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of Anna A. Mastori

(R.N.: 7340012018012)

'The legal framework of mergers & acquisitions under European Union Competition Law'

Supervising Committee:

Emmanouil Perakis, Assistant Professor, NKUA (Supervisor)
Metaxia Kouskouna, Assistant Professor, NKUA
Revekka - Emmanouela Papadopoulou, Assistant Professor, NKUA

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Abstract

The present dissertation deals with mergers and acquisitions under the prism of EU competition law. The merger waves that emerged all over the globe the last decades have triggered the vigorous interest of scholars, businesspeople and politicians. Business concentrations are highly disputed due to the fact that although in some cases they are considered to contribute to robust competition and economic efficiency, in others they are deemed to subvert the economy and social welfare. The specific work focuses on the legal framework of mergers and acquisitions with an EU dimension and seeks to ascertain whether this legal system has managed to strike a balance between the enforcement of competition law and the protection of public interest. It is divided into two main parts, the first of which comprises the EU legal provisions that aim to preserve effective competition, while the second includes the ones that purpose to safeguard public interest. Finally, this dissertation attempts to provide a critical discussion regarding the controversial issue of the alleged existence of protectionism as an underlying objective of the EU merger regime.

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List of Abbreviations

CJ	Court of Justice
CC	Competition Commission (UK)
DG COMP	Directorate General for Competition
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
EUMR	European Union Merger Regulation
ICN	International Competition Network
JV	Joint Venture
M&As	Mergers & Acquisitions
NCAs	National Competition Authorities
OECD	Organisation for Economic Cooperation & Development
OFT	Office of Fair Trading (UK)
R&D	Research & Development
SIEC	Significant Impediment to Effective Competition
SLC	Substantial Lessening of Competition
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States (of America)
VAT	Value-Added Tax

1. Introduction

A. Merger activity

The bouts of 'merger mania' that emerged globally the last decades have sparked the interest of all kinds of stakeholders[1] in a typical corporation. Many scholars, having recognized the importance of this dynamic phenomenon, have analyzed various aspects of mergers and acquisitions (hereinafter M&As), mainly legal, economic and political, and their correlation with each other. During particular periods of time, which are characterized by a considerable number of mergers[2], let alone takeovers[3] of 'national champions', this business strategy could be considered as the centre of gravity for a country's economy.

One widely known feature of the mergers is that they appear in waves. Golbe and White (1993) were among the first to observe empirically the cyclical pattern of M&A activity.[4] A strand of the literature, exemplified by Mitchell and Mulherin (1996), has tried to elaborate on the reasons why mergers occur in waves, and, additionally, why within a wave they strongly cluster by industry. These features suggest that mergers might occur as a reaction to unexpected shocks to

[1] Stakeholders are the parties that have an interest in a company and can either affect or be affected by the business. Primary stakeholders in a typical corporation include investors, employees, customers and suppliers, while secondary stakeholders include governments, communities and trade associations.

[2] I often refer to the term 'merger' throughout this dissertation, even though many transactions that the Commission reviews under the merger control regulation consists of stock or asset acquisitions. This terminology is, though, consistent with the well-established practice in competition law literature, which systematically uses the term "merger control' to capture both mergers and acquisitions.

[3] As a business term, a takeover means the purchase of one company (the target) by another (the acquirer, or bidder). In the UK, the term refers to the acquisition of a public company listed on a stock exchange, in contrast to the acquisition of a private company. I use this term occasionally throughout this dissertation instead of the term M&A.

[4] Golbe, D.L. and White, L.J. (1993). Catch a Wave: The Time Series Behaviour of Mergers. Review of Economics and Statistics 75, 493-497, in Martynova, Marina and Renneboog, Luc, Mergers and Acquisitions in Europe (January 2006). ECGI - Finance Working Paper No. 114/2006; CentER Discussion Paper Series No. 2006-06. Available at SSRN: https://ssrn.com/abstract=880379 or http://dx.doi.org/10.2139/ssrn.880379.

industry structure.[5] Although all waves exhibit unique patterns and underlying motives, some commonalities can be observed. First, all waves occur in periods of economic recovery, as a corollary, for instance, of a market crash and economic recession caused by war or an energy crisis. Second, the waves coincide with periods of rapid credit expansion and booming stock markets. It is notable that all five waves ended with the collapse of stock markets. Hence, it seems that a burgeoning external capital market is a fundamental condition for a takeover wave to emerge. Third, takeover waves are preceded by industrial and technological shocks often in form of technological and financial innovations, supply shocks, such as oil price shocks, deregulation, and increased foreign completion. Finally, takeovers often occur in periods when regulatory changes, such as those related to antitrust or takeover defence mechanisms, take place.[6]

Moreover, as already mentioned, five waves have been examined in the literature: those of the early 1900s, the 1920s, the 1960s, the 1980s, and the 1990s. The most recent wave was particularly remarkable due to its size and geographical dispersion. For the first time, Continental European firms were as eager to participate as their US and UK counterparts, and M&A activity in Europe reached levels similar to those experienced in the US. It is widely believed that the introduction of the Euro, the globalisation process, technological advancements, deregulation and privatisation, as well as the financial markets boom, spurred European companies to be involved with M&As during the 1990s.[7] While the main engine of takeover activity in Europe

[5] Mitchell, Mark L. and J. Harold Mulherin, 1996. "The impact of industry shocks on takeover and restructuring activity," *Journal of Financial Economics*, 41, pp. 193-229, in Andrade, Gregor M-M. and Mitchell, Mark L. and Stafford, Erik, New Evidence and Perspectives on Mergers (January 2001). Harvard Business School Working Paper No. 01-070; HBS Finance Working Paper No. 01-070. Available at SSRN: https://ssrn.com/abstract=269313 or http://dx.doi.org/10.2139/ssrn.269313.

[6] Martynova, Marina and Renneboog, Luc, A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand? (previous title: The History of M&A Activity Around the World: A Survey of Literature). Journal of Banking and Finance, 2008; ECGI - Finance Working Paper No. 97/2005. Available at SSRN: https://ssrn.com/abstract=820984.

[7] Martynova, Marina and Renneboog, Luc, Mergers and Acquisitions in Europe (January 2006). ECGI - Finance Working Paper No. 114/2006; CentER Discussion Paper Series No. 2006-06. Available at SSRN: https://ssrn.com/abstract=880379 or http://dx.doi.org/10.2139/ssrn.880379.

during the 1990s was still the UK, M&As in Continental Europe have increased considerably both in number of deals and total transaction value compared to the previous decades. [8]

From 1998 to 2001 there was a period of frenetic merger activity, although this then declined substantially as a consequence of the global economic depression. Another upswing started in 2005 and continued through to 2007, notably because private equity firms became involved in ever-larger acquisitions of well-established firms. In a speech in June 2007 Commissioner Kroes spoke of a 'tsunami' of mergers which she welcomed since it involved the cross-border restructuring of markets in many sectors from energy to banking and from air transport to telecommunications[9]. The financial crisis that erupted in 2008 led to a sharp decline in merger activity in the following years. DG COMP's Table of Statistics[10] demonstrates clearly the peaks and troughs of merger notifications under the EUMR[11]. Indicatively, the number from 211 in 2003 increased to 402 in 2007, then dropped to 277 in 2013, and later on, in 2016 the number amounted to 362 until it reached the number of 414 in 2018, whilst in September 2019 mergers amounted to 270.

An important feature of mergers in recent years has been the increasing complexity, size and geographical reach. Very large mergers have taken place in many sectors as companies have sought to restructure and consolidate their place in an increasingly global market. For example, in the pharmaceuticals industry Pfizer and Warner-Lambert merged to become the largest pharmaceutical company in the world[12]. Major mergers have taken place in the car industry, for instance between Daimler-Benz and Chrysler[13], between Ford and Volvo[14], between Renault and Nissan[15], between Fiat and Chrysler[16], and between Nissan and Mitsubishi[17]. In the oil industry

[8] Ibid.

[9] Speech by Kroes 'European Competition Policy in a changing world and globalised economy: fundamentals, new objectives and challenges ahead', 5 June 2007, available at www.ec.europa.eu/competition, in Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 831-832.

[10] Available at https://ec.europa.eu/competition/mergers/statistics.pdf.

[11] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ No. L 24 of 29 January 2004 (hereinafter: EUMR).

[12] Case M 1878, decision of 22 May 2000.

[13] Case M 1204, decision of 22 July 1998.

[14] Case M 1452, decision of 26 March 1999.

[15] Case M 1519, decision of 12 May 1999.

Exxon merged with Mobil to become the largest oil company in the world[18], and BP Amoco merged with Arco[19]. Telecommunications has also seen a high degree of merger activity[20]. As at 8 December 2017 the merger in 1999 of VodafoneAirTouch and Mannesmann[21] was the largest merger by value. It is obvious that the size, complexity and number of mergers that have been occurring places significant burdens on the authorities responsible for merger control.[22]

B. Motives for M&As

A profusion of studies has shown that mergers seem to create shareholder value, with most of the gains accruing to the target company. However, on the issue of why mergers occur, research success has been more limited. Economic theory has provided plausible reasons why mergers might occur. Some of them are the following: creation of economies of scale or other synergies; endeavors to obtain market power, perhaps by forming monopolies or oligopolies; achievement of market discipline, as in the case of the removal of incompetent target management; self-serving attempts by acquirer management to "over-expand" and other agency costs; and taking advantage of opportunities for diversification, like by exploiting internal capital markets and by managing risk for undiversified managers. Most of these theories have been considered to be the causal link to the conclusion of a number of mergers over the last century, and thus are explicitly relevant to a comprehensive understanding of what triggers M&A activity.[23]

The literature offers several alternatives as to what motivates companies to participate in corporate takeovers. The key explanations are synergies and the correction of managerial failure.

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[16] Case M 5518, decision of 24 July 2009.

[17] Case M 8099, decision of 5 October 2016.

[18] Case M 1383, decision of 29 September 1999.

[19] Case M 1532, decision of 29 September 1999.

[20] See Manigrassi et al 'Recent developments in telecoms merger', Competition Merger Brief 3/2016, available at www.ec.europa.eu/competition.

[21] Case M 1795, decision of 12 April 2000.

[22] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 831-832.

[23] Andrade, Gregor M-M. and Mitchell, Mark L. and Stafford, Erik, New Evidence and Perspectives on Mergers (January 2001). Harvard Business School Working Paper No. 01-070; HBS Finance Working Paper No. 01-070. Available at SSRN: https://ssrn.com/abstract=269313 or http://dx.doi.org/10.2139/ssrn.269313.

Typically, one of the anticipated results of takeovers is the creation of operating and financial synergies. Operating synergies arise through the realization of economies of scale and scope, the elimination of duplicate activities, vertical integration, the transfer of knowledge or skills by the bidder's management team, and a reduction in agency costs by bringing organization-specific assets under common ownership.[24] An argument of paramount importance in favour of mergers is the achievement of economies of scale and scope[25]. Mergers can enhance economic efficiency in a number of different ways.[26] Firms will produce most efficiently when they maximize economies of scale. These are economies that can be reaped by the firm which is at the optimum size for that industry. A certain product may be made most efficiently with a particular piece of machinery, but this machinery may require a specific turnover before it is economically viable.[27] A firm will produce goods at the lowest marginal cost where it is able to operate at the minimum efficient scale. If it operates on a smaller scale than this, marginal cost will increase and there will be a consequent loss of allocative efficiency.[28]

Mergers may also enhance distributional efficiency. It may, for example, be more efficient for a manufacturing firm, which is seeking to extend its operations in the marketplace, to merge with an existing distributor, rather than learn the skills of this new activity of the supply chain from scratch.[29] Put it differently, backward integration[30], that is, for instance, the takeover of a

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[24] Ravenscraft, D.J. and Scherer, F.M. (1987). Mergers, Sell-offs and Economic Efficiency. Washington, DC: The Brookings Press & Ravenscraft, D.J. and Scherer, F.M. (1989). The Profitability of Mergers. International Journal of Industrial Organization 7, 101-116, in Martynova, Marina and Renneboog, Luc, Mergers and Acquisitions in Europe (January 2006). ECGI - Finance Working Paper No. 114/2006; CentER Discussion Paper Series No. 2006-06. Available at SSRN: https://ssrn.com/abstract=880379 or http://dx.doi.org/10.2139/ssrn.880379.

[25] See OECD Roundtable Jurisdictional nexus in merger control regimes (2016), available at www.oecd.org/competition.

[26] S. Bishop, A. Lofaro, F. Rosati & J. Young, 'The efficiency-enhancing effects of Non-Horizontal Mergers, Office for Official Publications of the European Communities, 2005.

[27] Paul Craig & Gráinne de Búrca (2015) 'EU Law: Text, Cases, and Materials', sixth edition, Oxford University Press, p. 1092.

[28] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 833-834.

[29] Paul Craig & Gráinne de Búrca (2015) 'EU Law: Text, Cases, and Materials', sixth edition, Oxford University Press, p. 1092.

[30] Backward integration occurs when a company initiates vertical integration by moving backward in its industry's chain. A typical example is the case of a retail supplier merging with or acquiring the manufacturer. On the contrary,

distributor, may be less costly than establishing a distribution network operating on a contractual basis. Besides, this way, it is possible that a firm aims to gain improved access to loan and equity capital than it had prior to the merger, have access to a greater pool of industrial technology, or acquire the patents and know-how of a particular firm.[31] Moreover, cross-border M&As also offer companies a legal means to take advantage of beneficial tax provisions of other countries' tax systems.[32] In addition, imperfect capital markets allow firms to exploit favourable exchange rate movements by moving operations to other countries or by acquiring foreign firms.[33]

Another crucial argument in favour of mergers is the achievement of management efficiency and the market for corporate control. It is considered that the threat of a takeover bid is a spur for management to perform with purpose to protect the interests of the shareholders[34]. The market for corporate control helps to promote economic efficiency: where the shareholders are satisfied with the management's performance, they will not wish to sell their shares to another bidder[35], unless it is overbidding. If shareholders are dissatisfied, they may prefer to sell at the price offered and to reinvest the proceeds in another company. As a consequence, it is likely that the old management will be replaced by the bidder. If the threat of takeovers is considered to have

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forward integration is a form of vertical integration whereby business activities are expanded to include the direct distribution or supply of a company's product.

[31] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, p. 834.

[32] Scholes, M. and Wolfson, M. (1990). The effects of changes in tax laws on corporate reorganization activity. Journal of Business, 141–164 & Servaes, H. and Zenner, M. (1994). Taxes and the returns to foreign acquisitions in the United States. Financial Management 23, 42–56, in Martynova, Marina and Renneboog, Luc, Mergers and Acquisitions in Europe (January 2006). ECGI - Finance Working Paper No. 114/2006; CentER Discussion Paper Series No. 2006-06. Available at SSRN: https://ssrn.com/abstract=880379 or http://dx.doi.org/10.2139/ssrn.880379.

[33] Froot, K. and Stein, J. (1991). Exchange rates and foreign direct investments: an imperfect capital markets approach. Quarterly Journal of Economics 106, 1191–1271 & Cebenoyan, A., Papaioannou, G. and Travlos, N. (1992). Foreign takeover activity in the US and wealth effects for target firm shareholders. Financial Management 21, 58–68, in Martynova, Marina and Renneboog, Luc, Mergers and Acquisitions in Europe (January 2006). ECGI - Finance Working Paper No. 114/2006; CentER Discussion Paper Series No. 2006-06. Available at SSRN: https://ssrn.com/abstract=880379 or http://dx.doi.org/10.2139/ssrn.880379.

[34] S. Bishop, A. Lofaro, F. Rosati & J. Young, 'The efficiency-enhancing effects of Non-Horizontal Mergers, Office for Official Publications of the European Communities, 2005.

[35] Paul Craig & Gráinne de Búrca (2015) 'EU Law: Text, Cases, and Materials', sixth edition, Oxford University Press, p. 1092.

such a significant role, this has implications for merger policy, namely distortion of the market for corporate control, thus diminishing its disciplining effect on management.[36]

Last but not least, it has to be highlighted that companies within one nation state -or within one political grouping such as the European Union- may wish to merge in order to become a 'national champion' (or a 'European champion'). Governments may encourage mergers that will create domestic firms more capable of competing on international markets, although 'national champions' free from the disciplining effect of competition on their domestic markets may lack the skills necessary to succeed in the wider world[37].[38]

D. In pursuit of EU national 'champions'?

The notion of a national champion is difficult to define and may depend upon the particular context. In the context of merger control, the notion generally means government support for a merger between two domestic firms to create a more powerful entity, often also expressly opposing the takeover of one of the domestic firms by a foreign company. There can be many reasons for government support for the creation or protection of a national champion such as securing employment, creation of economies of scale, and many others that loosely fall under the heading of public policy rationale. Indeed, many governments may argue that national champions in particular sectors are essential for 'public/national security' reasons, such as maintaining regulatory oversight of a particular firm or sector.[39]

The European Commission's merger-review power has been a subject of controversy among lawmakers and commentators for more than two decades. One reason why is that the Commission has sometimes used its extensive competition authority to prohibit high-profile mergers involving non-EU firms, although the same acquisitions are approved by other

[36] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 834-835.

[37] The European Commission is resolutely opposed to the creation by Member States of 'national champions': see ch. 21, 'Outright prohibitions', pp. 922-928; for interesting discussion of the issue see OECD Roundtable Competition Policy, Industrial Policy and National Champions (2009), available at www.oecd.org/competition.

[38] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, p. 834.

[39] Galloway, Jonathan, The Pursuit of National Champions: The Intersection of Competition Law and Industrial Policy (February 23, 2007). European Competition Law Review, 2007. Available at SSRN: https://ssrn.com/abstract=1767865.

competition authorities. The Commission's 2001 decision to block the USD 42 billion acquisition of Honeywell by General Electric -a merger approved by the U.S. Department of Justice- is perhaps the most well-known of these cases. Furthermore, in the name of competition law, the Commission has repeatedly blocked or forced significant restructuring of mergers involving a wide range of illustrious American firms, including Boeing, MCI WorldCom, Time Warner and UPS. These high-profile interventions have raised concerns that the Commission is using its merger-review power to advance protectionist industrial policy rather than effective competition.[40]

Rising inequality and unemployment rates contributed considerably to fuel protectionist fears in Europe and the U.S. There's also frustration over Beijing's market-distorting subsidies for cutting-edge industries and the Chinese protectionism against foreign competition. U.S. President Donald Trump was elected in part thanks to his aggressive talk about China and saving American factories and jobs. In Europe, leaders including French President Emmanuel Macron and German Chancellor Angela Merkel are calling for more scrutiny of foreign takeovers and changes to EU rules so local companies can develop and become more competitive in a global environment. However, it has to be noted that the specific views aren't fully shared by the European Commission.[41]

The question is: Do 'European champions' constitute an underlying objective of the EU merger control regime hidden behind the public interest protection?

[40] Bradford, Anu and Jackson, Jr., Robert J. and Zytnick, Jonathon, Is EU Merger Control Used for Protectionism? An Empirical Analysis (June 23, 2017). Journal for Empirical Legal Studies 14:4, December 2017, Forthcoming; Columbia Law and Economics Working Paper No. 571. Available at SSRN: https://ssrn.com/abstract=3003955.

[41] Dendrinou Viktoria & Aoife White, Why Europe Wants to Pump Up Companies to Make 'National Champions', published on 7 June 2019 by www.bloomberg.com, Available at https://www.bloomberg.com/news/articles/2019-06-07/how-china-s-rise-spurs-quest-for-homegrown-giants-quicktake.

2. Main Part

Part I: Merger control to enforce effective competition

I.A. TFEU provisions on competition

I.A.1. Prohibited agreements, decisions and concerted practices

The EU competition rules are set out in the TFEU[42], Council and Commission regulations and a range of 'soft law' instruments. Policy initiatives and priorities are set out in a variety of publications such as the European Commission's annual competition reports, and the Competition Policy Brief and specific policy statements made throughout the year by senior officials and the Commissioner.

The competition rules are set out in Chapter 1 of Title VII TFEU. Section 1, containing Articles 101 and 102, sets out the rules applicable to undertakings. Article 101 applies to conduct of two or more undertakings, whilst Article 102 applies, in general, to the conduct of a single undertaking. Both provisions require that the allegedly prohibited conduct in question restrict competition and have an appreciable effect on trade between Member States. The EUMR[43] governs merger control at EU level. The regulation requires compulsory notification to the Commission by the parties of concentrations which exceed certain turnover thresholds.

Article 3(3) of the Treaty on European Union (TEU)[44] sets out one of the objectives of the Union: achieving a 'highly competitive social market economy'. The role of competition policy is integral for the internal market. An effective competition system is conducive to the attainment of the internal market. If the restrictions on the free movement of goods and services required to be eliminated by the Member States could be replaced by restrictive arrangements made between private parties, the internal market would never be achieved. Accordingly, the competition rules,

[42] Treaty on the Functioning of the European Union (consolidated version), OJ No. C 115 of 9 May 2008.

[43] See supra note 14.

[44] Treaty establishing the European Community (consolidated version), OJ No. C 321E of 29 December 2006 (hereinafter: TEU).

in many senses, are a reflection of the free movement provisions, applicable as between undertakings engaged in economic activity.

Both sets of rules have common objectives: the attainment of the single market, the encouragement of economic activity and the maximization of efficiency by enabling goods and resources to flow freely amongst Member States according to the operation of the normal market forces. Any attempt to isolate or divide up markets attracts severe penalties. For example, Nintendo was fined EUR 149 million for preventing the exports of game consoles and related products from the United Kingdom to the Netherlands and Germany[45]. In addition to market integration, EU competition policy has one fundamental objective in common with all competition systems: consumer welfare. Consumers should have access to goods and services at optimal prices and trading terms. This can be achieved through the efficient allocation of resources and ensuring the competitive structure of the market.[46]

Article 101 TFEU constitutes one of the three pillars of EU competition law.[47] The first paragraph of the aforementioned Article defines three types of coordinated market behaviour which are deemed to be incompatible with the internal market, thus prohibited under EU law, namely (a) restrictive agreements between independent market operators acting either at the same level of the economy (horizontal agreements), often as actual or potential competitors, or at different levels (vertical agreements), mostly as producer and distributor in the supply chain, (b) decisions by associations of undertakings, and (c) concerted practices. In order for the prohibition to be activated these market behaviours need to have the characteristics mentioned below. Firstly, they may affect trade between Member States to an appreciable extent and they have as their object or effect the prevention, restriction or distortion of competition within the internal market.

As already demonstrated, Article 101(1) TFEU sets out a general prohibition, that is precluding any form of collusion between undertakings which may have an adverse effect on competition within the internal market. The specific provision contains a list of various prohibited market conduct types. The list is not exhaustive and comprises the following examples:

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[45] [2003] OJ L255/33.

[46] Woods, L. Watson, Ph. & Costa, M. (2017) Steiner & Woods EU Law, 13th edition, Oxford University Press, pp. 628-629.

[47] The second pillar is Article 102 TFEU, which prohibits the abuse by one or more undertakings of a dominant positions within the internal market, and the third pillar is the EU Merger Regulation.

• direct or indirect fixing of purchase or selling prices or any other trading conditions;

• limiting or controlling production, markets, technical development, or investment;

• sharing of markets or sources of supply;

• applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

• 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.

Overall, market conduct is prohibited under Article 101(1) TFEU if the following criteria are met:

(a) the market conduct occurs between undertakings (or within an association of undertakings);

(b) the market conduct coordinates the market behaviour of several undertakings (collusion);

(c) the market conduct has as its object or effect the prevention, restriction or distortion of competition;

(d) it has an appreciable effect on competition;

(e) it has an appreciable effect on trade between Member States.

Article 101(2) TFEU governs the legal consequences of a violation of the prohibition contained in the first paragraph of the provision. Any agreement, decision or concerted practice in breach of Article 101(1) TFEU is automatically void. Beyond these automatic civil law consequences, competition authorities can impose fines on undertakings that are involved in anticompetitive practices.[48]

Article 101(3) TFEU provides for exhaustive exceptions to the rule of paragraph 1. In particular, the prohibition contained in Article 1 is inapplicable in case of agreements between undertakings, decisions by associations of undertakings or concerted practices, that are conducive to improving the production or distribution of goods, or to promoting technical or economic development, while offering consumers a fair share of the created benefit, and that (a) do not impose to the undertakings concerned restrictions which are not pivotal for the

[48] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, p. 62.

accomplishment of these objectives, and (b) do not equip the undertakings with the possibility of eradicating competition in a substantial part of the products concerned.

I.A.2. Abuse of dominant position

Article 102 TFEU complements the regulations of EU competition law dealing with agreements between two or more undertakings. The provision restricts certain conduct by undertakings which have a dominant position in a given market. Although dominant undertakings are in principle free to engage in diverse economic activities exactly as their competitors do, they have a 'special responsibility' not to hinder competition on the market. This term was first used in Michelin[49], one of the ECJ's landmark decisions on the abuse of a dominant position. During the administrative procedure, the Commission established that the tyre manufacturer Michelin had a dominant position on the market for new replacement tyres for lorries, buses and similar vehicles and that it had abused this position by way of its rebate and bonus system. In the subsequent appeal proceedings the ECJ confirmed the Commission's finding that Michelin had a dominant position on the market for replacement tyres and added that a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. Thus, Article 102 TFEU does not prohibit an undertaking to possess a dominant position. However, it sets specific restrictions on companies that have a dominant position. More specifically, Article 102 TFEU stipulates two major conditions: a dominant position and an abuse. It is the abuse of the dominant position that is prohibited under EU law, and not the dominance as such. Therefore, if the Commission finds that an undertaking abuses its dominant position, it may impose a fine on the latter. Article 102 TFEU requires that the following conditions are satisfied to establish a violation:

(a) a dominant position on the relevant market must be held by one or more undertakings;

(b) the position must be held in the internal market or a substantial part of it;

(c) abuse of the dominant position;

[49] Case 322/81 - Michelin v Commission, ECLI:EU:C:1983:313

(d) actual or potential effect on trade between Member States.

It is not necessary to demonstrate that the abusive conduct is a result of the exercise of the dominant position in the relevant market. The undertaking may not even be aware of its dominant position. Consequently, it is not required a causal link between the existence of the dominance and the abuse to exist.[50] Moreover, the abusive conduct may also take place on a different market than the market dominated by the undertaking. Thus, in Tetra Pak[51] the ECJ noted that the undertaking concerned had a quasi-monopoly on the market for aseptic cartons for liquids ('tetra briks') and a 'leading', albeit not dominant, position on the market for non-aseptic cartons. Even though these products serve different purposes and form distinct product markets, both the General Court and the ECJ put considerable weight on the fact that Tetra Pak appeared to have a dominant position on a (hypothetical) overall market for cartons. It also noted that many of Tetra Pak's customers bought both aseptic and non-aseptic cartons and that the two markets were therefore closely interlinked. Against this background, the ECJ was of the opinion that the 'associative links' between the two markets constituted a sufficient nexus for a finding that the undertaking had abused its dominant position.[52]

I.A.3. The effect on trade between Member States under the TFEU provisions on competition

As already mentioned above, Article 101 of the TFEU prohibits agreements between companies which have as their object or effect to restrict competition within the internal market. The Court has consistently ruled that Article 102 TFEU is not applicable where the impact of an agreement on competition is not appreciable (de minimis doctrine). More specifically, the Court has held that 'in order to come within the prohibition imposed by Article 101, the agreement must affect trade between Member States and the free play of competition to an appreciable extent'.[53]

[50] ECJ (21 February 1973), Case 6/72 – Europemballage Corporation and Continental Can Company v Commission [1973] ECR 215, para. 27.

[51] ECJ (14 November 1996), Case C-333/94 P – Tetra Pak v Commission [1996] ECR I-5951.

[52] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, pp. 189-190.

[53] Case 22/71, Béguelin Import Export (1971) ECR 949, para. 16 (even though the text of Art. 101 does not require it).

The concept of appreciability was accepted by the Court in Völk v Vervaecke[54]. The case concerned an exclusive distribution agreement concluded between Mr. Völk and the owner of a company, Erd & Co, which manufactured washing machines, and Vervaecke, a Belgian company which distributed household electrical appliances. Under the agreement, Vervaecke had the exclusive right to sell Völk's products in Belgium and Luxembourg. According to the Commission, Erd & Co had only 0.08% percent of the market for the production of washing machines EU-wide, 0.02 percent of the market in Germany, and 0.6 percent of the market in Belgium and Luxembourg. Following a dispute which raised the validity of the agreement before the German courts, the Oberlandesgericht in Munich referred to the Court, asking whether, in considering if an agreement fell within Article 101(1), consideration should be made of the proportion of the market that the grantor had.[55]

According to the judgment of the Court: 'If an agreement is to be capable of affecting trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States. Moreover, the prohibition in Article 101(1)[56] is applicable only if the agreement in question also has as its object or effect the prevention, restriction or distortion of competition within the internal market. Those conditions must be interpreted by reference to the actual circumstances of the agreement. Consequently, an agreement falls outside the prohibition in Article 101 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question. Thus, an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article 101(1)'. [57]

This case clarifies that EU law is not concerned with agreements between parties that hold a weak position, and which have an insignificant effect on trade between Member States and/or on

[54] ECJ (9 July 2019), Case 5/69 – Volk [1969] ECR 295, paras. 5 and 7.

[55] Alison Jones & Brenda Sufrin (2016) EU Competition Law: Text, Cases, and Materials, sixth edition, Oxford University Press, pp. 170-171.

[56] The judgment mentioned article 85, which was at that time in force.

[57] Case 5/69, Völk v Vervaecke (1969) ECR 295, paras. 5 and 7.

competition. The insignificant position held by the undertakings means the agreement does not threaten the EU objectives.[58] Because the concept of appreciability is of huge practical importance to undertakings, particularly small and medium-sized ones, the Commission has, over the years, issued a series of Notices indicating when, in its view, an agreement is likely to fall outside Article 101 on this ground. The Commission's interpretation of appreciability is now fleshed out in two separate Notices -one dealing with the effect on trade concept[59] and one dealing with agreements of minor importance which do not appreciably restrict competition[60].[61]

More detailed information on the agreements and practices deemed to fall outside the scope of Article 101(1) TFEU can be found in the Commission's Notice on Agreements of Minor Importance[62] which creates a 'safe harbour' for agreements that do not exceed the following thresholds:

• aggregate market share amounts to less than 10% on any relevant market in the case of agreements between competitors, or

• market share held by each of the parties does not exceed 15% on any of the relevant markets in the case of agreements between non-competitors.

It is important to note that the Commission's Notice is only of an instructive nature and its applicability may be limited depending on the facts of the case. It is settled case-law that the de minimis doctrine does not apply when the parties to an agreement have small market shares, but the market is a fragmented one and the market shares exceed significantly those of most

[58] Rather, it is more appropriate that they should be examined, if at all, within the framework of national competition legislation.

[59] Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ No. C 101 of 27 April 2004.

[60] Commission Notice on Agreements of Minor Importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ No. C 368 of 22

December 2001.

[61] Alison Jones & Brenda Sufrin (2016) EU Competition Law: Text, Cases, and Materials, sixth edition, Oxford University Press, pp. 170-171.

[62] Commission Notice on Agreements of Minor Importance which do not appreciably restrict competition under article 81(1) of the Treaty establishing the European Community (de minimis), OJ No. C 368 of 22 December 2001, p. 13.

competitors.[63] The Notice contains a list of ‘hardcore’ restrictions which are not encompassed by the ‘safe harbour’ benefit. The most important are agreements on price fixing, market sharing, resale price maintenance and export restrictions.[64]

According to analysis made by eminent competition law scholars[65], the concept of an effect between Member States sets out a jurisdictional limit to the general prohibition stipulated in Article 101 TFEU. Similarly, Article 102 TFEU defines as a precondition the effect on trade in accordance with the purposes of the specific provision. The criterion confines the scope of application of Articles 101 and 102 to practices having a minimum level of cross-border effects within the EU, hence the companies must appreciably affect trade between Member States. It has been interpreted broadly, although it is accepted that the EU has no jurisdiction over conduct whose effect is confined to one Member State.[66] The “effect” has been interpreted by the Court. Subsequently, the Commission published a Notice on the concept of effect on trade between Member States[67] which aims to lay down the principles established by the judgments of the Court and define explicitly which agreements, decisions, practices and generally kinds of conduct that may have an appreciable impact on trade between Member States. Its purpose is ‘to set out the methodology for the implication of the effect on trade concept and to provide guidance on its application in frequently occurring situations’.[68] In paragraphs 58-109 of the Guidelines it applies the general principles set out in the cases to common types of agreements and abuses, for example: different types of agreements and abuse covering or implemented in several Member States; agreements and abuses involving imports and exports with undertakings located in third countries; and agreements and practices involving undertakings located in third

[63] ECJ (7 June 1983), Joined Cases 100/80 to 103/80 – Musique Diffusion française v Commission [1983] ECR 1825; ECJ (10 July 1980), Case 30/78 – Distillers Company v Commission [1980] ECR 2229. (Lorenz, 2013)

[64] Lorenz, M. (2013) An introduction to EU Competition law, Cambridge University Press, pp. 113-114.

[65] Alison Jones & Brenda Sufrin (2016) EU Competition Law: Text, Cases, and Materials, sixth edition, Oxford University Press, pp. 170-174.

[66] Case 22/78, Hugin v Commission (1979) ECR 1869.

[67] (2004) OJ C 101/81.

[68] Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ No. C 101 of 27 April 2004, para. 3.

countries. The Guidelines are, of course, without prejudice to the interpretation given to the concept by the EU courts.[69]

Pursuant to the aforementioned analysis[70], the Commission's Notice points out, based on case-law of the Court[71], that the concept of 'trade' does not only cover exchanges of goods and services within the borders of an EU country, but it is extended to all cross-border economic activity, including establishment. This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital.[72] An agreement will be deemed to 'affect trade' if it interferes with the pattern of trade between Member States.[73] There must be an impact on the flow of goods and services or other relevant economic activities involving at least two Member States. An agreement or practice may also be deemed to affect trade if it is liable to interfere with the structure of competition in the common market, for example where it eliminates or threatens to eliminate competitors operating within the EU. This latter structural test is more commonly used in the context of Article 102 than Article 101.[74]

Finally, the analysis mentioned above[75] elaborates on the pattern of trade test. In Société Technique Minière v Maschinenbau Ulm,[76] the CJ set out a broad interpretation of the requirement that an agreement should affect trade so that is easily satisfied. The indispensable element is that 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an

[69] Ibid., para. 5.

[70] Alison Jones & Brenda Sufrin (2016) EU Competition Law: Text, Cases, and Materials, sixth edition, Oxford University Press, pp. 170-174.

[71] See, e.g., Case 172/80, Zuchner v Bayerisch AG (1981) ECR 2021, para. 18 and Case C-309/99, Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (2002) ECR I-1577, Case C-41/90, Hofner and Elser v Macrotron (1991) ECR I-1979. (Alison Jones & Brenda Sufrin, 2016)

[72] Guidelines on the effect on trade concept, para. 19.

[73] Case 56/65, STM (1966) ECR 235.

[74] See case 6-7/73, Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp v Commission (1974) ECR 223, especially para. 5, and chap. 5.

[75] Alison Jones & Brenda Sufrin (2016) EU Competition Law: Text, Cases, and Materials, sixth edition, Oxford University Press, pp. 170-174.

[76] Case 56/65 (1996) ECR 235.

influence, direct or indirect, actual or potential, on the pattern of trade between Member States…'.[77]

The test requires the following to be shown:

(a) a sufficient degree of probability on the basis of a set of objective factors of law of fact;[78]

(b) an influence on the pattern of trade between Member States;[79]

(c) a direct or indirect, actual or potential influence on the pattern of trade.[80]

Consequently, an agreement will be caught even if it is not established that the agreement will affect the pattern of trade if it can be shown that it is capable of having such an effect,[81] for example if it is anticipated that it will affect the pattern of trade in the future. As it is only a jurisdictional criterion it is not necessary to establish that it actually has cross-border effects. Relevant factors to the determination will be: the nature of the agreement and practice; the nature of the products; and the position and importance of the undertakings involved.

The fact that the influence on trade may be direct, indirect, actual, or potential, means that a broad range of agreements will be caught including, for example: agreements affecting goods or services that are not traded, but which are used in the supply of a final product, which is traded;[82] and agreements which do not actually affect trade but which, taking account of foreseeable market developments, may affect trade in the future. In AEG v Commission,[83] the CJ held that the fact that there was little inter-state trade did not mean that Article 101(1) was inapplicable if it could reasonably be expected that the patterns of trade in the future might change. The Commission states, however, that the inclusion of indirect and potential effects in the analysis of effects on trade between Member States does not mean that the analysis can be based on remote, hypothetical, or speculative effects.

[77] Ibid. 249, and Case 5/69, Volk v Vervaecke (1969) ECR 295, 302.

[78] Guidelines on the effect on trade concept, paras. 25-32.

[79] Ibid., paras. 33-35.

[80] Ibid., paras. 36-43.

[81] Ibid., para. 26.

[82] Case 123/83, BNIC v Clair [1985] ECR 391, para. 29.

[83] Case 107/82 [1983] ECR 3151, par. 60; see also AEI/Reyrolle Parsons re Vacuum Interrupters [1971] OJ L48/32.

For instance, an agreement that raises the prices of a product which is not tradable, reduces the disposable income of consumers. As consumers have less money to spend, they may purchase fewer products imported from other Member States. However, the link between such income effects and trade between member-states is generally in itself too remote to establish [EU] law jurisdiction[84].[85]

I.A.4. Application of TFEU provisions on competition in the field of mergers

Prior to the implementation of the original Merger Regulation in 1990, several mergers and acquisitions had been scrutinised by the Commission in accordance with the TFEU provisions on competition law, and in particular Articles 101 and 102.

The impetus for the adoption of the Merger Regulation was the prevailing uncertainty regarding the applicability of the specific antitrust provisions to mergers and acquisitions, along with the inappropriateness for merger control.[86] However, even prior to the implementation of the Merger Regulation, it was still possible for the Commission to intervene under Article 101 in respect of (a) minority shareholdings and other structural links that did not give rise to concentrations, and (b) other forms of cooperation between independent undertakings falling short of a concentration such as partial function joint ventures.

In addition, Article 101 is still applicable in the context of some concentrations, especially (a) in situations where the establishment of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of the parent companies,[87] or (b) for the assessment of

[84] Guidelines on the effect on trade concept, para. 43.

[85] Alison Jones & Brenda Sufrin (2016) EU Competition Law: Text, Cases, and Materials, sixth edition, Oxford University Press, pp. 170-174.

[86] Recital (7) to the Merger Reg. recognises that Arts 101 and 102 were insufficient for the control of concentrations; accordingly, the legal basis for the Merger Reg. is principally Art 352 TFEU (not only Art 103 TFEU).

[87] This is expressly acknowledged in the Commission's Horizontal Cooperation Guidelines, OJ 2011 C11/1, n 2, where it is noted that 'if the creation of a joint venture constituting a concentration under art. 3of the Merger Reg has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, then that coordination will be appraised under art. 101 of the Treaty'.

restrictive arrangements which may have been entered into at the time of a concentration but which do not qualify as 'ancillary' to that concentration. [88]

Further on, regarding Article 102, as mentioned before, it prohibits the abuse by an undertaking of a dominant position. Nevertheless, it does not prohibit an undertaking from holding a dominant position but prohibits certain anti-competitive conduct by dominant undertakings considered largely on an ex post basis. In 1973, the Court held in Continental Can[89] that the acquisition of a competitor by a dominant company may constitute an abuse within the meaning of Article 102 since this may reinforce the acquirer's dominant position. The Court stated at paragraphs 26 and 27 of its judgment that: 'Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.'[90] 'Such being the meaning and the scope of Article 86 of the EEC Treaty, the question of the link of causality raised by the applicants which in their opinion has to question exist between the dominant position and its abuse, is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty, regardless of the means and procedure by which it is achieved, if it has the effects mentioned above.'[91]

In this case, the Commission had applied Article 102 in the context of a proposed merger, namely the proposed takeover of Continental Can, which owned an 86 percent share in SLW in Germany, of TDV in Holland, the entire package to be held by Continental Can's subsidiary Europemballage. The Commission issued a decision that the proposed takeover constituted an abuse of their dominant position within the common market. During annulment proceedings Continental Can argued that such action could not be regarded as an abuse. Article 102 was concerned only with behaviour detrimental to consumers. Moreover, it required a causative link between the position of dominance and abuse. Neither Continental Can nor Europemballage had

[88] Bellamy & Child (2018) European Union Law of Competition, eighth edition, Oxford University Press, pp. 751-760.

[89] Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, EU:C:1973:22. However, on the facts that CJ held that the Commission had failed properly to define the relevant market and so annulled the Commission's decision that there had been an abuse of dominant position.

[90] Par. 26 of the judgment.

[91] Par. 27 of the judgment.

used their power to effect the merger. The Court disagreed, thus ruling that Article 102 cannot allow mergers which eliminate competition. Prejudice under that Article does not mean affecting consumers directly but also prejudice through interference with the structure of competition itself. Nor was it necessary to prove a causal link between the dominance and the abuse. The mere fact of dominance rendered the proposed takeover an abuse. Although the Court annulled the Commission's decision on the grounds that the relevant product markets had not been fully proved, the principle was established.[92]

Following Continental Can, in Tetra Pak Rausing SA v Commission[93], the takeover by Tetra Pak of a company holding an exclusive license to new technology for sterilizing milk cartons was held to constitute a breach of Article 102, although the acquisition of an exclusive license was not per se abusive, Tetra Pak's acquisition of that license had the practical effect of precluding all competition in the relevant market.

Continental Can and Article 102 remained the basis on which the Commission exercised control over mergers until the Court decided for the first time, in BAT & Reynolds, that mergers could also fall within Article 101(1)[94]. While the decision was upheld by the Court, the Court affirmed that Article 101(1) could apply in principle to mergers. Although the acquisition of an equity interest in a competitor did not itself restrict competition, it might serve as an instrument to that end. The judgment paved the way for the acceptance by Member States of a regulation on merger control which had been dwindling for many years. The final version of the Regulation, Regulation 4069/89 was adopted in December 1989, after much debate among Member States on the appropriate turnover and market-share thresholds required to bring the Regulation into operation.[95]

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[92] Woods, L. Watson, Ph. & Costa, M. (2017) Steiner & Woods EU Law, 13th edition, Oxford University Press, pp. 677-678.

[93] T-51/89 - Tetra Pak v Commission, EU:T:1990:41.

[94] Joined Cases 142 and 156/84 - BAT and Reynolds v Commission, EU:C:1987:490. This case arose from a proposed merger between Philip Morris Inc and Rembrandt Ltd, which would have given Philip Morris a controlling interest in one of its principal competitors, Rothmans Tobacco (Holding) Ltd in the EU cigarette market.

[95] Woods, L. Watson, Ph. & Costa, M. (2017) Steiner & Woods EU Law, 13th edition, Oxford University Press, pp. 677-678.

Prior to the adoption of the Merger Regulation, the Commission used its powers derived from Article 102 in investigations of a number of mergers.[96] However, merger control under Article 102 could only apply to an acquisition involving an already dominant undertaking and not to the creation of a dominant position which might occur with a merger. Following the adoption of the Merger Regulation, the EU courts have reaffirmed that it may be considered to be an abuse for a dominant company to acquire a competitor,[97] as well as to acquire a minority shareholding in, or create other structural links with, a competitor. [98]

Perhaps one of the most noteworthy provisions of the Merger Regulation is Article 21(1) and (2) thereof, which provides that the Regulation exclusively will apply to 'concentrations' and that the implementing regulations for Articles 101 and 102[99] will not apply to them 'except in relation to joint ventures that do not have [an EU] dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.' To the extent that Article 103 TFEU provides a legal basis for the Merger Regulation, and since the definition in Article 3 of the Merger Regulation does not distinguish between concentrations with or without an EU dimension, Regulation 1/2003 and the other implementing regulations are

[96] The Commission's Annual Reports on Competition Policy refer to a number of cases prior to the implementation of the Merger Reg where the Commission raised objections under art. 102. These include Pilkington/BSN-Gervais-Danone, Xth Report on Competition Policy (1980), points 152-155; Michelin/Kleber-Colombes, Xth Report on Competition Policy (1980), points 156; Baxter/SmithKline RIT, Xth Report on Competition Policy (1980), points 157; Amicon/Fortia/Wright, Xth Report on Competition policy (1981), point 112;Irish Distillers, XVIIIth Report on Competition Policy (1988), point 80. The Commission allowed some other concentrations to proceed subject to certain conditions, including British Airways/British Caledonian, XVIIIth Report (1988), point 81; Consolidated Gold Fields/Minorco, XIXth Report on Competition policy (1989), point 68; Stenal/Houlder Offshore, XIXth Report on Competition Policy (1989), point 70. (Bellamy & Child, 2018)

[97] See, e.g. Case T-87/05 EDP v Commission [2005] ECR II-3745, EU:T:2005:333, para.47; Case T-210/01 General Electric v Commission [2005] ECR II-5575, EU:T:2005:456, para.86.

[98] Bellamy & Child (2018) European Union Law of Competition, eighth edition, Oxford University Press, pp. 751-760.

[99] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition

laid down in Articles 81 and 82 of the Treaty, OJ No. L 1 of 4 January 2003. It implements arts. 101 and 102 for all sectors.

disapplied for all concentrations whether or not they have an EU dimension, with the exception of the coordinative aspects of joint ventures without an EU dimension.[100]

Finally, to the extent that the Merger Regulation operates as an implementing regulation for Articles 101 and 102 (insofar as they are applicable to certain concentrations), it seems to exist no scope for action by the Commission or Member States in respect of concentrations under Articles 104 and 105, the so-called transitional competition rules of the Treaty[101]. [102]

I.B. Merger Regulation No. 139/2004 (EUMR)

I.B.1. The merger regime under the EUMR

Independent provisions on merger control are absent from the Treaties. Article 66 ECSC[103] provided such a rule in the case of steel production and mining companies, however the ECSC expired on 23 July 2002. It may indeed be the case that a merger may be prohibited on the basis of Article 101 and/or 102 TFEU, however these provisions do not regulate merger control systematically.[104]

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[100] Recital (6) of the Merger Reg. refers to the need for a specific legal instrument 'to permit effective control of all concentrations in terms of their effect on the structure of competition in the [EU] and to be the only instrument applicable to such concentrations'. Recital (7) refers to the Merger Reg. as being based not only on art. 103 but, principally, on art. 352 TFEU.

[101] In R V Secretary of state for Trade and Industry, ex p Airlines of Britain [1993] BCC 89, the English Court of Appeal considered that the Merger Reg creates 'a seamless system for dealing with concentrations within the [EU]'. Concentrations with an EU dimension are to be dealt with by the Commission under the Merger Reg. (unless referred to a Member State under art. 4(4) or art. 9), and concentrations without an EU dimension are to be dealt with by the Member States applying their national merger control rules (unless referred to the Commission under art. 4(5) or art. 22). The Court thus held that the application of art. 104 was precluded in respect of a concentration without an EU dimension, so the UK authorities were right not to take arts. 101 and 102 into account when assessing a concentration. (Bellamy & Child, 2018)

[102] Bellamy & Child (2018) European Union Law of Competition, eighth edition, Oxford University Press, pp. 751-760.

[103] Treaty establishing the European Coal and Steel Community of 18 April 1951, OJ II 1952, effective 23 July 1952.

[104] Walter Frenz (2016) Handbook of EU Competition Law, Springer, pp. 1093-1094.

Regulating transnational mergers at EU level offers important advantages compared to merger control performed solely at national level. The specific system contributes to the development of the internal market and concurrently the elimination of hindrances for transnational mergers between undertakings. Therefore, the Council enacted Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings[105], which became effective on 21 September 1990. The Commission has been granted thereafter comprehensive competence to examine concentrations.[106]

The Union's regime, originally established by Council Regulation 4064/89 ('the 1989 Regulation'), for regulating major cross-border activity has been in force for fifteen years. In that time DG COMP of the Commission had dealt with over 2,800 notifications, an average of approximately 200 per year[107]. The EU merger control regime has undergone both considerable evolution and significant change, as a result of legislative amendment, judicial interpretation and the Commission's own case work and procedures. What is of utmost importance, though, is the replacement of the original Regulation by the new Council Regulation 139/2004, which came into operation on May 1, 2004.[108] The Merger Regulation (EUMR)[109] has been in effect since 1 May 2005, superseding the previous Council Regulation (EEC) No. 4064/89. The EUMR is accompanied by an Implementing Regulation[110] and various Commission Communications and Guidelines on its interpretation and application.

[105] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395.

[106] Walter Frenz (2016) Handbook of EU Competition Law, Springer, pp. 1093-1094.

[107] European Commission website: merger statistics updated to September 20, 2005.

[108] Cook, C.J & Kerse, C.S. (2005) EC Merger Control, fourth edition, Street & Maxwell, p. 1.

[109] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1.

[110] Commission Regulation (EC) No. 802/2004 of 7 April 2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ L 133/1, last amended by Commission Regulation (EU) No. 519/2013 of 21 February 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, right of establishment and freedom to provide services, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, fisheries, transport policy, energy, taxation, statistics, social policy and employment, environment, customs union, external relations, and foreign, security and defence policy, by reason of the accession of Croatia, OJ L 15874.

As provided in the EUMR,[111] Articles 101 and 102, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are inadequate to control all operations which may prove to be incompatible with the system of undistorted competition enshrined in the Treaty. This Regulation should therefore be based not only on now Article 103 but, principally, on now Article 352 of the Treaty, under which the Union may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

Furthermore, according to the EUMR,[112] the provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of the Member States. Such concentrations should, as a general rule, be reviewed exclusively at Union level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation fall, in principle, within the jurisdiction of the Member States.

The Regulation applies not simply to mergers, in the technical sense of the term, but to all concentrations, whether through the acquisition of shares and assets, including situations where an undertaking acquires control -that is by exercising decisive influence- on its own, or jointly with other undertakings, over another undertaking, with the result that they can no longer be considered independent. This influence may derive from substantial minority shareholdings, but may also arise from a number of other factors, individually or in combination, such as management agreements or close commercial links between the undertakings concerned.[113]

With the exception of public bids, and other cases where individual dispensations have been granted by the Commission, the Regulation forbids the implementation of a concentration with a Union[114] dimension prior to notification and until it has been declared by the Commission to be compatible with the common market.[115]

[111] Recital 7.

[112] Recital 8.

[113] Cook, C.J & Kerse, C.S. (2005) EC Merger Control, fourth edition, Street & Maxwell, pp. 6-7.

[114] Due to the entering into force of the Treaty of Lisbon the term 'Union Dimension' is to be understood as an equivalent to 'Community Dimension' as referred to in the EUMR, the Jurisdictional Notice and literature.

[115] Cook, C.J & Kerse, C.S. (2005) EC Merger Control, fourth edition, Street & Maxwell, pp. 6-7.

The rationale of the merger control in force as emerging from Regulation 139/2004 relates to ex-ante policy interventions fostering competition. The rationale behind ex-ante intervention is that it is better to prevent potential harmful ramifications than to suppress already existing ones. 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. Therefore, the philosophy of ex-ante merger control is that prevention is better than cure. Put it differently, the underlying objective of the current EU merger control regime is that it is much easier to stop a concentration that is likely to undermine competition than to deal with the repercussions ex-post, after the damage has been done and facing the possibility of de-merging, which can be cumbersome.[116]

The scope of application of this Regulation[117] should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Union dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.

Pursuant to the EUMR,[118] concentration with a Union dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds. That should apply irrespective of whether or not the undertakings effecting the concentration have their seat or principal activities in the territory of the Union, provided they have substantial operations there.

I.B.2. The concept of 'concentration' under the EUMR

[116] Rusu, C.S. (2010) European Merger control: The Challenges Raised by Twenty Years of Enforcement Experience, Wolters Kluwer Law & Business.

[117] Recital 9.

[118] Recital 10.

As follows from the decisional practice of the EU courts and the Commission the concept of concentration shall be understood widely and encompasses all operations bringing about a lasting change in the control of undertakings concerned and therefore in the structure of the market[119]. It covers mergers, acquisitions of sole or joint control and the creation of autonomous full-function joint ventures. The notion of concentration is defined in Article 3 EUMR. Article 3(1) EUMR distinguishes two general categories of concentrations: (a)mergers and (b) acquisitions of control. However, this distinction does not influence the substantial assessment of the proposed transaction in any way and is only helpful in determining the party obliged to notify the concentration to the Commission pursuant to Article 4(2) EUMR.[120]

The concept of concentration is analysed exceptionally and in an explicit way by Whish and Bailey[121] , as follows. A merger generally occurs as an outcome of a procedure through which two or more formerly independent entities unite. A number of different transactions and agreements concluded by undertakings could result in a unification of independent undertakings' decision-making process. Every jurisdiction needs, therefore, to adopt a definition of what constitutes a merger for the purposes of their merger control legislation[122]. A true merger involves two separate undertakings merging entirely into a new entity: a high-profile example was the fusion in 1996 of Ciba-Geigy and Sandoz to form the major pharmaceutical and chemical company Novartis[123]; a further example in 2017 was the creation of DowDuPont as a result of the merger of Dow Chemical and DuPont[124]. However, the expression "merger" as used in competition policy includes a far broader range of corporate transactions than full mergers of this kind[125]. Where A acquires all, or a majority of, the shares in B, this would be described as a merger if it results in A being able to control the strategic business decisions of B; even the

[119] EUMR, recital 20.

[120] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, p. 244.

[121] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 882-887.

[122] Jones, A. & Sufrin, B. (2016) 'EU Competition Law: Text, Cases, and Materials', sixth edition, Oxford University Press, p. 1085.

[123] Case M 737, decision of July 1996; the Commission's decisions are available on DG COMP's website at www.ec.europa.eu/competition.

[124] Case M 7932, decision of 27 March 2017.

[125] See generally the OECD Roundtable Definition of Transaction for the Purpose of Merger Control Review (2013), available at www.oecd.org/competition.

acquisition of a minority shareholding may be sufficient, in particular circumstances, to qualify as a merger. Under the EUMR the question is whether A will acquire "the possibility of exercising decisive influence" over the strategic commercial behavior of B. the acquisition of assets-for example a well-known brand name-can amount to a merger[126]. Two or more undertakings which merge part of their businesses into a newly-established joint venture company, 'Newco', may be found to be parties to a merger. In each case the essential question is whether previously independent businesses have come or will come under common control with the consequence that, in the future, the market will function less competitively than it did prior to the merger. [127]

Pursuant to Article 3(1) of the EUMR, which lays down the definition of 'concentration': 'A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.'

Mergers in the sense of Article 3(1)(a) are dealt with in paragraphs 9 and 10 of the *Jurisdictional Notice*[128], which provides examples of cases covered by it such as *AstraZeneca/Novartis*[129] and *Chevron/Texaco*[130]. Paragraph 10 explains that there can be factual ('de facto') mergers where, in the absence of a legal merger, activities of previously independent entities are combined with the result that a single economic unit is created under a permanent, single economic management; examples given are *Price Waterhouse/Coopers & Lybrand*[131] and *Ernst & Young/Andersen Germany*[132].

[126] See e.g. Case M 890 Blokker/Toys 'R' Us, decision of 26 June 1997.

[127] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp 829-830.

[128] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ No. C 95 of 16 April 2008.

[129] Case M 1806, decision of 26 July 2000.

[130] Case M 2208, decision of 26 January 2001; see also Case M 5747 Iberia/British Airways, decision of 14 July 2010.

[131] Case M 1016, decision of 20 May 1998.

In practice most cases are concerned with the acquisition of control in the sense of Article 3(1)(b) of the EUMR: the *Jurisdictional Notice* deals with this concept from paragraphs 11 to 123. It begins by discussing the concept of control, and then it deals in turn with the acquisition of sole control and of joint control.

As regards the concept of control, Article 3(2) of the EUMR defines control for the purpose of determining whether there is a concentration[133]: ‘Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.’

Apparently, this is a very broad concept, and control can exist on a legal (‘de jure’) or a factual (‘de facto’) basis[134]. The most common means for the acquisition of control is the acquisition of shares, sometimes in conjunction with a shareholder’s agreement, in the case of joint control, or the acquisition of assets[135]. However, it is also possible for control to be acquired on a contractual basis[136]. A franchise agreement is not normally sufficient to establish control[137]. In exceptional cases a situation of economic dependence resulting from, for example, long-term supply agreements, could give rise to control[138]. It is important to understand that the concept of

[132] Case M 2824, decision of 27 August 2002.

[133] It would seem that the notion of control in article 3(2) of the EUMR is broader than the one used when applying the single economic entity doctrine under article 101 TFEU.

[134] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ No. C 95 of 16 April 2008, para. 16.

[135] Ibid., para. 17; for an example of an acquisition of assets constituting a concentration see Case M 5727 *Microsoft/Yahoo!Search Business*, decision of 18 February 2010, paras. 14-19. (Whish & Bailey, 2018)

[136] *Jurisdictional Notice*, para. 18.

[137] Ibid., para. 19.

[138] Ibid., para. 20; for an example of long-term supply and financing agreements giving rise to a concentration see Case M 7839 *Outokumpu/Hernandez Edelstahl*, decision of 16 December 2015, paras. 11-14. (Whish & Bailey, 2018)

control as used in the EUMR may be different from the one used in other EU or national laws on matters such as taxation or the media[139]. It should be added that, when deciding under Article 5(4) whether the turnover of affiliated companies should be included within group turnover, a stricter notion of control is applied than in the case of Article 3.

The acquisition of control of assets -for example the transfer of the client base of a business or of intangible assets such as brands, patents or copyrights- will be considered a concentration only if they amount to a business with a market presence to which a market turnover can be clearly attributed[140]. To amount to a concentration the acquisition of control must be on a lasting basis, resulting in a change in the structure of the market[141]. Where several undertakings acquire a company, with the intention of dividing up the assets at a later stage, the first acquisition may be regarded as purely transitory with the result that it would not amount to a concentration: the subsequent division of the assets in question would however have to be investigated, and could give rise to more than one concentration[142]. The same analysis could be applied where an operation envisages the joint control of a new operation for a start-up period followed by a conversion to sole control: where the joint control does not exceed a year there would not be a concentration during that period[143].

Where an interim buyer, such as a bank, acquires an undertaking on the basis of an agreement in the future to sell it on to an ultimate buyer, the Commission will examine the case as one of acquisition by the ultimate buyer[144]: this is sometimes referred to in practice as 'warehousing' arrangement. Several transactions may be regarded as a single concentration in the sense of Article 3 where they are unitary in nature, that is to say where they are interdependent in such a way that one transaction would not have been carried out without the other and if they ultimately lead to control by the same undertaking(s)[145]. In *Canon/Toshiba Medical Systems*[146] the

[139] *Jurisdictional Notice*, para. 23.

[140] Ibid., para. 24.

[141] Ibid., para. 28; see also recital 20 of the EUMR.

[142] Ibid., paras. 29-33.

[143] Ibid., para. 34.

[144] Ibid., para. 35.

[145] Ibid., paras. 36-47; on the existence of a single concentration see Case T-282/02 Cementbouw Handel & Industrie v Commission EU:T:2006:64, paras. 101-149 and Case T-704/14 - Marine Harvest v Commission

Commission has issued a statement of objections in relation to Canon's use of warehousing arrangement to implement a merger without the prior approval of the Commission.

Article 5(2) of the EUMR establishes a rule that allows the Commission to consider successive transactions occurring within a two-year period to be treated as a single concentration: this is an 'anti-avoidance' rule to ensure that the same persons do not break a transaction down into a series of sales of assets over a period of time with the aim of avoiding the application of the EUMR[147]. The internal restructuring of an undertaking that does not result in change of control is not covered by the EUMR[148].

Sole control may be enjoyed on a legal or a factual basis. Legal control is normally acquired where an undertaking acquires a majority of the voting rights of a company, but could also occur, for example, where a minority shareholder owns shares that confer special rights to determine the strategic direction of the company to be acquired[149]. Factual control can occur where a minority shareholder is able to veto the strategic decisions of an undertaking: although it cannot impose decisions, the fact that it can block decisions means that it has the possibility of exercising decisive influence in the sense of Article 3(2) of the EUMR. This is often referred to as negative control[150]. Factual control can also exist where a minority shareholder is likely to be able at shareholders' meetings to achieve a majority: the Commission will look at past voting behaviour to try to predict what the position is likely to be in the future[151]. In *Electrabel/ Compagnie Nationale du Rhône*[152] the Commission concluded that that Electrabel had acquired sole control over CNR, despite being a minority shareholder, on the basis of a number of different considerations, including that it was assured of a *de facto* majority at CNR's General Meeting; as the concentration had not been notified, but sole control had been acquired,

EU:T:2017:753, paras. 85-229, on appeal to the Court of Justice Case C-10/18, not yet decided. (Whish & Bailey, 2018)

[146] See Commission Press Release IP/17/1924, 6 July 2017.

[147] *Jurisdictional Notice*, paras. 49-50.

[148] Ibid., par. 51.

[149] Ibid., paras. 56-58.

[150] Ibid., para. 54.

[151] Ibid., para. 59.

[152] Case M 4994, decision of 10 June 2009.

Electrabel was fined €20 million for 'gun-jumping'[153]. The Commission's decision, and the fine, were confirmed on appeal to the General Court[154] and to the Court of Justice[155]. Depending on the facts of the case, a shareholding of less than 25% can be found to provide the possibility of exercising decisive influence: for example in CCIE/GTE[156] CCIE acquired 19% of the voting rights in EDIL and was found to have acquired control, the remaining shares being held by an independent investment bank whose approval was not needed for important commercial decisions.

An option to purchase or convert shares does not in itself confer control unless the option will be exercised in the near future according to legally binding agreements[157].

Joint control occurs where two or more undertakings have the possibility of exercising decisive influence over another undertaking. Joint control typically arises from the fact that the undertakings in question enjoy negative control, that is to say the power to reject strategic decisions, which means that they have to act in common in order to determine the joint venture's commercial policy[158]. Joint control can be established both on a legal and a factual basis[159]. Joint control can arise where:

• there are only two parent companies each with the same number of voting rights;[160]

• in the absence of voting equality, parent companies enjoy veto rights, either by virtue of the statute of the joint venture or a shareholders' agreement between the parents[161]. The veto rights

[153] See similarly Case M 7184 Marine Harvest/Morpol, decision of 23 July 2014, finding a shareholding of 48.5% gave rise to de facto sole control, upheld on appeal Case T-704/14 Marine Harvest ASA v Commission EU:T:2017:753. (Whish & Bailey, 2018)

[154] Case T-332/09 - Electrabel v Commission EU:T:2012:672.

[155] Case C-84/13 P - Electrabel v Commission EU:C:2014:2040.

[156] Case M 258, decision of 25 September 1992; similarly in Case M 8465 Vivendi/Telecom Italia, decision of 30 May 2017, paras.5-9, a shareholding of 23.9% was found sufficient to confer sole control.

[157] *Jurisdictional Notice,* para. 60.

[158] Ibid. para. 62.

[159] Ibid. para. 63.

[160] Ibid. para. 64.

[161] Ibid. para. 65.

must be related to strategic decisions of the joint venture on issues such as the budget, business plan, major investments or the appointment of senior management[162] or

• in the absence of veto rights, it is likely, in fact or in law, that the parents will act jointly in the exercise of their voting rights, whether as a result of a legally binding agreement[163] or as a matter of fact, because of 'strong common interests'[164].

A concentration can occur where there is a change in the quality of control of an undertaking: there may be a change from sole to joint control[165]; a change in the identity of the parent companies so that there is a change in the nature of the joint control; and a change from joint to sole control[166]. However, a change from negative to positive control is not regarded as a concentration[167]. A short-form notification may be made in the case of a change from joint to sole control[168].

As regards joint ventures. Article 3(4) of the EUMR provides that: The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of Article 3(1)(b).

Concentrations in the sense of Article 3(4) are known as 'full-function joint ventures'. A joint venture will be full-function where it:

• enjoys operational autonomy;

• has activities beyond one specific function for the parents;

• deals with its parents on an arm's length basis after a start-up period;

• is intended to operate on a lasting basis.

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[162] Ibid., paras. 67-73; see e.g. Case M 6141 China National Agrochemical Corporation/Koor Industries/Makhteshim Agan Industries, decision of 3 October 2011, where a right to veto the appointment and removal of senior management was sufficient to confer joint control. (Whish & Bailey, 2018)

[163] *Jurisdictional Notice,* para. 75.

[164] Ibid., paras. 76-80.

[165] See e.g. Case M 5141 KLM/Martinair, decision of 17 September 2008.

[166] *Jurisdictional Notice,* paras. 83-90.

[167] Ibid., par. 83.

[168] See Annex II of the Implementing Regulation.

The *Jurisdictional Notice* explains that the requirements of autonomy in Article 3(4) refers to operational autonomy: its parents will be responsible for its strategic decisions, which is precisely why they will be considered to be in joint control in the first place[169]. To be operationally autonomous the joint venture must have sufficient resources to operate independently on a market: this means that it must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets to carry on the business activities provided for in the joint-venture agreement[170].

A joint venture will not be full-function where it takes over one specific function of its parents' activities, such as R&D or production. Similarly, a joint sales company would not be full-function[171]. Partial-function joint ventures must be analysed under Article 101 and/or national competition law. The acquisition of joint control of an undertaking that itself is not fully functional does not constitute a concentration under Article 3(4)[172]. On 7 September 2017, the Court of Justice issued its preliminary ruling in Case C-248/16 Austria Asphalt[173]. The judgment clarifies that a change from sole to joint control over an existing undertaking is a notifiable concentration under the Merger Regulation only if the resulting joint venture will be a "*full function*" joint venture post-transaction. The judgment in essence follows Advocate General Kokott's Opinion of 27 April 2017. The specific ruling is as follows: 'Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) must be interpreted as meaning that a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity.'

A joint venture may not be sufficiently autonomous where its parents have a strong presence as suppliers to or purchasers from it. However, the Commission recognises that the joint venture might be dependent on sales to or purchases from its parents during its 'start-up' period, which

[169] *Jurisdictional Notice*, para. 93.

[170] Ibid., para. 94; see e.g. Case M 6800 PRSfM/STIM/GEMA/JV, decision of 16 June 2015.

[171] *Jurisdictional Notice*, para. 95; for an example of a joint venture found not to be full-function see Case M 3003 Electrabel/Energia Italia/Interpower, decision of 23 December 2002.

[172] Case C-248/16 Austria Asphalt GmbH & Co OG v Bundeskartellanwalt EU:C:2017:643, para.35.

[173] Ibid.

should normally not exceed three years[174]. Where sales are made to the parents on a lasting basis the Commission will consider whether the joint venture is geared to play an active role on the market independently of its parents: the proportion of sales made to the market will be an important consideration, and if the joint venture sells more than 50% of its output to the market it would normally be considered to be full-function[175]. The Commission is more sceptical about long-term purchases from the parents, which might mean that the joint venture is closer to being a sales agency[176]; however, it recognises that, where the joint venture operates on a 'trade market', it may be full-function even though it purchases from its parents[177]. A trade market is one where undertakings specialise in the selling and distribution of products without being vertically integrated and where different sources of supply are available for the products in question. In such a case a joint venture could be considered to be full-function provided that it has the necessary facilities and is likely to obtain a substantial proportion of its supplies not only from its parents but also from competing sources.

As a matter of substantive analysis, contractual provisions in agreements between a full-function joint venture and its parents may amount to ancillary restraints; or they may require separate assessment under Article 101 TFEU.

To be full-function a joint venture must be established on a lasting basis. The fact that the parents provide for dissolution of the joint venture, for example in the event of its failure or fundamental disagreement between them, does not mean that it is not established on a lasting basis[178]. If the joint venture is established for a short, finite period -for example in order to construct a specific project such as a power plant- it would not be considered to be long-lasting[179]. An enlargement of the activities of a full-function joint venture may amount to a new concentration, as will a change from being partial-function to being full-function[180].

[174] *Jurisdictional Notice*, para. 97.

[175] Ibid., para. 98.

[176] Ibid., para. 101.

[177] Ibid., para. 102.

[178] Ibid., para. 103.

[179] Ibid., para. 104.

[180] Ibid., paras. 106-109; for an example of a joint venture changing from partial-function to full-function see Case M 5241 American Express/Fortis/Alpha Card, decision of 3 October 2008, paras. 13-15.

It is important to know whether a joint venture is full-function or not since this determines whether the EUMR is capable of application. A full-function joint venture having a Union dimension is subject to mandatory pre-notification to the Commission. If the joint venture is not full-function, the possibility remains that it might be subject to Article 101 TFEU and/or national competition law[181].[182]

I.B.3. The application of the EUMR

As previously analysed, the EU system of merger control is governed by the EU Merger Regulation, Regulation 139/2004 ('the EUMR').

Pursuant to article 21(1)-(3) of the EUMR:

'1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003, (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 (4) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.'

Article 21 encompasses the 'one-stop shop' principle. The general rule is that the EUMR, and no other EU or national competition law applies to concentrations with an EU dimension and the Commission has sole jurisdiction over such transactions. Further it sets out that the general rule (combined with Article 1) that no EU competition law applies to concentrations that do not have an EU dimension[183].

[181] For an example of partial-function joint venture investigated under article 101 TFEU see BHP Billiton, Rio Tinto, Commission Press Release IP/10/45, 25 January 2010.

[182] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 882-887.

[183] Jones, A. & Sufrin, B. (2016) 'EU Competition Law: Text, Cases, and Materials', sixth edition, Oxford University Press, p. 1109.

The EUMR applies only to concentrations having a Union dimension.[184] The nature and purpose of this test have been explained by the General Court with regard to the predecessor regulation of the EUMR in *Cementenbouw*: ‘It follows from Article 1 of Regulation No 4064/89 that the Community legislature intended that, in the context of its role in respect of concentrations, the Commission would come involved only where the proposed concentration – or the concentration already carried out – attains a certain economic size and geographic scope, that is to say, a ‘Community dimension’.’[185]

The concept of Union dimension as defined in Article 1 EUMR relies solely on the turnover of the undertakings concerned. It is their task to assess the relevant turnover and to determine the authority competent for the substantial assessment of the concentration to be notified.[186] For this purpose the market shares are irrelevant.

According to the Jurisdictional Notice the relevant date for establishing Union jurisdiction over a concentration is the date of:

- the conclusion of the binding legal agreement, or
- the announcement of a public bid, or
- the acquisition of the controlling interest, or
- the date of the first notification.[187]

Article 1 sets out two turnover tests. [188]

Article 1(2) EUMR sets out a turnover test. According to this provision, a concentration has a Union dimension when the following three criteria are fulfilled:

(a) the combined aggregate worldwide turnover of all undertakings concerned is more than EUR 5,000 million, and

[184] Due to the entering into force of the Treaty of Lisbon the term ‘Union Dimension’ is to be understood as an equivalent to ‘Community Dimension’ as referred to in the EUMR, the Jurisdictional Notice and literature.

[185] GC (23 February 2006), Case T-282/02 - Cementbouw Handel & Industrie v Commission [2006] ECR, II-00319, para. 115.

[186] See GC (14 July 2006), Case T-417/05 - Endesa v Commission [2006], ECR, II-2533, para.99.

[187] Jurisdictional Notice, para. 156.

[188] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, p. 251.

(b) the aggregate Union –wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, and

(b) neither of the undertakings involved achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

These criteria have been designed in order for the EUMR to cover only concentrations between undertakings having some significant impact on the EU market. However, due to the fact that only two of the undertakings involved must generate a Union-wide turnover of no less than EUR 250 million, it occurs repeatedly that the Commission must deal with concentrations of large non-EU undertakings that intend to establish a joint venture operating outside the EU market. For example, the EUMR was applicable to a concentration where four big Japanese companies set up a joint venture to provide telecommunication services in Japan and which had virtually no effect in the EU[189]. [190]

Article 1(3) EUMR provides for an alternative set of turnover thresholds:

(a) the combined aggregate worldwide turnover of all undertakings concerned exceeds EUR 2,500 million, and

(b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, and

(c) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than 100 million, and

(d) in each of at least three Member States taken into account under (iii) the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million, and

(e) neither of the undertakings involved achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

The set of thresholds provided in Article 1(3) EUMR aims mainly at tackling concentrations not covered by Article 1(2) EUMR which due to their significant impact on national markets would have to be notified in several Member States. This was the case in Ryanair/Aer Lingus where the

[189] Commission decision of 30 June 1993, Case IV/M.346 - JCSAT / SAJAC, available at http://ec.europa.eu/competition/mergers/cases/decisions/m346_en.pdf. In practice such concentrations are examined following the simplified procedure which does not require a lengthy and complex investigation.

[190] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, pp. 251-252.

Commission established its jurisdiction based on Article 1(3) in order to prohibit the take-over of Aer Lingus[191] .[192]

As regards the turnover calculation, the analysis following, conducted by Lorenz[193], is very constructive. The question whether a concentration has a Union dimension depends on the turnover of the undertakings involved. The methods of calculating turnover are set out in Article 5 EUMR and apply only to undertakings concerned. The Jurisdictional Notice gives guidance on how to determine the undertakings concerned.[194] It distinguishes the following scenarios:

-In case of mergers the undertakings concerned are all merging equities

Where A and B merge and a new entity C is established, A and B are the undertakings concerned.

-Acquisition of sole control

Both the acquiring undertaking and the target are undertakings concerned when sole control over a whole company is to be acquired.

Where A takes over B from C, only A and B are the undertakings concerned.

The acquirer and the acquired parts of the target company are undertakings concerned when the control over part of an enterprise is to be transferred.

Where A takes over part of B from C, only A and the relevant part of B are the undertakings concerned.

-Acquisition of joint control

Each of the companies involved in an acquisition of joint control over a newly created JV excluding the JV itself.

Where A and B create a JV C, only A and B are the undertakings concerned.

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[191] Commission decision of 27 June 2007, Case COMP/M.4439 – Ryanair/Aer Lingus, available at http://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf

[192] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, p. 252.

[193] Ibid. pp.251-253.

[194] Jurisdictional Notice, paras. 129-153.

In cases where a company acquires joint control in an already existing undertaking solely controlled by another company the acquirer and the controlling undertaking are undertakings concerned.

Where A acquires from B joint control over C that was previously solely controlled by B, only A and B are the undertakings concerned.

-Acquisition of control through a JV

If the control is acquired through a full-function JV already active on the market only the JV and the target are the undertakings concerned.

Where A and B have joint control over C being a full-function JV and C acquires control over D, only C and D are the undertakings concerned.

However, if the control is acquired through a JV being only a transaction vehicle its parent companies and the target must be considered as undertakings concerned.

Where A and B have joint control over C being a transaction vehicle and C acquires control over D, the companies A, B and D are the undertakings concerned.

Article 5(1) EUMR provides for a general definition of turnover. For the purpose of EU merger control, turnover shall be understood as amounts derived by the undertakings from 'the sale of products and the provision of services falling within the undertakings' ordinary activities'. Normally the Commission takes into consideration the most accurate data and refers to the closest financial year to the date of transaction. Then, only turnover corresponding to the ordinary activities of the undertakings concerned, i.e. sales in the normal course of their business, is included in the calculation. Additionally, any sales rebates, VAT and other taxes directly related to the turnover are deducted from the main turnover figure.

Some special and more detailed rules are provided for the calculation of turnover of capital groups/holdings (Article 5(4) EUMR), credit institutions (Article 5(3)(a) EUMR) and insurance undertakings (Article 5(3)(b) EUMR).[195]

The main purpose of the thresholds set out in Article 1(2) and (3) EUMR is to identify mergers being cross-border in nature and having a Union dimension. In this way the Commission's jurisdiction over certain transactions can be determined. Therefore, the required turnover shall be

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[195] For an extensive guidance on the attribution of turnover under article 5(4) EUMR see Jurisdictional Notice, paras. 175-94.

allocated geographically to the Union and/or to Member States. The general rule is that the turnover shall comprise products sold, and services provided to undertakings or consumers in the Union or in the particular Member State. The decisive factor is the location of the customer. Some additional criteria have to be applied when the location of the customer at the time of purchase cannot be identified, e.g. services with cross-border aspects such as sale of flight tickets. Therefore, in Ryanair/Aer Lingus the Commission applied a calculation method based on the place of departure and not the place of destination of the traveler or the location of the customer.[196] A detailed guidance on methods applicable when allocating geographically the turnover of concerned undertakings can be found in the Jurisdictional Notice.[197]

On the contrary, when concentrations are not considered to have an EU dimension, national laws apply. Article 21(1) EUMR provides that solely the specific regulation is applicable to 'concentrations' and disapplies Regulation 1/2003 and the other implementing regulations that confer power on the Commission and NCAs to implement Articles 101 and 102. The general principle is thus that national competition law only applies to concentrations which do not have an EU dimension.

The application of national merger rules must, however, be compatible with EU law more generally, and must not impose restrictions on freedom of establishment and free movement of capital unless they can be justified by imperative legitimate interests and pass the proportionality test[198]. The free movement provisions are, however, triggered only by restrictions and do not, therefore, appear to preclude a Member State from, for example, exercising regulatory approval of mergers between domestic companies on public interest grounds (as is permitted in a number of Member States), even if the application of such rules might result in the creation of a national champion at the expense of competition and the interest of consumer welfare within the Union. Indeed, there has been concern in some cases that Member States may have applied national law to permit mergers without an EU dimension, which are nonetheless liable to harm competition throughout the Union.[199]

[196] Commission decision of 27 June 2007, Case COMP/M.4439 – Ryanair/Aer Lingus, available at http://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf, paras. 20–31.

[197] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, pp. 253-254.

[198] Article 21 (4) of the EUMR.

[199] Alison Jones & Brenda Sufrin (2016) EU Competition Law: Text, Cases, and Materials, sixth edition, Oxford University Press, pp. 1119-1120.

I.B.4. The adoption of the 'significant impediment to effective competition' test

Once the Commission has jurisdiction in relation to a concentration its task is to determine whether it is 'compatible with the internal market' or not.

Article 2(1) of the EUMR sets out a list of 'appraisal criteria' which the Commission must take into account when investigating concentrations. It provides that: 'In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the [internal] 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 [Union];

(b) 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.'

The information required in relation to affected markets by Form CO[200] reflects the appraisal criteria set out in Article 2(1). The list of factors in Article 2(1) is not exhaustive: the Commission must consider all matters relevant to the assessment of a merger. Article 2(1) does not establish a hierarchy, giving greater weight to one assessment factor than another. The impact that the different appraisal criteria have on the Commission's determination will vary depending on each individual case.

Article 2(2) provides that: 'A concentration which would not significantly impede effective competition in the [internal] 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 compatible with the [internal] market.'

Article 2(3) provides that: 'A concentration which would significantly impede effective competition in the [internal] market or in a substantial part of it, in particular as a result of the

[200] Available at http://ec.europa.eu/competition/consultations/2013_merger_regulation/draft_revised_form_co_en.pdf

creation or strengthening of a dominant position, shall be declared incompatible with the [internal] market.'

The burden of proof is on the Commission to produce convincing evidence that a merger is incompatible with the internal market.[201] The Court of Justice has held that there is no presumption that a merger is compatible with, or incompatible with, the internal market;[202] rather the Commission must adopt a decision 'in accordance with its assessment of the economic outcome attributable to the merger which is most likely to ensue'.[203] To put the point another way, intervention should be possible only where a merger would be likely to enable firms, individually or collectively, to exercise market power and thereby significantly impede effective competition.

The Commission will find a merger to be incompatible with the internal market where it would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. The specific concept differs slightly from the test in the original Merger Regulation of 1989, which asked whether the merger would create or strengthen a dominant position as a result of which effective competition would be significantly impeded. The change in the substantive test was made in 2004 following a protracted debate which focused, in particular, on the respective merits of a test based on dominance, on the one hand, and on a substantial lessening of competition ('SLC'), on the other; and on the specific question of whether the dominance test left a 'gap' which meant that some mergers that could be harmful to competition could not be challenged under the EUMR. The compromise that emerged from this debate was the significant impediment to effective competition ('SIEC') test. [204]

In practice, to assess whether a merger has anticompetitive effects most competition authorities rely on one of two tests: (i) the dominance test; and (ii) the significant lessening of competition

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[201] See e.g. Case C-12/03 P Commission v Tetra Laval BV EU:C:2005:87, paras. 37-51; Case T-210/01 General Electric v Commission EU:T:2005:456, paras. 60-64.

[202] Case C-413/06 P - Bertelsmann and Sony Corporation of America v Impala EU:C:2008:392, para. 48; see similarly Case T-210/01 General Electric v Commission EU:T:2005:456, para. 61.

[203] Case C-413/06 P - Bertelsmann and Sony Corporation of America v Impala EU:C:2008:392, para. 52; see also Case T-79/12 - Cisco Systems and Messagenet v Commission EU:T:2013:635, para. 47, rejecting the contention that the Commission should prove beyond any reasonable doubt that a merger does not lead to competition concerns.

[204] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 882-887.

(SLC) test. In a few countries, there is a hybrid test. Under the dominance test, a merger is anticompetitive and can be prohibited if it strengthens or creates a dominant position on the market. Under the SLC test, a merger has anticompetitive effects if it is likely to substantially lessen competition on the market. In comparison with the dominance test, the SLC test focuses on the effects of the merger on the market and on the loss of competition among firms rather than on threshold structural issues such as market shares. Under the SLC test, the investigation and assessment of a merger are more concerned with whether prices are likely to rise after the merger is consummated. The dominance test holds that a merger is anticompetitive and can be prohibited if it strengthens or creates a dominant position in the market. The SLC test holds that a merger has anticompetitive effects if it is likely to substantially lessen competition in the market. Finally, the hybrid test holds that a merger is anticompetitive if it significantly impedes effective competition on the market, in particular through the creation or strengthening of a dominant position. This is the test currently in force in the EU, the so-called SIEC test.[205]

By the time that the original Merger Regulation was adopted there was a reasonable amount of jurisprudence on the meaning of dominance under Article 102, in particular in cases Continental Can v Commission[206] and United Brands v Commission[207]; it was obviously attractive to deploy that jurisprudence for the purpose of merger control. In the years that followed the adoption of the Merger Regulation the Commission was able to adapt the dominance test and to apply it successfully to cases on single-firm dominance[208] and to collective dominance it also prohibited some vertical mergers under the dominance test[209]. For the most part the EU system of merger control developed very successfully, with one exception: the possibility that it could not be used to deal with problems of 'non-collusive oligopoly'. [210]

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[205] Jenny, Frederic, Substantive Convergence in Merger Control: An Assessment (January 1, 2015). Revue des Droits de la Concurrence, Jan 2015, Vol. 1, Issue 1, p. 21-41. Available at SSRN: https://ssrn.com/abstract=2869098.

[206] Case 6/72 - Europemballage Corporation and Continental Can Company v Commission EU:C:1973:22.

[207] Case 27/76 - United Brands v Commission EU:C:1978:22.

[208] See e.g. Case M 53 Aerospatiale-Alenia/de Havilland, decision of 2 October 1991, OJ [1991] L 334/42: this was the first prohibition decision under the Merger Regulation.

[209] See e.g. Case M 490 Nordic Satellite Distribution, decision of 19 July 1995, OJ [1996] L 53/20.

[210] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 882-887.

The perception that there could be a 'gap'[211] in the coverage of the Merger Regulation arose as a result of the *Airtours/First Choice* decision[212]. Airtour's proposed acquisition of First Choice would reduce the number of major tour operators in the UK from four to three. No firm would be individually dominant after the merger. The Commission prohibited the transaction on the basis that it would create a collective dominant position. However, it mentioned in its reasoning, in particular in paragraph 54 of its ruling, that each firm remaining on the market would be able *unilaterally* to exercise market power, without any need to act in a *coordinated* manner. On appeal the General Court annulled the Commission's decision and equated collective dominance with coordinated effects. [213]

It followed that, if the Commission did think that the problem in Airtours/First Choice was one of unilateral as opposed to coordinated effects, there was a gap in the Merger Regulation's coverage; if such a gap did exist it was because of the word 'dominance' which did not cover all unilateral effects. [214]

Because of the uncertainty raised by *Airtours*, some commentators were skeptical about whether dominance was an appropriate test: an alternative would be to ask whether a merger would 'substantially lessen competition' ('SLC'): this is the test in the UK and US. However, other commentators were far from convinced that a move to a SLC test was necessary or desirable, as long as, inter alia, the dominance test was firmly established and it was operating effectively[215].

The solution adopted by the Council in the EUMR of 2004 was to retain the vocabulary of Article 2 of the old Merger Regulation but rearrange it in a way that retains the existing law of dominance while at the same time closing the gap. The wording within each of Articles 2(2) and 2(3) was merely reversed. The test is now whether a merger would lead to a SIEC, in particular by creating or strengthening a dominant position. The revised formulation envisages that most cases will be dealt with under the dominance standard as a result of the inclusion of the words '*in*

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[211] See generally Kokkoris (2011) Merger Control in Europe: The Gap in the ECMR and National Merger legislations, Routledge.

[212] Case M 1524, decision of 22 September 1999, OJ [2000] L 93/1.

[213] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 882-887.

[214] Id.

[215] See e.g. Böge and Muller 'From the Market Dominance Test to the SLC Test: Are There Any Reasons for a Change?' (2002) 23 ECLR 495; Levy 'Dominance vs SLC: A Subtle Distinction', 8 November 2002, available at www.ibanet.org.

particular': this responds to the concern that a repeal of the dominance test would lead to uncertainty and 'undo' years of know-how and decisional practice of the Commission: recital 26 of the EUMR specifically refers to the desirability of preserving the existing jurisprudence and decisional practice under the old Regulation[216]. However, the SIEC test does not make dominance the exclusive test and enables the Commission to prohibit or require the modification of a merger that would not create or strengthen a dominant position but would 'significantly impede effective competition'. Recital 25 makes clear that this formulation is intended to provide jurisdiction to deal with the 'gap', that is to say the problem of non-collusive oligopoly.

The most important change in the 2004 Merger Regulation reform was the introduction of the SIEC test. The SIEC test maintained that SIECs most prominently arise through the creation or strengthening of a dominant position. The test thereby allowed continued building upon the precedents of the Commission and the case-law of the European Courts. As before, when assessing the impact of a notified merger on competition, the Commission continues to examine whether or not the merger would significantly impede effective competition in the internal market or a substantial part of it. In particular, the Commission seeks to determine whether the merger would create or strengthen a dominant position. In addition, the SIEC test's objective was the elimination of a possible enforcement "gap", because the previous test was not believed to clearly capture likely anticompetitive effects resulting from a merger of two firms in an oligopolistic market, where the merged entity would not have become dominant. The introduction of the SIEC test eliminated this uncertainty and allowed the Commission to strengthen its economic analysis of complex mergers. The assessment uses a combination of qualitative and, where available, quantitative/empirical evidence. In the majority of cases, the Commission has looked at possible anti-competitive effects resulting from the merger of two undertakings active in the same market absent any coordination with other competitors ("non-coordinated effects"). Commission investigations that look at whether a merger would enhance the risk of coordination between the merged entity and other firms ("coordinated effects") or whether a merger between firms active in vertically or closely related markets8 effects", respectively) have been much more rare.[217]

[216] The Commission's Guidelines on the assessment of horizontal mergers OJ [2004] C 31/5 make the same point at para. 4.

[217] European Commission, WHITE PAPER Towards more effective EU merger control, COM(2014) 449 final, Brussels, 9.7.2014, pp. 4-8.

In *France v Commission*[218] the Court held that there must be a causal link between the concentration and the deterioration of the competitive structure of the market for the EUMR to apply. In that case the Court of Justice was considering whether a 'failing firm' defence[219] existed under the EUMR. It held that a concentration should not be blocked where the target would have failed anyway and its market share would have accrued to the acquirer, since the concentration did not cause the harm to competition. In *De Beers/LVMH*[220] the Commission's clearance was specifically based on the absence of any causal link between the creation of the joint venture and the strengthening of De Beer's dominant position in the market for rough diamonds. [221]

[218] Cases C-68/94 and C-30/95 EU:C:1998:148; this case was decided under the original Merger Regulation: there is no reason to suppose that the requirement of a causal link would not apply in the case of the reformulated substantive test.

Paragraph 89 of the *Horizontal merger guidelines* explains that the Commission may decide that an otherwise problematic merger is nevertheless capable of being found compatible with the internal market where one of the parties is the failing firm (See Cases C-68/94 and C-30/95 France v Commission EU:C:1998:148, for further discussion see the EU contribution to the OECD Roundtable Failing Firm Defence (2009), available at www.oecd.org/competition).

Three cumulative criteria are relevant: (a) the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken by another firm, (b) there is no less anti-competitive alternative than the notified merger, (c) in the absence of the merger the assets of the failing firm would inevitably exit the market (the *Horizontal merger guidelines,* para. 90).

It is for the notifying parties to provide in due time the relevant information to support a failing firm defence (Ibid, para. 91). The Commission rejected a failing firm defence in *JCI/VB/FIAMM* (Case M 4381, decision of 5 October 2007). However, the defence was invoked successfully twice in 2013, in *Nynas/Shell/Harburg Rafinery* (Case M 6360, decision of 2 September 2013, paras. 312-362), where it was a division of Shell itself, that was failing; and in *Aegean/Olympic II* (Case M 6796, decision of 9 October 2013), where Olympic was in a much worse state than at the time of the previous proposed merger between Aegean and Olympic (Case M 5830, decision of 26 January 2011) (Whish & Bailey, 2018, pp. 898-899).

[220] Case M 2333, decision of 25 July 2001, paras. 112-114; see similarly Case M 2816 Ernst & Young France/Andersen France, decision of 5 September 2002, paras. 75 and 90; Case M 4381 JCI/VB/FIAMM, decision of 5 October 2007, paras. 708ff.

[221] Whish, R. & Bailey, D. (2018) 'Competition Law', ninth edition, Oxford University Press, pp. 882-887.

The application of the SIEC test involves a comparison of the prospects for competition with the merger against the situation without the merger: the 'counterfactual'[222]. In many cases the conditions of competition at the same time of the merger will be the counterfactual[223]. However, the Commission may take into account future changes to the market that can reasonably be predicted[224].

Part II: Merger control to protect public interest

II.A. TFEU provisions on public interest

II.A.1. Exception to the general prohibition of agreements, decisions and concerted practices which result in the prevention, restriction or distortion of competition

The main objective of EU competition law is to safeguard competition on the market in order to enhance consumer welfare and ensure the optimal allocation of resources. Since some of the agreements restricting competition may also have some procompetitive effects, it is necessary to balance the possible efficiency gains against anticompetitive effects and to assess the net effect of an agreement. In this way, the aforementioned objective of the EU competition rules may be achieved by ensuring that market conduct, optimal from a competition policy point of view, is not classified as unlawful. This approach is reflected in Article 101(3) TFEU which expressly states that some anticompetitive agreements may generate net economic benefits.[225]

Before the entry into force of Regulation 1/2003, an undertaking that wished to have a certain agreement excluded from the scope of application of Article 101 TFEU had to notify the

[222] Merger assessment involved predicting the effect on competition in the market if a particular transaction is consummated. This necessarily involves a comparison between the situation if the merger goes ahead and the position if it did not happen: the competitive situation without the merger is often referred to as the counterfactual. The counterfactual will usually be the prevailing conditions before the merger, although there may be cases in which it is necessary to take into account conditions as they would be in the near future if, for example, it is known that other firms are about to enter or exit the market or to expand capacity; another example would be that one of the merging firms was on the point of failing, so that it would not be present on the market in the future anyway. The UK Competition and Markets Authority ('the CMA') explicitly states the counterfactual in each of its merger inquiry reports (Whish & Bailey, 2018, p. 842).

[223] Guidelines on the assessment of horizontal mergers OJ [2004] C 31/5, para. 9.

[224] Ibid.

[225] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, p. 118.

agreement to the Commission and apply for individual exemption[226]. The Commission had the sole power to declare Article 101(1) TFEU inapplicable[227]. This system of obligatory notification of agreements to the Commission has been replaced by a system of 'legal exception'. According to Article 1(2) Regulation 1/2003, Article 101(3) TFEU has become directly applicable; not only may it be applied by the Commission, but also by the competition authorities of the Member States and national courts. At the same time the Commission lost its exclusive power to grant individual exemptions pursuant to Article 101(3) TFEU.

Under the new regime, undertakings can no longer notify agreements they find restrictive of competition to the Commission and rely on its decisions or 'comfort letters' to confirm the compatibility of the market conduct at issue with EU competition law. This means that the companies themselves are responsible for the assessment of the measures to be undertaken and implemented on the market and that the competition authorities may at any time scrutinise them in the light of Article 101 TFEU and impose sanctions in case of an infringement.[228]

Article 101(3) TFEU applies to all types of agreements found to infringe Article 101(1) TFEU, regardless of whether it has the restriction of competition as its object or effect. Even measures referred to as 'hardcore' restrictions may escape the prohibition in Article 101(1) TFEU: the Court considers that, in principle, no anticompetitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article [101(3) TFEU] are satisfied . . .[229] .[230]

Article 101(3) permits exemption of agreements falling within Article 101(1). It implies a cost-benefit assessment, whereby the advantages of collaboration are balanced against the disadvantages of impeded competition. However, the terms of Article 101(3) are rather more specific than general economic cost-benefit. The provision contains four elements; two positive conditions and two negative conditions and all of them must be satisfied. The two positive conditions demand a yield of economic progress, a fair share of which must percolate to the

[226] Council Regulation No. 17/1962 of 6 February 1962: First regulation implementing Articles 85 and 86 of the Treaty, OJ No. 13 of 21 February 1962, p. 204, Article 4(1).

[227] Ibid., Article 9(1).

[228] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, p. 119.

[229] GC (15 June 1994), Case T-17/93 – Matra Hachette v Commission [1994] ECR II-595, para. 85.

[230] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, p. 120.

consumer, while the two negative conditions forbid unnecessary extra restraints and the elimination of competition. Article 101(3) provides a specific framework for weighing the pro- and the anti-competitive features of a restriction. Typically, a Commission decision relating to Article 101(3) will appraise the general economic context of an agreement and then proceed to apply these four elements. Despite this step-by-step approach, there is a correlation between these four elements. [231]

The exception of Article 101(3) TFEU applies when an agreement meets the following four cumulative[232] conditions:

(a) it must contribute to improving the production or distribution of goods or to promoting technical or economic progress;

(b) it must allow the consumers a fair share of the resulting benefit;

(c) it must not impose on the undertakings restrictions which are not indispensable to the attainment of these objectives;

(d) it must not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

According to Lorenz[233], efficiency claims may be raised only when the benefit produced by the agreement at issue is of an objective nature and value to the Union. Since only objective benefits can be taken into account, Article 101(3) TFEU does not encompass agreements which only benefit its parties[234]. The assessment of positive effects must not necessarily be confined to the relevant product markets, but it may also include all markets benefiting from the scrutinised agreement.

The purpose of the first condition is to identify and define the nature of the efficiencies that are to be analysed in the light of the second and third conditions. Therefore, it is necessary to establish a link between the agreement and the claimed benefits and to specify their objective

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[231] Weatherill, St. (2016) Cases & Materials on EU Law, 12th edition, Oxford University Press, p. 478.

[232] GC (19 March 2003), Case T-213/00 – CMA GCM and Others v Commission, [2003] ECR II-913, para. 226; Commission Guidelines on the application of Article 81(3) of the Treaty, OJ No. C 101 of 27 April 2004, p. 97, para. 42.

[233] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, pp. 120-121.

[234] ECJ (13 July 1966), Joined Cases 56/64, 58/64 – Consten and Grundig v Commission [1966] ECR 299, 348.

value. In order to achieve this goal, the Commission proposes to apply the following 'four-step' test to each efficiency claim, according to which the claim made by an undertaking must specify:

(i) the nature of the agreement in order to verify whether the claimed efficiencies are objective in nature;

(ii) the link between the agreement and the efficiencies, in order to verify that the efficiencies result from the economic activity that forms the object of the agreement;

(iii) the likelihood and magnitude of each claimed efficiency, in order to establish its objective value;

(iv) how and when each claimed efficiency would be achieved[235].

Article 101(3) TFEU covers all types of economic efficiencies and its scope may not be limited to the categories listed therein. The main distinction shall be drawn between cost and quantitative efficiencies.

The Commission has declined to accept that an agreement produces an improvement if, in practice, its effect is a disproportionate distortion of competition in the market in question[236]. An agreement must be examined in the light of all the factual arguments and evidence put forward by the parties in support of their argument that the conditions laid down in Article 101(3) are met[237]. The Commission requires the parties to build their argument that Article 101(3) applies 'on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts': it will not be persuaded 'by economic theory alone'[238] . In *Groupement des Cartes Bancaires* the Commission concluded that the Groupement had provided no empirical evidence that the restrictive fees for membership of the CB payment card system were necessary to prevent new entrants from free riding on investment by the other members[239].[240]

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[235] Ibid., para. 51.

[236] *Screensport/EBU* OJ [1991] L 63/32, [1992] 5 CMLR 273, para 71.

[237] Cases C- 501/06 P etc *GlaxoSmithKline Services Unlimited* [2009] ECR I- 9291, [2010] 4 CMLR 50, paras 102–104.

[238] See *MasterCard*, Commission decision of 19 December 2007, para 690: see also paras 694-701; see also Case T-111/ 08 *MasterCard and others v Commission*, ECLI:EU:T:2012:260.

[239] Commission decision of 17 October 2007 relating to a proceeding pursuant to Article 81 of the EC Treaty in Case COMP/D1/38606 – GROUPEMENT DES CARTES BANCAIRES "CB", see also Case T- 491/07 CB v Commission, ECLI:EU:T:2012:633.

A narrow view of Article 101(3) is that it permits only agreements that would ameliorate economic efficiency. The wording of Article 101(3), which concerns improvements to production and distribution and to technical and economic development, is clearly suggestive of an efficiency standard. However, an alternative, and broader, view of Article 101(3) is possible, that is to allow policies other than economic efficiency to be taken into account when deciding whether to authirise agreements that are restrictive of competition. There are a lot of crucial policies in the Union, for example on industry, the environment, employment, the regions and culture, which go beyond the simple enhancement of economic efficiency.[241]

Article 101(3) TFEU applies only when a fair share of the benefit resulting from the agreement at issue will accrue to the consumers. For the purpose of Article 101(3) TFEU the concept of 'consumer' shall be understood as 'all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers'[242].

Since an overall assessment is required, there is no need to prove that each efficiency caught by the first condition benefits the consumers. The focus should be on the overall impact on the consumers of the particular products on the relevant market and the question whether the benefits compensating consumers for any actual or likely negative impact inflicted by the distortion of competition at issue have been allocated to them. The exemption of Article 101(3) TFEU applies only when the net effect of the agreement is at least neutral from the point of view of consumers directly or indirectly affected by the agreement.

As with the first condition, a distinction can be made between cost efficiencies on the one hand and qualitative efficiencies on the other. Cost efficiencies may, for example, arise from increased output which also leads to lower prices for consumers. In such a constellation the following factors should be taken into account:

• the characteristics and structure of the market;

• the nature and magnitude of the efficiency gains;

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[240] Whish, R. & Bailey, D. (2012) 'Competition Law', seventh edition, Oxford University Press, pp. 155-166.

[241] Whish, R. & Bailey, D. (2012) 'Competition Law', seventh edition, Oxford University Press, pp. 155-166.

[242] Commission Guidelines on the application of Article 81(3) of the Treaty, OJ No. C 101 of 27 April 2004, p. 97, para. 84.

• the elasticity of demand;

• the magnitude of the restriction of competition.[243]

The passing-on of qualitative efficiencies in the form of new and improved products requires a cost-benefit assessment, taking into account the whole economic context in which the agreement at stake operates. In particular, it should be assessed whether the claimed efficiencies will create benefits that will outweigh for the negative effects resulting from the restrictions on competition[244].[245]

The indispensability condition is of essential importance. According to the Commission Guidelines it requires a twofold test:

(i) whether the agreement at issue is necessary to achieve the analysed efficiencies, and

(ii) whether the particular restrictions resulting from the agreement are reasonably necessary for the attainment of the efficiencies.

Under (i) it should be assessed if there are other economically practicable and less restrictive means of achieving the claimed efficiencies. The second limb of the test (ii) is designed to exclude any individual restrictions which are not necessary to produce the claimed benefits from the scope of Article 101(3) TFEU. In order to establish whether this is the case, a test shall be conducted to demonstrate whether the absence of the agreement would eliminate or significantly reduce the volume of efficiencies or make it less possible that they materialise.

In BNP-Dresdner Bank[246] the Commission has exempted an agreement between two major banks from the application of Article 101(1) TFEU. The French Banque Nationale de Paris and the German Dresdner Bank had agreed to cooperate with each other on a worldwide and exclusive basis. The cooperation agreement, which aimed at reducing costs and strengthening the banks' respective presence in third countries, was held by the Commission to considerably restrict both actual and potential competition between the two entities. The Commission, inter alia, considered that the exclusivity clauses contained in the agreement would limit the banks'

[243] Ibid., para. 96.

[244] Ibid., paras. 103–4.

[245] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, pp. 123-124.

[246] Commission decision of 24 June 1996, Case IV.34.607 – BNP-Dresdner Bank, OJ No. L 188 of 27 July 1996, p. 37.

ability to cooperate with third party financial institutions. Nonetheless, it was of the opinion that these stipulations were indispensable, because they were the only available tool for the banks to protect their business secrets and the know-how they had shared[247].

The general principle is that the more competition is already weakened on the relevant market, the slighter the further reduction of competition has to be in order for the agreement to fall outside the scope of Article 101(3) TFEU[248]

Despite the fact that market shares alone are insufficient to establish the magnitude of competition in the market, they are often used as a starting point when determining whether or not sufficient competition remains. However, an in-depth analysis of the actual market conditions must be undertaken in order to verify such a first impression. Declining any intention to set firm thresholds, the Commission uses in its examples a combined market share of 70% as being indicative of the elimination of competition, without stipulating further, specialised conditions.

There is no direct relation between the elimination of competition and the concept of dominance as expressed in Article 102 TFEU. It is widely accepted that competition can be substantially eliminated in case an undertaking does not enjoy dominance in the market. In addition, the General Court has recently clarified the inverse situation when it held that the prohibition on eliminating competition is a narrower concept than that of the existence or acquisition of a dominant position, so that an agreement could be regarded as not eliminating competition within the meaning of Article [101(3)(b)] TFEU, and therefore qualify for exemption, even if it established a dominant position for the benefit of its members[249].[250]

II.A.2. Exception for undertakings entrusted with the operation of services of general economic interest and revenue-producing monopolies

[247] Ibid., para. 20(c).

[248] Commission Guidelines on the application of Article 81(3) of the Treaty, OJ No. C 101 of 27 April 2004, p. 97, para. 107.

[249] GC (28 February 2003), Case T-395/94 – Atlantic Container Line and Others v Commission [2002] ECR II-875, para. 330.

[250] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, pp. 125.

Article 102 TFEU also applies to state-owned and private companies having a monopoly conferred upon them by statute. However, the personal scope of the prohibition is limited by Article 106(2) TFEU which grants Member States the right to confer immunity on undertakings from Article 102 TFEU in circumscribed cases. Undertakings may only be exempted from the application of Article 102 TFEU if they have been entrusted with the performance of services of 'general economic interest' or if they are a 'revenue-producing monopoly' and if the application of the competition rules would make the provision of the services more difficult. The Member States are generally free to define the services they consider to be of 'general economic interest' and their decision is only subject to control for manifest error.[251] Services to which Article 102 TFEU has been applied include, inter alia, public television and radio stations,[252] suppliers of electricity,[253] public employment agencies,[254] universal postal services,[255] and mooring operators.[256] In any event, the provision should be interpreted narrowly since it constitutes an exception to a general rule and the European courts have been very reluctant to extend their rulings to similar or related undertakings.

Some public undertakings, such as utility companies, defending a claim of alleged abuse under Article 102 may seek to rely on Article 106(2). This provides that undertakings entrusted with the operation of services of general economic interest or which have the character of a revenue-producing monopoly are subject to the rules in the Treaty (including competition rules) unless the performance of the tasks assigned to them would be obstructed by the application of those

[251] Commission Communication regarding Services of general interest in Europe, OJ No. C 17 of 19 January 2001, p. 4, para. 22.

[252] ECJ (30 April 1974), Case 155/73 – Sacchi [1974] ECR 409, paras. 14–15.

[253] ECJ (27 April 1994), Case C-393/92 – Municipality of Almelo and others v NV Energiebedrijf Ijsselmij [1994] ECR I-1477, para. 48.

[254] ECJ (23 April 1991), Case C-41/90 – Höfner and Elser v Macrotron [1991] ECR I-1979, para. 24.

[255] ECJ (17 May 2001), Case C-340/99 – TNT Traco, [2001] ECR 4109, paras. 52–53; ECJ (18 December 2007), Case C-220/06 – Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia [2007] ECR I-12175, paras. 78–9.

[256] ECJ (18 June 1998), Case C-266/96 – Corsica Ferries France v Gruppo Antichi Ormeggiatori del porto di Genova and Others [1998] ECR I-3949, para. 45.

rules. The exception is subject to the proviso that the 'development of trade must not be affected to such an extent as would be contrary to the interests of the Union.[257]

In order to specify when Article 102 TFEU is not applicable, there is a twofold test. To be able to rely on this exception, not only must the entity show, first, that it is the requisite type of undertaking, but, secondly, that it cannot perform the tasks assigned to it without relying on provisions or behaviour which would normally be in breach of competition provisions, and in particular, Article 102. In Corbeau[258], Corbeau was prevented from running a postal service because the Belgian postal service had a monopoly. Potentially this could have breached Article 102 unless the Belgian postal service could rely on Article 106(2). The CJ accepted that the Belgian postal service was an undertaking within Article 106(2) and also that a certain amount of restriction of competition was necessary for the purpose of economic liability. The postal service is required to perform some services which can only be carried out at a loss (e.g. delivery to outlying areas) and it funds these activities from profit-making activities. Unrestricted competition would allow other companies to acquire the profitable services without having to carry out the non-profitable activities, leaving the Belgian postal service with the obligation but not the means of paying for it. In TNT Traco v Poste Italiane SpA[259] (case C-340/99), therefore, a requirement that economic operators providing an express mail service that fell outside the scope of the universal postal service had to pay the equivalent of the normal postal charges to the universal service provider was compatible with Articles 102 and 106 if the proceeds of such payments were necessary to enable the universal service provider to operate in economically acceptable conditions. Moreover, the universal service provider must be under the same obligation when providing an express mail service which is not part of the universal service. However, this should not be interpreted as excluding all competition. In order for a decision to be made regarding the applicability of Article 102(2) in the case in question, the authorities must identify the extent of restriction necessary to enable the undertaking to perform its tasks, considering 'the economic conditions in which the undertaking operates, the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject.

[257] Woods, L. Watson, Ph. & Costa, M. (2017) Steiner & Woods EU Law, 13th edition, Oxford University Press, pp. 674-675.

[258] C-320/91 – Corbeau, EU:C:1993:198.

[259] Case C-340/99 - TNT Traco, EU:C:2001:281.

Furthermore, It should be highlighted that the interests of the Union must be also taken into account. Although it is not clear precisely what the provision of Article 106(2) requires, it will explicitly curtail the scope of the exception provided under this Article. It has been suggested from the terms of Almelo judgment[260] that, broadly speaking, an assessment will be made entailing a balancing of the needs of the undertaking with other EU goals. It is not clear what impact Article 14 TFEU, which obliges Member States to ensure that services of general economic interest 'operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions', will have, as on the one hand both the Union and Member States are required to take into account the 'shared values of the Union as well as their role in promoting social and territorial cohesion' and, on the other hand, this provision is expresses to be without prejudice to certain Treaty Articles including Article 106.[261]

II.B. EUMR provisions on public interest

II.B.1. Legitimate interest clause

Article 21(4) recognises that there are some matters which are so sensitive to the national interest that the Member States should be entitled to retain control over them. Under Article 21(4), a Member State may act in order to safeguard 'legitimate interests' not protected under the EUMR itself:

'4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of [EU] law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.'

More specifically, the three types of legitimate interests that may be pursued by Member States: under Article 21(4) EUMR are:

[260] Case C-393/92 - Gemeente Almelo and Others v Energiebedrijf IJsselmij, EU:C:1994:171.

[261] Woods, L. Watson, Ph. & Costa, M. (2017) Steiner & Woods EU Law, 13th edition, Oxford University Press, pp. 674-675.

• Public security and defence: Member States are allowed to take measures aimed at protection of their public security interests. This exception encompasses the supply of services and goods that are essential for public health.

• Plurality of the media: this exception has been introduced to protect the Member States' legitimate interest in preserving plurality of information and opinions by shielding the independence of different sources of information.

• Prudential rules: they are particularly important for the financial sector. Member States are entitled to block concentrations in the financial services sector that would put at risk the financial system, or part of it, or threaten interests of consumers.[262]

Any other public interest not stipulated in the aforementioned provision must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of EU law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

According to analysis made by Jones and Sufrin[263], first of all, it has only been used defensively in practice. It was used in order for a Member State to protect its legitimate interests by scrutinising, and, if necessary, *prohibiting* mergers which raise concerns other than pure competition ones, even irrespective of the fact that the Commission may had considered the merger to be compatible with the internal market. Nevertheless, it does not seem to allow a Member State to act, as it can where the EUMR is not applicable, to authorise a merger on public interest grounds, even if competition concerns arise.[264]

Secondly, in cases of uncertainty as to whether one of the recognised legitimate interests laid down in Article 21(4) applies, whether such measures conform with EU law,[265] or where a Member State wishes to act to protect '[a]ny other public interest', the Member State must notify

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[262] Lorenz, M. (2013) An Introduction to EU Competition Law, Cambridge University Press, p. 260.

[263] Jones, A. & Sufrin, B. (2016) 'EU Competition Law: Text, Cases, and Materials', sixth edition, Oxford University Press, pp. 1110-1119.

[264] This is the Commission's view and is consistent with case-law holding that the principle of supremacy of EU law precludes a Member State from authorising a transaction which has been prohibited under the EU Treaty competition provisions.

[265] See e.g. M 1616, BSCH/A.Champaliaud (1999), OJ C306/37, para. 66.

it to the Commission.[266] The Commission may thus consider whether the narrow criteria of Article 21(4) are satisfied. Not only does it require that, if the interest to be protected is not one of the recognised interests, it must be a 'public' interest which is not protected by the EUMR itself, namely not a 'competition' interest, but, crucially, that measures taken are compatible with EU law, particularly the rules on freedom of establishment and free movement of capital, set out in Articles 49 and 63 TFEU respectively. These provisions impose substantial constraints on the ability of a Member State to impose 'restrictions' on free movement, for example through prohibiting, submitting to conditions, or prejudicing, investments through shareholding, mergers and acquisitions. Such measures are incompatible with EU law, unless the Member State can prove that the measure is both: (a) justifiable, either on the basis of one of the specific Treaty-based exceptions or the Court-recognised justifications-the overriding requirements of public interest; and (b) proportionate[267].[268]

An extricable and important link thus exists between 'legitimate interests', within the meaning of Article 21(4) and the exceptions and justifications that apply to the free movement of capital and freedom of establishment rules. If the national rules 'restrict' free movement of capital and/or freedom of establishment and do not fall within one of the exceptions or justifications to those rules, it will not be permitted under Article 21(4); the legitimate interest pursued must therefore constitute a valid public interest justification within the meaning of those free movement rules. The close relation between the concept of legitimate interest under Article 21(4) and the free movement provisions is reinforced by the fact that the recognised interests (public security, plurality of the media and prudential rules) are concepts whose specific meaning has been developed under that law. [269]

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[266] Article 21(4) EUMR and M 1616, ibid, para. 27.

[267] See Jones, Alison and Davies, John, Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate (December 22, 2014). [2014] 10(3) European Competition Journal 453; [2014] 10(3) European Competition Journal 453; TLI Think! Paper 24/2016; King's College London Law School Research Paper No. 2015-12. Available at SSRN: https://ssrn.com/abstract=2533860.

[268] Jones, A. & Sufrin, B. (2016) 'EU Competition Law: Text, Cases, and Materials', sixth edition, Oxford University Press, pp. 1110-1119.

[269] Id.

In a number of cases the Commission has accepted that Member States may take action to: protect defence policy or military security[270] (the Member States also have a general right, set out in Article 346 TFEU, to protect national security);[271] maintain diversified sources of information, plurality of opinion, and a multiplicity of views in media markets; or safeguard 'prudential rules' (aiming to ensure, for example, capital adequacy requirements (solvency) and the good repute and honesty of the managers of the company in question). In Newspaper Publishing, for example, although the proposed acquisition of Newspaper Publishing plc (publisher of the Independent) by Promotora de Informaciones SA, Editoriale l' Espression SpA, and Mirror Group Newspapers plc fell within the scope of the EUMR, the UK was able to take steps to protect its legitimate interests, namely the plurality of the media. Any measures adopted by the UK authorities had, however, to pass the proportionality test, that is not going beyond what is necessary for the attainment of the objective concerned. In Thomson CSF/Racal (II) the UK authorities also stated an intention to consider the public security aspects of a concentration impacting on 'defence electronics' markets under Article 21(4) and in Sun Alliance/Royal Insurance the Commission accepted that the UK authorities could apply UK insurance legislation to the transaction. [272]

[270] See eg M 1858, Thomson CSF/Racal (II), 15 June 2000 (impacting on defence electronics market), M 336, IBM France/CGI, 19 May 1993 (involving IT businesses, including hardware, software and services), M 3418, General Dynamics/Alvis, 26 May 2004 (involving British armoured combat vehicles), M 3720, BAE Systems/AMS, 14 March 2005 (involving defence and commercial aerospace systems and BAE's communications and avionics business) and M 4561, GE/Smiths Aerospace, 23 April 2007 (involving Smiths Group's aerospace division). (Jones, & Sufrin, 2016)

[271] EUMR, recital 19 makes it clear that the Regulation, and in particular Article 21(4), does not affect a Member State's ability to act under Article 346 TFEU. A list of arms referred to by Article 346 TFEU was adopted by the Council (Decision 255/58), see Bellany and Child (V. Rose and D. Bailey, eds.), European Union Law of Competition (7th edn, Oxford University Press, 2013), Vol. II, A7. When acting under Article 346 TFEU, Member States, instead of acting in addition to the Commission under the EUMR (as in the case under Article 21(4) EUMR), have generally instructed firms no to notify the exclusively military aspects of the deal to the Commission at all, see eg M 528, British Aerospace/VSEL, 24 November 1994 and M 529, GEC/VSEL, 7 December 1994. If the Commission considers that a Member State is making improper use of these powers it may take the matter directly before the Court under Article 348 TFEU. (Jones & Sufrin, 2016)

[272] Jones, A. & Sufrin, B. (2016) 'EU Competition Law: Text, Cases, and Materials', sixth edition, Oxford University Press, pp. 1110-1119.

By analogy with the free movement provisions, it also seems that public security would encompass proportionate measures to counter a genuine and sufficiently serious threat to the security of supplies of a product or service which is of fundamental importance for the existence of, or survival of those in, that Member State (such as oil, gas, water, electricity, telecommunications) or of vital or essential interest for the population's health. In Lyonnaise des Eaux SA/Northumbrian Water Group, for example, the Commission accepted that the regulation of the UK water industry constituted a legitimate interest. In accepting the legitimate interests of the UK, however, the Commission stressed that the UK authorities should not, in their scrutiny of the concentration, take account of factors properly falling for assessment by the Commission.[273]

Thirdly, although, to ensure the effet utile of the EUMR, non-recognised interests must be notified to the Commission, in some cases Member States have not complied with the notification and stand-still obligation in circumstances where the Commission considers that the conditions of Article 21(4) are not satisfied. An important ruling therefore is Portuguese Republic v Commission, where the Court confirmed that, even if no communication is made by the Member State to the Commission, the Commission is still entitled to adopt a decision assessing whether measures taken by a Member State are compatible with Article 21(4) and requiring a Member State to withdraw measures which it finds are not. Otherwise, Member States could easily avoid the scrutiny of the Commission and national measures could irretrievably prejudice a merger with an EU dimension.[274]

In practice, therefore, where the Commission believes that a Member State has infringed the exclusivity provisions of the EUMR, it communicates this preliminary view to the Member State and gives it a chance to respond, before issuing an Article 21 decision. For example, it went into battle with the Spanish authorities over their actions in relation to competing bids for Spanish electricity operator, Endesa. In this case, the Commission had cleared E.ON's and ENEL/Acciona's respective bids under the EUMR.[275] A third bid, which was supported by the Spanish government, by Spanish Gas Natural, did not have an EU dimension and was appraised by the Spanish competition authorities. Nonetheless, the Spanish authorities imposed conditions on the potential investors under regulatory powers. In its Article 21 EUMR decisions, the

[273] Id.

[274] Id.

[275] Cases M 4110 and M 4197, E.ON/Endesa (2006) and M 4685, ENEL/Acciona/Endesa (2007).

Commission found that the actions were not justified by a need to protect the security of supply risks alleged and were contrary to the capital and establishment provisions and required Spain to withdraw them without delay. Public security could be relied on only if there were a genuine and sufficiently serious threat to a fundamental interest of society, for example if measures were necessary to ensure a minimum level of energy supplies in the event of a crisis. As the measures were not withdrawn, the Commission eventually brought enforcement proceedings against Spain under Article 258 TFEU. Finally, the Court[276] confirmed that, by not withdrawing conditions to the E.ON merger, Spain had failed to fulfil its Treaty obligations.[277]

In BSCH/A.Champalimaud[278], the Commission also found that Portugal had improperly applied Article 21(4) of the EUMR to a transaction, this time in the insurance sector. In this case the Portuguese Minister of Finance relied on measures restricting a foreign firm from acquiring in excess of 20 percent of domestic insurance firms to prohibit a proposed concentration with an EU dimension between Banco Santander Central Hispano (BSCH), a Spanish banking group, and Champalimaud (which was ultimately cleared by the Commission). The Portuguese authorities had not communicated any public interest to the Commission but in press statements had stated that they had acted to protect national interests and strategic sectors for the national economy. The Commission considered that the government should have notified its actions to it and that the protection of national interests and strategic sectors for the national economy could not constitute a legitimate interest within the meaning of the Article 21(4). Further, it entertained considerable doubt as to whether the actions were really based on prudential rules rather than constituting a discriminatory measure designed to prevent the opening of the financial services sector to non-nationals. The Commission thus ordered the Republic of Portugal to suspend the measures adopted and to notify them to it as required. In the end, the Portuguese authorities agreed to modified arrangements which were also cleared by the Commission under the EUMR.[279]

Following the Champalimaud case, then Competition Commissioner Mario Monti stressed the importance of the Commission's intervention in this case to the safeguarding of the internal market and that it should serve as a reminder that Member States should not try and prevent the

[276] Case C-196/07, Commission v Spain (2008) ECR I-41.

[277] Id.

[278] Cases M 1616, M 1680 and M 1724, BSCH/A.Champaliaud (1999).

[279] Id.

opening if their markets to non-nationals and that operations which did not raise competition concerns should in principle be able to proceed.

Overall, the analysis above[280] demonstrates that although there have been a number of cases in which Member States have successfully relied on recognised interests to scrutinise a merger for its impact on non-competition factors, recognition of other legitimate interests has been rare.

II.B.2. The EU merger control & the 'emergence' of European champions

According to a report[281] on merger control conducted by an international law firm with global reach, in 2018 a record number of merger notifications was observed, as global M&A activity soared during the first half of the year. Notably, intervention by antitrust authorities overall remained high.

Geo-political considerations were also present in 2018. In the EU in particular there were two sets of considerations. On one hand, merger rules were criticised by leading politicians as restricting the emergence of 'European Champions' to compete with other growing entities on the global stage, particularly those based in China. The recent prohibition of Siemens/Alstom by the European Commission attracted the fury of top politicians in France and Germany. On the other hand, many jurisdictions took steps to strengthen their oversight of inbound foreign investment. To that effect, well established rules were bolstered, and new regulatory regimes started to emerge, especially in Europe.

In the EU, the European Commission is coming under increasing pressure from the leading politicians in some Member States to apply merger control rules in a way which supports the creation of 'EU champions'. They want such companies to be able to compete on a global stage with growing international firms, particularly those originating from China. The Siemens/Alstom[282] deal was the focal point in this debate throughout 2018 and into 2019, thus giving rise to a kind of political turmoil. Politicians in both France and Germany made repeated

[280] Id.

[281] Antonio Bavasso & Louisse Tolley, Allen & Overy: Global trends in merger control enforcement, February 2019, Available at http://www.allenovery.com/publications/en-gb/mergercontroltrends/Documents/Merger-Control-Report-19.pdf.

[282] M 8677 – Siemens/Alstom, 6 February 2019. The proposed merger was considered to be incompatible with the internal market.

requests for the Commission to approve the transaction in order to create one of the world's largest rail companies capable of competing with China's state-owned equivalent. However, in February 2019 the Commission blocked the deal, sparking intense criticism from many (mainly political) groups and receiving support from others. Such intensity of political pressure has not been witnessed since President Chirac reportedly called Commissioner Monti to support the clearance of Schneider/Legrand, a merger which the Commission then blocked in 2001[283] (although it was later overturned by the Court of First Instance).

In response to the prohibition, French Minister of Economy and Finance Bruno Le Maire stated that EU antitrust rules should be reformed to allow Member State representatives to intervene in the process, echoing similar remarks made by Manfred Weber, one of the lead candidates to succeed Commission President Juncker in November 2019. Commissioner Vestager's stance in protecting independent decision-making by the Commission has been firm. She stood by her decision and her reply was that EU merger policy does lead to large European companies. She noted regarding the controversial proposed merger[284] between Siemens and Alstom that both of them separately constitute "global champions". However, she stressed that European champions cannot be built by undermining competition. The current Commission President Jean-Claude Juncker supports this approach.

According to a recent empirical analysis[285], evidence indicates that, although the European Commission may be portrayed by certain policymakers and practitioners as a protectionist institution that deploys its vast merger control powers as a tool for industrial policy, it has not systematically used its authority to intervene more frequently or more extensively in transactions involving a foreign firm's acquisition of a company based in the EU territory, or transactions involving a firm based in the United States. The outcome of this research has demonstrated that 'the Commission is less likely to challenge transactions involving foreign acquirers'. The authors of the specific research argue that, although they may have not comprehensively proven that protectionism is absent from Commission merger control, at least their analysis has managed to shift the burden of proof to those who allege that the Commission acts in a protectionist way.

[283] M 2283 – Schneider/Legrande, 10 October 2001.

[284] See supra note 288.

[285] Bradford, Anu and Jackson, Jr., Robert J. and Zytnick, Jonathon, Is EU Merger Control Used for Protectionism? An Empirical Analysis (June 23, 2017). Journal for Empirical Legal Studies 14:4, December 2017, Forthcoming; Columbia Law and Economics Working Paper No. 571. Available at SSRN: https://ssrn.com/abstract=3003955.

Several plausible reasons to believe that the merger-review process would be an attractive means of achieving protectionist policy goals are mentioned in the aforementioned analysis[286]. First of all, opposing acquisitions of domestic companies by foreign firms often entails a heated political debate. Furthermore, in several cases mergers can be blamed for causing a high level of unemployment. People may also fear that foreign acquirers will transfer significant economic activity back to their home jurisdiction. Antitrust agencies might similarly be responsive to public demand to protect domestic brands. Just as many Americans may be unwilling to contemplate Coca-Cola as a foreign-owned company, Europeans might have strong opposition to allowing German companies like Siemens or Mercedes-Benz be associated with countries outside the EU. Finally, foreign acquisitions may also increase the political impact on foreign nations in the target's market, a particularly prominent concern when the foreign nation's culture and political regime differ considerably from the target's.

On the other hand, there are compelling arguments mentioned in the Article referred-to above as regards the view that merger-review authority does not constitute an effective tool for achieving protectionist economic policy. First, systematic bias against foreign acquirers could undermine the interests of domestic firms if other merger-review authorities chose to retaliate. Such bias would also generate significant collateral damage, undermining the interests of many European firms. Moreover, the Commission, as an EU institution, has three three institutional characteristics, which do not favour protectionism in its merger-review decisions. First, the Commission is subject to an unusual degree of transparency, and all the merger-review decisions must be sufficiently justified. As a result, whether or not it chooses to intervene in public decisions, it is difficult to conceal systematic protectionist bias. Second, although judicial review of Commission decisions is rare, it can be meaningful: in 2002, after a series of public defeats in court, the Commission significantly reformed its approach to merger review. Thus, systematic bias against foreign acquirers would raise a considerable risk of reversal in the courts. Lastly, the Commission's governance structure makes it unlikely that policymakers could succeed in pursuing protectionism through the merger-review process. The Commission's case teams that prepare proposed decisions typically consist of lawyers and economists from across the European Union, only few of which come from the target nation. Any final decision rests on the vote of the entire Commission, comprising a Commissioner from each Member State, and only one being from the target nation. Any decision to challenge a welfare-enhancing merger to

[286] Ibid.

protect a particular nation's economic interests would hence require all Commissioners and a multinational case team to forego benefits to consumers across Europe to hand a protectionist benefit to a particular nation's industry.

Pursuant to research conducted by Jones and Davies[287], although the Commission does have an extensive general power under the EUMR to review foreign investment through large scale concentrations (essentially, mergers between two or more undertakings, changes in control over an undertaking and the creation of autonomous full-function joint ventures) with an EU dimension, these provisions do not draw a formal policy distinction between EU and non-EU investment but only permit the Commission to prohibit transactions which may lead to a significant impediment to effective competition in the EU. The EUMR is thus based on "competition" interests and is designed to prevent mergers which will limit competition between the merging parties and result in higher prices, lower quality, services and products, and/or reduced output or innovation to the detriment of consumers.

Although some commentators have expressed concern that the Commission's willingness to adopt an expansive approach to the concept of an undertaking and single economic unit in the context of state-owned enterprises ("SOE"s) increases the risk of EU merger review and distorts merger assessment involving, for example, Chinese companies, the Commission has stressed that it applies the same criteria to all transactions, wherever the inward investment originates from: "And I can assure you that EU merger control will remain on that track. I can give you concrete examples of this. Earlier this year we cleared without conditions a string of mergers involving companies owned by the Chinese state: China National Bluestar/Elkem, DSM/Sinochem, Petrochina/Ineos, and Huaneng/Intergen. In all these cases, we applied the same criteria that we adopt to assess mergers involving companies controlled by EU countries. This goes to show that our analysis is based on competition considerations only, and is irrespective of the nationality of the companies. And I expect that European companies will enjoy the same treatment when competition authorities in other parts of the world review their merger projects"[288]. The EUMR affords no grounds for applying less favourable rules, and for retaliating against companies of

[287] Jones, Alison and Davies, John, Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate (December 22, 2014). [2014] 10(3) European Competition Journal 453; [2014] 10(3) European Competition Journal 453; TLI Think! Paper 24/2016; King's College London Law School Research Paper No. 2015-12. Available at SSRN: https://ssrn.com/abstract=2533860.

[288] SPEECH/11/561, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Policy Objectives in Merger Control.

third countries that discriminate against EU companies in their own merger control or foreign investment legislation.

It is true that final merger decisions are taken by the College of Commissioners, and that in some controversial or politically charged cases vigorous lobbying of the Competition Commissioner or the other Commissioners takes place. Nonetheless, it does not appear that such lobbying has, in recent years at least, affected the final outcome of merger decisions. Thus although some high-profile merger cases, such as the merger between NYSE Euronext and Deutsche Börse or other proposed concentrations which might have created a European champion[289], may have caused public clashes between advocates of industrial policy and supporters of a competition policy based strictly on competition factors alone, in most cases the Commission has resolutely opposed to mergers which will significantly impede effective competition in the EU. In practice, therefore, the College of Commissioners ordinarily accepts the decisions prepared by DG COMP overseen by the Commissioner for competition. It is noteworthy, however, that in 2012 then Commission President Barroso asked Commissioner Almunia to give early advance notice of cases with a dimension going beyond the scope of competition policy which might impact on other EU policies. Even though it is possible that things might change in the future, Competition Commissioners have, to date, worked hard to send the message that industrial and other "non-competition" criteria do not prevail in EU merger policy. In addition, the Commission seeks to tackle "nationalistic" or "protectionist" measures by Member States by bringing proceedings against them where national rules, or actions based upon them, violate EU law.[290]

II.C. The equilibrium between consumer welfare and public interest in merger control

II.C.1. Overarching goals of competition laws under a comparative prism

The ICN[291] Competition Advocacy Working Group reported in 2002: "The objectives of competition laws vary widely from one jurisdiction to another. Some competition laws expressly pursue economic efficiency. Others put a greater emphasis on consumer welfare alone, which

[289] See e.g., Case M.6166, NYSE Euronext/Deutsche Börse (2012).

[290] Jones, Alison and Davies, John, Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate (December 22, 2014). [2014] 10(3) European Competition Journal 453; [2014] 10(3) European Competition Journal 453; TLI Think! Paper 24/2016; King's College London Law School Research Paper No. 2015-12. Available at SSRN: https://ssrn.com/abstract=2533860.

[291] International Competition Network, official site available at https://www.internationalcompetitionnetwork.org/

forms part of economic efficiency."[292] Nine years later, in 2011, the ICN conducted another survey of fifty-six competition authorities. The results of this survey, when compared to the results of the earlier survey, reveals that the first decade of the 21st century did not lead to much convergence on the goals of competition law. Whereas most competition authorities are concerned with the protection of the consumer surplus, there are different views on whether the protection of consumer surplus is a natural result of competition or an underlying goal of competition law. Among the jurisdictions for which consumer surplus is indeed a goal of competition law, there are differences between those which consider that consumer surplus is the only goal of competition and those which consider that competition has other economic goals. Finally, among the jurisdictions for which consumer surplus is one of the economic goals of competition there are differences between those which consider that economic goals are the sole goals of competition law and those for which competition law may also have social or political goals.[293]

Apart from the protection of consumer surplus, some competition authorities pursue other economic goals. For instance, in countries like Australia, Norway or New Zealand, the goal of competition law is the protection of total welfare rather than consumer welfare. The strategic goal of the Competition Authority of Swaziland is to promote active competition for the public benefit. In Kenya competition law sometimes seeks to maximize producer and consumer surplus, not consumer surplus alone. Among the countries that have a broader economic agenda than the strict promotion of consumer surplus, Germany, Hungary, Iceland, Ireland or Switzerland could be cited. In Germany, according to a recent draft guideline issued by the Bundeskartellamt, the purpose of merger control is "to protect competition as an effective process", which the draft guidelines explain "may sometimes coincide with protecting competitors."[294] In Hungary, the goals of the competition law are the maintenance of effective competition and the promotion of efficiencies. The Icelandic Competition Act aims to promote effective competition and thereby increase the efficiency of the factors of production of society. According to the Irish Competition

[292] *Advocacy and Competition Policy*, Report prepared by the Advocacy Working Group, ICN's Conference, Naples, Italy, 2002.

[293] Jenny, Frederic, Substantive Convergence in Merger Control: An Assessment (January 1, 2015). Revue des Droits de la Concurrence, Jan 2015, Vol. 1, Issue 1, p. 21-41. Available at SSRN: https://ssrn.com/abstract=2869098.

[294] Reported in L. Fullerton and M. Alvarez, Convergence in International Merger Control, *Antitrust*, Vol. 26, No 2, Spring 2012.

Authority, the primary goal of its work is to ensure competitiveness in the Irish economy, which will ultimately benefit the consumer. The main goal of Switzerland's Cartel Act is to prevent the harmful economic or social effects of cartels and other restraints of competition. Except for broader economic goals than the promotion of consumer surplus, a number of competition laws also have social or political goals.

As the OECD noted in 2011: "The specific objectives behind merger control (…) may differ between jurisdictions. (…) For example, protecting local or small and medium size competitors, achieving various socio-economic and socio-political objectives, protecting employment, encouraging enterprise, and achieving various industrial policy objectives including promoting the international competitiveness of the local economy and building strong national firms."[295] For example, the above-mentioned ICN survey of 2011 states that the goals of competition law in Canada are to promote the efficiency and adaptability of the Canadian economy, to expand opportunities for Canadian participation in world markets, without, however, undermining the role of foreign competition in Canada, and to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the national economy. Similarly, the Korean competition law goals are a mix of economic and non-economic goals. Article 1 of Korea's Monopoly Regulation and Fair Trade Act (MRFTA) states that "this act seeks to promote free and fair competition such that creative business activities are fostered, to protect consumers, and to strive for the balanced development of the national economy by preventing the abuse of market dominance by enterprises and excessive concentration of economic power and by regulating unlawful coordinated interaction and unfair business practices." The Competition Act of South Africa and that of Namibia have very wide goals that contain both economic and non-economic aspects. The purpose of the South African Act is, inter alia, to promote the efficiency, adaptability and development of the economy, to provide consumers with competitive prices and product choices, while at the same time promote employment and advance the social and economic welfare of South Africans. Similarly, the Anti-Monopoly Law of China (the "AML"), which took effect in 2008, has a variety of goals including "the protection of fair competition in the market" and "the interests of consumers," but also "the promotion of the healthy development of the socialist market economy." Another stated objective of the Chinese AML is to protect the "lawful business operations" of undertakings in industries "controlled by the State-

[295] OECD Global Forum on Competition, Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies, Background Note (Jan. 13, 2011).

owned economy and concerning the lifeline of national economy and national security." As a contrast, the Brazilian competition law prohibits concentrations which involve the elimination of competition in a substantial portion of the relevant market or which would create or strengthen a dominant position, or that can result in the dominance of the relevant market of goods or services except if they are strictly necessary to increase productivity or competition, to improve the quality of goods or services or to encourage efficient and technological or economic development where a significant part of the transaction benefits is transferred to consumers. Thus, the Brazilian merger law does not include public interest provisions.[296]

II.C.2. The integration of public interest in competition enforcement

Competition law aims primarily to protect competition as a means of enhancing consumer welfare and ensuring efficient allocation of resources. When competition law is used to promote 'public interest', certain restrictive conduct may be immunized or pro-competitive behaviour suppressed, as social and political objectives are allowed to override market concerns.[297]

In recent review of selected mergers, the OECD observed that public interest considerations are quite prevalent in competition laws. Though, developed economies tend to interpret 'public interest' narrowly, thus applying the exemption not often, whilst developing countries, being more inclined to prioritize economic equity instead of market efficiency, they invoke 'public interest more frequently[298].[299]

It would be interesting to mention some examples that constitute landmark cases regarding public interest. During the financial crisis in 2008, a proposed merger in the UK spurred

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[296] Jenny, Frederic, Substantive Convergence in Merger Control: An Assessment (January 1, 2015). Revue des Droits de la Concurrence, Jan 2015, Vol. 1, Issue 1, pp. 21-41. Available at SSRN: https://ssrn.com/abstract=2869098.

[297] Abrenica, Ma. Joy V., Balancing Consumer Welfare and Public Interest in Competition Law (September 28, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 2, pp. 443-462, September 2018. Available at SSRN: https://ssrn.com/abstract=3256737.

[298] Public Interest Considerations in Merger Control 5 (Organisation for Econ. Cooperation & Dev. [OECD], Paper No. DAF/COMP/WP3(2016)3, 2016).

[299] Abrenica, Ma. Joy V., Balancing Consumer Welfare and Public Interest in Competition Law (September 28, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 2, pp. 443-462, September 2018. Available at SSRN: https://ssrn.com/abstract=3256737.

contentious debate. It was the merger between Lloyds TSB and HBOS[300], which did not have an EU dimension and consequently it was subject to assessment under the UK merger regime. At the time the discussions of merger initiated, in late 2008, these two companies were respectively the fourth and fifth largest banks in the UK. It was clear on the basis of previous reports, that the proposed merger, would in normal circumstances be blocked by the UK competition authorities. The Office of Fair Trading (hereinafter 'OFT') had significant competition concerns in a number of markets and it recommended that the merger should be referred to the Competition Commission (hereinafter 'CC'). Given that the agreement to merger was conditional on no reference to the Competition Commission, this would inevitably lead to the collapse of the proposed merger. There were a number of submissions to the OFT that the merger should be allowed to proceed on the grounds that this would prevent the collapse of HBOS and support the financial stability of the UK banking system. The UK government decided not to make a reference to the CC, thus permitting the merger on the grounds that the benefits to the financial stability of the country outweighed the potential competition concerns.[301] The UK government also blocked the 2011 merger of News Corporation and BSkyB to maintain plurality in media, despite the assessment of the European Commission that the transaction would not harm market competition[302]. Further on, in 2015, the German Federal Cartel Office banned the merger of two supermarket giants, EDEKA and Kaiser's Tengelmann, on ground that it could result in

[300] 31 October 2008, see OFT, Anticipated acquisition by Lloyds TSB plc Report to the Secretary of State for Business Enterprise and Regulatory Reform (2008), in Alison Jones & Brenda Sufrin (2016) EU Competition Law: Text, Cases, and Materials, sixth edition, Oxford University Press, pp. 1119-1120.

[301] Graham, Cosmo, Public Interest Mergers (March 15, 2013). Available at SSRN: https://ssrn.com/abstract=2233822 or http://dx.doi.org/10.2139/ssrn.2233822. See, also, Federico Mor, Contested Mergers and Takeovers 7 (House of Commons Libr., Paper No. 5374, 2018), in Abrenica, Ma. Joy V., Balancing Consumer Welfare and Public Interest in Competition Law (September 28, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 2, pp. 443-462, September 2018. Available at SSRN: https://ssrn.com/abstract=3256737.

[302] News Corporation/BSkyB Merger, GOV. UK (June 30, 2011), https://www.gov.uk/government /news/news-corporation-bskyb-merger, in Abrenica, Ma. Joy V., Balancing Consumer Welfare and Public Interest in Competition Law (September 28, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 2, pp. 443-462, September 2018. Available at SSRN: https://ssrn.com/abstract=3256737.

domination of regional markets[303]. However, the Economic Minister later overturned this decision due to concerns on employment, job security and workers' rights[304]. On the other hand, without any finding of competition concern, the US government blocked the planned merger among semiconductor companies, Singapore-based Broadcom Limited, California-based Broadcom Corporation and Broadcom Cayman L.P., which it claimed posed a threat to national security[305]. Last but not least, the German Government's decision to overrule the decision of the German NCA and authorise a merger between energy companies E.ON/Ruhrgas and the creation of a national champion, caused considerable consternation and anxiety.

According to a thorough analysis[306], interventions to competition enforcement on public interest grounds are not new, but the current wave of protectionism around the globe has given rise to concern that public interest might be used to legitimize a protectionist policy. There are considerable fears that these few cases could become the norm for facilitating anticompetitive practices, thus promoting social and political objectives.

Public interest concerns, particularly those affecting national security, public health, environment and financial stability, are not inferior to that market efficiency, and deserve to have priority over competition objectives under certain circumstances. Nonetheless, without explicit and equitable reasons for intervention, competition could be distorted. It should not be ignored that in some cases the harm caused by distortion of competition may in the long run countervail or even outbalance the temporary benefits, which accrue from public interest policies, that subvert effective competition. And if this harm due to distorted competition is irreversible, this could deteriorate even more the existing situation.[307]

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[303] Bundeskartellamt Prohibits Takeover of Kaiser's Tengelmann by EDEKA, BUNDESKARTELLAMT (Apr. 1, 2015), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/01_04_2015_Edeka_Untersagung.html.

[304] Düsseldorf Higher Regional Court Confirms Prohibition of EDEKA/Kaiser's Tengelmann Merger, BUNDESKARTELLAMT (Aug. 24, 2017), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2017/25_08_2017_OLG_EDEKA_KT.html.

[305] White House, Presidential Order Regarding The Proposed Takeover Of Qualcomm Incorporated By Broadcom Limited (Mar. 12, 2018).

[306] Abrenica, Ma. Joy V., Balancing Consumer Welfare and Public Interest in Competition Law (September 28, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 2, pp. 443-462, September 2018. Available at SSRN: https://ssrn.com/abstract=3256737.

[307] Ibid.

Encouraging public interest may lead to lower social welfare when competition is suppressed to satisfy non-competition objectives, and the anticompetitive effects of such action are not counterbalanced. The first-best solution is therefore to shield competition law from being deployed to attain public interest objectives. This way, competition law enforcement could focus on its core objective of advancing consumer welfare. However, in cases that it proves to be unavoidable and expedient to accommodate public interest in competition law, then the parameters for intervention should be defined and transparent.[308]

'How public interest is actually integrated in competition enforcement is often intractable as there are different ways of managing public interest vis- à-vis competition concerns.' One approach, which appears to be advocated by South Africa and Chinese Taipei, is to weigh competition objectives against public interest considerations in each individual case. The other approach is to balance competition and public interest considerations in exceptional cases, and to consider only competition-related factors in general cases. This would describe the U.K. government intervention to the jurisdiction of the competition authority in "exceptional" situations where national security, media plurality or stability of the financial system is at stake. Another approach is to consider public interest concerns only when the market conduct is found to substantially impede competition. South Korea, for instance, considers "efficiency enhancing effects" and failing firm defense only after the conduct at issue fails the competition test.

Public interest considerations are generally broad and thus difficult to interpret and apply in an objective, transparent and consistent manner. Their inclusion unavoidably creates uncertainty and unpredictability in competition law enforcement.[309]

Apart from undermining antitrust enforcement, accommodating public interest poses other risks. A principal risk, which is discussed scrupulously throughout this dissertation, is the concealment of protectionist policies. Other risk could occur, also, due to the prioritization of social and political goals are over pure competition objectives, antitrust agencies become targets of lobbying by interest groups[310], which may jeopardise their independence and credibility. Furthermore, considering the wide variation in public interest clauses across jurisdictions, their

[308] Ibid.

[309] OECD, Interim Report on Convergence of Competition Policies, at 8-9, OECD Doc. OECD/GD(94)64 (June 1994).

[310] Ibid.

inclusion in competition laws could cause further divergence in competition enforcement, thus giving rise to additional hindrances to cross-border trade.[311]

It is noteworthy that several jurisdictions, among which South Africa, Australia and the UK, have issued protocols for public interest intervention to ensure transparency, coherence and procedural fairness. These regimes strive, inter alia, to reserve intervention to select circumstances that reflect their respective country's social and political priorities to apply controls in non-discriminatory manner, as well as to ensure that competition is not hampered to an extent more than necessary for the attainment of public interest goals. There are, however, some differences in scope and procedures of intervention among these regimes.[312]

The question to be answered is whether there is a 'juste-milieu' between pure competition and public interest objectives. The golden mean is to circumscribe the concept of public interest to the highest social and political goals of a country, which could not be achieved by promoting market efficiency. National security, media plurality and financial stability are fundamental goals which should be accommodated in competition enforcement. In contrast, industrial development and employment generation are arguably promoted when the market attains efficiency through competition. Therefore, they should not be basis for subverting competition enforcement. Moreover, since these goals are tied to the status of the country, they are not permanent and would have to be reviewed and possibly modified, from time to time, to reflect new priorities. Competition laws across jurisdictions should have explicit objectives, be transparent with respect to the substantive review standard of merger[313], and stipulate public interest goals as exemptions or variation of standard that will is solely applicable in exceptional circumstances. Last but not

[311] Abrenica, Ma. Joy V., Balancing Consumer Welfare and Public Interest in Competition Law (September 28, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 2, pp. 443-462, September 2018. Available at SSRN: https://ssrn.com/abstract=3256737.

[312] For more details on these guidelines see a comprehensive analysis see ibid.

[313] See Jenny, Frederic, Substantive Convergence in Merger Control: An Assessment (January 1, 2015). Revue des Droits de la Concurrence, Jan 2015, Vol. 1, Issue 1, p. 21-41. Available at SSRN: https://ssrn.com/abstract=2869098. & Abrenica, Ma. Joy V., Balancing Consumer Welfare and Public Interest in Competition Law (September 28, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 2, pp. 443-462, September 2018. Available at SSRN: https://ssrn.com/abstract=3256737.

least, it should be mentioned that it is arguable whether the competition authorities should have dual role of enforcing competition and intervening in the public interest.[314]

[314] See ibid.

3. Conclusion

M & As constitute a business strategy of paramount importance for a country's economy, as a lot of benefits ensue from them, such as the generation of shareholder value and the creation of economies of scale and scope. It is a multi-dimensional phenomenon with significant economic, legal and political aspects, thus engendering heated debates especially when it comes to giant corporations involved with mergers.

The EU merger control regime is governed by the EU Merger Regulation, Regulation 139/2004, which provides for the exclusive competence of European Commission to examine concentrations with a Union dimension. The EUMR introduced the so-called SIEC test, according to which, the Commission will find a merger to be incompatible with the internal market where it would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. Moreover, the EUMR provides for an exception to the rule of sole jurisdiction of the Commission to decide whether concentrations with a Union dimension are compatible with the internal market. More specifically, it defines three types of legitimate interests that may be invoked by Member States, thus affording them with the power to take appropriate measures to protect those interests, namely public security and defence, plurality of the media, and prudential rules.

According to a recent Commission report[315], the EUMR has contributed to more efficient merger control within the EU since it came into force on 1 May 2004. Its turnover thresholds have, in most cases, been effective in distinguishing merger cases of EU relevance from those with a primarily national focus. Also, the improved system of case re-allocation (introduced in 2004) has allowed businesses to have their cases reviewed by the more appropriate authority: either a Member State's National Competition Authority or the Commission's 'one-stop-shop' facility.

[315] EC Merger Regulation contributes to more efficient merger control in EU Claude Rakovsky, Manuel Godhino de Matos, Alexander Kopke, Peter Ohrlander and Paul Shiels], available at https://ec.europa.eu/competition/publications/cpn/2009_2_4.pdf.

According to the aforementioned report[316], overall, the jurisdictional thresholds and the set of corrective mechanisms established by the EUMR have provided an appropriate legal framework for allocating cases between Union and Member State level. It finds that this framework has in most cases been effective in distinguishing cases that have a Union dimension from those with a primarily national nexus. Notwithstanding this, it concludes that there is scope for further improvement in the current system of case allocation in a number of respects. Indicatively, as flaws of the system could be considered the existence of a relatively large number of mergers that are notified in two or more Member States, and of a small number of cases dealt with by the Member States under the two-thirds rule, which nevertheless had a potential cross-border impact. Stakeholders have suggested that case allocation between the Commission and the Member States could be improved through more efficient referral mechanisms or by moving towards automatic re-allocation of jurisdiction to the Commission in cases with a cross-border impact. In addition, increased convergence between the national merger control regimes would in their view be beneficial to businesses as it would reduce the costs incurred and the time needed for cross-border mergers.

Finally, the EU merger control system has been accused by some lawmakers and commentators of having obscure 'protectionist' motives camouflaged under public interest. However, from the review of research and analyses made by distinguished competition scholars and commentators, it became evident that for fifteen years, the EU's merger control system, unlike most others in the world, offered only minimal possibilities for taking efficiency gains into account as a mitigating factor that might offset the anti-competitive effects of a merger.[317] Moreover, the EU merger regime sets a clear primary competition objective, while leaves space for three fundamental public interest issues only in exceptional cases. It could be assumed, therefore, that under the EU system pure competition objectives are not subordinated to public interest objectives. Overall, it could be deduced that the EU merger regime has managed to strike a balance between pure competition and public interest, as it does not deploy public interest in favour of protectionism and does not have an underlying objective to create 'European champions'. Generally, jurisdictions across the globe should try to find the equilibrium between

[316] Ibid.

[317] Ilkovitz, F. & Meiklejohn, R. (2006) European Merger Control: Do We Need an Efficiency Defence?, Edward Elgar Publishing Limited, p. 1.

the effective competition objectives and public interest goals, as otherwise potential atrocious reverberations for consumer welfare lurk.

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