Merger Control Policy as it is today? To tackle this question we designed a pyramid-resembling model in which the key element is integration; integration as a tool to achieve the societal welfare described in Article 2 of the EC Treaty, as the ultimate goal to be fulfilled through Community actions. Due to complex circumstances, due to the input stemming from the elements of the pyramid puzzle (M&A phenomenon, competition policy, industrial and other Community policies, etc) the concept of integration showed diverse and changing dynamics. As we have provided in the current chapter, the integration dynamics destabilised to a certain extent the European Competition System's conceptual framework and further on, this destabilization has been intensified by increasing demands for accommodation between competition law goals and other goals of the Community.

It may be argued that the answer to our question lies on a conglomeration of features, events, policies, attitudes and circumstances. Once we have established that the *sui generis* originally tailored societal welfare enhancement concept may be defined as the most plausible, dominating (however, not the sole) answer to the matter of enacting the European Merger Control Policy, the natural question arising here is what happens to the merger control system / competition policy once the objective of market integration will be achieved? What is the purpose of merger control in such a context? Are the goals / objectives of the merger control policy changing? One has to bear in mind that as diverse the drivers for enacting a merger control policy are, as diverse are its objectives and areas of interest. Once integration is achieved and one more step is accomplished towards societal welfare, merger control as an element of competition policy will still observe the functioning of market structures which have a potential to create anti-competitive results. In other words, merger control, just as much as the other Community policies promote actions towards maintaining or better yet improving the *status quo*. The methods and tools to be employed in this respect are hard to predict as the choice will be very much influenced by the development of EU law and the features of the political, economic and social future environment.

Chapter 4

Ex-ante or *Ex-post* Merger Control?

Better safe than sorry: is prevention always better than the cure?

1. Introduction

Once a decision to enact a merger control policy is reached the next logic step is to define the features of its outlook. When designing a merger control policy one has to take into account numerous variables. First, the size and defining features of the economy for which the policy will be enacted should normally be taken into account. Second, the goals aimed at by the enactment of the merger control system should be formulated and enclosed in coherent principles. Third, at least the following elements have to be present in order to coherently aim for the already set goals.

- Substantive law should lie at the heart of a merger control policy, while at the same time constituting its basic tool of functionality. Substantive law should list the principles of the policy's functionality.
- Comprehensive procedural law defining matters of jurisdiction and clarifying the types of transactions which fall under the application of the substantive rules; the procedural steps that need to be followed while assessing a concentration transaction; deadlines; sanctions and remedies; the possibility of judicial review, etc.
- A set of competent and adequately empowered institutions - including here a court system - that coherently and consistently apply the substantive and procedural rules enacted.
- The ability to create sufficient incentives and opportunities for all categories of market actors to be familiar with the contents of the policy at hand.

According to some authors (Navarro, Font, Folguera, Briones, 2005, p. 2), the logic of competition policy demands that legal systems are equipped with mechanisms for the control of mergers and acquisitions of undertakings, and, in the wider sense, of any transaction that results in an increase in the concentration in a given market. This assertion may be severely contested by *laissez-faire* approach supporters, but assuming that a merger control policy will be enacted in a given market, one has to assess which is the perfect timing when the control of a given transaction should intervene: should the control occur before the transaction is completed and implemented or after its implementation. In other words, what should regulators opt for: *ex-ante* (*a priori*) or *ex-post* (*a posteriori*) control?

The chapter at hand aims at investigating the subtleties of these antagonistic methods of control's features, discussing their flaws and strengths; also it aims at assessing these methods' functionality in the context of the European Merger Control System's set goals. In other words, what is the manner in which these concentration control techniques work for the purpose of achieving the societal welfare goal as embedded in Article 2 of the EC Treaty and the consumer welfare goal embedded in the substance of competition policy?

2. Basic Functions of a Merger Control System

In order to properly commence the assessment, one has to first investigate the basic functions that a merger control system, be it *ex-ante* or *ex-post,* should be empowered with. Observing the various merger control mechanisms applied worldwide, we can

conclude that the basic functions of any merger control system are as follows:

- The disciplinary function: first of all a merger control policy should have the means to discipline the market and to ensure a fair and equal environment in which the market actors can operate.
- The punitive function: a merger control system should be able to equitably punish the players who, through their actions, bring about damages to the proper functioning of the market and / or break the substantive and procedural rules of the game.
- The educational function: merger control rules should be able to confer guidance to the undertakings involved in the market transactions, as to what constitutes legal or illegal behaviour, what the consequences of illegal behaviour are and the manner in which the substantive rules are applied.
- The preventive function: merger regulations should be set in such a manner that illegal behaviour is discovered in due time, so as the least harm possible is brought about to the proper market functioning.

This hypothetical model sketched above should function as an objective observer of the market functioning, as a fair judge of the actions committed within the market exercise and also as a deterrent for merging companies which are aware that their transaction will fail to meet the clearance requirements, to proceed with their transaction; all of these have to be combined with administrative efficiency manifested by proportionality of the regulators' and enforcers' actions.

3. Antagonistic Views of Merger Control Policy

The current rationale of merger control as emerging from Regulation 139/2004 relates to *ex-ante* policy interventions fostering competition. By *ex-ante* we mean that preventing a merger is typically based on the idea that competition would be hampered, to the detriment of consumers and overall social welfare[105], if the market structure were changed in the way resulting from the merger. Such interventions are a complement to remedies which, regarding the presence of an existing market structure, are based on the observation that competition is not taking place in ways which would benefit society. In lay terms the philosophy of *ex-ante* merger control is that prevention is better than cure. In other words, the underlying logic of the current European Merger Control System is that it is much easier to stop a concentration that is likely to undermine competition than to deal with the situation *ex-post*, after the damage has been done (which could have been prevented in the first place) and facing the possibility of de-merging, which can be cumbersome. But doesn't this amount to raising obstacles in the way of furthering innovation and technological progress, which would in turn raise issues to the detriment of achieving overall social welfare? As we will detail throughout the next chapter of this contribution, this fact puts great weight on the quality of the assessment of future economic developments.

As a general remark in this respect, a contention may be put forward that the current

[105] See discussion provided in Chapter 3 of this contribution.

European view of the *ex-post* method of control is as a rather passive method, only occasional interventions occurring when the market's functionality has been disturbed. Meanwhile, the *ex-ante* approach seems to enable on the other hand more active involvement in industry development, benefiting from a superior degree of knowledge through permanent oversight of the market's functioning.

If the above lines briefly describe the current European approach to merger control, this does not mean that the Community has not employed *ex-post* concentration control tools. Articles 85 / 81 and 86 / 82 of the EC Treaty which forbid collusion restricting competition and the abuse of a dominant position respectively have been used to monitor the level of concentration in the market, before Regulation 4064/89 was enacted. They constitute rules to be applied *ex-post*, i.e. to make corrections when markets are not operating in conditions of effective competition. The reasons for applying these particular provisions to concentration transactions are diverse and have been largely discussed throughout this contribution. However, several questions arise: first of all, why did the European regulators opt for a shift in their approach to concentration control from the *a posteriori* to the *a priori* technique; second of all, once the *ex-ante* method has been enacted and implemented, should we still be concerned with the application of the *ex-post* mechanisms, namely Articles 81 and 82 of the EC Treaty?

4. Why the Switch?

The Community was more or less forced to use Articles 85 / 81 and 86 / 82 of the EC Treaty in order to control the anti-competitive mergers in the Common Market, due to the lack of specific binding legal instrument to control the concentration transactions at the early stages of European integration. Articles 85 / 81 and 86 / 82 were considered to a certain extent fit for the purpose of merger control, despite the contrary legal arguments stemming from the Treaty provisions themselves, as well as the historical context revealing a clear legislative intent not to include merger control in the EC Treaty. However, as we will see in below, in paragraph 4.1 of this chapter, serious questions regarding the appropriateness of such an initiative were raised. Without denying the relevance of the *Continental Can* and *Phillip Morris / Rothmans* cases for the purpose of merger control, the judgments delivered in these cases also revealed the shortcomings of the approach discussed.

Still, it must be noticed that, with regard to these cases, Articles 81 and 82 had to be interpreted in a manner which reflected the fact that they are both meant to achieve the same ends, namely those set in Articles 2 and 3, par. 1, (g) of the EC Treaty.

Aspects regarding the change from employing Articles 81 and 82 of the EC Treaty for the purpose of merger control to the application of a specific concentration control tool embodied in the Merger Control Regulation have been assessed in the previous chapter. To sum up, we will provide that this change relates to the need of fulfilling the goal of European integration, which according to the pyramid model provided above, is crucial for the achievement of the societal welfare goal set by the EC Treaty. Assuming that a change was needed, the question we are interested in at this point is why was the switch

from *ex-post* control to *ex-ante* control opted for? In other words, why was the *ex-ante* method considered fitter than the *ex-post* technique for the purpose of achieving the immediate and long term goals of merger control? Once the switch was operated, one more follow-up question may be asked, namely was this change properly implemented, or can it be characterized as being to a certain extent forced? To take a specific example, once an *ex-ante* mechanism was enacted, is it appropriate to still employ tools specific to the *ex-post* method, namely the use of the appraisal criteria contained in Article 81, paragraph 1 and 3 of the EC Treaty, or the dominance test, with a view to establishing whether or not the concentration transaction is compatible with the Common Market. We will try to deal with these questions in the lines to follow.

From the very beginning it has to be understood that the switch exhibits multiple dimensions. The change cannot be justified by one singular event or trigger. A complex set of circumstances which will be detailed throughout the next chapter of this contribution, intertwined and lead to the transition from the *ex-post* to the *ex-ante* regime. As we will point out below, all of these circumstances, events or triggers are strongly related to either one of the following goals:

- Maintaining a fair, undistorted and stimulating competitive level in the market;
- Ensuring the highest possible degree of legal certainty afforded to the commercial parties acting in the market.

4.1. Inappropriateness of Using Articles 81 and 82 of the EC Treaty

It has been widely argued that Articles 81 and 82 of the EC Treaty are not entirely appropriate for performing efficient concentration control. The topic has been extensively discussed in the literature (Reynolds, 1983, Elland, 1987, Le Bolzer, 1990, Neven, Nuttall, Seabright, 1993, Van Bael, Bellis, 1994, Camesasca, 2000) and also during the consultations which led to different policy documents (such as the 1966 Commission Memorandum) being issued. The arguments in this respect may be summarized as follows.

Article 85 / 81 of the EC Treaty

- Article 81 is not applicable to structural changes in the market through agreements whose purpose is the acquisition of total or partial ownership of undertakings or the reorganization of theis ownership.
- The conditions for exemptions under Article 81, par. 3 (especially the proportionality test) may be considered as ill-suited and too restrictive with regard to concentration transactions. Furthermore, mergers and acquisitions are usually carried out under great time constraints and require legal certainty, whereas the Commission's decision-making process under Regulation 17/62 is slow and exemptions may be granted for only a limited period of time, subject to renewal.
- Article 81 would be difficult to apply hostile take-overs, where there is no agreement present or to Stock Exchange shares purchases made without inter-board agreements, unless “agreement” is given a very wide meaning.

Article 86 / 82 of the EC Treaty

- Many instances of concentration activity, such as mergers which create a dominant position, were left outside the scope of Article 82.
- Article 82 does not provide for any systematic pre-merger notification procedure, neither for any exemptions similar to Article 81, par. 3.
- The procedures set by Regulation 17/62 are open-ended and lengthy, their implementation seems rather inflexible and the decisions adopted under these legal provisions are time-fixed and not perpetual.

All in all, it was argued that the application of these two Treaty provisions to concentration transactions bears in itself a high degree of legal uncertainty since companies often found it hard to predict the Commission's approach to their transaction and whether a challenge will be put forward. This lack of legal certainty was regarded to constitute a serious deterrent for companies to expand through merging and produce wealth. In this context it was believed that the *a posteriori* application of these legal provisions does not add to the integration desideratum that the Communities were moving towards.

4.2. Institutional Matters

Competition regimes around the world and their features vary in many respects, from the substantive principles ensuring the foundation of their rationale to the procedural rules ensuring their application. Basically, when dealing with merger control, there are several ways of approaching the issue from a regulatory point of view:

- *Laissez-faire* - doing nothing, i.e. no anti-trust prohibition, no penalties imposed by the authorities;
- *Ex-ante* regime of authorization - the competition authority assesses the transaction from a competitive point of view only and clears it or blocks it depending on the effects the transaction will produce on competition;
- *Ex-post* administrative regime - the competition authority analyses whether competition has been restrained and whether the restrain is illegal;
- *Ex-post* judiciary regime - firms restraining competition can be sued before the judiciary by affected business firms and consumers;
- *Ex-post* strict liability regime - parties affected by the transaction can sue the causing firms in tort law, civil law or criminal law processes.

This enumeration is not rigid though, as it is a common phenomenon to combine these methods amongst themselves while setting up a comprehensive competition policy. Competition policies may allow for such innovative approaches which are most common for the last three options of the enumeration. What interests us at this specific point of our research, is whether the choice is influenced at all by institutional setup matters. Does the institutional design and / or the constitutional principles of a given entity influence the choice of the merger control tool at all? And if so, to what extent is this influence relevant?

It was contended that what is important when opting for one of the approaches above is

the entity's institutional strength (Borrell, 2005) and also the market players' force to counterbalance this strength. According to this theory, in a society with very weak institutions, firms restraining competition can subvert any anti-trust legislation and will employ resources to do so. Thus, it is argued that in such a situation it is better not to have any competition control regime at all and allow the market to regulate the competition level by itself. This is a strong "Chicago-oriented approach" which as discussed in a previous chapter has no practical basis at EU level at all, since the *laissez-faire* approach has been ruled out from the very origin of the European integration phenomenon. Moving on with the argument, at a moderate level of institutional weakness, with moderate costs for firms to subvert the law, an *ex-ante* authorisation regime may be more adequate. The flipside of this assertion would be that for an entity with highly developed and strong institutions that make it costly for firms to subvert competition law, an *ex-post* administrative or judiciary regime would be optimal. And this is because the competition authority can afford to tackle the market players' anticompetitive behaviour (behaviour that may entail serious costs on the firms' behalf) based on hard, perceivable evidence and not on predictions.

It is extremely difficult if not impossible to argue upon the strength or weakness of the EU institutional design. Furthermore, it is not the goal of this contribution to label whether institutionally the EU bodies rise up to a certain standard of strength and efficacy. Again, this is in no way meant to find the needle in the hay stack, despite the fact that within this contribution several critiques to the functioning of the European Merger Control System found their place. After all, having behind us twenty years of *ex-ante* merger control it seems difficult to argue that in 1989 the European Community institutional design acknowledged its weaknesses and chose to switch to a different merger control regime only due to institutional circumstances. Accepting such an approach would severely undermine the credibility of the current *ex-ante* system.

The theory above, whether or not suitable for the European example still opens up interesting debates from two perspectives: first of all, with regard to the issue of counter-balancing the institutional strength of the EU, issue that European undertakings may attempt to address, and second of all with regard to the matter of policy formulation / regulation. Both these debates tie themselves together around the goals of competition policy on one hand and merger control on the other hand.

4.3. Counterbalancing Institutional Strength and the Means to Address This Issue

The institutional theory described above has to be viewed in a larger frame of events and objectives. Of course, the institutional design is important as it relates to the institutions' force or capacity to efficiently cope with the challenges raised by the process of achieving their goals: in this case we are talking about maintaining an equal, fair, clean and undistorted competitive environment within the EU. This necessarily entails proportionality and fairness of action, which may be translated as follows:

- Not imposing unnecessary costs to companies when dealing with the competition authorities;
- Achieving the goals of the EC Treaty through the most appropriate means

available.

In this respect a balance between achieving the goals of competition policy and the means employed to do this has to be observed. If achieving the goals of maintaining an undistorted competitive environment requires detecting anti-competitive behaviour at an early stage, so as to avoid severe damage to the market functioning, the *ex-ante* approach must not necessarily be perceived as an indicative of weak institutional setup. On the contrary, the situation may be interpreted as efficiently addressing market events and, at least from the institutional / regulatory perspective this approach was most likely perceived as a non-excessive measure.

The issue may be taken one step further, as the switch from *ex-post* to *ex-ante* control should be viewed not only in the light of competition policy goals, but also, in the light of the higher goals of societal welfare meant to be achieved through the market integration process / the 1992 Single Market Programme, given the already postulated ultimate origins of competition and merger control in Europe[106]. One of the principal declared goals of the Single Market Programme was to enhance competition. By opening up borders for players of other Member States, entry is facilitated. This was though to have the effect of enhancing competition in those markets that are opened to foreign players. Successful companies can grow to their optimal size and also easier leverage their success into other markets than their domestic one, thereby increasing the incentives to compete and to innovate. Whether these projections came out to be true or not does not constitute the object of this analysis. What has to be kept in mind is the reaction that companies had towards this elimination of borders phenomenon; and more importantly the European institutions' perception of the undertakings' reaction.

Facing less obstacles to become "more internationalized" companies may have perceived the European challenge as an advantageous opportunity to increase their size or for wealth enhancement. A situation as such may often conflict with the European institutions' perception of issues such as optimal company size and workable competitive environment. In other words, enabling companies to reach sizes large enough to allow attaining dominance was never amongst the desires of the Commission. This is where one of the Commission's worries regarding the proper market functioning could have originated: the Commission might have been fearing that this firm growth phenomenon will extend beyond its optimal limits resulting in large and difficult to control monopolies. This issue needed to be effectively dealt with so that situations of severe market damage will not occur. It is probably in this context that Brussels aimed at being cautious enough not to allow the balance of strengths to be tipped towards the market players' side. It is here that we find appropriate to make reference to the public vs. private interests relationship discussed in the previous chapter where we provided that the relationship between these two sides was characterized by both support and by fear that other actors may pose a threat to the realization of private desires. Consequently, it was most likely thought that timely intervention should be the most appropriate means to address the issue of firm growth through concentrations. Thus, instituting an *ex-ante* concentration control system, Brussels apparently hoped for two things: firstly, detect any

[106] See the pyramid model as explained in the previous chapter.

potentially market obstructive behaviour from its foundations and secondly, maintain a workable power balance in which the European institutions are less likely not to end up on top of things.

Furthermore, legal certainty was one matter that needed to be connected to the power issue discussed above. And this is because if firms will be prevented from achieving larger sizes, they should at least know what to expect when their actions will be scrutinized. To this end, the *ex-ante* model opted for by the European regulators brought about the "one-stop-shop" concept. The regulation's single "stop" concept was meant to simplify administrative procedures and enable businesses to minimize the costs of restructuring in a single market. It aimed at creating a level-playing-field by ensuring that the same notification requirements, procedure and legal standard apply to all concentrations with a Community dimension. Last but not least, the "one-stop-shop" principle sought to ensure the market players that one single unitary regime will be applied to their concentration transaction and once the transaction's scrutiny results in a clearance decision, no other challenges as to the substance of the transaction will occur. This translates in increased legal certainty and higher room of manoeuvre for European undertakings.

4.4. Regulating Competition

One important aspect which should not be overlooked in the context of the *ex-ante / ex-post* discussion is the competition / regulation relationship for the purpose of merger control. The literature on the topic is rather extensive and although it is besides the core objective of this contribution to investigate in great detail the intricacies of the competition / regulation debate, it is worth summarizing, from a merger control perspective, the key issues which dominate the doctrine in this respect. The main approach refers to the fact that 'regulation'[107], whether widely or narrowly defined, cannot be kept isolated when discussing regulation and competition. Rather, it should always be viewed in its context. To this end, one important question that may be posed is if a coherent system might be built in which regulation and competition comprise a single body of rules with similar aims or objectives, even if the tools employed to achieve these objectives are different; a follow-up query may investigate how these two concepts might remain as two independent systems coexisting, acting or interacting in coherence. Of course the answers to these questions are far from being straightforward as the features defining the relationship between these two concepts are extremely diverse. What can be asserted is that competition and regulation do intertwine and their relationship can at best be assessed based on criteria such as the time at which regulatory or competition law obligations are applied, the form used to express the obligations, the effect that these obligations have in the market, their degree of precision, the objectives they pursue, etc. At this point we may affirm that competition and regulation can indeed cohabitate under the same roof aiming for unitary goals. The best example to support this assertion would be a return to the pyramid model according to which, different elements, either regulatory

[107] The meaning attached to the concept of regulation may differ from one legal tradition to another (English, Latin, etc). For further details, see: Moneger, Joel, *Competition, Regulation and System Coherence* in Ullrich, 2006, p. 275-276.

in nature or competition oriented / related occur at different levels of the scale, in order to fulfill the same goals, but approaching the issue from different perspectives and focusing on different specific fields.

What interests us here is the first criteria enunciated above: the time when regulatory or competition obligations are applied. To this end, the doctrine[108] generally presented competition law as being applied *ex-post facto* whereas regulation involves intervention *ex-ante*[109]. Are there any exceptions to this rule? The answer is an affirmative one[110], and this is where the discussion may be placed in 'merger control terms'. As exhibited in Regulations 4064/89 and 139/2004, merger control takes the shape of *ex-ante* control. The main question here is why merger control, a classic competition tool, switched to *ex-ante* once regulation was introduced? The arguments are diverse and we will try to summarize them in the following paragraphs.

First, as postulated before, in chapter 3 of this contribution, one has to observe the dual function that merger control serves: on one hand it works towards the end of attaining the highest degree possible of consumer welfare. On the other hand, merger control has to be viewed within the wider frame of European integration which aims at fulfilling the ultimate goal of societal welfare.

Second, one striking assertion which is scattered throughout the relevant literature is that regulation seems to appear where the market is not working to offer an efficient allocation of resources (Kahn, 1970, Nihoul, 1998-1999). In other words, regulation emerges when competition cannot get the job done. What is stated in the Preamble to the Regulation 4064/89, namely "Articles 85 / 81 and 86 / 82 ... are not ... sufficient to control all operations which may prove to be incompatible with the system of undistorted competition" (par. 6), comes to validate the assertion above.

Furthermore, competition pursues economic objectives whereas regulation deals with other diverse goals. However, it is not uncommon, especially in the past few decades, to witness situations where competition policy has been applied to support a broad range of objectives which go beyond economic efficiency and consumer welfare. Many examples may be provided in this respect, but the most relevant for the purpose of the discussion is the one referring to employing competition policy for the purpose of achieving societal welfare at European level[111].

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[108] See, for example Nihoul, P., *Comment: The Opposition between Competition and Regulation – Some Nuances*, in Ullrich, 2006, p. 301.

[109] The most common examples in this respect are the following: an *ex-post* Commission investigation of a dominant position abuse based on Article 82 of the EC Treaty (competition) and the directives adopted by the EU Council and the European Parliament, regulating in an *ex-ante* manner the electronic communication sector (regulation).

[110] The fact that regulation may work as *ex-post* just as much as competition law may work *ex-ante* proves the complex nature of their relation.

[111] Other examples of employing competition policy for the purpose of achieving other varied goals may be the French example of having competition policy serve for achieving of domestic industrial policy goals. See also the 'failing firm defense' theory, as well as the practical example of the European Commission decision in the *Ford / Volkswagen* case, Decision 93/49/EEC, case IV/33.814, OJ 1992 L20/22.

Having regard to the three arguments above, namely:

- Viewing merger control as serving both consumer welfare and societal welfare;
- The insufficiency of classic competition tools to achieve certain set objectives;
- Employing competition / merger control policy for achieving diverse goals,

and observing these given issues through the lens of the competition / regulation debate, one may assert the following: by regulating the M&A phenomenon in Europe through the enactment of the merger control policy Brussels most likely aimed at injecting more competition in the market through regulation, while wishing to allow firms to grow to their optimal size, however avoiding the likelihood of this size threshold being exceeded and, at the same time, maintaining the endeavour to achieve the higher Community goals to a realistic standard.

Why did Brussels consider *ex-ante* regulation fitter than the *ex-post* competition approach? First of all, as stated before, the *ex-ante* method amounts to an assertion of power on the Commission's behalf: if firms long for growth by acquisition they must pass through Brussels' scrutiny. Second of all, grounding this stance in theoretical / doctrinal support one may detect the following main differences between the functioning of competition and regulation:

- While competition, in dealing with market power, addresses issues in the context where firms operate and aims at ensuring a proper market functioning through rather indirect methods, regulation addresses direct instructions to firms. In other words, regulation does not address the context but instead directly addresses the market players encouraging them to merge while maintaining the competitive market environment.
- Competition obligations traditionally have a negative form. In other words, firms are required not to behave in certain specific ways (e.g. do not coordinate market practices, do not abuse a dominant position, do not tie contracts, etc). By contrast, regulatory obligations are set to have a positive formulation.
- While competition prescriptions may normally seem general and vague, regulation is most of the times precise and detailed.

To this end, if we are to conceptually assess the 'prior 1989 approach merger control', one may assume that the Commission's rationale was as follows: what better way to

- assert it's power stance
- while providing incentive to reach optimal firm size
- and while preserving the achievement of the goals set in the EC Treaty

than through direct, positive and detailed rather than indirect, negative and general formulation? In this context, the choice for *ex-ante* regulation of the concentration phenomenon may have seemed at the time suitable.

4.5. Procedural Issues Referring to the Legal Certainty, Standard and Burden of Proof

The change may also be connected, however, to a lesser extent, to procedural issues

regarding the functioning of merger control. To be more precise, concepts such as standard of proof and burden of proof are essential elements when it comes down to conferring legal certainty to the market players. And the reason for the high degree of importance conferred to these two legal concepts for the purpose of legal certainty is that the burden and standard of proof reflect certain values inherent in a legal system. These values may be translated in the prevention to the highest extent possible of the occurrence of erroneous decisions being taken.

The concept of legal certainty and consequently the standard and burden of proof may be considered relevant for the purpose of the *ex-post / ex-ante* shift from two perspectives: first, as we will detail in the next paragraphs of this chapter, the *ex-ante* system confers a higher degree of legal certainty, hence the shift could be beneficial for the market players; second, partitioning certain elements of the burden of proof and assigning them to different parties of the merger control proceedings would release the previously fully burdened competition authority from important workload factors, with all the consequences that follow.

Under an *ex-post* control system, as embodied in the application of Articles 81 and 82, the burden of proof lies on the competition authority to prove that anticompetitive behaviour has taken place. The Commission only acted upon discovering obstructions to the competitive exercise on the market, bringing evidence concerning these obstructions.

Under an *ex-ante* method of control the situation seems more intricate. There has been considerable debate as to whether Article 2 of the Merger Control Regulation provides that the burden of proof in EC merger proceedings is equal. That is, if the merging entities have an equally large obligation to show the merger to be lawful as the Commission has to show the merger to be unlawful. Indeed, in its appeal to the ECJ in the *Tetra Laval* case, the Commission complained that the Court of First Instance had applied the provision contrary to its perfectly symmetrical legal requirements. However, the Courts do not support a perfect symmetry as such an approach would not be possible to apply in practice. To the same end, by stipulating that, if the Commission does not make a decision in good time, the concentration must be deemed authorized[112], the Community legislature demonstrates as a matter of fact that it considers that, in the case of uncertainty as to whether or not the transaction is compatible with the Common Market, the interest of the undertakings seeking to create the merger must prevail. The burden of proof thus lies on the Commission to prove that the conditions in Article 2 of the Merger Regulation have been met.

When speaking of the burden of proof, the Commission still acts upon the existence or likelihood of future existence of infringements to competition; however, the premises of these actions may be three-fold:

- infringements relating to the lack of notification of a concentration transaction;
- infringements deducted from the analysis of the facts and details provided upon the mandatory notification of a given transaction;

[112] See Article 10, par. 6 of Regulation 139/2004.

- potential infringements resulting from the predictions undertaken by the Commission with regard to the merger's impact on the market.

In this context, it can be argued that the Commission managed to get at least part of its message across: companies should be more responsible and not attempt to carry on completing obvious anti-competitive transactions. Also, responsibility has to be shown in providing accurate data in the merger notification, in order to avoid unnecessary fines and penalties. After all, according to Article 14 of the Merger Control Regulation, the parties have to provide complete, accurate and non-misleading information in a submission, certification, notification or supplement thereto. Given that the starting point of the investigation is the actual notification, the Commission has to verify whether the information provided in the notification is genuine and accurate. One would think that this situation is more burdensome for the Commission than the one embedded in the *ex-post* system. However, issues such as efficiencies and commitments have to be argued and proved by the parties involved. And this counts a great deal, given that efficiency defences and structural and behavioural commitments are options that firms never overlook.

Several consequences flow from the assertions above. With regard to the Commission's status, one cannot help but notice the position it exhibited once the switch from the *ex-post* to the *ex-ante* method was operated. First, the Commission aimed at ceasing to be the full-time watchdog of the competition process in the Common Market. Second, by trying to balance the distribution of the burden of proof, the Commission aimed at removing a considerable part of the costs and burdens that supporting evidence with regard to the existence of illegal behaviour incurs, from the Commission to the undertakings involved.

To sum up, when it comes down to the aspects regarding the burden of proof one can only speculate what were the Commission's intentions in connection to the *ex-post / ex-ante* shift. Of course the Commission could have longed for a more comfortable position when dealing with concentration assessments. And to a certain extent it managed to remove some of the burdens. However, the procedural aspects sketched above cannot justify by themselves only, a smoother, speedier and more efficient achievement of the immediate and long term goals of merger control. After all, both the *ex-ante* and *ex-post* methods embody specific means of achieving these goals and the procedural aspects regarding the burden of proof, although more conveniently (for the Commission) designed under the *ex-ante* method, do not determinatively influence the achievement of consumer / societal welfare.

5. Should We Still Be Concerned with the Application of Articles 81 and 82 of the EC Treaty to Concentration Transactions?

An interesting theoretical question, which the European Courts System may one day have to rule upon, is whether the *ex-ante* application of the Merger Control Regulation has deprived current Articles 81 and 82 of their direct effect in relation to concentrations (Whish, 2001, p. 738). In other words, does the application of *ex-ante* control totally

exclude the use of the *ex-post* control as embodied in these Treaty articles?

By virtue of the direct effect of the provisions of these two articles, legal and natural persons should be able to rely upon these provisions in order to initiate proceedings opposing concentrations before national courts. Thus, it may be argued that it should theoretically be possible for a national court to apply the above mentioned articles to a concentration transaction, even when that concentration is or has been under review by the Commission (Van Bael, Bellis, 1994, p. 430-431). This especially since the Merger Control Regulation does not contain any explicit provisions to the contrary. However, under the current legal framework, except in certain isolated situations, it may be argued that Articles 81 and 82 do not constitute fruitful legal basis for proceedings brought before national courts by parties seeking to delay hostile takeovers or other different types of concentrations; and this is because Articles 81 and 82 are not meant to simply bypass in any given situation the application of merger control specific rules contained in the Merger Control Regulation; furthermore, one should not overlook the fact that all the Member States apply domestic legal provisions regarding merger control. Second of all, if one chooses to overlook these substantive limitations, the practice of national courts in proceedings involving transactions under parallel review by the Commission (if such a situation may occur in practice) should be taken into account; in situations as such, the national courts tend to stay the proceedings pending completion of the Commission's review. The flipside of this situation would amount to a widely open door to companies opposing a concentration transaction for obstructive practices.

To this end, it can be argued that once the Merger Control Regulation has been adopted, the practical utility of applying Articles 81 and 82 to concentration transaction has been considerably reduced although not necessarily excluded.

In accordance with Article 84 (previously 88) of the EC Treaty, the national authorities are required to rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the Common Market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82. However, Article 84 may only be relied upon in the absence of implementing legislation adopted pursuant to Article 83 of the EC Treaty[113]. In case the Merger Control Regulation may be deemed to constitute such implementing legislation for the purposes of applying Articles 81 and 82 to mergers, it may be argued that the national authorities do not, therefore, retain any residual authority to apply Articles 81 and 82 of the EC Treaty to concentration transactions, both with, and without a Community dimension (Van Bael, Bellis, 1994, p. 430-431, Levitt, 1993). It may be doubtful however that the Merger Control Regulation constitutes implementing legislation as provided above, for the following reasons:

- The Regulation's test of a concentration's compatibility with the market goes well beyond and is substantially different from the test contained in Article 86 / 82 of the EC Treaty;

[113] Article 83, par. 1 of the EC Treaty states the following: The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

- If the Regulation were implementing legislation, qualified majority voting procedure would have been sufficient instead of the unanimity sought for. Thus, the Regulation could have been adopted much earlier;
- Regulation 4064/89 was adopted based on Article 87 and principally on Article 235 of the EC Treaty.

Further on, technically speaking, Regulation 4064/89 did not preclude *per se* the application of Articles 85 / 81 and 86 / 82 of the EC Treaty. What it did by Article 22, par. 2 is merely to dis-apply Regulation 17, 1017/68[114], 4056/86[115] and 3975/87[116], which gave the Commission powers to enforce and implement Articles 85 / 81 and 86 / 82 (the direct effect of whose provisions remained intact) in respect of concentrations. It was probably in this respect believed that the national authorities do not retain any residual authority to apply Articles 81 and 82 of the EC Treaty to concentration transactions, as dis-applying these regulations, should have led to a deterrence of direct actions in national courts.

Challenges on the basis of Articles 81 and 82 of the EC Treaty may still arise where a target company or a third party has sufficient interest in the concentration to have *locus standi*, especially if the concentration falls below the Community dimension threshold. For example, a challenge under Article 82 of the EC Treaty may arise on the basis that the merger itself constitutes an abuse, or as a weapon used by a party seeking to oppose a merger, or as a damages action filed by an injured third party, following an abusive merger, while challenges under Article 81 of the EC Treaty may arise especially in the area of restrictions ancillary to concentration, such as non-competition clauses, supply agreements, etc and also with regard to partial-function joint ventures, spill-over effects of full-function joint ventures and minority shareholdings which do not confer control.

Last but not least, according to Article 85 (previously 89) of the EC Treaty, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. Furthermore, with regard to concentrations without a Community dimension, the danger of a possible legal vacuum in the event of Member State inactivity with regard to this type of transactions pushed the Commission towards reserving its right to intervene, according to Article 85 (previously 89) of the EC Treaty. Indeed, the Commission could resort to the provisions of this Treaty article in situations where relevant national authorities may fail to take what the Commission judges to be an

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[114] *Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway*, OJ L 175, 23.7.1968.

[115] *Council Regulation (EEC) No 4056/86 of 22 December 1986, laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport*, OJ L 378, 31.12.1986

[116] *Council Regulation (EEC) No 3975/87 of 14 December 1987, laying down the procedure for the application of the rules on competition to undertakings in the air transport sector*, OJ L 374, 31.12.1987, as amended by *Council Regulation (EEC) No 1284/91 of 14 May 1991*, OJ L 122, 17.5.1991 and *Council Regulation (EEC) No 2410/92 of 23 July 1992*, OJ L 240, 24.8.1992.

appropriate action against a concentration without a Community dimension[117]. However, since the terms of such an involvement tend to amount more as a self-denying of competence with regard to concentrations without a Community dimension, the national courts may still be the authorities indirectly entrusted with enforcing the Community law in this respect (Van Bael, Bellis, 1994, p. 432, Elland, 1990, p. 27).

To sum up, under the current *ex-ante* regime and given the current institutional and regulatory circumstances, the possibility of a joint application of the Merger Control regulation and Articles 81 and 82 of the EC Treaty, although existent, was regarded as undesirable due to the confuse expectations it would have created on the part of the companies involved in a merger.

Still, the previous paragraphs and especially the mention of the current Article 85 of the EC Treaty may lead to the question whether or not *ex-ante* and *ex-post* control of concentration transactions may cohabitate under the same roof; is there a possibility to apply both *ex-ante* and *ex-post* control to one and the same transaction? And furthermore could this be done while employing one and the same legal basis? Is a solution as such a workable option in order to better fulfil the goals of merger control? These are questions of fundamental importance that will be discussed in the following parts of this contribution.

6. The Functions of Merger Control

As the topic at hand may entail challenging discussions and controversies, below we will aim at assessing the *ex-ante* and *ex-post* methods'[118] functionality revealing their defining features, strengths and weaknesses. A simple exercise employing the merger control functions enumerated a few paragraphs above reveals a number of limitations of both of the approaches, which may find their remedies under the opposite technique. We will further deal with the problems raised by, and state the case of both the *ex-ante* and the *ex-post* approaches. One observation is highly important before running through this exercise though, as it relates to the fact that these functions are interconnected in between themselves. Their roles often intertwine and their practical application may overlap. As we will see below, the realization of one of the functions sometimes conditions the fulfilment of another, or enables the proper apprehension of different other functions.

6.1. The Disciplinary Function

A merger control policy should have the means to discipline the market and to ensure a

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[117] See the *Joint Policy Statement issued by the Council and the Commission*, 1990, 4 CMLR 314 *(Nineteenth Report on Competition Policy)* and the previous experience encountered in the air transport sector in cases such as: *Ministere Public v. Asjes & Ors*, 1986, ECR 1425.

[118] As embodied in the Merger Control Regulation (4064/89 and 139/2004) and in Articles 81 and 82 of the EC Treaty, respectively. For the purpose of the following paragraphs, where a distinction between the *ex-ante* method contained in Regulation 4064/89 and the *ex-ante* method contained in Regulation 139/2004 is necessary in the context of the analysis, it will be specifically provided for. In any other case, when referring to the *ex-ante* technique, it should be understood as referring to the tools contained both in the old and new Merger Control Regulation.

fair and equal environment in which the market actors can operate. Fair and equal environment should be the key terms in the previous statement. An open and transparent market as the European market tends to be should allow equal chances to all the undertakings to act on the market and to draw the legit benefits from performing their activities. Of course, the Community policies may favour certain undertakings through different methods such as the state aid policies as enclosed in Articles 87 – 89 of the EC Treaty. However, this is not to be interpreted as being at odds with the end of ensuring a fair business environment, as the rationale behind such subsidizing policies takes utter care towards the proportionality of the action taken and the goals to be followed through these policies.

How does market discipline come through one may ask. First, Article 2 of the EC Treaty speaks about high aims such as harmonious, balanced and sustainable development of economic activities, a high degree of competitiveness and convergence of economic performance and economic and social cohesion, etc. Furthermore, paragraph 2 of Article 3 of the EC Treaty urges the Community to eliminate inequalities in applying all the policies designed for the purpose of achieving the Community goals. Second, the European Merger Control Policy as formulated in its main piece of legislation, the Merger Control Regulation, aims at fulfilling these ideals. The endeavour of disciplining the market radiates from the full text of the regulation, also having in mind the societal welfare goal enclosed in the EC Treaty. For example, recital 2 of the Regulation provides that one of the Community's objectives is instituting a system ensuring that competition in the Internal Market is not distorted. Article 4, par. 1 of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the Internal Market. Article 2, par. 1 (a) of the Regulation speaks about the need to maintain and develop effective competition within the Common Market. Furthermore, the substantive test employed by Regulation 139/2004, the "significant impeding of effective competition" test, aims at maintaining a clean and healthy operating environment for businesses (effective competition), tackling all sorts of behaviour which may obstruct the proper working of the market. The rationale behind the disciplinary function of the Merger Control Policy is exactly to afford this clean and healthy operating environment for undertakings in the Common Market.

How is discipline provided for by the *ex-ante* method, on one hand and by the *ex-post* technique, on the other hand? Which one of these methods ensures a more effective degree of discipline?

The *ex-ante* method leaves the impression of robustness whereas all transactions of a certain size must pass the Commission's scrutiny. Furthermore, from a legal certainty point of view, the *ex-ante* technique affords the undertakings involved in, or wishing to pursue a concentration transaction with sufficient knowledge and information. Companies know before they engage in the transaction what to expect; they are aware of the scrutiny process steps, the responsibilities incurred, the penalties applicable in case of not respecting the rules of the game, etc. To sum up, companies find themselves in the comfortable position of knowing how to deal with the process. This ensures the

smoothness of the assessment process. But one should not forget that behind the wish to merge lies most of the times the companies' desire to maximize their output /size, fact which may be detrimental to the market. In this respect, it may be argued that undertakings enjoy a privileged stance of knowing how and what to negotiate for, as well as knowing the expected Commission's reactions. Consequently, it may be hypothetically contended that firms may attempt to find loopholes in the control system and thus potentially have a concentration transaction which in its essence may have potential competition damaging consequences, cleared through intelligent negotiation, strategic divestitures or wisely premeditated commitments offered. Whether the Commission will "bite the bait", it may be argued that the *ex-ante* system is more or less inadequate, portraying the Commission as a dog which barks, but rarely bites[119].

The *ex-post* technique on the other hand, as previously embodied in the application of Articles 81 and 82 of the EC Treaty, functioned in a different manner with respect to the disciplinary function of concentration control. For starters, the *ex-post* technique did not offer the same degree of legal certainty as the *ex-ante* method does; companies were engaging in concentration transactions of varied sizes, without notifying competent competition authorities and most importantly, without having the guarantee that once the transaction is completed and implemented, competition authorities would not step up and challenge the merger. A chain of consequences flows from an approach as such. Undertakings had no knowledge where exactly the dividing line between a transaction that faces no risk to be challenged and a transaction deemed to be challenged lies. Furthermore, they lacked information according to which how much input can they put forward in a transaction, which parts of their businesses should they involve in the transaction, what to divest etc, although informative contacts between the merging companies and the competent authorities could have been initiated. Last but not least, once the transaction was implemented and subsequently challenged, restoring the pre-merger *status quo* constituted most of the times a cumbersome, lengthy and costly process. All in all, when legal certainty is on the agenda, the *ex-post* method of control is to a larger extent deficient.

However, the practical disciplinary efficacy of the *ex-post* control cannot be doubted. Only transactions hampering the proper functioning of the market were challenged. Companies tend to be cautious in acquiring highly evident market power as they were aware that in contrary situations they were facing challenges and consequently potential unwanted operations entailing restoring the level of competition existent prior to their transaction. In other words, normally undertakings stop focusing on finding the gap in the system's functioning in order to acquire more power; instead they have more incentive to direct their attention into merging in a manner compatible with the market's functioning. As simple as it may seem, market discipline is served and the goals of the merger control policy aimed for.

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[119] A complete statistical analysis of the Commission's merger scrutiny activity for the period September 21st, 1990 – July 31st, 2009 may be found at http://ec.europa.eu/competition/mergers/statistics.pdf, as displayed on the 12th of August, 2009. The analysis reveals a total of only 20 transactions blocked based on Article 8 par. 3 of the Merger Control Regulation. See Annex 2 for more details.

To sum up, it may be argued that although providing for a higher degree of legal certainty than the *ex-post* control, the *ex-ante* method, although clearly intending to aim ad disciplining the market, may allow to a higher extent for the possibility of non-disciplined behaviour to occur.

6.2. The Punitive Function

The punitive function refers to the ability of a merger control system to equitably punish the players which, through their behaviour, stifle effective competition or break the rules of the game. In this respect, the manner in which the *ex-ante* and *ex-post* techniques function is rather similar. Failure to comply with the rules set by the substantive and procedural rules coordinating the concentration control process results in fines and periodic penalty payments imposed on the undertakings involved in the transaction[120]. The rationale behind imposing these penalties relates to a certain extent to the disciplinary function discussed above, as the punitive function contains a disciplinary purpose within its nature. Companies illegally merging are "disciplined" accordingly through the application of either the *ex-ante* or *ex-post* techniques; either by not being allowed to merge and compensating the infringements to effective competition brought about by their premature wrongful deeds (*ex-ante*), either by being obliged to de-merge and incur financial penalties (*ex-post*).

Despite the fact that both of the techniques contain a punitive element, it is important to note when this punitive element is deployed and how efficient it is. The timing is crucial: under the *ex-ante* approach the punitive function seems more efficient especially if perceived in conjunction with the preventive function of merger control. To detail, the penalties imposed on the undertakings exhibiting anticompetitive behaviour make sense if the anticompetitive behaviour is detected in due time so as the least damage to the market functioning has occurred. Under the *ex-post* approach, the likelihood that illegal behaviour may have produced irreversible damages to the functioning of the market is higher, also due to the lack of mandatory contacts between the undertakings concerned and the competent competition authorities. In this respect the penalties that will be imposed are meant only to punish the illegal behaviour and not also to repair the irreversible consequences of the concentration. Thus it may be argued that in the case of the *ex-post* control, the punitive function seems to contain a less efficient reparatory element.

6.3. The Educational Function

Merger control rules should be able to confer guidance to the undertakings involved in the market transactions, as to what constitutes legal or illegal behaviour, what the consequences of illegal behaviour are and the manner in which the substantive rules are applied. The way that the problem should be perceived in this respect is two-fold: general purpose guidance addressed to all the players who perform their businesses in the market and case-by-case guidance throughout the assessment of any given concentration transaction.

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[120] See Articles 14 and 15 of Regulation 139/2004.

First, the general purpose guidance provided for the undertakings involved in the market transactions should be properly set, made public and comprehended by undertakings, through informational notices, guidelines, etc. Legal certainty should be the key term in such a discussion, as companies perceive it as extremely important to know what to expect from the Commission. However, it is only fair that companies will try to get the best out of the situation as they can; in other words, they will try to find the loopholes or better yet situations which will allow them to merge in the most profitable circumstances according to their views. Most of the times though these circumstances may be located at the border between what constitute competitive / anti-competitive or welfare-enhancing / welfare-reducing behaviour. In this respect, it is the Commission's task to ensure that negotiations with the undertakings involved may lead only to competitive results.

Therefore, second of all, the educational function of merger control is fulfilled also through the case-by-case negotiations carried on specific transactions. The competition authority is meant to give meaningful advice to the companies involved in the concentration transaction as to what constitutes legal or illegal behaviour and also is supposed to guide the undertakings towards a completing a competitive merger.

Guidance as to what constitutes legal or illegal behaviour can be efficiently conferred through both of the *ex-ante* and *ex-post* techniques through properly set regulations, guidelines, notices, etc. In this respect it will all depend on how comprehensive the provisions of these guidelines / notices are. However, when it boils down to the case-by-case negotiations, the *ex-ante* technique seems to allow for more room regarding the educational function, for the simple reason that once a transaction is notified, it will not be implemented until negotiations and discussions on the features of the given transaction will take place. The Commission has the opportunity to point out what elements of the concentration it regards as anticompetitive or competitive; thus, it can correct and bring the undertakings' actions on the right track should these actions have an illegal character. Under the *ex-post* method of control the competition authority is only left with the possibility of ascertaining the existence of anticompetitive behaviour, and consequently punish the companies accordingly. In circumstances as such, saving whatever part of the transaction could be still rendered as competitive constitutes an aim extremely difficult to achieve.

6.4. The Preventive Function

The merger regulations should be set in such a manner that illegal behaviour is discovered in due time, so as the least harm possible is brought about to the proper market functioning. In this respect, as previewed above, the matter is rather straightforward. The earlier anticompetitive behaviour is detected, the smaller the chance that irreversible damage to the market functioning will occur. Hence, one could argue that the *ex-ante* technique fulfils the preventive function more accurately than the *ex-post* technique; and this is due to the fundamental features of prior notification and suspension of the projected concentration until a decision is reached, both features being mandatory under the *ex-ante* method[121]. The likelihood of damaging consequences to the market to

[121] See Articles 4 and 7 of Regulation 139/2004.

occur is smaller in this case, given that the concentration will not be implemented unless properly modelled (if necessary) and then cleared by the Commission. The only issue debatable in the context of the *ex-ante* method is whether the Commission substantially possesses the proper *ex-ante* mechanisms to assess and model transactions which raise competition concerns. Under the *ex-post* method, the challenges brought by the competition authority may be engaged too late, given that the concentration may have already been implemented and thus potentially irreversible damage to the market functioning may have already taken place. Summing up, prevention by its nature functions more accurately in an *ex-ante* manner, rather than *ex-post*.

7. Efficient Use of Resources

It may be argued that an *ex-ante* approach to merger control could be regarded as inefficient with respect to the drain of resources that it may cause. Too many transactions are investigated, a large percentage of which are cleared, sometimes even without commitments[122]; whereas *ex-post* control would be more efficient in terms of resources consumption as only the transactions which are considered damaging to the competitive environment of the market are tackled.

From this point of view, is it really worth the effort to investigate merger transactions before they are actually implemented, one may ask? One straightforward answer would be yes, because if the aim is to fulfil the goals set by the enactment of the policy, the rules of the game are to be respected. Once one discovers irregularities in the market functioning, the competitive environment distortion is likely to have been caused by illegal / anti-competitive actions. The consequences of these acts may be most of the times irreversible (with respect to the beneficiaries of the policy). Let us take a simple example which may bring clarity to this issue: assuming a concentration leads to a dominant position which is abused by the merged entity. The fine which may be imposed as a sanction for the undertakings' anticompetitive behaviour may not compensate the end consumers or the competitors for the losses they have incurred, nor may it compensate for the economic inefficiencies that such abuse may have caused regarding prices or production. In this respect it can be contended that a properly applied *ex-ante* approach should be able to prevent such anticompetitive behaviour and the consequences that flow from it. As one may say, 'better safe than sorry'. And after all, the 'drain of resources' argument cannot stand, as long as with each decision taken with regard to concentration control, one more step ahead is taken when it comes to building an extensive body of law and jurisprudence that will eventually serve as constantly improved and up-to-date guidance for the behaviour of the legal subjects acting in the market, thus fulfilling the educational function of merger control. On the same note, the *ex-post* regime entails a certain degree of resource consumption as well, owed to the need of sustaining a qualified authority entrusted with monitoring the market behaviour of the players involved. However, the *ex-post* regime may counteract at least in part the resource consumption due to the fact that part of the authority's costs with regard to monitoring the market are incurred by private parties / undertakings which are co-interested in detecting anticompetitive behaviour of their competitors.

[122] For a detailed breakdown of cases involving commitments, see Annex 2.

All in all, let us not forget that the current merger control system in the European Community functions according to the provisions of the subsidiarity principle[123], where a decision is taken by the authority best placed and equipped to deal with a given situation, also for the purpose of avoiding unnecessary resources drains.

8. A Simple Example

Let us take a simple example which will illustrate how the educational, disciplinary, preventive and punitive functions intertwine with each other.

We start with a hypothesis in which two undertakings intend to merge and the end result would be an entity with sufficient market power to raise doubts regarding the transaction's compatibility with the market and consequently to alert the competent competition authority, in our case the European Commission; in other words, we are hypothetically facing a borderline transaction situated somewhere at the dividing line between what constitutes a competitive or anti-competitive transaction. If the merger control policy is coherently formulated and its functionality clearly disclosed through, for example, comprehensive guidelines applied by the competition authority, the undertakings are aware of the problems their transaction may raise.

Under an *ex-ante* approach, these companies would know what to expect and know how to negotiate their transaction with the Commission. Whether they will "say" what the Commission wants to "hear" the merger is likely to be cleared pending on certain commitments / undertakings. In a situation as such it may be argued that legal certainty is provided for. However, the predictability of the competition authority's approach may leave room for detrimental effects on the market to arise, pending on how satisfying the undertakings' "promises" are. In this respect, although we may be faced with an impression of discipline, behaviour infringing the proper functioning of the market may be present. Should we assume that the merger will be cleared, the preventive and punitive functions of merger control will not be served; to be more precise, potential detrimental behaviour to the market functioning was not detected in time and since the merger was cleared, the companies will not be "punished" through fines or penalties.

Given the same starting ground, the *ex-post* technique would function slightly different. Assuming guidelines exist and are taken into account, the impression of legal certainty is created. However, as already stated, the dividing line between what constitutes an acceptable / clearable concentration and a concentration that will normally be blocked may be rather unclear. In this respect, due to the lack of notification requirement under the *ex-post* approach, companies are uncertain how they can better "advertise" their concentration project. The educational function is therefore lacking to a certain extent. Let us assume that the two merging undertakings decide to go "all in", namely merging

[123] The subsidiarity principle is enclosed in Article 5 of the EC Treaty which states the following: In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

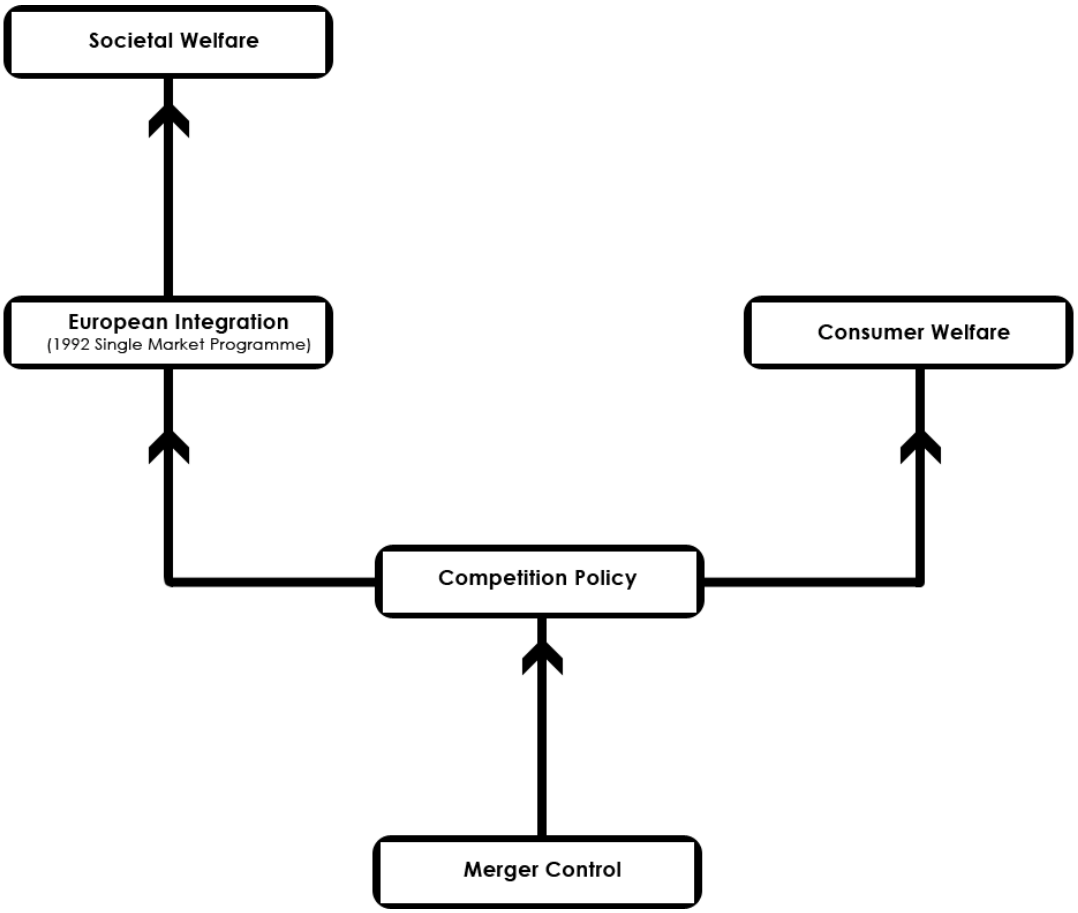
without planning any divestitures or without planning for a failsafe plan, hoping for the best. Once the merger is completed, the Commission will engage its competence if post-merger infringements to the proper functioning of the market are detected. The urgency that the Commission exhibits throughout its intervention can be crucial to the development of the events. To elaborate, the quicker the competition authority operates, the smaller are the chances of anti-competitive effects of the assuming already implemented merger to occur. However, once the concentration has been implemented, at least some of its consequences may be irreversible. In this respect, the preventive function of the *ex-post* method of control has not been asserted coherently, as the irreversible consequences of the concentration were not detected in due time. If this is the case, the companies involved in the transaction will have to suffer penalties / fines which may compensate up to a certain point the damages created in the market, according to the punitive purpose of the merger control. Summing up this hypothesis, the disciplinary function will be fulfilled, however, at the cost of the irreparable damage caused to the proper market functioning.

The example above aimed at briefly revealing how the *ex-ante* and *ex-post* approaches handle a typical concentration transaction. As portrayed above, both of these techniques sufficiently serve some of the functions that merger control should carry out, while also running short on some of the others. There are two interesting issues to notice and investigate: first of all, one may spot out how these two techniques complement each other. Where the *ex-ante* approach seems rather fragile, the *ex-post* method may compensate and *vice versa*. The question which naturally follows is: could these two approaches be accommodated within the same policy in order to fulfil each other's gaps? Could there be a solution to substantively apply both of these techniques to any given concentration transaction? We will tackle this question in chapter 6 of this contribution. Second of all, after we have seen how these methods function one more essential inquiry may be posed: how do these approaches individually enable the most efficient realization of the ultimate goals of the European Merger Control System (consumer welfare / societal welfare)? Is there a better solution out there to more efficiently permit the achievement of these goals and if so, which one would this solution be?

9. Which Method of Control (*Ex-ante* or *Ex-post*) Best Serves the Purpose of Achieving Consumer / Societal Welfare? Concluding Remarks

The functions of merger control as described above have to be viewed in two different frameworks / perspectives: the role that merger control fulfils within the European Competition Policy, on one hand and the goal that merger control serves in the wider frame of European integration. Merger control is commonly regarded as one of the pillars of the European competition policy and to this end serves towards the end of attaining the highest degree possible of consumer welfare. Still, as postulated in the previous chapter of this contribution, merger control, as part of the European Competition Policy has to be viewed within the wider frame of European integration which aims at fulfilling the ultimate goal of societal welfare. If the simple example provided in the previous paragraph of this chapter is essentially thought in the context of consumer welfare, it is imperative to observe the merger control phenomenon within both frameworks. To

clarify things, the scheme below observes the pyramid model provided in the previous chapter from both (consumer / societal welfare) perspectives.



Having in mind the dual purpose that merger control serves, it is now time to draw the lines together. In the next few lines, we will summarize our arguments so far concerning the *ex-post* / *ex-ante* debate and will attempt to assess, which one of the two methods of control serves best the purpose of achieving consumer welfare, on one hand and societal welfare, on the other hand.

	Ex-Ante Method of Merger Control	***Ex-Post Method of Merger Control***
Market Discipline and Security	- Strong theoretical approach, aiming at ensuring that the principle of an open market economy with free competition is respected; however the system may be flawed in certain respects from a practical perspective - Efficient preventive and / or reparatory approach if applied within the correct timeframe	- Robust practical approach, based on hard, 'palpable' evidence; only transactions which are considered damaging to the competitive environment of the market are tackled - The likelihood that illegal behaviour may have produced irreversible damages to the functioning of the market is high

Legal Certainty	- Market players are well informed of the general purpose guidance rules of the market - Possibility of fruitful case-by-case negotiations - Provides a high degree of legal certainty	- Market players are well informed of the general purpose guidance rules of the market - Lack of sufficient case-by-case information / procedural knowledge for market players - Provides a lower degree of legal certainty
Efficient Use of Resources	- Cautious approach: 'better safe than sorry' - Debate on the efficiency of resource consumption - The benefits of the subsidiarity principle - Solid contribution to the development of a solid merger control body of law, yet scarce and indirect achievement of results	- Lower however, not inconsiderable resource consumption; still, resources are efficiently used - More evident, direct and tangible results

Let us now approach the problem from a different perspective, namely the dual set of goals – consumer and societal welfare. It has to be observed that while consumer welfare is the main task entrusted to competition policy, the achievement of societal welfare constitutes a more remote goal, the realization of which depends on the proper functioning of considerably more diverse elements (the European industrial, agricultural, commercial, social policies, etc) than only competition circumstances, acts and facts.

As we have seen in the previous chapter of this contribution, societal welfare refers to a certain extent to the overall welfare of society. With sufficiently strong assumptions, it can be specified as the summation of the welfare of all the individuals in the society. To this end, it may be said that it all boils down to economic efficiency and wealth distribution. Within the European context, societal welfare is translated as clearly as possible in Article 2 of the EC Treaty.

The consumer welfare concept is narrower and refers to the individual benefits derived from the consumption of goods and services. The range which this concept reaches extends so far as individual consumers are concerned with goods / services quality and / or corroborate with prices charged. In other words, while societal welfare takes into account a wider set of subjects and circumstances, consumer welfare directs its focus mainly on consumer aspects.

How do we place these features in merger control semantics? What needs to be established is the extent to which the prior and the post methods of merger control will ensure appropriate attainment of the desiderates listed in Article 2 of the EC Treaty and will protect the consumer from the detrimental effects of market events.

	Consumer Welfare	***Societal Welfare***
Ex-Ante Merger Control	*Pros:* - Incentive for companies to compete - Timely detection of market disturbances - The SIEC test (Reg. 139/2004) - Possibility of corrections to a partially anticompetitive operation, efficiency defence after 2004 *Cons:* - Reliance on predictions and contestable tests and tools during concentration assessments - Lack of *ex-post* monitoring - Flaws of the dominance test - Intransparency of scrutiny	*Pros:* - Market integration orientation - Encouragement to (cross-border) merge and produce efficiencies - Efficiencies, emphasis on technological progress, innovation, etc. *Cons:* - Improper coverage of market transactions under the dominance test
Ex-Post Merger Control	*Pros:* - Procedural conduct and assessment / appraisal based on facts *Cons:* - Flaws of the dominance test - Lack of efficiency defence and commitments / undertakings - Lower legal certainty - The 'price umbrella' effect[124]	*Pros:* - Efficient use of resources - Efficiency of action *Cons:* - Weaker incentive to merge - Lack of market integration oriented incentives / mechanisms

The contents of the table above call for a more comprehensive analysis; the arguments provided in its support portray the *ex-ante* method of control as being somehow (not in a fully irrefutable manner) more appropriate for fulfilling the societal welfare goal. This should be understood in the sense that the features offered by the *ex-ante* approach, corroborated with the environment and circumstances it is applied in (such as increased incentive to merge and cross borders) exhibits a greater opening towards the integration goal. Furthermore, the new tools and institutions developed throughout time alongside this method of control seem rather eye-catchy as far as consumer welfare is concerned. However, from this point of view, things may not be as they seem, as one cannot help but notice flaws in its practical application. One of the most troublesome of these concerns leads inevitably to the question: is the Commission able to efficiently predict the competitive or anti-competitive outcome of a given concentration, making use of its current tools and economic analysis mechanisms? We will not insist on this question at this point, as it will constitute the object of the next chapter of this contribution.

[124] A "price umbrella" is an effect that may be created by a dominant company, in which competing firms can find buyers as long as they charge at or below the level of the dominant one, assuming that their products or services are not inferior to the dominant firm's products / services..

Where does the *ex-post* method stand in this equation? From a consumer welfare standpoint, the *ex-post* mechanism holds its ground. Efficiency of the scrutiny process is difficult to doubt, as action is taken upon facts, palpable evidence as opposed to the *ex-ante* method which works on predictions on how the market will function post merger. However, it may be argued that although practically efficient, the *ex-post* method still has its limits when it comes down to the variety of transactions covered and the legal certainty conferred to the economic operators. What may be asserted, on the other hand, is that the *ex-post* method does not seem to have been designed specifically with a view of attaining societal welfare. The *ex-post* method does not, in its essence, contain a specific, dedicated plan of action for achieving societal welfare; it does not exhibit the opening for tools and instruments such as incentive to merge, market integration etc. which are concepts designed with a view of attaining societal welfare. However, this does not necessarily mean that the *ex-post* system does not allow for the achievement of societal welfare. The above assertions are to be read in the sense that the goal of societal welfare may be realistically attained as discussed in the above paragraphs[125], however through rather indirect channels which are not necessarily designed specifically for that purpose.

A provisional assumption may be made at this point, based on the above assertions. It may seem that Brussels, while adopting the switch from *ex-post* to *ex-ante* control opted for a conceptual trade-off or compromise with regard to the goals to be followed through the merger control policy. Of course, consumer welfare constituted an objective that cannot be abandoned as long as merger control is to be regarded as a part of the Community Competition Policy. However, Brussels chose to trade a rather cost-efficient and workable, although not sufficiently comprehensive merger control tool for a control mechanism which does not differ in its essence[126] and also had its flaws, but most importantly brings about one important construction: for the purpose of achieving the societal welfare goal, a mechanism specifically incorporated into a wide, but coherent market integration plan was brought about, aiming to facilitate in a clearer manner the attainment of this goal. The key word here is coherence: the merger control mechanism, although kept on the basis of the dominance concept, needed to be fine-tuned so as to fit the overall picture of the market integration programme which was meant to entail more opportunities and freedom of action for the market players. We draw the attention in this context to the discussion provided in paragraph 4, and especially subparagraph 4.2 of this chapter, where we have explained that the *ex-ante* method was regarded as a sort of a 'must' when it comes down to balancing the power scale between economic operators eager to increase their size and the authorities' endeavour to keep a proper competitive environment. To place it in lay terms, Brussels may have reasoned to the extent of not allowing the Community undertakings to 'bite the hand that feeds them'.

It follows that the European regulators may seem to have not necessarily neglected the consumer welfare goal dealt with in merger control terms, but certainly downgraded its

[125] See, for example, the section on the disciplinary function of merger control.

[126] After all, the same concept of dominance was kept in the assessment test under Regulation 4064/89, concept which points out to the notion of dominance as used in the context of the application of Article 82 to concentration assessment.

priority of fulfilment, so as the societal welfare goal was viewed as the highest desideratum. It is only after fifteen years of *ex-ante* control that a more comprehensive assessment mechanism with a wider reach when it comes to the types of transactions covered (the SIEC substantive test) has been enacted signalling that indeed, the consumer welfare desideratum has not been neglected.

Chapter 5

Is the Commission Able to Properly Predict the Competitive or Anti-Competitive Outcome of a Given Concentration Using the Current (*Ex-ante*) Approach?

While better evidence is always desirable, refining or raising the standard of proof in merger cases glosses over a second difficulty – that often the results of a merger are not susceptible to proof one way or another. (Howarth, 2005)

1. Introduction

Recital 23 of Regulation 139/2004 provides that it is necessary to establish whether or not concentrations with a Community dimension are compatible with the Common Market in terms of the need to maintain and develop effective competition in the Common Market. In doing so, the Commission must place its concentration appraisals within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the EC Treaty and Article G of the EU Treaty[127]. The contents of the recital mentioned above not only emphasize the importance that the desideratum of fulfilling the goal of societal welfare bears on the functionality of the Merger Control Regulation, but also, read in conjunction with Article 2 of the Regulation 139/2004, draw the general lines in which the Commission's concentration appraisal should unfold. Article 2, par. 1 of the Merger Control Regulation provides that the concentration appraisal should be pursued in accordance with the objectives of the regulation (*both societal and consumer welfare*) and taking into account the following factors: the need to maintain and develop effective competition within the Common Market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community; the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

If these are the general guiding factors which the Commission takes into account while appraising a concentration transaction, one observation stems out: the features above refer either to past events, present status of the concentrating parties / market structure or future likely events / undertakings' behaviour. What interests us in the context of this chapter is not necessarily an assessment of these features, as they have been extensively dealt with from different perspectives in the existing literature[128]. At this point we are interested in observing the sufficiency that the results these features and the tools employed in their application lead to, in meeting the necessary requirements for a concentration to be blocked / cleared. In other words, we turn to one of the questions left open in the previous chapter of this contribution which revolves around the issue whether the Commission, under the *ex-ante* system, is able to sufficiently / appropriately predict the competitive or anti-competitive outcome of a given concentration, making use of its current tools and economic analysis mechanisms? As a benchmark of comparison it may seem handy to place the *ex-ante* and *ex-post* systems of control one next to another and observe which of the two systems reveals a closer image of what is regarded as meeting

[127] Article G of the EU Treaty states the following: The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

[128] See Navarro, Font, Folguera, Briones, 2005, Faull, Nikpay, 1999, Cook & Kerse, 2000.

the necessary requirements for a concentration to be blocked / cleared, on one hand and for societal / consumer welfare to be achieved, on the other hand. However, one may claim that the comparison seems biased from the very beginning as it is in the very nature of things that predicting with an absolute degree of certainty the likelihood of any given future event to take or not to take place, is impossible. Establishing the anti-competitive nature of a concentration transaction therefore involves an evaluation of the degree of likelihood that the merger will be incompatible with the Common Market in the future, and whether that likelihood has been established to some standard of proof. This evaluation inevitably involves a certain amount of judgment and is one of the reasons why the Community Courts have traditionally left a margin of discretion to the Commission's assessment.

Still, it seems interesting to investigate this predictability issue also given that several adjacent (interconnected) questions may arise alongside: how demanding are these requirements for a concentration to be cleared / blocked; can the degree of prediction sufficiency be empirically stated / quantified; does reliance on presumptions alter the general frame of assessment; is the standard of proof a key issue to be taken into account? Furthermore, whichever answer will be reached for the main question at hand (yes, the Commission can properly predict the outcome of a concentration or no, the anti-competitive outcome of a concentration cannot be reliably predicted), several implications for the achievement of both societal and consumer welfare objectives will be revealed.

For the sake of completeness and clarity, the topic at hand pertains a dual analytical approach: a theoretical one and an empirical one. First, attention needs to be directed to the Commission's approach to assessing a given concentration transaction, the stages the assessment goes through and the theories employed in determining the outcome of the appraisal process. Second, focus needs to be placed on merger control cases that have been handled by the Commission and the Community Courts, in order to exemplify the theoretical findings and to understand how the European judicature has articulated the scope of its judicial powers in exercising its oversight of the Commission's merger control practice. We will not opt for a strict and rigid approach of the topic, therefore, throughout our analysis, correlations between theory and practice will be emphasized where such an approach is deemed appropriate.

2. Background

Throughout the previous chapter we have observed the arguments pro and against the *ex-ante* and *ex-post* systems, from the societal and consumer welfare perspectives. One aspect which stems out is that according to Brussels' perspective, competition policy, while being primarily preoccupied with the fulfilment of the consumer welfare desideratum, exhibits a somewhat negative approach to the *ex-post* method, embodied mainly in the inappropriateness of Articles' 81 and 82 use for the purpose of controlling concentrations. In other words, the arguments for the switch to the *ex-ante* system surround a certain degree of insufficiency on behalf of the *ex-post* method, to fulfil the already set welfare goals; hence, as it was argued by Brussels EC officials as revealed in

Regulation 4064/89's preamble, the need for *ex-ante* control. It may be observed that the attitude towards *ex-ante* on the other hand developed to be rather positive in nature, as built up on generous arguments revolving around the benefits arising from the 'one-stop-shop' principle, the enhanced functionality of threshold system, the preventive character of the prior notification and so on. The question that one may ask Brussels in this respect is to what extent this positive approach is constructed with a view of achieving consumer welfare and to what extent with regard to fulfilling societal welfare goals? We have presented the case of the *ex-ante* method within the social welfare frame in the previous section. Also, the previous chapter concluded that the social welfare goal was viewed as the highest desideratum, downgrading to a certain extent the consumer welfare goals' priority of fulfilment. Whether this may be characterized by some as a trade-off between more or less important Community objectives, and referring to the societal / consumer welfare analysis provided in the previous sections, one issue still remains rather blurry: do the European decision-makers urge us to accept that it is important to reach societal welfare while, for the fulfilment of consumer welfare goals, it is sufficient to rely on the somehow more fragile approach of prediction tools?

In order to tackle these problems, one has to investigate the Commission's interpretation of economic theory that predicts potential negative effects in a concentration transaction. From the very beginning it has to be acknowledged that the prediction of competitive harm in a given case requires a particularly rigorous assessment of the facts, as well as a convincing explanation of the following:

- Why negative effects are sufficiently likely to occur in the near future in the case at hand;
- An assessment of the likelihood and magnitude of the expected harm, particularly if the consequences are not expected in the near term.

In other words, the Commission must identify the precise mechanism that brings about the competitive harm[129]. To accomplish this, it has to be understood that the Commission during the course of an investigation performs many types of analyses and tests. Each of them may theoretically be scrutinized for their accuracy; however, as we will see below, this scrutiny exercise can face real difficulties. Last but not least, each of the analyses and tests bears a certain degree of importance with regard to the final decision of clearing or blocking a concentration transaction. Brought together in a more or less homogenous collage, these tools define what is referred to as the Commission's concentration appraisal.

3. Causation – An Essential Element to Be Proven

It is well established that the Commission cannot prohibit a merger under the Merger Control Regulation unless it demonstrates a causal link between the transaction and the significant impediment to effective competition in the Common Market or a substantial

[129] See the Economic Advisory Group on Competition Policy report: *An Economic Approach to Article 82*, July 2005. See also EAGCP, *Non-Horizontal Mergers Guidelines: Ten Principles*, August 2006.

part of it[130]. Establishing causation in merger control is especially complex because, besides being prospective, it is also multifaceted, with a wide range of relevant interacting considerations which lead to a final conclusion on whether a merger should be permitted to proceed.

One crucial concept that the Commission makes use of, while assessing a concentration transaction is the "counterfactual" concept, defined as the situation that would have arisen in the absence of the event which is the subject of the Commission's assessment (in our case, the concentration transaction). Generally speaking, "counterfactual" thinking refers to a set of cognitions involving the simulation of alternatives to past, present, or likely future factual events or circumstances (Bavasso, Lindsay, 2007). Par. 9 of the *Horizontal Merger Guidelines*[131] elaborates on the "counterfactual" concept as follows: in assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. In most cases, the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison[132].

The assertions above call for a closer assessment. We are referring especially to the future market changes that can be reasonably predicted. These changes form part of the market dynamics and they may or may not necessarily be linked to the merging firms' behaviour. In any case, causation in merger control requires the following elements to be present:

- The pre-merger state of the market;
- The likelihood of the pre-merger state to change, in the absence of the concentration transaction;
- The likely post-merger state of the market;
- The differences between the above two elements of the enumeration.

What has to be understood is that the Commission, under a merger control investigation can only intervene and address issues which are merger specific and not issues regarding the general state of the market[133]. However, when we observe the "counterfactual" principle "at work" we may notice that the Commission very often has to take into account likely future developments in the operation of the markets affected by the merger[134]. While applying the Merger Control Regulation, the Commission has to also

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[130] In *Kali & Salz,* Case M.308, the Commission specifically stated that "there must be a causal link between the concentration and the creation or strengthening of a dominant position".

[131] OJ C 31, 05.02.2004.

[132] See for example, case T-102/96, *Gencor v. Commission*, 1999 ECR II-753, par. 247-263.

[133] See, the *Bertelsmann / Springer* case, COMP/M.3178, par. 157 and 159.

[134] To exemplify, the following cases may be relevant: Case COMP/M.3863 *TUI / CP Ships*, where a third party had served notice to terminate its membership of a shipping consortium and was therefore not considered as part of the consortium for the purposes of assessing the proposed merger. In Case COMP/M.2547 *Bayer / Aventis Crop Science*, [2004] O.J. L107/1, the Commission took account of the effects of an EC Directive, which was likely to result in the withdrawal from the market of a large number

observe the need to maintain and develop effective competition within the Common Market, with a view to fulfil the societal welfare goal. As we will see throughout the next paragraphs, the further development of the market / market dynamics may be influenced by a varying number of circumstances and coordinates, not necessarily merger specific.

Summing up, it seems appropriate to observe Bavasso and Lindsay's (2007) illustration of the "counterfactual" principle: a merger may be prohibited even if prices are likely to fall following the transaction if it can be shown that prices would have fallen further or faster in the absence of the transaction. This is because the counterfactual, against which the effects of the merger are judged, is one in which prices would have fallen further or faster. In this scenario, the merger harms consumers just as much as if prices had risen following the transaction. However, it follows from the same "counterfactual" principle that a merger should not be prohibited, even if conditions of competition decline following the transaction, so long as conditions of competition would have declined at least to the same extent had the transaction not occurred. Consequently, a merger may not be prohibited if it does not aggravate a pre-existing competition issue.

The above hypothetical exercise comes to emphasize the fact that the use of the "counterfactual" principle is dependant on a broad set of circumstances relating to the market functioning. Moreover, as we will see below, the "counterfactual" concept is inevitably linked to the opaque concept of standard of proof in merger control.

4. Discussion on the Standard of Proof

In the context of the prospective nature of merger control, one may ask: how far should the Commission go to prove that the concentration dealt with will hinder competition? What is the standard of proof that the Commission has to meet? Or, how demanding are the requirements for a concentration to be blocked? Better yet, what is the degree of plausibility that the Commission's evidentiary package must exhibit?

The standard of proof that the Commission's evidence package has to meet in a merger case is not defined in the Merger Control Regulation. Consequently, the Community Courts have attempted to define the Commission's evidentiary threshold for a concentration to be blocked, by means of case law[135]; however, as we will observe throughout this paragraph, they seem to have done that in a rather inconsistent manner, by formulating the standard of proof in a variety of different terms and concepts. The Courts' previous unwillingness to approach questions of proof in the past may be regarded as being the product of a combination of factors:

- The nature and place of merger control and competition policy in the European

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of plant protection products. The Commission appears to have misapplied a counterfactual analysis in Case COMP/M.3280 *Air France/KLM* (appeal dismissed in Case T-177/04 *EasyJet Airline Company v. Commission*, judgment of 4 July 2006). In that case the Commission considered an argument that a third party airline intended to join an alliance but stated that its admittance to the alliance was "not a fact" and "it would not be appropriate to take it into consideration" in the merger investigation. Further, the Commission stated that it could not take into account potential entry on an airline route because "it is a future and merely hypothetical fact."

[135] See the *Airtours, Schneider* and *Tetra Laval* trilogy.

legal order.

- The Courts' position, as judicial review bodies, has limited their role in the merger process in accordance with article 230 of the EC Treaty[136]. On matters of substance, judicial review must take account of the Commission's margin of discretion when dealing with questions of an economic nature, such as whether a merger is compatible with the Common Market[137]. Therefore, the Courts may have been previously (meaning prior to the *Airtours, Schneider* and *Tetra Laval* trilogy) reluctant to overturn a Commission decision in the absence of a "*manifest error of assessment.*[138]"
- The prospective nature of merger control under the *ex-ante* system[139]. The different approaches to facts and predictions that merger proceedings involve may have caused the Courts and the legislature to be hesitant in laying down precise rules regarding the standard of proof and instead trust the economic expertise of the Commission.
- Faced with the different legal traditions of the Member States, the Courts may have deliberately avoided defining the standard of proof, as the many legal cultures represented by the Courts may thus have impeded the evolvement of precise legal guidelines on the subject.
- The Courts may have also taken into account the tight time limits under which the Commission has to operate under both the new and the old Merger Regulations.

For the sake of tackling the predictability issue it is important to define what is the exact standard of proof that the Commission has to meet. And this is because if one accepts that the Commission is not expected to "prove the un-provable", the companies involved in a concentration transaction must nonetheless be able to rely on the certainty of the law and know how far the Commission must go in proving them wrong. To this end, in the *Dunlop Slazenger* case[140], concerning an Article 81 infringement, it was stated: "As a

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[136] Article 230 of the EC Treaty states the following: The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

[137] See par. 64 of the *Airtours* judgment.

[138] See the *Airtours* judgment, par. 19-47.

[139] At par. 42 of the *Tetra Laval* ECJ judgment, it has been provided that merger cases involve reasonings of prospective nature, often rather unfamiliar to lawyers.

[140] Case T-43/92, *Dunlop Slazenger v. Commission* (1994) ECR II-441, par. 79.

preliminary point, the requirement of legal certainty, on which economic operators are entitled to rely, entails that when there is a dispute concerning the existence of infringement of competition law the Commission, which bears the burden of proving infringements which it finds, *must adduce evidence which will sufficiently establish the existence of the facts constituting the infringement.*" Of course Article 81 cases are different than merger control cases; however, the legal certainty principle is unitary and calls for a clearer definition of the standard of proof concept.

4.1. Relevant Case-Law. The Facts

To exemplify the above assertions, we will take a closer look at a few merger control cases and investigations, which may seem relevant for the topic at hand. The selection of the cases that will be discussed in more detail in the paragraphs to follow pertains to the fact that these cases constitute landmark examples on judiciary reversals of negative Commission decisions while also dealing with challenges as to the concept of standard of proof being put forward. Furthermore, the case-law prior to the judgements in *Airtours, Tetra Laval* and *Schneider*, shows the EC Courts' judicial review being limited to determining if the Commission's decision is based on sufficiently *cogent and consistent* evidence and whether or not the Commission committed a *manifest error* in its assessment. Prior to these three cases, the Courts have not replaced the Commission's economic reasoning and conclusions with their own.

At first, it feels appropriate to get familiarized with the facts of these cases. Further on, we will exemplify out theoretical assertions with references to the Commission's decisions or the Courts' judgments.

4.1.1. *Airtours / First Choice*

The Commissions' decision to block the merger between *Airtours* and *First Choice*, on the ground that the merger would create a collective dominant position between the three largest short-haul package holiday companies in the United Kingdom, was the first case in which the Court of First Instance overturned a negative Commission decision under the Merger Control Regulation. In its decision, the Commission applied the collective dominance doctrine for the first time to a 4-to-3 merger, in an oligopolistic market with no single dominant players (*Airtours / First Choice* - 32%, *Thomson* - 27%, *Thomas Cook* - 20%), and which lacks the typical characteristics favoring collusion (such as product heterogeneity, high volatility of market shares, and low barriers to entry). The facts and the chronological unfolding of the events are as follows.

On 29 April 1999, *Airtours plc*, a United Kingdom company whose main activity is as a tour operator and supplier of package holidays, announced its intention to acquire all the shares in the United Kingdom tour operator, *First Choice plc*, one of its competitors. The notification was forwarded to the Commission on the same day. Finding that the transaction gave rise to serious doubts as to its compatibility with the Common Market, the Commission initiated the assessment procedures. The Commission sent the applicant a statement of objections under Article 18 of Regulation 4064/89, in which it set out the

reasons why it took the view, *prima facie*, that the proposed merger would give rise to a collective dominant position in the United Kingdom short-haul foreign package holiday market. After the applicants submitted undertakings as a response to the Commission's statement of objections, by way of decision[141], the Commission declared that the concentration was incompatible with the Common Market under Article 8, par. 3 of Regulation 4064/89 on the ground that it would create a collective dominant position, as a result of which competition would be significantly impeded. The Commission stated in the decision that the undertakings proposed by *Airtours* would not prevent the creation of a collective dominant position.

The applicants appealed the negative decision in front of the Court of First Instance, relying on four pleas in law, in support of the application. The first plea alleged that there were manifest errors of assessment in the definition of the relevant product market and infringement of Article 253 of the EC Treaty[142]. The second plea alleged infringement of Article 2 of Regulation 4064/89, breach of the principle of legal certainty in so far as the Commission applied a new and incorrect definition of collective dominance in its assessment of the present case, and infringement of Article 253 EC. The third plea alleged infringement of Article 2 of Regulation 4064/89 - in that the Commission found that the transaction created a collective dominant position - together with infringement of Article 253 EC. The fourth plea alleged infringement of Article 8, par. 2 of Regulation 4064/89 and breach of the principle of proportionality inasmuch as the Commission did not accept the undertakings proposed by the applicant. The Court, after analyzing the parties' arguments concluded that the Commission's decision to block the transaction, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proven to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market. Consequently, the Commission decision was overturned.

4.1.2. *Schneider*

The case concerned the merger between *Schneider Electric SA* and *Legrand SA*, two French companies engaged in the production and sale of products and systems in the electrical distribution, industrial control and automation sectors (*Schneider*) and electrical equipment for low-voltage installations (*Legrand*). The industrial sector affected by the concentration consisted of low voltage electrical equipment, in particular switchboards and their components. Wholesalers were buying the electrical equipment from *Schneider* and *Legrand*, assemblers put together the equipment to fit the customers' needs and installation engineers fit the switchboards at the end-users premises. Both companies

[141] Decision C(1999)3022 final.

[142] Article 253 of the EC Treaty provides the following: Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

operated across a number of European markets. On a European-wide basis their market share was low, although their combined share was high in France and moderately high in Italy, Spain, Portugal and Denmark. In most markets the merging parties faced competition from several large multinational electrical components manufacturers such as General Electric, ABB and Siemens, some of which also had their own integrated installation arm.

On 16 February 2001 *Schneider* and *Legrand* notified the Commission of *Schneider's* proposal to make a public exchange offer in respect of all the shares in *Legrand* held by the public. Since Article 7, par. 3 of Regulation 4064/89 allows the implementation of public bids which have been notified to the Commission, provided that the purchaser does not exercise the voting rights attached to the securities concerned, *Schneider* launched its offer in June 2001 and closed it in July 2001. The Commission concluded that the notified concentration fell within the scope of Regulation 4064/89 and that there were serious doubts as to its compatibility with the Common Market and the European Economic Area. The Commission claimed that the relevant markets were national because of differing standards and prices. However, despite defining national markets, the Commission looked at the merged group's position across the Community as a whole and argued that the merged entity's wide geographic presence revealed dominance in any single national market. Consequently, the Commission sent *Schneider* several statements of objections, in which it stated that it intended to adopt a decision under Article 8, par. 4 of Regulation 4064/89 ordering the separation of *Schneider* and *Legrand*. *Schneider* replied to the statements of objection. However, by way of decision, the Commission adopted under Article 8, par. 4 of Regulation 4064/89 a decision ordering *Schneider* to divest itself of the *Legrand* group.

Schneider lodged an appeal against the Commission's divestiture decision, submitting that the divestiture decision is vitiated by independent defects arising from procedural irregularities, by infringement of the requirement to state reasons, by the Commission's lack of territorial jurisdiction, by infringement of Article 8, par. 4 of Regulation 4064/89, by failure to observe the principle of sound administration and, finally, by manifest errors of assessment.

The Court of First Instance agreed with *Schneider* that the Commission's reasoning was flawed in a number of areas. The Court found that the Commission was wrong to draw inferences from *Schneider's* position at a Community level for the various national markets. The Court also found that the Commission erred in excluding vertically integrated sales from its analysis of the relevant market. It held that the Commission's analysis was insufficiently clear and lacked country specific analysis on the detailed workings of individual countries' distribution networks. The CFI argued that the Commission did not provide detailed country specific data; instead it relied on sweeping across-country statements. Consequently, the Court of First Instance annulled the Commission Decision which ordered the separation of undertakings[143].

[143] Decision C (2002) 360 final.

4.1.3. *Tetra Laval*

The case originated from the Commission's prohibition in 2001 of the merger between *Tetra Laval*, which, according to the Commission, had a dominant position in carton drinks packaging, and *Sidel*, a market leader in the production of machines used for making PET plastic bottles.

On 27 March 2001, *Tetra Laval SA*, a privately held company incorporated under French law and a wholly owned subsidiary of *Tetra Laval BV*, a holding company belonging to the *Tetra Laval* group, announced a public bid for all outstanding shares in *Sidel SA*, a French publicly quoted company. On the same day, *Tetra Laval SA* acquired roughly 9.75% of the shares in *Sidel* from *Azeo* (5.56%) and *Sidel's* directors (4.19%). Pursuant to the bid, *Tetra* acquired approximately 81.3% of the outstanding shares in *Sidel*. After the closing of the bid, the applicant acquired certain additional shares, making its current holdings roughly 95.2% of the shares and 95.93% of the voting rights in *Sidel.* The operations by which *Tetra* acquired its shareholding in *Sidel* were notified to the Commission. In October 2001, the Commission adopted a decision blocking the concentration transaction, pursuant to Article 8, par. 3 of the Merger Control Regulation[144]. Following the prohibition decision, the Commission notified to the applicant a statement of objections, setting out the specific measures which it considered appropriate in order to restore conditions of effective competition. After *Tetra's* response to this statement of objections, the Commission issued the divestiture decision, ordering *Tetra* to divest itself of its shares in *Sidel*.

On the merits, the Commission concluded that the merger would have resulted in anti-competitive 'conglomerate effects'. In particular, although *Tetra Laval* and *Sidel* did not previously have a competitive relationship, either as direct competitors or through a vertical relationship, the Commission believed that the combination of the parties' businesses in potentially converging areas would encourage *Tetra Laval* to leverage its existing market power (by predatory pricing, price wars and by granting loyalty rebates) to persuade its customers to choose *Sidel's* PET bottling machines in future. The Commission concluded that this would turn *Sidel's* market leadership into a dominant position and that the elimination of *Sidel* as a potential competitor would strengthen *Tetra Laval's* dominant position on the carton packaging market.

Tetra brought an appeal in front of the Court of First Instance, putting forward four pleas in support of its action: first, infringement of its procedural rights; second, lack of legal basis for the divestiture decision as a result of the illegality of the prohibition decision; third, non-applicability of Article 8, par. 4 of the Regulation; and fourth, infringement of the principle of proportionality. Ruling on the appeal brought by *Tetra Laval*, the Court of First Instance annulled the Commission's prohibition. Following a new investigation, the Commission cleared the merger, subject to a commitment by *Tetra Laval* to license its new technology for making PET plastic bottles to third parties. In parallel, the Commission appealed the CFI's ruling to the ECJ. The Commission's main grounds of

[144] Decision C (2001) 3345 final.

appeal related to the standard of proof in merger cases and to the scope of judicial review by the Court of First Instance of Commission decisions. In particular, the Commission argued that the CFI's analysis had gone beyond the proper scope of judicial review as set out in the EC Treaty and previous case-law and that the Court of First Instance had set an excessively high standard of proof for the prohibition of mergers.

In order to better understand the concept of Commission discretion, a brief expose of the manner in which the problem of leveraging was dealt with in the *Tetra Laval* case may be provided here[145]. According to the Commission, the notified merger would encourage *Tetra* to leverage its dominant position on the market for equipment and consumables for carton packaging so as to persuade its customers on that market who are switching to PET in order to package certain sensitive products to choose *Sidel*'s SBM machines, thereby excluding much smaller competitors and turning *Sidel*'s leading position on the market for SBM machines for sensitive products into a dominant position. *Tetra* would be helped in this by its close and sustained relationship with its customers, its financial strength, its know-how and its reputation in the aseptic and ultra-clean sector, by *Sidel*'s current strength, technology and reputation for quality and by the vertical integration from which the entity emerging from the notified merger ('the merged entity') will profit in relation to the three packaging systems (carton, PET and HDPE). In its judgment, the Court of First Instance held that the Commission had committed manifest errors of assessment in its findings as to leveraging and the strengthening of Tetra's dominant position in the carton sector and therefore annulled the contested decision. As regards the Commission's claims that the notified merger would have anti-competitive conglomerate effects and, in particular, give the merged entity the capacity and incentive to engage in leveraging, the Court of First Instance observed that the Commission itself had taken the view that such a dominant position would not arise from the merger itself but rather from the foreseeable conduct of the merged entity. However, the Court of First Instance held that, where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof: i.e. examining all the circumstances which might determine that conduct. Given that, in the case of a dominant undertaking such as Tetra, the supposed leveraging could constitute an abuse of the pre-existing dominant position, the Court of First Instance held that, when examining the likelihood of the adoption of anti-competitive conduct, the Commission must have regard not only to the incentives to adopt such conduct but also to the factors liable to reduce, or even eliminate, those incentives, such as the probability of legal action against and penalties for such conduct. Since the Commission had failed to carry out such an examination, its findings could not be upheld. Consequently, the Court of First Instance examined whether the Commission could nevertheless establish the merits of its argument in the absence of those findings. The Court of First Instance found that there was, in principle, a possibility of leveraging by the merged entity. It acknowledged that conglomerate mergers raise a number of specific problems, which must be examined in turn. Given the prospective nature of merger control, the CFI pointing at *Kali & Salz,* disagreed with *Tetra* which was of the opinion that the ability of creating a dominant position must be established with certainty. The Court concluded that for the Commission to realistically

[145] See the *Tetra Laval* ECJ judgment.

be able to control mergers with solely or principally conglomerate effects, it must be given some leeway, suggested also by the wording: *in all likelihood.* According to *Tetra*, the Court of First Instance respected the Commission's margin of discretion and did not exceed the bounds of its power of judicial review by rejecting the statement of reasons for the contested decision, but merely found that the Commission had failed to establish leveraging.

In its appeal ruling, the European Court of Justice recognized that the provisions of the Merger Control Regulation "confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Community Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations." The ECJ also confirmed the importance of judicial review, stating that the Commission's margin of discretion "does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature." In particular, the European Court of Justice stated that it is for the Court of First Instance to establish not only whether the evidence relied on by the Commission is "factually accurate, reliable and consistent", but also whether that evidence contains "all the information" needed to assess a "complex situation" and whether it is "capable of substantiating" the Commission's conclusions. The European Court of Justice concluded that the Court of First Instance had exercised its powers of judicial review appropriately and that it had properly explained why the evidence submitted by the Commission in support of its prohibition decision was "inaccurate".

4.2. The Concept of Standard of Proof at a Glance

4.2.1. Placing the Standard of Proof in the Context of EU Merger Control

It has been acknowledged (Bavasso, Lindsay, 2007) that legal certainty requires that the Commission applies an objective standard of proof, for example *the balance of probabilities* (that is, more likely than not) or *beyond reasonable doubt* (that is, sure) as opposed to apparently subjective standards (such as a sufficient degree of certainty). According to Botteman (2006), in Europe, the nature of competition law and its place and aims in the European legal order (as described in the previous section) distinguishes it both from criminal law, on one hand and from civil law, on the other hand when assessing the standard of proof threshold. In civil matters, the burden is set at a relatively low threshold and is often defined under the *preponderance of the evidence* standard. The court will put all the facts and arguments that the parties have produced into the balance before reaching a conclusion. This is also called the *balance of probabilities* test. At the other end of the spectrum, in criminal matters, the standard is set at a very stringent threshold, namely the *beyond reasonable doubt*. This latter threshold demands from the court that its conclusions be grounded on very solid evidence and that any possibility that the accused is not guilty has been considered and rejected. In competition matters, the standard of proof can move between the two extremes of the spectrum. However, the exact place of the evidentiary threshold in between these two extremes has not been

clearly defined.

Indeed, the Courts have alternatively used phrases such as *likely, properly demonstrate, in all likelihood, very plausible, sufficiently reliable, convincing / sufficient evidence* or *very probable,* suggesting that the standard that the Commission has to meet is more than a mere preponderance of the evidence test. It may seem normal that such a multitude of terms has been employed to draw the boundaries of the Commission's evidentiary threshold since, in par. 32 of the *Tetra Laval* judgment the ECJ has acknowledged that *there is no consistent terminology with regard to the requisite standard of proof.* Let us look at a few examples of attempts to define the guiding lines of the standard of proof concept.

In par. 153 of the *Tetra Laval* CFI judgment, the Court stated as follows: "if the Commission is able to conclude that a dominant position would, *in all likelihood*, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded, it must prohibit it." Par. 269 of this judgment states that the contested decision does not provide *sufficient evidence* to justify the definition of distinct sub-markets among SBM machines with reference to their end-use. Par. 154-155 of the same judgment provide that where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce *convincing evidence* thereof. Furthermore, par. 199 of the *Airtours* judgment the Court provided as follows: First, it does not appear that the Commission's method of gauging the wide variations which it found in the extent to which distribution was concentrated on the various national markets provided a *sufficiently reliable basis* for the conclusions it reached about the relative strengths of manufacturers and wholesalers. Also, par. 230 of the same judgment provides that neither the fact that the merged entity will be an unavoidable trading partner for wholesalers nor their inability to exercise competitive constraints on it have been *properly demonstrated*.

Going beyond semantics though, defining the concept of standard of proof would seem to relate to the level of probability that the Commission has to reach before a merger can be held to be anti-competitive. In any event, the standard of proof must be viewed in the light of the principle that mergers in the EU are not presumed to be unlawful.

So far, no opinion expressed in the literature and no official authority statements require the Commission to predict with an absolute degree of certainty the anti-competitive outcome of a concentration transaction. After all, since absolute certainty is rather unattainable in resolving merger cases in an *ex-ante* manner, the law relies on probability instead. There is inevitably a degree of judgment involved in this sort of evaluation and probability does not boil down to precise percentages in reality.

Nevertheless, in attempting to answer the question "how far should the Commission go to be convincing with regard to the likelihood of a concentration once completed to be anti-competitive", certain commentators (Heyer, 2005) have suggested that the probability / likelihood that a merger is anticompetitive should be somewhere around 70%, arguing

that the determination of the standard of proof is to some extent closely connected with the "false positives" and "false negatives" problem in antitrust decision-making. Is this 70% estimation enough to convince us? Or better yet, isn't the remaining 30%, probability-wise, too much, leading us to believe that there is enough room for anti-competitive behaviour[146] to sneak in, consequently jeopardizing both the attainment of consumer and societal welfare? Of course, working with a clearly defined concept of standard of proof would be desirable. However, we believe that such a sharp delimitation of the concept, using percentage boundaries, eliminates any possibility for flexibility and may consequently invite massive criticism. This brings us to the next natural question, which pertains to the standard of proof concept's rigidity.

4.2.2. How Rigid Is the Standard of Proof Concept?

What is the likelihood of the standard of proof concept to be shaped and moulded by other concepts, principles or circumstances? In other words, how far may the limits of this concept can be stretched?

First, as stated above, the case law is quite unclear about the applicable standard of proof in merger investigations. It may be argued that the Commission's evidentiary burden may vary depending on the stage of process at which the case is standing, as well as on the nature of the elements to be investigated. Thus, a Phase I decision will face a lighter scrutiny than a Phase II decision, as a clearance under Phase I seems obviously more straightforward on the facts of the case than an in-depth investigation under Phase II. After all, advancing to the second phase of the procedure is justified by the existence of serious competitive concerns regarding the given concentration analyzed (Article 6, par. 1 (c) of the Merger Control Regulation).

Also, the standard of proof seems admittedly much higher when the Commission reviews past and current market conditions than when it starts to rely on those facts to predict the likely competitive effects of the merger in the short and mid-term. On one hand, factual evidence should be established with a relatively high level of accuracy, reliability, and consistency. On the other hand, the Court of First Instance in *Tetra Laval / Sidel* held that, when the effects of the merger do not immediately affect the structure of the market, the Commission must be convinced that merger will *in all likelihood* allow the parties to achieve a dominant position in the near future. That is, the further in time such effects are predicted to materialize, the higher the burden the Commission must deliver and the closer to the *beyond reasonable doubt* standard its predictions must settle. On appeal of

[146] To clarify, anti-competitive behaviour in the context of merger control may be translated through the concept of 'significant impediment to effective competition'. As already pointed out in a previous section of this contribution, Recital 25 of Regulation 139/2004 elaborates on this concept by providing that the notion of 'significant impediment to effective competition' as embodied in Article 2(2) and (3) of the Merger Control Regulation should be interpreted as extending beyond the concept of dominance, enclosing coordinated and non-coordinated effects which prevent the proper functioning of the market in the spirit of effective competition. We will not dwell on the concept of anti-competitive behavior at this point of our contribution, as we will return to this discussion in one of the next paragraphs of this section. At that point, we will asses what is the relationship between predicting the effects of a concentration, future firm behaviour and the boundaries of what constitutes competitive or anti-competitive conduct.

the CFI's judgment in the *Tetra Laval / Sidel* case, Advocate General Tizzano suggested, however, that given the prospective nature of merger analysis, it is *sufficient* if on the basis of *solid elements* gathered in the course of a thorough and painstaking investigation, and having regard to its technical knowledge, the Commission is persuaded that the notified concentration would *very probably* lead to the creation or the strengthening of a dominant position. If the Commission is not able to reach such an opinion, it must clear the merger.

Second, does the standard of proof vary according to the theory of competitive harm or the issues under the Commission's consideration? We believe the answer in this matter should be negative. The CFI stressed in par. 141-146 of the *Tetra Laval* judgment that Article 2 of the Merger Control Regulation makes no distinction between mergers with conglomerate effects and those with horizontal and vertical effects. In any situation, the Commission must thus authorize the merger if it does not create or strengthen a dominant position resulting in effective competition being significantly impeded. This was confirmed by the ECJ in its *Tetra Laval* judgment at par. 40. Furthermore, par. 154-155 of the same judgment, referring to: *Kali & Salz*, par. 222, and *Airtours v. Commission*, par. 63 state that the Commission's analysis of a merger producing a conglomerate effect is conditioned by requirements *similar* to those defined by the Court with regard to the creation of a situation of collective dominance.

4.2.3. Commission's Discretion v. Standard of Proof / Certainty

Given the above we may argue that there may be an inherent conflict between the standard of proof that the Commission has to meet and the quality of evidence in support of its line of argument, on one hand and the wide discretion which it enjoys in assessing economic matters, on the other hand.

In the *Tetra Laval* case, the Commission argued before the European Court of Justice that from the principles referred to, and from the review carried out by the Court in *Kali and Salz,* it is required to examine the relevant market closely, weigh up all the relevant factors, and base its assessment on evidence which is factually accurate, is not clearly insignificant and is capable of substantiating the conclusions drawn from it and that it must reach its conclusions on the basis of consistent reasoning. The Commission took the view, first of all, that the standard of *convincing evidence* differs substantially, in degree and in nature, both from the obligation to produce *cogent and consistent evidence*, established in *Kali & Salz*, and from the principle that the Commission's assessment must be accepted unless it is shown to be manifestly wrong. The standard is different in degree because, unlike the standard of *convincing evidence*, that of *cogent and consistent evidence* does not rule out the possibility that another body might reach a different conclusion if it were competent to give a decision on the matter[147]. In response to that, the European Court of Justice noted in par. 20, 25 and 39 of the *Tetra Laval* judgment that whilst the Court recognizes that the Commission has a margin of discretion with regard to economic matters, which is essential for defining the rules on concentrations, that does not mean that the Community Courts must refrain from reviewing the Commission's

[147] See par. 26-27 of the *Tetra Laval* ECJ judgment, referring to par. 220-224 of *Kali & Salz.*

interpretation of information of an economic nature. Not only must the Community Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also if that evidence contains all the information which must be taken into account in order to assess a complex situation and if it is capable of verifying the conclusions resulting from it. Such a review is even more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect. Furthermore, the ECJ seems to agree with the CFI's requirement of *convincing evidence* to prohibit a merger. Although the Court of First Instance stated, in par. 155 of the *Tetra Laval* judgment, that proof of anti-competitive conglomerate effects of a merger of the kind notified calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects, *it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger*[148].

Still, is really the Commission's margin of discretion at odds with the degree of certainty it has too meet in its merger control decisions? The dividing line between discretion and interpretation may often be thin. Of course the Commission will claim that a margin of discretion is inherent in any prospective analysis[149]. The likelihood of certain market developments within a foreseeable time-frame must be determined on the basis of the market situation, observable trends and other appropriate indicators. To require that the Commission's assessment be, in effect, based on undisputed or virtually unequivocal evidence, irrespective of its merit, would deprive the Commission of its function of evaluating the evidence and attaching, for justifiable reasons, more weight to some sources than to others[150]. To fully accept the above assertions would amount to accepting that there is no clear idea of how far should the Commission should go in convincing us that a concentration transaction is indeed anti-competitive. In other words, there is no standard of proof whatsoever. Of course, a situation as such is highly unacceptable as it severely breaches the principle of legal certainty. Indeed, the Commission's margin of discretion may be wide, however not absolute. The ECJ emphasized this by stating in par. 39 of the *Tetra Laval* judgment that the discretion granted to the Commission does not mean that the Courts have to refrain from reviewing the Commission's interpretation of information of an economic nature. Thus, it may be argued that the Courts righteously seem to favour the certainty of a correct outcome in place of the Commission' discretion.

In the same judgment, the ECJ underlined that *a prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted*. Thus, the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to

[148] See par. 41 of the *Tetra Laval* ECJ judgment.
[149] See the *Tetra Laval* ECJ judgment, par. 37.
[150] See par. 28 of the *Tetra Laval* ECJ judgment.

establish whether it would give rise to a serious impediment to effective competition. *Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely*[151]. It may be argued that this method of evaluating the evidence seems very similar to the balance of probabilities approach used in civil cases in common law jurisdictions; however, despite this similarity, the use of concepts and terms such as *properly demonstrate, very plausible, sufficiently reliable, convincing / sufficient evidence* tends to indicate that the standard the Commission has to meet entails more than a mere balance of probabilities. At the same time, it may be argued that this method of evaluating the evidence also appears very different from the standard of manifest errors of assessment.

Summing up, the ECJ recognized the importance of the Commission's discretionary powers by confirming that par. 119 of the CFI *Tetra Laval* judgment correctly[152] sets out the tests to be applied when carrying out judicial review of a Commission decision on a concentration as laid down in the judgment in *Kali & Salz*[153]. However, the ECJ qualified this statement by making it clear in the *Tetra Laval* judgment[154] that, while exercising its discretion, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the Common Market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be *plausible*.

4.3. Drawing the Lines Together

All in all, it may be the case that the standard of proof in merger cases is not uniform. On the contrary, much will depend on the features of the merger concerned, the evidence available, the degree of judgment involved and the scope for value judgment. Cook and Kerse (2000, p. 215) suggest that the Commission must establish that an effect is more likely than not to occur *as a result* of a concentration before a prohibition or the imposition of conditions is justified. Returning to the causation issue we have discussed in paragraph 3 of this chapter, it has to be clear that the adverse effects on competition must be attributable to the notified concentration and those effects must be significant. The authors reiterate the difficulty of *ex-ante* merger assessment by stating that the issue of causation is more than usually complicated because in merger assessments it involves

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[151] See par. 42-43 of the *Tetra Laval* ECJ judgment.

[152] Par. 45 of the *Tetra Laval* ECJ judgment states: "It follows ... that the Court of First Instance did not err in law when it set out the tests to be applied in the exercise of its power of judicial review or when it specified the quality of the evidence which the Commission is required to produce in order to demonstrate that the requirements of Article 2(3) of the Regulation are satisfied."

[153] 'As a preliminary point, it must be recalled that the substantive rules of the Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission ('Kali & Salz')* [1998] ECR I-1375, paragraphs 223 and 224; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 164 and 165; and Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 64).'

[154] See par. 44 of the *Tetra Laval* ECJ judgment.

predicting the future rather than seeking to attribute responsibility for an event or chain of events which have already happened.

Going beyond semantics, quantifications, and the already articulated probability thresholds (*likely, properly demonstrate, in all likelihood, very plausible, sufficiently reliable, convincing / sufficient evidence* or *very probable*), it has to be acknowledged that when talking about the concept of standard of proof in merger control, it all boils down to the Commission being required to deliver a body of evidence that is not only *cogent and consistent*[155], but also *convincing*[156], however, without placing an unreasonably high burden of proof on the Commission's shoulders; in other words, without requiring it to prove the anti-competitive effects of the concentration transaction with an absolute degree of certainty. Despite the fact that it is not once that the Courts have referred to the concept of *requisite legal standard*[157], a clear-cut statement arising from the Courts as to the exact boundaries of the standard of proof concept and consequently of the level of probability that the Commission's prospective analysis should meet, is still to be delivered. However, interpreting the wording of the two *Tetra Laval* judgments, especially par. 119, 123-140 (CFI) and par. 38-39 (ECJ), it results that the Courts do hold the Commission to a quite high standard of proof, even for events for which it is difficult to generate concrete evidence, such as the future behaviour of the entity's customers.

But the situation as such is still anything but clear. The ECJ has not addressed the relationship between the *convincing evidence standard* and the *absence of manifest errors standard,* or if they bear similar weights. A first glance over the matter may highlight at least one fundamental difference between the two: if the former standard seems to point towards the substance of the transaction assessed and its bearing over the outlook of the market structure, the latter seems to refer more to the procedural aspects of the appraisal. Evaluating issues regarding these features of the merger assessment brings us back to the *Tetra Laval* judgment and the discussion of whether the Courts can substitute their judgment for the Commission's economic assessment, given the limitations stated in Article 230 of the EC Treaty. A clarification of this issue is not only desirable, but also necessary.

Furthermore, the ECJ missed on the opportunity to specify which exact standard should be used and what exactly are its features. Consequently, it may be argued that the *Airtours, Schneider* and *Tetra Laval* trilogy has not clarified at all the boundaries of the Commission's evidentiary threshold[158]. After all, in *Kali & Salz*, the ECJ's reasoning was very similar to that of the CFI in *Tetra Laval* and *Airtours,* judgments delivered years later. To exemplify, in *Kali and Salz* judgment the ECJ stated in par. 246: *to assess with a*

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[155] As stated in the *Kali & Salz,* Case C-68/94 *France v. Commission,* (1998) ECR I-1375, at par. 228 and also in par. 136-137 of the *Tetra Laval* CFI judgment where it was stated: "... no cogent evidence to that effect was put forward by the Commission in the contested decision, other than the reference to the responses to the market investigation…"

[156] *Airtours,* par. 21-64 and *Tetra Laval* (ECJ), par. 41.

[157] See for example par. 192 and 336 of the CFI's *Tetra Laval* judgment.

[158] See also Bailey, 2003.

sufficient degree of probability the effect which a concentration might have on competition on the relevant market it is essential to rely on a rigorous analysis of the competitors' weight. This stance was reiterated by the CFI in all the merger cases just mentioned. To this end, what may be taken as a departure from the previous case law is not so much the language used, but the fact that the CFI has displaced the discretionary judgment of the Commission in the more recent merger cases. It has to be acknowledged in this context that this situation may not necessarily be connected with an attempt to get us closer to a clearer and better defined concept of standard of proof, but with the fact that the Court of First Instance may have accumulated experience and became to a certain extent bolder in asserting its stance. And to show once more that the situation has not really changed, even after the ECJ *Tetra Laval* judgment[159], the CFI continues to be short in words by stating only that, as regards complex economic assessments, the Commission enjoys a 'wide discretion'.

The standard of proof applying to the Commission's prospective analyses, far from being clear, continues to raise a number of interesting questions. Within our area of interest one may still look into how exactly does the ECJ's define its *plausibility* test? Does it mean that the standard of proof concept in merger cases is floating free within some undefined boundaries of probability? Does it mean that econometrics would be subject to less scrutiny, especially where such instruments are used to predict the likely effects of a merger? We will assess this question in paragraph 5.5 of this chapter, where we will also observe the importance that merger simulation models and tools bear upon the Commission's prospective decision-making.

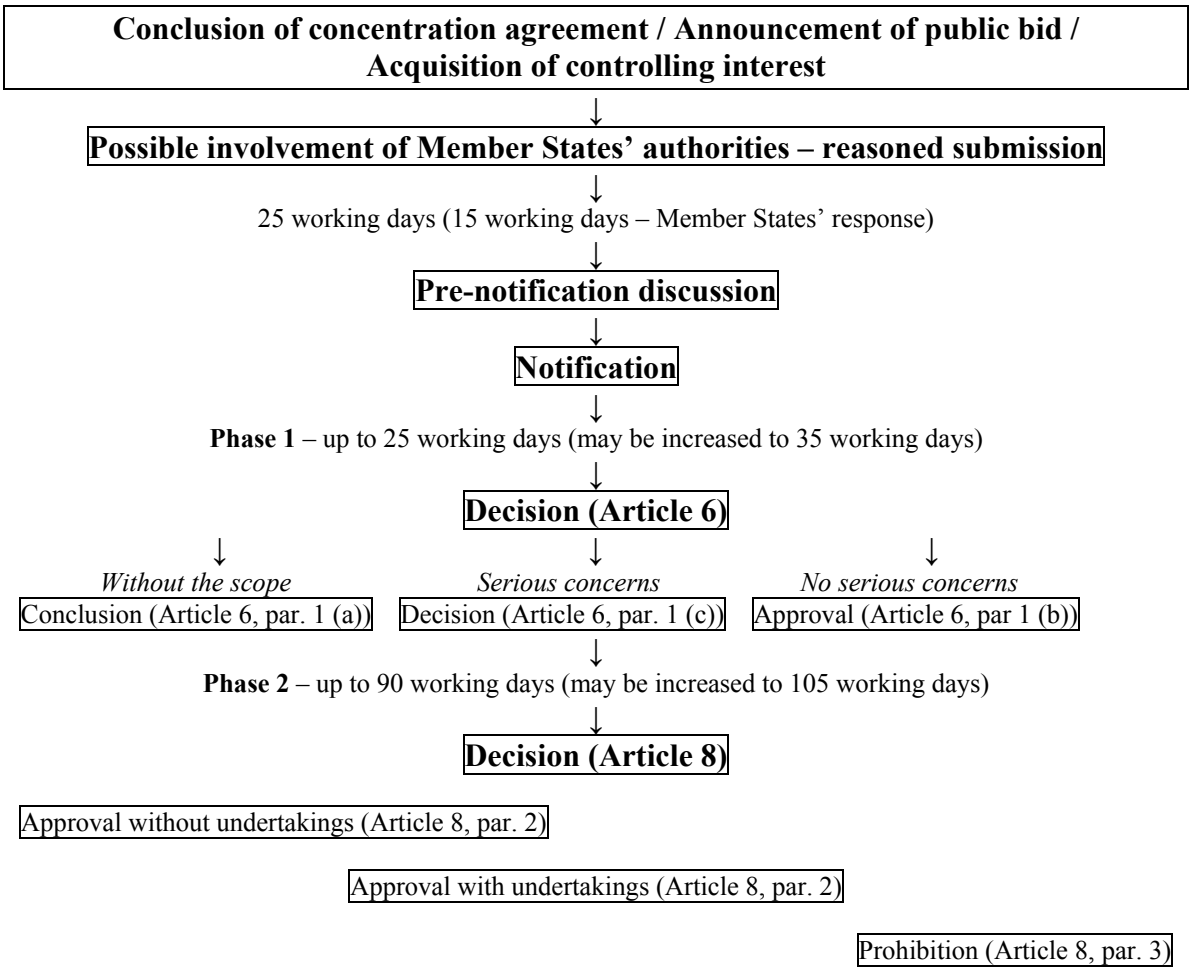
Having in mind the above and acknowledging the fact that the standard of proof concept still swims in muddy waters, we may return to the more fundamental question of this section and qualify it, from the standard of proof perspective we have just investigated: is the Commission able to predict the competitive or anti-competitive outcome of a given concentration given that it is still not clear how far these predictions should reach? Of course the answer to this question cannot be based solely on standard of proof allegations. However, one has to agree that even if one would assert that predicition is indeed possible, not knowing the exact threshold of probability that needs to be exceeded for a prediction to be accepted as sufficient to declare a concentration as anti-competitive (and the fact that this threshold is free-floating on a case-by-case basis), seriously undermines the principle of legal certainty. Consequently, the argument may be taken one step further in stating that consumer and societal welfare may be at stake. In other words, it seems logical that before asking the question whether the Commission is able to properly predict the outcome of a concentration, the pre-requisites of this question should be clear. Where the boundaries of the very object of this prediction are not clear, the prediction process is bound to be generating uncertainty and unreliability.

5. Methods of Concentration Assessment

Although procedural aspects of merger control do not constitute the core of this contribution it seems appropriate to provide a basic step-by-step scheme which portrays

[159] See for example the *EDP v. Commission* CFI judgment, Case T-87/05.

the procedural steps that the Commissions has to run through in order to clear or block a notified concentration transaction.



The assessment of the concentration's compatibility with the Common Market is performed in Phase I and Phase II of the procedure in accordance with the provisions of the Regulation, being guided mainly by the contents of Article 2 of the Regulation. Article 2 offers a multitude of mechanisms that allow investigations of (for example) market patterns and trends, firm behaviour, considerations of entry, product repositioning, ability of buyers to vertically integrate, etc.

The standard approach to merger control in the EU is characterized by defining the relevant market, calculating market shares, and then carrying out an analysis if the post-merger market shares suggest there may be a competition problem with the merger. There are different techniques that may be employed in order to predict the anti-competitive effects of a concentration transaction; consequently different types of classifications may be presented in order to define the nature of these techniques. Furthermore, some of these techniques (for example merger simulation models, or econometric tools) may be regarded as having different places in the Commission's delivery of the evidence package, depending on the use that these techniques have been assigned with. There is no

unitary classification of concentration appraisal techniques in the doctrine. However, in a strictly exemplifying exercise, one may divide these techniques in two groups:

- The classic method is embodied in a competitive effects analysis, which traditionally looks at the post-merger constraints on the merged entity. The principal areas of focus are usually barriers to entry, barriers to expansion, buyer power, and the increased scope for coordinated behaviour post-merger.
- The second group of methods consists of a number of economic tools which range from very basic instruments, such as market-share information, diversion ratios, win/loss analyses, and critical loss analyses, to more sophisticated econometric instruments such as regressions, and bid and merger simulation models.

Still, this classification above is highly didactic, as in practice, the circumstances of each case may determine:

- What weight is attached to each of these techniques,
- Whether some of the techniques are employed just as a scientific support to other main elements of the evidentiary package,
- Or if some of these tools are simply ruled out as inappropriate for the analysis of a given factual situation.

Consequently, one and the same test or econometric tool may be portrayed in different fashions and may exhibit different functionality features, depending on its exact place in the Commission's evidentiary package. One could argue in this context that the appraisal process may indeed be highly dynamic.

The most natural analytical approach would be to first follow the Commission's steps in approaching any given concentration transaction. Subsequently, we will group the Commission's appraisal elements to be analyzed, in several stems (factors relating primarily to the merging undertakings, factors relating to competitors and other factors / econometric tools), again in a didactic endeavour, which aims at pinpointing the dynamics of the appraisal process. Case law examples will be provided where appropriate in order to substantiate our theoretical assertions.

5.1. The (Four) Steps Analysis

One may identify several procedural steps that the Commission follows before declaring a concentration to be incompatible with the Common Market. In particular, the Commission has to:

- Gather all relevant facts,
- Develop the basic theory of anticompetitive harm,
- Specify the applicable test(s) and
- Select the appropriate econometric tools that would support its opinion.

These (four) steps do not take place all at once or within a specified order. Rather, the facts will determine the theories and tests to be used and *vice versa*. In this sense, as mentioned above, the process is relatively dynamic and evolving. Some or all the above steps may be considered with varying degrees of depth and detail in the course of the first Phase of the investigation, depending on the issues at hand. In this respect, and for the

sake of clarity of the analysis, we will choose to first briefly tackle the issues concerning the facts gathering process and the aspects regarding the Commission's specifying the basic theory of anticompetitive harm and the applicable test(s). Subsequently, we will direct our main focus to the most relevant elements of the Commission's concentration appraisal one by one, while attempting to establish what importance is attached to each of them in the overall process of predicting the effects of a given concentration transaction.

5.1.1. Gathering the Facts

With regard to the facts, it was previously provided[160] that the Commission has a duty to conduct a thorough and painstaking investigation, while being guided by the principles of good administration. Namely it must collect all relevant qualitative and quantitative information from the market in a comprehensive manner. The Merger Regulation and the decisions of the Community Courts have given the Commission wide, discretionary, however not absolute powers as to the type of information that it may choose to collect from the notifying parties, its competitors, suppliers, and customers, as to the scope and depth of information that the Commission may request pursuant to Article 11 of the Merger Regulation, and also as to the conclusions drawn from the above. However, with this wide degree of discretion comes the expectation that the facts package that the Commission will collect will raise up to a quite high standard of accuracy; and this is so especially given the retrospective nature that the facts of any given case bear.

Indeed, once the facts are gathered, the Commission has to describe the pre-existing market conditions with accuracy. As the ECJ consistently pointed out on numerous occasions, the quality of the data is key to the reliability of the Commission's prospective analyses. The task of the Commission is particularly demanding. For instance, in the context of particularly complex merger cases such as *GE / Instrumentarium*[161] and *Oracle / PeopleSoft*[162], this has resulted in a very burdensome data gathering process. In this respect, one may question if the strict timetables set forth in the Merger Control Regulation conflict with the evidentiary requirements. It seems that, in view of the necessity to base its opinion on solid factual grounds the Commission will probably continue to make extensive use of the "stop the clock" provision under Article 11 Merger Control Regulation. For instance, in the *Oracle/PeopleSoft* merger, the clock was stopped twice and the review period was extended by about 6 months (Botteman, 2006, p. 78). Under these tight time constrains, one may speculate in the sense that, if the Commission cannot abuse employing the "stop the clock" provision, the quality and reliability of the data collected may sometimes be doubtful and consequently, the likelihood that the prediction process may be to a certain extent flawed, arises. To this end, in order to keep the Commission in check, the Court of First Instance stipulated in the *Airtours* case that the Commission may not rely on information taken out of context or on information whose source cannot be verified. Still, we believe it is extremely difficult to substantiate a proposition as the above, concerning the prediction process being possibly flawed, based solely on the tightness of the procedural deadlines.

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[160] Opinion of Advocate General Tizzano provided in the *Tetra Laval / Sidel* case.
[161] Case COMP/M.3083.
[162] Case COMP/M.3216.

Moving on, once facts are established, the Commission has to assess them and determine whether certain conditions and requirements are met. All relevant factors must be taken into account and carefully reviewed before any conclusion is drawn as to their significance and impact on market conditions. In this respect, such conclusions must satisfy the requirements of logic, coherence and appropriateness.

Indeed, the Community Courts regard the factual findings matter extremely seriously and will review the accuracy of such findings and the correctness of the conclusions stemming from them with the highest degree of attention, however, respecting the Commission's margin of discretion. Therefore, the Courts will not proceed in re-establishing the investigation process themselves, instead they will consider the entirety of the factual elements[163]. As predicated in the *Tetra Laval* Judgment, the Courts will make sure that the evidence relied on has to be factually accurate, reliable and consistent. However, as stated above, respecting the Commission's margin of discretion is not an absolute predicament, as there will be no hesitation on the Courts' behalf to point out and sanction the Commission's following actions, inactions or approaches:

- The selective omission of certain elements of the facts, which the Courts may consider relevant[164];
- The extent to which the Commission took all relevant factors into account and/or sufficiently inquired into the materiality of an assertion made in its decision[165];
- Conclusions reached, whether the facts upon which they relied actually appear to support the opposite outcome.

5.1.2 Specifying the Basic Theory of Anti-competitive Harm and the Applicable Test(s)

As a part of this investigatory process and on the basis of the data provided by the parties in their Form CO and also in response to the various information requests, the Commission will start applying the basic anti-competitive harm theory behind the transaction. It will typically pay attention to the potential anti-competitive effects that the concentration may generate using as a basic framework the two theories (coordinated and non-coordinated effects) laid out in the *Horizontal Merger Guidelines,* as well as the conglomerate and / or vertical effects theories listed in the *Guidelines on the Assessment of non-horizontal Mergers*[166]. Monopoly or oligopoly settings will also be taken into account at this stage. In particular, the coordinated and unilateral effects theories under the Horizontal Merger Guidelines will often be considered useful instruments to better identify and frame the issues. The Commission's task will not only be to articulate the theory of anticompetitive harm, but to go a step further by laying out the test and the conditions that must be satisfied before its intuitive thinking rises to the level of informed assessment.

According to the opinion of Advocate-General Tizzano in the *Tetra Laval* case, the

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[163] See the *Airtours* case.
[164] Ibid.
[165] The Airtours, Tetra Laval and Schneider cases.
[166] OJ C 265, 18.10.2008.

Commission's task entails a complex technical assessment, based not necessarily on the application of precise scientific rules but on economic criteria and principles which are open to question. Therefore particular attention must be paid to the selection, use, and calibration of economic theories and instruments. It is self evident that errors performed at this initial stage will result in faulty assessment results. The chosen theories and tests have to be supported by facts, and the Commission should ensure that this is so. However, it seems that there is no clear specification out there besides the principles of logic, coherence and appropriateness, as to how the Commission should argue it's preference for a certain theory, for a particular type of calibration or for the selection of a certain variable against another. Therefore, it goes without saying that choosing the appropriate setting of investigation is of paramount importance to the entire development of the appraisal process.

The Community Courts have reviewed the appropriateness of the economic theories used by the Commission to articulate the competitive harm effects underlying problematic transactions on several occasions[167]. The Courts have:

- Scrutinized how correctly were the constitutive elements of the theories employed were spelled out thus;
- Analyzed the extent to which the relevant test has been adequately presented by the Commission, including all its ramifications;
- Observed whether the relevant questions were correctly posed in the course of the administrative proceedings.

Once these tests / theories have been properly spelled out, the Commission will have to use a number of market assessment techniques and economic tools to verify whether each proposition of the test is fulfilled. We will take a look at the roles of such factors in the paragraphs to follow, focusing on those which may raise problems in the context of the Commission's prediction exercise.

5.2. Factors Relating (Primarily) to the Merging Undertakings

The analysis which will follow under this heading pertains to the merging parties just as much as it pertains to the remaining competitors in the market. The breakdown of the market shares and economic strength concepts relates from an analytical point of view to the study of the actual / current competition / competitors concepts. And this is because considerations relating to market shares and economic strength inevitably reflect to a large extent on the status of the remaining competitors. After all, the *Nestle / Perrier*[168], *Varta / Bosch*[169], *Renault / Volvo*[170], *Boeing / McDonnell Douglas*[171] and *DuPont / ICI*[172] cases emphasize the Commission's pattern of going beyond simple market shares comparisons, judging the competitors' resources and reputation, their propensity to

[167] The *Gencor*, *Kali and Salz, Airtours* and *Tetra Laval* cases.
[168] Case IV/M.190.
[169] Case IV/M.12.
[170] Case COMP/M.1980.
[171] Case IV/M.877.
[172] Case COMP M.984.

provide effective competition and the ability to do so. The questions that need to be asked here are: can the structure of the market still provide effective competition? Can the competitors left in the post-merger market still exercise restraints on the merged entity? Even more, does the weight attached to market shares guarantee the Commission's ability to reach a viable decision from a consumer / social welfare standpoint?

5.2.1. Market Shares / Remaining Competition

The concept of market shares relates to the percentage of total shares of the product to be held by the merged entity and the distribution of the remaining shares among the rival firms in the relevant market.

The division of market shares[173] practically depends on an accurate and realistic definition of the relevant market. Market shares are meaningless unless they flow from a proper definition of the geographic and product market (Cook & Kerse, 2000, p.152). It is self-evident that a wide relevant market would amount to more players and thus a lower market share for the undertakings concerned. By the same token, a narrow market definition usually preferred by the Commission[174], leads to a smaller number of companies in the relevant market and consequently to higher market shares for the undertakings concerned. In other words, the effect of the anti-competitiveness in discussion, as mirrored by the established market share, may be less evident if one faces a widely defined market, than if the market is narrowly defined.

It is a commonly agreed fact that traditionally, merger control in Europe has focused mainly on market share analysis; competition authorities have been concerned predominantly with the market share of the merged entity and with the level of concentration within the industry. The Merger Task Force of the European Commission, for instance, has tended to become agitated about a merger when the merged entity would have more than 40% of the market[175], or the largest three firms post-merger would have more than about 70%. Market shares at these levels created a (rebuttable) presumption

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[173] The market shares of the concentrating parties are cumulated and compared with the market shares of the competitors using the *Herfindahl / Hirschman Index (HHI)*, test which presents an advanced method of balancing the importance of market shares and establishing market share thresholds. The *HHI* is a measure of the size of undertakings and an indicator of the amount of competition among them. It is defined as the sum of the squares of the market shares of each individual undertaking. As such, it can range from a very large amount of very small firms to a single monopolistic undertaking. Decreases in the *HHI* generally indicate a loss of pricing power and an increase in competition, whereas increases imply the opposite. The *HHI* is purely indicative.

[174] For an extreme example of a narrow market definition see: (2000/12/EC) Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement *(*Case IV/36.888 - *1998 Football World Cup)* (notified under document number C(1999) 2295), OJ 2000 L5/55. Moreover, cases such as Case C-333/94, *Tetra Pak II*; Cases 6 and 7/73 *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission*, 1974 ECR 223, 1974 CMLR 309; Case 22/78 *Hugin v. Commission*, 1979 ECR 1869, 1979 3 CMLR 345; Case 53/87 *CICRA v. Régie Nationale des Usines Renault*, 1988 ECR 6039, 1990 4 CMLR 265; and Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, 1988 ECR 6211, 1989 4 CMLR 122 all highlight the tendency in Community law to adopt narrow market definitions.

[175] See par. 150 of the Tenth Competition Policy Report.

that the merger would be anti-competitive. Therefore, this has naturally meant that the market definition in a merger case has been the key to the outcome of the competition authorities' deliberations. However, this description of traditional European merger control is, of course, not entirely fair, as the presumptions based on market shares are rebuttable and frequently are rebutted[176]. Competition authorities have long known that competition can be intense even in concentrated industries, and that factors such as the ease of entry into the industry, or ease of expansion by players already in the industry, could remove the possibility of anti-competitive effects. Indeed, at European level, a number of concentration transactions giving rise to aggregate market shares exceeding 40% of the relevant market have been cleared, sometimes even in Phase I[177].

As we have discussed in chapter 2 of this contribution, the switch from the dominance test to the SIEC test in the standards against which mergers are judged in the EU means, among other things, that it is likely for less reliance to be placed on market shares in merger control in the future. And this is because, dominance is not deemed anymore to be the sole method of altering effective competition through a concentration transaction?

Empirical analysis has played a significant role in European merger control for a number of years. However, the empirical analysis has tended no to focus on consumer harm[178]. Instead, due to the use of the dominance test, it has focused on market definition, a necessary precursor to calculating market shares. Hence the empirical analysis has tended to be focused on the cross-elasticities between products and the own-price elasticities of groups of products (for product market definition) and on competition between regions (for geographic market definition). The new SIEC substantive test suggests that there is scope for empirical analysis that focuses directly on the potential price effects of a merger, with a closer view to the attainment of consumer welfare.

While acknowledging the benefits this new trend set through the shift in substantive analysis, the question we are still interested is: are market shares indications, as an element of the Commission's evidentiary package, able to effectively contribute to the Commission's ability to predict the likely effects of a concentration transaction.

First, having regard to the emphasis originally placed on the market shares, we may argue that evaluating the market shares should only be the starting point of a concentration assessment and their importance has to be put in the overall context of the given transaction; still, how accurate is the reflection market shares give as to the strength of a

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[176] See for example the *GE / Instrumentarium* case.

[177] See for examples cases such as: *Rhone Poulenc / SNIA II,* Case M.206*, Vesuvius / Wulfrath,* Case IV/M.472, *GE / CIGI,* Case IV/M.465, etc.

[178] For example, *Boeing / McDonnell Douglas* case the post-merger market share of the parties would have been 70%, a 6% increment on the pre-merger market share of Boeing. On purely structural grounds, that looked like a problematic merger and, indeed, the Commission did impose significant remedies on Boeing, such as canceling its exclusive contracts with American Airlines, Delta and Continental, and maintaining McDonnell Douglas as a separate legal entity for ten years. However, at no point in the decision is there a discussion of how the merger might harm consumers, whilst there is much on how it might harm competitors. For further details, see Walker, 2005.

company / the structure of the market?

Of course, there are different methods of calculating market shares[179]. Also, market shares may fluctuate easily depending on the characteristics of the market (especially if one is assessing a relatively new market[180]), on the type / nature of competition on it[181], on the defining features of the product / service in question[182], on the temporal factor (the time span, according to which market shares are calculated)[183]. These fluctuations are very important, as is the pace of technological change and product innovation, aspects which are encompassed in the phrase 'the structure of all markets concerned'. Consequently, given the presence or absence of different circumstances as such, market shares figures may deliver different messages. For examples, cases involving oligopolistic markets may be regarded as different from the market share issue standpoint, because in such markets, the symmetry of the market shares may cause concerns just as much as the wide disparity between them (Cook, Kerse, 2000, p. 156).

Furthermore, *ex-ante* merger control decisions entail predictions on how a specific market will develop in the future should the concentration be allowed. To exemplify, in the *Mannesmann / Hoesch* case[184], while clearing the merger of the parties' steel tube businesses, the Commission took into account the imminent introduction of the utilities procurement rules in the German market, which stated that where in certain product sectors the merged entity would have over half the market, more than 50% of contracts for gasline pipes would have to be advertised and let competitively. At par. 91 of the Article 8 Commission decision it was stated that high market shares are an important factor as evidence of a dominant position provided they not only reflect current conditions but are also *a reliable indicator of future conditions.* Indeed, the Commission continued, if no other structural factors are identifiable which are liable in due course to change the existing conditions of competition, market shares have to be viewed as a reliable indicator of future conditions.

Also, the significance of a high market share must be seen in the context of the market dynamics and of the degree of competition, both actual and potential, which the merged entity faces in the market (Van Bael, Bellis, 1994, p. 451). Both actual and potential competition may act as a significant check on the market conduct of the merged entity[185]. It has been actually said that the real market power of an undertaking with high market share is qualified by the position of remaining competitors and the entry conditions in the

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[179] See for example the *Boeing / Mc Donnell Douglas* case.
[180] *Digital / Kienzle*, Case M057/1991.
[181] For example, in the *American Cyanamid / Shell* case, IV/M.354, where the Commission dealt with a heterogeneous market showing growth, innovation and rapid technological change. The Commission stated that in a market exhibiting features as such, an analysis focusing on market share alone is not particularly probative in a dynamic and R&D – intensive industry. Furthermore, it concluded that high market shares may provide no indication of market power, particularly if entry barriers are low.
[182] *ABB / BREL,* Case M221, 1992.
[183] *Elf Aquitaine / Thyssen / Minol*, Case M235, 1992
[184] Case IV/M.0222.
[185] See, for example the *Courtaulds / SNIA* case, M113, 1991.

market under scrutiny[186]. The effectiveness of the constraining influence of actual competitors on the competitive behaviour of the merged entity depends on the market share that these competitors possess[187] as well as on their production capacity, the financial resources, their access to technology, the effectiveness of the distribution network and the quality of the products / services offered. If the products offered by the actual competitor are out-dated, or have a poor reputation, the ability of the competitor to restrain the market conduct of the merger entity will be limited. Also, the strength of the actual competitors will be limited if they are only able to offer a more limited range of products than the merged undertaking. The strength of potential competition, on the other hand, both from expansion on the part of companies already present on the market and from new entrants depends primarily on the legal, technical or economic nature of the barriers to expansion or entry to the relevant market (Van Bael, Bellis, 1994, p. 453). Past market status or trends in this respect is taken into account; however, there is a necessity for an analysis of the nature and functioning of the above mentioned barriers in the context of the market, following the concentration, in order to properly grasp the relevance of the pressure exercised by competitors on the market behaviour of the merged entity. A more comprehensive look at issues regarding potential competition, as well as barriers to expansion or entry, in the context of the Commission's ability to predict the effects of a given merger, will be provided in paragraph 5.3.1 of this chapter. However, the assertions above are meant to emphasize the fact, that market share should not and cannot be assessed in a singular manner. Considerations regarding market share intertwine with those referring to competitors or buyer power. It is in this context that we have to reiterate that the format of analysis we are following here is strictly didactic, since a unitary classification of the elements forming the market analysis cannot be rigidly provided.

It may very well happen that market shares are either unavailable or completely unreliable. For example, in the *Securicor / Datatrack* case[188], no concentration appraisal could be made because the joint venture's purpose was to introduce a vehicle tracking service to the Dutch market where no similar service was available. Furthermore, in the *ABB / BREL* case, the Commission noticing the high and unpredictable fluctuation of the market shares on a yearly basis, neglected the market shares division and stated that for the concentration at hand it sees no competitive concerns, especially given the likely stiff competition to occur in the future due to the presence on the European market of several large competitors.

All in all, we may argue that market shares may be able to mirror the realities of a market structure, but only to a certain degree of accuracy: namely, they are only as reliable as the accuracy of the product and geographic market definition that they are based on, or as reliable as accurate the correlation with the market dynamics is. Market share indicators, although providing a rough impression of market realities, do not necessarily give us an insight in the merging undertaking's future behaviour patterns, or in the future market

[186] See also Cook & Kerse, 2000, p. 152.
[187] The larger the gap between the market share of the merged entity and the nearest actual competitor is, the indication of the merged entity to act independently of those competitors is greater.
[188] Case IV/M.561.

dynamics development. Relying solely on market shares and ignoring the relevance of the other factors involved may lead to severe errors in judgment; and this is because market share estimations do not guarantee by themselves the future existence of anti-competitive market performance. Last but not least, the market share determination is placed at the end of a chain of events, determinations or assessments (such as defining the relevant market, technological change and product innovation). Mistakes or inaccuracies committed during these processes or the misinterpretation of the presence or absence of certain market circumstances may very well lead to an incorrect establishment of market shares, which in turn will jeopardize the prediction process.

5.2.2. Economic and Financial Power, Portfolio Power and Access to Supplies or Markets

Although market shares are the primary tools to mirror the economic power of an undertaking, several other features, which may evade the assessment contained in the market share calculation exercise, may portray a clearer picture of the strength of a company. Although less emphasis is placed on factors such as mentioned above, it must be acknowledged that for the purpose of predicting the outcome of a concentration transaction, these factors may introduce new dimensions of the predicting process. Whether relying solely on market shares while appraising a transaction may lead to faulty results, the Commission has to go deeper in examining the undertakings' power by investigating their financial and economic resources. The resources of particular undertakings may provide them with considerable immunity from the actions of its apparent rivals.

The manner in which financial and economic power is assessed relates to a number of different parameters, such as turnover, profitability and access to finance. Not only this, but a firm which has access to well-established sources of supply, markets for its products or solid distribution systems and access to outlets, may have a safe-net against adverse market trends. These cushions sheltering an undertaking from such market reactions may manifest themselves in vertical rather than horizontal expansions; thus the Commission's prediction exercise becomes even more complicated due to the involvement of new markets and new parameters (such as the likelihood of leveraging, market foreclosure, etc) which require fresh assessments. To detail the above, leveraging may be manifested in different shapes.

First, a company may redirect its resources to other distinct markets and activities that it may be involved in. In this respect, the manner, speed and efficiency of this potential shift in company focus require a thorough investigation. Second, economic strength leveraging may be performed through strategic market transactions. Companies may premeditate tactical moves such as divestments and spin-offs which may apparently mask the actual strength of a given undertaking. Analyzing such issues is not uncomplicated to perform, not only due to their prospective nature, but also due to the motivations and drivers which lie behind them. It is beyond the scope of this contribution to investigate remote issues as such. However, it has to be acknowledged that they form part of the market dynamics which plays a key role to predicting the outcome of a given transaction.

Last but not least, in cases such as *Coca-Cola / Amalgamated Beverages*[189], *Coca-Cola / Carlsberg*[190] and *Guinness / Grand Metropolitan*[191], the Commission aimed at identifying the risk that the depth of an undertaking's product range and more specifically a portfolio of strong brands may in itself, if misused, lead to anticompetitive effects[192]. It may be argued that commercial and economic advantages may arise due to the portfolio effect. To take a few examples, we may refer to increased supplier power, greater pricing flexibility, etc. However, in order to properly assess the effects of portfolio power on the market structure, one has to clearly understand the strength of a particular brand. In this context new and non-merger specific elements may be added to the equation: marketing techniques, publicity, etc. All in all, strong undertakings may have their portfolio spread across different product markets, which may exhibit extremely varied features.

Therefore, measuring a company's "muscles" is an exercise more complex that just assessing market shares and the companies' position in the market. Even more, while appraising a concentration, with a view to attaining welfare, the undertakings' force is to be put in the context of the market dynamics, which entails more intricate behavioural or structural elements. In this respect, it may be argued that the prediction process entails more triggers than simply one's market strength.

5.3. Factors Relating to Competitors

It is appropriate to commence this analysis from one of the statements provided in the previous paragraph, namely: the real market power of an undertaking with high market share is qualified by the position of remaining competitors and the entry conditions in the market under scrutiny. It is an assertion as such that can properly emphasize the importance of market dynamics. We will choose to briefly assess potential competition issues and barriers to entry elements together as they are highly interrelated. It is self-evident that the existence of solid barriers to market entry will cause a smaller incentive and likelihood of outsiders to penetrate the given market. In other words, the real scope for potential competition depends critically on entry barriers. Subsequently we will engage in a more specific and exemplifying discussion which will better emphasize the functioning of the market dynamics. We refer here to situations of parallel and overlapping mergers.

5.3.1. Potential Competition / Barriers to Entry

The assessment of barriers to entry (in whatever shape manifested[193]) and the emergence

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[189] 1997, OJ L218/15.
[190] 1998, OJ L145/41.
[191] 1998, OJ L288/24.
[192] See also Cook and Kerse, 2000.
[193] According to Cook and Kerse, 2000, barriers to entry may be classified in three, sometimes overlapping categories: absolute advantages enjoyed by incumbents over potential entrants, strategic advantages of incumbents and exclusionary practices of incumbents. A different classification displays the variety of shapes that barriers to entry may be embodied in: costs of advertising (*Procter & Gamble / Schickedanz,* Case M.398), the strength of established brands (*Guinness / Grand Metropolitan*), economies of scale (*Saint Gobain / Wacker-Chemie / NOM,* Case IV/M.774), tariffs and national (legal) regulations, should

of potential competitors to the merged entity, must be placed in a coherent frame. First, one must identify if the barriers to entry are raised due to the merger, or they are pre-existing. Market dynamics have to be assessed both in a prospective and a retrospective manner. Second, it is important to correlate potential competition considerations with the status of the actual competitors already existing on the market. The Commission not only has to predict the reaction of existing competitors to the merger, but must corroborate these reactions with the market shifts that may arise should new entrants bring about new restraints on the merged entity. Seeing things in perspective, it has to go beyond assessing the likelihood of entry. In this respect, one factor that will invariably have a bearing on the likelihood of entry is the prospective growth of the market or the probability of future market / competition disruptions to occur.

Furthermore, it is imperative to assess the period that a potential market entrant would need in order to overcome any barriers and establish a viable presence on the market. However, this exercise may be highly speculative with regard to the Commission's main aim of predicting whether the concentration at hand will or will not be compatible with the Common Market. And this is so because:

- The Commission has to go beyond the mere possibility of entry and must provide cogent evidence that entry is a realistic prospect within a short period of time (normally the Commission uses a 1 year period as standard of reference[194]);
- Also, the Commission has to assess whether the current prices and the potential profits in a given market are sufficiently attractive for outsiders. However, in order to determine whether entry will be successful or not, the standard to report to should be the prices and profits that will rule thereafter.

Speaking of prices and costs, it is important to correctly estimate the expenses that establishing a profitable and fully workable plant would entail. It has to be investigated if potential market entrants regard the possibility of penetrating a new market as a cost-effective move. Furthermore, one has to study if potential market players are indeed sufficiently motivated and able to pose serious opposition to the merged entity, which may presumably be dominant in that given market. Reference has to be made here to the arguments provided above, in paragraph 5.2.2 of this chapter, concerning the economic strength of a given undertaking. However, the Commission's practice resumes to investigating hard evidence from recent past provided by the merging parties in their form CO. If evidence of successful recent entry can be demonstrated, or if a market can be shown to be dynamic with a record of recent entry and exit, this is likely to be sufficiently convincing for the Commission that entry is likely. In this respect it may be argued that the Commission's approach relies on the likelihood of history repeating itself. For this assessment to be a credible one, insights in these companies' market strategy and development plans need to be observed and understood; and this is not a simple exercise

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that still be the case, buying preferences (*Kali and Salz*), patents and other intellectual property rights (*Tetra Pak / Alfa-Laval,* Case M.68), the need to establish handling facilities, distribution or servicing networks (*Kesko / Tuko*, Case IV/M.784, *Mercedes Benz / Kassbohrer,* Case M.477).

[194] See the *Mercedes-Benz / Kassbohrer* and *Saint Gobain / Wacker Chemie / NUM* cases.

and furthermore, neither a necessarily useful one. The reason for this is that not many companies exhibit great transparency in their future market strategy, innovation developments or R&D prospects. Even if this would be the case, inferences drawn from potential future strategic actions may not be relied on to a full extent, since these potential entrants may not be bound to act on these purely informative statements of intentions.

Considerations on potential competition form part of the market dynamics concept. Although being inevitably related to aspects concerning (pre-existing) entry barriers, potential competition assessment is always prospective. Relying on past experience and market patterns can of course constitute a workable basis to start from. However, the potentiality of market entry to actually take place revolves around more complex elements, which may evade the past market patterns. The degree of deviation from previous market entry evidence may vary depending on a multitude of circumstances, sometimes of behavioural nature, which may or may not be placed in a prediction frame. For example, let's say it can be reasonably assumed (however, without an absolute degree of certainty) that if market entry will take place, there may be some sort of reaction from the existing players on the market. It goes without saying that hard proof concerning the future likelihood of market players' reactions to take place is difficult to produce. Should these reactions actually take place, their nature and causes, however, often go beyond what is displayed on the market and what can be observed with the naked eye. Moreover, with regard to the causes and internal companies' motivations to enter the market or to react to new market entry, it is often difficult to get the grips of reliable evidence which can form the basis of the prediction process. In this respect we may argue that cogent evidence that entry is a realistic prospect, or that entry will trigger certain market reactions / fluctuations is difficult to produce, as long as full disclosure of companies' market tactics seems complicated to achieve.

5.3.2. Parallel and Overlapping Mergers

On a more practical note, let us exemplify how market dynamics should be approached. We will refer in the lines to follow to certain situations that arise when there are two or more mergers in contemplation in the same market at the same time. Although a setting like this does not occur often, it constitutes a good exercise in observing market dynamics at work. It is useful to distinguish parallel mergers, that is mergers that are in contemplation in the same market, but which involve different suppliers from overlapping mergers, that is mergers that are in contemplation in the same market and which involve the same supplier (for example if one of the parties to the first proposed transaction is in the process of acquiring or disposing of another business in the same market through a second transaction). From the very beginning it has to be understood that the second transaction must be sufficiently far advanced to be taken into account for the purposes of the Commission's counterfactual analysis. Opinions in the doctrine provide that if the second transaction is *likely* to occur, then it ought to be factored into the analysis, but if it is not (as will normally be the case with transactions that have not passed the planning stage), it should be disregarded (Bavasso, Lindsay, 2007, p. 21). The

Commission seems to embrace this pattern[195].

Cases such as: *Nestle / Perrier, Air Liquide / BOC, BPAmoco / Arco, Sanitec / Sphinx, Verizon / MCI*[196], display the Commission's approach to parallel or overlapping mergers, exemplifying how the counterfactual principle functions in the context of predicting the market effect of the given concentration transactions. Indeed, should there be two proposed mergers, *X* and *Y*, and the Commission is considering proposed merger *X*, it is required to take account of proposed merger *Y* (because it has to predict the way in which the market would develop in the absence of merger *X,* in order to identify the counterfactual). For example, in *Nestle / Perrier* the Commission stated: "In its assessment of the proposed merger, the Commission must take into account any existing agreement, the implementation of which would have an appreciable effect on the future market structure." Furthermore, in the *Verizon / MCI* case, the Commission *assumed* that a parallel merger would proceed and found that no competition concerns would arise even if it did.

Of course, the Commission must stay in tune with all the developments of the market. However, it must not address them under the Merger Control Regulation, unless they are merger specific. Parallel or overlapping mergers are market developments which may be assessed using the Commission's merger control procedures and must be taken into account if the market structure assessment is to be reliable. One may ask though, how does one merger investigation feed into the other, and what is the impact on the prediction process, that this feedback may have?

The matter may not be as straightforward as it may theoretically seem. Every detail or intricacy of each merger appraisal may have a bearing on the concurrent assessment. And this is so because every variable inserted in the picture will alter the status of each transaction but in opposing directions. Such variables may be the following:

- One of the mergers may be, concomitantly or not, assessed by a different competition authority (for example, the US Federal Trade Commission or the Department of Justice), using different substantive and procedural laws.
- The undertakings involved in one of the transactions may put forward commitments, provide divestiture plans, etc, which may alter the market structure. These circumstances need to be viewed carefully from both sides of the story, as they may alter the structure of the market in which the merged entities would function.

Ideally, the Commission would want to prepare for the concurrent mergers two decisions which are as much as the circumstances of each case allow it, identical, like in the *BP / E.ON*[197] and *Shell / DEA*[198] cases. In the hypothetical parallel mergers setting, the Commission will aim, from a temporal perspective, at running two parallel appraisals,

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[195] See case *Industri Kapital 97 Ltd / Superfos A/S*, COMP/M.1748.
[196] Case COMP/M.1630, *Air Liquide / BOC*, [2004] O.J. L92/1., Case IV/M.1532 *BPAmoco / Arco*, [2001] O.J. L18/1, Case IV/M.1578 *Sanitec / Sphinx*, [2000] O.J. L294/1.
[197] Case COMP/M.2533, [2002] O.J. L276/31.
[198] Case COMP/M.2389, [2003] O.J. L15/35.

analyzing the data of the cases, the commitments put forward, etc at the same time. Of course, this setting may occur seldom rather than often. The strict time constraints that the Commission has to abide by during the appraisal procedure often do not allow for such time coordination to be achieved. The overlapping mergers setting offers an even more limited likelihood of timely-parallel assessment leading to (near) identical decisions. Thus, the feedback from the investigation of merger *X* may reach the investigation of merger *Y* tardily.

Whether one still aims at maintaining a temporal parallel appraisal, two possibilities arise: first, assumptions (more or less properly founded) will be employed to overcome a situation as such, possibly leading to jeopardizing the prediction process in both appraisals. Second, in the optimistic setting that the Commission has jurisdiction in relation to both proposed mergers *X* and *Y* and determines that only one of the mergers may proceed, then, logically, the first one that is decided should be approved because, in assessing the likelihood of the second occurring, the Commission will take account of the question of whether it is likely to grant approval to the second. In this context it has to be kept in mind that merger decisions are based on an analysis of the market at the date of the decision and not at some earlier date (for example, the date of any merger agreement or the date of the notification).

In a rather less optimistic setting, if the second merger falls outside the Commission's jurisdiction, then the Commission must predict the likely treatment of the second merger by any other antitrust authorities. A situation as such bears deeper qualifications as it relates to the cooperation (or lack thereof) relationship existing between different competition authorities[199]. To exemplify, we will direct the reader's attention to the discussions provided in the previous sections of this contribution regarding the difficulties and obstacles still present in double investigations processes run by the Commission and the DOJ / FTC. Of course, the Commission can be expected to be liaising with those authorities; however, predicting the likely treatment of a second merger, by a different authority, employing different rules, does add to the complexity of the issue. For example, if the other authorities are likely to prohibit the second transaction if the Commission approves the first, then the position is as described in the second *X* and *Y* scenario above. The position is even more complex if the other antitrust authorities are likely to permit the second merger even if the Commission approves the first. If the Commission's assessment is that only one transaction may proceed then, logically, it is required to prohibit the first transaction in this situation[200].

One other theoretical exercise would be to assume a setting where both transactions would be prohibited. A situation as such would produce an incoherent outcome because the Commission would have no grounds for prohibiting a subsequent third merger in the same market or, indeed, a fresh merger between one of the original two sets of merging parties (Stadler, 2003). It is also noteworthy that, if both transactions are prohibited in this situation, then there is scope for competitors to seek to block a transaction by themselves announcing a merger. The classic example in this respect is when the *Coca-*

[199] See for example the EU–US 1991 Cooperation Agreement and the 1998 "Positive Comity Agreement".
[200] See also Bavasso, Lindsay, 2007.

Cola Company announced the proposed acquisition of *Dr. Pepper*, *Pepsi* quickly announced that it would acquire *Seven-Up* in a tactical move widely perceived as seeking to reduce the chances that *Coca-Cola* would receive antitrust clearance for its acquisition.

One last observation refers to overlapping mergers. The Commission normally analyzes the first transaction on the assumption that the second will proceed, but is cautious about assuming that proposed disposals will proceed because, once approval for the first transaction has been obtained, the merging party may have an incentive to go back on the disposal agreement if retaining the business will result in its acquiring substantial market power. For example, in the *Industri Kapital / Perstorp*[201] the Commission, while announcing that the case had been taken into a detailed Phase II investigation, stated that the impact of the proposed acquisition of *Industri Kapital* of *Dyno* is under investigation under a separate procedure. Consequently, the assessment of *Industri Kapital's* acquisition over *Perstorp* has to be based on the assumption that *Dyno* already forms part of the *Industri Kapital group*. In *Ahlstrom / Andritz*[202] the Commission took note of the fact that the purchaser had signed an agreement to sell a business that gave rise to the bulk of the overlap. The Commission cleared the transaction on the basis that it did not raise competition concerns provided that the disposal was completed, and indicated that if the disposal were not completed the Commission may revoke the present decision and re-examine the transaction.

To conclude, chronology is an important aspect: it is necessary to determine whether two transactions are sufficiently close to one another chronologically that the latter should be taken into account for the purposes of the counterfactual analysis. Logically, the decision whether to approve a merger is built on the basis of the information available as of the date of that decision and a recently announced merger ought therefore to be taken into account. However, with a view to the strict deadlines, the Commission takes the view that if the new information emerged so shortly before the decision deadline that the Commission could not carry out a proper assessment, then it should be entitled to disregard it. Still, qualifications of an assertion as such may be brought up, since the Commission's approach, as just displayed, contradicts the necessity of observing market dynamics in perspective:

- In the case of parallel mergers, the power under Article 10 (4), i.e. suspending the timetable whilst information is requested under Art.11, is not available because the need to obtain additional information would not arise as a result of circumstances for which one of the undertakings involved in the concentration is responsible.
- When a case is being considered in the first phase, the Commission has the option to open a second phase inquiry to consider the relevance of the recently announced transaction if that transaction creates serious doubts regarding the compatibility of the concentration with the Common Market[203].

Overall, whether dealing with overlapping mergers or parallel mergers, the prediction

[201] Case COMP/M.1963.
[202] Case COMP/M.1930.
[203] Schmidt, 2003, p. 189.

process has to take into account not only the (likely) presence of a different transaction and the way that it may alter the given market structure, but also the manner in which the two transactions influence each other. In any case, the appraisal process is a dynamic one which theoretically should be capable of quick adjustments when new circumstances are inserted in the transaction assessment. However, as we have seen above, an assertion as such bears its complications and limitations.

5.4. Other Factors

5.4.1. Buyer Power

Just as actual and potential competition, buyer countervailing power is a mean to constrain the actions of the merging parties. Assessing the effectiveness of the merged entity's customers' countervailing activities may therefore be relevant for the purpose of predicting the likely outcome of a given concentration transaction. Buyer power is a factor normally considered by the Commission in its appraisals however, it has been of major influence only in a few cases[204].

How does the Commission assess buyer power? The Commission investigates first the structure of the buyers. It departs from the assumption that buyer power is more likely if the buyer structure is concentrated rather than fragmented[205]. Features such as size, sophistication and resourcefulness of the buyers may not necessarily be significant buyer power characteristics and the Commission tends to attach little importance to such features especially if these customers only buy small volumes of a given product. For example, the Commission will regard buyer power as being sufficiently strong and providing adequate countervailing force if purchasers have the ability to develop alternative suppliers. Nevertheless, the Commission has so far only accepted that a company has countervailing buyer power if specific reasons for the existence and use of such power can be identified (Navarro, Font, Folguera, Briones, 2005).

In par. 81 of the Article 8 *Coca-Cola / Carlsberg* decision, the Commission formulated the substance of buyer power analysis as follows: "… in an assessment of dominance the question is whether there is sufficient countervailing buyer power to neutralize the market power of the parties." The key factor in this assertion is the sufficiency of the countervailing power as embodied in the relative degree of dependence of one party on the business of the other (Cook & Kerse, 2000). The term "sufficient" bears a relative connotation to its meaning, which leads to uncertainty when establishing how far should the Commission go in order to prove the likelihood that the countervailing buyer power is able to satisfyingly contribute to maintaining a competitive market structure. Not only this, but further ramifications and qualifications of the concept come in the picture, as it is not always enough to investigate whether there is sufficient buyer power present to bypass any anti-competitive effects that a concentration may bring about. The analysis needs to be taken one step further and investigations on how effective the countervailing power will be need to be performed.

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[204] See for example cases such as: *Nestle Perrier, Guinness / Grand Metropolitan.*
[205] See for example case *Enso / Stora,* IV/M1225, 1998.

For example, buying tactics may be important and the Commission has taken into account[206] a tradition of competitive tendering or multiple sourcing as behaviour by buyers which can impose credible restraints upon a pre-eminent manufacturer or supplier. In some situations the buyer may even be instrumental in introducing a new competitor, or may have the resources to integrate vertically as protection against an apparently dominant firm (Cook & Kerse, 2000). However, past evidence may not necessarily prove (with an absolute degree of certainty) the likelihood of history repeating itself. The intricacies of the new post-merger market structure may cause repositioning of corporate strategies the truthfulness of which may not guarantee the appropriate counterbalancing of the merged entity's strength. Furthermore, when assessing buyer power one has to be aware that it may not necessarily be stored in the hands of well defined market subjects. Buyer power may be transformed into seller power in markets downstream, thus making it more difficult to follow whether the countervailing power still works towards guaranteeing the fulfilment of consumer welfare.

For the purpose of predicting if the market structure will still be a competitive one, should the given concentration be cleared, the crucial aspect in respect of countervailing buyer power is its ability to neutralize the potential anti-competitive effects which may arise as a result of the merger. It may be argued that, the buyer power's degree of sufficiency mentioned above translates, in the Commission's view, in the ability to neutralize potential anti-competitive effects. In this respect, cogent proof needs to be provided that countervailing buyer power will be not only present but also effective. As we have already stated in paragraph 3 of this chapter, the difficulty of delivering such proof is qualified by numerous factors, amongst which, extremely difficult to establish or to predict are those relating to corporate strategies or concerning the precise identification of the buyer power holders. Last but not least, it has to be borne in mind that assessing buyer power, although departing from the presumed or proven existence of customers, constitutes a prospective analysis which needs to be corroborated with all the aspects of market dynamics. Even so, employing buyer power assessment for the purpose of predicting the effects of a given merger does not constitute a workable solution as long as defining the boundaries of the neutralization effect is a difficult exercise.

5.4.2. Product Homogeneity, Substitutability, Demand, Supply, Customer Preferences, the SSNIP Test

The elements mentioned above form part of the product / service relevant market definition process, which constitutes the first step of a concentration appraisal. We chose to group these elements in one paragraph for the following reason: it is an already established fact that an accurate market definition is key to the proper unfolding of concentration appraisal procedure. These elements do not primarily constitute prediction tools in the hands of the Commission. However, the results of their assessment provide valuable information which will subsequently feed into different other processes (such as market shares calculation) aimed at predicting the outcome of the concentration.

For example, properly assessing the product functionality and characteristic will establish

[206] See for example the *Price Waterhouse / Coopers & Lybrand*, Case IV/M.1016.

the relevant product market in the context of which the market share calculation will be performed. Also, it may also be the case that the structure of supply and demand may lead to the identification of separate product markets, where an approach based on physical characteristics and functionality, and even price, may have suggested the opposite. The correct examination of price elasticities and the conclusions drawn from the application of the SSNIP test, besides establishing the relevant market boundaries, will also constitute input in any merger simulation models or other econometric tools. Furthermore, understanding trade patterns and supply conditions may constitute valuable information in establishing cartelization patterns or oligopoly investigations. Last but not least, conclusions regarding supply substitutability, transport or other transaction associated costs have to be viewed in the context of analyzing barriers to entry or potential competition consideration.

The Commission's approach to the determination of the relevant product market is based largely on the examination of the physical characteristics, functionality and end use of the products concerned[207], criteria which we believe usually tend in general antitrust practice to merge into one question: whether a product's characteristics render it capable of fulfilling the needs of potential buyers. Functionality, which is crucial in influencing the buyer's preferences, depends on factors such as diversity of application as well as level of performance. However, products that exhibit the same functionality may not form part of the same market[208] (Kokkoris, 2005, p. 210). Also, the mere observation that particular products have similar characteristics does not imply any particular degree of substitutability or cross-elasticity between them. Normally, for any pair of characteristics there will be some degree of substitutability and the choice of relevant characteristics may sometimes be difficult. In *Magneti Marelli / CEAC,* for example, it was argued that the starter batteries used both as original equipment for new cars and those used as replacements in used cars were identical but were, nevertheless, considered to be parts of separate markets; this was so not only because of the price differences between them, but also because of the fact that manufacturers were required to supply very large numbers of batteries on a just-in-time basis to car manufacturers under stringent conditions, which differed very much from supplying a wide range of dealers and garages with a variety of replacement batteries for stock for resale to motorists from time to time.

In the same context, one fact that should not be overlooked is that over time, shifting and blurring between the boundaries which separate two products or services exhibiting different characteristics may occur. Therefore, the market definition may itself be influenced by changes in commercial practice, which are often brought about by the changing requirements of customers. Not only this, but the Commission has emphasized that even if undertakings are operating in different markets, like in the *Tetra / Sidel* case, the fact that these markets may converge at one point in the future may influence the further assessment of the case. The relevance of the timing of production or purchase factor, which may influence the competitive nature of the market, is therefore an element that should not be left apart while defining the relevant market; we are referring in this

[207] See for example the following cases: *Magneti Marelli / CEAC*, case IV/M43, 1992, 4 CMLR M61, *Knorr – Bremse / Allied Signal,* case IV/M377, 1993, 5 CMLR535.
[208] See, for example the *Nestle / Perrier* case.

context to peak and off-peak services, seasonal variations, innovation, etc. The timing of decisions such as procurement or production can have an impact in cases where suppliers cannot substitute between time periods as well as in cases where it is not possible for customers to substitute between time periods (Kokkoris, 2005, p. 211). The Commission has to take into account these temporal shifting with regard to the product characteristics and market circumstances and has to foresee the future layout of the competition conditions whether the concentration transaction will be cleared or blocked.

Observations regarding the physical characteristics, end-use and functionality of the products concerned may not always be sufficient in order to obtain a complete and accurate market definition. Therefore, while defining the relevant product market, the Commission employs data of substitution in the recent past, preferences and views of consumers and competitors, barriers and costs associated with switching demand to potential substitutes, etc.[209]

The concept of substitutability pertains to supply substitutability as well as to demand substitutability. The process of identifying suitable substitutes is not always straightforward and easy to complete. The Commission places a great deal of emphasis on demand substitutability, relegating supply-side substitutability to the assessment of the concentration stage, fact also emphasized by the *Market Definition Notice*.

With regard to the supply substitutability aspect, it relates to the ability of undertakings to quickly and easily switch production or other resources to enter a market in which they have previously not been active. If they can do so, their potential entry will exercise a significant and effective constraint on the ability of the merged entity to act independently of its competitors. Market entry is only taken in consideration if it can be sufficiently swift and sustained to deter or defeat the exercise of anti-competitive behaviour of the merged entity. The appropriate time period for market entry to take place depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants. Market entry must be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger[210].

When defining the relevant product market employing only the use of demand substitution, some products are inevitably left out from the range encompassed by the product market; however these products are afterwards taken into consideration when assessing whether the merger transaction significantly impedes effective competition or creates / strengthens a dominant position. Therefore the post-merger competitive status with regard to the conditions of competition in a certain geographical region and also with regard to substitutable products is a result obtained starting from flawed premises, namely, an inappropriate definition of the relevant market. For this reason more attention has to be directed to supply substitution as well, as it should be also perceived as a significant parameter of correctly defining the relevant market. The risks of defining the relevant market solely based on demand substitution were emphasised in the *Pepsi Co /*

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[209] See paragraph 37-43 of the *Notice on the Definition of the Relevant Market,* OJ C 372, 09.12.
[210] For further details, see Maudhuit, Soames, 2005, p. 81.

Kas[211] case. The Commission in this case stated that there might be low demand substitution between different flavours of carbonated soft drinks, but a high supply substitution, as switching from the production of one flavour to the other is easy in the short term. Nevertheless, the Commission decided that specific flavours form different markets and therefore the relevant product market in this specific case was narrowly defined.

In assessing supply substitutability one cannot help but notice that this concept pertains a great deal to potential competition (through an analysis of barriers to entry). Potential competition is important both in the context of defining the market as well as with regard to considering the effect that the concentration has on the market. Supply substitution from these two points of view may be conceptualized through the following equation[212]:

Reduction in demand for products of the merged undertaking
=
Demand substitution
+
Supply substitution to existing products, coming from outside the relevant market, namely from potential competitors (taking into account barriers to entry)
+
Supply substitution to new products (taking into account the possibilities and resources of market new entrants to quickly adjust to the conditions of competition of the market and bring about new substitute products)

The way in which substitutability is conceptualized follows the US practice of estimating the cross-price elasticity of demand, by postulating the SSNIP (small, but significant, non-transitory increase in price) principle[213], which evaluates the likely reactions of customers to hypothetical price changes within the market. The ability of the hypothetical monopolist to raise prices in a market is inevitably limited both by supply substitution and demand substitution. The way in which the SSNIP test works may seem quite simple: whether a 5-10% increase in the price of a good determines such an increase in the price of another good, thus rendering the price increase unprofitable, then the two goods in question belong to the same product market. The SSNIP test starts off with the narrowest possible market definition, further examining whether the hypothetical monopolist can profitably maintain the small, but significant, non-transitory increase in price. Whether such a price increase is profitable will depend on whether the loss of sales resulting from the price increase can be offset by the increase in profits. Assuming the small, but significant, non-transitory increase in price is not profitable the next closest substitute is added to the relevant product market, possibly extending the geographic market as well. The test is run as many times as it takes in order to establish the smallest, most compact

[211] Case M.289 / 1992.
[212] See Neven, Nuttall, Seabright, 1993, p. 49.
[213] In 1982 the US Department of Justice Merger Guidelines introduced the SSNIP test as a new method for defining markets and for measuring market power directly. The European Commission adopted SSNIP formulation in its 1997 *Notice on Market Definition*. Since then, the SSNIP test has been widely accepted as an essential tool in defining the relevant market.

group of products in a certain geographic area, so that a hypothetical monopolist is able to profitably maintain prices which are higher than the competitive level of prices, even by a small amount.

Complications may occur in the application of the SSNIP test, especially when establishing the existence of a dominant position, since the starting price to be assessed may be established in a low competitive environment, thus leading to wider relevant markets and consequently, faulty substantive assessments of anti-competitive behaviours. This phenomenon is called the "cellophane fallacy", after the *US v. E.I. du Pont de Nemours & Co.*[214] monopolization case in 1956, involving a cellophane producer. In this case, the Court mistakenly decided that the producer had no market power due to the existence of substitutes. However, these products were considered proper substitutes at the monopoly price already charged by the producer. The "cellophane fallacy" phenomenon is more relevant in regimes where the substantive legal test is based on dominance, since the level of market power needs to be carefully addressed, rather than in SLC or SIEC regimes, where the focus is directed towards the changes that occur in the market.

With regard to merger assessments, the application of the SSNIP test, especially with respect to the starting price aspect, may face difficulties in situations where the pre-merger price is slightly higher than the competitive level of prices, but the post-merger price, due to efficiency gains may be significantly closer to the above mentioned price level. Such a situation would lead to incorrect market definitions.

Determining what constitutes a high level of substitutability may therefore seem somehow arbitrary. To this end, the Commission should employ alongside the SSNIP test, other devices or formulas in order to properly determine the coordinates of the relevant market. For example, in the media sector, let us assume a cross-media merger between a newspaper and a TV station. The SSNIP test would of course be the starting point; however the factual circumstances, mostly of political or cultural nature, which cross-media mergers entail, may render the SSNIP test insufficient for properly defining the relevant market. Say the left-wing newspaper merges with a right-wing TV station the result may be a loss of political plurality, due to the shifting that may occur in one or the other's media group position. The SSNIP test does not extend as far as to cover issues of political plurality or cultural diversity when identifying the relevant market. Therefore, an 'elimination of diversity' test may be inserted in the picture. Pursuing this hypothesis one may investigate starting from a narrow relevant product and geographic market whether opting for a single editorial line between the two media groups would lead the customers to find the eliminated view in a readily available alternative (Lyons in Mueller, Haid, Weigand, 1999 p. 136). Upon the results from such an inquiry a wider relevant market, including political plurality or cultural diversity may be revealed. However, defining a relevant market also taking into account political or cultural issues may lead to distortions and malfunctions during the actual assessment of the concentration, as the concentration appraisal process focuses rather exclusively on economic analysis. Furthermore, it was argued that competition policy intervention should be by the antitrust authority, while the

[214] 351 US 377, 1956.

sectoral regulatory body should intervene in defence of pluralism (Motta, Polo, 1997, p. 321). If one accepts this approach, it should be obvious that a merger as the one portrayed in the above listed hypothesis would need a double clearance coming from two separate institutions which enforce different norms. At this stage of development of the merger control system, it seems unlikely that an approach as such would be chosen, given the Commission's reluctance to waive at least some of its powers on concentration investigation. Still, the 'elimination of diversity' test may be regarded as a handy tool in appropriately defining the relevant market.

5.4.3. Factors Relevant Primarily in Situations of Oligopoly

The perspective of merger investigations in cases of oligopolistic dominance is necessarily considered to be different than those entailing single dominance, since the members of the oligopoly are by assumption capable of exerting sufficient additional constraints on each other. Consequently, a new dimension of the prediction analytical exercise is inserted. Not only the Commission has to run through its classic appraisal methods, but it also has to take into account the interactions between the oligopolists. To this end, situations of oligopoly entail more than just a corroboration of the merger entity – remaining competitors on one hand and merged entity – potential competitors relationships. One question to be answered in situations of oligopolies is if the post-merger market structure is such that, given the inter dependence between the members of the oligopoly, they would be able to maximize their profits jointly by avoiding competition amongst themselves. The general assumption is that oligopolists will sooner or later find a way of avoiding competition among themselves since they are aware that their overall profits are maximized with this strategy. However, the question is much more complex.

In cases of oligopoly, collusion without explicit agreements is not easy to achieve or to prove, since there will be no written agreements to enforce against a company that deviates from the common strategy. Moreover, if tacit collusive strategies are implemented and oligopolists manage to raise prices significantly above their competitive level, each oligopolists will be confronted with a conflict between sticking to the tacitly agreed behaviour or increasing its individual profits by cheating on its competitors. Consequently, the one extra key issue for the Commission to find out is how likely or how easy it will be for oligopolists to collude or avoid competition among themselves after the merger, or to depart from previous behavioural patterns. Again, much will depend on individual corporate strategies and the existence of a sufficient degree of power, so as a given undertaking can oppose possible retaliatory actions. Establishing if the post-merger market structure will induce the leading firms to engage in anti-competitive parallel behaviour, or to depart from such behaviour at a later stage is therefore a difficult task to establish.

The Commission will normally start by investigating structural factors such as the degree of concentration, barriers to entry or exit and demand side factors. These are necessary but not sufficient for a finding of oligopolistic dominance. Next to the classic analytical approach it usually performs, the Commission may attach certain assumptions in

situations of oligopoly; it departs from the supposition that fewer firms each with a larger share of the market are more likely to spot cheating, have less incentive to cheat and are more likely to get caught cheating. Furthermore, it may be assumed to be easier to sustain collusion with many small buyers rather than a few large ones. Concentration is an important factor because large sellers are more likely to be detected if they cheat than small ones. Large players are also more likely to detect the cheating of others because they have information about the market in its capacity of being a big part of it. In addition, fears of collusive activity are confined to industries in which the products are relatively homogenous, with little differentiation or customization. This is because it is easier to fix a schedule of collusive prices when products are similar than when they all have different characteristics and when sales at very different prices and can be modified for specific customer needs. It is self evident that the above constitute simple assumptions, which should not form an appraisal template. Moreover, most of these assumptions dwell on the market share calculations that the Commission normally performs. In this respect, the shortcomings of an approach relying solely on market shares estimates discussed above apply here just as much.

Going beyond that[215], in situations of oligopoly, specific attention needs to be paid to the market transparency and price comparisons need to be performed. Reference should be taken of previous pricing techniques, should parallel pricing be indicative of likely collusion patterns. Furthermore, transparent pricing should make cheating easier to detect and thereby should deter making collusion stable. A certain degree of transparency enables the competitors to get access to information on prices practiced by the other suppliers, which makes monitoring such parallel behaviour possible. For example, it is normally expected that the Commission will conclude that the market is naturally transparent if factors like few suppliers and little price differentiation are present.

The degree of integration in upstream and downstream markets is also taken into account as it may affect the supplier's willingness to engage in parallel behaviour, or affect the market transparency which will have an influence on the likelihood of successful parallel pricing. Thorough investigations on this point have been made in *Mannesmann / Vallourec / Ilva* and in *Airtours / First Choice*.

The Commission will also look for a history of explicit attempts of cartelization in the market. Markets with a history of cartel behaviour are likely to be susceptible to co-operation, given the already existing or presumed links and contacts between the players. Previous cartel relations between suppliers, or if the industry has been prone to tacit collusion, seem likely in the Commission's view, to increase the concerns of possible future parallel. For example, this was noted in *Glaverbel / PPG*[216], where two float glass suppliers notified a concentration.

Last but not least, the Commission takes into account any existing links between the merging parties concerned and third parties within the same sector of activity, even

[215] For further reading on the Commission's oligopolies approach, see Navarro, Font, Folguera, Briones, 2005 and Cook & Kerse, 2000.
[216] See Case No IV/M.1230, par. 20.

though such links do not necessarily entail that the merging undertakings have control over such third parties. The nature of the links in discussion may vary from structural links, to economic or ownership links. Also, the term link is abstract and may cover a wide number of issues, the importance of which ranges from insignificant to crucial. The relevance and importance of links depend on the specific nature of the link and of the context of the case. In any case the existence of such links, even though proven, is not necessarily indicative of collective dominance, unless supported by further conclusive evidence. In any case, links need to be viewed in the larger frame of the particular case at hand. For example, certain categories of links require a particular assessment because they may affect the transparency of the market or otherwise reinforce the likelihood of parallel behaviour. Such links may be particularly important because they compensate for the lack of natural transparency in market conditions. Also, links taking the form of repetitive contacts between the same players have to be coupled with the assessment of a possible pre-existing cartelization pattern within the market, as they tend to reduce the uncertainty and enable the companies to gain a better understanding of each other's competitive strategies. Links between customers and their suppliers may also increase the risk of collusion because they tend to create dependency between these categories of players. Such links were examined in *Pilkington-Techint / SIV*[217] where the Commission found that cross-supply relationships reduce information gaps, since the buyer can compare the prices charged by the suppliers, although it also noted that the cross-supply relationship was justified on efficiency grounds.

All in all, situations of oligopoly tend to add to the difficulty of the prediction process, especially due to the extra variable sheltered in the relationship between the oligopolists. From the outset, this relationship and its features are difficult to label and analyze, given the often lack of written explicit collusive agreements. It is at this point of the appraisal that assumptions are employed and oligopolistic market templates are used in order to predict how the concentration transaction will develop. The relationship between oligopolists, the details of which are most of the times intentionally camouflaged by the merging parties, requires going beyond the classic analysis of the structural elements present in any given type of concentration appraisal. To this end, the Commission also takes into account features commonly found to oligopolistic markets, which may portray a clearer picture of this relationship. However, the degree of market transparency, a pattern of cartelization or the pre-existence of links between undertakings do not necessarily predict whether a concentration will alter in the future the market structure in an anti-competitive manner. Such factors provide an overview of previous market behaviour and current trends at best. They refer to past or current events and constitute retrospective conclusions with a view to past market status; these are necessary elements in understanding the intricacies of that specific market's functioning, however, they do not bring about sufficient proof concerning the likelihood of future events to take or not to take place. The conclusion of the analysis performed on such events can only constitute the basis / prerequisites of further assumptions or appraisal exercises. For example, finding proof that a market is transparent will be fed in the assumption that an oligopolistic situation may occur. Similarly, in case a cartelization pattern has been

[217] Case No IV/M.358, par. 39.

established, this finding will be inserted into an investigation process meant to establish study if the requirements that need to be met for a cartel to be present / likely to exist are still present on the market.

5.5. Econometric Tools, Merger Simulation Models and Their Role in Concentration Analysis

5.5.1. Brief Outline and Definitions of Commonly Used Econometric Tools

The econometric tools that the Commission uses in merger control investigations range from market-share information, diversion ratios, win/loss analyses, and critical loss analyses, to regressions and bid and merger simulation models. In the following paragraphs we will briefly discuss these tools; however, we will mainly direct our focus on merger simulation models.

Diversion ratios calculate the amount of lost sales by product A to product B when the price of product A increases by a certain percentage. Diversion ratios can be estimated using own-price and cross-price elasticities. A high diversion ratio between two products indicates that the products are close substitutes. A less sophisticated alternative to diversion ratios includes customer switching studies or win/loss analyses.

Critical loss analysis calculates the volume losses that would be necessary to make a post-merger price rise unprofitable and determines whether such a loss would be likely in view of the characteristics of the industry. Critical loss is considered as a useful tool to define markets, but can also, in certain circumstances, be used to assess the unilateral effects of a merger by providing the minimum lost sales necessary to defeat a price increase. Critical loss analysis has been used by the Commission in merger cases such as, the *UCB / Solutia* case[218].

Regression analysis assesses the relationship between one variable called the explained, or dependent, variable and one or more other variables called explanatory variables. Regression analyses are used as a quantitative technique to examine how the variable in question (e.g. price) is affected by a number of other variables (e.g. reduction in the number of competitors or the increased level of concentration). Regression models have been used by the Commission in the *GE / Instrumentarium* and *Oracle / PeopleSoft* cases.

5.5.2. Merger Simulation Models. Generalities

It is a fact that competition authorities seem to turn more and more to merger simulation models. The European Commission has employed them in the past[219] and has discussed them in rather recent decisions[220]. Likewise at the national level, competition authorities are beginning to use, or at least assess the use of merger simulation models. For example,

[218] Case COMP/M 3060—*UCB/Solutia*, Commission Decision of 31 January 2003, para 42.
[219] See, for example, the *Volvo / Scania,* Case COMP/M.1672 and *Oracle / PeopleSoft* mergers.
[220] *Philip Morris / Papastratos*, Case COMP/M.3191, *Lagardere / Natexis / VUP,* Case COMP/M.2978.

the UK Competition Commission used one in *Centrica / Dynegy*[221]. Among the other Member States, the Swedish Competition Authority claims to use them regularly[222], while the German, Dutch and Irish authorities have all expressed interest in using them.

From the outset, several questions may be asked: first, what exactly are merger simulation models and second, how useful are they and how should they be used? Some argue that they are very useful, because they allow investigators to compute directly the price effects of a merger without having to carry out a competitive effects analysis. Others argue that they are at best another potential piece of evidence in addition to the usual competitive effects analysis that is undertaken in mergers, and that they are frequently not worth the attention they get[223].

Rather than first defining the market, then calculating market shares, then carrying out a competitive effects analysis and then taking a view on the likely effect of the merger, a merger simulation proposes the alternative of directly calculating the extent to which prices will rise, post-merger. In theory this might allow us to avoid the need to engage in a market analysis exercise at all[224].

Most merger simulations start from the assumption that the industry in question can be modelled using a Bertrand differentiated products framework[225]. By making various assumptions about key industry parameters and calibrating the model using the current

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[221] Centrica plc and Dynegy Storage Ltd and Dynegy Onshore Processing UK Ltd: *A report on the merger situation*, Competition Commission, August 2003.

[222] Speech by Mats Bergman, Chief Economist, Swedish Competition Authority, *The Role of Economics in European Competition Policy*, Brussels, 26 May 2004.

[223] For further reading and in-depth look at the ongoing debate, refer to: Dubow, Elliott, Morrison, 2004 and Ivaldi, Verboven, 2005, p. 669–691.

[224] In a setting as such, merger simulations do not take account of the factors, or areas of focus, that the competitive effects analysis does. Instead, they are calibrated using current market data to predict what the price effect of a merger will be.

[225] The Bertrand and the Cournot models are the most commonly used by economists in situations relating to competition and merger control. Although the models have similar assumptions, they have very different implications. Neither model is necessarily better than the other. The accuracy of the predictions of each model will vary from industry to industry, depending on the closeness of each model to the industry situation. The Bertrand model (named after Joseph Louis François Bertrand) specifically entails a model of price competition between duopoly firms which results in each firm charging the price that would be charged under perfect competition, known as marginal cost pricing. The model has the following assumptions: there are at least two firms producing homogeneous products; firms do not cooperate; firms have the same marginal cost; marginal cost is constant; demand is linear; firms compete in price, and choose their respective prices simultaneously; there is strategic behaviour by both firms; both firms compete solely on price and then supply the quantity demanded; consumers buy everything from the cheaper firm or half at each, if the price is equal. Cournot competition (named after Antoine Augustin Cournot, who observed competition in a spring water duopoly) is an economic model used to describe an industry structure in which companies compete on the amount of output they will produce, which they decide on independently of each other and at the same time. The Cournot model works on the following assumptions: there is more than one firm and all firms produce a homogeneous product, i.e. there is no product differentiation; firms do not cooperate, i.e. there is no collusion; firms have market power, i.e. each firm's output decision affects the good's price; the number of firms is fixed; firms compete in quantities, and choose quantities simultaneously; the firms are economically rational and act strategically, usually seeking to maximize profit given their competitors' decisions.

competitive situation, it should be then possible to estimate the post-merger equilibrium. The necessary inputs include the identities of the competitors in the market, the products they sell, marginal costs, own-price and cross-price elasticities, how these elasticities vary as prices vary, expected marginal cost efficiencies and the nature of competition post-merger, market shares and so on. Nonetheless, it is generally not enough that a merger simulation is consistent with the current facts of the market. This should be considered a necessary, but not sufficient condition. In order to provide at least an impression or reliability, the model should also be able to explain relevant recent past facts about the industry. For instance, have there been significant market share shifts in the recent past? If so, can these be explained within the assumptions of the model about the nature of competition?

The advantages of merger simulation models have to be acknowledged. Just to give a few examples:

- Merger simulation models provide speed of assessment and they may be used also as a first cut estimate of the likely effect of a merger. This estimate may be useful at the planning stage of a merger to give the parties an indication as to whether a potential merger will run into competition policy concerns.
- Merger simulations can be useful in the area of divestment analysis, as a handy way of identifying those divestments that solve the competitive problems and those divestments that do not. However, it should be noted that even here a competitive effects analysis will be required.
- Also, merger simulation models provide further support to the case if their results are consistent with the rest of the market analysis. A merger simulation the results of which are consistent with the rest of the market analysis does increase one's confidence in the market analysis.

If these are some of the advantages that merger simulation models may bring about, one may ask why in the current competition *status quo* in Europe, a regulatory authority investigating a transaction is unlikely to be guided solely by the predictions of a simulation model? Furthermore, how do merger simulation models further our thinking and our merger assessment capabilities besides the acknowledged advantages provided above in an exemplifying manner? Also, should they be given more weight in the context of a concentration assessment? Or is their reliability doubtful and for this reason, they are still relegated to being support evidence in merger analysis?

There have been claims made by some proponents of merger simulation models stating that they may amount to avoiding the need to engage in much of the market analysis. However, in the current settings, the Commission's focus on market analysis contradicts propositions as such. We may suggest that merger simulation should be regarded not as a substitute for the competitive effects analysis, but just as an additional support that implies that the market analysis still needs to be carried out. And this is because although merger simulation analysis can predict the short-term impact of the merger on output and prices, issues relating to the longer-term evolution of the market such as entry, product repositioning must be separately considered since they are not included in the merger simulation model (Kokkoris, 2006, p. 251).

To exemplify, in par. 32 of the *Philip Morris / Papastratos* Decision the Commission stated the following: "The parties have provided the results of a merger simulation that shows that on average the market price increase post-merger would be minimal. The simulation model assumes that the merging parties' products compete in different segments, or in other words, that the degree of substitutability between their products is low. The market investigation has confirmed the market segmentation. The results of the simulation confirm that the present merger would not lead to significant price increase in the Greek cigarette market". In other words, the competitive effects analysis was first needed, which then fed into a simulation that showed what the competitive effects analysis had already shown. In this respect, the merger simulation model is used as a verifying method for the accuracy of the competitive effects analysis and by no means as a tool to predict the outcome of a merger.

First, merger simulation models have the potential to be very useful in the merger control process, but this usefulness needs to be put into context. A merger simulation must be rooted firmly in the particular facts of the specific industry in question and this requires a competitive effects analysis. A model that is not based on the facts of the specific industry in question may lead to erroneous results and is unlikely to be reliable in predicting the future facts of the industry.

Second, merger simulation models typically miss out much that is competitively important in reality, such as the interaction between retailers and wholesalers, the nature of non-price competition and the scope for post-merger entry or product repositioning, aspects which may be rigorously important for the totality of the analysis. Instead, merger simulation models tend to focus on price issues, however they are often carried out in branded goods industries, where it is known that non-price competition issues, such as advertising and promotions, are important.

Third, as we will detail below, the results of a merger simulation depend heavily on its input; should the input inferences be flawed, the results of the simulation will be defective. When we talk about input we refer especially to the various own-price and cross-price elasticities between the products in question. These measure the degree of competitive interaction between products and the loss in competition caused by the merger (i.e. the cross-elasticities between the products of the merging firms) and the competitive constraint imposed by the other competitors (the cross-elasticities between the products of the non-merging firms and the products of the merging firms).

5.5.3. Merger Simulation Models in Practice

The approach of merger simulation models normally involves two separate steps[226]:

- Estimating a structural demand model;
- Simulating the post merger equilibrium to predict post merger prices and quantities which can be used to calculate measures of economic welfare (Crooke, Froeb, Tschantz, Werden, 1997).

[226] For further reading see Walker, 2005 and Kokkoris, 2006.

In the first stage, assumptions are made for the value of the market shares as well as of the own-price and cross-price elasticity for each product in the market prior to the merger. Estimates regarding elasticities may be obtained in two ways: first, through econometric estimations; second, assumptions can be made about the structure of consumer demand and then elasticities for all the products can be calculated using data on the prices and outputs of the main products.

To substantiate an assertion regarding the paramount importance of the elasticity estimates that are used in the simulation we will take a closer look at how elasticities function. The greater the cross-price elasticities between the merging products, the greater the post-merger price rises. Equally, the greater the cross-price elasticities between the other competitors and the merging parties, the lower the post-merger price rises. It has to be kept in mind that it is also necessary to make some assumptions about how the elasticities vary as prices rise. Whereas it may on occasion be possible to obtain reasonably accurate estimates of elasticities at current price levels, it is less easy to obtain good and reliable estimates of how elasticities vary as prices rise, particularly when the simulation model is predicting price rises above prices that have existed in the past.

Subsequently, the functional forms of demand must be employed, in order to specify the relationship between prices charged and quantities sold in the relevant market. It is interesting to see how merger simulation models function and the results they lead to, pending on functional form is chosen (log-linear, linear, logit, AIDS and so on). It is not uncommon to witness drastically different results arising from the use of different functional schemes.

There may be times when the model predicts such small price rises that there is no concern under any functional form. Equally there may be times when it predicts large price rises under any functional form and then it might be argued that the model shows that the merger is a problem even under the assumptions most favourable to the merging parties. The above assertions are valid of course if we depart from the assumption that the competition authority had an accurate estimate of the various elasticities involved. In reality, estimating elasticities is a hazardous exercise at the best of times and there is always a substantial element of uncertainty over the exact figures. On top of that, keeping in mind the severe time constrains dominating merger investigations the data that is available in this time-scale for econometric work may often be inadequate. Therefore, incorrect elasticity estimates, even if functional form assumptions are correct, may lead to substantial inaccuracies in the predictions of a merger simulation.

To exemplify the above, let us take a closer look at the evidence obtained by Crooke and colleagues (1999), who looked at four alternative functional forms within a non-cooperative Bertrand setting using a setting of two firms merging in an industry with four to eight firms. The interesting aspect that may be noticed is how different the predicted price rises are depending on which functional form is chosen. Crooke and colleagues found price increases for different firms placed in the model ranging from 1.6% under the linear specification to 28.2% under the log-linear specification. It is self-evident that when discussing functional forms, results that vary this much based on different but

plausible assumptions are quite unreliable and therefore unlikely to be useful for merger control purposes.

In the second stage, an assumption is made about the nature of the competition in the market in order to assess the impact of the change in the merged firm's prices compared to the prices that the two firms that merged charged prior to the merger. Taking into account the estimated demand elasticities and the assumption about the nature of competition, post merger prices and outputs are obtained by calculating the prices that the merging parties would set to maximise the merged firm's profits. For example, in the *Oracle/PeopleSoft* case, the merger simulation model used was based on estimated market shares and it predicted that a reduction from three to two bidders would not harm customers since neither prices were likely to increase nor product variety was likely to decrease. In the *Volvo/Scania* merger, the results of the econometric analysis for the estimation of demand elasticities for the main heavy truck brands in each EU country were used as inputs in a merger simulation model. The model was developed to quantify the price effects of the proposed transaction and indicated that the prices of rival suppliers' heavy trucks were largely unaffected by the merger. This second stage is a complex one and it involves taking into account many variables and circumstances. For example, attention has to be paid to varied considerations such as: whether an increase in price by the post-merger firm will enhance demand for competing firms' products, should consumers switch their demand towards these alternatives; will this consequently result in an encouragement of rival firms to raise prices too? All in all, the post merger equilibrium position is reached when no firm in the market has an incentive to unilaterally change its prices.

5.5.4. Merger Simulation Models and the Standard of Proof

In paragraph 3 of this chapter we have asked the following question referring to merger simulation models in the context of the standard of proof discussion: are econometric tools subject to less scrutiny by the Courts, especially where such instruments are used to predict the likely effects of a merger? The answer to this question is a difficult one, due to the complexity of variables that surround the use of merger simulation models. Some opinions (Botteman, 2006) argue that econometrics should not be treated differently from the other factual elements of a merger investigation, at least from the perspective of the evidentiary threshold that has to be satisfied. However, several circumstances may come to contradict this clear-cut, tough approach, in the sense that merger simulation models may benefit from a lighter scrutiny:

- It is an acknowledged fact that the Commission enjoys a certain margin of discretion when dealing with economic evidence. Of course, this margin of discretion cannot be used as an obstacle in reviewing the Commission's reasoning. Just as much as this may be true, it is a known and accepted issue that the margin of discretion in discussion constitutes a means to limit the Courts from performing their own economic assessment of the concentration transaction. However, as we have already seen, on several occasions the Court did not hesitate to substitute its judgment to the Commission's analysis.
- Econometrics in general and merger simulation models in particular entail

> something more complex that mere facts. Reference has to be made in this context to the prospective nature of the analysis.

We have already provided that in competition matters, the standard of proof can move between the two extremes (*preponderance of the evidence* and *beyond reasonable doubt* standards) of the spectrum. In view of the complexity and purpose of merger simulation models, it is not unreasonable to believe that the standard of proof regarding merger simulation models may be looser than the standard of proof referring to past and current market facts and events. After all, as we have already provided, it seems just as reasonable that the Commission's evidentiary burden may vary depending on the stage of process at which the case is standing, as well as on the nature of the elements to be investigated. To be more precise on the topic, it may be a fact that the Courts may not have all the expertise themselves to re-do the analysis of the Commission in order to verify whether it is valid and solidly grounded on the facts of the case and conforms to mainstream economics. They may need to seek assistance from an expert or involve the parties in elucidating how the models were constructed, what they intended to demonstrate and why they are consistent with mainstream economics. Undeniably, the complexity of econometrics may have the consequence that Courts may not be keen to delve too much into their intricacies and, for the sake of judicial economy, rather prefer to carry out a relatively "light" review of econometric evidence (Botteman, 2006, p. 73).

5.5.5. Summing Up

It may be observed that there is little guidance on the level of confidence or probability that the Commission must arrive at in relation to the results generated by the operation of econometric models. The ECJ only indicates that the economic effects predicted by the econometric theories and models should be *plausible*. While the selection of a particular econometric tool should logically be made in accordance with a relatively well established set of guidelines, and should respect the principles of logic, coherence and appropriateness, the way a particular instrument should be used (the parameters and variables to be included in the model and the admissible assumptions that the Commission may draw) and the data upon which it should rely are still subject to debate.

Summing up, can merger simulation models play a firm role in predicting the anti-competitive effects of any given concentration transaction? Can merger simulation models be likely to result in an improvement in European merger control functionality? These are questions which are difficult to answer, however, given the arguments presented above, we are inclined to state that the results of merger simulation models should not be trusted except under stringent conditions, such as that the investigator has good evidence on the actual values of the necessary inputs (elasticities, marginal costs, and so on), has good evidence on the actual form of competition in the market and can show that the model is able to explain recent past data as well as current data. Even so, the degree of assumption employed, the often detected uncertainties related to the data input and the highly varied results that different functional schemes provide under one and the same model, seem to render merger simulation models, *on their own*, inappropriate for predicting the anti-competitive effects of a concentration transaction. Indeed, to date, there is no evidence of a competition authority relying solely on merger

simulation models while clearing or blocking a concentration transaction. Still, when viewed as part of the concentration assessment process, merger simulation models may be perceived as a handy tool to provide an outside the box image of the transaction. When assessed in conjunction with the full set of evidence gathered throughout the assessment process, merger simulation models may be helpful if consistent with the results the rest of the evidence provided, thus strengthening the competition authority's confidence that the right decision has been taken with a view of consumer welfare.

6. Concluding Remarks

The analysis above is meant to emphasize the intricacies of the prediction process that the Commission has to perform in order to conclude its concentration appraisal. The issue that we tried to investigate is if the Commission, under the *ex-ante* system, is able to predict the anti-competitive outcome of a given concentration, making use of its current tools and economic analysis mechanisms. It may be concluded that the prediction process is multifaceted. It is a dynamic process with multiple dimensions and coordinates which intertwine and influence each other. Due to its complexity, it is extremely difficult to draw definite conclusions on the degree of sufficiency that the prediction process exhibits. And this is especially so also due to the ambiguous character of the relevant jurisprudence. What one may observe though is that there are sufficient elements of the appraisal process and sufficient circumstances that may very well impinge on the quality of this prediction exercise.

From the outset we have observed that the concept of standard of proof is still not clear, as it still has not developed comprehensible boundaries, either legislative or built through the Court's jurisprudence. In this context, one thesis may be that the prediction exercise is essentially flawed since one has no precisely defined guidance as to how far should the Commission go in proving that a given transaction will produce anti-competitive effects.

It is in this context, and also having in mind the prospective nature of *ex-ante* merger control, that we have to mention that the burden of proof placed on the Commission requires very hypothetical reasoning. To exemplify, if past practices cannot necessarily be regarded as proof of future conduct, it is very hard for the Commission to "prove" anything. Rather the Court of First Instance demands an evaluation of how the merged entity would behave given the future circumstances it would operate in. This begs the question of what sort of company the Court has in mind: a rational, law abiding and well run company? Indeed, the Court's standpoint seems to call for a great deal of speculation and consequently increases the likelihood of differences of opinion.

Several interesting ramifications arise from the assertions above. First, as we have seen throughout this analysis, at different stages of the concentration appraisal process the Commission may make extensive use of different types of assumptions which are either drawn from past various market circumstances or events, either feed different analytical techniques or tests. The reliability of these assumptions varies pending on the number and trustworthiness of the variables / other assumptions they will communicate or be coupled with throughout the prediction process.

Second, the remark concerning the typology of undertakings points to another crucial aspect, namely the influence that corporate strategies and competitive strategies may have on the dynamics of the prediction process. Corporate strategies define the markets and the businesses in which a company will operate. They are typically decided in the context of defining the companies' mission and vision, that is, saying what the companies do, why they exist, and what they are intended to become. Competitive or business strategies define for a given business the basis on which it will compete. They hinge on a company's capabilities, strengths, and weaknesses in relation to market characteristics and the corresponding capabilities, strengths, and weaknesses of its competitors. It has to be accepted that competition within an industry is driven mainly by five basic factors, that we have previously touched upon in different settings of this contribution: threat of new entrants, threat of substitute products or services, bargaining power of suppliers, bargaining power of buyers and rivalry among existing firms. The interplay of such factors and their manifestation on the market, the inter-markets dynamics and several other corroborating factors[227], serve as basis for formulating or altering corporate and competitive strategy. Establishing how companies interpret these factors is indeed a very speculative exercise, containing a large spectrum for individual judgment. It may be that sufficient and satisfactory data on the merging companies' goals and objectives could be drawn from the information provided in the Form CO and from the inferences obtained during the concentration appraisal. However, this assertion is not necessarily valid for the remaining companies in the market and even more, for potential competitors, given that companies are not obliged to fully disclose in the highest transparent manner their future market-related intentions. Furthermore, companies may feel threatened by a merger in a given market[228], just as much as, given the corporate and competitive strategies and motivations they are driven by, they may seek to explore different new market avenues, which may be wealth-enhancing in scope, or just simple cascading or herding behaviour[229]. On top of this, it would be even harder to assess the shifts in customers' reactions to these (potential) market developments, especially since these reactions may be curbed by factors not necessarily competition-related. In this context, it may be stated, that the evidence that the Commission could put forward as to these market events, lacks in conclusiveness and consistency.

Third, we have to address the observation on the future environment the merged entity would operate in. The future features of the market have to be defined within the meaning and intent of the objectives that have been defined for merger control, namely consumer and societal welfare. Should consumer welfare only be at stake, the Commission should be focusing on maintaining an effective competitive environment, which constitutes the driving force behind achieving technological progress and a successful economic performance, for the benefit of consumers. Should the attainment of social welfare also be at stake, the general functioning of the Common Market has to be taken into account. In this respect, the implications of assessing the future features of the market where the

[227] Products / services offered, users / customers served, market types and needs, production capability and capacity, technology, sales, distribution and marketing methods, etc.
[228] For a comprehensive study detailing the intricacies of assessing the drivers and likelihood of retaliatory or defensive competitor reaction to a merger, see Boyer, 1992.
[229] For a detailed analysis of companies' merging motivations, see Schenk, 2006.

merged entity will operate will be expanded to take into account varied considerations related to the European integration process. Indeed, the structure of the market may be altered not only through competition-related actions or inactions but also, through regulatory and policy means. The brackets of what we can now define as (European) societal welfare are contained in the EC Treaty and they entail diverse elements which call for rather extensive study and assessment[230]. Should the Commission be requested to have regard of these elements, predicting the future market outlook departs from competitive-only considerations to reflections which observe wider goals such as the attainment of efficient allocation of resources, a high level of employment and of social protection, non-inflationary growth, economic and social cohesion and so on.

The observations provided so far in this paragraph relate to the wider concept of market dynamics, which was mentioned throughout this chapter. We have established above that the variables that may influence the predicting process are as many as the circumstances which future market dynamics may raise. Each of these market novelties may contain triggers which if not taken into account will jeopardize a reliable predictive process. Nevertheless, the Court requires the Commission to produce cogent evidence to support its findings even in this respect[231]. Given the above, one may conclude that the prediction exercise is flawed due to at least the following:

- The limited capacity of grasping the future outlook of essential elements of the market dynamics;
- The uncertainty which surrounds the concept of standard of proof;
- The doubtfulness of the Commission's ability to provide cogent and consistent evidence regarding elements which may be out of its regulatory reach (such as corporate and competitive strategies);
- The use of assumptions and template test which base their findings on previous market behavioural patterns.

Should this be so, it follows that the possible resulting Type I (pro-competitive or neutral mergers prohibited) and Type II (anti-competitive mergers cleared) errors will reflect on the attainment of both consumer and societal welfare. We have dwelled on the intricacies of these consumer / societal welfare-related consequences in the previous chapters. The chapter to follow will propose alternatives that may bypass, at least to a certain extent the inconveniences and uncertainties posed by the current prediction method as well as the prospective negative welfare effect.

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[230] Of course, these brackets may shift in time, however, this should not impinge on the concentration appraisal process, since a decision clearing or blocking a merger should report to the moment when the decision is taken. After all, the goals of the Commission's prediction exercise is not to establish whether the concepts of societal / consumer welfare will suffer changes in time, but to establish whether the concentration transaction appraised will / will not be at odds with fulfilling the societal / consumer welfare goals, should they remain identically formulated in the future.

[231] For example, in the *Tetra Laval / Sidel* CFI judgment, the Court stated at par. 294 that the contested decision should have examined in more detail the ability of that competition to resist leveraging on the part of the merged entity. Furthermore, referring to the quality and sufficiency of the evidence, the Court continued noting that it is necessary for the decision to contain enough information for the Court to be able assess the foreseeable effects.

From the discussion above at least one paradox may be identified. Should the Commission observe the attainment of non-competition-oriented goals (aimed at achieving societal welfare) while foreseeing the future features of the market where the merged entity will operate, this may be at odds with the general frame of assessment that the Merger Control Regulation has built. This frame is based on competition criteria, as embedded in the appraisal test.

The Courts were confronted with an issue as such; however, a certain inconsistency in judgment was revealed as to the manner in which the objectives of the merger control policy are drafted, applied and eventually understood. Let us elaborate. Recital 13 of Regulation 4064/89 requires the Commission to take account of the contents of Article 2 of the EC Treaty while assessing a concentration's compatibility with the Common Market. However, as stemming from the *Comite Central d'Entreprise de la Societe Anonyme Vittel v. Commission* case, involving a challenge by trade unions in the *Perrier Group* to the Commission's conditional clearance of the *Nestle / Perrier* deal, the Commission chose to take a different approach by suggesting that Recital 13 could not impose specific positive obligations requiring it to analyze considerations concerning the principles of Article 2 of the EC Treaty in particular concentration transactions appraisals. The Commission made the point that for considerations of employment consequences to be taken into account the *Perrier* unions had to demonstrate an interest as to the essential purpose of the Merger Control Regulation, i.e. maintaining and developing competition in the Common Market. Therefore, according to the Commission's take, the plaintiff bears the burden of proof regarding the significant liability that the clearance may have in bringing prejudice to the attainment of the Article 2 of the EC Treaty objectives. Given that the Acquired Rights Directive 77/187 provides employee protection in cases of transfer of business, the Court had its hands tied and cleared the merger, however, not hesitating to suggest in par. 38-40 of the judgment that the obligation to ensure that the appraisal process was conducted within the overall framework of Article 2 involves some positive obligation on the Commission's part. This suggestion hasn't however led the Commission to include any formal acknowledgment in its future decisions that it has examined notified concentrations from the perspective of Article 2 of the EC Treaty.

The example above is important because it reveals certain oddities. First, the example above and also, the general approach taken in *Kali and Salz*, reveal the Courts' reluctance to place serious weight on the provisions of a recital which is not reflected in the operative part of the piece of legislation to which it belongs.

Secondly, the issue derives into a wider discussion which emphasizes once again the possible disruptions which occur in the process of attaining consumer welfare and societal welfare. The causes of such disruptions are first legislative in nature. As we have seen, different pieces of legislation have loose coordination when it comes down to fulfilling these welfare objectives. Furthermore, disruptions appear in the same piece of legislation, as principles contain in the recitals are not properly reflected in the operative part of the text. This will mirror on the practical approach of the Commission's appraisal process, thus defining a functional side of the disruptions in discussion. To be clearer,

although societal welfare is embedded in the Merger Control Regulation's recitals, it is not pursued as thoroughly in the Regulation's operative part.

To date, there is no official statement or established practical approach explicitly mentioning societal welfare aims while appraising a concentration transaction. The EU Competition Policy in general and the merger control policy in particular, shelter themselves by manifestly adopting a consumer welfare standard, clearing mergers only if they are not likely to negatively affect consumers. However, the consistency of such an approach with the general framework of attaining the EC Treaty Article 2 goals and the European competition policy's unique role in the European construction scheme may be doubted. We believe that the task of merger control legislation should be to evaluate mergers in light of their likely welfare effects, evaluation which requires identifying the relevant, and often overlapping, groups of citizens whose welfare will be affected by the merger. For the purpose of attaining societal welfare, these categories of citizens should be taken into account in the Commission's evaluation and, in case of conflicting welfare effects on different groups of citizens, the merger control system must trade-off the groups' interests against each other. Thus, the attainment of the fundamental principles gathered under the societal welfare roof would be likelier, the legislative coherence more transparent and legal certainty stronger.

Chapter 6

Conclusions

Better safer than sorry: is a return to ex-post control appropriate?

1. The Topics Approached

The contribution at hand aimed at studying the challenges relating to fundamental goals that shape the very essence of European merger control and the appropriateness of the methods used to attain them. Two major research questions have been posed. First, we aimed at identifying what the motivation of the concentration control system's enactment in Europe was and what its goals and objectives are. Second, we have investigated which method of concentration control is better fit to ensure the attainment of the established goals.

We have shown in Chapter 2 of this contribution that the *raison d'etre* of the European Merger Control System may be identified in the following exemplifying enumeration:

- The non-availability of effective behavioural instruments against the exploitation of post-merger market power (i.e. Articles 85 and 86 of the EC Treaty)[232].
- The launch of the 1992 Internal Market Strategy and the fundamental linkage between concentration of market power and the functioning of the Internal Market, as reflected as early as the *travaux preparatoires* of the 1955 Messina Conference, leading to the creation of the European Communities (Sutherland, 1988, p. 47).
- The industry's repeated calls for increased legal certainty and transparency at European level.
- The desire to avoid multiple scrutinies at domestic levels, in cases involving cross-border transactions.
- The endeavour to ensure that mergers affecting firms established in the Community are in harmony with the economic and social aims of the Community and the maintenance of fair competition as much within the Common Market as in external markets in conformity with the rules laid down by the EEC Treaty[233].

We suggest that each of these triggers translates into the desideratum to attain consumer *and / or* societal welfare.

We have previously provided that both under the old and new merger control regulations, the Commission has postulated consumer welfare as the applicable standard of appraisal. Under this standard, attention is paid to consumer surplus, price increases, cost savings, volumes of transactions, consumer preferences, quality of goods / services and generally speaking, anticompetitive effects in the short run. However, viewing the ultimate goal of competition policy as the maximization of consumer surplus, is a much too narrow interpretation of wealth to be able to deal with mergers and acquisitions that might be harmful to the economy by jeopardizing its wealth-generating capacity. Re-appraising mergers in terms of the public rather than the consumer's interest would seem to be a more elegant line of approach (Schenk, 2006).

To this end, merger control has to be viewed in the wider frame of the European

[232] See Kaseberg, 2006, p. 411.
[233] See *Final Declaration of the Conference of the Heads of State or of Governments of the Member States of the Enlarged Community,* EEC Summit, October 1972, point 7.

construction. In this context, we must ask to what extent does a merger contribute positively to the economy as a whole (Sutherland, 1988, p. 48)? The interplay of different Community policies is important in this respect. To this end, as early as the *Continental Can* judgment, it was noted that the Court placed importance on the need of consistency of public policy with regard to restrictions of competition. It was argued that the applicable legislation to merger transactions should be construed so as to enable the full implementation of the general principles laid down in Articles 2 and 3 of the EC Treaty[234]. Therefore, just as much as a competition policy tool, merger control has to be regarded as a mean to attain market integration and consequently, the Community's goals. From this standpoint, concentration control is aimed at attaining societal welfare as well. After all, Sir Leon Brittan, in his quality of Vice-president of the Commission acknowledged this in 1991 by stating that "if our Community is to play its role in Europe as an anchor of democratic stability and competitive prosperity, competition policy has much to contribute and the adoption of the Merger Regulation is a major and most heartening step towards enhancing that contribution".

Under the societal welfare standard, one has to go beyond assessing the anti-competitive effects that a merger might induce and investigate the different economy-wide effects that concentration transactions and policy approaches may have. Still, as we have provided in Chapter 5 of this contribution, the Commission's practice to date reveals no clear inclination to take societal welfare considerations into account while appraising concentration transactions. This emphasizes certain conflicts / tensions between the goals set by the Treaties and the means employed to achieve them.

In this context, we asked the question which of the two possible methods of assessment, *ex-ante* or *ex-post* merger control serves the purpose of attaining consumer and societal welfare best. In Chapter 4 of this contribution, we have stated the case of both methods in the context of each welfare standard. Often the discussion was based on matters of principle (i.e. is prevention always better than the cure?). Additionally, punctual substantive and procedural issues have been invoked for further argumentation. The *ex-ante* method of control seems (not in a fully irrefutable manner) more appropriate for fulfilling the societal welfare goal due to its features (i.e. 'one-stop-shop', greater opening towards the integration goal, etc), corroborated with the environment and circumstances it is applied in (such as increased incentive to merge and cross borders). On the other hand, the *ex-post* method of control does better when talking about consumer welfare due mainly to the efficiency of the scrutiny process, as action is taken upon facts, palpable evidence rather that predictions. We have also provided that in the current setup, the *ex-ante* method may be flawed, due to, among other factors, the limited capacity of grasping the future outlook of essential elements of the market dynamics, the uncertainty which surrounds the concept of standard of proof, the limited possibility of predicting future corporate and competitive strategies, and the use of assumptions and template test which base their findings on previous market behavioural patterns. All in all, the *ex-ante* method is designed to attain societal welfare; however, we may suggest that it may miss certain essential elements necessary for fulfilling the consumer welfare goal. These elements and features may be provided under an *ex-post* scheme.

[234] See also Empel, 1990, p. 9.

2. The Existing Challenge

Given the above, we propose that the European Merger Control System fights at least two parallel, yet interconnected "battles": attaining consumer welfare, on one hand and societal welfare, on the other hand. The commitment attached to, and means of attaining these goals are not at all times balanced, though. The "guns" used often seem inappropriate. Therefore we suggest that European concentration control should move from hardcore *a priori* prevention to a lighter *ex-ante* scrutiny combined with *ex-post* consistent monitoring of the market[235]. In order to improve the functioning and results of the concentration control system, benefits may be drawn from the *ex-post* functional precision. This would entail finding solutions of having the *ex-ante* and the *ex-post* methods of control cohabitate under the roof of the same legal order. In this respect we believe that the subsequently discussed models would provide for appropriate solutions which would cover the flaws that the *ex-ante* system alone exhibits. Also, these models would add to the effectiveness of the European Merger Control System in attaining consumer and societal welfare.

Should these proposals not be embraced, we are of the opinion that the existing gaps and flaws in the Commission's *ex-ante* prediction exercise would continue to raise important questions regarding the appropriateness of the means used to fulfill the objectives of the European Merger Control System. If merger control is observed as isolated from the European integration process, and consumer welfare still perceived as the commendable goal of merger control, one may enquire why the shift from the *ex-post* to the *ex-ante* method of control took place. If the move to an *ex-ante* system is justified by remote societal welfare considerations, then why are these considerations absent in the Commission's merger-related decisions?

Therefore, we suggest that the tactics should be adjusted. Throughout this contribution we have put forward proposals to enhance the workability of the merger control system. To take a few examples: improving the Commission's ability to predict (Chapter 5), providing for a more transparent and objective institutional separation of powers, better equipped checks-and-balances (Chapter 2), etc. In the next paragraphs we will put forward several models which suggest changes and amendments addressing the tensions and challenges that the European Merger Control System still faces. In this respect, it may be stated that the existing challenge encompasses the redefining and enforcing the appropriate mechanisms and tools for the achievement of the welfare goals set.

We therefore affirm the following:

- The conceptual foundation of merger control has to be rethought. Societal welfare has to be properly acknowledged as a merger control commendable goal.
- The *ex-ante* method has to be redesigned and supported through coherent follow-up. The 'one-stop-shop' principle has to be altered.
- Institutional and substantive reforms have to support the new conceptual

[235] See discussion provided in Chapter 4, where we have dwelled on the relationship between the *ex-ante* and *ex-post* methods of controlling market concentration, revealing their complementary features from a preventive, punitive, educational and disciplinary point of view.

framework.

Most of the changes / reforms that will be outlined in the next paragraphs would require consistent alterations to the existing legislation: applicable Treaties, the Merger Control Regulation and its supporting subsequent legislative documentation. We acknowledge the difficulty of this process. The institutional and substantive reforms we will put forward would have to pass majority or sometimes unanimous scrutiny from the Member States. However, we consider that these amendments are essential for the proper attainment of merger control goals. Paramount institutional and substantive reorganization has been done before at the European level. Therefore, we trust that the reorganization of the European Merger Control System is an achievable task.

3. Propositions

Societal Welfare

First, we propose the controversy as to the ultimate goals of merger control shall be ended. We state that societal welfare should be legislatively acknowledged as a legitimate merger control goal. The concept of societal welfare has to be embedded in the operative text of the Merger Control Regulation, alongside consumer welfare. Article 2 par. 1 of Regulation 139/2004 has to be therefore extended in order to include references to the objectives listed in the "constitutional" provisions from Article 2 of the EC Treaty. The obligation to ensure that the appraisal process is conducted within the overall framework of Article 2 of the EC Treaty must involve a positive obligation on the Commission's part. This would most definitely affect the appraisal process and would result in varied substantive and procedural alterations. For example, from a substantive standpoint, the appraisal criteria would have to be revised. From a procedural standpoint, issues such as involvement of third parties, procedural deadlines, remedies, commitments, etc would have to be reviewed. However, such an approach would build new basis and incentive for companies to merge and create wealth. Also, it would leave considerable more room for efficiencies.

We propose that the *ex-ante* pre-notification should not be abandoned; especially given that one of its main features is it being designed to aim for market integration and societal welfare realization. However, the 'one-stop-shop' principle, as we will detail below, would have to suffer changes. We suggest that it should redistribute parts of its adjudicative side. Maintaining the pre-notification system would however confer the Commission the ability to keep an accurate evidence of the concentration transactions with a Community dimension, for a proper follow-up. Speaking of which, the *ex-ante* method of control as currently used has little if any functional follow-up of the concentration transaction which has just been cleared. In the same context, given the above discussed in Chapter 5, economic theory, as well as empirical methodology, are lacking the strength to meet the required standard of proof, the *ex-ante* method alone does not seem to be a particularly reliable tool for the attainment of the Merger Control System's goals. The true test regarding whether a concentration transaction will enhance consumer and societal welfare can be done only after the transaction has been

implemented. It is then when one can find tangible evidence and evaluate if, for example, the efficiencies projected have indeed materialized or if the commitments attached to the clearance decision have been respected.

Should the *ex-ante* method of control stay in place, several improvements may be provided for increasing the merger control's policy ability to attain its welfare-enhancing goals. These improvements, discussed below are meant to remedy the flaws of the prediction exercise as well as to ameliorate the institutional and regulatory functioning of the European Construction. Inserting *ex-post* considerations is meant to improve the quality of the decision-making process, improve legal certainty and institutional transparency and ensure a likelier attainment of the European Merger Control System's set goals.

The Standard of Proof

The standard of proof in merger appraisals should be tightened. To date, the European Courts System has not addressed the fact whether the *convincing evidence standard* and the *absence of manifest errors standard* are similar or not. Also, it is still not clear if a *balance of probabilities* test is favoured in merger control appraisals and how exactly does the European Court of Justice define its *plausibility* test. A clarification in this respect should be done preferably through legislative means, through the insertion of a provision in the Merger Control Regulation. However, action taken by the Courts may also be welcomed. In any case, the enactment of clear guidelines or indications as to the exact boundaries of the standard of proof concept and consequently of the level of probability that the Commission's prospective analysis should meet must be set. This may alleviate part of the critique that rests upon the Commission's inability to predict.

We suggest that adopting a(n) (elevated) *probability* approach would be appropriate. Since it is not really possible to prospectively prove anything, the probability approach provides a flexible way of ensuring that the standard of proof remains the same, while at the same time making it harder to prove improbable events, thus guaranteeing just outcomes based on facts and not the hypothetical predictions of the Commission. The more remote or improbable a given competitive effect is, the more compelling the evidence required to prove that it will, in all likelihood, occur. Thus, we believe that the realization of consumer and societal welfare will be dominated no more by the current uncertainty pertaining to the improper definition (or lack thereof) of the standard of proof.

Involvement of the Community Courts

We propose that a greater role should be entrusted in the hands of the Community Courts System. Along time, there have been suggestions that the European Merger Control System should move away from its administrative practice, to a judicial-based scheme. Such a structure would solve the institutional / transparency / checks-and-balances challenges discussed in Chapter 2 of this contribution. The Commission would continue its administrative practice and it would act as a prosecuting agency, whereas the final

decision on the concentration's compatibility with the Common Market would be taken by the Courts. However, as we have pointed out in the previous sections, it seems highly unlikely that a sudden move from administrative to judicial approach in merger control will take place soon in Europe.

Nevertheless, we suggest that the Community Courts should be more involved in the merger control process, without necessarily altering the administrative nature of the Commission's work. We will argue that the consequences of reforming the role the judiciary has in merger control would have a solid bearing on attaining the welfare goals. We suggest that this may be a workable solution especially given the Courts' willingness to become involved in a deeper manner in merger control enforcement, through, for instance, performing economic-oriented analysis, as shown in the *Airtours, Schneider* and *Tetra Laval* cases.

The process of involving the Courts in the merger control process exhibits several dimensions. We will briefly mention them here.

First, there is an institutional dimension. The legislative possibility for the Courts to deliver competition-related judgments has been created. The Treaty of Nice allows for judicial panels to be attached to the Court of First Instance under the conditions laid down in Article 225a[236] of the EC Treaty in order to exercise, in certain specific areas, the judicial competence laid down by this Treaty. Therefore, we believe that a specialized competition chamber could be created.

Second, from a procedural and functional perspective, since it would be extremely difficult to remove the adjudicative function in merger control proceedings from the Commission's hands, we propose that the competition chamber performs certain *ex-post* functions. From this perspective, we believe that the competition chamber could act as a reviewer of (parts of) the Commission's decision-making process. We will detail these issues in the paragraphs to follow.

Third, there should be a substantive dimension of the Courts' involvement. To this end, the competences of the chamber should be clearly delimitated. We suggest that the chamber should be endowed with sufficient economic expertise in order to competently

[236] Article 225a of the EC Treaty provides as follows: The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The decision establishing a judicial panel shall lay down the rules on the organization of the panel and the extent of the jurisdiction conferred upon it. Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance. The members of the judicial panels shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously. The judicial panels shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council, acting by a qualified majority. Unless the decision establishing the judicial panel provides otherwise, the provisions of this Treaty relating to the Court of Justice and the provisions of the Statute of the Court of Justice shall apply to the judicial panels.

judge the Commission decision's inconsistencies. Staff and organizational improvements should be provided in this respect, in order for the judicial bodies to be able to cope with their newly assigned tasks.

In this respect, and also having regard to the procedural and functional side of the chamber's activity, both the EC Treaty and the Merger Control Regulation should be revised so as to coherently define the competences, powers and roles that the competition chamber should embody. There are several ways in which such a competition chamber could intervene in merger control.

The Ex-post Review[237]

As a part of the combined lighter *ex-ante* scrutiny and *ex-post* consistent monitoring of the market, for Phase II Commission decisions it may be appropriate to perform a timely *ex-post* review. We propose that only Phase II decisions are reviewed, since it is primarily these transactions that contain elements and ramifications (i.e. proposed efficiencies, assumed commitments, planned divestitures, etc) which are either key or problematic to the realization of consumer and societal welfare. By its very nature, the *ex-post* review would constitute an alteration of the 'one-stop-shop' principle. It may be argued that from a legal certainty point of view, the functioning of the European Merger Control System will be at a loss. We claim that this may not necessarily be the case, should the parties involved in the procedure be aware from the very beginning that their concentration will be facing an *ex-post* scrutiny. After all, it is the existence of concerns as to the transaction's compatibility with the Common Market that sends the case in Phase II investigation proceedings; and furthermore, it is the solutions put forward during the concentrating parties / Commission negotiations that will tip the balance between the transaction being compatible with the set of welfare objectives or not. To this end, we suggest that sacrificing societal and consumer welfare objectives' attainment for the sake of legal certainty is not a safe bet, especially since legal certainty may be provided through clear and timely information being provided to the parties. Furthermore, legal certainty may stem out of the indispensable reformulation of the 'one-stop-shop' principle as enclosed in the Merger Control Regulation, so as to make room for the competition chamber's *ex-post* review.

Such a review may have a complex character, involving considerations of both substantive and procedural nature. To this end, the structure and functioning of the review process have to be coupled with the institutional and functional reforms proposed above, in the sense that the depth of the review process will depend on the complexity and scope of the competences afforded to the competition judicial chamber. This review will have a dual purpose.

First, it is meant to establish if the market structure as shaped by the Commission's decision is capable of pursuing the goals of the Merger Control Regulation. A second dimension of the review may be added here, in order to complement the original assessment of whether the competition *status quo* on the market has been further impeded

[237] See also *Ex-post Review of Merger Control Decisions - Study carried out by LEAR,* 2006.

by the concentration transaction. This second dimension should investigate if the market structure existing after the Commission decision aims for societal and consumer welfare better than the market structures that could have arisen from the alternative decisions that the Commission could have legally taken. The approach on which the review is founded should be based on a set of tests meant to understand whether there is a causal relationship between two events: the actual evolution of the market and the actual concentration transaction. Therefore, we believe that one needs to revisit the main features of the relevant market both in its geographical and product / service dimension. A comparative approach between the market's outlook, as present at the moment of the Commission decision and at the time the review is performed, should be taken with regard to the market's typology, concentration level, number of players, barriers to entry, structure of supply and demand, etc. Furthermore, the key elements that the parties claim to be welfare-enhancing (efficiencies, innovation, lower prices, quality of the goods, better allocation of resources, etc) and the degree of their realization have to be well documented and supported by palpable evidence. A clear evaluation if the commitments attached to the Commission decision have been respected has to be performed.

We propose that the *ex-post* review could offer an objective estimate of the improvement or deterioration of consumer and societal welfare because the market evolution after the merger may provide enough palpable information to understand whether such welfare increases or decreases took place. Also, the causes of eventual shifts in consumer and societal welfare or of a more competitive or less competitive market may be easier to identify *a posteriori*. These causes may be either exogenous factors (i.e. factors non-dependent on the merger) or merger-specific factors.

In the case that exogenous factors are not present, if after the merger, the market has become more competitive or it maintained its level of competitiveness, the Commission decision was appropriate, whereas if the market has become less competitive the decision was inappropriate.

Should exogenous factors be present, further empirical investigations of the market would have to follow, such as surveys of market players, event studies, customer questionnaires, etc. Also, a verification if the Commission exercised due diligence as to choosing the best approaches to commitments during the decision-making-process would be performed. However, it has to be understood that exogenous factors do not pertain to the merging firms' behaviour. The shortcomings of predicting the future outlook of the market and its dynamics, and the emergence of exogenous factors have to be discussed in a policy, rather than case-by-case basis. The Commission will have to ensure consistent coordination between all the relevant Community policies that can affect the functioning of the market.

These conclusions are however reached only from a consumer welfare point of view. To draw a similar conclusion from a societal welfare perspective, a wider view of all the relevant Community policies has to be taken into account. The consistency of the Commission decision with the desideratum set in Article 2 of the EC Treaty has to be verified, by investigating if the Commission decision blatantly contravenes policy

objectives clearly set for the attainment of societal welfare. In this respect, we suggest that a thorough check be performed if all the possible policy compatible / consistent solutions (i.e. commitments) have been investigated at the time the Commission decision was prepared. We also propose that the societal welfare considerations should be placed in terms of efficiencies. The reviewer will have to investigate the degree of causation between the innovation, technological progress and so on achieved, and the realization of the Article 2 of the EC Treaty objectives. For a discussion on the treatment of efficiencies we will direct the reader to the last model put forward in one of the next paragraphs.

Given that (most of the) visible effects on consumer and societal welfare would only be observed after a certain period of time has past from the completion and implementation of the concentration transaction, we propose that the *ex-post* review should be performed after 3-5 years from the Commission's decision. Of course, a certain degree of discretion may be legislatively provided, for extensions of this deadline, should the circumstances of the case require an approach as such.

Second, the *ex-post* review should assess if the appraisal process which lead to the adoption of the Commission decision is accurate and appropriate. In this respect, one has to investigate the coherence, consistency, validity and completeness of the key factual assertions and logical propositions put forward by the Commission. Understanding why and how the Commission met the economic goal of the merger regulations, if it did, and in case an inappropriate decision was taken, where exactly the error that led to it was made, is important for the purpose of transparency in merger control. Also, the *ex-post* review would enhance the Commission's *ex-ante* decision-making process, and reduce the probability and the size of the errors, with consequences on the attainment of both consumer and societal welfare. In addition, even if the Commission took the appropriate decision, it could have done so for the wrong reasons and from this too other useful lessons can be derived.

The Direct Effect of Articles 81 and 82 of the EC Treaty / Private Enforcement

It was alleged (Venit, 1990, p. 11) that the Merger Control Regulation is *ultra vires* because, among others, it takes away rights which third parties have previously enjoyed, especially through the application of Regulation 17/62. Should this legal defect be perceived as still existing and problematic, a possible remedy would entail a return to the *ex-post* mechanisms contained in Articles 81 and 82 of the EC Treaty which may efficiently complement the existing *ex-ante* method. In this respect, the direct effect and private enforcement concepts may be put at work.

We have provided in Chapter 4, that by virtue of the direct effect of the provisions of these two articles, legal and natural persons should be able to rely upon these provisions in order to initiate proceedings opposing concentrations before national courts. Thus, there is a theoretical possibility for a national court to apply the above mentioned articles to a concentration transaction, even when that concentration is or has been under review by the Commission, especially since the Merger Control Regulation does not contain any explicit provisions to the contrary. We suggest that better use should be made of the

direct effect of the prescriptions embedded in these articles through the encouragement of private enforcement.

If undertakings and individuals would be afforded greater possibilities to trigger prosecution of anticompetitive behaviour an extra monitoring device would ensure greater certainty as to the attainment of the merger control's welfare objectives. The Commission embraces such an approach and it believes that private enforcement could very well work as a deterrent of anticompetitive behaviour. In its 2005 Green Paper[238] the Commission acknowledged that violations of the Articles 81 and 82 of the EC Treaty rules, in particular price fixing cartels can cause considerable damage to companies and consumers but numerous obstacles can hinder actions for damages by injured parties in national courts. The Green Paper identified certain of these obstacles (such as access to evidence, the defence that companies claiming damages may have simply passed on any price increases to their own customers and the quantification of damages) and presented various options for debate for their removal. The options set out in the Green Paper were meant to ensure that companies and consumers were compensated for their losses, while avoiding vexatious claims. Furthermore, in its 2001 judgment, in *Courage v Crehan*[239], the Court of Justice explicitly recognized a right to damages for breaches of EC competition law by stating that "the full effectiveness of Article 81 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 81, par. 1 would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition." In the same endeavour, the European Commission has published in 2008 a White Paper[240] suggesting a new model for achieving compensation for consumers and businesses who are the victims of breaches of EC Treaty rules on restrictive business practices and abuse of dominant market positions. The White Paper addresses the serious obstacles in the EU Member States that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions and includes suggestions to make damages claims by victims more efficient, whilst ensuring respect for European legal systems and traditions. The model outlined by the Commission is based on compensation through single damages for the harm suffered. The White Paper's other key recommendations cover collective redress, disclosure of evidence and the effect of final decisions of competition authorities in subsequent damages actions. The recommendations balance rights and obligations of both the claimant and the defendant and include safeguards against abuses of litigation. However, none of these documents[241] outlined here specifically address the matter of private enforcement in the context of concentration control

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[238] *Damages actions for breach of the EC antitrust rules*, SEC(2005) 1732, COM/2005/0672 final.
[239] Case C-453/99.
[240] *White Paper on Damages Actions for Breach of the EC antitrust rule,* COM(2008) 165.
[241] For further details concerning the 2005 and 2008 Papers and the Commission's efforts to stimulate civil enforcement in competition matters, see http://ec.europa.eu/competition/antitrust/actionsdamages/index.html, as displayed on August 12th, 2009.

Encouraging specific private enforcement in concentration control is in this respect desirable as it may bring about great benefits:

- Triggering prosecutions through private actions would relieve part of the Commission's burden and would allow it to focus on key cases. Furthermore, it would aid achieving a lower risk of political influence; it would involve private parties in a process which ultimately concerns them either directly, either indirectly. All in all, proposals like the above may bring about a higher degree of transparency in the European Merger Control System.
- Private actions would result in more cases to be dealt with. Consequently, the competitive environment would be much healthier since a greater deal of anticompetitive behaviour would be sanctioned. Speaking of which, it may be assumed that more fines (going to EU's budget) would be applied.
- From a transparency point of view, private parties that trigger the examination of anticompetitive behaviour would be actively involved in the review. Any piece of information regarding the case will be directed not only to the 'defendants' but also to the 'plaintiff'. Moreover, private parties involved in an antitrust case have more motivation to place pressure on competition authorities to transparently disclose information, than simple spectators have.
- The realization of the rights and interests of different categories of citizens, with a bearing on the attainment of societal welfare, would be more likely.

As optimistic and as encouraging private monitoring of anticompetitive behaviour presents itself, it must be agreed that there are also downsides of such an approach, fact acknowledged also by the US system. A system of private enforcement would not reach the speed that the current system has, with regard to reaching a final decision. Entrusting private parties with such prerogatives may lead to their abusive misuse, for the purpose of forcing competitors to waste time and resources. Moreover, private enforcement does not posses the suitable tools and options public authorities do, such as varied remedies.

Furthermore, the benefits of direct effect may be drawn in front of national courts. Should the competition chamber desire to be more involved when it comes to private enforcement, we propose that a rather large reform, both regulatory and institutional in nature should take place. The chamber would need to be afforded new competences of intervention in this respect. As things currently stand, although the ECJ accepts claims from private parties, for damages caused by anti-competitive behaviour, there is no mention of triggering private competition cases in the EU Treaty. As already provided above, enabling such an option would require an amendment of the Treaty, with all the difficulties entailed. If a path as such would be pursued, serious institutional, substantive and procedural amendments would need to be applied to the treaties and to the regulations which guide the functioning of the European Court System.

However, the two solutions discussed above (*ex-post review* and *private enforcement*) would only touch upon Type II (anti-competitive / non-welfare-enhancing mergers cleared) errors and consequently, they would remedy the circumstances precluding the attainment of the welfare-enhancing objectives and would not add extra incentive for attaining welfare. These solutions will not touch upon the wrongful prohibitions of

potentially welfare-enhancing mergers. Still, given the Commission's poor record of prohibitions[242] since the enactment of Regulation 4064/89 we suggest that the discussion concerning Type I (competitive / welfare-enhancing mergers prohibited) errors should be placed in terms of efficiencies. To elaborate, a merger which is clearly leading to competition hindrance may still be on the welfare-enhancing side, if coherent efficiencies are put forward. After all, to exemplify, it is efficiencies which refer to innovation, sustainable growth, employment, technological progress, etc, that pertain to attaining welfare. To this end, we believe the next model may be extremely useful.

Ex-post Evaluation of Efficiencies

We believe efficiencies relate to societal welfare just as much as (if not even more than) they relate to consumer welfare. It has been previously stated (Schenk, 2006) that accepting the idea of an efficiency defence indicates renewed sensitivity to the public interest principle. Opening the possibility to accept concentrations that involve substantial productive and dynamic efficiency gains through the reforms of 2004[243] confirms the endeavour of attaining European societal welfare and consumer welfare.

Such an approach is in keeping with the majority of opinions which argue that it is of significant interest to consider efficiency effects when testing the permissibility of mergers with a view to eliminate the likelihood of Type I errors. Brussels acknowledged the importance attached to international competitive growth and innovation, too and stated new major welfare-enhancing targets for the EU through "The New Lisbon Strategy"[244].

Still, the Commission continues to adopt the approach of assessing if a merger is likely to significantly impede effective competition by affecting allocative efficiency. The model presented below proposes that productive and dynamic inefficiencies should be given considerably more attention given their bearing upon the attainment of societal welfare.

Schenk (2006) claims that one of the ways in which mergers could fail to generate or even destroy wealth would be if they had a negative effect on competition without compensating for this by parallel improvements in the productivity of the parties to a merger or in the quality of their products. This would be the case if a deterioration of allocative efficiency would not be compensated for by an increase in productive (or

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[242] See Annex 2.

[243] Prior to 2004, the efficiency defense was not accepted in merger control proceedings. The *Danish Crown / Vestjyske Slagterier,* case M.1313, confirmed that the old Merger Control Regulation did not allow practical scope for an efficiency defense, once a dominant position was created or strengthened. Furthermore, Ilzkovitz and Meiklejohn (2003) suggest that under Regulation 4064/89 mergers were judged on the basis of their anti-competitive effects alone and efficiency gains cannot be used to justify mergers which would otherwise be unacceptable. Jacquemin (1990) stated that the wording of Article 2 par. 1 of Regulation 4064/89 suggests that the regulation contains no efficiency defense at all and the wording implies that only consumers' surplus, and not producers' surplus, is retained.

[244] Enterprise and Industry Directorate-General European Commission, *The New Lisbon Strategy, An estimation of the economic impact of reaching five Lisbon targets*, Industrial Policy and Economic Reforms Papers No. 1, January 2006, p. 79.

internal) efficiency, transactional efficiency and / or dynamic efficiency. While asking the question whether the current European merger control setup is able to further beneficial mergers and block mergers that are a threat to economic welfare, he sketches a Full Efficiency Test, entailing a verification of the proposed merger not only for allocative effects but also for productive and dynamic effects. The model would entail revisiting the concentrations which involved efficiencies being put forward after a period of time sufficient for such efficiencies to materialize their welfare-enhancing effects.

We trust that the models put forward in the previous paragraphs, relating to an *ex-post review* performed by a competent specialized competition chamber and the Full Efficiency Test relate to, and complement each other. A few observations seem appropriate here.

First, testing efficiencies *ex-post* reveals a positive attitude towards mergers and opening towards attaining the welfare goals: such an approach entails that, from an efficiency point of view, only mergers that are unlikely to create productive and / or dynamic efficiency would be blocked while mergers that are likely to have positive efficiency effects would be allowed if no negative allocative efficiency effects are expected.

Second, we suggest that the Commission should assume in this respect a more pro-active role in the sense that, when faced with a transaction which seems clear-cut prohibition material, it should *ex-oficio* suggest modifications of the transaction and efficiency gains schemes, that would point towards the realization of welfare objectives. In other words, the Commission should actively, on a case-by-case basis, pursue the goals with the attainment of which it has been entrusted. This is important from the standpoint of both welfare standards discussed, because efficiencies may bear upon innovation, employment, development, etc, issues that form part of the Community's endeavours listed in the EC Treaty. However, it is moreover in the merging parties' interest to come up with a plausible efficiency scheme, if the merger is to go through. To this end, the burden of proof in productive and dynamic efficiency cases would rest on the merging parties.

Third, we consider that testing efficiencies in and *ex-post* manner would fit properly in the model where the competition chamber performs its review, only if the chamber will be sufficiently equipped with economic and managerial skills.

The Commission's current approach to appraising efficiencies entails an *ex-ante* investigation whether they will benefit consumers, if they are merger-specific, verifiable, timely and substantial enough to bypass the anti-competitive effects of the merger[245]. In other words, the Commission considers from the outset whether efficiency gains generated by the concentration:

- Are likely to enhance the ability and incentive of the new entity to act pro-competitively for the benefit of consumers;
- Are properly supported by consistent documentation and quantification provided

[245] See the efficiencies-related provisions of Regulation 802/2004 and of the *Guidelines on the Assessment of Horizontal Mergers*.

by the parties;

- Cannot be achieved to a similar extent by means other than through the merger proposed, and in a manner that is not likely to raise competition concerns.

These criteria should not be abandoned. Instead, they should be upgraded so as to clearly reflect the endeavour of attainment of both consumer and societal welfare. We consider that acknowledging societal welfare as a legitimate merger control goal, through its insertion in the operative text of the Merger Control Regulation would resolve this issue.

Moving towards an *ex-post* review of efficiencies would bring about great benefits. Predicting if efficiencies will fit the criteria mentioned above would be replaced by a verification based on factual evidence of the accomplishment of these requirements. The chances for opportunistic settlements and regulatory capture would be reduced significantly (Schenk, 2006). Transparency of the appraisal process would be improved, should the merging parties be informed in due time that an *ex-post* verification will take place. The likelihood of Type I errors would be reduced, since only the proposed mergers which does not put forward dynamic or productive efficiencies would be blocked. The same assertion may be provided regarding the possibility of non-welfare-enhancing mergers going through, and consequently de-merging procedures to be necessary. If the Commission will exercise due diligence concerning the type of efficiencies put forward and will establish appropriate safe-nets through coherent commitments plans, de-merging concerns would be alleviated. Last but not least, the model just described would provide greater incentive for improving the Commission's *ex-ante* decision-making process and for companies to create welfare through economically beneficial mergers, and also strong deterrents for non-welfare-enhancing mergers to be put forward.

4. Final Remarks

All in all, we consider that the models outlined above would bring about benefits to the European Merger Control System's institutional setup and functioning. Also, these models would ensure a higher likelihood of realization for both the consumer and societal welfare goals. However, it seems that even after 20 years of European merger control enforcement, the EU continues to ignore these fundamental, latent tensions within its functioning, while persisting to place its focus on procedural and jurisdictional issues. On the eve of the European Merger Control System's 20th anniversary, Brussels reached the conclusion that the EU Merger Control Regulation has contributed to more efficient merger control within the EU since it came into force. The *Report on the functioning of Regulation No 139/2004* adopted by the Commission on June 18th, 2009[246], dealing with the functioning of the jurisdictional and referral mechanisms, confirms this stance. Still, the evaluation of societal welfare considerations and the *ex-post* possibility of controlling mergers continue to await official acknowledgment.

[246] *Communication from the Commission to the Council, Report on the functioning of Regulation No. 139/2004*, COM(2009) 281 final.

Annex 1
European Merger Control Legislative Landmarks

- *Commission's Memorandum on the Problem of Concentrations in the Common Market*, the 1st of December, 1965, SEC (65) 3500 constitutes the first investigation on how mergers may be controlled at a European level.
- *Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings*, submitted to the Council by the Commission on 20 July 1973 (OJ C 92/1, 31.10.1973). This is the first legislative proposal for the enactment of a European merger control act. It provided a basic scheme of control, significantly referring not to Article 82 and 83 (previously 86 and 87), but to Article 308 (previously 235) of the EC Treaty as the authority for its prospective enactment.
- The 1981, 1984, 1986, 1988 *Merger Control Regulation Drafts* (OJ C 36, 12.2.1982 / OJ C 51, 23.2.1984 / OJ C 324, 17.12.1986 / OJ C 130, 19.5.1988)
- The *Cecchini Report* (SEC (88) 524 final, 13.4.1988) is a report by a group of experts, chaired by Paolo Cecchini, examining the benefits and costs of creating a single market in Europe, in accordance with provisions of the Treaty of Rome.
- *Council Regulation (EEC) 4064/89 of December 21st, 1989 on the control of concentrations between undertakings* (OJ L 395, 30.12.1989) is the first merger control regulation enacted at European level.
- The 1996 *Green Paper on Community Merger Control* (COM (96)19 final) reviewing the operation of Regulation 4064/89 since it came into effect and presenting a series of possible amendments regarding the level of the thresholds, the problem of multiple notifications where a concentration was below the Community dimension thresholds, the treatment of joint ventures and certain procedural improvements regarding the Phase I commitments.
- *Council Regulation (EC) 1310/97 of June 30th, 1997 amending Regulation (EEC) 4064/89 on the control of concentrations between undertakings* (OJ 1997, L 180/1) entered into force on the 1st of May, 1998. The regulation brought amendments which extended the application of the Merger Control Regulation to a wider range of mergers and joint venture transactions.
- *The Regulation 447/98* (OJ 1998, L 61/1), dealing with the formalities of notifications and deadlines under the Merger Control Regulation, repealing the earlier Regulation 3384/94 (OJ 1994, L 377/1).
- In order to summarize its approach to particular issues, the Commission has published several notices (*Notice on the Definition of the Relevant Market*, OJ 1997, C 372/3, *Notice on Restrictions Directly Related and Necessary to Concentrations*, OJ 2001, C 188/5, replacing the earlier notice regarding restrictions ancillary to concentrations, OJ 1990, C 203/5, *Notice on the Concept of Concentration*, OJ 1998, C 66/5, *Notice on the Concept of Undertakings Concerned*, OJ 1998, C 66/14, *Notice on the Calculation of Turnover*, OJ 1998, C 66/25, *Notice on the Concept of Full-Function Joint Ventures*, OJ 1998, C 66/1, *Commission Notice Concerning Alignment Of Procedures for Processing Mergers*

Under the ECSC and EC Treaties, OJ 1998, C 66, *Notice on Simplified Procedure for Certain Concentrations*, OJ 2000, C 217/32, *Notice on Remedies*, OJ 2001, C 68/3). These notices attempt to explain aspects of the Commission's decisional practice under the Merger Control Regulation. The notices do not have binding legislative effect, fact that does not undermine their utility; they must be regarded as explanations of the Commission's approach to certain issues and they must be interpreted with flexibility.

- *The 2001 Green Paper on the Review of Council Regulation (EEC) 4064/89* (COM (2001) 745/6 final). The proposed revision of the Merger Regulation was undertaken with a view to ensuring that the Merger Regulation will continue to be an effective instrument of merger control in a changing economic and political environment, both in Europe and worldwide.
- *The Communication from the Commission to the Council and the European Parliament Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward*, issued on the 21st of May 2003 (COM (2003) 284 final). Strengthening shareholders rights, reinforcing protection for employees and creditors and increasing the efficiency and competitiveness of business were the main aims of the *Commission's Action Plan*. It also contained references to the need of a general reform of the European Merger Control System as well as to the imperative of creating a new framework for companies intending to pursue cross-border concentrations.
- Following the outcome of the *2001Green Paper* and of the propositions contained in the *Commission's Action Plan*, on the 16th of December 2003, the Commission adopted the new *Merger Control Regulation 139/2004* (OJ L 24, 29.01.2004), which came into force on the 1st of May 2004. Regulation 139/2004 brought about substantive, jurisdictional and procedural changes. The substantive test for the assessment of mergers has been reworded. The mechanism for reallocating cases from the Commission to Member States and vice versa has been revamped. Procedural changes have been made to craft the regulation more flexible.
- Right before *Regulation 139/2004* entered into force, the Commission adopted *Regulation 802/2004* (OJ 2004, L 133) on the 7th April 2004 implementing *Council Regulation 139/2004*. The Regulation provides the measures to be taken in practice, in order to simplify and expedite the examination of the notifications and of the reasoned submissions. Further on, *Decision 78/2004* and *Decision 79/2004*, adopted on the 8th of June 2004 by the EEA Joint Committee set out the applicability of the EC Merger Regulation to the entire EEA-area.
- The notices that attempted to explain aspects of the Commission's decisional practice under Regulation 4064/89, mentioned above, have been updated in order to be consistent with the provisions of the new Merger Control Regulation. Furthermore, a few more notices, information notes and communications (*DG Competition Information Note on Art. 6 (1) c 2nd sentence of Regulation 139/2004 (abandonment of concentrations), Communication From the Commission pursuant to Article 23(1) of Commission Regulation 802/2004 Implementing Council Regulation 139/2004 on the Control of Concentrations between Undertakings*, OJ 2004, C 139/02, *Commission Notice of 13 December 2005 on the Rules for Access to the Commission File in Cases Pursuant to*

Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation 139/2004, OJ 2005, C 325/07, *Commission Notice on Case Referral in respect of concentrations*, OJ 2005, C 56/2) have been added, in order to complete the legislative panel of the merger review package.

- In 2007 the Commission adopted a new *Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004*. The notice replaces the previous four jurisdictional notices, all adopted by the Commission in 1998 under *Council Regulation 4064/89*. These are: *the Notice on the concept of concentration, the Notice on the concept of full-function joint ventures, the Notice on the concept of undertakings concerned* and *the Notice on calculation of turnover*.
- *The Directive 2005/56/EC of the European Parliament and of the Council on Cross-Border Mergers of Limited Liability Companies* (OJ 2005, C 310/1) is aimed at facilitating cross-border merger operations ensuring cooperation and consolidation between limited liability companies from different Member States.
- It is also important to mention the Commission's efforts in rendering a more transparent merger control appraisal. To this end, *the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (OJ C 31, 05.02.2004), *the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (OJ C 265 of 18.10.2008), *the Best Practice Guidelines on the Conduct of EC Merger Control Proceedings* and The *Best Practice Guidelines: the Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the Merger Regulation* constitute important guidance, conferring a higher degree of legal certainty to the companies which intend to pursue concentration transactions which will face the Commission's scrutiny.

Annex 2
European Merger Control Statistics

I.) NOTIFICATIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	July 09	Total
Number of notified cases	11	64	59	59	95	110	131	168	224	276	330	335	277	211	247	313	356	402	347	129	**4144**
Cases withdrawn - Phase 1	0	0	3	1	6	4	5	9	5	7	8	8	3	0	3	6	7	5	10	1	**91**
Cases withdrawn - Phase 2	0	0	0	1	0	0	1	0	4	5	5	4	1	0	2	3	2	2	3	2	**35**

II.) REFERRALS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	July 09	Total
Art 4(4) request (Form RS)															2	14	13	5	9	5	**48**
Art 4(4) referral to Member State															2	11	13	5	9	4	**44**
Art 4(4) partial referral to Member State															0	0	0	1	0	0	**1**
Art 4(4) refusal of referral															0	0	0	0	0	0	**0**
Art 4(5) request (Form RS)															20	28	38	51	23	11	**171**
Art 4(5) referral accepted															16	24	39	50	22	10	**161**
Art 4(5) refusal of referral															2	0	0	2	0	0	**4**
Art 22 request	0	0	0	1	0	1	1	1	0	0	0	0	2	1	1	4	4	3	2	0	**21**
Art 22(3) referral (Art 22. 4 taken in conjunction with article 6 or 8 under Reg. 4064\89)	0	0	0	1	0	1	1	1	0	0	0	0	2	1	1	3	3	2	3	0	**19**
Art 22(3) refusal of referral																1	1	0	0	0	**2**
Art 9 request	0	1	1	1	1	0	3	7	4	9	4	9	8	10	4	7	6	3	5	0	**83**
Art 9.3 partial referral to Member State	0	0	1	0	1	0	0	6	3	2	3	6	7	1	1	3	1	1	2	0	**38**
Art 9.3 full referral	0	0	0	1	0	0	3	1	1	3	2	1	4	8	2	3	1	1	2	0	**33**
Art 9.3 refusal of referral	0	1	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	1	0	0	**4**

III.) FIRST PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	July 09	Total
Art 6.1 (a) out of scope Merger Regulation	2	5	9	4	5	9	6	4	4	1	1	1	1	0	0	0	0	0	0	0	**52**
Art 6.1 (b) compatible	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	368	307	120	**3592**
Art 6.1(b) compatible, under simplified procedure (figures included in 6.1(b) compatible above)	0	0	0	0	0	0	0	0	0	0	41	141	103	110	137	167	207	238	189	80	**1413**
Art 6.1 (b) in conjunction with Art 6.2 (compatible w. commitments)	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	18	19	8	**185**

IV.) PHASE II PROCEEDINGS INITIATED

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	July 09	Total
Art 6.1 (c)	0	6	4	4	6	7	6	11	11	20	18	21	7	9	8	10	13	15	10	4	**190**

V.) SECOND PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	July 09	Total
Art 8.1 compatible (8.2 under Reg. 4064/89)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	5	9	0	**46**
Art 8.2 compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	2	**90**
Art 8.3 prohibition	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0	**20**
Art 8.4 restore effective competition	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	0	0	0	**4**

VI.) OTHER DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	July 09	Total
Art 6.3 decision revoked	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	**1**
Art 8.6 decision revoked	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**0**
Art 14 decision imposing fines	0	0	0	0	0	0	0	0	1	4	1	0	1	0	1	0	0	0	0	1	**9**
Art 7.3 derogation from suspension (7.4 under Reg. 4064/89)	1	1	2	3	3	2	4	5	13	7	4	7	14	8	10	6	2	3	6	4	**105**
Art 21	0	0	0	0	0	1	0	1	0	1	1	0	1	0	0	0	2	1	0	0	**8**

Source: http://ec.europa.eu/competition/mergers/statistics.pdf

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Summary

This contribution aims at studying the fundamental challenges that shape the very essence of the European Merger Control System. In this respect, the core of the thesis relates to the rationale behind enacting a merger control mechanism in the European legal system and the goals that it is meant to achieve. While investigating these issues, the contribution's recurrent theme gravitates around concepts such as legal certainty, effectiveness and welfare enhancement, principles which are acknowledged to be essential to the generic functioning and development of the European construction and, more particularly, to the appropriate operation of the competition and merger control policies.

Throughout the thesis, we identified a multitude of tensions / challenges that occurred during the twenty years of European merger control enforcement experience. Some of these challenges have been faced or solved and some remain latent.

We started by exemplifying some of the former tensions and revealing the manner in which they have been approached. The 2004 merger review package has dealt with both substantive and institutional / transparency matters, however, with different degrees of intensity. The analysis we performed with regard to the substantive and institutional challenges often referred to the main pieces of legislation which postulated the changes brought to the functioning of the European Merger Control System, such as Regulation 4064/89, Regulation 1310/97, Regulation 139/2004, relevant Green Papers, etc. We have concluded that by replacing the dominance test with the 'significant impeding of effective competition' test, the EU managed to solve the substantive challenge concerning the appraisal test. The analysis indicated that the Commission has increasingly deviated from a structural approach to merger enforcement towards a closer attention being devoted to the competitive effects of concentration transactions. A fair compromise has been reached, combining the appropriate standards already existing in other jurisdictions, without altering the existing body of jurisprudence or bypassing the previous dominance test experience. The situation stands somehow differently with respect to the institutional and transparency challenges. Steps towards increasing transparency have been taken. However, institutionally speaking, the European Merger Control System continues to exhibit no clear separation of the different appraisal stages, a fact that impinges on the objectivity of the process, despite the procedural, cosmetic or internal structural reforms undertaken.

Turning to the main research questions approached in this contribution, we argued that merger control should not be viewed as isolated from the economic, social, political and regulatory realities of the EU. It must be established that the European Merger Control System embodies a dual purpose: attaining consumer and societal welfare. In other words, one has to go beyond assessing the anti-competitive effects that a merger might induce and investigate the different economy-wide effects that concentration transactions and policy approaches may have. Still, the Commission's practice to date reveals no clear

inclination to take societal welfare considerations into account while appraising concentration transactions, thus emphasizing certain conflicts between the goals set by the Treaties and the means used to achieve them.

Further on, we have debated on which of the two possible methods of assessment, *ex-ante* or *ex-post* merger control serves the purpose of attaining consumer and societal welfare best. The discussion was based on matters of principle and also on punctual substantive and procedural issues. We reached the conclusion that the *ex-ante* method of control seems more appropriate for fulfilling the societal welfare goal and the *ex-post* method of control does better when talking about consumer welfare.

We continued by providing that in the current setup, the *ex-ante* method may be flawed, due to, among other factors, the limited capacity of grasping the future outlook of essential elements of the market dynamics, the uncertainty which surrounds the concept of standard of proof, the limited possibility of predicting future corporate and competitive strategies, and the use of assumptions and template test which base their findings on previous market behavioural patterns. All in all, the *ex-ante* method is designed to attain societal welfare; however, we may suggest that it may miss certain essential elements necessary for fulfilling the consumer welfare goal. These elements and features may be provided under an *ex-post* scheme.

In this respect, we proposed that a reconstruction of the merger control system would seem necessary. On conceptual grounds, we suggested a clear acknowledgment of the societal welfare goal in the Merger Control Regulation's text and in the Commission's appraisal process. We proposed a departure from the current approach of sole hard core (*a priori*) prevention towards a more complex construction entailing lighter *ex-ante* scrutiny combined with consistent *ex-post* monitoring. A better use of the direct effect concept, private enforcement and consistent efficiency review in an *ex-post* judiciary setting, would allow the appropriate attainment of the system's goals. Also, a proper concentration transaction follow-up procedure would alleviate the 'legal certainty realization' critique and the current system's inherent prediction shortcomings would be resolved. All in all, the merger control would contribute in a more active and effective manner to the expansion of the European construction.

Samenvatting

In dit proefschrift is studie verricht naar de fundamentele vraagstukken die samenhangen met de essentie van het Europese stelsel van concentratiecontrole. De kern van het onderzoek is gericht op de beginselen die ten grondslag liggen aan de Europese concentratiecontrole alsmede op de doelen die daarmee worden beoogd. Concepten als rechtszekerheid, doeltreffendenheid en welvaart spelen een belangrijke rol bij de analyse omdat zij essentieel zijn voor het functioneren en de ontwikkeling van 'Europa', in het bijzonder voor het beleid ten aanzien van mededinginging en fusies (concentraties).

In het onderzoek zijn tal van spanningsvelden/vraagstukken gesignaleerd die zich in de afgelopen twintig jaren hebben voorgedaan bij de handhaving van de Europese concentratiecontrole (fusiecontrole). Sommige daarvan zijn opgepakt en opgelost, andere zijn echter blijven liggen.

Om te beginnen hebben we een aantal inmiddels voormalige spanningsvelden besproken en de manier waarop deze zijn aangepakt. Met name de herziening van het concentratiecontrole beleid in 2004 heeft een positief effect gehad, zij het in wisselende mate, op aangelegenheden van materiële en institutionele aard en op de transparantie. In onze analyse van materiële en institutionele aspecten verwijzen we voorts frequent naar de regelgeving waardoor het functioneren van het Europese stelsel van concentratiecontrole in belangrijke mate werd gewijzigd, zoals Verordening 4064/89, Verordening 1310/97, Verordening 139/2004 en relevante beleidsstukken (Green Papers). Onze conclusie is dat met het vervangen van de toets op dominantie (machtspositie) door de toets of een concentratie de daadwerkelijke mededinging op significante wijze belemmert, de EU er in geslaagd is om de uitdaging die in toetsing van concentraties besloten ligt, het hoofd te bieden. Uit het onderzoek blijkt dat de Commissie in toenemende mate is afgeweken van een structurele aanpak van fusiecontrole ten gunste van meer focus op de effecten die concentraties op de mededinging hebben. Dat heeft geleid tot een aanvaardbaar compromis, dat wil zeggen, tot een combinatie van geschikte criteria die reeds in andere jurisdicties in gebruik waren maar zonder dat daarmee de bestaande jurisprudentie haar geldigheid verloor of voorbij werd gegaan aan de ervaring die was opgedaan met de toets op dominantie.

Voor wat betreft de institutionele aspecten en de transparantie is de situatie enigszins anders. Inzake transparantie is vooruitgang geboekt maar daar staat tegenover dat het Europese stelsel van concentratiecontrole, ondanks aanpassingen van procedurele of cosmetische aard en van interne procedures, nog steeds geen duidelijke onderscheid kent tussen de verschillende fases van beoordeling hetgeen een nadelig effect heeft op de objectiviteit van het controleproces.

De hoofdvraag van het onderzoek heeft ons geleid naar de conclusie dat concentratiecontrole niet los moet worden gezien van de economische, sociale, politieke en juridische werkelijkheid van de EU. We stellen vast dat het Europese stelsel van

concentratiecontrole een tweevoudig doel dient, namelijk het bereiken van welvaart voor de consument en de maatschappij als geheel. Anders gezegd, men moet bij de beoordeling van een concentratie meer in ogenschouw nemen dan de mededingingsbeperkende effecten die er door kunnen worden veroorzaakt en men moet onderzoeken welke effecten concentraties en het beleid betreffende concentraties op de economie als geheel hebben. De praktijk van de Commissie tot op heden tendeert er echter niet naar maatschappelijke welvaart (*societal welfare*) mee te wegen bij haar beoordeling van concentraties waardoor wordt benadrukt dat er een zekere strijdigheid bestaat tussen de doeleinden die door de Verdragen zijn gesteld en de middelen om die te bereiken.

Voorts hebben we beredeneerd welke van de twee beoordelingsmethoden – concentratiecontrole *ex-post* of *ex-ante* - het meest geschikt is met het oog op het bereiken van welvaart voor consument en maatschappij. Het desbetreffende betoog is gebaseerd op aangelegenheden van principiële aard, maar ook op specificieke materiële en formele kwesties. De conclusie is dat de *ex-ante* methode meer geëigend is voor het bereiken van maatschappelijke welvaart terwijl de *ex-post* methode het beter doet als het gaat om welvaart voor de consument.

In het vervolg van de studie is gesteld dat de *ex-ante* methode wordt verzwakt door diverse factoren waaronder het beperkte vermogen om in te schatten hoe toekomstige essentiële elementen voor de dynamiek in de markt er uit zullen zien, de onzekerheid die is verbonden met het vereiste bewijs, de beperkte mogelijkheden om ondernemings- en mededingingsstrategieën te voorspellen en het gebruik van aannames en modellen die zijn gebaseerd op voorafgaande gedragspatronen op de markt. Welbeschouwd is de *ex-ante* methode ontworpen om maatschappelijke welvaart te bereiken maar naar onze mening mist zij bepaalde essentiële elementen om doeleinden van consumenten welvaart te verwezenlijken. Die elementen zijn wel aanwezig in de *ex-post* methode.

We zijn tot de conclusie gekomen dat hervorming van het stelsel van concentratiecontrole geboden is. Naar onze mening moet het doel van maatschappelijke welvaart op duidelijke wijze erkend worden in de tekst van de Concentratieverordening en in de weging door de Commissie. De huidige benadering van zuivere *(a priori)* preventie dient te worden verlaten voor een meer complexe opzet bestaande uit een lichter *ex-ante* onderzoek in combinatie met een consistente *ex-post* monitoring. Betere benutting van het beginsel van direct effect, privaatrechtelijke handhaving en een consistente doelmatigheidstoets via een *ex-post* rechterlijke toetsing zouden het mogelijk maken de met concentratiecontrole beoogde doelen te bereiken. Een goede follow-up procedure voor concentraties zou tevens tegemoetkomen aan de kritiek op het gebrek aan rechtszekerheid en oplossing bieden voor de voorspellingen die een zwakte zijn van het huidige systeem. Dit alles zou kunnen leiden tot een actievere en efficiëntere bijdrage van de concentratiecontrole aan 'Europa'.

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Curriculum Vitae

Catalin Stefan Rusu was born in Satu-Mare, Romania on December 1st, 1979. He attended the "Doamna Stanca" high school there, between 1994 and 1998. He moved to Cluj-Napoca, Romania, in 1998, where he obtained his Bachelor degree in law (2002) and his Master degree in European Law and Regulation (2003). He enrolled in the MA International and European Legal Studies programme at Utrecht University in 2003. He wrote his MA dissertation under Professor A.F.M. Dorresteijn's guidance and graduated with a *cum laude* distinction. The master thesis dealt with the regulation of cross-border mergers and acquisitions in the European Union. In 2005 he was awarded the "Romanian Government Special Scholarship" meant to subsidize this PhD project under the supervision of Professor A.F.M. Dorresteijn and Professor E.J.J. Schenk. From 2005 until 2009 he performed academic research at the Molengraaff Institute for Private Law, participated in international conferences and workshops, published a number of articles and pursued a traineeship at the Brussels office of the AKD Prinsen van Wijmen law firm. He will defend his PhD thesis on November 27th, 2009.