

**An Appraisal of the European Commission's
Application of the New Merger Regulation**

By

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**A thesis submitted in partial fulfilment for the requirements for
the degree of MPhil at the University of Central Lancashire.**

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ABSTRACT

The original Rome Treaties, which established the European Economic Community, made no direct reference to the regulation of mergers. The establishment and evolution of a Community framework of merger regulation, therefore, was piecemeal, incremental and sporadic in nature, the building blocks of the framework premised upon specific cases such as the 1973 *Continental Can* judgment which established the foundations of the quasi merger regulation framework.¹

The European Community Merger Regulation which was formulated in 1989 and entered into force on September 21st 1990, aimed to establish a pro-active, pre-emptive, unitary system of merger control. This Regulation represented a critical juncture in the evolution of the merger regulation policy framework establishing a system that regulated mergers which possessed a Community dimension. This system appeared to be working effectively until early 2001-2002, when the Court of the First Instance reversed several of the Commission's decisions and severely rebuked it for its errors and incorrect interpretation of evidence when investigating the transaction.

The revised Merger Regulation entered into force on May 1st 2004, enhancing the role of the Commission, introducing a higher degree of flexibility into the notification procedure and implementing the Significant Impediment Test. The Merger Task Force was dismantled and sectoral teams introduced. A Chief Competition Economist and team were also established to oversee the application of economic models during more complex investigations. The Courts have also been drawn into the governance regime as the whole investigative process has become much more adversarial in nature as parties become more willing to challenge Commission decisions, if they are not in agreement.

The thesis, therefore, will examine if and how the application of the revised Merger Regulation has changed the direction of merger regulation policy. The thesis will illustrate that the application of the Regulation by the Commission represents a step rather than a radical change in the evolving framework of merger regulation. Paradigmatically and procedurally, the entry into force of the New Merger Regulation represents a shift in the focus and application of the provisions of the merger regulation framework by the Commission. The revised referral system, more flexible notification system, introduction of triangular meetings and the revision of the substantive test, all require the Commission to modify and reinterpret the foundations of the merger regulation framework. Economics now plays a much larger role in merger investigations, and the spectre of Court intervention looms on the horizon of any investigation where any party or interested person does not agree with the Commission's decision.

¹Case No 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, (1973) ECR 215; McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger control. *Governance: An International Journal of Policy and Administration*, (1999), 12, (2).

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TABLE OF CASES (ALPHABETICAL)

M.4150 - Abbott/Guidant

M.3942 - Adidas/ Reebok

M.3280 - Air France/KLM

M.3765 - Amer/Salomon

M.3593 -Apollo/Bakelite

M50 - AT&T/NCR

M.3178 – Bertelsmann/Springer JV

M.3625 - Blackstone/Acetex

M.4066 - CVC/SLEC

M.1313 –Danish Crown/Vestiyske Slagterier

M.2300 - De Beers/LVMH

M3696 - E.ON/MOL

M.4180 - Gaz De France/Suez

M. 3083 General Electric/ Instrumentalism

M.2220 - General Electric/Honeywell

M.4000 - Inco/Falconbridge

M.3687 - Johnson & Johnson/Guidant

M.4314 - Johnson & Johnson/Pfizer Consumer Healthcare

M.4057 - Korsnas/Assidoman Cartonboard

M.2978 - Lagardere/VUP

M.4141 - Linde/BOC

M.2544 - Master Foods/Royal Canine

M.477 - Mercedes- Benz/Kassbohrer

M.4137 - Mittal/Arcelor

M.190 - Nestle/Perrier

M.2337 - Nestle/Ralston Purina

M.3779 - Pernod Ricard/Allied Domecq

M.4439 - Ryanair/Aer Lingus

M.3653 - Siemens/VA Tech

M.3465 - Syngenta CP /Advanta

M.3916 - T-Mobile Austria / Tele.Ring

M. 3410 - Total/Gaz De France

M.1069 - Worldcom/MCI

TABLE OF CASES (EUROPEAN COURT OF JUSTICE)

C-6/72, Europemballage Corporation and Continental Can Company Inc. v
Commission of the European Communities, (1973) ECR 215

C-142 and 1586/84, BAT Ltd and R.J Reynolds Inc v. Commission and Philip
Morris [1987] E.C.R. 4487[1987] 2 CMLR 551

C-IV/M877, Gencor v Commission of the European Communities [1999] E.C.R.
II-753

C-12/03 P and C-13/03 P, The Appeal Against The Judgment of the Court of the First Instance Annuling the Decision of the European Commission Prohibiting The Merger of Tetra Laval Sidel is Dismissed

TABLE OF CASES (COURT OF THE FIRST INSTANCE)

Joined Cases 68/94 & 30/95, France v The Commission [1998] E.C.R. I-1375

(Kali & Salz)

T-342/99, Airtours plc. v. Commission [2002] ECR II-2585

T-310/01 and T-77/02, Schneider Electric v. Commission [2002] ECR 11-4071

T-5/02 and Case T-80/02 Tetra Laval BV v Commission [2002] ECR 11-4381

T-114/02, Babyliiss SA v. Commission of the European Communities
Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der
Bundesrepublik Deutschland (ARD) v Commission of the European
Communities. [2003] ECR II-03825.

T-209/01 and 210/01, Honeywell v Commission and General Electric v
Commission [2005] ECR II-5527.

T-464/04 Sony v BMG [2006] ECR II-2289.

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ABBREVIATIONS

| | |
|--------------|---|
| CET - | Chief Economist's Team |
| CFI - | Court of the First Instance |
| DG Comp - | Directorate General Competition |
| DoJ - | Department of Justice |
| DT - | Dominance Test |
| EC - | European Community |
| EC Treaty - | European Community Treaty |
| EEC Treaty - | European Economic Community Treaty |
| ECJ - | European Court of Justice of the European Communities |
| ECMR - | European Community Merger Regulation |
| ECSC - | The European Coal and Steel Community Treaty |
| EMU - | Economic and Monetary Union |
| EU - | European Union |
| FTC - | Federal Trade Commission |
| HHI - | Herfindahl-Hirschman Index |
| HVB- | Bayerische Hypo-und Vereinsbank AG |
| ICN - | International Competition Network |
| NMR - | New Merger Regulation |
| MTF - | Merger Task Force |
| R&D - | Research and Design |
| RPP - | Resolution Performance Products |
| SIEC - | Substantial Impediment of Competition Test |
| SLC - | Significant Lessening of Competition |
| US - | United States of America |

CHAPTER 1: INTRODUCTION & LITERATURE REVIEW

1.1 Introduction

The evolvement of a European dimension to merger control is a relatively new innovation. The European Community Merger Regulation (ECMR) was formulated in 1989 and entered into force on September 21st 1990. The aim was to establish a pro-active, pre-emptive, unitary system of merger¹ control which prevented the possible distortion of the Common Market as a consequence of a merger. The ECMR applied to any proposed concentration with a Community dimension. Until 2000 the merger system appeared to be working effectively: between 21st September 1990 to December 2003, there were 2399 cases notified to the Commission, of which 2125 were declared compatible and only 18 were prohibited.² The ECMR, therefore, appeared to be successful, regulating rather than dissuading concentrations between corporate entities. Several Commission decisions, however, were reversed by the Court of the First Instance (CFI) during 2001-2002.

A New Merger Regulation (NMR) - Regulation 139/2004 - entered into force on the 1st May 2004. This Regulation enhanced the role of the Commission, introduced a higher degree of flexibility into the notification procedure, modified the system, both enhancing the investigative powers of the Commission and increasing potential financial penalties for the failure of companies involved in the

¹ The term merger will be used in a generic sense throughout the thesis to refer to all concentrations drawn under the scope of the Regulation. Article 3 of the Regulation states that a concentration arises "... where a change of control on a lasting basis results from": mergers, joint-ventures or acquisitions. (A full list can be found in Article 3 of the Merger Regulation).

² Commission of the European Communities, *European Merger Control – Council Regulation 139/2004 Statistics*. Available from: <http://ec.europa.eu/comm/competition/mergers/cases/stats.html> (Accessed 17/10/06).

proposed concentration to respond to Article 11 letters. The NMR also introduced a “Significant Impediment Test”. Now, the Commission may block any proposed concentration which “would significantly impede effective competition, in the Common Market or in a substantial part of it, particularly as a result of the creation or strengthening of a dominant position”.³ The pre- and post-notification procedures have been made more flexible. As part of the revision of the system of merger regulation, the Directorate General for Competition (DG Comp) was reformed with the Merger Task Force (MTF) being dismantled and replaced by sectoral specific merger units coordinated by an overall merger unit. A Chief Competition Economist was also introduced to oversee the correct application of econometric analysis in complex cases.

Although the formal aspects of the revised Merger Control Regulation have been examined in great detail in existing literature, the application and interpretation of these provisions by the Commission have, due to lack of substantial empirical evidence and relevant case-law, remained unexamined by recent analyses. This thesis will fill the gap by focusing upon empirical evidence which will provide an insight into the application of the NMR and the interpretation of the accompanying Guidelines by the Commission as the merger regulation framework evolves and develops.

³ Eur-lex, *Council Regulation (EC) No 139/2004 of the 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)*. OJ L024, 29/1/2004.

In 1990, Soames⁴ stated that “[T]he coming into force of the Merger Control Regulation on 21 September 1990 will constitute a fundamental change in the control of mergers at ... Community level.” Thus the entry into force of the ECMR represents what Bulmer and Burch⁵ refer to as a “critical juncture”.⁶ The entry into force, and the subsequent application of the Regulation by the Commission, highlighted the framework’s strengths and weaknesses. The revised Regulation sought to retain the successful elements of the Regulation whilst at the same time filling the gaps and providing clarification. Weitbrecht⁷ stated “[T]he year 2004 will be remembered in EU merger control as a year of transition”. Entry into force of the NMR signified the introduction of a “new substantive test as well as significant procedural changes”. My hypothesis therefore centres around an analysis of the application of the revised Regulation by the Commission. The thesis will examine the hypothesis that the application of the NMR by the Commission will result in a step-change rather than a radical readjustment of the existing Merger Control Regulation framework. To assess the accuracy of this hypothesis, the thesis will, therefore, provide an analysis of the recent developments in EU Merger control and the subsequent application of these revised provisions by the Commission.

⁴ Soames, T. EC and Competition Unit, Norton Rose, Merger Regulation: Member States and the Commission. *Law Society's Gazette*, 18 July 1990.

⁵ Bulmer, S. J. & M. Burch, Organising for Europe. *Public Administration*, 1998, 76, (4): 605.

⁶ “Critical junctures create branching points at which institutional developments move on to a new trajectory or pathway which is then followed incrementally until a new critical moment arises, a new critical juncture follows and a new direction is taken”. (Bulmer, S. J. & M. Burch, Organising for Europe. *Public Administration*, 1998, 76, (4): 605. 605).

⁷ Weitbrecht, A. EU Merger Control in 2004 - An Overview. *E.C.L.R.* 2005, 26(2): 67-74.

1.2 Literature Review

The purpose of this section of the thesis is to provide an overview of the existing literature and illustrate where this thesis can fill the gap and add a new dimension to what is already available in this field of research.

The existing politico-jurisprudential-historical analysis of EU merger regulation policy considers the evolution of EU merger control from the Treaty of Paris (1951) until the entry into force of the ECMR in 1990. Fountoukakos and Ryan note that "Merger control has been a feature of European competition law since its inception".⁸ They provide a brief historical account of the evolution of EU merger control, observing that Articles 65 and 66 of the Treaty of Paris prohibited restrictive practices and permitted parties to merge if this did not hinder competition, whilst the Spaak report (1955) anticipated the necessity for merger regulation, stating the need to prohibit the domination of a market by one party. The Treaty of Rome (1957), however, did not contain any explicit reference to merger control. Instead Articles 81 (ex. Article 85) and 82 (ex. Article 86) regulate the behaviour of undertakings, rather than mergers per se, and it is noted that these Articles did not and were not supposed to provide a sufficient legal base to regulate mergers.⁹

In 1966 the Commission, in its Memorandum on the Concentration of Enterprises in the Common Market, identified that some type of merger control Regulation was required as lack of competence to intervene in this area of competition policy prevented the Commission from establishing and regulating competition in the Common Market.¹⁰ After the European Court of Justice of the European Communities' (ECJ) Continental Can judgment (1973),¹¹ the

⁸ Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296.

⁹ Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296; Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004.

¹⁰ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 855.

¹¹ Judgment of the Court of 21 February 1973, Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, ECR [1973]. In this case Continental Can appealed to the ECJ on the basis that the Commission had made several mistakes when prohibiting the transaction. The ECJ reversed the Commission's decision, stating that the Commission had failed to meet the burden of proof in order to show that Continental Can possessed a dominant position in the relevant market and would thus

Commission first proposed a Merger Control Regulation in 1973, premised upon Articles 83 (ex. Article 87) and 235, (ex. Article 308) but the Council failed to make a decision due to divisions concerning the extent to which “non-competition considerations should be taken into account”.¹² Revised draft Merger Control Regulations were presented by the Commission to the Council in 1981, 1984 and 1986. A revised Merger Control Regulation containing a Dominance Test (DT) was adopted by the Commission in 1988. This was accepted by the Council in 1989.¹³ Analysis of the sporadic evolvement of merger regulation gives an interesting insight into the politico-jurisprudential history of merger control policy. The critical junctures which have shaped the direction of policy can be placed into context, and the main actors who, and institutions which, have shaped the pathway (or hindered it) can be identified. The analysis of the formative period of merger control can then be taken forward and expanded upon as the path dependent structures develop.

The contents of both the old¹⁴ and new¹⁵ Merger Control Regulations have already been examined in great detail in existing literature, as has the gradual evolvement of merger regulation policy from the entry into force of the first EC Merger Control Regulation, the ECMR, onwards.¹⁶ A significant amount of literature examines the pros and cons of the DT, a central tenet of the ECMR. The two phase investigative process has been analysed in great detail.¹⁷ Literature also focuses upon the successful operation of the ECMR until the late

impede or eliminate competition. The ECJ did, however, uphold the Commission's argument that a company can impede competition if a company, which already holds a dominant position then increases its dominance through the acquirement of a competitor.

¹² Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 855; Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296.

¹³ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 855; Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296.

¹⁴ Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich.

¹⁵ Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich; Ratcliff, J. Major Events and Policy Issues in EC Competition Law. *I.C.C.R.*, 15(2), 2004: 19-24.

¹⁶ Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218.

¹⁷ Cini, M. & L. McGowan, *Competition Policy in the European Union*. St Martins Press, 1998: 21; Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296.

20th Century and provides analysis of the cases which highlight the shortcomings of the original framework. The drivers for change: the increasing pressure that the DG Comp was placed under due to the escalating number of notifications which required the MTF to investigate;¹⁸ publication of the Green Paper on the Review of Council Regulation No. 4064/89;¹⁹ enhanced extraterritorial competence, endowed by the Courts²⁰ coupled with the reversal of Commission decisions by the CFI, are all appraised in the existing literature.²¹ The influences of national actors in shaping the policy making process and content of the recast Merger Control Regulation are also analysed.²² More recent analysis examines the finite detail, substance and potential of the NMR which entered into force on 1st May 2004, comparing the new substantive test, the Substantial Impediment of Competition Test (SIEC), with the old DT, as outlined in the ECMR and the Substantive Lessening of Competition (SLC) Test used, for example, by the US and UK.²³

Levy²⁴ provides an interesting, concise introduction to the analysis of the formative period of merger control. His article outlines the principles which provide the rationale for the initiation of EU merger regulation policy. Continued removal of the internal barriers to facilitate the successful operation of the Common Market will enable “corporate reorganisation in the Community, particularly in the forms of concentration”.²⁵ “[M]ergers and other forms of concentrations” are

¹⁸ Morgan, E. J. & S. McGuire, Transatlantic divergence: GE-Honeywell and the EU's merger policy. *Journal of European Public Policy*, 11 (1), 2004: 42.

¹⁹ Weitbrecht, A. EU Merger Control in 2004 - An Overview. *E.C.L.R.*, 26(2), 2005: 67-74 ; Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004:860-2, 876; Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218.

²⁰ Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218.

²¹ Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich. Cini, M. & L. McGowan, *Competition Policy in the European Union*. St Martins Press, 1998; Morgan, E. J. & S. McGuire, Transatlantic divergence: GE-Honeywell and the EU's merger policy. *Journal of European Public Policy*, 11 (1), 2004: 42; Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004; Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004; Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218: 211.

²² Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 913.

²³ e.g. Weitbrecht, A. EU Merger Control in 2004 - An Overview. *E.C.L.R.* 2005, 26(2): 67-74.

²⁴ Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218.

²⁵ Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218.

capable of enhancing the competitiveness of the European economy and the standards of living within the Union and ensure that the evolution of these new concentrations do not damage the principle of effective competition.²⁶ A more recently announced principle of EU merger policy was the need to protect consumers from the effects of monopolistic activities, price fixing, poorer quality products and bundling of particular goods.²⁷

Levy provides a brief résumé of the main details of the ECMR and identifies four epochs in the evolution of EU merger regulation policy. 1990 to 1994, were, according to Levy, “the early years of discovery”. During that period, the Commission began to use economic methodology to meet the procedural deadlines for each case and work with the Member State antitrust authorities, utilising the ECMR as a tool to encourage a unified approach to merger control. “A significant and disproportionate amount of time” was spent addressing issues which emerged as a consequence of the implementation of the Regulation. The first “milestone”, 1995 to 1998, represented “the years of consolidation”, as the limitations of the ECMR were addressed by the Commission, introducing a “short form” for straightforward proposed concentrations, starting to assess the spill-over effects from the creation of “full-function joint ventures” and in order to reduce the need for multi-jurisdictional filings, establishing a second lower threshold, to trigger the Commission’s involvement and competence over transactions which covered three or more Member States. The Commission also adopted the Market Definition Notice, institutionalising the principle of market definition. The “increasing maturity, confidence and sophistication in the Commission’s substantive review” meant that appraisals of transactions became increasingly detailed.²⁸

; Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004.

²⁶ Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004: 195.

²⁷ Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004: 197.

²⁸ Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004: 205.

During this period, the Commission started to initiate a number of economic antitrust theories, prohibiting: eight proposed transactions, due to concerns about vertical effects; a merger of two platinum suppliers on the basis that they could establish oligopolistic dominance in the platinum market and also considered the possibility of conglomerate effects in several cases including *coca-cola Enterprises/Amalgamated Beverages GB*.²⁹ The first transatlantic differences concerning merger control policy became apparent in *Boeing/McDonnell Douglas*.³⁰ The United States Department of Justice (DOJ) felt that the proposed transaction did not require remedial action as the merger would not threaten the dynamics of the market, whereas the European Commission expressed concern over the reduction of global aircraft suppliers and the consequential strengthening of Boeing's position within the market. The Commission, therefore, only agreed to completion of the transaction on the condition that a series of remedies were implemented.

The years of controversy, 1994 to 2001, represented a "... forceful, confident, and creative approach to its application" of merger regulation.³¹ The Commission became more assertive, prohibiting several transactions, utilising a wide range of economic theories when assessing transactions and developing the principle of collective dominance. The Commission also began to evaluate transactions where the merging parties possessed less than 40% of the market share post merger as a possible situation of single-firm dominance. Proposed packages of remedial action, put forward by the merging firms after deadlines had passed, were ignored by the Commission. The transatlantic furore over the *General Electric/Honeywell (GE/Honeywell)*³² decision, highlighted the differing approaches to merger regulation,

²⁹ Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004:206. Case No. IV/M.794 *Coca-Cola Enterprises/Amalgamated Beverages GB*, OJ L218 (1997). Commission authorized Coca-Cola's acquisition of Amalgamated Beverages GB. Transfer would go to The Coca Cola Company (parent company), thus becoming vertically integrated into their soft drinks portfolio. Conclusion: would not increase dominant position or impede competition.

³⁰ Merger between two US aerospace giants. Approved by FTC. Only approved by EU after remedies promised by Boeing - cancel the contracts with US airlines.

³¹ Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004: 207.

³² Case No. M.2220 - General Electric/Honeywell. Proposed acquisition by General Electric of Honeywell Inc. Passed by FTC. Commission expressed concern that transaction would reduce

with US antitrust commentators and officials very vocal in their differing opinions. Reservations were expressed over the Commission's role as "investigator, prosecutor and judge in EU merger control".³³ As the ECMR had evolved, checks and balances had not developed at the same pace, making them less effective at monitoring the Commission's actions when appraising mergers. Lack of a swift judicial review, despite the introduction of the fast track procedure, was also seen as a negative feature of the existing framework.

The "years of reckoning and reform", 2002-2003 saw the adoption of the Green Paper on the Review of the Merger Control Regulation, which identified the need to reform merger regulation in order to meet the challenges of: global markets; Economic and Monetary Union (EMU); the completion of the Single Market and the increased interaction of national and supranational antitrust authorities. Levy's analysis outlined the relatively "modest" proposals of the Green Paper, which were revised as a consequence of the CFI reversing three of the Commission's decisions which prohibited concentrations from taking place. He also analysed the proposed revised Regulation and the accompanying Guidelines and Notices, illustrating how the proposed NMR differed from the ECMR and how the new substantive test bridged the "enforcement gap" between the US and UK SLC test. The NMR, rather than a judicial-led system, adopted a more flexible timetable, with Courts providing a speedier process of appeal.

Levy made several points and observations which remain pertinent, despite the recent revisions to the merger regulation framework. As the EU merger regulation framework has evolved, it has become "an integral part of the antitrust practice",³⁴ with a substantial amount of accompanying jurisprudence providing clarification on a variety of issues relating to the ECMR. The approach of the Commission towards the appraisal of mergers is transparent: all Commission

competition and ultimately raise prices for consumers, prohibited the transaction. (Prohibition upheld by the ECJ).

³³ Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004.

³⁴ Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004: 200.

decisions are published on the DG Comp website,³⁵ as are consultation documents. Finally, the focus upon the use of economic methodology by the MTF has encouraged the other Directorates within DG Comp to also utilise economic methodology. Although Levy's analysis of the evolution of EU merger policy has been rendered outdated by the entry into force of the NMR, and the Guidelines in 2004, this article remains an excellent source of information, outlining the main points of the ECMR, pinpointing the main issues and drivers which precipitated the revision of the original Merger Control Regulation. Levy's examination represents a step up from a narrative account to an in-depth analysis. Through utilisation of a comparative methodology in order to outline: the differing merger regimes; the identification of the principles which underpin EU merger regulation; the key developments and also the drivers which have shaped reform, he therefore provided analysis which can be built upon as the EU merger regime evolves.

The substantive test in EU merger control has proved to be the most contentious issue, both in practice³⁶ and when examined in the existing literature appraising merger control policy. Despite the fact that in 2000, the US prohibited a takeover of BOC by Air Liquide/Air Liquid³⁷ which had already been sanctioned by the EU, transatlantic divergence of attitudes towards the substantive test only became more apparent and vocal after the *GE/Honeywell* case,³⁸ "which came as a shock to the system", considering the extent of EU/US collaboration in competition policy.³⁹ This case is significant both because it illustrates the extent to which EU competition policy can affect "US-based multinational firms" and because it illustrates how two antitrust authorities, presented with the same information, came to diametrically opposed conclusions about the effects of the proposed merger upon

³⁵ Tillotson, J. & N. Foster, *Text, Cases and Materials on European Union*. Cavendish Publishing, (4th ed), 2004: 201.

³⁶ Selvam, V. S. V. The EC Merger Control Impasse: Is There A Solution To This Predicament. *E.C.L.R.*, 25(1), 2004: 52-67; Morgan, E. J. & S. McGuire, Transatlantic divergence: GE-Honeywell and the EU's merger policy. *Journal of European Public Policy*, 11 (1), 2004: 42.

³⁷ Case No COMP/M.1630 Air Liquide/BOC. This transaction involved the acquisition of BOC (UK) by Air Liquide (France) and Air Products(USA). These are all large gas producers. The Commission held jurisdiction over Air Liquide but not Air Products. This transaction was cleared (with substantial commitments) by the Commission but blocked by the FTC.

³⁸ Veljanovski, C. EC Merger Development after GE/ Honeywell and Airtours. *Antitrust Bulletin*, March 2004; Morgan, E. J. & S. McGuire, Transatlantic divergence: GE-Honeywell and the EU's merger policy. *Journal of European Public Policy*, 11 (1), 2004: 42.

³⁹ Burnside, A. GE, Honey, I Sunk the Merger. *E.C.M.R.*, 23(2), 2002: 107-110.

world markets.⁴⁰ Academic argument focused upon the need for the introduction of a uniform substantive test,⁴¹ because as Patterson and Shapiro⁴² noted, conflicting substantive tests increase transaction costs for the proposed merging parties and can damage the political consensus and agreement that underpin the evolving international competition framework.

Levy⁴³ also contrasted the main provisions of the ECMR with the US merger control framework, illustrating the differing standards of dominance, comparing the SLC to the DT, highlighting the fact that there were ways that Member States could become involved during the appraisal process, whereas in the US, there is no formal avenue for the states' involvement in the process. The ECMR was premised upon a strict timetable, requiring the submission of a detailed set of information at the outset of the appraisal and an administrative system, based around the MTF and Commission approval. The Courts could only be brought in to rule on a point of law whereas in the US, the timetable is more flexible, the information required at the outset of the merger investigation is only minimal and the system is not administrative but judicial: parties must persuade the Courts to permit the concentration to go ahead. Although the NMR has rendered some of the points outdated, it remains an interesting comparative account of the main points of the ECMR, presenting a comparative framework which can be built upon, examining how the new NMR differs from the ECMR, identifying the points on which the NMR converges with the US system of merger regulation.

The capabilities of, and gaps in, the DT have also been discussed in great detail.⁴⁴ There is a general consensus that the DT is capable of assessing vertical

⁴⁰ Morgan, E. J. & S. McGuire, Transatlantic divergence: GE-Honeywell and the EU's merger policy. *Journal of European Public Policy*, 11 (1), 2004: 42..

⁴¹ Morgan, E. J. & S. McGuire, Transatlantic divergence: GE-Honeywell and the EU's merger policy. *Journal of European Public Policy*, 11 (1), 2004: 42.

⁴² Patterson, D.E. & C. Shapiro, Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons. *Antitrust Magazine*, November 12, 2001.

⁴³ Patterson, D.E. & C. Shapiro, Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons. *Antitrust Magazine*, November 12, 2001: 200.

⁴⁴ Selvam, V. S. V. The EC Merger Control Impasse: Is There A Solution To This Predicament. *E.C.L.R.*, 25(1), 2004: 52-67; ⁴⁴ Veljanovski, C. EC Merger Development after GE/ Honeywell and Airtours. *Antitrust Bulletin*, March 2004; Fingleton, J. & D. Nolan, Mind the gap: Reforming the EU Merger Regulation, (in translation as: Mind the Gap. La riforma del

mergers as well as conglomerate mergers between two companies which make products that belong to the same family, which could be bundled together, thus enhancing the merged company's market power as its portfolio of products increased as a result of the merger. The DT is also capable of assessing collective dominant situations and preventing one merged company from dominating a market.

The literature, which examines the gaps or flaws of the DT, highlights its limitations when a major player possesses less than 40% of the market and thus cannot be considered "dominant" in the eyes of the EU. A "three to two merger" in this type of market will not necessarily allow one of the remaining firms to become dominant or control the market, but may allow one player to manipulate the market in the future.⁴⁵ Weitbrecht⁴⁶ agrees that the DT does possess limitations when it is used to appraise mergers which are based in markets which have a "high level of concentration even before the merger". The test for single firm dominance was appropriate when the proposed merger would create a "new market leader", but if the number of competing firms is reduced without establishing a new leader, the only way potential dominance could be assessed is to consider if all the firms, which include the merging parties, could create a situation of collective dominance within that particular market, which would result in a situation of "co-ordinated effects".⁴⁷ If the collusion between firms is tacit, then the conditions are laid down by the *Airtours*⁴⁸ judgment. Non-coordinated cooperation or collusion, however, was not covered by the original Merger Control Regulation. Thus a "gap in the

regolamento comunitario sulle concentrazioni), *Mercato Concorrenze Regole*, No. 2: 297-308, 2003.

⁴⁵ Selvam, V. S. V. The EC Merger Control Impasse: Is There A Solution To This Predicament. *E.C.L.R.*, 25(1), 2004: 52-67.

⁴⁶ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.*, 26(2), 2005: 67-74.

⁴⁷ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.*, 26(2), 2005: 67-74.

⁴⁸ Case T-342/99, *Airtours plc. v. Commission*, Judgment of the Court of First Instance of 6 June 2002. In this case the CFI overturned the Commission's decision to prohibit the acquisition of First Choice by Airtours on the basis that it would create a dominant oligopoly. The CFI found that the Commission had failed to find evidence of tacit collusion. The CFI provided a checklist for future cases. To identify cases of collective dominance the market must be transparent; the tacit collusion must be sustainable over time and the cooperation between competitors must not be threatened by new entrants into the market. (Lexecon, *Competition Memo: Airtours Case*, 1999: 1).

enforcement regime”⁴⁹ evolved as an unanticipated consequence of the ECMR. It was also debatable whether or not the:

“... EC may have lacked a legal basis to intervene below the level of single dominance. Indeed, there was uncertainty about the EC's power to prohibit mergers under a theory of unilateral effects at all.”⁵⁰

This strand of literature often compares the DT with the SLC Test, to illustrate where the US Test can fill the gaps. This analysis has become more useful as a tool of comparison in order to consider if the new substantive test has filled the gaps left by the original DT.

Literature examining the evolution of EU merger control evaluated the drivers for reform: the controversial decision in *GE/Honeywell*⁵¹ - where the Commission prohibited the merger which the US antitrust authorities had already agreed to - highlighted the transatlantic differences in merger control. The failures on the part of the Commission concerning the use of inadequate economic analysis, procedural problems⁵² and the impact these issues have had upon the subsequent reform of the merger framework, were also analysed in great detail.⁵³ Both these factors shaped and influenced the content of the Green Paper on Merger Reform published in December 2001⁵⁴ and can be identified as a series of critical junctures which shaped the future pathway of EU merger policy.

Examination of these pressures facing the DG Comp creates the majority of the politico-jurisprudential literature. This literature also speculates upon the possible detail of the reformed Merger Control Regulation in terms of the content of a revised substantive test, drawing comparisons with the US version.⁵⁵

⁴⁹ Weitbrecht, A. EU Merger Control in 2004 - An Overview. *E.C.L.R.* 2005, 26(2): 67-74.

⁵⁰ Baxter, S. & F. Dethmers, Unilateral Effects under the European Merger Regulation: How Big is the Gap. *E.C.L.R.*, 26(7), 2005: 380-389.

⁵¹ Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich.; Weitbrecht, A. EU Merger Control in 2004 - An Overview. *E.C.L.R.* 2005, 26(2): 67-74.

⁵² Weitbrecht, A. EU Merger Control in 2004 - An Overview. *E.C.L.R.* 2005, 26(2): 67-74.

⁵³ Editor, Commission loses Tetra Laval/Sidel Appeal. *EU Focus*, 2005: 2-4.

⁵⁴ Weitbrecht, A. EU Merger Control in 2004 - An Overview. *E.C.L.R.* 2005, 26(2): 67-74.

⁵⁵ Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich.

Although the Green Paper had been published before the CFI reversed three merger prohibition decisions, the points raised by the CFI, which criticised the procedures of the DG Comp, influenced the subsequent reform of EU merger policy. The most recent body of literature focuses upon assessment of the reform of EU merger policy, examining the recast Merger Control Regulation. Jones and Suftrin,⁵⁶ for example, provide an in-depth analysis of the evolution of EU merger policy, the purpose, pros and cons of a merger and the different types of merger. Details of the revised Merger Control Regulation are examined in detail in most EU competition policy monographs, as are the accompanying Guidelines, Notices and instances when the NMR cannot be applied - when the concentration lacks a Community dimension. The expanded referral system, flexible timetable, internal reform of the Commission, the introduction of a Chief Competition Economist and the abolition of the MTF, which was subsequently reorganised along sectoral lines, have all been examined.⁵⁷ Interestingly, the potential for a residual role for Articles 81 and 82 EC Treaty, are discussed, as is the potential for the expansion of private antitrust litigation as there is now potential for private individuals to challenge the compatibility of a concentration with Articles 81 and 82 in national courts,⁵⁸ and claim damages.

Examination of the SIEC Test, however, is the focal point for the majority of recent literature examining the evolution of EU merger regulation policy.⁵⁹ Most of the literature contrasts the "old" Article 2(2) with the new version. Roller and de la Mano,⁶⁰ for example, examine the impact of the new substantive test for the European Commission, contrasting the old version, outlined in the ECMR (Article 2(2)) which bars mergers which: "create or strengthen a dominant position as a

⁵⁶ Jones, A. & B. Suftrin, *EC Competition Law*. (2nd Ed.), OUP, 2004.

⁵⁷ Jones, A. & B. Suftrin, *EC Competition Law*. (2nd Ed.), OUP, 2004; Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich.

⁵⁸ Jones, A. & B. Suftrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 897.

⁵⁹ Baxter, S. & F. Dethmers, Unilateral Effects under the European Merger Regulation: How Big is the Gap. *E.C.L.R.*, 26(7), 2005: 380-389.

⁶⁰ Roller, L. H. & M. de la Mano, *The Impact of the New Substantive Test in European Merger Control*. European Commission, January 2006. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

result of which effective competition would be significantly impeded”, with the new Article 2(2). This modifies the original Article, stating that:

“A concentration which would significantly impede effective competition, in particular by the creation or strengthening of a dominant position, in the Common Market or in a substantial part of it shall be declared incompatible with the Common Market.”⁶¹

The original Article 2(2) is open to two interpretations:⁶² firstly mergers, which strengthen or create a dominant position, automatically hamper effective competition; secondly that the DT is a two-step test. “A concentration is prohibited” if it reinforces or creates a situation of dominance and there is evidence that this would significantly impede competition.⁶³ The original Article 2(2), therefore, is restricted by the emphasis placed upon the principle of dominance as a necessary prerequisite before a proposed concentration can be prohibited. As noted by Roller and de la Mano,⁶⁴ the Courts have reinforced the principle that the two tier interpretation of Article 2(2) is dependent upon the principle of dominance. The Commission restated this view, focusing upon the competitive effects of the proposed concentration: the effect it will have upon that particular market, rather than examining the effect the merger will have upon market share. The revised Article 2(2) does not rely on the principle of dominance as the only reason to prohibit a merger.⁶⁵ Fountoukakos and Ryan⁶⁶ argue that the SIEC fills the gaps left by the dominance test. The new substantive test “now contains not only a pure competition test but also one which is drafted in terms that reflect accurately the underlying objectives of competition policy”. The two-tier or limb test has been combined: the assessment now considers if the proposed transaction will impede

⁶¹ Roller, L. H. & M. de la Mano, *The Impact of the New Substantive Test in European Merger Control*. European Commission, January 2006.

⁶² Roller, L. H. & M. de la Mano, *The Impact of the New Substantive Test in European Merger Control*. European Commission, January 2006.

⁶³ Camesasca, P. D. The Explicit Efficiency Defence in Merger Control: Does it Make the Difference. *E.C.L.R.*, 20(1), 1999: 14-28; Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296.

⁶⁴ Roller, L. H. & M. de la Mano, *The Impact of the New Substantive Test in European Merger Control*. European Commission, January 2006.

⁶⁵ Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296.

⁶⁶ Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296.

competition but does not need to find dominance as required by the original test. They argue that the new test will enhance the efficacy of merger control, filling the gaps left by the dominance test. Weitbrecht,⁶⁷ citing Recital 25 of the NMR, notes that the purpose of the SIEC is to close the gap concerning unilateral effects, which came to light in the *Airtours* judgment, whilst maintaining the *acquis communautaire* established by existing case-law and Commission decisions.

The analysis of Baxter and Dethmers⁶⁸ of the new substantive test considers the application of unilateral effects analysis, as the SIEC gives the Commission a legal base from which to appraise transactions on the basis of: anticipated unilateral effects; how the SIEC compares to the DT; how the two coexist under the NMR and, finally, whether or not the threshold for intervention has been lowered as a consequence of the recast Merger Control Regulation. “Unilateral effects analysis is premised upon the oligopoly model” whereby dominance is not identified as a consequence of market share but as the potential of companies in the same market post-merger to manipulate prices and distort competition through “strategic interaction”, whereby competing firms consider or anticipate the action of their competitors before taking a course of action.⁶⁹ Single firm dominance is premised upon the monopoly model whereby one company can dominate the market by itself. Since it holds a monopolistic position it therefore does not need to consider its competitors’ actions.⁷⁰ Both these theories have a legal basis under the NMR, with Baxter and Dethmers⁷¹ citing several cases where either unilateral effect or the single firm dominance model are used to assess proposed transactions. They comment that:

“The co-existence of unilateral effects and single dominance under the EC’s case law is undesirable, as it increases legal uncertainty and

⁶⁷ Weitbrecht, A. EU Merger Control in 2004 - An Overview. *E.C.L.R.*, 2005, 26(2): 67-74.

⁶⁸ Baxter, S. & F. Dethmers, Unilateral Effects under the European Merger Regulation: How Big is the Gap. *E.C.L.R.*, 26(7), 2005: 380-389.

⁶⁹ Baxter, S. & F. Dethmers, Unilateral Effects under the European Merger Regulation: How Big is the Gap. *E.C.L.R.*, 26(7), 2005: 380-389.

⁷⁰ Baxter, S. & F. Dethmers, Unilateral Effects under the European Merger Regulation: How Big is the Gap. *E.C.L.R.*, 26(7), 2005: 380-389.

⁷¹ Baxter, S. & F. Dethmers, Unilateral Effects under the European Merger Regulation: How Big is the Gap. *E.C.L.R.*, 26(7), 2005: 380-389.

undermines the potential positive impact that a rigorous unilateral effects approach could have on the analysis of horizontal mergers.”⁷²

The Commission may apply either one of these theories to the appraisal of horizontal mergers, which may result in the outcome of the appraisal being very different than if the other theory had been used to assess the transaction. They also consider that the Commission will apply these theories opportunistically, for example, not utilising unilateral effects theory because a high proportion of market share is seen as indicative of single firm dominance. The incorporation of unilateral effect theory into the equation may actually negate the findings of single firm dominance, as has been the case in several appraisals.⁷³

The threshold for intervention was not supposed to change as a consequence of the entry into force of the NMR.⁷⁴ Baxter and Dethmers⁷⁵ argue that, both in theory and reality, the threshold for intervention has changed as a consequence of the revised Merger Control Regulation. Transactions which would not have been covered by the single or collective dominance analysis may now be subject to unilateral effects. The threshold for identifying unilateral effects is lower than single-firm dominance. Even if the merged entity does not hold a clearly dominant position within its respective market, the transaction may be prohibited on the basis that it is anticompetitive: a reduction of the number of competing firms will increase prices whereas single market dominance is measured in increased market share.

The literature which examines the new substantive test compares the DT with the SIEC, illustrating where the new substantive test fills the gaps left as an unanticipated consequence of the DT. This strand of literature, by focusing upon a central tenet of the old and new Merger Control Regulation, provides an in-depth

⁷² Baxter, S. & F. Dethmers, *Unilateral Effects under the European Merger Regulation: How Big is the Gap*. *E.C.L.R.*, 26(7), 2005: 380-389.

⁷³ Baxter, S. & F. Dethmers, *Unilateral Effects under the European Merger Regulation: How Big is the Gap*. *E.C.L.R.*, 26(7), 2005: 380-389.

⁷⁴ Baxter, S. & F. Dethmers, *Unilateral Effects under the European Merger Regulation: How Big is the Gap*. *E.C.L.R.*, 26(7), 2005: 380-389.

⁷⁵ Baxter, S. & F. Dethmers, *Unilateral Effects under the European Merger Regulation: How Big is the Gap*. *E.C.L.R.*, 26(7), 2005: 380-389.

analysis of the potential of the new test, analyses the potential gaps and uses several antitrust theories to test the efficacy and the potential for gaps in the new test.

As noted by Lyons,⁷⁶ the “globalization of industry” requires the filing of proposed mergers to be appraised by antitrust agencies in more than one country, thus precipitating the comparison of the agencies’ procedures, frameworks and ideologies. The potential for cooperation between differing agencies is also considered in terms of existing cross-national agreements concerning the appraisal of mergers and exchange of information.

There is a strand of literature which examines and contrasts EU/US Merger Control Regulations but this relates more to the original ECMR – The European Commission Directorate General for Competition International Bar Association, for example, held a conference in 2000 examining international merger control which included a panel on the comparison of EU and US Merger Control Regulations. This body of literature draws comparisons with Section 7 of the US Clayton Act which forms the basis of the US merger framework, the ideological differences between the EU and US merger regulation frameworks and the comparative longevity of the US system in comparison with the EU. The Sherman Act of 1890 marked the start of the evolution of the US competition law framework.⁷⁷ The Federal Trade Commission (FTC) was established and the Clayton Act entered into force in 1914, with the 1950 amendments and the 1992 Guidelines⁷⁸ adding to the evolving framework - compared to the EU system which only entered into force in 1990. The majority of the literature examines the difference between the ECMR and the US tests for the appraisal of mergers.⁷⁹ The original ECMR possessed a DT: Article 2(3) stated that:

⁷⁶ Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich.

⁷⁷ Fountoukakos, K. & Ryan, S. A New Substantive Test for EU Merger Control. *E.C.L.R.*, 26(5), 2005: 277-296.

⁷⁸ Camesasca, P. D. The Explicit Efficiency Defence in Merger Control: Does it Make the Difference. *E.C.L.R.*, 20(1), 1999: 14-28.

⁷⁹ Camesasca, P. D. The Explicit Efficiency Defence in Merger Control: Does it Make the Difference. *E.C.L.R.*, 20(1), 1999: 14-28; Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich; Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218: 202.

“A concentration [i.e. merger or acquisition] which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it shall be declared incompatible with the Common Market.”

The Clayton Act, Section 7, possesses a SLC test which prevented the purchase of the:

“stock or other share capital of another corporation . . . where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition”

As noted by Camesasca,⁸⁰ the appraisal criteria for the ECMR are much wider than both the Clayton Act and the U.S. Merger Guidelines. They aimed to achieve the goal of the EU: market integration, whilst the aim of the US merger regime is to protect the consumer.⁸¹ Although this argument has now been superseded by the insertion of the SIEC Test, it is useful to outline this discussion as it embodies a crucial aspect of the evolution of EU merger policy.

Other differences between the anti-trust frameworks highlighted in the existing literature include the examination of the differing institutions which police each respective framework. The EU system, prior to the 2004 reform, possessed a MTF, which had the competence to investigate all proposed mergers. The merger review had two phases, with very specific deadlines for the completion of each phase and all the European Commissioners made the final decision, based upon the decision of the MTF whether or not a merger should be permitted to proceed.⁸² The CFI and ECJ could become involved in the proceedings if parties involved in the proposed merger appealed, but this referral was limited to judicial review, the Courts considering, for example, if the Commission had used the correct economic model to draw its conclusions, rather than assessing the information per se. In

⁸⁰ Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218: 202.

⁸¹ Veljanovski, C. EC Merger Development after GE/ Honeywell and Airtours. *Antitrust Bulletin*, March 2004.

⁸² Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich: 5.

contrast, the US system is more Court-centred,⁸³ an integral part of the merger regulation framework. The Court is not restricted to judicial review, but considers the facts in hand and is involved from the initial notification. The parties and either the DOJ or FTC may negotiate a settlement, ironing out any anti-competitive effects the proposed merger may have. The parties concerned then present their case to the judge and the Supreme Court makes the decision whether or not the parties can merge.⁸⁴

The principle or notion of “efficiencies” is the final aspect of EU merger control to be examined in detail by existing literature. As noted by McGowan and Cini, there already exists an ever increasing body of literature, dominated by economic analyses, examining the efficiency tests.⁸⁵ The first wave of literature examined and highlighted how the ECMR could not take into account the efficiency defence when assessing mergers because “the wording ... does not leave scope for taking dynamic efficiencies into account once dominance is concluded upon”.⁸⁶ Now the DG Comp may consider the effect the proposed merger may have upon prices, for example, and consider the impact increased efficiencies - lowered costs for operation, pooling of transport facilities, economies of scale - may have as a trade off for the increased market share/possible dominant position. The Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Undertakings between Concentrations permit the impact of efficiencies to be considered by the DG Comp when considering if a concentration is permissible, whereas under the original ECMR, the Commission had restated that there was no means to justify taking into consideration the efficiency defence when conducting a merger investigation. The NMR and accompanying Guidelines explicitly permit the efficiency defence in the appraisal of mergers, which has

⁸³ Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich.

⁸⁴ Viscusi, W. P. & Vernon, J. M. & J. E. Harrington, *Economics of Regulation and Antitrust, Third Edition*. Massachusetts Institute of Technology, 2000: 209.

⁸⁵ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger control. *Governance: An International Journal of Policy and Administration*, 12,(2), 1999: 175-200.

⁸⁶ Camesasca, P. D. The Explicit Efficiency Defence in Merger Control: Does it Make the Difference. *E.C.L.R.*, 20(1), 1999: 14-28.

triggered the evolution of a strand of literature which is both standalone⁸⁷ and linked to a wider debate concerning the content of the NMR.⁸⁸

Of course there is a vast amount of literature which focuses upon case comments. This strand of literature assesses the Courts' conclusions, the evidence put forward by both the Commission and the merging parties and also reviews the Courts' decisions to determine whether or not the author of the case comment feels the conclusion was correct. This strand of literature also considers the impact that particular case will have upon the evolution of the merger regulation policy framework. The case comment, for example, examining the CFI's annulment of the Commission's decisions concerning *Tetra Laval/Sidel*⁸⁹ which had prohibited the merger and the Commission's subsequent appeal to the ECJ, outlines the background information to the case: which markets - carton packaging - are involved and the reasons why the CFI annulled the Commission's decision. The case comment also outlines and reviews the ECJ's decision to uphold the previous decision made by the CFI. Naturally all case comment related literature is different, focusing upon the specifics of that particular case. What is useful about the case focused literature relating to EU merger decisions is that this provides an excellent insight into policy in action and the critical junctures which shape the evolution of EU merger control policy.

The academic community which examines the evolution of EU merger regulation focuses upon the evolution of the framework of merger control at European level rather than examining the implementation of policy by the Commission. This analysis can be taken one step further through the examination of the application of recent Commission decisions and Court judgments. This new

⁸⁷ Luescher, C. Efficiency Considerations in European Merger Control – Just Another Battleground for the European Commission, Economists and Competition Lawyers. *European Competition Law Review*, 2, (25), 2004: 72-86.

⁸⁸ Ratcliff, J. Major Events and Policy Issues in EC Competition Law. *I.C.C.R.*, 15(2), 2004: 19-24.

⁸⁹ Commission prohibited the acquisition of Sidel by Tetra Laval on the basis that the combination of Tetra's dominant position in the carton packaging industry and Sidel's leading position in the plastic packaging equipment market would create a dominant position in the PET packaging market. (Rapid Press Release: Commission prohibits acquisition of Sidel by Tetra Laval. IP/01/1516. Available from:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1516>)

policy implementation-focused analysis will determine if the original conclusions are correct or need re-evaluating in the light of new empirical evidence. My thesis, therefore, adds a new dimension to the existing literature by firstly analysing how the application of the merger regulation framework by the Commission has altered as a consequence of the entry into force of the NMR and secondly by considering how the merger regulation policy landscape and governance regime have altered as the NMR has been interpreted and applied by the Commission.

1.3 Frameworks for Analysis & Methodology

This section will outline the frameworks used for the jurisprudential research, summarize the research methodology and present the arguments that the thesis does fulfil the originality requirements for the MPhil degree. The thesis will utilise both the black letter law approach and historical institutionalist analysis to examine the evolution of EU merger policy and the application of the NMR by the Commission.

1.4 Black Letter Law

The black letter approach to legal analysis does provide some of the tools needed to analyse the content of Merger Control Regulation legislation. Emerging during the period of Enlightenment of the late 18th Century, black letter law is influenced by the scientific, positivist and utilitarian discourse of authors, such as Bentham,⁹⁰ which was sweeping the social science movement throughout Europe during this time. Black letter analysis, premised upon legal formalism⁹¹ and objectivism,⁹² applies the same analytical techniques used in the natural sciences. Classification, methods of induction and deduction and rationalisation in order to elucidate the correct answer, all underpin the methods of black letter law theory. The black letter approach examines legal rules and principles scientifically, separating law from social and political imperatives, influences and factors, analysing the meaning and visible, formal, rather than

⁹⁰ S. Adelman, & K. Foster, Critical Legal Theory: The Power of Law, in Grigg-Spall, I. & P. Ireland, (Eds.) *The Critical Lawyers Handbook*. Pluto Press, 1992, 39-44.

⁹¹ S. Adelman, & K. Foster, Critical Legal Theory: The Power of Law, in Grigg-Spall, I. & P. Ireland, (Eds.) *The Critical Lawyers Handbook*. Pluto Press, 1992, 39-44.

⁹² Unger, R. M. *The Critical Legal Studies Movement*. Harvard University Press, 1986, 2.

substantive, element of the rules and procedures as laid down in treaties, constitutions, laws or jurisprudence. Black letterism focuses upon the intention rather than the impact of the system, legal process or legislation. Black letter methodology is part of the legal science discourse: conclusions can be drawn by the categorisation of legal rules and concepts.

The black letter approach is used to categorise the details of the Merger Control Regulations in order to determine to which category the legislative provisions belong. The subsequent results can then be placed within a wider context to determine how the NMR differs from the original Merger Control Regulation.

1.5 Historical Institutionalism

Although this thesis is primarily focused upon the legal aspects of the EU merger regulation framework, the thesis takes a multi-disciplinary approach to the analysis of EU merger regulation. The historical institutional methodology evolved as a reaction to the epistemological, theoretical and ideological debates and differences which cluttered the analysis of EU politics⁹³ and legal framework in the 1980s and 1990s. The historical institutional framework of analysis is used to pinpoint changes in normative dimension, institutional change, evolution of policy and systemic change.⁹⁴ The term evolution is used as a tool to describe how the policy under evaluation has become institutionalized through a “logic of institutionalization”.⁹⁵ As Stone Sweet and Sandholtz point out,⁹⁶ as actors and institutions interpret, apply and “... encounter the limits of ...” rules, a loop of institutionalisation emerges. New actors are drawn into the policy process in order to adjudicate. As unanticipated gaps in policy develop, new legislation is constructed to fill these gaps, thus

⁹³ Almond, G.A. *Discipline Divided Schools and Sects in Political Science*. Sage, 1990.

⁹⁴ Bulmer, S. J. History and Institutions of the European Union, in Artis, M. and N. Lee, (Eds.) *The Economics of the European Union*. Oxford University Press, 1997, 1-32; Bulmer, S. J. Setting and Influencing the Rules, in D. Mayes, (Ed.) *The Evolution of the Single European Market*. Edward Elgar, 1997, 30-48, 32.

⁹⁵ Stone Sweet, A. & W. Sandholtz, Integration and Supranational Governance, in Sandholtz, W. & A. Stone Sweet, *European Integration and Supranational Governance*. OUP, 1998: 17.

⁹⁶ Stone Sweet, A. & W. Sandholtz, Integration and Supranational Governance, in Sandholtz, W. & A. Stone Sweet, *European Integration and Supranational Governance*. OUP, 1998: 17.

policy evolves.⁹⁷ It is not static but gradually develops and changes as the rules are (re)interpreted and applied by the relevant actors and new sign-post legislation is subsequently established in order to fill the gaps and improve the existing policy, to ensure it is compatible with existing ideological discourse.

Analysis of systemic change⁹⁸ gives the researcher an insight into which actors and institutions have shaped the evolution of a specific policy, as looking backwards to the roots of a policy can assist understanding of its future direction. In this case, analysis of the evolution of merger regulation policy illustrates how a cohesive framework is relatively new in comparison to other strands of competition policy. Examination of systemic change also enables the researcher to pinpoint critical junctures and analyse how and why policy has changed. Within the analysis of case-law, decisions and examination of the shifting power relations between the different institutions, the thesis has identified the changing institutional configurations, paradigmatic shifts in the normative dimension and pinpointed the critical junctures which provide signposts for the trajectory of policy.

Analysis of the evolution of policy allows for identification of the toolkit used by the Commission to investigate transactions and pinpoint how this toolkit has changed as a consequence of the entry into force of the NMR. The researcher can also examine the “iterative” process of policy-making through the development of governance regimes.⁹⁹ By tracing the involvement of policy and political actors who have participated in this process, it is possible to determine how a governance regime has been constructed around the merger regulation policy arena and how the dynamics have changed as the system has become more adversarial in nature. Examination of the normative dimension provides an insight into the direction policy may take in the future and permits

⁹⁷ Stone Sweet, A. & W. Sandholtz, *Integration and Supranational Governance*, in Sandholtz, W. & A. Stone Sweet, *European Integration and Supranational Governance*. OUP, 1998: 17.

⁹⁸ Bulmer, S. J. *New Institutionalism, The Single Market and EU Governance*. *Arena Working Papers*, WP 97/25.

⁹⁹ Bulmer, S. J. *New Institutionalism, The Single Market and EU Governance*. *Arena Working Papers*, WP 97/25.

the researcher to consider what factors may have precipitated this paradigmatic shift in the norms and values of a policy community.

1.6 Research Methodology

The research for the thesis has been qualitative rather than quantitative. There has been no need for field work as the information needed for the thesis can be accessed via e-journals, the World Wide Web or inter-library loan. Research, therefore, has been desk based. Primary sources, for the two substantive chapters, were accessed via the EU competition policy website, and include the texts of the Merger Control Regulations, Commission decisions on merger cases, speeches given by Competition Commission officials and Green papers. The secondary sources used include *European Voice*, to gain an insight into the forces and influences which shape the formulation of EU merger policy and reaction to CFI judgments. The EU legal journals, accessed via Lexis Nexis and Westlaw provided analysis and details about recent merger case law. Existing academic monographs were also used to gain background information concerning EU merger policy as were conference papers accessed from the Universities' websites, such as the Centre for Competition and Regulation, which is held at the University of East Anglia.

1.7 Originality

The principle of originality provides the distinction between the MPhil and MA degree by research. The MPhil must add a new dimension to the existing literature which analyses that particular subject. Although there is already a body of literature which examines the finite details and evolution of EU merger control, this thesis takes the analysis one step further by analysing how the Commission has operationalised the recast Merger Control Regulation.

The thesis examines the evolution of the EU merger regulation regime and analyses recent examples of the application of the NMR by the Commission in order to evaluate if the entry into force of the NMR represents a change in direction for the EU merger regulation framework.

The thesis analyses jurisdictional, substantive and procedural issues, in order to consider if the evolving procedural and ideological dynamics have altered direction as a consequence of the entry into force of the NMR or, if the application of the New Regulation by the Commission represents a natural continuation of the path dependent policy established by the original Regulation as amended by the 1997 Regulation. The changing role of the Commission in both the EU and international Merger Regulation framework was also evaluated, as was the environment within which Commission decisions are taken.

By bringing together and updating existing literature, utilising a comparative framework of analysis, the thesis adds a new dimension to the existing literature examining EU merger regulation policy. Analysis of recent application of the recast NMR by the Commission provides an avenue through which the thesis can lay claim to academic purchase and adds a new dimension to the existing literature.

The two substantive chapters of the MPhil are linked together by the systematic analysis of the EU merger regulation framework, its application by the Commission and the direction taken by the merger regulation framework. The first substantive chapter will provide a synthesis and analysis of the gradual evolution of the EU merger regulation framework as a response to the emergence of a global market and the consequential need to reduce both the demand for multiple notifications and the transaction costs for merging parties. This chapter will highlight the evolving governance regime, the changing dynamics within this regime and illustrate the unanticipated gaps that emerged as a consequence of the application of the original Merger Control Regulation by the Commission. This chapter will also illustrate how the revised merger framework and the accompanying non-legislative reforms fill the unanticipated gaps and provide clarification of some aspects of the original Regulation.

The second substantive chapter will provide an appraisal of the application of the revised, recast Merger Control Regulation by the Commission, examining if and how the entry into force of the NMR and its subsequent application have altered the dynamics of the EU merger regulation regime. This chapter will

consider if the revised Regulation has increased the flexibility of the framework in relation to: the referral system; the stop-the-clock procedure and revised notification proceedings. Analysis of the application of the substantive test will examine whether or not the introduction of this new test will result in continued use of dominance by the Commission, as the reason to prohibit a merger. This chapter will consider if the introduction of the new test will result in the use of effect-based analysis during merger investigations. The chapter will also examine ancillary restrictions in order to analyse the possibility that the Commission's application of these principles has altered as a consequence of the entry into force of the NMR. The thesis will place the Commission's actions/influence within an international context in order to examine the functions and position of the Commission both within the EU merger regulation regime and within the international merger regulation/competition regime.

Factors over which the Commission has little or no control can also influence or hinder the application of the NMR. The impact of judicial review, the counter effect of protectionist Member States and the influence of the media and Public Relation agencies upon the merger review/regulation process will all be examined in order to consider to what extent, and how, these factors have become institutionalised in the merger regulation policy governance regime and how they shape or influence the application of the NMR by the Commission. The conclusion will re-state the main points of each chapter to consider whether or not the application of the NMR by the Commission will result in a radical reshaping of the existing merger regulation framework.

As many of the changes to the system of Merger Control Regulation have yet to crystallise or be translated into concrete decisions, the impact of the changes, therefore, cannot be fully assessed. Initial assessment of the direction of merger policy, however, can be conjectured through analysis of the Commission's recent decisions.

CHAPTER 2: THE EVOLVEMENT OF A EUROPEAN DIMENSION TO MERGER CONTROL

2.1 Introduction

The aims of this chapter are to provide an overview, an update and synthesis of the evolution of EU merger control in order to illustrate to what extent the original ECMR differs from the recast Merger Control Regulation and to outline the main provisions of both. This chapter will provide an evaluation of the evolution and the incremental establishment of a European merger regulation framework.

2.2 Evolution of a Framework of Merger Control

The evolution of a framework of Community-wide merger control has been slow and incremental in nature. The evolving merger policy community contains actors who differ in their visions for the future and for the potential framework of merger regulation. As a consequence, these divisions have hindered (or shaped) the development of the merger control policy regime. This regime highlights, reflects and represents a microcosm of the tensions between the supranational and national actors within the EU as a whole, as, on the one hand, the national actors seek to hold on to key policy areas whilst on the other hand, the Commission aims to acquire more competence. The European Coal and Steel Community Treaty (ECSC) contained provisions (Articles 65 and 66) which explicitly regulated mergers. Article 66 ECSC required the Commission when authorizing any merger concerning coal and steel companies, to ensure that the:

“... proposed transaction will not give ... [those] ... concerned the power ... to determine prices, ... to hinder effective competition in a substantial part of the market, or to evade the rules of competition instituted under this Treaty ... by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets”¹

The Spaak Report anticipated the need for merger control: “it will be necessary to prevent ... the absorption or domination of a market for a production by a single enterprise ...”.² Although the subsequent Treaty, the Treaty of Rome (the European Economic Community Treaty (EEC, now EC Treaty)), did retain an

¹ Cited by Fountoukakos, K. & S. Ryan, A New Substantive Test for EU Merger Control. *E.C.L.R.* 26(5), 2005: 277-296.

² Fountoukakos, K. & S. Ryan, A New Substantive Test for EU Merger Control. *E.C.L.R.* 26(5), 2005: 277-296.

obligation set out in Article 3(G) to institute "... a system ensuring that competition in the Common Market is not distorted", it did not, however, contain an explicit provision for merger control similar to Article 66 ECSC.³

As McGowan and Cini⁴ pointed out, the two Treaties were "radically different". The ECSC "is ... *traite-loi*", aimed at establishing a regulatory framework for identifiable industries: coal and steel. The intention of the ECSC was to repair Franco-German relations after World War Two and to tie Germany into a set of supranational institutions which would prevent a repeat conflict. Merger control was an integral and essential part of the Treaty. The EC Treaty, however, is "*traite-cadre*", establishing a framework which requires secondary action to achieve its aims.⁵ The lack of merger control provisions in the EC Treaty became apparent immediately, but the Council of Ministers did not want to endow the Commission with any more competence in this area.⁶ Articles 81 (ex. Art. 85) and 82 (ex. Art. 86) are the pillars of EU competition policy which are in essence "an economic constitution".⁷ Articles relating to competition policy - 81 to 86 EC Treaty (ex. Arts. 85 to 90) - focused upon the regulation of cartels and the abuse of dominance. Jones and Sufirin argue that lack of a legal basis to regulate mergers was due to the fact that the "concentration of economic power rather than the prohibition of mergers was thought to be the best way of achieving the objectives of economic expansion set out in Article 2".⁸ The Commission acknowledged, straight after the entry into force of the EC Treaty, that it lacked the provisions to regulate mergers or joint ventures which may create or possess anti-competitive

³ Fountoukakos, K. & S. Ryan, A New Substantive Test for EU Merger Control. *E.C.L.R.* 26(5), 2005: 277-296.

⁴ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 175-200, 178.

⁵ Bulmer, S. J. 1994, 423-4, quoted by McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 175-200, 178; Jones, A. & B. Sufirin, *EC Competition Law*. (2nd Ed.), OUP, 2004.

⁶ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 175-200, 178.

⁷ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 175-200, 177.

⁸ Jones, A. & B. Sufirin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 707, quoted by S. V. Selvam, The EC Merger Control Impasse: Is there a solution to the predicament? *E.C.L.R.*, 25 (1), 2004: 52-67.

effects which would damage that particular market by establishing a monopolistic or oligopolistic situation.⁹ Council Regulation 17, which entered into force in 1962, endowed the Commission with competence “to police Arts. 81 and 82” but does not appear to be applicable to the policing of concentrations.¹⁰ In the 1966 Memorandum on the Problems of Concentration in the Common Market¹¹ the Commission stated that Article 82 may be operationalised to “regulate concentrations,”¹² but made it clear that Article 81 remained inapplicable to merging parties.¹³

The *Continental Can* (1973) judgment established the foundations of the quasi merger regulation framework.¹⁴ This case involved Continental wanting to purchase its main competitor in the packaging market. Although the ECJ annulled the Commission's decision that Europemballage and Continental Can could not merge, on the basis that the Commission had utilised inadequate economic analysis when analysing the packaging market, the Court, however, did support the Commission's use of Article 82, due to the potential effect the merger may have upon the *structures* of the market. The ECJ stated that “any structural measure may influence market conditions, if it increases the size and the economic power of the undertaking”.¹⁵ The Court agreed with the Commission, establishing that in certain circumstances a firm holding a dominant position could abuse its status as market leader when entering into a merger or taking over another company.¹⁶ Although this ruling did provide clarification for the Commission, it didn't compensate for the

⁹ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 707, quoted by S. V. Selvam, The EC Merger Control Impasse: Is there a solution to the predicament? *E.C.L.R.*, 25 (1), 2004: 52-67.

¹⁰ Fountoukakos, K. & S. Ryan, A New Substantive Test for EU Merger Control. *E.C.L.R.* 26(5), 2005: 277-296.

¹¹ COM, Memorandum on the problem of concentration in the Common market, *EEC Competition Series* No. 3 1966, Para 58.

¹² McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 175-200, 179; COM, *EEC Competition Series Study*, No.3, 1966.

¹³ Fountoukakos, K. & S. Ryan, A New Substantive Test for EU Merger Control. *E.C.L.R.* 26(5), 2005: 277-296.

¹⁴ Case No 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, (1973) ECR 215; McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 175-200.

¹⁵ Case No 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, (1973) ECR 215, at 243.

¹⁶ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 175-200, 179.

lack of any substantial merger regulation framework upon which the Commission could rely. Article 82 had only limited potential for the regulation of mergers, as it could only be used if the firm already held a dominant position within the market. The framework was not pre-emptive but re-active and so could not be used to assess the merits or disadvantages of a proposed merger.¹⁷ Only cases of possible abuse of dominant position could be investigated.¹⁸ This:

“... ruling [therefore] left a serious anomaly in EEC law for a merger involving at least one firm in a dominant position might be prohibited under Article 86 [now Article 82] whereas a merger between a small number of equal size firms would contravene no law even if it created a 100% monopoly”.¹⁹

Due to the limitations of Article 82, the Commission did not apply this Article to many investigations after the *Continental Can* case.²⁰ After this judgment, the Commission presented its first proposal for a Merger Control Regulation in 1973 premised upon Articles 83 and 235, but the Council failed to make a decision due to divisions concerning the extent to which “non-competition considerations should be taken into account.”²¹ National political imperatives and influences coupled with the world wide oil crisis and subsequent recession precipitated opposition from France, UK and Germany at Council level due to their determination to ensure national competence was retained over merger regulation. Three further revised Merger Control Regulation proposals were presented by the Commission to the Council in 1981, 1984 and 1986.²²

The issue of the need to regulate the market became apparent with the incremental establishment of the single market. Although the 1985 White Paper *Completing the Internal Market*²³ did not mention the need for the establishment of

¹⁷ Arnall, A. et al. *Wyatt & Dashwood, European Union Law*, Sweet & Maxwell, 2002: 651.

¹⁸ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 175-200, 179; Arnall, A. et al. *Wyatt & Dashwood, European Union Law*, Sweet & Maxwell, 2002: 651.

¹⁹ Fishwick, F. *Making Sense of Competition Policy*. Kogan Page, 1993: 115.

²⁰ Arnall, A. et al. *Wyatt & Dashwood, European Union Law*, Sweet & Maxwell, 2002: 651.

²¹ Fountoukakos, K. & S. Ryan, A New Substantive Test for EU Merger Control. *E.C.L.R.* 26(5), 2005: 277-296; Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 855.

²² Fountoukakos, K. & S. Ryan, A New Substantive Test for EU Merger Control. *E.C.L.R.* 26(5), 2005: 277-296; Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 855.

²³ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 179.

a formalised, coherent framework, due to the proliferation and exponential growth of crossnational mergers, acquisitions and joint ventures, it became apparent to all concerned that some framework of regulation in this area was necessary.

In the period running up to the establishment of the 1989 Regulation, the ECJ was brought back into the equation with the *Philip Morris* case.²⁴ BAT and RJ Reynolds had brought a complaint to the Commission concerning the agreement between Philip Morris and Rembrandt. This agreement gave Philip Morris control over one of Rembrandt's subsidiaries and also gave them first refusal over Rothman International's shares. Following an investigation by the Commission, the Commission insisted that the agreement should be altered. Philip Morris appealed, but the ECJ not only upheld the Commission's decision but also pointed out that concentrations which were established as a consequence of agreed share transactions could be classified as restrictive agreements. In the *BAT*²⁵ case the Court concluded:

“Although the acquisition by one company of an equity interest in a competitor does not itself constitute conduct restricting competition, such an acquisition may nonetheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market in which they carry on business”.

Restrictive agreements would, therefore, be brought under Article 81 (which is concerned with the prohibition of restrictive practices), giving the Commission the competence to “intercede in so-called ‘friendly mergers’”.²⁶ The Commission utilised this interpretation of Article 81 to force British Airways to give up some of its flight paths to its competitors after it had taken over British Caledonian.²⁷

²⁴ Fountoukakos, K. & S. Ryan, A New Substantive Test for EU Merger Control. *E.C.L.R.* 26(5), 2005: 277-296.

²⁵ Cases 142 and 1586/84 *BAT Ltd and R.J Reynolds Inc v. Commission and Philip Morris*, E.C.R. 4487[1987] 2 CMLR 551. Morris was going to purchase 50% share of Rothmans. Due to competitors' complaints, the share was reduced to 30.8% with only 24.9% voting rights and no representation on Rothmans' Board (which the Commission was agreeable with). The complainants (BAT and RJ Reynolds) challenged the Commission before the ECJ. The ECJ stated that friendly agreements could be seen as restrictive and impede competition. (Rodger, B. J.& A. MacCulloch, *Competition Law and Politics*. Routledge/Cavendish, 2004: 205).

²⁶ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999: 180.

²⁷ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999.

The incremental accrual of powers by the Commission to regulate mergers, joint ventures and acquisitions did not offset the lack of a formal framework to regulate these transactions. The de-facto framework which emerged as a consequence of sporadic jurisprudence did not engender support or confidence from European industry. The business community was concerned at the possible abuse of dominant position by market leaders which would result in the market being monopolised and distorted. The decision "did not clearly delineate the scope of Article 85(now Art. 81) of the EEC Treaty and therefore left open the possibility that it was applicable to all mergers".²⁸ National industry organisations, therefore, increased pressure on national governments to work together to establish a comprehensive transnational framework of merger regulation.²⁹

Just two weeks after the Philip Morris case, on 17th November 1987, the Council permitted the Commission to construct a new draft Merger Control Regulation. The fifth draft Merger Control Regulation was finally presented to the Council of Ministers in March 1988. The main bones of contention related to: the transference of competence from national to supranational institutions; the lack of clarity between the powers held by national and supranational competition authorities; how much competence the supranational authorities would hold and how the concentrations should be assessed.³⁰

2.3 Details of the ECMR

The final draft of the Regulation was agreed upon by the Council on 21st December 1989 and entered into force on 21st September 1990. After a "long history of failed proposals",³¹ a formalised framework of merger control was finally established. This Regulation - the first European-wide Regulation - established the foundations and path dependent structures of merger policy. The legal basis for this

²⁸ Coate, M. B. Economics, the Guidelines and the Evolution of Merger Policy. *The Antitrust Bulletin*, 37, 1992, 1033, cited McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 180.

²⁹ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999.

³⁰ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 181.

³¹ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

Regulation is Articles 83 and 235 EC Treaty. Whilst this Regulation laid out the “jurisdictional, procedural and substantive rules, Regulation 447/98 established the rules of procedure”.³² This Regulation allowed the Commission competence over any “concentration” which possesses a “Community dimension”,³³ established a pre-notification system,³⁴ the DT³⁵ and a strict investigative timetable.³⁶ The purpose of the Merger Control Regulation was “to permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations”. The ECMR, as with the recast, revised versions, does not only regulate mergers but also joint ventures and acquisitions.³⁷ The Competition Commissioner at that time, Leon Brittan, succinctly summarised the Merger Control Regulation:

“All mergers with a Community dimension will benefit from the one-stop-shop regime. A large European merger which had to be hawked around several European capitals for approval and consideration also had to be given to the precise scope of Articles in this field, on the basis of two judgments of the European Court. Now we have the policy right and we have clarified the procedures and the substantive rules.”³⁸

Intervention was only triggered if there was a European dimension to the merger. In the draft Regulation submitted by the Commission the thresholds were set at between ECU 1 and 10 million. States with no national legislation, such as Luxembourg, wanted lower thresholds whilst Member States, such as the UK, wanted higher thresholds so they could maintain influence and regulate larger mergers, preserving some semblance of economic sovereignty in this area. The higher threshold requirement ensured that fewer mergers were brought under the jurisdiction of the Commission.³⁹ The thresholds for intervention were clearly defined in the ECMR. The firms involved have an aggregate world wide turnover

³² Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.) OUP, 2004: 859.

³³ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004.

³⁴ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004.

³⁵ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004.

³⁶ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004.

³⁷ Commission Notices on the Guidance on the Concept of Concentrations then provides more detailed explanation.

³⁸ Brittan, L. The Law and Policy of Merger Control in the EEC, *E. L Rev.* 5, 357, 1990.

³⁹ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 182.

of more than ECU 5 billion,⁴⁰ each of at least two of the firms involved had to have an aggregate turnover of more than ECU 250 million and at least one of the undertakings involved had to have more than two-thirds of its aggregate EU-wide turnover within one Member State.⁴¹

Other issues of contention related to cases being brought back under the jurisdiction of national competition authorities. The German government was insistent that in cases where a proposed merger would have consequences for a national market there must be a provision for mergers to be referred back to the national authorities. Article 9 colloquially referred to as the "German clause" was inserted. The German Federal Cartel Office was the first authority to submit four submissions to the Commission requesting that these mergers be repatriated to be examined by their own authorities (these were refused by the Commission). Article 22(3), the "Dutch clause" permitted Member States to ask the Commission to conduct investigations on their behalf, even if the merger did not contain a European dimension and so did not fall within the Commission's jurisdiction. This clause has been invoked most frequently by Member States who have weak or no merger regulation frameworks.⁴²

The bedrock of the ECMR was Article 2(3) which established the DT. The article stated: "a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market shall be declared incompatible with the Common Market".

The Council of Ministers and European Parliament remained marginal in the competition policy making process. "At the institutional heart of EU competition policy sits the European Commission ... and European Courts".⁴³ Interaction between the Commission and Courts shaped the pathway of competition policy.

⁴⁰ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999.

⁴¹ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999

⁴² McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 182.

⁴³ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999. 177.

Regulation 176/62 established the Commission as the pivotal actor in competition policy, the implementer and guardian of merger policy. The responsibility for merger investigations was placed with the MTF, four units, without any specific specialisation, placed within the then DGIV, now the Competition Commission.

The investigation was conducted in two phases, premised upon a very strict timetable, ensuring that the final decision was taken in five months or less. Three specific questions: "whether the notified concentration falls within the scope of the regulation, ... its compatibility with the Common Market [and] whether or not it creates or strengthens a dominant position in the Common Market"⁴⁴ were considered by the Commission.

After notification of the proposed merger, the Commission started its investigation. Phase 1 took four weeks, during which time the merging parties ceased negotiations, in case the Commission rejected the proposed merger, which would then require a divestiture. The Commission then presented their report to the Advisory Committee on Concentrations. The Committee considered its opinion then presented its findings to the Commission. The proposed merger could be: sanctioned, determined to be outside EU jurisdiction or subjected to more investigation - Phase II. Article 8 of the ECMR permitted a further four month investigation to be held, with the outcome resulting in: the concentration being permitted to proceed; continuation but with conditions attached or the proposed merger prohibited.

During the early 1990s, the German Federal Office lobbied for the introduction of an independent European Cartel Office, due to increasing distrust and antipathy to the Commission holding all the main cards and control over the merger policy framework. As this proposal was quickly dismissed during the 1996

⁴⁴ Commission of the European Communities, *22nd Report. on Competition Policy 1992*, COM (93) 162 Final, 130, Brussels, 5 May, 1993, quoted McGowan, L. & M. Cini, McGowan, L. & M. Cini, *Discretion and Politicization in EU Competition Policy: The Case of Merger Control. Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 183.

IGC, focus for reform was placed upon the threshold limits and the shift of competencies between national and supranational institutions.⁴⁵

The Council had opposed the reduction of the threshold in the 1993 review, despite support from the business community. Regardless of this opposition, the Commission declared its intention to review the threshold limits, which it did in 1996, after extensive consultation with representatives from the European business community, presenting its report in the 1996 Green Paper on the Review of the Merger Control Regulation.⁴⁶ This proposal would have drawn crossnational transactions which had the potential to detrimentally affect European markets but just fell below the threshold limit within the jurisdiction of the Commission. This proposal would have enhanced the competence of the MTF and reduced the thresholds of ECU 5 billion and 250 million to ECU 2 billion and 100 million respectively.⁴⁷ Several Member States, however, opposed the reduction of the thresholds.⁴⁸ The final proposal presented to the Council by the Commission was much more restrained. Under this proposal the two-thirds rule remained the same and the thresholds were slightly reduced, whilst focus was placed upon the need to reduce multiple filings.⁴⁹ The Commission suggested that if a proposed transaction fell below the threshold but at least three Member States needed to be informed, the Commission should investigate the merger. The final Resolution agreed upon by the Council in 1997⁵⁰ did not revise the threshold limits which remained the same as outlined in the 1989 Regulation. It did, however, permit the Commission to intervene if the combined turnover of all companies involved was over ECU 100 million in three or more Member States. This Regulation did introduce the “two-third rule” whereby if an “undertaking” achieves two-thirds of its “Community turnover” in one Member State, then it did not fall within the jurisdiction of the

⁴⁵ McGowan, L. & M. Cini, McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 183: 194.

⁴⁶ Commission of the European Communities, *Green Paper on the Review of the Merger Regulation*, COM(96) Final 721, Brussels, 31/01/1996.

⁴⁷ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 195.

⁴⁸ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 195.

⁴⁹ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999.

⁵⁰ EUR-Lex, Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ L 180, 09/07/1997, 1-6.

Commission.⁵¹ The Commission issued Guidance Notices clarifying the meaning of concentration and calculation of turnover.⁵²

As noted by Soames,⁵³ until 2002, despite the fact that the number of merger investigations increased dramatically, with investigations raising the profile of the Competition Commission, only one decision was annulled by the CFI: *Kali and Salz*.⁵⁴ Between 21st September 1990 to December 2003, 2399 cases were notified to the Commission, 2125 were declared compatible and 18 were prohibited. The rest were either referred back to the Member States, did not come under the scope of the Regulation or were subject to remedies.⁵⁵ As pointed out by Levy,⁵⁶ the Commission adopted an informal approach to the application of the Merger Control Regulation, entering into informal pre-notification meetings to explain procedures, gather preliminary information related to markets and clarify existing jurisprudence. In 2002, however, the CFI annulled three Commission merger decisions: *Airtours*,⁵⁷ *Schneider*⁵⁸ and *Tetra Laval*.⁵⁹ The CFI overturned the *Airtours* decision on the basis that the Commission had interpreted the facts of the case

⁵¹ EUR-Lex, Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ L 180, 09/07/1997, 1-6.

⁵² EUR-Lex, Commission Notice on the meaning of Concentration OJ C 66/5, 1998; Commission Notice on calculation of turnover OJ C 66/25, 1998.

⁵³ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

⁵⁴ Joined Cases C 68/94 & 30/95, *France v The Commission*, [1998] E.C.R. I-1375.

⁵⁵ Commission, Council Regulation 4064/89 Statistics. Available from: <http://ec.europa.eu/comm/competition/mergers/cases/stats.html> (Accessed 17/10/06)

⁵⁶ Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218, 201.

⁵⁷ Case T-342/99, *Airtours plc. v. Commission*, Judgment of the Court of First Instance of 6 June 2002.

⁵⁸ Cases T-310/01 and T-77/02, *Schneider Electric v. Commission*, Judgments of the Court of First Instance of 22 October 2002. In 2001 the Commission had prohibited a merger between Schneider and Legrand SA as it would impede competition in certain electricity markets. Schneider appealed to the CFI. The CFI dismissed the Commission decision in two judgements: the first (*Schneider I*) the decision to prohibit the concentration and the second (*Schneider II*) requiring Schneider to divest LeGrand on the basis that the Commission had infringed Schneider's defence rights by not outlining its true objections to the transaction in the SO. (Howery, *Antitrust Update*. July 2007, Available from: http://www.howrey.com/files/News/650e6e2d-ffbf-4cde-875b-f63b08d743ec/Presentation/NewsAttachment/b8ebb360-a3e3-4911-afa5-c5b0d86fdaa7/clientalert_schneider.pdf).

⁵⁹ Case T-5/02 and Case T-80/02 *Tetra Laval BV v Commission*, Judgment of the Court of the First Instance, 25 October 2002. The Commission had prohibited the acquisition of Sidel by Tetra Laval BV and ordered the divestment of Sidel. The Commission found the transaction would increase Tetra Laval's already dominant position in the polyethylene terephthalate (PET) packaging market. The CFI overturned the Commission's decision on the basis that the Commission had overestimated the possible distortion to the market as a consequence of the transaction. Howery Europe *Antitrust Client Alert*, August 2002. Available from: <http://www.howrey.com/files/News/ac794c7d-786c-4f05-9933-07348d4674da/Presentation/NewsAttachment/96167459-99df-4c67-b5b6-29c2ec5e86b1/ClientAlert20020820.pdf> [Accessed 24/08/08].

incorrectly, *Schneider* on the basis that the Commission had committed “several obvious errors, omissions and contradictions”,⁶⁰ when applying the Merger Control Regulation to this case which “infringed Schneider’s defence rights”⁶¹ and overturned the *Tetra Laval* decision on the basis that the Commission had overestimated the possible distortion of competition. The incorrect application of the ECMR by the Commission resulted in three high profile court cases which in essence criticized the application of the ECMR by the Commission.

The need for merger reform had been mooted as early as 1998 with the Commission stating that:

“... competition policy must adapt to the economic realities of the contemporary world Present legislation and practice are still rooted in the early years Despite periodic alterations it seems clear that legislation is out of step with the requirements of an effective policy”⁶²

Article 1(4) of the ECMR required the Commission to present a review of the jurisdictional thresholds in 2000.⁶³ In the Report to the Council on the application of the Merger Control Regulation Thresholds,⁶⁴ the Commission asserted that a large number of crossnational transactions had still not been brought under the jurisdiction of the Commission. The Commission argued that a more in-depth review was required, not just to analyse the jurisdictional thresholds, but also to consider procedures and other substantive issues.⁶⁵ The subsequent Green Paper,⁶⁶ published on the 11th December 2001, considered if there should be a: revised substantive test; a mechanism for permitting the investigation of mergers which do not possess a European dimension but require multiple filings; a more relaxed and flexible approach to the investigative timetable and a mechanism through which investigations can be passed from Member States to the Commission and vice

⁶⁰ Chapman, P. Monti court defeat over merger veto gives boost to reform calls. *European Voice*, 8 (38), 24 Oct 2002.

⁶¹ Chapman, P. Monti court defeat over merger veto gives boost to reform calls. *European Voice*, 8 (38), 24 Oct 2002.

⁶² Commission of the European Communities, *Twenty-Seventh Report on Competition Policy*, 1997. Luxembourg: CEC, 1998: 13.

⁶³ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 860.

⁶⁴ Commission of the European Communities, *Report to the Council on the Application of the Merger Regulation Thresholds*. COM (2000) 399 Final.

⁶⁵ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 860.

⁶⁶ Commission of the European Communities, *Green Paper on the Review of Council Regulation*, 4064/1989 COM (2001) 745 Final.

versa. The growing discord between US and EU competition authorities due to the Commission prohibiting the *GE/Honeywell* merger, in June 2001, on grounds of efficiency, whilst not precipitating the review of the Merger Control Regulation, did, however influence and shape the path dependent structures and policies which evolved as a consequence of the review of the Merger Control Regulation.

During the first twelve years of application of the ECMR by the Commission, “The Merger Regulation evolved into an integral part of Community antitrust practice.”⁶⁷ Even prior to the revision of merger policy, this policy was “arguably the most potent weapon at DGIV’s disposal,”⁶⁸ and certainly the most visible within the Competition Commission’s portfolio. The dynamics of this policy community, however, fluctuate and are prone to instability and power struggles. Clearly all the actors and groups involved had different visions of the potential future pathway of merger policy. The business community wanted to reduce transaction costs and establish a framework which would iron out the problems of uncertainty and distrust in the evolving system, precipitated by the step-by-step approach initiated by cases brought before the European Courts. The Commission wanted to protect, expand and enhance its own position and increase its competence within the regime and act as a facilitator within the policy community, actively encouraging negotiation, discussion and preliminary meetings with merging parties prior to investigations, engaging in consultation with European and national business representation groups during the review process. The Commission’s interaction with the business community ensured that the process was transparent, open and had established links, a source of information and possible support from the business community. Certain members of the Council (those with already robust merger regulation laws), however, did not want the Commission to accrue any more competence, and so lose any more sovereignty in this politically sensitive area. The European Courts are another dynamic which must be considered, as they hold the potential to shape the future of European merger policy.

⁶⁷ Levy, N. EU Merger Control: From Birth to Adolescence. *World Competition*, 26(2), 2003: 195-218, 201.

⁶⁸ McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999, 176.

2.4 The Recast Merger Control Regulation

In November 2002, the Commission presented to the Council the revised ECMR⁶⁹ and draft Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.⁷⁰ The package proposed by Monti included a revised Regulation, draft guidelines for horizontal mergers, proposed measures aimed at restructuring staffing and examples of best practices, which would, stated Monti, "... improve our merger control system making it ... a model to be emulated worldwide".⁷¹ The aim of the reform was to preserve the elements of the ECMR that had proved their worth. The establishment of: the "one-stop shop"; a timetable for investigations; transparency during the decision-making process through the publication of decisions and the Commission as the completely independent decision-maker "must be retained and preserved" whilst at the same time the elements of the system which have come under increasing strain must be reformed.⁷² The Competitiveness Council agreed upon a revised Merger Control Regulation on 27th November 2003, which was subsequently adopted and published in the Official Journal on 20th January 2004. The new Regulation entered into force on 1st May 2004, equipping "the European Union with a modern, more flexible and efficient legislation to cater for the interests of 450 million consumers ...".⁷³ As specified by Article 26(2) of the NMR, the old ECMR remained applicable to those transactions which had concluded an agreement or a public bid announced prior to 1st May 2004.

The original ECMR applied to mergers, acquisitions and full function joint-ventures. The revised Merger Control Regulation clarifies the type of transaction which falls within the scope of the Regulation. The Regulation still covers the original three types of concentrations but has been widened to include creeping mergers and "conditional or staggered transactions".⁷⁴

⁶⁹ EUR-Lex, Proposal for a Council Regulation on the control of concentrations between undertakings ("The EC Merger Regulation") COM (2002) 711 Final, [2003] OJ C 20/06:4.

⁷⁰ Luescher, C. Efficiency Considerations in European Merger Control, *S.C.L.R.* 25(2) 72-86.

⁷¹ Rapid, Commission Press Release, *Commission adopts comprehensive reform of EU merger control*, IP/02/1856, Brussels, 11/12/2002.

⁷² Monti, M, European Commissioner for Competition Policy, Merger Policy Control in the European Union: a radical reform. *European Commission/ IBA Conference on EU Merger Control*, Brussels, 7/11/2002. Rapid Press Release, Speech/02/545.

⁷³ Rapid Press Release, *EU gives itself new merger control rules for 21st century*. IP/04/70, 20/01/04.

⁷⁴ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

The revised Merger Control Regulation is supplemented by several Notices which provide assistance and guidance, expanding upon the text and concepts established in the ECMR.⁷⁵ The ECMR, as with the two previous Regulations, is applicable to any “concentration” which possesses a “Community dimension”. To possess this dimension, the turnover of parties to the transaction must exceed the thresholds established in Article 1(2) of the Regulation, or, if a smaller, multi-jurisdictional merger, fulfil the alternative thresholds established in the 1998 Regulation.⁷⁶ Article 22 permits the Commission to review proposed transactions which do not fall under their jurisdiction by virtue of Articles 1(2) and 1(3), but would require multiple notification, if asked to do so by one or more Member States. The revised Merger Control Regulation also permits the notifying parties to ask the Commission to review the transaction, if the transaction would require notification in three or more Member States and no Member State objects. Mergers which do not possess a Community dimension fall under the scope of national merger regulations, whilst those which do, fall under the jurisdiction of the Commission and the EU framework of merger regulation.⁷⁷

Prior to the reform of merger policy, the MTF, Directorate B within DG Comp, dealt with all concentrations which were covered by the ECMR. Despite having to comply with legally binding frameworks and an expanding workload, only one decision was annulled by the CFI between 1989 and 2002. During 2002, however, the CFI reversed several of the Commission's decisions, criticising their methods and procedures. As part of the reform of EU merger control policy, the DG Comp was reorganised. Until the 2004 reform, the MTF examined all transactions which fell within the scope of the ECMR. The MTF was one of the sectoral directorates within DG Comp. During 2003/4 the MTF was dismantled and replaced by merger units, all part of the Merger Network. These units were placed within each of the sectoral Directorates of DG Comp relating to antitrust investigations connected to a specific sector of the economy. An overall co-ordinating merger unit was established in Directorate A, which is in charge of

⁷⁵ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 862.

⁷⁶ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22.

⁷⁷ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22.

“policy and strategic support”. A Chief Competition Economist, the first to be appointed was/is Lars-Hendrik Roller with a supporting office, a team of 10 “PhD level economists,” as the Chief Economist’s Team (CET),⁷⁸ will ensure the correct application of economic analysis in complex cases. The poor quality application and incorrect assessment of markets etc, it must be remembered, were criticisms levelled at the Commission by the CFI. The creation of these posts can be seen as a response to this criticism. As noted by Maudhuit and Soames, this team has already been used in the preparation of requests when the Commission has asked for Article 11 information.⁷⁹ The appointment of this “in-house team” provides the Commission with expertise “since otherwise it would have had to continue to rely on the input of the parties’ economists, as has generally happened with the assessment of past complex cases”.⁸⁰

The NMR did not change the threshold requirements, but, instead, focused upon reforming the referral system.⁸¹ The NMR outlines the procedures and notification rules for proposed transactions, whilst the Implementing Regulation⁸² informs the notifying parties about what information needs to be provided, explains and clarifies the time limits and procedures for hearings and raising objections.⁸³ The Regulation framework permits informal, pre-notification discussion between the Commission and the notifying parties. A transaction may not be finalised before notification and subsequent investigation by the Commission has been completed. If the parties to the transaction complete before the Commission has agreed that the concentration is compatible with the market, they may be fined up to 10% of their aggregate turnover. Notification is made by the completion of Form CO (the official form for standard merger notification) or the Form SO (the Short Form CO for simplified merger notifications). Articles 11 and 13 permit the Commission to gather information from both parties to the transaction and third parties - customers,

⁷⁸ Lyons, B. R. Reform of European Merger Policy. *Working Paper CCR 03-5*, Centre for Competition & Regulation, UEA Norwich.

⁷⁹ Maudhuit, S. & T. Soames, Changes in EU Merger Control, (Part 3) *E.C.L.R.* 26(3), 2005: 144-150.

⁸⁰ Maudhuit, S. & T. Soames, Changes in EU Merger Control, (Part 3) *E.C.L.R.* 26(3), 2005: 144-150.

⁸¹ Maudhuit, S. & T. Soames, Changes in EU Merger Control, (Part 3) *E.C.L.R.* 26(3), 2005: 144-150.

⁸² EUR-Lex, Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004 (The “Implementing Regulation”) and its annexes (Form CO, Short Form CO and Form RS). OJ L 133, 30/04/2004: 1-39.

⁸³ EUR-Lex, Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004 (The “Implementing Regulation”) and its annexes (Form CO, Short Form CO and Form RS). OJ L 133, 30/04/2004: 17.

suppliers, competitors - and permit it to conduct unannounced investigations. The Commission's powers of investigation were enhanced as a consequence of the new Regulation, and are now similar to those possessed by the Commission in relation to Regulation 1/2003.⁸⁴

To ensure compliance with the principle of subsidiarity outlined in Article 5 EC Treaty, the NMR ensures that the best placed competition authority evaluates the proposed transaction. The Commission's Notice on Case Referral in Respect of Concentrations⁸⁵ outlines the principles upon which the system is premised. Allocation of cases must not only be based upon legal and economic analysis but must also take into account "practical considerations" such as who has the authority and possesses the necessary expertise and finance if the investigation has to be fragmented by several competition authorities. Fragmentation of investigations must be avoided if at all possible to avoid the increased costs associated with multiple filing. The need for "legal certainty" means that cases must not be reallocated to authorities which were not perceived as competent to assess the transaction at the outset of the investigation.⁸⁶

Part of the pre-notification framework, Article 4 of the recast Merger Control Regulation, permits the Commission to refer the transaction to a Member State (Art. 4(4)) or, three or more Member States to refer to the Commission (Art.4(5)). "[T]he big novelty of Article 4"⁸⁷ is that the referral may be prompted by the merging parties - but this type of referral must take place before filing in any EU Member State.⁸⁸ Parties submit a reasoned submission form which "... allows the parties to identify at the pre-notification stage, their preferred review agency".⁸⁹

In order to improve the efficacy of the referral system the majority of the reforms focused upon Articles 9 and 22. At the post-notification stage the Commission can initiate the referral process. The revised Article 9 permits the Commission to ask Member States to request a referral of a transaction to a

⁸⁴Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 907.

⁸⁵Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

⁸⁶Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

⁸⁷Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

⁸⁸Maudhuit, S. & T. Soames, Changes in EU Merger Control, (Part 3) *E.C.L.R.* 26(3), 2005: 144-150.

⁸⁹Maudhuit, S. & T. Soames, Changes in EU Merger Control, (Part 3) *E.C.L.R.* 26(3), 2005: 144-150.

Member State. The recast Article 22 permits the Commission to invite Member States to refer a transaction to it even though the transaction does not fall within the Commission's jurisdiction but may have an impact upon the EU market.⁹⁰

The new Best Practice Notice, aimed at enhancing transparency and the standard of the decision-making process, is supposed to improve the communication and interaction between all actors involved in the decision-making process. "State of play meetings" have been introduced "designed to provide notifying parties with a clear understanding of the Commission's internal thinking at key stages of proceedings".⁹¹ "Triangular meetings" between the Commission, parties to the transaction and complainants have also been introduced which is helpful to the Commission, as the complainants provide an expert insight into the market under examination. These meetings provide the Commission with the opportunity to verify third party submissions.⁹²

The timetable and procedures to which the Commission must adhere, remain but are now more flexible. The need to notify within a week of concluding a merger agreement has been abolished. The original Merger Control Regulation contained a post-notification mechanism, requiring that a transaction be filed before referral to the "best placed" merger authority could take place.⁹³ Now notification of concentrations can be premised upon either legally-binding agreements or the demonstration of a "good faith intention". The timetable for investigation is now measured in *working* days, thus there is now no need to make calculations to take into account public holidays, length of months etc.⁹⁴

Phase I of the investigation starts the day after the Commission receives notification of the transaction. If the notification material presented by the parties is incomplete, the timetable stops until the correct information is provided. The Commission has 25 working days (which can be extended to 35 if the Commission requests a referral) to consider the compatibility of the proposed transaction with

⁹⁰ Maudhuit, S. & T. Soames, Changes in EU Merger Control, (Part 3) *E.C.L.R.* 26(3), 2005: 144-150, for details of the procedures and processes for these Articles.

⁹¹ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

⁹² Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

⁹³ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

⁹⁴ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

the Common Market.⁹⁵ Parties must offer remedies within 20 working days, although as Maudhuit and Soames⁹⁶ point out in certain circumstances, outlined in the Commission Notice on Remedies, remedies will be accepted after the deadline has passed. The Commission must also inform the national competition authorities and publish all the information relevant to the merger in the Official Journal on Merger Control. The NMR endows the Commission with powers of inspection⁹⁷ and it can impose fines of up to 1% of aggregate turnover of parties of a proposed transaction if they refuse to supply information, or if the information supplied is incorrect or falsified.⁹⁸

The Commission has initially 90 days to make its decision relating to the Phase II,⁹⁹ which can be extended to 125 days in certain circumstances.¹⁰⁰ After the initiation of this phase and the adoption of the Statement of Objections by the Commission, the Hearing Officer holds an Oral Hearing where parties can discuss any relevant points or concerns.¹⁰¹ At the end of the investigation the Commission may decide that the concentration is: compatible with the Common Market; compatible after certain commitments are met or they can decide that the concentration is incompatible with the Common Market.¹⁰² Article 10(3) introduced the “stop the clock” provision for up to 20 days during an investigation in order to provide clarification and verification of details in complex cases. The Commission cannot refuse such a request, which must be made within 15 working days after the start of the Phase II investigation. Comprised of experts from the Directorate and members from the Merger Network, “Devil’s advocate panels” have also been introduced to ensure that a “fresh pair of eyes” is brought in to the

⁹⁵ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 863.

⁹⁶ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

⁹⁷ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Article 13.

⁹⁸ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Article 14.

⁹⁹ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Article 10(3), e.g. where more information is needed by the Commission or commitments are offered by the parties to the transaction.

¹⁰⁰ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Article 10(4).

¹⁰¹ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

¹⁰² EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Article 8.

investigation.¹⁰³ “The Advisory Committee on Concentrations must be consulted before a final decision is made by the College of Commissioners, although Phase I decisions may be delegated to one Commissioner.”¹⁰⁴

Parties may appeal against Commission decisions to the CFI. Although the need for haste in assessing these cases is widely acknowledged, “there is, [only], an expedited appeals procedure in straightforward cases”.¹⁰⁵ In all other cases, it may take up to three years until a decision is made by the CFI to prohibit or clear a merger. If the Commission’s decision is annulled, the investigative process goes back to Phase I, and the parties have to provide up-to-date information about the condition of their market.¹⁰⁶

Articles 8(4) and 8(5) of the NMR clarify the Commission’s decision-making powers.¹⁰⁷ If a merger breaches the remedies (conditions rather than obligations) which are linked to Phase II decisions, or if the concentration has been implemented before the conclusion of the investigation, the Commission can order that the transaction be dissolved and so restore the market to its previous position. As noted by Maudhuit and Soames, divestiture of acquired shares etc is not always an option. Article 8(4), therefore, permits the Commission to take appropriate action to re-establish the market conditions prior to the merger.¹⁰⁸

The most contentious issue during the formulation of both the original and the recast Merger Control Regulation¹⁰⁹ related to how the concentration should be appraised.¹¹⁰ Whilst the Commission considered the arguments: for and against the adoption of the SLC test; the retention of the existing DT or the adoption of a test which combines the DT and SLC,¹¹¹ the final test represented a compromise. “This

¹⁰³ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004 ; Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

¹⁰⁴ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 903.

¹⁰⁵ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 863.

¹⁰⁶ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

& Maudhuit, S. & T. Soames, Changes in EU Merger Control, (Part 3) *E.C.L.R.* 26(3), 2005: 144-150.

¹⁰⁷ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

¹⁰⁸ Maudhuit, S. & T. Soames, Changes in EU Merger Control, *E.C.L.R.* 26(1), 2005: 57-64.

¹⁰⁹ The Irish and UK representatives pushed for the insertion of a Significant Lessening of Competition Test whilst the German delegation wanted to retain the DT (Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 913).

¹¹⁰ Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004: 909.

¹¹¹ France and Spain advocated a combination of the two tests, (Jones, A. & B. Suffrin, *EC Competition Law*. (2nd Ed.), OUP, 2004).

compromise, which is a remarkable and elegant exercise in semantics ...” does not represent a whole scale revision of the test merely a re-ordering of the existing words.¹¹² As noted by Jones and Suftrin,¹¹³ the new test represents an attempt to combine the arguments and concerns of advocates of both the SLC and DT and as a consequence it is “broader” than the original test. Article 2(3) of the revised ECMR introduced the significant impediment of effective competition test, stating that:

“A concentration which would significantly impede effective competition in the Common Market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the Common Market”.

The decision to retain the DT, whilst at the same time widening the test to include concentrations where there is not necessarily collective dominance and to deal with non-coordinated effects of a transaction, brings the test into line with countries which already use the SLC test.¹¹⁴ Recital 25 of the Regulation aims to close the unanticipated gaps left by the DT:

“... therefore in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede competition ... should be declared incompatible with the Common Market.”¹¹⁵

The Commission adopted the Guidelines on the Assessment of Horizontal Mergers at the same time as the NMR. “The purpose of this guidance is to provide guidance as to how the Commission assesses concentration,”¹¹⁶ when the merging parties are competitors within the same market, which could result in a distortion of competition. The incorporation of the Guidelines into the merger control regulation framework represents an attempt to increase the level of “legal certainty”:¹¹⁷

¹¹² Weitbrecht, A. EU Merger Control in 2004 – An Overview, *E.C.L.R.* 26 (2), 2005: 67-73.

¹¹³ Jones, A. & B. Suftrin, *EC Competition Law*. (2nd Ed.), OUP, 2004.

¹¹⁴ Weitbrecht, A. EU Merger Control in 2004 – An Overview, *E.C.L.R.* 26 (2), 2005: 67-73.

¹¹⁵ EUR-Lex, EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Recital 25.

¹¹⁶ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Recital 5.

¹¹⁷ Maudhuit, S. & T. Soames, Changes in EU Merger Control : Part 2. *E.C.L.R.* 2005, 26(2): 74-81.

“The guidance set out in this notice draws and elaborates on the Commission’s evolving experience with the appraisal of horizontal mergers under Regulation 4064/89 since its entry into force on 21st September 1990 as well as the case law of the Court of Justice and the Court of the First Instance”¹¹⁸

The Guidelines are designed to assist the Commission when it assesses horizontal mergers¹¹⁹ and to provide guidance for parties to the proposed transaction.¹²⁰ The Guidelines outline the Commission’s approach to market share and concentration thresholds (section III), the likely anticompetitive effect the merger would have upon the market if there are no countervailing factors (section IV), the effect “buyer power would have as countervailing factor” to any anti-competitive effects resulting from the merger (section V). The Guidelines outline the probability that the market would remain competitive in spite of the merger (section VI), the possibility that efficiencies may counterbalance the anti-competitive effects of the merger (section VII) and the conditions for the failing company defence (section VIII).¹²¹

Assessment of market share is the first task of the Commission during the appraisal of mergers. The post-merger market share is premised upon the total pre-market share of all the merging parties.¹²² If the combined market share is 25% or less then the merger is not likely to distort the market. If it is more than 50%, there may be dominance.¹²³ If this may be the case, the Commission will examine the strength and influence of competitors to prevent the merged entity from dominating the market.¹²⁴ To assess the concentration of the market, the Commission uses the Herfindahl-Hirschman Index (HHI), to measure the absolute concentration of a

¹¹⁸ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Recital 26.

¹¹⁹ The Commission has announced its intention to adopt similar Guidelines for Vertical and Conglomerate Mergers in the near future. (Maudhuit, S. & T. Soames, *Changes in EU Merger Control : Part 2. E.C.L.R. 2005, 26(2): 74-81*).

¹²⁰ Maudhuit, S. & T. Soames, *Changes in EU Merger Control : Part 2. E.C.L.R. 2005, 26(2): 74-81*.

¹²¹ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Recital 11; Weitbrecht, A. *EU Merger Control in 2004 – An Overview, E.C.L.R. 26 (2), 2005: 67-73*; Maudhuit, S. & T. Soames, *Changes in EU Merger Control : Part 2. E.C.L.R. 2005, 26(2): 74-81*.

¹²² EUR-Lex, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 15*.

¹²³ Maudhuit, S. & T. Soames, *Changes in EU Merger Control : Part 2. E.C.L.R. 2005, 26(2): 74-81*.

¹²⁴ Maudhuit, S. & T. Soames, *Changes in EU Merger Control : Part 2. E.C.L.R. 2005, 26(2): 74-81*; EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, *Guidelines, para 17*.

market, then the change in HHI (the delta) as a result of the merger. If the HHI is less than 1000, post-merger, the Commission is unlikely to investigate. If the HHI is between 1000 - 2000 with a delta below 250 or the HHI post-merger is above 2000 with a delta of 150 or less, the Commission is unlikely to investigate. However, if one of the merging companies possesses a post-market share of 50% or more, or if the rest of the competitors are linked through cross-shareholding, or, if one of the merging parties is unpredictable (a maverick) and likely to destabilize the market, the Commission will investigate the transaction.¹²⁵

As noted in the Guidelines, horizontal mergers may impede competition by strengthening or establishing a dominant position as the number of competitors are reduced by the merger.¹²⁶ Horizontal mergers may impede competition in two ways: through both non-coordinated and coordinated effects. The Commission must assess whether or not the merger would precipitate changes to the market which would result in these effects.¹²⁷ The reduction of "important competitive restraints on one or more firms" (the removal of one or more rivals) would permit company(ies) to increase market share and power without having to coordinate behaviour with other firms. Typically, the non-coordinated effects of a horizontal merger may result in either the merged party possessing an increased market share which is greater than its competitors¹²⁸ or oligopolistic markets where there is a reduction in competition. These non-coordinated effects are incompatible with the Common Market.¹²⁹ The Commission must, therefore, consider several factors such as: market share - the larger the share, the greater the chance a dominant position will be created; the closeness of merging parties' products - if there is a high degree of "substitutability", then there are likely to be price increases, if however, competing firms create similar products this will increase/protect rivalry. The potential for customers to switch suppliers - a reduction of suppliers may

¹²⁵ A full list of the factors which would precipitate a detailed investigation by the Commission can be found at para 20 of the Guidelines.

¹²⁶ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, para. 22.

¹²⁷ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, para. 23.

¹²⁸ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, para. 25.

¹²⁹ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, para. 25.

reduce their opportunity to switch if costs are raised - and the possibility that there will be a reduction of supply to increase market prices post-merger, will all be considered by the Commission when assessing if the merger will precipitate non-coordinated effects.¹³⁰

A merger may enable or facilitate closer coordination between the remaining firms, without any firms having to enter into a legally-binding agreement.¹³¹ Tacit coordination between competitors permits firms to act independently but coordinate their behaviour when necessary. This coordination may take the form of: companies keeping market prices artificially high; the division of the market geographically or on the basis of social characteristics, or the restriction of the entry of new products on to the market.¹³²

When assessing the possibility of coordinated effects, the Commission, therefore, must consider: evidence of past examples of coordination between competitors; the number of firms involved - it is easier to coordinate between a few firms; the stability of the market - it is easier to coordinate market prices when a market is stable; if coordinating firms are able to monitor competitors to ensure rules are being adhered to. If coordination is to be successful there must be checks, balances and relative transparency for the coordination to work. Finally the Commission must consider if competitors outside the coordinating group and consumers can counteract the effects of coordination.¹³³

There has been much debate examining whether or not the old Article 2(1) (b) was a suitable mechanism to take into account the efficiency defence when appraising mergers.¹³⁴ At first, Commission decisions dismissed the value of efficiencies as a possible defence, taking the view that efficiencies would strengthen a merged entity's dominant position. In *AT & T/NCR* the Commission decided that

¹³⁰ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 24-38. This list, as noted by the Guidelines is not comprehensive.

¹³¹ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, 39.

¹³² EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, 40.

¹³³ Maudhuit, S. & T. Soames, Changes in EU Merger Control : Part 2. *E.C.L.R.* 2005, 26(2): 74-81.

¹³⁴ See literature review.

“It is not excluded that potential advantages flowing from synergies may create or strengthen a dominant position.”¹³⁵ Although the efficiency argument was used by the Commission in the *Aerospatiale-Alenia/Alenia/Havilland*¹³⁶ decision, whereby any savings made by a merger should be passed to the consumer, this line of analysis petered out, with the Commission's approach to efficiencies gained by a transaction either vague, or irrelevant. In *Mercedes-Benz/Kässbohrer*, for example, the Commission concluded that although this merger would lead to increased efficiencies in terms of research and design (R&D), administration and production, the effect this would have upon the merger remained unclear.¹³⁷ In *De Beers/LVMH*, the Commission concluded that the synergies gained from this proposed joint venture in terms of “efficiencies and reduction in cost production” coupled with LVMH's expertise in international sales actually permitted them to become the dominant player in the luxury branded jewellery market. This joint venture was authorised, however, as these efficiencies would not significantly strengthen De Beers' already dominant position.¹³⁸ In *GE/Honeywell*, the Commission prohibited the transaction, taking the view that the efficiencies which could be gained from the merger would put less efficient companies at a disadvantage and as a consequence strengthen the merged entity's dominant position.¹³⁹ Prior to the entry in to force of the NMR, the Commission took the view that any efficiencies passed on to the consumer may harm competitors. As noted in the *GE/Honeywell* case, as the more efficient new entity can cut costs and increase competitiveness, competitors attempt to cut costs in order to compete but, as a consequence, due to the loss of revenue, may have to reduce investment in R&D¹⁴⁰ or may have to exit the market because they can't pay suppliers, wages etc.¹⁴¹

¹³⁵ Case No. COMP IV/M50, *AT&T/NCR*, [1991], at 31. This case involved American Telephone & Telegraph (AT&T) purchasing shares in NCR Corporation. The Commission cleared the transaction.

¹³⁶ Case No. COMP IV/M.477, *Mercedes-Benz/Kässbohrer*, OJ L 211, 06/09/1995: 0001 – 0029. A merger between two bus companies. The Commission permitted this transaction subject to certain conditions.

¹³⁷ Case No. COMP IV/M.477, *Mercedes-Benz/Kässbohrer*, OJ L 211, 06/09/1995: 0001 – 0029, 66-67.

¹³⁸ Case No. COMP/M.2300, *De Beers/LVMH* [2001] at 102-5; Snelders, R. & S. Genevaz, *Mergers Efficiencies and Remedies*, in *The International Comparative Legal Guide to: Merger Control*. Global Legal Group: London. This case involved DeBeers (a large diamond group) and LVMH (a high end French luxury conglomerate) entering into a joint venture in order for DeBeers to sell high end jewellery in LVMH stores.

¹³⁹ Case No. COMP IV/M2000, *General Electric/ Honeywell*, at 350.

¹⁴⁰ Case No. COMP IV/M2000, *General Electric/ Honeywell* at 403.

¹⁴¹ Case No. COMP IV/M2000, *General Electric/ Honeywell* at 402.

The efficiency defence, introduced by the combination of Article 2(1) (b) and Recital 29 clarifies that it is the *consumer* that must benefit from the efficiency trade off. Recital 29 of the NMR makes it clear that the efficiencies can offset and counterbalance the anti-competitive effects of the merger:

“... it is appropriate to take into account any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition”

The efficiency defence must be premised upon objective efficiencies, “cost savings arising from the exercise of market power will not be relevant. The efficiencies must result from the economic activity which forms the object of the agreement, and they must be substantiated”.¹⁴² The parties concerned must provide evidence which substantiates these claims and shows how these benefits can be passed on to the consumer.¹⁴³

The Guidelines allow for the clearance of mergers which impede competition, but only if one of the parties to the transaction is failing. The Commission “identifies three cumulative criteria of a ‘failing firm’ defence”.¹⁴⁴ The first criterion is that the failing firm would collapse and hence be forced out of the market in the near future if the take-over was not cleared. The second is that there is no alternative merger that is less anticompetitive available and the third criterion is that the failing firm would collapse and the market conditions would be the same as if the merger had been permitted as there would still be one less competitor.

Under the original Merger Control Regulation, the Commission had been required to assess the ancillary restraints, such as purchasing agreements, which are part and parcel of a merger agreement. The Commission had tried to avoid completing this assessment, but the CFI prevented it from doing so. The NMR requires companies to self-assess ancillary restraints, and the Commission has

¹⁴² Ratcliff, J. Major Events and Policy Issues in EC Competition Law. *I.C.C.R.* 15(2), 2004: 19-24.

¹⁴³ Ratcliff, J. Major Events and Policy Issues in EC Competition Law. *I.C.C.R.* 15(2), 2004: 19-24.

¹⁴⁴ Maudhuit, S. & T. Soames, Changes in EU Merger Control : Part 2. *E.C.L.R.* 2005, 26(2): 74-81.

provided a guidance notice advising parties how to do so: the Commission Notice on Restrictions Directly Related and Necessary to Concentrations.¹⁴⁵

“Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation”.¹⁴⁶ The Commission remains the pivotal, central actor within this policy framework. The framework of merger regulation has evolved. The revised NMR and the accompanying package of legislative and procedural reforms are certainly far-reaching, aiming to solve the unanticipated consequences which have evolved as the original framework buckled under an ever-increasing workload and criticism from the European Courts.

The analysis of joint ventures has proved a challenge for the Commission and “... posed the most difficult analytical issues for EEC competition lawyers”.¹⁴⁷ Joint ventures can take on different guises and involve different levels of integration, be structural or merely represent a partnership. Joint ventures may raise or defuse competition concerns, increase the efficiency of the parent companies or they may foreclose a particular market to competitors.¹⁴⁸ The evolution of the Commission's approach to the analysis of joint ventures illustrates the complexities involved when the Commission is analysing a transaction.

Pathak noted that the Commission struggled for nearly 20 years to “develop a coherent approach for the assessment of joint ventures”.¹⁴⁹ The Commission first assessed joint ventures under Article 81. As noted by Zonnekeyn,¹⁵⁰ for most of the formative period of the EC, the Commission reasoned that Article 81 EC Treaty remained inapplicable to mergers and other such “structural arrangements”. The

¹⁴⁵ Ratcliff, J. Major Events and Policy Issues in EC Competition Law. *I.C.C.R.* 15(2), 2004: 19-24; Maudhuit, S. & T. Soames, Changes in EU Merger Control : Part 2. *E.C.L.R.* 2005, 26(2): 74-81; Weitbrecht, A. EU Merger Control in 2004 – An Overview, *E.C.L.R.* 26 (2), 2005: 67-73.

¹⁴⁶ EUR-Lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings. Article 1(3), OJ L 24, 29/01.2004: 1-22, Art. 21(2).

¹⁴⁷ Pathak, A. S. The EC Commission's approach to joint ventures: a policy of contradictions. *E.C.L.R.* 171, 1991.

¹⁴⁸ Xiong, T. & J. Kirkbride, The European control of joint ventures: an historic opportunity or a mere continuation of existing practice. *E.L.R.* 1998.

¹⁴⁹ Xiong, T. & J. Kirkbride, The European control of joint ventures: an historic opportunity or a mere continuation of existing practice. *E.L.R.* 1998.

¹⁵⁰ Zonnekeyn, G. A, The Treatment of joint ventures under the amended E.C. Merger Regulation. *E.C.L.R.* 414.

Commission identified two types of joint ventures: concentrative joint ventures which "... do not give rise to the possibility that parent companies will coordinate their competitive behaviour in the joint ventures' market", whilst cooperative joint ventures included those which may involve the parent companies remaining in the market post transaction and so may coordinate their actions.¹⁵¹ The Commission, therefore, developed the "partial merger test" for concentrative transactions. The "partial merger test" required the parties to "transfer all their business to the joint venture on a lasting basis" whilst the new joint venture remained an independent economic/business entity and the joint venture would not lead to co-operation between the "parent companies" in other areas.¹⁵² Cooperative joint ventures continued to be examined under Article 81(1) & 81(3) EC Treaty.

This test was applied by the Commission to several transactions. *De Laval/Stork*,¹⁵³ for example, involved De Laval and Stork wanting to enter into a joint venture in order to develop compressors, turbines and pumps. The Commission, as observed by Zonnekeyn,¹⁵⁴ refused to accept that this transaction represented a joint venture as there was no proof that the parent companies would just become holding companies. The first (and only) Commission decision where a joint venture decision was deemed concentrative was *SHV/Chevron*.¹⁵⁵ The Commission's Sixth Report on Competition Policy (1976) cited this transaction as a case where the parent companies "completely and irreversibly" left the joint venture's market without detrimentally effecting competition within that particular market.¹⁵⁶ Thus the market-exit criterion was an essential element if a transaction was to be categorized as concentrative. Zonnekeyn¹⁵⁷ considered that the Commission's application of the assessment of joint ventures was "... not

¹⁵¹ Prescott, D. & S. Swartz, *Joint Ventures in the International Arena*. American Bar Association, 2003.

¹⁵² Prescott, D. & S. Swartz, *Joint Ventures in the International Arena*. American Bar Association, 2003.

¹⁵³ CMLR, *De Laval / Stork* decision [1977] 2 CMLR D69. De Laval (US company) and Stork (Dutch company), both turbine companies formed a joint venture to make and sell turbines.

¹⁵⁴ CMLR, *De Laval / Stork* decision [1977] 2 CMLR D69.

¹⁵⁵ In this case Steenkolen-Handelsvereniging (SHV) and Chevron Oil Europe Inc. (Chevron) established a joint venture to sell products in a market, where previously the parent companies had competed. The parent companies transferred all their related assets and distribution networks to the joint venture.

¹⁵⁶ Pathak, A. S. The EC Commission's approach to joint ventures: a policy of contradictions. *E.C.L.R.* 171, 1991.

¹⁵⁷ Pathak, A. S. The EC Commission's approach to joint ventures: a policy of contradictions. *E.C.L.R.* 171, 1991.

successful. The Commission was taking a too formalistic approach, finding potential competition to be present on the basis of rather unsatisfactory analysis”.

The Commission sought to provide further clarification in the ECMR between concentrative and cooperative joint ventures. Concentrative joint ventures fell under the jurisdiction of the ECMR whilst cooperative joint ventures were examined by Article 81. The Commission defined joint ventures as “undertakings which are jointly controlled by two or more undertakings which are economically independent”.¹⁵⁸ The ECMR attempted to solve this problem by replacing the partial merger test, with the new Regulation continuing the distinction drawn between concentrative and cooperative joint ventures. Brown¹⁵⁹ pointed out that historically “[T]he distinction between concentrative joint ventures and cooperative ones is critical It forms the basis of the jurisdiction test” The Commission, under the ECMR, only had jurisdiction over concentrative joint ventures: Article 3 (2), second paragraph stated that:

“[T]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b)”.¹⁶⁰

Article 3(2) defined cooperative joint ventures as “an operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent, shall not constitute a concentration within the meaning of paragraph 1 (b)”. Structural cooperative joint ventures would not fall under the ECMR and had to be assessed/reviewed under Article 81, pursuant to Regulation 17/62.¹⁶¹ Levy¹⁶² stated that

¹⁵⁸ Xiong, T. & J. Kirkbride, *The European control of joint ventures: an historic opportunity or a mere continuation of existing practice.* E.L.R. 1998.

¹⁵⁹ Brown, A. *Distinguishing between concentrative and cooperative joint ventures: is it getting any easier.* E.C.L. R. 240.

¹⁶⁰ EUR-Lex, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

¹⁶¹ Zonnekeyn, G. A, *The Treatment of joint ventures under the amended E.C. Merger Regulation.* E.C.L.R. 414.

¹⁶² Zonnekeyn, G. A, *The Treatment of joint ventures under the amended E.C. Merger Regulation.* E.C.L.R. 414.

“[A] significant and disproportionate amount of time ... was devoted to addressing issues that arose from the distinction made in the original version of the Merger Regulation” between concentrative and cooperative joint ventures. In a further attempt to clarify the differences between the two types of joint ventures, the Commission published the “Interface Notice” in 1990.¹⁶³ As parties which were proposing a transaction sought to get them classified as concentrative due to them then falling under the jurisdiction of the ECMR and its strict timetable - rather than cooperative- the Commission published a series of Notices in an attempt to ensure legal certainty. As noted by Cahill,¹⁶⁴ however: “... in practice ... Article 3.2 criteria were difficult to apply”. Article 3.2 stipulated that joint ventures would be categorized as cooperative (and fall under the jurisdiction of Regulation 17 rather than the ECMR) if the venture would lead to coordination between the parent companies. As some coordination is inevitable between parent companies during the establishment and operation of many joint ventures, Cahill considered that “... this criterion seemed excessive.”¹⁶⁵ Another problem with the distinction drawn between the two types of ventures, as noted by Cahill, was that in cases where there were both concentrative and cooperative elements the concentrative elements were drawn under the timetable of the ECMR whilst the cooperative elements were drawn under the (slower) jurisdiction of Article 81. To improve the framework for the assessment of joint ventures, the fast track procedure was introduced in 1993 and the Commission Notice on the distinction between concentrative and cooperative joint ventures replaced Commission Notice C203/10 (The Interface Notice).¹⁶⁶ This Notice provided that to categorize a joint venture as concentrative the analysis should focus on economic autonomy of the venture and the continued competitiveness of the parent companies post transaction. Notably the 1994 Notice permitted interaction between the joint venture and parent company for the first

¹⁶³ European Commission, Commission notice regarding the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. O.J. [1990] C203/10.

¹⁶⁴ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

¹⁶⁵ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

¹⁶⁶ Zonnekeyn, G. A, *The Treatment of joint ventures under the amended E.C. Merger Regulation. E.C.L.R.* 414.

three years of its existence.¹⁶⁷ The revised Interface Notice “paved the way for the amendment of Article 3.2. by the 1998 amending Regulation”.¹⁶⁸

The 1996 Green Paper¹⁶⁹ which analysed the ECMR, highlighted concerns raised by both industry and Member States: that to treat the two types of joint ventures differently was unfair. Both types of joint ventures can have the same effect on the structures of the market, but fell under the jurisdiction of different frameworks, with different timetables for assessment and differing levels of legal certainty.¹⁷⁰

Cahill noted that: “[T]he 1994 Notice effectively went “half way” but it took the amending Regulation and 1998 Notice to finish the job”.¹⁷¹ The ECMR was revised in 1997 and the amending Regulation¹⁷² entered into force on March 1 1998. In relation to mergers, the revised Regulation established a lower turnover threshold whilst full function joint ventures, which have a Community dimension, would become a “concentration” within the definition laid out in the ECMR. The Merger Regulation no longer differentiated between concentrative and structural cooperative joint ventures. This Regulation removed all references to cooperative joint ventures (Article 3.2). The revised Article 3.2 determined the criteria for a concentrative joint venture: “... joint ventures that perform on a lasting basis all of the functions of an autonomous economic entity”.¹⁷³ The 1998 Notice was premised upon the concept of full-function joint ventures, “(E)ffectively, this

¹⁶⁷ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

¹⁶⁸ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

¹⁶⁹ Commission, Community Merger Control - Green Paper on the review of the merger regulation COM (96) 19, January 1996. Available from:

http://europa.eu/documents/comm/green_papers/index_en.htm#1996 [Accessed 17/07/08].

¹⁷⁰ Zonnekeyn, G. A, The Treatment of joint ventures under the amended E.C. Merger Regulation. *E.C.L.R.* 414.

¹⁷¹ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

¹⁷² EUR-Lex, Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ L 180 of 9 July 1997.

¹⁷³ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

heralds the abandonment, both as a matter of law and a matter of Commission policy and practice, of the concentrative/cooperative distinction ...".¹⁷⁴ The distinction between full function and non-function joint ventures determined if the transaction fell under either the jurisdictional threshold of the ECMR or Regulation 17/62. The revised Notice required the full function joint venture to fulfil both the DT and to satisfy the criteria laid out in Article 81(3) which dealt with coordination between parent companies.¹⁷⁵

The possibility that the parent companies may interact and coordinate post joint venture did not now negate the application of the provisions of the ECMR. Article 2.4 allowed the coordination between parent companies to be assessed under Article 81 EC Treaty and the merger regulation framework. All full function joint ventures had to remain under the control of both parent companies and the principles to which joint ventures must adhere, if they were to be drawn under the jurisdiction of the ECMR, were outlined in the updated Commission Notice on the concept of concentration (1998).¹⁷⁶

At first glance the enactment of the NMR did little to change the position of joint ventures within the merger regulation framework. Sinan and Uphoff¹⁷⁷ comment that:

“Joint ventures remain the problem child of European competition laws. They do not fit neatly within legal frameworks which tend to view the world in terms of absolutes [t]his has led to a plethora of somewhat artificial distinction in attempting to fit joint ventures into the existing

¹⁷⁴ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

¹⁷⁵ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

¹⁷⁵ Cahill, D. The EC MERGER REGULATION – AMENDMENT AND REFORM. *Commercial Law Practitioner*, Oct 1998: 229-235.

¹⁷⁶ Zonnekeyn, G. A, The Treatment of joint ventures under the amended E.C. Merger Regulation. *E.C.L.R.* 414.

¹⁷⁷ Sinan, I. M, & N. T. Uphoff, Review of joint ventures under the new EC Merger Regulation. *The European Antitrust Review*, 2005: 36-39.

framework ... the significance of which has changed with each adaptation of the ECMR”

Under the revised Merger Regulation a joint venture falls under the jurisdiction of the NMR if the turnover thresholds are fulfilled (Article 1(2) and Article 1(3)) and, as stated in the Commission's Joint Venture Notice, if two or more separate companies acquire/share control over another company. The venture must be full function. As stated in the Joint Venture Notice Article 12 full functionality is achieved if:

“Essentially this means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to resources including finance, staff and resources ... in order to conduct on a lasting basis its business activities within the area provided for in the joint venture agreement”.¹⁷⁸

There does not need to be full functionality at the start of the venture. In *Toray/Murata/Teijin*,¹⁷⁹ for example, the Commission accepted that initially the venture would only provide joint marketing services and would become full function after one year when it acquired manufacturing assets. Non full function joint ventures continue to be appraised under Article 81(1) and 81(3) EC Treaty to assess whether or not the concentration is compatible with the common market. The analysis must be conducted within the same timeframe as analysis conducted under the Merger Regulation.

Most importantly of all, joint ventures do not only have to be subject to the SIEC but are also subject to a second test outlined in Article 2(4) ECMR. The Commission must assess whether or not there will be coordination between the

¹⁷⁸ EUR-Lex, Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings. OJ C, 02/03/1998.

¹⁷⁹ COMP/M2763, *Toray/Murata/Teijin*, Official Journal C 280, 16/11/2002 P. 0026 – 0026. The Commission concluded that the joint venture between these three textile machinery firms – gaining control over TMT Machinery Inc, would not impede competition as there was a clear timetable detailing when full-functionality would be achieved.

parent companies (spill-over). If spill-over effects are identified they will be assessed under Article 81(1) EC Treaty.

On Jul 10, 2007, the Commission adopted the Consolidated Jurisdictional Notice. This Notice updated and consolidated four existing Notices, one of which relates to full function joint ventures. If a pre-existing joint venture acquires part or all of a company from the parent company, if the joint venture acquires new assets or the joint venture becomes full-function, then EU notification may be required.

The regulation of these transactions has evolved in a somewhat semantic fashion. Distinctions between the two types of ventures remain, but slowly the demarcation has become less distinct as the merger framework's jurisdiction has been widened to incorporate more types of ventures. Problems with analysing joint ventures, as highlighted by Tyson,¹⁸⁰ still remain where transactions may result in structural change but the venture does not fall under the jurisdiction of the Merger Regulation. Partial full function joint ventures and strategic alliances may provide the base for a full function joint venture in the future, but these business arrangements are excluded from the merger regulation framework. As the Commission itself acknowledges "[E]xclusion from the ECMR assessment produces difficulties because ... substantial sunk costs and far-reaching integration makes *ex post* control and consequential potential unravelling generally incongruous".¹⁸¹

2.5 Conclusion

"[O]f all the European Commission's current activities in the competition arena, it is merger control that exemplifies this particular policy's potential for controversy."¹⁸² The increasing proliferation of mergers naturally precipitates concerns about the future direction of "European capitalism". The expansion of companies which cross national boundaries which are increasingly difficult to

¹⁸⁰ Tyson, N. Joint Venture Regulation under European Competition Laws: An Update. *European Law Review*, 13, 3, 2007: 408-423.

¹⁸¹ Tyson, N. Joint Venture Regulation under European Competition Laws: An Update. *European Law Review*, 13, 3, 2007: 408-423.

¹⁸² McGowan, L. & M. Cini, Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance: An International Journal of Policy and Administration*, 12 (2), April 1999.

regulate, coupled with the need to ensure that the Single Market is not impeded due to mergers which establish or reinforce the dominant position of one company within a market, precipitated demands by all actors involved for the need for a transnational, European-wide, framework of merger regulation. A merger regulation framework was established in order to provide points of clarification for issues raised by the European Courts, to reduce transaction costs for businesses through the establishment of a “one-stop shop” for proposed mergers, joint ventures or agreements with a European dimension. The entry into force of the ECMR, the subsequent revisions in 1998 and amendments introduced by the 2004 Regulation established a complex and intricate framework of merger regulation. The Commission holds a pivotal position within the merger policy framework, a position which is unique to this policy regime, not replicated in any other policy area. The European Parliament and European Council only possess a residual role, constructing the legislative framework and Guidelines, the formal framework of merger regulation. The Commission, however, establishes and implements the substantive merger regulation framework. Particularly since the early 21st Century, the trajectory of policy has been shaped by the sometimes contentious relationship between the Community Courts and the Commission, the reversal of three key decisions by the CFI not precipitating, but shaping, the content of the recast Merger Control Regulation.

Although the formal contents of the NMR have already been examined, the implementation and application of the Merger Control Regulation and the new Guidelines by the Commission have not. The rest of the thesis, therefore, will focus attention on this area of research, analysing the application of the NMR by the Commission.

CHAPTER 3: APPLICATION OF THE REVISED MERGER CONTROL REGULATION BY THE COMMISSION

3.1 Introduction

As the thesis is taking a centralised approach to the analysis of the recast Merger Control Regulation, this chapter will focus upon the application of the new Regulation by the Commission. This, the main substantive chapter of the thesis, will examine if, and to what extent, the pathway of policy is shifting as a result of this application and utilise empirical examples to illustrate the extent to which the two Regulations differ.

Prior to the entry into force of the NMR, the Commission could only challenge transactions which would establish or strengthen the dominance of an entity post-merger. The most obvious examples of the Commission prohibiting a merger were cases of single firm dominance where the entity, as the dominant player, was able to raise prices. The Commission has also identified and prohibited cases of collective dominance where there could be tacit collusion in order to increase prices. As the *Airtours* judgment illustrated, however, the Commission lacked the competence necessary to challenge mergers which raised competition concerns because they did not establish or strengthen a dominant position.¹ As part of the revision of the merger regulation framework, the DT was reworded, enabling the Commission to consider if a transaction may significantly impede competition even though it would not establish a collusive oligopoly or a position of dominance. The recast Merger Control Regulation also introduced or revised several Articles which required the reshaping of the merger regulation framework and the revision by the Commission of its approach and mind-set when applying the recast framework. In order to examine the hypothesis that the application of the NMR represents a step rather than a drastic change to the merger regulation framework, this chapter will consider how the European Commission has applied or adapted to these revisions and consider the impact the application of the NMR has had upon the trajectory of merger regulation policy and law and the (re)shaping of the merger regulation framework.

¹ Conti, M. EU Merger Analysis. *Comp. L.I.* 2006, 5(5): 6-9.

The first part of the chapter will be separated into several subheadings/issues: jurisdictional; substantive; procedural² and Commission as a facilitator, in order to examine if and how the application of the merger regulation policy by the Commission has changed as a consequence of the entry into force of the NMR. The latter part of the chapter will examine the factors which remain outside the Commission's control but can (attempt to) shape the application of the merger regulation framework. This section will examine the role the media plays in hindering or shaping the appraisal process and the application of the NMR by the Commission and also analyse the role the CFI and ECJ play in shaping the merger regulation framework.

3.2 Jurisdictional Issues

3.2.1 Allocation of Mergers

The original referral procedure, sometimes referred to as the "distinct market exception," was a product of compromise.³ Prior to the entry into force of the NMR, case referral was premised upon Articles 9: a Member State may request a referral back to national authorities, and 22: whereby Member States can request a referral to the Commission if the transaction did not fall within the threshold requirements. The intention of the original ECMR was to establish a one-stop shop. Sir Leon Brittan, the then Competition Commissioner, observed that: "... rather than adding an extra layer of bureaucracy, the Regulation would peel away several layers of bureaucratic control at one stroke reducing these to a single approval procedure in every case".⁴

Article 9 was only used infrequently in the formative period of the application of the ECMR. From 1996 onwards, however, this principle has been used more often by the Commission. The first time the reference back principle was

² This is following and building upon the framework laid out in Competition Law Monitor, *Mergers in the EC – Reform of the Merger Regulation*. *Comp Law Mon* 3.1(1), which examines the ECMR and charts developments, including reference to the proposed NMR.

³ Hirsbrunner, S. Referral of Mergers in EC Merger Control. *E.C.L.R.* 20(7), 1999: 372 - 378.

⁴ Soames, T. The "Community Dimension" in the EEC Merger Regulation: the Calculation of the Turnover Criteria. *E.C.L.R.* 11(5) 1990: 213-225.

operationalised was in *Steeley plc/Tarmac*⁵ in 1992. The Commission agreed that as the concentration would result in Tarmac and Steeley combining domestic building resources, this would lead to problems in the sale and manufacture of brick and clay tiles in certain parts of England. As the brick and tile market is regional and exportation of bricks and tiles to mainland Europe was low, due to transportation costs, the impact of the merger would affect UK markets. The economic implications of the merger were therefore referred back to the UK authorities whilst, at the same time, the Commission found that the remaining aspects of the merger were compatible with the Common Market.⁶ Prior to the entry into force of the NMR, analysis of Article 9 Referrals, as noted by Jones and Suffrin,⁷ reveals the potential “difficulties that can result” if one authority clears the merger whilst another prohibits the merger.

Monti, in his last speech to the IBA Conference (2004) as Competition Commissioner, stated that one of the objectives of the revision of the merger regulation framework was to “... put in place a more rational corrective mechanism of case allocation ... based on subsidiarity, by ensuring that the authority best-placed to carry out a particular merger investigation should deal with the case”.⁸ The new two-way system of referral ensures that the principle of subsidiarity is applied - the best-placed authority appraises the transaction. Now referrals can be premised upon Article 4(4), whereby the notifying parties request a referral to the Commission. The Case Referral Notice outlines the Commission's policy towards case referral. Prior to the amendments, they could only request a referral after notification of a transaction. The new Merger Control Regulation introduced a degree of flexibility in the referral system, permitting the parties to the transaction

⁵ Case COMP No IV/M.180 *Steeley/Tarmac*. The UK, under Article 9(2) requested a reference back in relation to certain markets, bricks and clay tiles. The Commission agreed as, due to transportation costs, the joint venture would not affect these markets on mainland Europe.

⁶ Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 886; Case No COMP IV/ M. 180, *Steeley plc/ Tarmac* [1992], 4, *C.M.L.R.* 337.

⁷ Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 886; Case No COMP IV/ M. 180, *Steeley plc/ Tarmac* [1992], 4, *C.M.L.R.* 337.

⁸ Monti, M., *Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation*. Speech by Mario Monti, IBA, 8th Annual Conference, Fiesole, 2004. EUROPA Rapid Press Release, SPEECH/04/403, Date: 17/09/2004. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=HTML&aged=0&language=EN&guiLanguage=en>, Accessed 17/10/06).

to request a referral from the Commission back to national competition authorities and vice versa, permitting referral at both the pre- and post-notification phase.

Between May 2004 and September 2006 there were 821 notifications.⁹ There were 37 referrals to Member States' national competition authorities. Pre-notification via Article 4(4) accounted for 21 of the referrals and post-notification via Article 9 for 16. There were 72 referrals to the Commission via Article 4(5) pre-notification and 7 via Article 22 post-notification.¹⁰ The Commission refused 6 referral requests between 2004 and 2006. In *Bertelsmann/Springer JV*,¹¹ for example, the Commission refused to refer to the German Competition Authority on the basis that there was a European dimension to this case. Monti noted that "the key aspect of the reform is that referrals can occur before a formal filing". The majority of requests want filings to be based in Brussels, whilst: "so far, the new referral system is not being used by businesses as a means of simply forum-shopping ... the great majority of the requests which have been submitted to the Commission under article 4(5) concerned genuinely cross-border cases ...".¹²

As noted by Lowe,¹³ the revised case referral system both ensures that the most suitably placed authority reviews a transaction and that the need for multiple filings is reduced (400 filings with national competition authorities were avoided as a consequence of the introduction of the "one-stop shop"), whilst Jones and Suffrin observed that the Commission must exert caution and discretion when utilising Article 9, "... if it is not [to] rob the one-stop shop principle of substance".¹⁴ The

⁹ European Commission, *European Merger Control – Council Regulation 139/2004 Statistics*. Available from: <http://ec.europa.eu/comm/competition/mergers/cases/stats.html> (Accessed 17/10/06).

¹⁰ See Appendix 1 for a full break down of referral statistics.

¹¹ COMP/ M.3178 Bertelsmann/Springer JV. Bertelsmann, Gruner+, Jaher and Springer wanted to combine their rotogravure printing presses in Germany and establish printing facilities in the UK. The German authorities requested a referral back but the Commission felt the joint venture had the capacity to affect the European market as a whole, not just the German high volume printing for magazine market. The Venture was later cleared.

¹² Conti, M. EU Merger Analysis. *Comp. L.I.* 2006, 5(5): 6-9.

¹³ Lowe, P. *EC Merger Regulation: Is there Really a New Approach? EC Competition Day*, Vienna, 2006 EC Competition Day. Available from: <http://www.competition06.com/NR/rdonlyres/BE2DD1E3-5FA3-48CE-A333-D136515D1FE4/25532/PhilipLowe/slides19June2006Vienna.pdf> (Accessed 14/01/08).

¹⁴ Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 889.

new case referral system, therefore, adheres to the principle of subsidiarity, which is a central tenet of the Community's acquis.

The revision of the allocation of mergers mechanism illustrates a theme which runs concurrently through the Merger Control Regulation and competition policy - the need to increase the flexibility of the regime. The use of these new mechanisms by both the notifying parties and the Commission has resulted in the need for fewer multiple-filings and represents a natural progression from the original mechanism rather than a radical change from the original provision. The new referral procedures are designed to find a balance between the need to establish a high degree of legal certainty - through the establishment of turnover thresholds which determine whether or not a concentration possesses a Community dimension - and the need to make provision for cases where a transaction *may* meet the threshold requirements but only has a limited impact upon a Member State or in cases where a transaction does not meet the threshold requirements but will impact upon a number of Member States.¹⁵

3.3 Substantive Issues: Substantive Test

3.3.1 SIEC Test

Prior to the entry into force of the NMR, the Merger Control Regulation only permitted the Commission to prohibit mergers which would establish or reinforce a dominant position.¹⁶ The toolkit used by the Commission during the application of the original Merger Control Regulation enabled it to consider if competition would be impeded as a consequence of the transaction, focusing upon and utilising theories of harm:¹⁷ the effect monopolies or bundling of products would have upon competition in that particular market and the effect the transaction would have upon that entity's position within the market, namely will it establish or reinforce its

¹⁵ Field, Fisher, Waterhouse LLP, *Competition Monthly Update – 2004*. Available from: <http://www.ffw.com/Publications/competition/alertersept2004.aspx> (Accessed 15/10/06).

¹⁶ Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 931.

¹⁷ Davidson, L. M. EU Merger Control and the Compatibility Test: A Review of Recent Developments. *Liverpool Law Review*, 25, 2004: 195-220.

dominant position and increase market share to such an extent that competition is impeded.¹⁸

As noted by Jones and Suffrin, however, although the original Merger Control Regulation "... provided *no* textual support for the view the regulation should also prohibit concentrations that would create or strengthen a collective dominant position on an oligopolistic market where a collusion-like outcome was likely," the Commission interpreted that the ECMR did permit the prohibition of concentrations which established or reinforced collective dominance.¹⁹ In a series of cases (some of which were upheld by the CFI²⁰ and ECJ), the Commission expanded the provisions of the Merger Control Regulation regime to also encompass transactions which had the potential to be duopolistic - in *Nestle/Perrier*,²¹ for example, the Commission required both companies to agree to commitments which would prevent the transaction creating a position of duopolistic dominance, whilst in *Kali und Salz/MdK/Treuhand* the Commission stated that the merger would create a duopoly in the potash market.²²

¹⁸ Dethmers, F. & N. Dodoo, *The Abuse of Hoffman Roche: The Meaning of Dominance Under EC Competition Law*. *E.C.L.R.* 27(10), 2006: 537-549.

¹⁹ Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 932.

²⁰ *Italian Flat Glass* [1992] ECR II 1403. In this non-merger case, the Commission found that three Italian flat glass manufacturers (whose aggregate shares accounted for 95% of the Italian market), were in fact violating Article 81 EC Treaty and fixing prices and sharing the market. The Commission also found the flat glass companies to be violating Article 82 as they would not permit customers to negotiate prices or terms of sale. The CFI upheld the Commission's view that Article 82 applied to any situation where more than two of the dominant companies were linked together by "economic links". (Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004:932).

²¹ Case No COMP/M.190 *Nestle/Perrier*[1992] OJ L336/1; Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 932. Nestle wanted to acquire Perrier. This merger involved still and sparkling bottled water markets. The Commission raised competition concerns relating to the French market where no drinks brand ie Coca Cola has managed to develop a presence in the bottled water market which rivals the three major suppliers: Nestle, Evian and Perrier (who also owned Volvic). The Commission identified high barriers to enter this market due to the high sunk costs involved in promoting a new brand of water and the fact that three companies already dominate this market. The Commission only permitted the merger to proceed after Nestle had sold off 20% of its existing brands, and agreed not to repurchase these assets at a later date.

²² Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004. This case involved Kali und Salz AG (subsidiary of BASF), and Mitteldeutsche Kali AG wanting to enter into a concentration in the potash market. The Commission felt that this would impede competition as the concentration would hold a collective dominant position in the Community market (apart from Germany and Spain). The ECJ upheld the Commission's decision. (Press Release No. 19/98, Judgment of the Court of Justice in Joined Cases C-68/94 French Republic v Commission of the European Communities and C-30/95 Société Commerciale des Potasses et de l'Azote (SCPA) and Entreprise Minière et Chimique (EMC) v Commission of the European Communities Available from: <http://curia.europa.eu/en/actu/communiqués/cp98/cp9819en.htm> Accessed 23/08/08).

The first case to reveal the difference the NMR would make to the application of the merger regulation framework by the Commission, was *Piaggio/Aprilia*.²³ This is one of the first cases to be referred as a pre-referral filing to the Commission for investigation on the basis of Article 4(5). In this instance the Commission cleared the acquisition of Aprilia S.p.A. by Piaggio & C. S.p.A. subject to conditions aimed at safeguarding the competitive environment for the sale of 50 cc motorcycles in Italy. Piaggio agreed to supply competitors/producers with 50cc engines in order to allay competition concerns expressed by the Commission.

The Commission's analysis was based upon the traditional concepts of single dominance - the merger would allow the new entity to dominate the below 50cc market in Italy, despite the strong competition from other manufacturers - and market definition - the Commission identified two markets, scooters with an engine below 50cc and above 50cc. In its assessment of scooters with an engine below 50cc, the Commission identified two sub-sections - high wheel and sports. In the high wheel market Piaggio was the market leader with 46% and Aprilia second in the market with 25%. Decline in Aprilia's sales in the first quarter of 2004 directly benefited Piaggio whose market sales went up 11%. The Commission identified competition concerns in this market as the combined entity would dominate the Italian below 50cc scooter market (the Commission identified no competition concerns outside Italy). The investigation, however, revealed a shift in emphasis to an analytical framework now influenced by the Horizontal Guidelines. The Commission's investigation focused primarily upon the closeness of substitution between Aprilia and Piaggio's products. The Commission identified a high degree of substitutability between the parties' products. As noted by Neven²⁴ "[T]he pattern of substitution and the competitive relationship between products has been considered in detail".

²³ Todino, M. First experiences with the new merger regulation: *Piaggio/Aprilia*. *Competition Policy Newsletter*, (1) Spring 2005: 79. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_1.pdf [Accessed 29/07/07]. Piaggio & C. S.p.A, a small motorbike and scooter manufacturer acquired Aprilia, also a scooter manufacturer. The Commission cleared the transaction subject to conditions: Piaggio will supply (at commercial prices) 50cc 4 stroke engines to manufacturers in the same market.

²⁴ Neven, D. Competitive Economics and Antitrust in Europe. *Economic Policy*, 21 (48), October 2006: 741-791.

The *Piaggio/Aprilia* case, as observed by Todino,²⁵ revealed “the novel features relating to the application of the procedural and analytical framework set out by the new merger regulation.” The Commission appeared to combine the old and new analytical toolkits whilst familiarising itself with the facets of the new framework. As the rest of the chapter will demonstrate, the Commission has taken a cautious, incremental, step-by-step approach when applying the framework established by the NMR, combining the most successful and appropriate elements from both the original and revised frameworks. The seeds of the policy pathway and ideological framework which shape the direction of and influence the application of policy had been planted and were already slowly being incorporated into the merger regulation framework prior to the entry into force of the NMR. The continuation and direction of policy was cemented by the entry into force of the revised Regulation and the Commission has, through a case-by-case approach, provided empirical examples of how it intends to apply the procedural and substantive frameworks.

Whilst the original Merger Control Regulation was premised upon a pure DT, the revised Regulation has been widened to focus upon an assessment of whether or not the merger significantly impedes competition. As Roller and de La Mano observe: “the dominance requirement zooms in on the market power of the merged entity, ignoring market wide equilibrium effects. Ignoring these equilibrium effects may lead to significant errors”. The recast test, therefore, widens the Commission’s remit for investigation of the impact of a transaction:

“... the Commission is now able to assess how a given concentration affects what would happen to prices, outputs and other important features of an oligopolistic market including efficiencies - if firms responded in an individually rivalrous way to market conditions, without any increased likelihood of engaging in tacit collusion.”²⁶

²⁵ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 79.

²⁶ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

In their assessment of the new substantive test, Roller and de La Mano²⁷ considered if the application of the SIEC test has "... changed the way that the Commission evaluates mergers".²⁸ Analysing cases which were notified after the entry into force of the NMR (May 1st 2004 to October 12th 2005) they focused upon "challenged mergers".²⁹ In their sample, Roller and de La Mano found that although "... dominance continues to play an important role in most cases ..." especially Phase I cases, the Commission put less emphasis upon dominance in Phase 2 cases. This section of the thesis, therefore, will outline their findings and conclusions and take their sampling techniques, analysis and conclusions and apply them to more recent cases where competition concerns are raised by the Commission.

To assess the impact of the NMR, Roller and de La Mano constructed two hypotheses, applying them to both horizontal and vertical mergers respectively. The first hypothesis examined the need for dominance as justification for challenging a merger: "The new test has reduced false negatives by focusing on the equilibrium effects of the merger. In particular dominance is not necessary".³⁰ If the Commission challenges a merger which does not establish or strengthen dominance, but threatens to challenge consumer welfare, it will be clear to the authors that there is "evidence of a gap case, in which case the new test clearly made a difference".³¹

²⁷ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

²⁸ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06]. 14.

²⁹ There were 425 notifications, 23 were challenged, 18 cleared after Phase I investigations with commitments, subject to Phase 2 investigations. No mergers were prohibited, (Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06]). See Appendix 2 for a list of evaluated cases.

³⁰ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 14.

³¹ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

The Commission's move to the application of an effects-based approach in merger regulation, as noted by Roller and de La Mano³² has evolved gradually, with the Commission, in several earlier decisions, emphasising that although the transaction after the merger would only possess low market share, it would result in an increase in market power or influence.³³ Weitbrecht observed that after the entry into force of the NMR the "majority of cases focus on the issue of whether the horizontal overlap brought about by the merger would trigger unilateral effects which may, but need not, include the creation or strengthening of a dominant position".³⁴ Instead of focusing upon whether or not the proposed merger strengthens or creates a dominant position, now the Commission focuses upon whether or not the horizontal effects of a merger may negatively effect/impede competition.³⁵ The Horizontal Merger Guidelines "only uses the term dominance sparingly," emphasis is placed upon non-coordinated³⁶ and coordinated effects.³⁷ As Weitbrecht³⁸ points out, the appraisal of mergers does not focus upon the "static issues" relating to market structures such as market share but instead focuses upon the potential for the merging parties to increase prices after the conclusion of the merger. The Commission, according to Weitbrecht,³⁹ examines whether or not the horizontal effects of the merger will harm the competitiveness of the market,

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

³² Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

³³ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

³⁴ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50, 47.

³⁵ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

³⁶ "non-coordinated (unilateral) effects comprise single firm dominance and the situation where the merger does not create a dominant firm, but where the merged entities' freedom to set prices may be substantially increased compared to the situation before the merger increasingly, the synonymous terms noncoordinated effects and unilateral effects are used to refer to all effects that are not coordinated effects and to include dominance". (Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006).

³⁷ "Co-ordinated effects refer to the situation of joint dominance as defined by the CFI judgment in *Airtours*, setting requirements that are not easy for the Commission to prove". (Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006).

³⁸ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006, 47.

³⁹ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006, 47.

significantly impeding competition.⁴⁰ The Horizontal Merger Guidelines, by focusing upon non-coordinated and coordinated effects of a merger, have moved analysis away from considering the potential establishment of a dominant position to take into account the overall effect and (possible) negative impact the merger may have upon competition.

The potential of horizontal overlap to precipitate non-coordinated effects has been examined in *Bertelsmann/Springer JV*.⁴¹ Bertelsmann, an international media company, its subsidiary, Arvato AG, which controls several European printing firms, and Springer which operates two rotogravure printing presses in Germany, proposed to purchase shares in NewCo in order to establish a new joint venture in rotogravure printing. The proposed transaction represented a full function joint venture as the concentration would operate as a separate legal entity.⁴² The Commission expressed concern that the concentration might impede competition, especially in the German market for high volume printing, where the joint venture would possess a market share of over 40%.⁴³ The Commission instigated the first Phase II investigation since the entry into force of the NMR, in order to investigate the possibility that competition in the high volume printing market would be impeded as a consequence of the approval of this joint venture. In the *Bertelsmann/Springer* case there was no reference by the Commission to either dominance or the SIEC. Instead the Commission was concerned with the potential of the merging parties to increase prices post-merger.⁴⁴

The Commission found that despite both companies possessing large market shares, this would not distort the market in Germany as: the three main competitors

⁴⁰ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006

⁴¹ Case No COMP/M.3178, *Bertelsmann/ Springer JV*. Brussels, 03/05/2005. Notified under document number C(2005) 1368 FINAL.

⁴² Case No COMP/M.3178, *Bertelsmann/ Springer JV*. Brussels, 03/05/2005. Notified under document number C(2005) 1368 FINAL. 4.

⁴³ Rapid, *Commission opens in-depth investigation into Bertelsmann/Springer rotogravure joint venture*. EUROPA Rapid Press Release, IP/04/1542, Available from: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/1542&format=HTML&aged=0&language=EN&guiLanguage=en>, [Accessed 27/08/06].

⁴⁴ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 15.

were planning long term expansion in terms of increasing net capacity; the presence of credible competitors: Rotosmeets, Quebecor and Ringier with printing presses close to the German borders, meant that they could offer their services to German publishers and prevent price increases in the German market for magazine printing. Despite the removal of Springer as an independent competitor, there remained three viable competitors who would prevent the market being distorted and the joint-venture would encourage competitors to switch from advertisement and catalogue to magazine printing.⁴⁵ The joint venture, therefore, was approved without the need for remedies.

In *Siemens/VA Tech*,⁴⁶ prior to the merger there were three main competitors: SMS, VA Tech and Dani eli (Siemens had a minority shareholding in SMS). This investigation resulted in a large Phase II investigation where the Commission explored the possibility that the concentration would establish a dominant position within the mechanical metallurgy and plant building market as the proposed venture would establish “numerous horizontal laps and horizontal overlaps in ... power generation ...; power transmission and distribution ...; frequency inverters ...; metallurgy ...; low voltage switchgears ...; building technology ... and other IT services.”⁴⁷ Roller and de La Mano observed that in this case “... the Commission came closer to challenging a merger which could not be challenged under the old test.”⁴⁸ This merger was cleared with conditions attached.

Roller and de La Mano noted that in the *J&J/Guidant*, *Siemens/ VA Tech* and *Lufthansa/Swiss* decisions, the Commission placed less emphasis upon dominance

⁴⁵ Commission of the European Communities, *Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement*. OJ L61/17.

⁴⁶Case No COMP/M.3653, *Siemens/VA Tech*. Brussels, 13/07/2005. Notified under document number C (2005) 2627 FINAL. Siemens proposed a takeover of VA Tech subject to commitments: Siemens would sell its share in SMS. The Commission accepted these commitments and cleared the transaction.

⁴⁷ Case No COMP/M.3653, *Siemens/VA Tech*. Brussels, 13/07/2005. Notified under document number C (2005) 2627 FINAL.

⁴⁸ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 15.

and more upon the analysis of equilibrium effects.⁴⁹ In relation to horizontal mergers, Roller and de La Mano note that during the time span of their sample there were no gap cases, and hence little evidence that the Commission would challenge horizontal mergers where there was little or no evidence of dominance. The Commission would only challenge mergers where there is clear evidence of dominance.

When Roller and de La Mano investigated vertical mergers, they found that the Commission was "... less reluctant to assess equilibrium effects". The *Apollo/Bakelite*⁵⁰ case, for example, involved the takeover of Bakelite by the Apollo Group. Bakelite produces formaldehyde resins, mouldings, compounds and epoxy resins whilst the Apollo Group is an investment corporation, owns two firms which are in direct competition with Bakelite: Borden in phenolic resins and Resolution Performance Products (RPP) in epoxy resins. In relation to amino resins, the Commission considered that Borden and Bakelite were not direct competitors in this market due to geographical constraints established in previous decisions.⁵¹ In relation to epoxy resins, specifically Cardura, however, the Commission was concerned that Bakelite's strong market position in epoxy resins would affect vertical relations as it possessed a strong market position prior to the merger, (30-40%).⁵² As RPP only possessed a small market share of the formulated systems, (0-10%), the Commission was concerned that as RPP was not active in the formulated systems market after the merger was complete, it had not got any incentive to supply Bakelite's competitors: "... RPP may find it profitable to leverage its

⁴⁹ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 15.

⁵⁰ Case No COMP/M.3593 *Apollo/Bakelite*, Brussels, 11/04/05, OJ C 048. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3593_20050411_20212_en.pdf. Eurlax website, document 32005M3593. The Commission cleared the acquisition of Bakelite AG (producer of formaldehyde resins) by Apollo (financial investment group which owns Borden and Resolution which also manufacture formaldehyde resins) subject to conditions. As the Commission identified competition concerns in the formaldehyde resins market, the parties offered to enter into long term supply agreements with any Cardura customer.

⁵¹ Case No COMP/M.3593 *Apollo/Bakelite*, Brussels, 11/04/05, OJ C 048. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3593_20050411_20212_en.pdf. Eurlax website, document 32005M3593, 3.

⁵² Case No COMP/M.3593 *Apollo/Bakelite*, Brussels, 11/04/05, OJ C 048. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3593_20050411_20212_en.pdf. Eurlax website, document 32005M3593, 25.

dominant position in mono-functional ester Reactive Diluents by ceasing to supply those new competitors in formulated systems and therefore reinforce Bakelite's already strong position (30-40%) in this market".⁵³ As Cardura is an essential ingredient of epoxy formulated systems which are specifically formulated for a large range of composites and laminates, the merger would permit Bakelite to increase its control and dominance in the whole epoxy product value chain and "foreclose downstream competitors".⁵⁴ The Commission concluded that the new entity "would use its dominant position upstream in mono-functional ester (Cardura) to increase market power in formulated systems downstream"⁵⁵ and increase "... its overall position over the whole epoxy product value chain and to foreclose Bakelite's downstream competitors".⁵⁶ It is also significant, as noted by Roller and de La Mano, "... that the merger would not allow Bakelite to acquire dominance downstream, as would be expected under the old test".⁵⁷ The Commission incorporated vertical effects⁵⁸ into its analysis, arguing that Bakelite's position was likely to be strengthened and to "increase market power", "an approach more in line with an equilibrium effects analysis".⁵⁹

⁵³Case No COMP/M.3593 *Apollo/Bakelite*, Brussels, 11/04/05, OJ C 048. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3593_20050411_20212_en.pdf. Eurlex website, document 32005M3593, 25.

⁵⁴ Rapid, Press Release: *Mergers: Commission approves the acquisition of the German company Bakelite AG by the Apollo Group, subject to conditions*. EUROPA Rapid Press Release, Reference IP/05/415. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/415> [Accessed 25/02/07].

⁵⁵ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 16.

⁵⁶ Case No COMP/M.3593 *Apollo/Bakelite*, Brussels, 11/04/05, OJ C 048. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3593_20050411_20212_en.pdf. Eurlex website, document 32005M3593, 45.

⁵⁷ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 16.

⁵⁸ Vertical effect analysis: examination of the upwards or downstream markets in order to examine the potential for the merged entity to exert dominance, as a firm which produces the raw material (upstream market) over the final assembly or distribution of a product. (Pass, C. et al, *Collins internet linked dictionary of ECONOMICS: Economics defined and explained*, Collins, 2005: 536).

⁵⁹ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

Roller and de La Mano found that the merger between E.ON and MOL represented a gap case in relation to their first hypothesis, where clearly the new test (and for the pedagogical and analytical requirements of this thesis) and its application by the Commission had changed the final decision. In this case the Commission challenged the merger between E.ON and MOL. This merger involved the acquisition of MOL, a Hungarian owned wholesale gas company, which possessed a quasi-monopolistic status in the Hungarian market⁶⁰ by E.ON Ruhrgas International AG (ERI), a subsidiary of a privately owned German firm, EON, which focused upon electricity and gas.⁶¹ The Commission concluded that this transaction raised compatibility concerns because after the transaction the new “entity will have the ability and the incentive to discriminate against its competitors in the downstream gas market for their access to storage capacity”.⁶² Prior to the transaction, MOL Storage already possessed the capacity necessary to exploit its dominance in the storage of gas in the Hungarian market.⁶³ The transaction would increase incentives to limit competitors’ access to storage through the creation of a “fully vertically-integrated undertaking along the gas chain supply”.⁶⁴ As the

⁶⁰ Roller, L. M. & M. de La Mano, Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 16; Commission decision of 21/07/2005, Declaring a Concentration Compatible with the Common Market and the EEA., COMP/M3696 - E.ON/MOL:3. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3696_20051221_20600_en.pdf [Accessed 27/02/07]. The E.ON/MOL transaction involved the acquisition of two MOL subsidiaries MOL WMT and MOL Storage by EON. As this transaction involved two gas distributors, the Commission raised concerns that they would prevent new entrants from accessing the market as there would be no storage access. Remedies accepted by the Commission included the unbundling of MOL’s gas transmission and production companies and the auctioning off of gas over a 10 year period in the Hungarian gas market, in order to re-establish a level playing field.

⁶¹ Commission decision of 21/07/2005, Declaring a Concentration Compatible with the Common Market and the EEA., COMP/M3696 - E.ON/MOL: 3. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3696_20051221_20600_en.pdf [Accessed 27/02/07].

⁶² Commission decision of 21/07/2005, Declaring a Concentration Compatible with the Common Market and the EEA., COMP/M3696 - E.ON/MOL: 3. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3696_20051221_20600_en.pdf [Accessed 27/02/07].

⁶³ Commission decision of 21/07/2005, Declaring a Concentration Compatible with the Common Market and the EEA., COMP/M3696 - E.ON/MOL:111. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3696_20051221_20600_en.pdf [Accessed 27/02/07].

⁶⁴ Commission decision of 21/07/2005, Declaring a Concentration Compatible with the Common Market and the EEA., COMP/M3696 - E.ON/MOL:111. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3696_20051221_20600_en.pdf [Accessed 27/02/07].

Commission pointed out, the structural links between MOL and MOL Storage would prevent new entrants gaining access into the storage market. E.ON would control the expansion of storage capacity in Hungary⁶⁵ whilst the storage shareholders' agreement between E.ON and MOL would allow E.ON to have the "ability and incentive to make new entry into the storage market impossible at least in the short-medium term". The Commission concluded that this merger would:

"... impede competition in a substantial part of the Common Market ... as the new entity is likely to discriminate against its competitors in the downstream gas markets for their access to storage capacity and is likely to make entry into the storage market impossible."⁶⁶

Roller and de La Mano concluded that this transaction represented a gap case as although there was little evidence to suggest that E.ON would acquire a dominant position downstream as consequence of the transaction,⁶⁷ the newly merged company would have the resources and incentive to increase the cost of access to wholesale gas to rival firms in the downstream market.

As a result of the examination of their hypothesis: that dominance by itself is not sufficient for the Commission to raise competition concerns, they concluded their evidence "was somewhat mixed".⁶⁸ Roller and de La Mano found that although dominance is still associated with the Commission raising competition concerns, in most cases once established, dominance appears a sufficient justification to prohibit a merger. In cases where the merging parties are only

⁶⁵ Commission decision of 21/07/2005, Declaring a Concentration Compatible with the Common Market and the EEA., COMP/M3696 - *E.ON/MOL*: 109. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3696_20051221_20600_en.pdf [Accessed 27/02/07].

⁶⁶ Commission decision of 21/07/2005, Declaring a Concentration Compatible with the Common Market and the EEA., COMP/M3696 - *E.ON/MOL*: 111. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3696_20051221_20600_en.pdf [Accessed 27/02/07].

⁶⁷ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 16.

⁶⁸ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 18.

distant competitors, dominance is often dismissed as a possible competition concern, even if they possess a high market share.

Continuing the analysis of the hypothesis established by Roller and de La Mano, in order to consider if the Commission's application of the merger regime has altered, as it has become more comfortable and acquainted with the new provisions of the NMR, the sample time frame has been extended. My sample is premised upon Commission decisions, taken between October 13th 2005 and June 28th 2007, which have raised competition concerns and is based upon the same sampling technique as used by Roller and de La Mano, to ensure analysis is both valid and reliable.⁶⁹

The examination of horizontal mergers indicates that, as noted by Weitbrecht,⁷⁰ they "... continue to be the principal focus of the Commission's review". The principle of dominance as the rationale for intervention has been dropped by the Commission. Instead it uses language and econometric models associated with significant impediment.⁷¹ An examination of the approach the Commission takes when examining non-coordinated effects in recent decisions, indicates that it, as Weitbrecht points out, is increasingly adopting a more "effects-based approach". The Commission is not only analysing the effect the transaction will have upon the market structure but also placing more emphasis upon the analysis and importance of the examination of the possibility that competitors, in order to raise prices, will restrict access to the market and may impede competition.

The *Adidas-Salomon/Reebok*⁷² takeover already approved by US competition authorities, was subsequently cleared by the European Commission, despite the horizontal overlap between the activities of the two companies, as they had "slightly different brand and pricing positions". The relevant product markets were athletic footwear - sports, which could be subdivided into thirteen markets and leisure wear

⁶⁹ I have only included analysis of the most relevant cases.

⁷⁰ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

⁷¹ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50

⁷² Case No. COMP/M.3942, *Adidas/ Reebok*, 24/01/06, D200298. This merger between these global sports and leisurewear manufacturers was cleared unconditionally by the Commission.

- and athletic clothing. Examining the competitive effect the merger would have in terms of unilateral effects in the footwear market, the Commission could not find any evidence that the merged company would be able to raise the price of trainers for consumers as Adidas is aimed at the middle to high price-point and Reebok middle to low. The parties' price point overlap at the €50 to €80⁷³ mark is where there are enough existing competitors to counteract any attempt to raise prices. In the subsections of the sports shoe market, Nike and other footwear specialists, such as K-Swiss in the tennis market, are the leaders. At the lower end of the market, where there is some overlap, there are enough no-brand and "private brand" competitors to maintain competition. Although there is significant overlap between leisure and tennis, basketball and workout specialised sports footwear, the Commission concluded that even where the shoe is designed for tennis and basketball there is enough competition from competitors and consumers who want a shoe for leisure rather than specific purposes, whilst in the workout shoe market there is no "alarming overlap" as Nike is the market leader and the market is tiny and as yet undefined.⁷⁴ In the most competitive footwear market, football, Reebok holds only limited market share whilst there are already many strong competitors which compete with Adidas.

The acquisition of Adidas by Reebok represented a significant adjustment to the market as the number of competitors post-merger was reduced from three to two. As Nike is the market leader there was no possibility of dominance. The Commission concluded that the possibility of collusion was negated by the changeability of the market, the strength and number of competitors and the number of markets involved.

Keen to encourage airline mergers in order to counteract competition from US counterparts, the Commission has cleared mergers which have affected many more passengers than the Ryanair transaction. The *AirFrance/KLM* and *Lufthansa/Swissair* mergers involved 70 million passengers whilst the Ryanair

⁷³ Case No. COMP/M.3942, *Adidas/ Reebok*, 24/01/06, D200298, 10.

⁷⁴ Case No. COMP/M.3942, *Adidas/ Reebok*, 24/01/06, D200298.

merger would have affected only 50 million.⁷⁵ This case is significant to the airline industry for several reasons. It was the first time the Commission had assessed two of the largest airlines operating out of the same country, Ireland. The proposed transaction was the first between two low-cost airlines covering the largest number of routes ever assessed by the Commission.⁷⁶ In the first prohibition since 2004, the Commission prohibited the proposed acquisition of Aer Lingus by Ryanair on the basis that the proposed transaction would have created a monopoly situation as these two companies are the main two carriers operating out of Dublin.⁷⁷ Kroes stated that:

“Our decision to prohibit this merger was essential to safeguard Irish consumers, who depend heavily on air transport, and other EU consumers. Monopolies are bad for consumers because they reduce choice, lower quality and give rise to higher prices. Low-cost carriers like Ryanair are no exception to this rule. Unfortunately, the remedies proposed by Ryanair were not sufficient to remove the competition concerns.”⁷⁸

The Commission conducted an in-depth market investigation consulting competitors, customers, etc. The Commission found that competitors would be unwilling to enter into direct competition with the merged company due to the fearsome reputation of Ryanair taking on any new entrant to the market and as they operate out of their existing hubs they already had access to the customers because of their famous brands.⁷⁹ The proposed monopoly would impede competition as the new entity would “... account for 80% of intra-European traffic at Dublin

⁷⁵ Watson, R. Ryanair's takeover bid for Aer Lingus fails. *Timesonline*, 28/06/07. Available from: http://business.timesonline.co.uk/tol/business/markets/mergers_and_acquisitions/article1996273.ece [Accessed 29/06/07]. RyanAir proposed a takeover of Aer Lingus. The Commission prohibited the takeover on the basis that it would create a monopoly over 35 routes flying out of Ireland.

⁷⁶ Rapid Press Release: *Commission prohibits Ryanair's proposed takeover of Aer Lingus*. Reference: IP/07/893 Date: 27/06/2007. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/893> [Accessed 13/07/07].

⁷⁷ Rapid Press Release: *Commission prohibits Ryanair's proposed takeover of Aer Lingus*. Reference: IP/07/893 Date: 27/06/2007. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/893> [Accessed 13/07/07].

⁷⁸ Rapid Press Release: *Commission prohibits Ryanair's proposed takeover of Aer Lingus*. Reference: IP/07/893 Date: 27/06/2007. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/893> [Accessed 13/07/07].

⁷⁹ Rapid Press Release: *Commission prohibits Ryanair's proposed takeover of Aer Lingus*. Reference: IP/07/893 Date: 27/06/2007. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/893> [Accessed 13/07/07].

airport",⁸⁰ have a monopoly over 35 routes, and thus there was potential for both an increase and decrease in fares and an increase in the number of seats when needed, if new entrants attempted to enter the market.⁸¹ Access to the market was further reduced by the presence of congestion at airports and the limited number of slots available.⁸²

Clearly Ryanair had recognised potential problems inherent in the proposed transaction, proposing short-term remedies on a proactive rather than a reactive basis as part of its proposal. Ryanair proposed that if the transaction was cleared by the Commission it would cut prices for customers by 10% and open up air-time slots at Heathrow and Dublin to rival carriers for a year in order to preserve competition. The Commission, however, rarely accepts short-term remedies as there is a potential for a monopoly situation to develop after the remedial action period had ended, over which the Commission has no control.

The continuation of Roller and de La Mano's analysis indicates that there are more instances where the Commission is willing to challenge horizontal mergers where there are competitive concerns. An examination of more recent case studies indicates that the Commission is no longer as concerned with the potential for the establishment of dominance when examining horizontal mergers. An examination of vertical mergers indicates that the Commission is continuing in the direction identified by Roller and de La Mano, slowly expanding its use of equilibrium effects theory.

The second hypothesis involves the analysis of the application of the old test by the Commission, and consideration if application of the new test by the

⁸⁰ Kroes, N. cited in: Ryanair's takeoverbid for Aer Lingus fails. *Timesonline*, 28/06/07. Available from: http://business.timesonline.co.uk/tol/business/markets/mergers_and_acquisitions/article1996273.ece [Accessed 29/06/07].

⁸¹ Buck, T. Brussels blocks Ryanair merger. *FT.com*, 28/06/07. Available from: <http://www.ft.com/cms/s/50909992-2513-11dc-bf47-000b5df10621.html> [Accessed 14/07/07]; Watson, R. Ryanair's takeoverbid for Aer Lingus fails. *Timesonline*, 28/06/07. Available from: http://business.timesonline.co.uk/tol/business/markets/mergers_and_acquisitions/article1996273.ece [Accessed 29/06/07].

⁸² Rapid, Press Release: *Commission prohibits Ryanair's proposed takeover of Aer Lingus*. Reference: IP/07/893 Date: 27/06/2007. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/893> [Accessed 13/07/07].

Commission would make a difference: “[T]he new test has (unequivocally) shifted the emphasis away from structural indicators towards competitive effects. In particular dominance is not sufficient”.⁸³ Roller and de la Mano noted that within their sample they “... find no cases where the Commission considers the possibility that the creation or strengthening of dominance might in itself be insufficient to raise competition concerns”.⁸⁴ As noted by these authors, and others who analyse the principle of dominance relating to both EU and national mergers, market share often provided justification for identification of dominance.⁸⁵ In *Pernod/Ricard*,⁸⁶ for instance, the Commission identified dominance because the combined market share was above 50%.⁸⁷ In more recent cases, there is evidence that high market share, on its own, is not interpreted by the Commission as justification to conclude that the transaction will impede competition. In *Bertelsmann/Springer*, the Commission cleared the transaction, after an in-depth investigation, without the need for remedies, although the combined market share after completion of the transaction was above 50%, as there was enough competition to counteract any potential dominance by the new joint-venture.⁸⁸ In *Johnson & Johnson/Guidant*, the presence of a combined market share post-merger of 70% was offset by a “lack of product homogeneity and lack of capacity constraints”.⁸⁹

⁸³ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 14.

⁸⁴ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

⁸⁵ Kokkoris, I. The Concept of Market Definition and SSNIP Test in the Merger Appraisal. *E.C.L.R.* 26(4), 2005: 209-214; ICN Report on Merger Guidelines - Chapter 2, April 2004: 2. www.internationalcompetitionnetwork.org/seoul/amg_chap2_mktdefn.pdf.

⁸⁶ Pernod and Ricard, both French distillers, merged in 1975, was and still is, the third largest distiller in the world.

⁸⁷ Kokkoris, I. The Concept of Market Definition and SSNIP Test in the Merger Appraisal. *E.C.L.R.* 26(4), 2005: 209-214; ICN Report on Merger Guidelines - Chapter 2, April 2004: 2. www.internationalcompetitionnetwork.org/seoul/amg_chap2_mktdefn.pdf.

⁸⁸ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 17.

⁸⁹ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*; Case No COMP/M.3687 *Johnson & Johnson/Guidant*. 25/08/2005. Notified under document number C(2005) 3200 FINAL. Johnson & Johnson sought to acquire Guidant. Both parties are involved in the research, design, manufacture and sale of vascular devices. Parties were direct competitors with only a small number of participants in the global market. The Commission identified competition concerns due to the lack of competitors. The transaction was subject to

Roller and de la Mano found that their evidence supporting their second hypothesis was mixed. If dominance was established during an investigation by the Commission, this appeared adequate justification to challenge a merger. If the merging parties were only distant competitors in a particular market, even if they possess high market share, dominance is dismissed.⁹⁰ Roller and de La Mano consider that “dominance remains a sufficient condition [to challenge a transaction], yet more than just high market shares are needed to reach a finding of dominance and to challenge a merger”.⁹¹

The *T-Mobile Austria/Tele.ring*⁹² case, as noted by Weitbrecht,⁹³ represents the first “gap case” in the application of the NMR by the Commission, as it would not have fallen under the scope of the original Regulation because this is the first case in which the Commission has raised competition concerns on the basis of non-coordinated, unilateral effects. In this case, T-Mobile, the second largest competitor in the market wanted to merge with the fourth, Tele.ring (post-merger Mobilkom would remain the strongest player in the market). Although Tele.ring was not Mobilkom’s nearest competitor, it was, however, considered by the Commission as a maverick. Over 50% of individuals shifting phone providers moved to Tele.ring as it offered the lowest prices.⁹⁴ The Commission felt that the merger would remove the maverick player, increase competition between the two main players, as pre-merger this competition had been impeded by Tele.ring and thus “... make the two leading players more symmetrical in terms of market share”.⁹⁵ The Commission cleared this merger after a Phase I investigation, accepting the

remedies: J&J divest its cordis steerable guidewire business (Europe) and Guidant its endovascular solutions business. Ultimately, however, this merger collapsed. J&J sued Guidant for \$76 million and Guidant merged with BSX.

⁹⁰ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*, 18.

⁹¹ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

⁹² Case No COMP/M.3916 *T-Mobile Austria/tele.ring*, Commission Decision, 26/4/2006. The Commission cleared the acquisition of Tele.ring by T-Mobile Austria subject to conditions. These conditions included the divestment of Tele.ring’s UMTS frequency sites and mobile telephony sites to competitors with a lower market share than Tele.ring.

⁹³ Weitbrecht, A. EU Merger Control – The Year in Review. *E.C.L.R.* 28(2), 2007: 125-133.

⁹⁴ Weitbrecht, A. EU Merger Control – The Year in Review. *E.C.L.R.* 28(2), 2007: 125-133.

⁹⁵ Weitbrecht, A. EU Merger Control – The Year in Review. *E.C.L.R.* 28(2), 2007: 125-133.

remedies presented by the notifying parties. As Weitbrecht points out, the use of unilateral effects enabled the Commission to: “intervene where a maverick is being acquired by the number two or number three player in the market without having to resort to a co-ordinated effects analysis”.⁹⁶

Another “noteworthy case of non-coordinated effects”⁹⁷ is *Linde/BOC*. The Commission found that competition *would* be impeded as a consequence of the transaction despite the fact that the merged entities would not become market leader⁹⁸ (this case was cleared subject to remedies). The *Linde/BOC*⁹⁹ case involved the acquisition of the BOC Group by Linde AG. Both companies were involved in the industrial - oxygen, nitrogen and argon - and speciality - helium - gas markets.¹⁰⁰ Analysing non-coordinated effects and the helium wholesale market, the Commission determined that prior to the merger, competition was symmetrical between Air Products, Praxair and BOC, with Air Liquide possessing a much smaller market share. Due to the limited access to and sources of helium, the market has remained relatively stable because market share is dependent upon access to these sources.¹⁰¹ Linde had also recently gained access to the wholesale helium market having acquired access to helium sources via a joint-venture with Sonatrach and several long term agreements. The Commission determined that the proposed transaction would alter the symmetry of the competition as Linde, now part of the triumvirate of the main competitors, would not have the incentive to act

⁹⁶ Weitbrecht, A. EU Merger Control – The Year in Review. *E.C.L.R.* 28(2), 2007: 125-133.

⁹⁷ Lowe, P. Commission's Enforcement Record 2006. *Competition Policy Newsletter*, (1) Spring 2006:1. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2007_1.pdf [Accessed 07/07/07].

⁹⁸ Lowe, P. Commission's Enforcement Record 2006. *Competition Policy Newsletter*, (1) Spring 2006:1. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2007_1.pdf [Accessed 07/07/07].

⁹⁹ Kijewski, S. et al. *Linde/BOC: Concentration in the industries of industrial gases, specialist gases and helium*. *Competition Policy Newsletter*, (3), Autumn 2006:41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07]. Linde acquired BOC. Both these companies are active in helium and industrial gas markets. Initially the Commission identified competition concerns as Linde would be removed as a potential competitor from the market. The parties offered commitments: divest Linde's gas business contracts in the UK and BOC's industrial gases in Poland. The Commission then cleared the transaction.

¹⁰⁰ Kijewski, S. et al. *Linde/BOC: Concentration in the industries of industrial gases, specialist gases and helium*. *Competition Policy Newsletter*, (3), Autumn 2006:41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

¹⁰¹ Kijewski, S. et al. *Linde/BOC: Concentration in the industries of industrial gases, specialist gases and helium*. *Competition Policy Newsletter*, (3), Autumn 2006:41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

aggressively. The removal of an aggressive competitor would encourage non-coordinated effects and precipitate an increase in prices for consumers.¹⁰²

Roller and de La Mano observe that the Commission is moving to a more effects based approach, which reveals the inherent tensions between dominance-led and effects-based analysis. They cite the example of *Bayer/Roche*¹⁰³ where, on the one hand, the Commission argues that in the topical antifungal market, competition is impeded as a consequence of a combination of "... a very high market share, the significant competitive overlap and low market share of remaining competitors ...".¹⁰⁴ On the other hand, in the Austrian plain antacids market, the Commission identified no such competition concerns, even though *Bayer/Roche* possessed 55-60% of the market share with a 10-15% overlap, because if this entity had attempted to raise prices there were enough substitutes to which consumers could turn. They also cite the *Reuters/Telerate*¹⁰⁵ decision as a reflection of these tensions. In this case, the Commission dismissed competition concerns in relation to the real-time data market. In the market-data platforms markets, however, the Commission raised competition concerns, without making any direct reference to dominance, as Reuters possessed 85% market share and Telerate 5%.¹⁰⁶

An important development in relation to the application of the NMR by the Commission is that dominance was identified by the Commission on the basis that the merging parties' products were too close. In *Novartis/Hexal*¹⁰⁷ the Commission argued that due to the high combined market share, the merger would foreclose

¹⁰² Kijewski, S. et al. *Linde/BOC: Concentration in the industries of industrial gases, specialist gases and helium. Competition Policy Newsletter*, (3), Autumn 2006:41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

¹⁰³ Case No. COMP/M.3544 Bayer Healthcare/ Roche. Bayer Healthcare AG acquired Roche OTC. This case was cleared unconditionally.

¹⁰⁴ Kijewski, S. et al. *Linde/BOC: Concentration in the industries of industrial gases, specialist gases and helium. Competition Policy Newsletter*, (3), Autumn 2006:41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

¹⁰⁵ Case No COMP/M.3692 Reuters/ Telerate. Reuters, a global information network, acquired Telerate, a global financial information provider. The Commission cleared the transaction without the need for commitments.

¹⁰⁶ Kijewski, S. et al. *Linde/BOC: Concentration in the industries of industrial gases, specialist gases and helium. Competition Policy Newsletter*, (3), Autumn 2006:41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

¹⁰⁷ Case No. COMP/M.3751 Novartis/Hexal. Novartis wanted to acquire Hexal. The parties offered commitments to ensure the market remained competitive. Novartis divested itself of certain assets. The Commission did not oppose the transaction.

consumer choice as the transaction would not only establish a market leader but as the products of the merging parties are very similar, the transaction would link together products which consumers would purchase as their first or second choices. The Commission also noted that due to the reduced number of competitors, combined with the high market share of the merging parties, the potential existed to establish single dominance.¹⁰⁸

There is, of course, the potential for not only non-coordinated (unilateral) but coordinated effects.¹⁰⁹ Since the entry into force of the NMR, the Commission has identified several cases where there is a danger of coordinated effects, which have sometimes required remedial action. In *AP Moller/Royal P&O Nedlloyd*, for example, the Commission, subject to certain conditions, cleared the acquisition of Royal P&O Nedlloyd by AP Moller – Maersk Group, establishing “the world’s largest shipping company”.¹¹⁰ The proposed transaction would establish links between Maersk and the other consortia and conferences of which Royal P&O was a member. Commission agreement to the transaction was conditional: Royal P&O had to leave the consortia hence severing links with competitors.

Although *Amer/Salomon*¹¹¹ did not possess a Community dimension it was referred to the Commission via the prenotification referral mechanism. In this case, Amer (Atomic) acquired Salomon from Adidas-Salomon. The Commission identified possible competition concerns as both the companies’ products did overlap in the ski equipment and accessories market. The Commission’s analysis focused upon the potential for unilateral and coordinated effects post-merger. In

¹⁰⁸ Kijewski, S. et al. Linde/BOC: Concentration in the industries of industrial gases, specialist gases and helium. *Competition Policy Newsletter*, (3), Autumn 2006:17. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

¹⁰⁹ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

¹¹⁰ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50. This transaction was cleared after a Phase I investigation. This decision permitted the acquisition of Royal P&O by AP Moller – Maersk Group (subject to conditions) which would establish the largest shipping company in the world. The Commission analyzed 11 European shipping lines to consider if the transaction would impede competition. As the proposed concentration would create links between Maersk and other consortia of which P&O is a member, remedial action required P&O to break these links in order to restore competition.

¹¹¹ Case No COMP/ M.3765 *Amer/Salomon*. 12/10/2005. Notified under document number D(2005) 205: 502. Amer Sports Corporation (Atomic is its winter goods segment) sought to acquire Salomon, a global winter sportswear/equipment manufacturer. In this case the Commission authorized the acquisition.

terms of unilateral effects, the Commission concluded that the products were not that close: Atomic has a “racing image” whilst Salomon has a lifestyle focus. The potential for coordinated effects was, however, much greater in the cross-country ski markets in Austria, France and Germany. Although there would not be clear cut coordinated effects, the merger would have precipitated a co-operation agreement between Salomon and Fischer to be widened to include Atomic - Fischer's main competitor in the cross-country ski market. The Commission conditionally cleared the acquisition of Amer by Adidas Salomon on condition that Salomon adapted its agreements with Fischer.¹¹²

3.3.2 Conglomerate Effects

Analysis of the conglomerate effects of a merger arises if the merging parties belong to separate but interrelated markets. As noted by Weirbrecht, conglomerate effects are analysed by the Commission in terms of “portfolio effects”. In *Proctor & Gamble/Gillette*,¹¹³ the Commission examined the potential for conglomerate effects developing as a consequence of their huge portfolio of brands and large market share in several different markets which did not overlap. The Commission focused upon the possibility of bundled products linked together by discount, promotion, etc and the potential for squeezing of competitors' products out of the market which could negatively affect the consumer. The Commission decided that post-merger, competition would be maintained and the retailer's purchasing influence would counteract any potential portfolio effects.

Proctor & Gamble/Gillette represented a significant case in the evolution of the Commission's application of the Merger Control Regulation regime as it was the first time that the Commission considered the importance of category management and revealed that the restrictive time constraints of the Phase 1 investigation will not preclude the Commission from conducting an in depth

¹¹² Weirbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

¹¹³ Case No. COMP/M.3732, *Proctor & Gamble/Gillette*. P&G (a global manufacturer with a portfolio of goods: household care, beauty care etc) acquired Gillette (a multinational producer of healthcare/oral care products). The Commission expressed competition concerns, so commitments were presented in order to restore competition. P&G divested its spin brush battery operated toothbrush business and agreed not to reacquire influence over this business for 10 years.

investigation.¹¹⁴ This case involved the acquisition of Gillette by Procter & Gamble. Both companies operate in a variety of healthcare/beauty related markets: Procter & Gamble produce a variety of beauty, health and household products whilst Gillette produce oral health care products, blades, razors and batteries. Post-merger the new company would operate in 21 markets and have an annual turnover of more than \$1 billion. Clearly as the merger would combine two market leaders, the Commission had to investigate the possibility that they would abuse their market position due to their large portfolio post-merger. The Commission, however, only identified limited overlap in several markets and only significant competition concerns in the battery toothbrush markets.¹¹⁵ This case, as noted by Kloc-Everson, highlighted the determination of the Commission to stay within the deadlines established by the timetable but also to conduct an in-depth investigation including new factors within their market investigation.¹¹⁶

An examination of conglomerate effects of the transaction was necessary due to the large portfolio of the combined companies. The Commission's analysis of non-horizontal effects focused specifically upon the potential of the parties to squeeze out competitors through the bundling of products and category management.¹¹⁷ The market investigation focused upon the possibility that parties may force retailers to stock their weaker performing brands with their "must have" ranges in order to occupy shelf space and squeeze out competitors. Bonuses and financial incentives were cited by third parties and competitors as methods of ensuring competitors' products were removed from the shelves.

The Commission's investigation found that direct bundling is only possible if the parties' products complement each other. Their combined portfolio was so

¹¹⁴ Kloc-Everson, K. et al. Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. *Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

¹¹⁵ Kloc-Everson, K. et al. Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. *Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

¹¹⁶ Kloc-Everson, K. et al. Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. *Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

¹¹⁷ Kloc-Everson, K. et al. Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. *Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

broad that this wasn't the case. When "combined bundling" is introduced it is normally on a buy one get one free basis. The promotion does not extend through the whole portfolio of goods. Strong customer buying power, strong competitors and the retailers' threat of changing supplier, all act as a countervailing power, preventing the parties abusing their position as a consequence of the transaction.

In *Procter & Gamble/Gillette* the Commission examined if category management/captainship may help the parties to dominate the market post-merger.¹¹⁸ Category captainship is when a supplier provides the retailer with information about the product and shoppers and details about where to place the products for optimal selling opportunities through plan-o-grams.¹¹⁹ Third parties expressed concern that category management would enable Procter & Gamble to position their own products in the best positions within these plan-o-grams with or without retailers consent. This would result in a gradual reduction of competition as rivals were squeezed out of the market and in a consequential rise in prices for consumers and a reduction in choice.

The intention and focal point of the Commission's enquiry, therefore, focused upon the potential of Gillette and Procter & Gamble to increase their captain/category management in the oral-care market post-merger because, although prior to the merger neither company possessed a full portfolio of oral-care products, after the merger, they would be in a stronger position to be captain managers in this market. Analysis focused upon the evaluation and comparison of Gillette, Procter & Gamble and their competitors' existing sales, the evolution of their market share and prices of products in markets where they were and were not category captains.¹²⁰

¹¹⁸ Kloc-Evison, K. et al. *Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

¹¹⁹ Kloc-Evison, K. et al. *Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

¹²⁰ Kloc-Evison, K. et al. *Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

The Commission found that the best selling products were not necessarily category captains. Retailers favour their own brands, and due to their own collation of information and data, were not dependent upon suppliers for information and so were not likely to be susceptible to biased recommendations provided by category captains. The Commission also found that retailers were unlikely to focus on their own brands and certain branded goods to the detriment of certain other brands. The Commission found that only failing brands were removed from the shelves and retailers "multi-sourced" their products, often deviating from advice given by the category captains. In the case of oral health-care products the Commission's investigation found that retailers often stocked a wide range of their own products which provided a wider variety of items than the largest suppliers and often stocked their own brands along-side branded products. Often products are delisted from retailers stock as they are failing to sell. Retailers agreed that in certain instances Gillette and Proctor & Gamble products had been removed even though they were category captains as they were underperforming. The Commission concluded that category captainship was beneficial to both retailers and consumers. Retailers' overall sales increased as a consequence of the plan-o-grams, as they could pinpoint which products - irrespective of brand - sold the most, whilst economies of scale could be achieved as retailers were more likely to stock according to the requirements of the plan-o-gram. Consumers have more choice - plans are based upon consumer choice/habit surveys, so products are more likely to be what they actually want. Category captainship was, therefore, a pro rather than an anti-competitive mechanism and would lead neither to an abuse of market position by the parties nor the elimination or squeezing out of competitors.¹²¹

The detailed examination of the non-horizontal and the conglomerate effects of the transaction indicate that the Commission is determined to apply the merger regulation framework diligently when conducting an examination of conglomerate mergers. Although this was only a Phase I investigation, the Commission's market analysis of category captainship and its consideration of economic evidence

¹²¹ Kloc-Evison, K. et al. Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. *Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

illustrated that it was willing to consider new factors, such as category captainship, and apply econometric models when conducting market investigations.

The acquisition of Guidant by Johnson & Johnson¹²² represented a transaction where both parties were involved in the research, design, manufacture and sale of vascular medical devices. The parties were in direct competition with only a small number of competitors active in this market (European and world-wide). Bacchiega et al. note that this case raises several interesting and relevant substantive and procedural points in relation to the application of the NMR by the Commission. Substantively the Commission has shifted its focus of analysis. Market definition and the potential for single dominance are no longer the focal point for investigation. Instead the Commission focused its attention upon the closeness and the possible substitution of products and the effect the transaction would have upon the competitive structure of the market. The Commission's investigation examined several areas: coronary drug eluting stents (DES) and accessories; endovascular stents and accessories used in peripheral arteries and endovascular stents.

Analysis of bundling strategies focused upon the impact they would have in terms of their foreclosure effects: can competitors successfully compete or risk being squeezed out of the market; do consumers have enough purchasing power to influence bundling practices. Guidant had a large portfolio of cardiac medical devices, as the market leader in steerable guide wires and is one of the main competitors in the European bare metal stent (BMS) market. Johnson & Johnson was also a competitor in the same markets and held a strong position in the DES market. The Commission, therefore, considered if the parties had the incentive and ability to enter into anti-competitive bundling practices.

With regard to the potential ability of the parties to enter into bundling agreements the Commission found that bundled products only accounted for about 30% of sales, and hospitals purchased medical devices from several competitors to

¹²² Bacchiega, A. et al. Johnson & Johnson/Guidant: potential competition and unilateral effects markets. *Competition Policy Newsletter*, 3, Autumn 2006:87. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 27/07/07].

avoid being reliant upon one supplier. Further more, both Medtronic and BSX were capable of entering into competitive bundling strategies.

The Commission also focused upon how the removal of a competitor would affect competition in that particular market. In its analysis of coronary stents in interventional cardiology, for example, the Commission had to determine if the removal of a competitor, in this instance Guidant, from the DES market would have a negative impact upon competition in this market. The Commission's investigation found that the time and expense of conducting research and design and clinical trials, the existence of patents which already cover these innovations and the existence of long-standing, trusting relationships between supplier and customer, all hindered new competitors' entry to the market. Due to the differing ambitions of competitors, the investigation identified two tiers within the market. In the higher tier, which was the market the Commission examined, there were/are only a limited number of companies active in the global DES market.

The Commission's analysis focused upon two issues: the hierarchy of competitors prior to the merger and the possibility that new entrants could enter the market post-merger. The investigation found that BSX's leadership of the market was precarious, and could be challenged either by Johnson & Johnson or by any new entrants. The Commission's analysis also focused upon the potential of a new entrant to enter and make an impact upon the DES market. In the case of Guidant, the Commission considered that the transaction would remove a new entrant to the market, as Guidant possessed the capacity to be a successful competitor in this particular market. Two new entrants, Medtronic and Abbott also had the capacity to enter the DES market and gain significant shares of the European market. The Commission, therefore, considered that the removal of Guidant would not harm competition in the DES market.¹²³

Procedurally the case also raised some interesting points. The Commission and FTC worked closely together in this case as the transaction raised several points

¹²³ Bacchiega, A. et al. Johnson & Johnson/Guidant: potential competition and unilateral effects markets. *Competition Policy Newsletter*, 3, Autumn 2006:87. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 27/07/07],. 89.

relevant to both investigations and the merger had the potential to increase the parties' patent portfolio in the Drug Eluting Stent market in America, which would, as a consequence of the transaction, foreclose the market with the negative competitive effects spilling over into the European market.¹²⁴ The transaction would result in the entity possessing a large portfolio of patents which would affect competition in both the US and European markets. The Commission, therefore, analysed the possibility that possession of intellectual property rights in the form of patents would preclude new entrants to both the DES and BMS markets. The Commission's investigation found that the "intellectual property landscape" differed between the US and European market. The US patent market is more litigious, patents are more expansive and last for longer, whilst in Europe there is less Court intervention, patents are more defined and are in existence for shorter periods of time.

The most important patents in the US market cover the Rapid Exchange delivery system which places the stent inside the patient's coronary artery. This is the most popular way of inserting the stent (over 70% of procedures). Only Guidant, Johnson & Johnson and BSX can manufacture this system. Thus new entrants are hindered from entry in to the US market due to existing patents and existing surgeon preferences. The European market, however, does not have Rapid Exchange delivery system patents. Competitors were concerned that the merged entity would be unwilling to grant licenses for the system to competitors in the US market. This would prevent new entrants penetrating the market. Lack of profitability in this market would spill over into the EU market as companies would lack the finances needed to effectively compete here. Evaluating these considerations as part of the investigation, the Commission dismissed these concerns as unfounded. The Commission felt that although the transaction may affect the US market - the outcome of litigation is difficult to predict - this would not necessarily spill over into the European markets. As research and design in this area is rapid, there is often the chance of injunctions, but these are rarely used in either market. More importantly those excluded from the US market were in the

¹²⁴ Bacchiega, A. et al. Johnson & Johnson/Guidant: potential competition and unilateral effects markets. *Competition Policy Newsletter*, 3, Autumn 2006:87. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 27/07/07].

process of entering the European markets, using the Rapid Exchange delivery system.

The endovascular stent market has a high degree of product differentiation and product substitution. The Commission, as part of its investigation had to assess the closeness of substitution between Johnson & Johnson and Guidant's stents. The Commission found that the removal of Guidant would remove the manufacturer whose products were closest to Johnson & Johnson. No other competitor's products were as close in terms of substitution as Guidant and Johnson & Johnson.

As hospitals are the main customers for the medical stent device market, the parties argued that they were in a strong position to exert countervailing buying power and to purchase their products from a variety of suppliers. The Commission found, however, that although multiple sourcing is a common practice, there are only a limited number of suppliers. The closeness of Guidant and Johnson & Johnson's products meant that consumer choice would be limited as a consequence of the transaction and countervailing purchasing power could not counteract the rise in prices.¹²⁵

The Commission's analysis decided that the transaction, by removing Guidant as a competitor, would eliminate the strongest rival in this market, which consequently would allow Johnson & Johnson to unilaterally raise prices. Doctors could not switch products in order to exert their buying power as they could in other markets as this is a niche market with only a limited number of manufacturers. The transaction would precipitate non-coordinated effects which would impede competition in the endovascular stent market.

The *Johnson & Johnson/Guidant* and *Procter/Gillette* decisions reveal the Commission's restrained approach when analysing the possibility that bundling

¹²⁵ Bacchiega, A. et al. Johnson & Johnson/Guidant: potential competition and unilateral effects markets. *Competition Policy Newsletter*, 3, Autumn 2006:87. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 27/07/07], 92.

policies will squeeze out and foreclose the market to competitors.¹²⁶ The Commission analysed both the purchasing power of consumers and the strength of competitors in counteracting the possible foreclosure of the market as a consequence of bundling strategies. In these cases the Commission determined that bundling would not occur despite the large portfolios of the companies involved. The Commission is following the Horizontal Guidelines, placing more emphasis upon the analysis of the substitution of products and the effect the transaction will have upon the competitive structure of the market rather than focusing upon the analysis of the potential for single dominance and market dominance.¹²⁷

3.4 Mergers: A Way of Opening Up Markets?

The *Total/Gaz*¹²⁸ case is notable as it is the first case where the application of the NMR by the Commission is the most evident.¹²⁹ In this case the transaction involved Total, a French oil and gas producer, acquiring certain gas assets in the South-West and Central France from the French public utility, Gaz de France (GDF). This acquisition took place within a larger context. A Nationalization Law (1946) had established a complex set of contracts linking Total, GDF and their affiliates Gaz du Sud Ouest (GSO) and Compagnie Francaise du Methane. This framework was revised as a consequence of the implementation of two European Gas Directives which liberalised the gas industry, opening up the market to new competitors. As a consequence of these Directives, Total and GDF decided to “unwind ... their cross-shareholdings”.¹³⁰ Total acquired GSO, and the gas

¹²⁶ Bacchiega, A. et al. Johnson & Johnson/Guidant: potential competition and unilateral effects markets. *Competition Policy Newsletter*, 3, Autumn 2006:87. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 27/07/07].

¹²⁷ Bacchiega, A. et al. Johnson & Johnson/Guidant: potential competition and unilateral effects markets. *Competition Policy Newsletter*, 3, Autumn 2006:87. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 27/07/07].

¹²⁸ Case No COMP/M. 3410 Total/Gaz De France. In this case the Commission cleared the acquisition of certain GDF assets by Total. To allay competition concerns that Total would hold a monopoly over the supply/storage of gas, it implemented measures which would allow competitors access to these facilities.

¹²⁹ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637; See rest of the chapter for further references to this case.

¹³⁰ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

pipelines between France and Spain (Lacal) and the natural gas storage facility (Izaute). Total also gained control of CFM's gas supply business.¹³¹

This is the first decision where the Commission did not make any reference to dominance.¹³² In this case the Commission examined each of the segments of the French gas sector in turn, allowing it to raise several competition concerns as Total's acquisition of the pipeline network and sole control over both Lacal and GSO placed Total in a monopolistic position post-merger in the South West France transportation of natural gases market. By obtaining control over Izaute, Total would have a monopoly over storage facilities.¹³³ As De Rivery and Guerard point out, this case represents a "gap" case because if the new SIEC test had not been introduced, the Commission would not have necessarily raised or identified competition concerns because Total already held a dominant position.¹³⁴

The Commission, therefore, analysed Total's position in the market, the possibility that it would legally restrict third parties' access to storage and pipeline facilities and thus counteract the objectives of the Second Gas Directive. Despite Total's strong position in the market, the Commission found that Total did not have either the capability or incentive to restrict GDF's access to the transportation or storage facilities. The Commission did find, however, that Total did have the capabilities and incentive to restrict new entrants to the market by restricting access to facilities. This possible abuse of their position by Total was not premised upon large market share but the relatively small markets involved in the natural gas market.¹³⁵

¹³¹ See De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637, for a more detailed outline of the transaction.

¹³² Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 11.

¹³³ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

¹³⁴ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

¹³⁵ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

The main reason the Commission challenged the transaction, therefore, was premised upon Total and GDF's shared use of transportation and storage facilities and the potential for Total to refuse to allow new entrants access to these facilities because of over-subscription. As noted by De Rivery and Guerard, the Commission's conclusions are "remarkable" because Total's control over storage and transportation is governed by the Second Gas Directive which expressly allows lack of capacity as a legitimate reason to refuse access. The remedies proposed by the Commission in order for the transaction to be cleared, were behavioural in order to ensure that facilities were shared fairly between existing and new competitors.

This case provides an insight into the way the Commission intends to address transactions in de-regulated liberalised industries in the future. It is clear that the Commission is keen to encourage transactions which facilitate liberalisation of markets which have previously been monopolies, even if there remains one competitor with a large market share.¹³⁶ The Commission is also willing to go further than is required by directives to ensure that competition, as required by the NMR, is not impeded.

The regulation of mergers has favoured the liberalisation of state monopolised markets and so can be placed within a wider EU competition policy context: the liberalisation of markets.¹³⁷ In *EDF/ENBW*,¹³⁸ *E.ON/MOL*, *Total/Gaz*, for example, the Commission has used these merger investigations and subsequent remedies as a way of opening up markets in the telecommunication, gas and energy sectors.¹³⁹

¹³⁶ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

¹³⁷ Monti, M. A reformed competition policy: achievements and challenges for the future. *Competition Policy Newsletter*, (3), Autumn 2004:6. Available from:

http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_3.pdf [Accessed 11/07/07].

¹³⁸ Case No. COMP/M.1853 EDF/EnBW. Subject to conditions, the Commission cleared the acquisition of joint control of EnBW by EDF and OEW. The Commission expressed concern that the EDF held a dominant position in the French market. EnBW was a potential competitor to enter the market. To address these concerns EDF agreed to make 6,000 Megawatts of generation capacity available to competitors.

¹³⁹ Lowe, P. *The Liberalisation of EU Energy Markets*. The Beesley Lectures, Institute of Economic Affairs, The Royal Society London, 9/11/06.

3.5 Three to Two Mergers

Prior to the entry into force of the NMR, 74% of three to two mergers were unconditionally cleared by the Commission,¹⁴⁰ as the original Regulation did not allow the Commission to examine three to two mergers because they did not fulfil the criteria for suspected collective dominance. After the entry into force of the NMR, Horner speculated that the *VNU/WPP/JV*¹⁴¹ decision, taken by the Commission on the basis of the new Guidelines would render three to two mergers illegal.¹⁴² Horner commented that the recast Merger Control Regulation may, in fact, ensure that the Commission can become interventionist, intervening in cases of single-firm dominance, targeting three to two mergers. Ridyard¹⁴³ pointed out that the recast Merger Control Regulation was supposed to close the “alleged gap in the old dominance test”, the SIEC enables the Commission to widen its scope of intervention to examine cases which fall below “... the tradition threshold associated by findings of single-firm dominance”.

In *Korsnas/AD Cartonboard*¹⁴⁴ the Commission cleared the acquisition of Assi Doman Cartonboard by Korsnas, the second and third companies in the liquid packaging board market (LPB) whose product is then sold to converters, Tetra Pak,

¹⁴⁰ Horner, N. Unilateral Effects and the EC Merger Regulation – How The Commission Had Its Cake And Ate It Too. *Hanselaw Review*, 2 (1), 2006: 37.

¹⁴¹ Case No. COMP/M.3152 VNU/WPP/JV, involved the establishment of a joint venture between ACNielson Corporation which controlled VNU N.V. and AGB Holdings S.p.A. to establish a new venture by purchasing shares in a newly established company – AGB Nielson Media Research. This transaction was cleared by the Commission.

¹⁴² Horner, N. Unilateral Effects and the EC Merger Regulation – How The Commission Had Its Cake And Ate It Too. *Hanselaw Review*, 2(1), 2006: 37.

¹⁴³ Ridyard, D. The Commission's New Horizontal Merger Guidelines – An Economic Commentary. *The Global Competition Law Centre Working Papers*, GCLC Working Paper 02/05, (Brugge, College of Europe) 5, *supra* note 27, 2, cited by Horner, N. Unilateral Effects and the EC Merger Regulation – How The Commission Had Its Cake And Ate It Too. *Hanselaw Review*, 2(1), 2006: 37.

¹⁴⁴ Case No COMP/M.4057, Korsnäs/Assidomän Cartonboard, 12/05/06 (2006/C 209/05); Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518. Korsnas and AD Cartonboard are two of the EEA leading producers in liquid packaging. As there are only three main producers in the EEA: Stora Enso, Korsnas and AD Cartonboard, this transaction would merge the second and third largest producers. There are three customers: Tetra Pak, Elopac and Combibloc. Although the market is small, the merger would not result in the market being impeded as there is countervailing buyer power and more competition is expected from Latin America and China. In fact the Commission felt that this transaction would increase efficiencies, allowing the parties to combine resources, increase production and manufacture both types of liquid packaging. (Rapid, Press Release, Mergers: *Commission approves the acquisition of AD Cartonboard by Korsnas*. IP/06/610. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/610>, Accessed 25/08/08)

Combibloc and Elopak who then convert it into packaging to hold liquids. Prior to the merger the main supplier was StoraEnso, and the two smaller suppliers Korsnas and AD Cartonboard on one side and the largest purchaser, Tetrapak and two smaller competitors, Elopak and Combibloc on the other.¹⁴⁵ Post-merger the supply side was distorted with only two suppliers, although not creating a market leader. It did, however, create and raise unilateral and coordinated effects concerns. As Karlsson points out this is a “notable case” whereby this transaction would result not in the establishment of a dominant position, but in a “near duopoly” in an already “highly concentrated market”¹⁴⁶ as the two largest companies in the LPB market post-merger would possess 90% of the market.¹⁴⁷ The proposed transaction also distorted the “mirrored structure of supply and demand”.¹⁴⁸ Karlsson commented that this case “sheds additional light on the non-coordinated effects test in oligopolistic markets”.¹⁴⁹ Examining the impact of the non-coordinated effects of the transaction, the Commission found that it would actually enhance competition as Korsnas and AD Cartonboard would function more optimally as a competitor as a combined force. Neither the merged entity nor its competitor would be able to raise prices due to the presence of a viable competitor, whilst the anticipated competition from outside the European Economic Area (EEA), especially Brazil and China, was also expected to constrain any anti-competitive effects the two main competitors may have on the market via a “ripple effect” in a few years.¹⁵⁰ Increased manufacture of liquid packaging board outside the EEA area would encourage the newly merged company and StoraEnso to resell within the EEA and therefore reduce the prices of their product as the market became more congested.

This case also raised serious coordinated effects and unilateral concerns. As noted by Karlsson, the *Korsnas/AD Cartonboard* case created a “near duopoly in the EEA”.¹⁵¹ The Commission was concerned about the change to the “exceptional

¹⁴⁵ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁴⁶ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁴⁷ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁴⁸ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁴⁹ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁵⁰ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁵¹ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

market structure” established by the *StoraEnso* merger, which established one large producer, StoraEnso, and two smaller producers, Korsnas and AD Cartonboard. As the merger would result in only two competitors, post-merger concerns were raised about the ability of the existing supplier and the new entity to increase production, if the other competitor raised prices and the possibility of coordinated effects. The Commission, therefore, during their Phase I investigation, closely scrutinised this possibility. The Commission felt that the two suppliers would find cooperation, post-merger, difficult: StoraEnso is much larger and produces white/white and white/brown LPB whilst the new entity only produces white/brown LPB and the countervailing buyer power would ensure that customers could not be shared. The longevity of customer agreements would mean that it would be several years before any cooperation could be put into operation and would be unlikely to be maintained partially due to countervailing power.¹⁵² This decision illustrates that the Commission does not necessarily consider that a three to two merger will impede competition. Rather the Commission appears to take the view that the reduction of competitors may enhance competition,¹⁵³ with countervailing buyer power seen as a device to maintain and ensure effective competition.

Although in *Korsnas/AD Cartonboard* there was no identification of dominance, there is a presumption evolving on the part of the Commission that does not follow the speculative argument of Horner. Instead of prohibiting three to two mergers, the Commission is clearing them on the basis that countervailing buyer power can counteract any negative impact of a transaction, whilst the transaction itself will not impede but encourage and enhance competition.

Although the introduction of the New Guidelines was supposed to enhance legal certainty, and restrict unpredictable application of the NMR,¹⁵⁴ Horner noted that three overriding factors - the HHI index, market definition and market share - actually influence the Commission's decisions. Horner also points out that although “typically” market share is assumed by the Commission to be between 40

¹⁵² Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁵³ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁵⁴ Horner, N. Unilateral Effects and the EC Merger Regulation – How The Commission Had Its Cake And Ate It Too. *Hanselaw Review*, 2(1), 2006: 37.

and 50%, in certain cases the threshold is much lower. In *Syngenta CP/Advanta*¹⁵⁵ for example, the Commission identified competition concerns in cases where the post-merger market share would have been much lower than would normally be the case for the Commission to register concern. Baxter uses these examples to argue that the Commission intends to lower the intervention threshold during the application of the NMR.¹⁵⁶

The Horizontal Merger Guidelines have widened the Commission's scope of investigation by emphasising the need to analyse the non-coordinated and coordinated effects of a merger. These Guidelines have moved the Commission's analysis away from the consideration of the potential establishment of a dominant position, instead the Commission now takes into account the overall effect and (possible) negative impact the merger may have upon competition, especially the effect the transaction may have for consumers. They do not necessarily prohibit three to two mergers. Instead they consider that this will, in fact, improve competition and countervailing buyer power will counteract any anti-competitive effects of the merger. The NMR also allows more scope for intervention by the Commission – thresholds for intervention have been lowered and the Commission can legitimately raise concerns on points of transaction which would not have been possible under the original regime. The Commission appears to be slowly becoming more comfortable with applying the provisions of the NMR, with a corresponding change in the normative dimension as focus is placed upon the possible effect the transaction will have in terms of significant effect on competition, not dominance.

¹⁵⁵ Horner, N. Unilateral Effects and the EC Merger Regulation – How The Commission Had Its Cake And Ate It Too. *Hanselaw Review*, 2(1), 2006: 37. In *Syngenta CP/Advanta* the Commission cleared the acquisition of Advanta by Syngenta, subject to conditions as the Commission identified competition concerns in the sugar beet seed market and other seed breeding markets. In the beet seed market the combined market share after the transaction would be 30/40%. Case No COMP/M.3465 - *Syngenta CP /Advanta*. Available from: <http://www.google.co.uk/search?hl=en&q=Syngenta+CP+%2FAdvanta.++&btnG=Google+Search&meta=> [Accessed 12/09/08]. Rapid Press Release, *Commission clears Syngenta acquisition of seed producer Advanta subject to sale of European operations*. IP/04/1036. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1036> [Accessed 09/09/08].

¹⁵⁶ Horner, N. Unilateral Effects and the EC Merger Regulation – How The Commission Had Its Cake And Ate It Too. *Hanselaw Review*, 2(1), 2006: 37.

3.6 The Gradual Incorporation of Efficiencies

Another, significant indication that the Commission is shifting away from a structural approach to the analysis of transactions is their changing attitude towards, and the gradual incorporation of, efficiencies into the Merger Control Regulation framework.¹⁵⁷ As Kocmut¹⁵⁸ points out, the original ECMR did not explicitly make reference to or include efficiencies in the evolving system of merger control. Although there were several legal bases upon which parties could base their efficiency defence, it was the revised Regulation which provided clarity in this area. Prior to the entry into force of the NMR, the use of the efficiency defence had not been well received by the Commission, who had regarded any benefits of a merger as secondary to the impact the merger may have for competitors.

During the formative period of merger control, despite Article 2(1) ECMR making implicit reference to efficiencies, the Commission viewed the potential benefit of efficiencies negatively, considering the impact they would have for competitors rather than consumers and the possibility that “the merger [would] increase societal welfare”.¹⁵⁹ Davidson¹⁶⁰ points out that the Commission’s use of the range effects theory of competitive harm “overly” focused upon the potential harm a merger may have upon competitors rather than the potential effect it will have on consumer/societal welfare. Whereas in the US, increased efficiency could be justified to authorise a merger which would impede competition, efficiencies were regarded by the Commission, however, as a “disadvantage to competitors, ..., an *efficiency offence*, rather than accept that efficiency would stimulate future competition on the market, i.e. an *efficiency defence*”.¹⁶¹ In some cases, such as

¹⁵⁷ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

¹⁵⁸ Kocmut, C. Efficiency Considerations and Merger Control - Quo Vadis, Commission. *E.C.L.R.* 27(1), 2006: 19-27.

¹⁵⁹ Davidson, L. M. EU Merger Control and the Compatibility Test: A Review of Recent Developments. *Liverpool Law Review*, 25, 2004: 195-220.

¹⁶⁰ Davidson, L. M. EU Merger Control and the Compatibility Test: A Review of Recent Developments. *Liverpool Law Review*, 25, 2004: 195-220, 211.

¹⁶¹ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 639.

Aerospatiale-Alenia/de Havilland,¹⁶² the Commission concluded that the claims that efficiencies would result as a consequence of the merger, were unsubstantiated and were of little importance when assessing the transaction.¹⁶³ In relation to conglomerate mergers, the Commission, in certain cases, did accept that efficiencies would result as a consequence of the merger, these efficiencies would allow the merging parties to reduce prices, and impede competition.¹⁶⁴ Whilst in 1996 the Commission stated: “[t]here is no real legal possibility of justifying an efficiency defence under the Merger Regulation Efficiency issues are ... not [used] to justify or mitigate that dominance in order to clear a concentration which would otherwise be prohibited”.¹⁶⁵ In 1999, however, the Commission stated that “[t]he creation of a dominant position in the relevant markets ... means that the efficiencies argument put forward by the parties cannot be taken into account in the assessment of the present merger”.¹⁶⁶

A much cited example of the transatlantic divergent attitude in relation to efficiencies is the *GE/Honeywell* case, whereby the US competition authorities considered the proposed transaction would permit merger-specific efficiencies as the merged company would be able to offer bundled products and spend more upon research, whereas the European Commission felt that the potential for the merged entity to bundle products would penalise competitors who could not compete, and that the increased financial power of the merged company would permit more risk-taking in the research field, without this risk-taking threatening the company's

¹⁶² Case TV/M 053 *Aerospatiale-Alenia/de Havilland* [1991] OJ L 334/42. This was the first case to be prohibited under the ECMR. This case involved the acquisition of de Havilland by Aerospatiale and Alenia. The Commission was concerned that this transaction would impede competition in the world market for regional turbo prop aircraft. The Commission prohibited the acquisition.

¹⁶³ Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 953.

¹⁶⁴ Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 954.

¹⁶⁵ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06]; European Commission: Contribution to Efficiency Claims in Mergers and Other Horizontal Agreements, O.E.C.D./GD(96)65, 1996.

¹⁶⁶ Case No COMP/ M.1313 – *Danish Crown/Vestjyske Slagterier*, para 198, cited by Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06]. This transaction was cleared conditionally by the Commission.

competitiveness within its market. The principle of efficiencies, as observed by Weitbrecht,¹⁶⁷ does not easily fit into the dominance-orientated model. From the early 2000s onwards, the Commission acknowledged the need to take the principle of efficiencies into account, publishing several studies examining the principles of efficiencies¹⁶⁸ and the 2002 Green Paper reviewing the ECMR “hinted” at the need to take efficiencies into account.¹⁶⁹ In the *Air France/KLM*¹⁷⁰ merger, the Commission’s press release, announcing clearance of the transaction, highlighted the positives and benefits of this merger for passengers, but the decision to clear the merger makes no reference to these efficiencies or the influence they may have had during the merger investigation.¹⁷¹

Recital 29 of the NMR makes it clear that if certain conditions are met, and clear identifiable gains can be made for the consumer, these gains can be used to offset or “counteract the effects of competition”, whilst Form CO invites merging parties to present their efficiency claims.¹⁷² The Guidelines on horizontal mergers (seventh section, para. 85) makes explicit reference to the need for efficiencies to be of benefit to the consumer, to enhance consumer welfare, to be merger specific and to be verifiable. The DG competition publication: Best Practices on the Conduct of EC Merger Control Proceedings also outlined the Commission’s approach to, and application of, the principle of efficiencies. Certainly, the ambiguity towards

¹⁶⁷ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

¹⁶⁸ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 13.

¹⁶⁹ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06].

¹⁷⁰ Case No IV/M.3280, *Air France/KLM*. Commission Decision of February 11, 2004, D2005 49. This case allowed Air France to acquire control of KLM. The Commission identified competition concerns in several flight routes (Paris-Amsterdam and Europe-US). The parties offered commitments: freeing up 94 slots a day to competitors. This would restore competition as flyers would be offered more choice and competitors would have the chance to enter the market. The Commission then cleared the transaction, establishing it as the third largest airline company in the world. (Rapid, Press Release, Commission clears merger between Air France and KLM subject to conditions. IP/04/194/ Available from:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/194> [Accessed 13/09/08].

¹⁷¹ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

¹⁷² EUR-lex, Commission Regulation 802/2004, Implementing Council Regulation 139/2004 [2004] O.J.L 133/1, at 20.

efficiencies which was evident both in the original Regulation and the application of the Merger Control Regulation by the Commission was diminished by the publication of these documents. It must be noted, however, that although "... the new legislation constitutes a vital step in the direction of awarding efficiencies a proper role in the EU merger control ... greatly improves clarity ... and enhances legal certainty", the principle of efficiencies remains absent from the legally-binding segment of the Regulation and package of merger control.¹⁷³ As Kocmut points out, the lack of efficiencies in the "legislative package" and the lack of a legal base to appraise concentrations partly "diminishes the importance of efficiency concerns in the appraisal of concentrations ... and The weight of such claims is adversely affected".¹⁷⁴ As the principle of efficiencies is only mentioned in the Preamble of the Merger Control Regulation and the Guidelines (which are not legally binding) merely "consolidate and explicate the provisional directions laid by the Commission's past decisions", the Commission retains a certain amount of interpretative flexibility in this area and in the pathway their attitude towards the merit and significance of efficiencies may take in future appraisals.¹⁷⁵ Whilst Roller and de La Mano note that "[E] fficiencies continue to play a negligible or hidden role in either Phase 1 or Phase 2 merger investigations",¹⁷⁶ they do, however, point to one "notable exception": *Proctor & Gamble/Gillette*. In this investigation the Commission consider that clearing this transaction may "... bring efficiencies to retailers and customers, for example, [retailers] benefit from having only one partner to negotiate with ...". Nevertheless it was buying power not efficiencies that counteracted portfolio effects.¹⁷⁷

¹⁷³ Kocmut. C. Efficiency Considerations and Merger Control - Quo Vadis, Commission. *E.C.L.R.* 27(1), 2006: 19-27.

¹⁷⁴ Kocmut. C. Efficiency Considerations and Merger Control - Quo Vadis, Commission. *E.C.L.R.* 27(1), 2006: 19-27; Rickard, S. European Merger Reform, *Int. Company and Commercial Law Review*, 2002: 408.

¹⁷⁵ Kocmut. C. Efficiency Considerations and Merger Control - Quo Vadis, Commission. *E.C.L.R.* 27(1), 2006: 19-27.

¹⁷⁶ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 18.

¹⁷⁷ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06]; Weitbrecht, A. EU Merger Control in 2005 - An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

In *Korsnas/ADCartonboard* and *Inco/Falconbridge*¹⁷⁸ the Commission clarified the position of efficiencies within the merger regulation framework. In these cases the Commission, in line with the Horizontal Guidelines, assessed the extent to which the efficiencies generated by these two transactions would counteract negative competitive effects. In *Korsnas/ADCartonboard*, both countervailing buying power and increased efficiencies were cited as reasons for clearance of the acquisition.¹⁷⁹ Although the Commission was not in a position to fully assess the efficiency claims in the Phase I investigation, it found, however, that efficiencies could be gained. The Commission concluded that the acquisition would generate efficiencies by increasing price competition between the market leader, StoroEnso and the merged entity. The Commission found that synergies would be made as the merged entity would be able to increase production of LPB. Taking into consideration a new agreement with one of its customers and a lack of opposition from their existing customers, the Commission concluded that efficiencies would result as a consequence of the transaction and the effects would be passed on to the consumer. The Commission also decided that the substantiated efficiencies would ensure that competition would not be impeded as a consequence of non-coordinated effects.¹⁸⁰ It appears, therefore, that the efficiencies will be considered by the Commission in terms of the potential impact they will have for the consumer.

*Inco/Falconbridge*¹⁸¹ involved the takeover of Falconbridge Limited by Inco Limited. Both are Canadian mining companies with interests in the mining, refinement and sale of nickel and other precious metals. This transaction would have created the largest mining operation company in the world. Ultimately, however, Inco's bid failed and the merger collapsed.¹⁸² This case, however, is the

¹⁷⁸ Case No. COMP/M.4000, *Inco/Falconbridge*, Brussels, 04/07/2006. Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4000_20060704_20600_en.pdf [Accessed 07/07/07]. involved the takeover of two Canadian mining companies: Falconbridge Limited by Inco Limited. This transaction would have created the largest mining operation company in the world. Ultimately, however, Inco's bid failed and the merger collapsed

¹⁷⁹ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁸⁰ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

¹⁸¹ Case No. COMP/M.4000, *Inco/Falconbridge*, Brussels, 04/07/2006.

¹⁸² Boeshertz, C. et al. *Inco/Falconbridge: A nickel mine of application in efficiencies and remedies. Competition Policy Newsletter*, (3), Autumn 2006: 41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

first time that the Commission has considered the impact of efficiencies in detail and so provides an interesting insight into the way the Commission intends to deal with their application. The parties claimed that the merger would generate efficiencies due to the closeness of their mines and processing plants in the Sudbury Basin which would enable their resources to be combined, resulting in lower production costs. These reductions could be passed on to nickel customers. The parties claimed that these efficiencies would offset any anti-competitive effects of the transaction.¹⁸³

Whilst the Commission acknowledged that the merger *would* facilitate significant operating efficiencies, these efficiencies were *not* merger specific - the same efficiencies could be achieved without the anti-competitive effects that the merger would precipitate. The Commission felt that the same savings/efficiencies could be achieved if Inco and Falconbridge entered into a joint-venture in the mining and processing of nickel, rather than a full scale merger. This would allow the two parties to continue to compete in the nickel refining and marketing markets. The Commission also considered that consumers of end-nickel products would not benefit from the cost-savings achieved by the merger in the markets identified as having competition concerns.¹⁸⁴ As cost-savings could be made during the upstream mining and during the processing stage, the savings would not be directed just to the customers of the three markets where competition concerns were identified but spread amongst all the nickel and cobalt markets. The transaction would also place the new company in a monopolistic position, with very little competitive pressure and so it would not have any incentive to distribute any benefits gained from the identified efficiencies to customers in these markets.¹⁸⁵

¹⁸³ Boeshertz, C. et al. Inco/Falconbridge: A nickel mine of application in efficiencies and remedies. *Competition Policy Newsletter*, (3), Autumn 2006: 41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

¹⁸⁴ Boeshertz, C. et al. Inco/Falconbridge: A nickel mine of application in efficiencies and remedies. *Competition Policy Newsletter*, (3), Autumn 2006: 46. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

¹⁸⁵ Boeshertz, C. et al. Inco/Falconbridge: A nickel mine of application in efficiencies and remedies. *Competition Policy Newsletter*, (3), Autumn 2006: 41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

This is the first case where the parties outline the potential operating efficiencies in detail. The Commission examined these claims, and, whilst acknowledging that efficiencies would be made as a consequence of the merger, decided that these savings were not merger-specific, would not directly benefit the consumers in the affected markets and therefore the synergies achieved by the acquisition could not be used to offset or justify the anti-competitive effects of the transaction. Clearly the Commission is determined to examine the potential efficiencies which parties feel would offset anti-competitive effects of the merger. In particular the Commission focuses upon the potential effect the efficiencies would have upon the merger (cost-savings etc) and upon customers in affected markets.¹⁸⁶

Prior to the entry into force of the NMR, the impact of the concentration upon competitors took precedence over the potential benefit the transaction would have for consumers. As a consequence of the adoption of the NMR and the increasing use of economic analysis, “[T]he issue of taking efficiency into consideration in Community merger control policy seems to be of primordial importance today”.¹⁸⁷ The analyses of Roller and de La Mano, and Weitbrecht and Kocmut’s merely theoretical analysis of the impact of efficiencies, highlights the fact that, although the merging parties can use the efficiency defence, there is little incentive to do so - hence the lack of empirical analysis. The Commission’s identification of dominance appears to be sufficient to challenge horizontal mergers where there are competition concerns, whilst with vertical mergers, where equilibrium effects are taken into account, the impact of the NMR is visible.¹⁸⁸

¹⁸⁶ Boeshertz, C. et al. Inco/Falconbridge: A nickel mine of application in efficiencies and remedies. *Competition Policy Newsletter*, (3), Autumn 2006: 41. Available from:

http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

¹⁸⁷ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 655.

¹⁸⁸ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from:

http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 18, found one case after the sample ended.

3.7 Remedies: Structural v. Behavioural

“In the early days of the EC Merger Control Regulation, the Commission adopted a strict rule against behavioural commitments and typically considered that structural¹⁸⁹ remedies should involve divestiture of a business”.¹⁹⁰ As Winckler¹⁹¹ commented, “... the Commission’s guidance as to what types of commitments would be likely to remedy the situation is increasingly more stringent and demanding”. The divestiture procedure was seen as an efficient way of protecting or restoring “effective competition”.¹⁹² The Commission laid out the “up front-buyer procedure” in its “Standard Model for Divestiture Commitments”.¹⁹³ In several cases the Commission required the parties to find a buyer, in certain cases the transaction had to be near completion or completed before the original merger could be cleared.¹⁹⁴ In *Masterfoods/Royal Canine*¹⁹⁵ the parties’ commitments were premised upon the divestiture of several of their pet food brands to an “up-front

¹⁸⁹ Although the Regulations and Notices do not define either structural or behavioural remedies, the CFI, in *Gencor* provides clarification. Structural remedies were defined as “commitment to reduce the market share of the entity arising from the concentration by the sale of a subsidiary.” The 2005 Remedies Study identifies the endowment of exclusive licenses and access to privileged information to third parties as alternatives to divestiture. Other structural remedies, established in *Gencor*, “include severing structural links between competitors, terminating an alliance, granting a long-term lease of manufacturing facilities, and terminating long-term supply or exclusive distribution agreements”. Behavioural commitments are not as clear cut. Went provides examples of behavioural remedies: “commitments not to price discriminate, not to use a trade mark for a period, to offer to supply products to third parties, not to assert intellectual property rights, not to engage in tying practices, not to enter into exclusive or long-term contracts, and to give customers an option to terminate long-term supply contracts”. Went, D. The Acceptibilities of Remedies under the EC Regulation: Structural versus Behavioural. *E.C.L.R.* 27(8), 2006: 455-475.

¹⁹⁰ Went, D. The Acceptibilities of Remedies under the EC Regulation: Structural versus Behavioural. *E.C.L.R.* 27(8), 2006: 455-475.

¹⁹¹ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232, 225.

¹⁹² Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232; Commission Notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98 OJ C 68, 02/03/2001: 3, para.13.

¹⁹³ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232, 226.

¹⁹⁴ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232

¹⁹⁵ Case No COMP IV/M.2544, *Master Foods/ Royal Canine*, 15/02/02, paras 90 and 100-102. The Commission conditionally cleared the acquisition of Royal Canine by Master Foods subject to the requirement that certain brands were divested.

buyer” prior to the closure of the original transaction,¹⁹⁶ whilst in *WorldCom/MCI*,¹⁹⁷ although the Commission had not demanded an up-front buyer to form part of the notifying parties commitments, the parties, as part of their proposed commitments, stated that the divestiture of certain businesses was dependent upon the Commission clearing the proposed transaction.¹⁹⁸ Notifying parties have also proposed alternative “crown jewel” provisions. In *Nestle/Ralston Purina*¹⁹⁹ the Commission accepted the proposed divestiture of Ralston Purina’s holdings in a joint-venture, Gallina Blanca Purina JV, as an alternative commitment and a fail safe, in case the parties failed to license the Friskies brands in Spain by a specific date or by the close of the transaction.²⁰⁰ Over time, however, that position has “softened”, with the Commission more willing to consider more flexible alternatives to divestiture. As noted by Went, the Commission has accepted that behavioural remedies can “... have a structural effect on the market”.²⁰¹ Although structural remedies are still regarded by the Commission as preferable to behavioural remedies, the latter are still preferable to the possibility of prohibition of the transaction. Additionally, as observed by Weitbrecht,²⁰² after the scathing criticism of the Commission by the CFI, the Commission has focused upon accommodation: “clearing mergers subject to remedies wherever possible”. The

¹⁹⁶ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232, 226.

¹⁹⁷ Case No COMP IV/ M.1069 *WorldCom/MCI*. 8/07/1998 (1999 OJ L116/1), paras 136-8. The Commission conditionally cleared the transaction, subject to MCI’s divestiture of its internet business.

¹⁹⁸ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232, 226.

¹⁹⁹ Case No COMP IV/M.2337, *Nestlé/Ralston Purina*, 27/07/2001, OJ C 179. In the Nestle/Ralston Purina case, the Commission cleared Nestle SA to acquire Ralston Purina, subject to certain conditions in relation to the Spanish, Italian and Greek markets. To allay Commission concerns relating to the continued competitiveness of the Spanish pet food market, Nestle offered the Commission two possible remedies to prevent distortion of competition – either to grant an exclusive licence for “Friskies” branded cat food and divest the Castellbisbal production site, or, to divest Ralston Purina’s 50% stake in a joint venture with Agrolimen SA - Gallina Blanca Purina. In Greece and Italy, the concentration would grant licenses for “Chow”, Ralston Purina’s branded pet food. In both situations, divestiture would include goodwill, marketing and public relations assets. Nestle/Ralston Purina would not be permitted to reintroduce or market the licensed brands for five years after the licence period’s expiry date.

²⁰⁰ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232, 228; Case No COMP IV/M.2337, *Nestlé/Ralston Purina*, 27/07/2001, OJ C 179.

²⁰¹ Went, D. The Acceptibilities of Remedies under the EC Regulation: Structural versus Behavioural. *E.C.L.R.* 27(8), 2006: 455-475, 455.

²⁰² Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

application of remedies is a crucial tool in the Commission's merger regulation toolkit, because, as Paas speculated,²⁰³ a large number of mergers would have been prohibited without them.

Weitbrecht²⁰⁴ noted the Commission's more accommodating approach was underway, prior to the entry in to force of the NMR. In *Lagardère/Natexis/VUP*,²⁰⁵ for example, the Commission, despite refusing a request for a partial referral, approved Lagardère's acquisition of Vivendi Universal Publishing (VUP). Vivendi is the leader in the French publishing market whilst Lagardère, who also owns Hachette, is the second largest company in the market. This merger, according to the Commission, would have created an entity which was seven times larger than its nearest competitor, controlling access to the "raw material (well-known writers) and access to sales outlets".²⁰⁶ Lagardère, therefore, was permitted to acquire 40% of VUP's assets which related to academic and reference books.

After the CFI judgments of 2002, the Commission tried to avoid further humiliation and lengthy court cases by employing remedies which are both strict yet innovative.²⁰⁷ The Commission, as observed by Weitbrecht, used remedial action as a means to open up regulated markets. The Commission had previously expressed concern about structural impediments - the restriction and scarcity of take off and landing slots - restricting competition in the air transportation market, due to the bi-lateral agreements between Member States and third countries. In *Air France/KLM*, therefore, the Commission required Air France and KLM to give up some of these slots, which allowed the creation of 31 new flights a day, and to enter into "intermodal agreements" with different types of transportation companies in order to encourage individuals to fly one way and to make the return journey by, for

²⁰³ Paas, A. Non-Structural Remedies in EU Merger Control. *E.C.L.R.* 27(5), 2006: 209-216.

²⁰⁴ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

²⁰⁵ Case No COMP IV/M.2978, *Lagardère/VUP*. 7/01/2004. After the referral back was rejected by the Commission, the Commission initiated an in-depth investigation examining the proposed acquisition of VUP by Lagardère. As these are the two largest publishers of French language text books, the Commission expressed dominance concerns. Lagardère could only purchase 40% of VUP's reference and academic portfolio.

²⁰⁶ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

²⁰⁷ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

example, train. The Dutch and French national regulatory authorities will widen cabotage rights to other companies wishing to stop over in their airports.

Prior to the entry into force of the NMR, the Commission was already utilising behavioural remedies. In *Areva/Urenco/ETC*,²⁰⁸ for example, the parties wanted to enter into a joint-venture in order to develop and manufacture centrifuges for the enrichment of uranium. The Commission expressed concern that this transaction would place Areva and Urenco in a joint dominant position in the EU uranium enrichment market. The Commission approved the merger, subject to the following commitments: the introduction of measures which would prevent the exchange of commercially sensitive information between Areva and Urenco; increased monitoring by the European Supply Agency and the parties agreement to supply the Agency with any additional information needed for it to monitor the “provision and pricing of enriched uranium”.

After the entry into force of the NMR, the Commission has continued with this flexible approach towards commitments, with remedial action being the tool of choice rather than the outright prohibition of a merger. “[A]s a result, [of the entry into force of the NMR] merging parties have flexibility in proposing remedies that address and are proportional to the competition concern raised by the transaction”.²⁰⁹

The application of the NMR by the Commission illustrates that although commitments are preferable to a prohibition of a merger, the tool most used is still either divestiture or the termination of contracts to other companies.²¹⁰ The two related transactions involved in the acquisition of Allied Domecq plc by Pernod

²⁰⁸ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74; Rapid Press Release, *Commission clears uranium enrichment equipment joint venture between AREVA and Urenco*. Reference: IP/04/1189 Date: 06/10/2004. The Commission approved this venture between AREVA and Urenco subject to the condition that the two parties continued to act independently after the transaction.

²⁰⁹ Went, D. The Acceptibilities of Remedies under the EC Regulation: Structural versus Behavioural. *E.C.L.R.* 27(8), 2006: 455-475.

²¹⁰ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

Ricard SA²¹¹ and the simultaneous divestiture of certain Allied brands to Fortune Brands,²¹² for example, were approved by the Commission subject to the divestiture of certain whisky brands and the cancellation of Moët & Chandon and Dom Perignon distribution agreements in Portugal. Behavioural remedies, however, are being used. In the *Piaggio/Aprilia and Total/Gaz de France* decisions, for example, behavioural remedies were accepted by the Commission. In the Piaggio decision, remedies were accepted by the Commission as they felt that purely structural remedies were “unrealistic”. Instead Piaggio’s promise to supply four stroke engines to competitors was seen as sufficient to restore competition to the market.

Whilst Total promised to improve/increase access to its gas storage and transmission facilities, these remedies were used to ensure that the transaction did not contravene the objectives of the Second Gas Directive.²¹³ This case also highlights how the Commission cannot operate in a vacuum when applying the NMR, but must take into account European legislation in that particular area. The Commission imposed remedies which actually went further than required by the EU and French legislation governing competitors and new entrants’ access to natural gas facilities, as it felt these laws failed to provide enough protection for competitors in terms of access to facilities.²¹⁴ Behavioural remedies included Total publishing transportation and gas storage capacities on their website, the development of a secondary market through the sale of storage and transportation capacities and the introduction of a points policy, to ensure that the capacity bookings are not merely booked as a means of preventing other competitors using the facilities.²¹⁵ Although “traditional” remedies are used by the Commission in order to restore the competitive balance of a market, behavioural remedies are, in

²¹¹ Case No COMP IV/M. 3779 *Pernod Ricard/Allied Domecq*, D(2005) 202800, 24/06/2005. Subject to conditions and obligations, Pernod was permitted to acquire Allied, as long as certain distribution agreements were cancelled and whisky and brandy brands sold off.

²¹² Rapid, Press Release: *Commission approves acquisition of Allied Domecq by Pernod Ricard, Subject to Conditions*. Reference: IP/05/792 Date: 24/06/2005. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/792> [Accessed 13/01/2007].

²¹³ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637, 627.

²¹⁴ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

²¹⁵ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

certain circumstances, becoming an acceptable alternative to potential prohibition, ensuring that a transaction can proceed without impeding competition.

Now, in order to avoid any more scathing criticism at the hands of the judiciary, the Commission takes a “risk-averse, middle-of-the-road”²¹⁶ approach to the appraisal of transactions. As Lowe observed, there was a “great deal of continuity” between the old and new system, whilst Roller and de La Mano considered that “there is no evidence of a radical change in the way the Commission assesses the competitive effects of mergers”.²¹⁷ Monti observed that whilst the reform of the substantive test has reinforced the effectiveness of the merger regulation framework, there is now little to distinguish between the American and EU system as both are premised upon “sound economics”, have SLC tests and can take efficiencies into account when evaluating the effects of a transaction.²¹⁸ The NMR, however, still represents a critical juncture, but is a step rather than a radical change in the evolution of EU merger regulation policy, in terms of normative dimension and formal policy path dependency. In relation to the introduction of the new substantive test, it formalised the move towards the effects-based approach, placing less emphasis upon structural factors.²¹⁹ Whilst Monti considered the discussion between the old and new test as “semantic” as dominance is retained as the main test for assessing a transaction’s compatibility with the Common Market,²²⁰ the dynamics and focus of the Commission’s investigation now place less emphasis upon structural issues such as market share.

²¹⁶ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26 (2), 2005: 67-74.

²¹⁷ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06]; Lowe, P. *EC Merger Regulation: Is there Really a New Approach? EC Competition Day*, Vienna, 2006 EC Competition Day. Available from: <http://www.competition06.com/NR/rdonlyres/BE2DD1E3-5FA3-48CE-A333-D136515D1FE4/25532/PhilipLoweSlides19June2006Vienna.pdf> (Accessed 14/01/08).

²¹⁸ Monti, M. A reformed competition policy: achievements and challenges for the future. *Competition Policy Newsletter*, (3), Autumn 2004:6. Available from:

http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_3.pdf [Accessed 11/07/07].

²¹⁹ Lowe, P. *EC Merger Regulation: Is there Really a New Approach? EC Competition Day*, Vienna, 2006 EC Competition Day. Available from:

<http://www.competition06.com/NR/rdonlyres/BE2DD1E3-5FA3-48CE-A333-D136515D1FE4/25532/PhilipLoweSlides19June2006Vienna.pdf> (Accessed 14/01/08).

²²⁰ Monti, M. A reformed competition policy: achievements and challenges for the future. *Competition Policy Newsletter*, (3), Autumn 2004:6. Available from:

http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_3.pdf [Accessed 11/07/07].

More importance is placed upon analysis of the impact that non-coordinated effects of a transaction may have not only for the merging parties but also for their rivals.

The identification of dominance is sufficient justification for the Commission to challenge a horizontal merger whilst the Commission has incorporated equilibrium effects analysis into its investigation of vertical mergers. The principles of efficiencies has also been clearly formalised within the merger regulation framework, although there is a lack of case-law in this area which could be used to analyse how the Commission will interpret and apply this device. The propensity of the Commission in utilising dominance as justification to challenge a merger may dissuade merging parties from presenting efficiency claims/defence, because as Roller and de La Mano note, "if efficiencies cannot trump findings of dominance, it is best to focus on rebutting such finding".²²¹ The NMR, therefore, closes the unanticipated "enforcement gap" which developed as an unanticipated consequence of the original Merger Control Regulation. The revised Merger Control Regulation allows the Commission to take into account the effect of the impact of non-coordinated effects of a transaction in cases where there is no clear cut market leader.

3.8 Procedural Issues

3.8.1. More Flexible Notification Procedure/Timetable

Prior to the entry into force of the NMR, concentrations had to be notified to the Commission within a week of notification of an agreement.²²² The *Total/Gaz* decision "can be regarded as concrete illustration of the 2004 reforms of the European merger control framework".²²³ This is the first case of the parties notifying the Commission of a proposed rather than a final transaction. Instead of presenting the Commission with a final agreement, the parties presented a *Protocole d'Accord*, a framework agreement between Total and Gaz to enter into several

²²¹ Monti, M. A reformed competition policy: achievements and challenges for the future. *Competition Policy Newsletter*, (3), Autumn 2004:6. Available from:

http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_3.pdf [Accessed 11/07/07].

²²² EUR-lex, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. OJ L 395, 30/12/1989: 0001 – 0012.

²²³ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637, 627.

agreements between the two parties. Although the framework agreement did not mention any financial considerations, it did, however, outline the desired outcome of the transaction and a variety of key issues.²²⁴

Again, emphasis is placed upon enhanced flexibility of the merger regulation framework. Whilst this provision is not reliant upon its application by the Commission rather than by the notifying parties themselves, it does, however, reflect the recognition of the need to accommodate the needs of the notifying parties.

3.8.2. Simplified Procedure

The simplified procedure is applicable to certain types of concentrations, which the Commission considers to be unproblematic and thus unlikely to impede competition. Examples of transactions being cleared by the Commission on the basis of the procedure prior to the entry into force of the NMR, included *SHV Holdings/NPM Capital* and *HVB/Commerzbanke/Deutsche Bank/Dresdner Bank*.²²⁵ The Commission published a new Commission Notice on a simplified procedure for treatment of certain concentrations pursuant to Council Regulation No. 139/2004, which replaced the original Notice.²²⁶ Several transactions have recently been cleared by the Commission using the simplified merger review procedure. These include the acquisition of Sitel by Onex and the acquisition of Nordkalk by Ahlström Capital and Rettig Capital.²²⁷

3.8.3. Stop-the-Clock

Regulation 4064/89 established very tight timetables and a two phase procedure for the application of the merger regulation framework, which as

²²⁴ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

²²⁵ Case COMP/M.2146 — *SHV Holdings/NPM Capital*; Case COMP/M.2039 *HVB/Commerzbanke/Deutsche Bank/DresdnerBank*.

²²⁶ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

²²⁷ Rapid Press Release, *Midday Express of 2006-12-22.*, Reference: MEX/06/1222 Date: 22/12/2006. Available from:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEX/06/1222&format=HTML&aged=0&language=EN&guiLanguage=en> [Accessed 19/04/07].

Andreangeli²²⁸ pointed out, “turned out to be too much of a good thing”, and turned into a “straightjacket” for all concerned in the investigation. As Winckler²²⁹ highlighted in a minority of complex cases, the Commission’s application of the merger rules was constrained by the strict timetable, as the MTF acted as negotiator, economic analyst, applying the DT, and “adopt[ed] realistic and enforceable complex remedies packages within the pre-established deadlines”. In *Tetra Laval v the Commission* the CFI was extremely critical of the Commission’s procedures in relation to the appraisal of commitments, highlighting flaws in the way proposed mergers were appraised by the Commission and its application of econometric models.²³⁰ Due to the time constraints involved, remedies or commitments could have placed parties in a weak position, as “objective market testing of the modified proposals became ‘extremely difficult and unpredictable’”.²³¹ In *Schneider/Legrand*²³² the notifying parties presented commitments which they presumed would counterbalance the competition concerns presented in the Statement of Objections (SO). The Commission, however, identified competition concerns which had not previously been identified in the original SO and so the notifying parties had not included commitments to address these concerns. Even so the Commission did not extend the timetable to allow the parties to discuss revised commitments.²³³ The Commission’s decision was later overturned by the CFI. The time constraints came under increasing scrutiny and there was a general consensus that the strict deadlines placed the parties to the transaction, in a weak bargaining

²²⁸ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409.

²²⁹ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232, 220.

²³⁰ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409.

²³¹ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409, quoting Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232.

²³² Case No COMP/M.2283, *Schneider/Legrand* 30 January 2002, quoted by Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232.

²³³ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232.

position, encouraging them to accept the remedies proposed by the Commission, due to the longevity of any possible appeal to the CFI.²³⁴

The introduction of the “stop-the-clock” provision in Art. 10(3), 2nd. subparagraph of the New Merger Control Regulation, allows both the parties and the Commission to request extensions²³⁵ (although the Commission must have the permission of the parties). As noted by Winckler, the original Merger Control Regulation permitted the Commission to extend the timetable in “exceptional circumstances”. In *Telia/Telenor*, the Commission granted a one-week extension²³⁶ and in *Oracle/PeopleSoft*,²³⁷ the Commission suspended the investigation twice and the review period was extended by about 6 months.²³⁸ The insertion of Article 10(3) in the recast Regulation, as Winckler²³⁹ anticipated and Andreangeli observed,²⁴⁰ adds an element of flexibility to the new merger policy regime, reflecting a desire to accommodate the notifying parties and to ensure that there is time for negotiation for the Commission to consider the transaction and any proposed commitments, hence avoiding rather (lengthy) standoffs in the courts.

²³⁴ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409, para. 32: 199-200.

²³⁵ “The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days”.

²³⁶ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232, 225.

²³⁷ Case COMP/M.3216 *Oracle/PeopleSoft*. Oracle, the second largest software company sought to acquire PeopleSoft. Due to the complexities of the case and the associated difficulties finding the information required by the Commission and the fast turnover of staff at Oracle, the Commission allowed a 6 month suspension period.

²³⁸ Botteman, Y. Mergers, Standard of Proof and Expert Economic Evidence. 2. *J. Competition L. & Econ.* 71, 2006: FN 28. Article 11 allowed the Commission to suspend proceedings until the correct documentation had been presented by the parties.

²³⁹ Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232.

²⁴⁰ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409.

In the *E.ON/MOL* investigation, for example, the notifying parties requested an extension to the timetable, and the Commission was in agreement.²⁴¹ As the *E.ON/MOL* case illustrates, Article 10 acts as a “potential safety valve”,²⁴² as both sides will enter into discussion, triangular or state of play meetings as the investigative timetable is now more flexible. The insertion of Article 10 (3) allows the Commission to consider proposed transactions and correctly apply complex econometric models without such pressure of time constraints etc, because as the American Chamber of Commerce to the EU observed, each submission would probably weigh over 180kg, and is the equivalent of a length of 8 metres. A typical year's worth of submissions, therefore, would equate to 53 tons and 2.5 km.²⁴³

Article 10, as noted by Andreangeli,²⁴⁴ must be “read in conjunction” with the new Best Practice Guidelines which encourage the use of “state-of-play” and “triangular” meetings, which establish points of contact and information for the parties and keeps the Commission in the loop of discussion, encouraging debate, negotiation and greater transparency. The introduction of Article 10 has added an element of flexibility into the merger regulation framework. The introduction of these provisions is part of a multifarious set of measures designed to enhance the “fairness and transparency of the enforcement regime”.²⁴⁵ The introduction of this clause, as noted by Andreangeli,²⁴⁶ is likely to quell the concerns of both industry and the House of Commons Select Committee on the European Union, who have expressed their concerns about the timescale pressures the notifying parties are placed under during the appraisal of commitments.

²⁴¹ Hearing Officer, *Final Report of the Hearing Officer in Case Comp/M.3696*. OJ C223/12. Available from: <http://66.102.9.104/search?q=cache:8Kv-8qq0WBMJ:eur-lex.europa.eu/LexUriServ/LexUriServ.do%3Furi%3DOJ:C:2006:223:0012:0013:EN:PDF+article+10+merger+eu+parties+suspend+merger&hl=en&ct=clnk&cd=9&gl=uk> [Accessed 21/04/07].

²⁴² Hearing Officer, *Final Report of the Hearing Officer in Case Comp/M.3696*. OJ C223/12. Available from: <http://66.102.9.104/search?q=cache:8Kv-8qq0WBMJ:eur-lex.europa.eu/LexUriServ/LexUriServ.do%3Furi%3DOJ:C:2006:223:0012:0013:EN:PDF+article+10+merger+eu+parties+suspend+merger&hl=en&ct=clnk&cd=9&gl=uk> [Accessed 21/04/07].

²⁴³ AmCham EU, *Position Paper on the Merger Implementing Regulation*, March 11, 2004. Available from: <http://www.amchameu.be/Pops/2004archive/mergerreg03112004.pdf> [Accessed 21/04/07].

²⁴⁴ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409.

²⁴⁵ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409.

²⁴⁶ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409.

The introduction of this procedure represents a fairly radical change designed to remove the timescale pressures which have emerged for both sides as an unanticipated consequence of the application of the original Regulation. The introduction of the stop-the-clock procedure enables the notifying parties to have time to present considered commitments and evidence. The Commission now has time to consider these commitments when conducting an investigation. The application of the NMR by the Commission will not be under the same timescale pressures when appraising commitments and so it should be able to avoid a repeat of the stinging criticism dealt by the CFI in 2002.

3.8.4. Ancillary Restrictions

The evolution of EU merger policy in relation to the assessment of ancillary restrictions has been shaped by the Commission attempting to put the onus of this assessment upon national authorities in order to free up resources to deal with the “main competition law issues raised by a notifiable concentration”.²⁴⁷ The Preamble to the original Merger Control Regulation stated that: “Regulation should still apply where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration”, whilst Article 8 (2) required that “[t]he decision declaring the concentration compatible with the Common Market shall also cover the restrictions directly related and necessary to the implementation of the concentration”. A further clause was inserted in 1997 relating to Phase I decisions. These clauses which related to the appraisal of ancillary restrictions were introduced in order to avoid the instigation of parallel proceedings by the Commission under the Merger Control Regulation and Articles 81 and 82 EC Treaty.²⁴⁸

Between 1990 and 2001 the Commission diligently followed its guidelines set out in the Notices on restrictions directly related and necessary to concentrations, “... usually reserv[ing] a few paragraphs under the heading of “Ancillary

²⁴⁷ Metaxas, G. & H. Armengod, *EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy*. *E.C.L.R.* 26(9), 2005: 500-506.

²⁴⁸ Metaxas, G. & H. Armengod, *EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy*. *E.C.L.R.* 26(9), 2005: 500-506.

Restrictions” for the analysis of ancillary restrictions”.²⁴⁹ The restrictions which were outlined in the appraisal were included in the Commission’s decision and those which did not fall under the scope of ancillary restrictions were considered separately under Articles 81 and 82 EC.²⁵⁰

The 2001 (second) Notice, however, indicated a change in trajectory of policy concerned with the appraisal of ancillary restrictions. This Notice stated that the Commission was no longer going to appraise and consider ancillary restrictions on a formal basis as Articles 6(1) (b) and 8(2) already covered all restrictions which fell under the scope of the Merger Control Regulation and “were already cleared by operation of law, whether or not explicitly addressed in the Commission’s decision”.²⁵¹ The 2001 Notice pushed for national courts to play an active role in adjudicating ancillary restraint disputes:

“[d]isputes between the parties to a concentration as to whether restrictions are directly related and necessary to its implementation and thus automatically covered by the Commission’s clearance decision fall under the jurisdiction of national courts.”²⁵²

In the *Lagardere and Canal+* case,²⁵³ the CFI ruled that as the Commission alone was responsible for the appraisal of transactions, it was therefore also required to assess whether or not restrictions presented by the notifying parties to

²⁴⁹ Metaxas, G. & H. Armengod, *EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission’s Policy*. *E.C.L.R.* 26(9), 2005: 500-506.

²⁵⁰ Metaxas, G. & H. Armengod, *EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission’s Policy*. *E.C.L.R.* 26(9), 2005: 500-506.

²⁵¹ Metaxas, G. & H. Armengod, *EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission’s Policy*. *E.C.L.R.* 26(9), 2005: 500-506.

²⁵² Metaxas, G. & H. Armengod, *EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission’s Policy*. *E.C.L.R.* 26(9), 2005: 500-506.

²⁵³ *Case T-251/00 Lagardere SCA and Canal+ SA v. Commission*. The Commission had approved the joint venture between Lagardere Canal and Liberty Media. In its first decision the Commission approved the concentration, accepting certain non-compete clauses were necessary. In the second corrective decision, issued two weeks later, the Commission concluded that two of the clauses were not, in fact, ancillary and the main non-compete clause could only be considered ancillary for a limited period. Lagardere and Canal+ appealed to the CFI. During the appeal the Commission (in an attempt to justify its position retroactively) issued a new Notice – “2001 Ancillary Restraints Notice” stating that any assessment of ancillary restraints should be seen as declaratory rather than legally binding. The Commission argued that the appeal should be dismissed as ancillary restraints analysis/decisions were not contained within the operative part of the decision. The CFI, dismissing the Commission’s argument, annulled the second decision stating that appeal by the parties was admissible because ancillary restrictions are legally binding in nature, as the Merger Regulation, by its very nature, was supposed to increase legal certainty.

the transaction were justifiable, necessary and actually needed as part of the transaction:

“... when the parties to a concentration notify the Commission of ... clauses as restrictions directly related and necessary to the implementation of a concentration, they must be deemed to form an integral part of the transaction [f]alling within the competence of the Commission, ... [it] must provide an adequate reply.”²⁵⁴

The CFI ruled that national courts may share jurisdiction with the Commission in decisions that related to Article 81.

The NMR clarifies the situation concerning the review of ancillary restrictions.²⁵⁵ Although, as noted by Metaxas and Armengod,²⁵⁶ the provisions relating to ancillary restrictions differed only “slightly” from the old, they are still “legally significant”. In Article 6(1) “shall cover” has been replaced by “shall be deemed to cover”. The 21st Recital of the NMR states:

“Commission decisions declaring concentrations compatible with the Common Market in application of this regulation should automatically cover such restrictions, without the Commission having to assess such restrictions At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration.”

In contrast to the Commission's approach to ancillary restrictions prior to the operationalisation of the NMR, the new Notice on the consideration of ancillary restrictions²⁵⁷ emphasises that restriction: must be “directly related”; must be economically linked to the transaction and must facilitate the shift to the new company post-merger. Whilst the non-competition clauses in relation to

²⁵⁴ Metaxas, G. & H. Armengod, EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy. *E.C.L.R.* 26(9), 2005: 500-506.

²⁵⁵ Maudhuit, S. & T. Soames, Changes in EU Merger Control: Part 3. *E.C.L.R.* 26(3), 2005: 144-150.

²⁵⁶ Metaxas, G. & H. Armengod, EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy. *E.C.L.R.* 26(9), 2005: 500-506, 504.

²⁵⁷ DG Comp, Commission Notice on Restrictions Directly Related and Necessary to Concentrations. OJ C56, 5/3/2005: 24.

acquisitions remain unchanged from the previous Notice, nevertheless the non-competition clauses in relation to joint-ventures, which prevent the parent company entering into competition with the joint-venture, were extended to encompass the time the joint-venture is in existence (rather than just the three years as specified by the previous Notice). The new Notice directly refers to the 21st Recital, reiterating the principle that “[d]isputes as to whether restrictions are directly related and necessary ... and thus automatically covered by the Commission’s clearance decision may be resolved before national courts”. The new ancillary restrictions policy is a “product of compromise”.²⁵⁸ The Commission’s proposal for the NMR did not include provision for the Commission to consider even “novel and unresolved” issues relating to ancillary restrictions, indicating that they did not wish to be involved with the assessment of ancillary restrictions at all.²⁵⁹ As the Commission is painfully aware of both the legal and political pitfalls inherent in the merger regulation/clearance system, the strict time constraints and deadlines²⁶⁰ and increasing case load, mean that they are not keen to take on more work, assessing ancillary restrictions for every case. The principle of self assessment of ancillary restrictions by notifying parties is consistent with the ethos of the 2004 revision of the competition policy regime.²⁶¹ This places more emphasis and reliance upon the parties to the transaction to interact and cooperate proactively with regulatory authorities, hence the reliance upon self assessment of ancillary restrictions, more flexibility when notifying a proposed transaction and use of efficiencies to offset and justify anti-competitive mergers.

In *Airbus/SITA*,²⁶² the Commission, as noted by Metaxas and Armengod, discussed ancillary restrictions briefly and inconclusively.²⁶³ During the

²⁵⁸ Metaxas, G. & H. Armengod, EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission’s Policy. *E.C.L.R.* 26(9), 2005: 500-506, 205.

²⁵⁹ Metaxas, G. & H. Armengod, EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission’s Policy. *E.C.L.R.* 26(9), 2005: 500-506.

²⁶⁰ Metaxas, G. & H. Armengod, EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission’s Policy. *E.C.L.R.* 26(9), 2005: 500-506.

²⁶¹ Metaxas, G. & H. Armengod, EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission’s Policy. *E.C.L.R.* 26(9), 2005: 500-506.

²⁶² Case No. COMP/M.3657 *Airbus/Sita/JV*. The Commission cleared the joint venture between Airbus, an airplane manufacturer, and SITA, a communications company, to establish a new venture: OnAir, which would enable the use of mobile phones and wifi etc onboard, concluding that the joint venture would not impede competition.

investigation, competitors argued that the creation of this joint venture would impede competition and limit consumer choice. The Commission approved the joint venture, making reference to the 3 year non-compete agreement between Airbus and SITA, stating that the agreement was compatible with the 2005 Notice. Metaxas and Armengod stated that the Commission's conclusions were distorted as the "references to the non-compete clause were heavily truncated in the public version Therefore legal relevance ... of the Commission's brief comment is unclear".²⁶⁴

The direction the Commission is taking in the application of the NMR and ancillary restrictions becomes more apparent in *Total/Gaz De France*. In this case Total sought the acquisition of certain assets of Gaz de France, which, prior to the transaction, were controlled jointly with Gaz de France,²⁶⁵ namely natural gas assets in South West and Central France. The supply, transportation and storage contracts between Total and Gaz required to make the transaction viable, could, as noted by De Rivery and Guerard, be regarded as ancillary restrictions as "... they were intimately linked to the concentration and rais[ed] novel issues".²⁶⁶ Instead of explicitly acknowledging and examining these contracts under the ancillary restrictions toolkit, however, the Commission only implicitly acknowledged their importance, including the appraisal of the need for these contracts by their inclusion in the market enquiry/analysis.²⁶⁷

Clearly the 2004 revisions to the European merger policy regime marked a radical, although not unexpected, change in ancillary restrictions policy. The Commission had been pressing for a less hands on approach in relation to the assessment of ancillary restrictions. The onus (unless there are novel and

²⁶³ Metaxas, G. & H. Armengod, EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy. *E.C.L.R.* 26(9), 2005: 500-506.

²⁶⁴ Metaxas, G. & H. Armengod, EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy. *E.C.L.R.* 26(9), 2005: 500-506.

²⁶⁵ See De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637 for background to this case.

²⁶⁶ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

²⁶⁷ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

exceptional circumstances) is now placed upon self assessment. Analysis in this area, therefore, must now examine how the Commission interprets these new Guidelines and applies them. Although empirical evidence in this area remains scarce, at the moment it appears that the Commission is taking a flexible case-by-case approach towards the analysis of ancillary restrictions.

3.9. Commission as Facilitator

The Commission plays a unique role in relation to merger policy, setting the systemic agenda, facilitating the exchange of ideas and establishing alternative institutional venues as forums for discussion. The Commission sets the systemic agenda by raising issues for discussion: for example, the Commission launched a public consultation initiative on a draft Consolidated Jurisdictional Notice which combines four existing Notices which were adopted in 1998 under the old Merger Control Regulation.²⁶⁸ In accordance with the EU's adherence to the open method of coordination and increased transparency, the Commission is the pivotal actor in the establishment of arenas where the discussion takes place. It facilitates the exchange of ideas by acting, as Wendon²⁶⁹ conceptualises, as an "image entrepreneur". The Commission also establishes "alternative institutional venues". In this case interested parties could submit their views on the draft Notice by the 1st December 2006. The DG Comp will then publish contributions on their website. The Commission states that "the comments will be valuable input for the finalisation of the consolidated Jurisdictional Notice which is planned to be adopted by the Commission at the beginning of 2007".²⁷⁰

As per all other policy arenas, the Commission is responsible for the drafting of all documentation and has prime responsibility for the application of the NMR and associated Notices. The NMR gave the Commission more "power[s] of

²⁶⁸ Rapid Press Release: *Commission launches public consultation on consolidated guidance concerning jurisdiction in merger control*. IP/06/1273, 28/09/2006.

²⁶⁹ Wendon, B. The Commission as image venue entrepreneur in EU social policy. *Journal of European Public Policy*, 5 (2), 1998: 339-358: 343.

²⁷⁰ DG Comp, *Draft Commission Jurisdictional Notice*. Available from: <http://ec.europa.eu/comm/competition/mergers/legislation/jn.html> (Accessed 11/10/06).

inspection”.²⁷¹ If the Commission is concerned about the compatibility of a concentration it can “by a simple request or decision”: enter premises, land or means of transportation and examine/photocopy business related evidence, seal the property and any documentation which is deemed relevant to the investigation and ask any representative of the company for clarification or explanation of any business related matters. Individuals appointed by the Commission to undertake investigations can ask Member State officials, such as the police, for assistance. The investigators must act in compliance with national law.

Mirroring the network of European competition Authorities established by Regulation 1/2003, the NMR, (Recital 14) requires the Commission and national authorities to establish a network which ensures that each case is dealt with by the most appropriate authority. This mechanism will also ensure that the Commission has many points of contact and sources of information, remaining a central structure in the EU merger regulation framework.

The original first three phases of merger regulation, pre-notification, Phase I and Phase II investigations had little scope for negotiation or discussion about possible remedies.²⁷² The New Best Practices Notice²⁷³ introduced “state of play” and “triangular meetings”. These meetings allow the Commission insight into the transaction and market under appraisal. In the *Total/Gaz* case, for example, as this was the first time there was to be an acquisition in the French gas sector, after the entry into force of the European Gas Directives which not only “opened up this market”²⁷⁴ but also represented a move away from the traditionally dirigiste national political economy towards a liberalised model, notifying parties consulted

²⁷¹ EUR-lex, Council Regulation 139/2004 of 20 January 2004 on the control of concentration between undertakings, Article 13. L. 24/1.

²⁷² Winckler, A. Some Comments on Procedures and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control. *World Competition*, 26(2), 2003: 219-232, 220.

²⁷³ See Chapter 1 of thesis.

²⁷⁴ De Rivery, M. D. & V. Guerard, Case No COMP/M.3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

both French and European authorities prior to and during the negotiations for the Protocole d'Accord.²⁷⁵

The Commission's activities are not just confined to the application of the NMR, and as noted by Davidson,²⁷⁶ "EU merger control does not exist in a vacuum". Economic globalisation has triggered the evolution of supranational, cross-national and national merger policy/regulation regimes. Transnational corporations are drawn under the scrutiny of a multitude of competition agencies in relation to the same proposed merger - Jones and Suffrin remarked on the "long arm of the ECMR," the provisions of which are triggered by the threshold requirement, even if the notifying parties were non-EU and the majority of their business conducted outside the EU.²⁷⁷ The Commission's role in the international merger policy regime, therefore, cannot be underestimated. It is an important player/regulator, able to block transatlantic mergers (*GE/Honeywell*) and influence the trajectory of international merger (and wider competition) regulation policy. The Commission, as Davidson observed "... has played a leading role in pushing forward the new multilateral competition architecture ... the International competition network, the Global Competition Forum and the demand for an enhanced competition role for the WTO".²⁷⁸ The Commission is a founder member of the International Competition Network (ICN). The ICN is an "informal forum", where competition authorities can interact informally, discussing a wide range of issues, including the future pathway of merger regulation policy.²⁷⁹ In relation to influencing the trajectory of merger regulation, the ICN has a Merger Working Group, which is split into merger and notification procedures and merger investigation and analysis.²⁸⁰ Although their decisions are non-binding, they have influenced the trajectory of policy, as they aim for a convergence of ideals, tools

²⁷⁵ De Rivery, M. D. & V. Guerard, Case No COMP/M.3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

²⁷⁶ Davidson, L. M. EU Merger Control and the Compatibility Test: A Review of Recent Developments. *Liverpool Law Review*, 25, 2004: 195-220, 197.

²⁷⁷ Jones, A. & B. Suffrin, *EC Competition Law*. OUP, 2004: 991.

²⁷⁸ Davidson, L. M. EU Merger Control and the Compatibility Test: A Review of Recent Developments. *Liverpool Law Review*, 25, 2004: 195-220, 197.

²⁷⁹ DG Comp, *International Competition Network (ICN)*. Available from: <http://ec.europa.eu/comm/ompetition/international/multilateral/icn.html> (Accessed 12/10/06).

²⁸⁰ ICN, *Merger Working Group*. Available from: <http://www.internationalcompetitionnetwork.org/mergers/index.html> (Accessed 12/10/06).

and frameworks. A consequence of the increasing influence of this multilateral architecture, "... allied to the emerging goal of greater international convergence in competition matters has directly led the EU to rethink the wording and operationalisation" of the DT.²⁸¹ Elements of the Guiding Principles for Merger Notification and Review Procedures, for example, can be identified in the NMR. The Commission has become intrinsically interlinked with the international merger policy community, not only shaping the trajectory of international policy but also abiding by and absorbing the principles established by the ICN when drafting merger policy documentation.

Broberg²⁸² pointed out that the [original] Merger Control Regulation gave the Commission the competence to investigate mergers which possessed a Community dimension. The Commission took an expansive interpretation of this competence, "... taking the view that it has the jurisdiction to examine transactions, such as the one in the *Boeing/McDonnell Douglas* case where this transaction fulfils the turnover thresholds and where it will produce direct and appreciable effects within the Community territory". The CFI upheld the Commission's approach to the application of the Regulation. In *Gencor v. Commission*²⁸³ the CFI stated that the Commission's actions are "... justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community". The Commission's jurisdiction, therefore, according to the CFI was dependent upon the fulfilment of both the threshold requirement and

²⁸¹ Davidson, L. M. EU Merger Control and the Compatibility Test: A Review of Recent Developments. *Liverpool Law Review*, 25, 2004: 195-220, 197.

²⁸² Broberg, A. The European Commission's Extraterritorial Powers in Merger Control. The Court of the First Instance's Judgment in *Gencor v. Commission*. *International and Comparative Law Quarterly*, 49, 2000, 172-182: 172.

²⁸³ Case No IV/M877, O.J. 1997, L336/16 cited Broberg, A. The European Commission's Extraterritorial Powers in Merger Control. The Court of the First Instance's Judgment in *Gencor v. Commission*. *International and Comparative Law Quarterly*, 49, 2000, 172-182; Judgment of the Court of First Instance in Case T-102/96. *Gencor v Commission*. Two mining and metal resources companies: Gencor Ltd (South African licensed) and Lornho (licensed in the UK) wanted to enter into a joint venture – Implats which would then be given control of Westplats. Although the South African authorities had no objections, the Commission felt the joint venture would impede competition within the European market, establishing collective dominance, as the transaction would reduce suppliers from three to two. The parties appealed to the CFI on the basis that the Commission did not have the jurisdiction to rule on mergers that affected a non-member state and that the principle of territoriality was applicable to the Community. The CFI upheld the Commission's decision, stating that if a transaction affects the Community, the Merger Regulation is applicable.

the effects principle. In several cases,²⁸⁴ albeit prior to the entry into force of the NMR, the Commission prohibited several transactions on the basis that they would increase or create a position of single dominance within the world market,²⁸⁵ and so impede competition within the EC market.

Although there are cases where divergence in attitudes has become apparent, the European Commission has entered into close cooperation and several bilateral agreements with the DOJ and FTC. As Schaub²⁸⁶ pointed out in 2001, there has been increased interaction between UK and US competition authorities in the light of an increase in global mergers. *Inco/Falconbridge* represents an example of transatlantic cooperation. As Boeshertz et al. noted, the DOJ pinpointed similar anti-competitive concerns, as did the Commission. The Consent Decree filed on the 23rd June 2006 by the DOJ approved the same remedy package proposed by the Commission.²⁸⁷ The EU has also entered into bilateral agreements with, for example, Japan, Canada and Australia.

Certainly by establishing points of access with interested parties, national and international competition authorities, encouraging dialogue between interested parties both in civil society and Member States' national competition authorities and by establishing venues or forums for discussion, the Commission ensures it has many points of information. It remains firmly in the centre of the merger regulation framework policy arena, aware of the frameworks and changes in merger regulation at all tiers of governance.

The Commission increasingly has to deal with a multitude of actors and interests when conducting in-depth market investigations. In

²⁸⁴ E.g. *Boeing/McDonnell Douglas; WorldCom/MCI; WorldCom/Sprint*.

²⁸⁵ Schaub, A. Director General for Competition, *Assessing International Mergers: The Commission's Approach*, EC Merger Control 10th Anniversary Conference, Brussels, 10-14 October 2000. Available from: http://ec.europa.eu/comm/competition/speeches/text/sp2000_015_en.html (accessed 12/10/06).

²⁸⁶ Schaub, A. Director General for Competition, *Assessing International Mergers: The Commission's Approach*, EC Merger Control 10th Anniversary Conference, Brussels, 10-14 October 2000. Available from: http://ec.europa.eu/comm/competition/speeches/text/sp2000_015_en.html (accessed 12/10/06).

²⁸⁷ Boeshertz, C. et al. *Inco/Falconbridge: A nickel mine of application in efficiencies and remedies*. *Competition Policy Newsletter*, (3), Autumn 2006: 41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

Johnson&Johnson/Guidant, for example, the Commission had to deal with the analysis of hundreds of markets which would be affected as a consequence of the transaction due to the different national vascular device markets in terms of purchasing processes, reimbursement schemes and pricing structures.²⁸⁸ The Commission had to gain the opinions of competitors and customers from all these markets, basing its analysis upon several rounds of investigations. Later rounds concentrated on the larger markets most affected by the transaction. The Commission also consulted several financial experts on the impact of the merger on the coronary and stent market and the possibility that competitors could fill the gap left by the removal of a competitor.²⁸⁹ When analysing if Guidant had the capacity to enter the DES market, the Commission sought advice from prominent doctors in this field, financial analysts and competitors.²⁹⁰

As noted by Roller and de La Mano, the Commission, and other parties involved in the merger investigation process, are embarking on a “learning curve”.²⁹¹ Investigative techniques need to be and are currently being expanded in order for the Commission not only to be able to examine market share, market dominance and the potential for dominance which would impede or distort competition, but also to be able to examine competitive effects, the reasons for the merger and the possible post-merger activity by parties involved in the transaction, hence the need for a more industrial economics based toolkit.

Although the legal and economic aspects of the merger regulation (and EU competition) regime are examined in detail by both academics and practitioners, the

²⁸⁸ Boeshertz, C. et al. *Inco/Falconbridge: A nickel mine of application in efficiencies and remedies. Competition Policy Newsletter*, (3), Autumn 2006: 41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07].

²⁸⁹ Boeshertz, C. et al. *Inco/Falconbridge: A nickel mine of application in efficiencies and remedies. Competition Policy Newsletter*, (3), Autumn 2006: 41. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf [Accessed 07/07/07]; Case No COMP/M.3687 - *Johnson & Johnson/Guidant*. 25/08/2005. C(2005)3230 FINAL.

²⁹⁰ Bacchiega, A. et al. *Johnson & Johnson/Guidant: potential competition and unilateral effects markets. Competition Policy Newsletter*, 3, Autumn 2006:87. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 27/07/07], 88.

²⁹¹ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 13.

politics of competition policy has also played a large part in the evolvment and consequential trajectory of merger policy.²⁹² In this area of economic regulation, the merger regime is “commit[ed] to enforce[ment] of the law, the role of discretion and issues such as transparency and democracy”.²⁹³ The Commission has evolved as a “genuinely federal actor”²⁹⁴ shaping the trajectory of merger regulation policy both externally and inside the borders of the EU. As Cini pointed out²⁹⁵ the *distinctiveness* of the EU model is premised upon three factors (which can be analysed by the historical institutional model). The original political compromise upon which merger regulation policy is premised, the “rationale which underpins policy” and the roles played by the actors within the governance regime have shaped the evolvment of merger policy, whilst the Commission’s application of the NMR (and original ECMR) has played a key role in interpreting and determining the shape and direction of policy.

The Commission is a multi-tasker within the merger policy governance regime: systemic agenda setter; facilitator; drafter of all documentation; holder of competence for the application of the NMR and is a global player in the international merger regulation framework. The tasks it performs when applying the Merger Control Regulation must not be viewed in isolation from its performance as an actor in the international merger regulation policy arena. The actions of the Commission within this policy arena are multifunctional. Its activities do not only affect European concentrations but have wider implications for the trajectory of global merger regulation. Looking internally, at the European dimension, the Commission is not only responsible for the interpretation and application of the merger regulation regime, but is also instrumental in setting the parameters for discussion and the systemic agenda. Externally the Commission has been and is instrumental in establishing a path dependent merger regulation policy at international level and mapping the trajectory of future policy pathways.

²⁹² McGowan, L. & M. Cini, Discretion and Politicisation in EU Competition Policy: The Case of Merger Control. *Governance* 12(2), 1999: 175-200.

²⁹³ McGowan, L. & M. Cini, Discretion and Politicisation in EU Competition Policy: The Case of Merger Control. *Governance* 12(2), 1999: 175-200.

²⁹⁴ McGowan, L. & M. Cini, Discretion and Politicisation in EU Competition Policy: The Case of Merger Control. *Governance* 12(2), 1999: 175-200.

²⁹⁵ Cini, M, Accounting for the Distinctiveness of the EU Model. *Policy Studies Journal* 30(2), 2002: 240-241.

3.10. The Counter Effect of Protectionist Member States

The application of the NMR by the Commission is not necessarily assisted by Member States who interfere in mergers which possess a European dimension in order to protect national interests and “national champions”. Internal Market Commissioner, Charlie McCreevy, stated that:

“[N]ot a day goes by lately without European governments commenting on, interfering in or trying to bluntly block the free flow of capital Everywhere you see the same outdated instinct, ... governments promoting national champions, of shutting out competition”²⁹⁶

Kroes, Competition Commissioner, addressing Members of the European Parliament, stated that:

“As guardian of the EC Treaty, and as the institution responsible for merger control on competition grounds at the European level, the Commission is determined to guarantee that companies can effectively benefit from the advantages of the EU's internal market. That is why enforcement of these provisions is, and will remain, one of the Commission's central priorities.”²⁹⁷

Clearly the Commission is determined to protect cross-national mergers and prevent a distortion of the market and will take Member States to task if they attempt to do so. The Commission has two legal instruments at its disposal which can be used to reassert its authority as the principal actor in the merger policy regime: Article 21 of the NMR, which allocates the Commission exclusive competence to assess mergers with a Community dimension, and secondly the single market rules outlined in the EC Treaty. The Commission has already started proceedings against Poland, writing a letter to the Polish government, informing it that it is in breach of Council Regulation 139/2004, Article 21, by requiring Unicredit, an Italian bank, to sell its shares in the Polish bank BPH S.A., after Unicredit acquired Bayerische Hypo-und Vereinsbank AG (HVB) which held

²⁹⁶ Rapid Press Release, C. McCreevy, *The Development of the European Capital Market*. Available from: europa.eu/.../05/702&format=HTML&aged=0&language=EN&guiLanguage=en - 23k [Accessed 03/06/08].

²⁹⁷ Rapid Press Release, N. Kroes, *Introductory remarks on 'Mergers in the Internal Market' European Parliament plenary session*. SPEECH/06/172 Date: 15/03/2006. Available from: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/06/172&format=HTML&aged=0&language=EN&guiLanguage=en> [Accessed 05/08/06].

indirect control of BPH.²⁹⁸ The Commission had already cleared the *Unicredit/HVB* merger, concluding that the merger did not present a significant threat to Polish markets. On the 20th December 2005, however, the Polish government demanded a divestiture on the basis that when Unicredit acquired the Polish bank Polska Kasa Opieki S.A. in 1999 from the Polish State Treasury, after the fall of Communism, a “non-compete clause” in the Polska agreement prevented Unicredit, for 10 years, from opening subsidiaries/acquiring banks which “were active there” or investing in the Polish banking industry. On the 1st February 2006, the Polish Treasury again requested Unicredit to comply with the non-compete clause: the divestiture of BPH within 3 months or the 1999 privatisation agreement would be revoked.

Although Article 21 gives the Commission exclusive jurisdiction over mergers with a Community dimension, Article 21(4), however, permits Member States to take “appropriate action” and instigate national measures to protect “legitimate interests”. Such measures have to be presented to the Commission (and justified by Member States) prior to implementation of the measure. In this case the Commission decided that the invocation of the “non-compete clause” by the Polish government represented a threat to the Unicredit transaction and the clause itself was incompatible with the EC Treaty. The Commission opened two proceedings against the Polish government.²⁹⁹ It sent a letter to the national authorities³⁰⁰ requiring them to justify their actions, and to respond within 15 days for the violation of Article 21 NMR. The Commission also opened an infringement procedure based upon Article 226, as it was concerned about the incompatibility

²⁹⁸ Unicredit acquired BPH as part of the acquisition of HVB. The Polish government required Unicredit to divest its shares in BPH (as per agreement when they invested in Polska Kasa Opieki SA in 1999). The Commission had cleared the transaction but the Polish government opposed it.

²⁹⁹ EU Focus, Commission Proceeds Against National Intervention In Merger Procedure. *EU Focus* 2006, 185, 5-6; European Commission, *Internal Market – Free Movement of Capital – Surveillance and Analysis of Capital, Poland: Unicredit/HVB Merger*. Available from: http://ec.europa.eu/internal_market/capital/analysis/index_en.htm [Accessed 07/08/06].

³⁰⁰ Rapid Press Release: *Commission Launches Procedure Against Poland for Preventing Unicredit/HVB Merger*. IP/06/277, 08/03/2006; Larsen, P. Unicredit plans sales to satisfy Warsaw. *FT.Com*, 27/05/06. Available from: <http://search.ft.com/search?queryText=Unicredit+plans+sales+to+satisfy+Warsaw&x=21&y=2&aje=true&dse=&dsz=> [Accessed 06/05/08].

between the “non-compete clause” and Articles 43 and 56 EC.³⁰¹ If the Commission was not satisfied by the arguments provided by the Polish authorities, the Commission could adopt a decision under Article 21 of the NMR preventing the Polish government from invoking the “non-compete” clause of the Polska agreement. This decision would be directly applicable and could be invoked at national level.³⁰² The Polish authorities filed a complaint with the CFI (only the second time a Member State has challenged a Commission’s merger ruling), arguing that the Commission had misinterpreted the effect the merger would have upon Polish markets.³⁰³ The first set of proceedings brought by the Commission were diffused by the fact that the Polish Government and Unicredit came to a compromise, with Unicredit agreeing to sell off 200 BPH’s branches and not cut jobs for 2 years.³⁰⁴ Kroes, however, has stated that this agreement does “not necessarily put an end to our case” concerning the infringement proceedings.³⁰⁵

In France and Spain, the creation of energy national champions, has come under investigation by the Commission. France engineered a take-over between

³⁰¹ Rapid Press Release Free Movement of Capital: *Commission Opens Infringement Procedure against Poland in context of Unicredit/HBV merger*. IP/06/276, 08/03/2006; Buck, T. & J. Cienski, EU steps up pressure on Poland over bank deal. *FT.Com*, 22/02/06. Available from: <http://search.ft.com/ftArticle?queryText=EU+steps+up+pressure+on+Poland+over+bank+deal.+++&y=8&aaje=true&x=18&id=060222001095&ct=0> [Accessed 06/05/08].

³⁰² Buck, T. & J. Cienski, EU steps up pressure on Poland over bank deal. *FT.Com*, 22/02/06. Available from:

<http://search.ft.com/ftArticle?queryText=EU+steps+up+pressure+on+Poland+over+bank+deal.+++&y=8&aaje=true&x=18&id=060222001095&ct=0> [Accessed 06/05/08].

³⁰³ Wagstyl, S. & T. Buck, Brussels faces merger challenge as Poland goes to court. *FT.Com*, 07/02/06. Available from:

http://search.ft.com/ftArticle?queryText=brussels+faces+a+merger+challenge+as+Poland+goes+to+court&y=0&aaje=true&x=0&id=060207001118&ct=0&nclick_check=1 [Accessed 05/05/08]; Court of First Instance, C T- 41/06 Republic of Poland v Commission of the European Communities, OJ C 96, 22/04/2006:17.

³⁰⁴ Cienski, J. & et al, Unicredit strikes a deal over BPH. *Financial Times*, 05/04/06. Available from: <http://search.ft.com/ftArticle?queryText=unicredit+strikes+a+deal+over+bph&y=0&aaje=true&x=0&id=060405008629&ct=0> [Accessed 05/05/08].

³⁰⁵ Cienski, J. & et al, Warsaw and UniCredit seal deal over bank takeover fight. *FT.Com*, 06/04/06. Available from:

<http://search.ft.com/ftArticle?queryText=Warsaw+and+UniCredit+seal+deal+over+bank+takeover+fight&y=10&aaje=true&x=14&id=060406000859&ct=0> [Accessed 05/05/08]; Cienski, J. Pekao, BPH tie-up is cleared. *FT.Com*, 08/04/06. Available from:

<http://search.ft.com/ftArticle?queryText=BPH+tie-up+is+cleared.+&y=8&aaje=true&x=16&id=060420000513&ct=0> [Accessed 06/05/08].

Gaz de France and Suez to prevent a takeover of Suez by the Italian firm Enel³⁰⁶ whilst the Spanish government passed emergency legislation to prevent a takeover of Endesa (a Spanish energy company) by E.ON (a German energy firm).³⁰⁷ In the Spanish case E.ON attempted to acquire Endesa (at the same time a Spanish firm, Gas Natural, launched a competing bid).³⁰⁸

Clearly in the application of the NMR, the Commission is not going to allow its central position within the merger governance regime to be challenged. As noted by both the internal market and Competition Commissioners, the Commission aims to fulfil its position as “guardian of the treaty” and ensure the single market is not undermined by Member States aiming to protect national interests.

3.11. Factors outside the Commission's control

Factors, which are not necessarily under the control of the Commission, can shape the application of the merger framework and the future pathway of policy. Increasingly the press has become absorbed into the merger regulation policy governance regime. Judicial review by the CFI has re-evaluated, re-shaped and revised the application of the NMR by the Commission, whilst the press has shaped the agenda within which decisions are made. There have been several high profile cases where Member States have sought to intervene in transactions in order to protect national interests.

3.11.1. The Impact of Judicial Review on the Application of the NMR

Whilst the European Commission holds the central role in relation to the application of the provisions of the merger regulation framework, nevertheless the European Courts, especially the CFI, as observed by Weitbrecht, “... continued to

³⁰⁶ Mortished, C. EU Inquiry threatens French Utility Deal, *The Timesonline*, 20/06/06. Available from: http://business.timesonline.co.uk/tol/business/industry_sectors/utilities/article676573.ece [Accessed 06/05/08].

³⁰⁷ EurActiv, Kroes: nationalism has no place in cross-border mergers. 16/03/2006. Available from: <http://www.euractiv.com/en/financial-services6/kroes-nationalism-place-cross-border-mergers/article-153438>. [20/06/06].

³⁰⁸ Rapid Press Release, *Commission rules against Spanish Energy Regulator's measures concerning E.ON's bid for Endesa*. Reference: IP/06/1265, 26/09/2006 Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1265&format=HTML&aged=0&language=EN&guiLanguage=en> [Accessed 30/03/07].

play a decisive role in reviewing and shaping Commission practice”.³⁰⁹ The Courts' decisions have and continue to have influence upon the evolvement of the EU merger regulation policy regime. Article 21(2) states that: “[S]ubject to review by the Court of Justice, the Commission shall have sole jurisdiction to take decisions provided for in this Regulation”. Analysis of the Commission's application of the NMR would not be complete without an examination of the influence the Courts have upon the Commission's application of the merger regulation framework.

According to Article 230, (para. 4):

“[a]ny natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”.

The European courts, therefore, are increasingly used by third parties to challenge the Commission decisions.³¹⁰ Lenaerts noted in the *Babyliiss* judgment that: “[I]t has consistently been held that persons other than the addressees of decisions can claim to be individually concerned only if that decision affects them by reason of certain attributes peculiar to them, or by reason of a factual situation ...”.³¹¹ In the *Babyliiss* judgment,³¹² the CFI considered if the acquisition of certain assets of the bankrupt Moulinex by SEB could be challenged by Babyliiss. The CFI decided that Babyliiss did have the standing to challenge the transaction, even though its products were only present in one of the thirteen product markets affected by the merger. The CFI noted its future potential as a competitor in the other markets affected by the merger.³¹³ The *ARD v Commission* judgment further clarified the right for third parties to challenge Commission decisions. Although, unlike Babyliiss, ARD was not affected by the merger as it was not, at that time,

³⁰⁹ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

³¹⁰ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

³¹¹ Case T-114/02, *Babyliiss SA v. Commission of the European Communities*. Judgment of the Court of First Instance (Third Chamber) of 3 April 2003, para 91. In this case Babyliiss (a third party) was successful in challenging the Commission decision to permit SEB to acquire Moulinex. The remedies were found by the CFI to be insufficient to allay competition concerns.

³¹² Case T-114/02, *Babyliiss SA v. Commission of the European Communities*. Judgment of the Court of First Instance (Third Chamber) of 3 April 2003, para 91.

³¹³ Case T-114/02, *Babyliiss SA v. Commission of the European Communities*. Judgment of the Court of First Instance (Third Chamber) of 3 April 2003, para. 106.

present in the pay for TV markets, the CFI held that ARD did pass the “direct and individual concern test” because:

“in the same way as potential competitors of the parties to the concentration may have standing to apply for annulment of an approval decision in the case of oligopolistic markets (...) where, as in the present case, an undertaking holding a monopoly sees its position strengthened by a concentration, an action for annulment brought by an operator present only on neighbouring upstream or downstream markets may, in certain circumstances, also be admissible.”³¹⁴

The right of third parties to challenge Commission's referral decisions was confirmed by the CFI in *Philips Electronics v Commission*, where Philips opposed a partial referral to the French authorities. The CFI found that a third party can be “directly and individually concerned” with a referral as, if a transaction is referred back to national competition authorities for appraisal, it is removed from the procedural and judicial jurisdiction of the EU and thus third parties cannot question the decisions before the CFI. In *Cableuropa and others v Commission*³¹⁵ the CFI reiterated and reinforced these principles in relation to total referrals back to national authorities. The CFI have extended Article 230 EC to this area, meaning that when the Commission is appraising transactions, it must consider that not only will parties involved in the transaction challenge Commission decisions,³¹⁶ but so also will third parties. Both referrals and the possibility that the Commission has committed “manifest errors” during investigation of a transaction, may be challenged in the Courts by these parties.³¹⁷

³¹⁴ EUR-lex, Judgment of the Court of First Instance (Third Chamber) of 30 September 2003, *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD) v Commission of the European Communities*. E.C.R. 2003, II-03825, Para. 78. In this case ARD contested the Commission's decision to clear the proposed concentration between BSkyB and KirchPay TV. Although ARD was, not at the present time, nor intended to be in the near future, a competitor, the CFI felt that ARD could still be considered “individually concerned” and the remedies proposed by the parties were insufficient to counter anti-competitive concerns.

³¹⁵ EUR-lex, Judgment of the Court of First Instance (Third Chamber) of 30 September 2003, *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD) v Commission of the European Communities*. E.C.R. 2003, II-03825, Para. 78.

³¹⁶ E.g. *Tetra Laval; AirTours*.

³¹⁷ E.g. Case T-177/04 *EasyJet Airline Company Ltd v Commission*, OJ C 201/17; Case T-48-04 *Qualcomm Wireless Business Solutions Europe v Commission*, OJ. C94/139.

Throughout the evolution of the merger regulation regime the CFI have been instrumental in setting the conditions and checklists to which the Commission must adhere when applying the provisions of the NMR.³¹⁸ In 2005, the Courts ruled on three merger control cases, two of which have implications for merger regulation policy and the “standard of judicial review” and standard of proof,³¹⁹ whilst the third confirms the difficulties the Commission may encounter when analyzing the anti-competitive impact conglomerate effects may have upon a market as a consequence of clearance of a merger. The Commission decided to appeal the *Tetra Laval* case partially on the grounds that the CFI had demanded a higher standard of proof than the standard established in *Kali & Salz* (where the CFI concluded that the Commission must present a “cogent and consistent body of evidence”). The CFI had not allowed the Commission enough margin for discretion, which it normally uses when making decisions which are economically complex.³²⁰ The Court of Justice stated that:

“A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events or current events, but rather a prediction Such an analysis makes it necessary to envisage various chains of cause and effect”.

In this judgment, the Court provides guidelines relating to standard of proof, which the Commission must meet when reviewing merger cases. This case is especially relevant to cases where there are conglomerate effects which have to be considered by the Commission. As noted by Howarth, several questions were raised as a consequence of the appeal, for example: “what is the standard of proof the Commission must meet in opposing a merger, particularly where conglomerate effects are involved?” and “can the CFI overrule the Commission's assessment on discretionary matters?”³²¹ In the appeal to the ECJ, the Commission had argued that it was impossible to produce “convincing” evidence to substantiate its decisions to prohibit mergers where there were conglomerate anti-competitive effects which

³¹⁸ E.g. *Airtours*; *Kali & Salz*.

³¹⁹ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50. The third was the GE/ Honeywell Appeal - the CFI upheld the Commission's decision but identified where the Commission had erred in its analysis.

³²⁰ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

³²¹ Howarth, D. *Tetra Laval/Sidel: Microeconomics or Microlaw*, *E.C.L.R.*, 26(7), 2005: 369-372.

would impede competition. The Commission, therefore, partially based its appeal on the premise that the CFI had misinterpreted the evidence relating to market definition and the effect of a transaction on competition and dominance. The ECJ partially dismissed these accusations as “partly unfounded” and “partly inadmissible”. Although the Commission argued that the CFI had disregarded the Commission’s margin of discretion when assessing merger transactions, the ECJ stated that:

“[W]hilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature”.

Clearly, as noted by Howarth,³²² this case “removes any doubt that the ECJ’s role in merger cases is purely as a court of appeal on matters of law”, whilst Bay et al. note that *Tetra Laval II* illustrates “... how sweeping the Community Courts’ powers of judicial review in the merger control area are”.³²³ Although the CFI must “... continue to exercise judicial restraint ...” when assessing Commission decisions, the Commission no longer enjoys the same margin of discretion³²⁴ when applying and interpreting economic models.³²⁵ The ECJ lays down clear parameters for judicial review of merger decisions:

“[N]ot only must Community Courts, inter alia, establish whether the evidence relied upon is factually accurate, reliable and consistent but also whether the evidence contains all the information which must be taken into account in order to assess complex situations and whether it is capable of substantiating the conclusions drawn from it.”³²⁶

This case also contributed to the ongoing debate relating to standard of proof, especially in relation to the assessment of *conglomerate* mergers, where the effects

³²² Howarth, D. *Tetra Laval/Sidel: Microeconomics or Microlaw*, *E.C.L.R.*, 26(7), 2005: 369-372.

³²³ Howarth, D. *Tetra Laval/Sidel: Microeconomics or Microlaw*, *E.C.L.R.*, 26(7), 2005: 369-372.

³²⁴ In *Tetra Laval I*, the CFI acknowledged that “Article 2 confers on the Commission a *certain discretion* ...” whilst the Commission, drawing upon the existing case law argued that it had “wide discretion”, in this area. (Bay, M. F. & J. R. Calzado, *Tetra Laval II: the Coming of Age of the Judicial Review of Merger decisions*. *World Competition*, 28(4), 2005: 433-453, 436).

³²⁵ Bay, M. F. & J. R. Calzado, *Tetra Laval II: the Coming of Age of the Judicial Review of Merger decisions*. *World Competition*, 28(4), 2005: 433-453, 436, 457.

³²⁶ Bay, M. F. & J. R. Calzado, *Tetra Laval II: the Coming of Age of the Judicial Review of Merger decisions*. *World Competition*, 28(4), 2005: 433-453, 438.

of a transaction are hard to pin point. The Court stated that specifically in these cases where:

“... chains of cause and effect are dimly discernible, uncertain and difficult to establish A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events - for which often many items of evidence are available which make it possible to understand the causes - or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.”³²⁷

Clearly judicial intervention can, and does, shape the Commission's application of the merger regulation framework. The above statement by the ECJ requires the Commission to take extra care when assessing conglomerate mergers, as anti-competitive effects are not clearly identifiable as they are in a horizontal merger.

In its decision of December 9th 2004, the CFI upheld the Commission's first prohibition decision since 2001, relating to the merger between Energias de Portugal and Gas de Portugal.³²⁸ In contrast to the ECJ statement in the *Tetra/Laval* judgment, the CFI stated that the Commission possesses a “wide” degree of discretion. The CFI went on to uphold the Commission's original decision to prohibit the transaction, on the grounds that the applicant had failed to illustrate that the Commission had committed “manifest errors”.³²⁹

The long awaited judgment in *GE/Honeywell* was delivered on December 14th 2005 by the CFI.³³⁰ Although the CFI dismissed the two appeals and upheld the

³²⁷ Howarth, D. *Tetra Laval/Sidel: Microeconomics or Microlaw*, *E.C.L.R.*, 26(7), 2005: 369-372.

³²⁸ Weitbrecht, A. *EU Merger Control in 2005 – An Overview*. *E.C.L.R.* 27(2), 2006: 43-50. In this case the Commission had prohibited the takeover of GDP by EDP & ENI on the basis that the transaction would impede competition through the removal of potential competitors. The CFI upheld the Commission's decision on the basis that the Commission had achieved the requisite legal standard of proof when conducting its investigation.

³²⁹ Weitbrecht, A. *EU Merger Control in 2005 – An Overview*. *E.C.L.R.* 27(2), 2006: 43-50. The CFI upheld the Commission's decision that a merger between the two avionic giants would impede dominance but the CFI also held that the Commission had failed to sufficiently prove that conglomerate effects of the merger would impede competition and illustrate that GE Capital and GE Capital Avionics Services would take advantage of this dominant position.

³³⁰ Weitbrecht, A. *EU Merger Control in 2005 – An Overview*. *E.C.L.R.* 27(2), 2006: 43-50.

Commission's decision to prohibit the merger between the two parties, the CFI held that the decision was "vitiating by illegalities" on the part of the Commission.³³¹ The CFI upheld the Commission's assertion that the merger would have: created a world-wide monopoly in the jet engines market; impeded competition inasmuch that price competition would be reduced. The CFI also upheld the rejection of the proposed commitments by the Commission. The CFI, however, was critical of several aspects of the Commission's economic analysis as "the Commission's analysis was ... vitiated by a manifest error of assessment".³³²

The annulment of the Commission's decision to permit the creation of a joint venture between Sony and BMG by the CFI on July 13th 2006,³³³ is a significant judgment, shaping the application of the merger regulation regime by the Commission, "... effect[ing] the way the Commission will handle any contentious merger case ...".³³⁴ In this case the CFI stated that the Commission: "did not demonstrate to the requisite legal standard either the non-existence of a collective dominant position before the concentration or the absence of a risk that such a position would be created as a result of the concentration".³³⁵ This case provided clarification concerning similar cases, confirming the "... test under the merger regulation is symmetric – the burden is just as high on the Commission to clear a

³³¹ Euractiv.com, ECJ: GE/Honeywell merger ban stands but the Commission made errors. Available from: <http://www.com/en/competition/ecj-gehoneywell-merger-ban-stands-commission.html> [Accessed 02/01/07].

³³² CVRIA, Judgment of the Court of First Instance in Cases T209/01 and 210/01, *Honeywell v Commission and General Electric v Commission*. *Press Release No 109/05*, 14 December 2005, CVRIA Luxembourg.

³³³ Case T-464/04 involved Impala, the international association which represents 2,500 music companies, bringing the appeal, with Sony and BMG as the interveners (Volcker, S. B. & C. O'Daly, *The Court of First Instance's Impala judgment: A Judicial Counter-Reformation in EU Merger Control*. *E.C.L.R.* 2006, 27(11). 589-596). The Sony/BMG merger represented a 5-4 merger. The Commission, during its investigation examined if there was parallel wholesaling pricing. The Commission found there was not enough evidence to establish collective dominance. Impala appealed to the CFI who stated the Commission not only had to prove there would be, but also that there would not be dominance as a result of the transaction. The CFI annulled the Commission decision.

³³⁴ Volcker, S. B. & C. O'Daly, *The Court of First Instance's Impala judgment: A Judicial Counter-Reformation in EU Merger Control*. *E.C.L.R.* 2006, 27(11): 589-596, 589.

³³⁵ Rapid Press Release, *Independent Music Publishers and Labels Association (Impala) v Commission of the European Communities*. *Press Release*, 60/06, Reference: CJE/06/60 Date: 13/07/2006.

merger as prohibit it".³³⁶ The CFI's judgment, as noted by Volcker and O'Daly,³³⁷ considers "an expansive interpretation of co-ordinated effects ... and saddles an already complex and time pressured review process with additional complications", whilst this judgment may trigger more ex-post intervention against closed cases.

The CFI criticised the Commission's economic analysis as "extremely succinct", "superficial, indeed purely formal", especially as this transaction "raises serious problems".³³⁸ The CFI was also critical of the Commission's use of backward looking analysis to examine if retaliation had occurred when there had been prior mergers, which was not a suitable analysis - prospective analysis was needed to identify if collective dominance would be established as a consequence of the merger. Consequentially the Commission had to reassess the transaction.

As observed by Volcker and O'Daly, if a Commission's decision is annulled by the Court, and has to be re-assessed, as with *Sony/BMG*, the Commission looks more favourably upon parties who have to re-notify transactions. For example in *Kali & Sali*, the CFI annulled conditional clearance whilst the Commission, after reassessment, granted unconditional clearance. In *TetraLaval/Sidel*, the CFI annulled the Commission's prohibition decision. Consequently the Commission reassessed the transaction, granting conditional clearance.³³⁹ The Courts, especially the CFI, have been drawn into the governance regime and can overturn and influence Commission decisions, as judgments can affect Commission reassessments.

³³⁶ Lowe, P. Commission's Enforcement Record 2006. *Competition Policy Newsletter*, (1) Spring 2006:1. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2007_1.pdf [Accessed 07/07/07].

³³⁷ Lowe, P. Commission's Enforcement Record 2006. *Competition Policy Newsletter*, (1) Spring 2006:1. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2007_1.pdf [Accessed 07/07/07].

³³⁸ Lowe, P. Commission's Enforcement Record 2006. *Competition Policy Newsletter*, (1) Spring 2006:1. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2007_1.pdf [Accessed 07/07/07].

³³⁹ Lowe, P. Commission's Enforcement Record 2006. *Competition Policy Newsletter*, (1) Spring 2006:1. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2007_1.pdf [Accessed 07/07/07].

Criticism of the competence of the Commission to correctly apply the provisions of the ECMR by the CFI,³⁴⁰ whilst not precipitating a revision of the merger framework, did, however, shape the direction of the review and subsequent pathway of policy. Judicial intervention has enhanced the Courts' position within this governance regime, establishing check lists and standards to which the Commission must adhere when conducting a merger investigation. Recent case-law indicates that the CFI and ECJ are continuing to mould the evolution of the EU merger regulation framework. This intervention, in turn, influences how the Commission applies the NMR. The European Courts have also continued to add more cases to the ongoing discussion surrounding the standard of judicial review. The effect judicial review has upon the application of the NMR by the Commission is clear. The scathing criticism of the application and interpretation of economic analysis by the CFI, which has been sanctioned by the ECJ to reassess analysis, coupled with more parties being allowed to challenge Commission decisions, even ex-post intervention, has made the whole review process more complex and time consuming for the Commission. Increasingly, as parties challenge Commission decisions in the Courts, the application of the NMR is adversarial rather than investigative in nature. In cases when interested parties challenge Commission decisions, both sides present their arguments in Court and it is the judiciary who make the final decision. The merger regulation control process is therefore converging with the US system, where the Federal Trade Commission and Parties present their evidence and it is the court that decides if a transaction should be approved or prohibited.

Although the Council establishes the signposts of policy, negotiating the content of the Merger Regulations, the trajectory of policy has been shaped by both the application of the Merger Control Regulation by the European Commission and, to a certain extent, by judicial review. The new competition architecture established in 1990 by the entry into force of the ECMR, as noted by Davidson,³⁴¹

³⁴⁰ Eg. Case T-5/02 *Tetra Laval BV v Commission of the European Communities*, (The ECJ dismissed the Commission's appeal against the CFI's decision to annul its prohibition of the merger).

³⁴¹ Davidson, L. M. *EU Merger Control and the Compatibility Test: A Review of Recent Developments*. *Liverpool Law Review*, 25, 2004: 195-220, 196.

was shaped by and also shaped the trajectory of, merger regulation policy. The revision of the ECMR has proved to be a formal critical juncture in the evolution of EU merger regulation, formalising the pathway and direction policy was taking as a consequence of the application of the merger regulation regime by the Commission. As the entry into force of the NMR closed many of the gaps which evolved as an unanticipated consequence of the application of the ECMR, the new, revised framework offers more opportunities for the Commission to continue to shape the evolution and direction of the new merger policy. The Commission, however, does not exist within a vacuum. Increasingly the Commission must share its role with the CFI and ECJ and is drawn into an adversarial, instead of an investigative, discourse justifying its decisions before the European Courts.

3.11.2. The Position of the Omnipresent Press within the New Merger Regime³⁴²

Prior to the entry into force of the NMR the press were already becoming part of the merger regulation process. At the Tenth Anniversary of the European ECMR Conference, Alec Burnside reviewed the key actors who control the merger process. He concluded that the European press corps was now a de facto part of the process of merger review.³⁴³ As the evaluation process by the Commission is one of the few areas that can evoke the [shareholding] public's interest in activities at EU level, there is, according to Heim,³⁴⁴ a small but hardcore press corps who target European national officials and parties to the transaction willing to speak off the record and "leak" certain papers, allowing the press to shape the environment within which decisions are made. The Commission officially reprimanded the Royal Caribbean for "leaks" in the *Carnival/P&O*³⁴⁵ case (it was assumed that if the Commission prevented a merger, it would benefit Royal Caribbean). During the *GE/Honeywell* merger, Monti publicly criticised "attempts to misinform the public

³⁴² I touched upon this discussion in an LLM assignment (2004) The Development of a European-wide framework of merger control.

³⁴³ Heim, M. The Impact of the Media on EU Merger decisions, *E.C.L.R.* 24(2), 2003: 49-53.

³⁴⁴ Heim, M. The Impact of the Media on EU Merger decisions, *E.C.L.R.* 24(2), 2003: 49-53.

³⁴⁵ Heim, M. The Impact of the Media on EU Merger decisions, *E.C.L.R.* 24(2), 2003: 49-53. The Commission cleared the merger between Carnival and P&O Princess. This enabled the parties to establish a dual-listed company. Reference: IP/03/212 Date: 10/02/2003, (Rapid Press Release: *Commission clears dual listed company combining the cruise activities of Carnival and P&O Princess*. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/212> [Accessed 24/08/08].

and to trigger political intervention” which is “entirely out of place in an antitrust case”.³⁴⁶ Heim argued that media coverage can “condition the environment” as a tool used by all parties involved to sensitise the “stakeholders to the possible outcomes”.³⁴⁷ By reporting the possibility that the Commission may not sanction a merger, the thought of possible remedies is made more palatable to all the stakeholders³⁴⁸ involved.

After the revision of the Merger Control Regulation, the press's position appears to be further entrenched within the EU merger regime, a tool used by all parties in order to not only to sweeten shareholders to the possibility that remedial action might be more palatable than concentrations being judged as incompatible with the Common Market but also to outline the future of the proposed concentrations as though the concentrations had already been approved, in order to present the Commission as the bad guy if the concentration is rejected. Announcements of the intention of parties to enter into a transaction, be it an acquisition, merger or joint-venture via a press release or press conference at the same time as notification, presents the transaction as *fait accompli*. Manipulation of the press by the parties draws attention away from the impact the transaction will have upon competition within a particular market, to the affect the transaction will have for consumers. Two examples of this are *Total/Gaz de France*³⁴⁹ and the Mittal takeover of Arcelor.³⁵⁰ In *Total/Gaz*, press releases were presented at the same time as the *Protocole d'Accord*, declaring their intentions, “making it clear

³⁴⁶ Rapid, *Commissioner Monti dismisses criticism of GE/Honeywell merger review and rejects politicisation of the case*, EUROPA Rapid Press Release, IP/01/855.

³⁴⁷ Heim, M. *The Impact of the Media on EU Merger decisions*, *E.C.L.R.* 24(2), 2003: 49-53, 52.

³⁴⁸ Heim, M. *The Impact of the Media on EU Merger decisions*, *E.C.L.R.* 24(2), 2003: 49-53, 53.

³⁴⁹ De Rivery, M. D. & V. Guerard, *Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector*. *E.C.L.R.* 26 (11), 2005: 624-637.

³⁵⁰ Smyth, C. & P. Hollinger, *Lakshmi Mittal warns on mistake of protectionism*. At the same time as notification Mittal released a statement saying that he “was confident the Luxembourg government would not take any decision which would frustrate this transaction”. He warned: “This kind of activity would really disturb the financial community [in Luxembourg].” *FT.Com*, 18/03/2006. Available from:

<http://search.ft.com/search?queryText=Lakshmi+Mittal+warns+on+mistake+of+protectionism%2C+&x=11&y=2&aje=true&dse=&dsz=> [Accessed 06/05/08]. The Commission approved the acquisition of Acelor by Mittal, subject to certain conditions, establishing the largest steel producer in the world. Rapid Press Release, *Commission approves acquisition of Acelor by Mittal, subject to conditions*. Reference: IP/06/725 Date: 02/06/2006. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/725> [29/08/08].

that the contemplated concentration would be ultimately implemented".³⁵¹ In the Mittal case, the press were used by Mittal to pre-empt possible protectionism by the French and Luxembourg governments, by illustrating how the economies of EU countries opposed to the hostile takeover³⁵² may be affected if the merger was sabotaged by protectionist measures. The press was also used by those opposed to the merger to urge national governments and the EU to oppose the merger and protect national economies.³⁵³ Certainly manipulation and opportunistic use of the press allows politicisation of merger decisions, creating a difficult environment within which the Commission has to apply the NMR.

Use of the media has become an integral, de facto, part of the merger review process prior to the implementation of the NMR. The media acts as another layer of scrutiny.³⁵⁴ Use of the press has been expanded upon to manipulate and shape the merger review process, in order to create an environment which is more amenable to the creation of a new concentration as the consequences could otherwise be detrimental to the economy. The press remain a non-judicial factor which must be considered when debating and considering the structures and institutions which not only shape and have input into the merger regulation framework but also influence and condition the environment within which the NMR is applied.

3.12. Change in Emphasis and Dynamics of the Policy Community Environment

Vallindas,³⁵⁵ notes that prior to the modernisation of EU competition law in 2004, "... everything seemed to indicate that the implementation of Community competition rules had lost its economic character, and as such, simply expressed the legalistic logic of the Common Market". Decisions made by both the Commission

³⁵¹ De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

³⁵² De Rivery, M. D. & V. Guerard, Case No COMP/M. 3410 – Total/ Gaz De France: Merger Control as a Tool to Greater Liberalisation in the Gas Sector. *E.C.L.R.* 26 (11), 2005: 624-637.

³⁵³ Parker, G. Mittal bid shows need for "strong EU role". *FT.Com*, 02/02/06. Available from: <http://search.ft.com/ftArticle?queryText=Mittal+bid+shows+need+for+%27strong+EU+role%27&y=0&aje=true&x=18&id=060206000849&ct=0> [Accessed 06/05/08].

³⁵⁴ Heim, M. The Impact of the Media on EU Merger decisions, *E.C.L.R.* 24(2), 2003: 49-53, 53.

³⁵⁵ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 639.

and the European Courts were influenced by the ordoliberalist doctrine, a theory which attempts to “re-establish competition, by ensuring that market power is widely distributed”.³⁵⁶ Application of economic principles by the Commission and ECJ was “*ad hoc* and imprecise ...”.³⁵⁷ The annulment of three Commission decisions by the CFI in 2002³⁵⁸ on the basis of inadequate economic analysis, however, “accelerated”³⁵⁹ the modernisation process and shaped the trajectory of policy change. “... [T]he scathing criticism originated from recent decisions of the Court of First Instance has cast a shadow on the overall fairness and objectivity of the assessments of concentrations on the part of the Commission’s Merger control task force”.³⁶⁰ The renewal (and improvement) of the Commission’s economic analysis was instigated not only by the revision of competition law in 2004, but also by the reorganisation of the Directorate. Late 2003, the then Competition Commissioner Monti announced that the MTF was to be reorganised. This reorganisation established the position of Senior Economist,³⁶¹ the first to be appointed being Professor Roller, and an accompanying office of 10 PhD level economists, within the Competition Directorate. The MTF was split into sector-specific directorates.

As Posner observed: “there is remarkable isomorphism between legal and economic theory [t]he law adopts an explicitly economic criterion of legality”.³⁶² As noted throughout the thesis, the application of the NMR, coupled with increased judicial review has precipitated both systemic change and a slight shift in both the normative dimension of the governance structure of merger policy and the combination of lawyers and economists, employed by all parties. The

³⁵⁶ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 641.

³⁵⁷ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 642.

³⁵⁸ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 645; see Chapter 1 for more details of the case law.

³⁵⁹ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 646; Soames, T. & S. Maudhuit, Changes in EU Merger Control: Parts 1-3, *E.C.L.R.* 26, (1-3), 2005.

³⁶⁰ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409.

³⁶¹ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409, 646.

³⁶² Posner, R. The Law and Economics of the Economic Expert Witness. *Journal of Economic Perspective*, 13(2), 1999: 91-99.

increased importance placed upon economic frameworks and models during merger investigations has consequences for the structures of governance within the merger regulation policy regime and for the teams who advise parties who wish to enter into a transaction. Economic theory and counsel is now, in more complex cases, placed on a par with legal advice.

The Commission's assessment of transactions has become increasingly complex and whilst the "quality" of decisions has improved with the Commission making no more "extreme aberrations such as the prohibition decisions taken in 2001",³⁶³ the parties to the transaction now have to present huge amounts of information and data sets to the Commission, which the Commission's own economists and Chief Economist's office will then examine. The *Procter & Gamble/Gillette* decision was one of the first cases to be seen by the Chief Economist and his team, as they conducted in-depth economic analysis of the non-horizontal effects of the merger.³⁶⁴ As the NMR has dropped the requirement to notify 7 days after an agreement between the parties has been signed, the proceedings have, as a consequence, become more drawn out as the parties themselves can decide when to notify after the agreement has been signed.³⁶⁵ This flexible time scale permits extensive prenotification meetings with the Commission. Weitbrecht draws attention to several "major cases" which involve several markets: *Procter & Gamble/Gillette* and *Pernod Ricard/Allied Domecq*. These cases involved a significant amount of prenotification meetings and consultation between the parties and Commission. The Commission was also involved in "market testing" prior to notification. These cases were cleared by the Commission (with significant commitments) after Phase I investigations.³⁶⁶ In *Kornas/AD Cartonboard* as noted by Karlsson,³⁶⁷ the Commission "bravely" cleared the complex transaction after a

³⁶³ Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50, 46.

³⁶⁴ Kloc-Evison, K. et al. *Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07], 48.

³⁶⁵ Kloc-Evison, K. et al. *Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

³⁶⁶ Kloc-Evison, K. et al. *Procter & Gamble/ Gillette: the role of economic analysis in Phase I cases. Competition Policy Newsletter*, (3) Autumn 2005: 43. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf [Accessed 16/07/07].

³⁶⁷ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

Phase I investigation as “considerable time and effort” was taken by the notifying parties to enter into interaction with the Commission. The increasing complexity and time consuming nature of Commission investigations also means, however, that investigations are referred to Phase II investigations because the Phase I investigation runs out of time. Some of these mergers, for example *Bertelsmann Springer/JV* and *Blackstone/Acetex*, were then cleared without the presentation of a publication of objections.³⁶⁸

The Commission are employing more economists and utilising an increasingly economic approach to the merger investigations and the application of the merger regulation framework. In *Blackstone/Acetex*,³⁶⁹ the proposed concentration was only finally cleared after extensive market testing and an investigation by the CET.³⁷⁰ Use of industrial economists by the Commission, however, was not a new innovation. Prior to the creation of the role of Chief Economist and the reorganisation of the MTF, academic economists were consulted by the Commission. Economics Professor Ivaldi, for example, was consulted in the *Volvo/Scania* transaction.³⁷¹

Complex cases are now increasingly referred to this team of economists, as analysis is premised upon both legal and economic scrutiny. As Weitbrecht³⁷² pointed out, questionnaires constructed by the merger units “... increasingly require consideration of economic elements based on Article 11 of the Merger Control

³⁶⁸ Karlsson, J. Clearance of a Near-Duopoly. *E.C.L.R.* 27(9), 2006: 514-518.

³⁶⁹ COMP/M.3625, *Blackstone/Acetex* (unreported, July 13, 2005). Available from: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3625_20050713_20682_en.pdf [Accessed 04/03/08]. Blackstone Crystal Holdings Capital Partners (a private merchant holdings company) acquired Acetex Corporation (chemicals company) subject to certain undertakings – to maintain Acetex's Pardies plant in France. The Commission cleared the transaction after an in depth investigation.

³⁷⁰ Weitbrecht, A. EU Merger Control in 2004 – An Overview. *E.C.L.R.* 26(2), 2005: 67-74.

³⁷¹ Posner, R. The Law and Economics of the Economic Expert Witness. *Journal of Economic Perspective*, 13(2), 1999: 91-99; Case No COMP/ M.1672*Volvo/Scania*15/03/2000; e.g. *Case T-36/91 Soda/Ash & Joined cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85 to C-129-85 Woodpulp*, all make reference to academic advice. In this case the Commission prohibited Volvo's acquisition of Scania as the proposed commitments were insufficient to remedy competition concerns. (Rapid Press Release, *The Commission prohibits Volvo's acquisition of its main competitor Scania*. Reference: IP/00/257 Date: 14/03/2000. Available from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/257&format=HTML&aged=1&language=EN&guiLanguage=en> [Accessed 29/08/08]).

³⁷² Weitbrecht, A. EU Merger Control in 2005 – An Overview. *E.C.L.R.* 27(2), 2006: 43-50.

Regulation".³⁷³ Pflanz³⁷⁴ noted that the team of economists apply "empirical quantitative analysis methods to the effects of mergers". "Facts-based" evidence, as noted by Vallindas,³⁷⁵ permits the relevant authorities to "resolve the problems raised by the use of economic science in competition law". As economists are flexible when constructing theoretical models, often providing alternatives, decisions can then be swayed by empirical evidence.³⁷⁶

Parties to transactions, like the Commission, are employing not only lawyers but also economists.³⁷⁷ Since the entry into force of the ECMR, expenditure to economic consultancy firms such as Lexecon, LECG and RRB has risen as cases have increased in complexity and there have been more appeals by parties to the CFI. Expenditure on specialised economic consultancies which specialise in EU competition issues now equals that in the United States where 15% of aggregate fees from antitrust cases are paid to economic consultancy firms.³⁷⁸ In the *Airtours* case, expenditure on economists totalled 21% of expenditure.³⁷⁹ Considering the percentage of Commission decisions which made "explicit reference to economic advice" between 1991-2005, Neven assessed the impact/influence economists have on competition policy.³⁸⁰ He found that reliance upon economic advice fluctuated from year to year, in conjunction with important, complex cases. The number of Commission in-house economic specialists in comparison with legal specialists has increased from 1:7 in the early 1990s to 1:2 in 2005. The Chief Economist and his team remain a small force in comparison with both the evolving economic

³⁷³ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 646.

³⁷⁴ Pflanz, P. Oracle/Peoplesoft: The Economics of the EC Review. *E.C.L.R.* 26, (3), 2005, 123-7.

³⁷⁵ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660, 647.

³⁷⁶ Vallindas, G. New Directions in EC Competition Policy: The Case of Merger Control. *E.L.J.*, 12 (5), 2006: 535-660.

³⁷⁷ Case No COMP/M.3083 *GE/Instrumentalism*, Commission Decision of 2 December 2003; COMP/M. 3216 *Oracle/PeopleSoft*, Commission Decision of 28 October 2004.

³⁷⁸ Neven, D. J. competition, economics and antitrust in Europe. *Economic Policy*, 1, 2006: 741-791.

³⁷⁹ Neven, D. J. competition, economics and antitrust in Europe. *Economic Policy*, 1, 2006: 741-791.

³⁸⁰ Neven, D. J. competition, economics and antitrust in Europe. *Economic Policy*, 1, 2006: 741-791.

consultancy industry and the economists employed at the US antitrust agencies who employ over 120 specialists.³⁸¹

The increasing number of economists employed by both sides does not necessarily reveal the impact economics has had upon case-law and the application of the NMR. Certainly the case-law, decisions and developments in the legal framework of the EU merger regulation framework³⁸² indicate that the EU has taken on a more economic outlook and analytical toolkit. As outlined by Neven,³⁸³ economic analysis (quantitative methods, merger simulation techniques and the theory of collusion in repeated games) have been operationalised by the Commission and affirmed by the Courts. Botteman³⁸⁴ identifies an “increasing use of complex econometric modelling in EC merger control proceedings”, as it is now standard procedure that economic experts from the Commission, notifying parties and third parties, should be actively involved in the investigative process, “... shaping the way mergers should be assessed”.³⁸⁵ Use of economics has become more influential in the analysis of non-coordinated effects.³⁸⁶ There appears to be a shift towards economic, as well as legal, analyses, as a self-fulfilling continuum evolves. A combination of both the parties to transactions who increasingly employed industrial economic consultancies and economic academics from the mid-1990s onwards, especially during the more complex cases, coupled with the criticism from the CFI of the Commission's incorrect application of economic models during certain investigations, has encouraged the Commission to adopt a more complex economic toolkit, and to reorganise the MTF in response to the parties' and Courts' actions. This, in turn, has facilitated the expansion of industrial economist consultancy firms who utilise more complex economic models to advise parties during investigations by the Commission, and during judicial review. The

³⁸¹ Neven, D. J. competition, economics and antitrust in Europe. *Economic Policy*, 1, 2006: 741-791.

³⁸² Neven, D. J. competition, economics and antitrust in Europe. *Economic Policy*, 1, 2006: 741-791.; see earlier sections of the thesis analysing jurisdictional and substantive issues.

³⁸³ Neven, D. J. competition, economics and antitrust in Europe. *Economic Policy*, 1, 2006: 741-791.

³⁸⁴ Botteman, Y. Mergers, Standard of Proof and Expert Economic Evidence. 2. *J.Competition L. & Econ.* 71, 2006.

³⁸⁵ Botteman, Y. Mergers, Standard of Proof and Expert Economic Evidence. 2. *J.Competition L. & Econ.* 71, 2006.

³⁸⁶ Botteman, Y. Mergers, Standard of Proof and Expert Economic Evidence. 2. *J.Competition L. & Econ.* 71, 2006; COMP/M.3083; COMP/M.3216.

application of the NMR, by the Commission, is evolving and utilising not only legal but also economic discourse.

Criticism (and opinion about the possible pathway merger regulation policy is taking) does not only emanate from protectionist Member States and the Judgments and Opinions of the European Courts. A new subdivision of academic interest examining the economics of EU merger regulation has evolved within the economic sphere with the accompanying literature, workshops, conferences and forums, which do not just catch the interest of academia but of specialists working within this area of economics. Academic roundtables, forums and conference themes focus upon a diverse range of issues relating to the future of the EU merger regulation regime, its potential, limitations, drawing comparisons with other Merger Control Regulations, notably the US, analysing the content of the NMR and examining both the impact judicial review has upon the application of the NMR by the Commission and the increasing emphasis placed upon the use of quantitative economic tools during merger investigations. Academic debate, interconnected research arenas and academic literature all add weight and (secondary) input into the merger regulation policy community.

Monti stated that the purpose of competition policy is to facilitate economic growth and strengthen European markets. This can only be achieved if there is a uniform, economic approach during the application of competition policy. The legislative (the revised substantive test) and policy changes (merger guidelines) which revised merger regulation, and the appointment of a Chief Economist and team of industrial economists, ensured that competition policy is now grounded in micro-economics.³⁸⁷ The legal landscape of merger control regulation policy, therefore, has changed as a consequence of the application of the NMR. The Commission, due to scathing criticism from the CFI relating to the incorrect application of economic models, and as a consequence of the entry into force of the NMR, has incorporated more complex analysis, which is more relevant and applicable, into its analytical toolkit. There are now more economists employed in

³⁸⁷ Monti, M. A reformed competition policy: achievements and challenges for the future. *Competition Policy Newsletter*, (3), Autumn 2004:6. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_3.pdf [Accessed 11/07/07].

the competition directorate whose expertise is employed during more complex investigations. On the flip side of the coin, parties also employ economists as well as lawyers as part of their teams, as required analysis and arguments are not only premised upon legal but economic models. Economics has become intrinsically linked with legal analysis as the EU merger regulation framework evolves.

3.13. Change of Direction in the Trajectory of Policy?

Lowe, in his speech at the EC competition Day 2006³⁸⁸ considered if the revision of the EC merger regulation framework had changed the trajectory of path dependency in merger policy. Noting that the objectives of the revision were to enhance the effectiveness of the system with the introduction of a new substantive test, and to improve jurisdictional allocation with the introduction of a new referral system, he pointed out that “there has been a high degree of continuity” between the old and the new system of merger regulation. The success of the NMR, however, is dependent upon the application of its provisions by the Commission. Although the NMR does represent a critical juncture in the evolution of the European merger regulation framework, formalising and clarifying the changes which were evolving prior to the entry into force of the NMR, the Commission appears cautious, taking a step-change approach to its application of the NMR.

The use of the SIEC by the Commission, coupled with organisational reform, has formalised the changes which were evolving in the normative dimension of the merger regulation regime prior to the entry into force of the NMR. The NMR has filled the unanticipated gaps left by the original Merger Control Regulation which emerged as a consequence of the application of the Regulation by the Commission. Whilst the move to a more economic and econometric toolkit, by the Commission, by parties to the transaction and third parties, does not represent a paradigmatic change per se, but a step-change, there is a shift in emphasis. Both academic economists' and economic consultancies' expertise, together with the advice of lawyers, are drawn upon by all concerned, especially in more complex cases.

³⁸⁸ Lowe, P. *EC Merger Regulation: Is there Really a New Approach? EC Competition Day*, Vienna, 2006 EC Competition Day. Available from: <http://www.competition06.com/NR/rdonlyres/BE2DD1E3-5FA3-48CE-A333-D136515D1FE4/25532/PhilipLoweSlides19June2006Vienna.pdf> (Accessed 14/01/08).

Although these actors had been drawn into the merger control regulation regime prior to the entry into force of the NMR, the application of the revised Regulation solidified, enhanced and secured their position within the framework.

The balance of power in the merger regulation governance regime has shifted. Scathing criticism and judicial review of merger decisions was not new. There are several well cited examples from mid 2000 onwards which highlighted the Commission's struggle to cope with the influx of notifications and the failure to correctly apply and interpret the economic models. This criticism shaped the direction of the pathway of change and indicated that the Courts were going to play an active role in this arena. Increasingly the Commission has been forced to justify decisions before the Courts, whilst the Courts have made it clear that they will not only consider the legality of the decision but also review the Commission's economic analysis.

The Commission has finally managed to take a step away from the assessment of ancillary restrictions, as parties can now self-assess unless the circumstances are novel and exceptional. Case referrals now permit the best placed authority to assess the merger and the whole process has been made more flexible to assist parties who may need to notify multiple authorities as they operate in the global market.

Although the consequences of the entry into force of the NMR and changes to the governance regime have yet to crystallise, as the NMR is still in its infancy and the way the Commission intends to apply the provisions is unclear, one can still conjecture from the evolving case-law that the Commission is being extremely cautious in its approach to merger regulation and the appraisal of transactions. New economic norms and values are evolving and the balance of power is shifting. The transition between the original and revised Merger Control Regulation has, as Lowe³⁸⁹ points out, been smooth, unlike some critical junctures, such as the 1986 Single European Act, which represented a significant change. The NMR has built

³⁸⁹ Lowe, P. *EC Merger Regulation: Is there Really a New Approach?* EC Competition Day, Vienna, 2006 EC Competition Day. Available from: <http://www.competition06.com/NR/rdonlyres/BE2DD1E3-5FA3-48CE-A333-D136515D1FE4/25532/PhilipLowseslides19June2006Vienna.pdf> (Accessed 14/01/08).

upon the existing framework, filling the gaps and making improvements where needed. Only the application of the new framework by the Commission will give insight into how the actual provisions are to be applied and where more improvement is needed.

3.14. Conclusion

According to Dactylidis and Goolden:

“Until a few years ago, intervention by the European Commission to control mergers and acquisitions within Europe on competition policy grounds was infrequent. Control was usually exercised under art 86 ... applicable only when the acquiring party held a pre-existing dominant position”.³⁹⁰

The fundamental changes which occurred in the regulation of mergers as a consequence of the ECMR entering into force on the 21st September 1990 gave the European Commission “... the exclusive right (subject to certain exceptions) to control mergers which are ‘concentrations with a Community dimension’”.³⁹¹ Elland,³⁹² examining the evolution of the merger policy regime and the first draft of the original Merger Control Regulation, highlighted the “Commission’s increasingly active role”³⁹³ and “active involvement in major EC mergers”.³⁹⁴ As early as 1990, Soames et al³⁹⁵ noted that the entry into force of the Merger Control Regulation “... provide[d] the Commission with a stiff challenge and it remains to be seen how the already over-stretched DGIV will cope”.³⁹⁶ Although initially the Commission coped with the challenges of applying the ECMR, the criticisms dealt out by the CFI are indicative that the Commission was not operating to an optimal standard, as the CFI highlighted and criticised the Commission’s failure to objectively and effectively assess transactions in several high profile cases.

³⁹⁰ Dactylidis, R. & J. Goolden, The EEC merger regulation – M&A control moves to Brussels. *New Law Journal*, 1990, 140 (6460).

³⁹¹ Soames, T. EC and Competition Unit, Norton Rose, The Scope of the EC Merger Regulation, *Law Society Gazette*, 4 July 1990.

³⁹² Elland, W. Merger Control by the EC Commission. *E.C.L.R.*, 8(2), 1987; 163-172.

³⁹³ Elland, W. Merger Control by the EC Commission. *E.C.L.R.*, 8(2), 1987; 163-172.

³⁹⁴ Elland, W. Merger Control by the EC Commission. *E.C.L.R.*, 8(2), 1987; 163-172.

³⁹⁵ Soames, T. EC and Competition Unit, Norton Rose, Merger Regulation: Member States and the Commission. *Law Society's Gazette*, 18 July 1990.

³⁹⁶ Andreangeli, A. Fairness and Timing in Merger Control Proceedings: Will the Stop-The-Clock Clause Work? *E.C.L.R.* 26(7), 2005: 403-409.

This chapter, the main substantive chapter of the thesis, considered if the direction of merger policy had changed as a consequence of the application of the revised Merger Regulation by the Commission. The application of the NMR and accompanying framework cannot have an instantaneous effect upon the “Commission’s decisional practices”.³⁹⁷ The evolution of the merger regulation framework is evolving incrementally on a case by case basis, based on a step change rather than radical readjustment to the direction of policy.

Vickers³⁹⁸ remarked that the 2004 revisions to the merger regulation regime – “recent winds of change” – “have dispersed much fog from merger policy...”. Clearly the revisions instigated by the NMR have clarified and filled the unanticipated gaps which have evolved as the original Regulation was implemented by the Commission. In terms of jurisdictional allocation, the reforms have streamlined and increased the flexibility of the allocation of mergers, inline with the EU’s emphasis upon subsidiarity, ensuring that the most suitably placed competition authority can assess the transaction. Increased flexibility appears to be key to the Merger Regulation reforms. Notification has become more flexible and the introduction of the stop-the-clock procedure allows more time for the Commission to enter into discussion with parties to the transaction and interested third parties, ensuring that any potential problems can be ironed out, reducing the possibility of the Courts being drawn into the proceedings.

Originally the Commission’s decisional practice when assessing the viability of transactions was premised upon assessment of market share and abuse of dominance criterion. The Commission could only challenge transactions which would strengthen or establish dominance of a concentration post merger, which resulted in transactions falling under the threshold or the Commission’s decision being overturned by the Courts. As Monti pointed out,³⁹⁹ the revisions represent a

³⁹⁷ Roller, L. M. & M. de La Mano, *The Impact of the New Substantive Test in European Merger Control*. Available from: http://72.14.207.104/search?q=cache:39_M60UYX1wJ:europa.eu.int/comm/dgs/competition/new_substantive_test.pdf+SIEC+test&hl=en&gl=uk&ct=clnk&cd=10 [Accessed 22/02/06], 3.

³⁹⁸ Vickers, J. Merger Policy in Europe: Retrospect and Prospect. *E.C.L.R.*, 25(7), 2004: 455-463.

³⁹⁹ Monti, M. A reformed competition policy: achievements and challenges for the future. *Competition Policy Newsletter*, (3), Autumn 2004:6. Available from:

“consolidation of a world-wide leading merger system”. Now the Commission’s toolkit has been widened to consider: closeness of substitution; symmetry of the market prior to and after the transaction; will the transaction open up, liberalise, the market and finally assess the effect the removal of a potential future competitor may have upon the competitiveness of the market. Market share, by itself, is no longer necessarily justification for the prohibition of a merger. The most notable readjustment to the merger regulation framework was the revision of the DT. Now a concentration only needs to significantly impede competition to be prohibited by the Commission.

The transition from the DT to the SIEC has not resulted in the instantaneous abandonment of the DT as the tool by which concentrations are assessed. The potential for a concentrations’ dominance to impede competition is still an important tool used by the Commission in Phase I cases, but less so in Phase II cases. In Phase II cases, other factors, such as equilibrium effects, are taken into account. If dominance is identified by the Commission, this is regarded as sufficient justification to challenge a merger. If dominance is not identified or not seen as sufficient evidence to challenge a transaction, other factors such as closeness of substitution are also brought into the analysis.

The revised Regulation allows factors such as increased efficiencies and countervailing buyer power to counteract dominance, whilst the focus of the Commission’s investigation has shifted from the effect the transaction will have upon competitors to the effect the transaction will have upon consumers in terms, for example, of price rises.

The Commission possesses a unique role within the merger regulation policy making regime. It not only compiles the draft Regulation but also applies the provisions of Regulation during the investigation and can either prohibit or clear a transaction. The EU’s emphasis upon the open method of coordination has

http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_3.pdf [Accessed 11/07/07] & Monti, M. A reformed competition policy: achievements and challenges for the future. *Competition Policy Newsletter*, (3), Autumn 2004:6. Available from: http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_3.pdf [Accessed 11/07/07].

enhanced the Commission's position within the policy regime. Points of access have been widened as the Commission meets with both parties to the transaction and interested parties. The Commission is also one of the main players within the international competition/merger regulation policy regime, influencing not only the direction of policy but also able to block mergers which may negatively affect competition within the borders of the EU. The Commission is also prepared to take to task Member States who attempt to protect national champions.

Despite the Commission being a multi-tasker and significant player within the policy regime, the CFI and ECJ can and do overrule Commission decisions, establishing new checks and balances to which the Commission must adhere to when conducting investigations. The press, whilst not being part of the formal policy regime, does, however, attempt to influence policy outcome.

Certainly there has been a step rather than a radical change in the direction of policy, the roots of which can be traced back prior to the entry into force of the NMR. The NMR, whilst not representing a radical shift in policy, does however improve the effectiveness of the framework, enhancing both the efficacy of jurisdictional allocation and also of legal certainty. As part of the change in emphasis and incremental shift in the direction of policy, economics and econometric models are becoming more influential, on a par with legal analysis. The merger regulation policy is incrementally evolving, the changes instigated by the entry into force and application of its provisions becoming more apparent as the Commission incorporates the formal changes into the substantive framework.

CHAPTER 4: CONCLUSION

This thesis was premised upon the hypothesis that the application of the NMR by the Commission represented a step-change rather than a radical readjustment to the existing merger regulation framework.

The evolution of EU merger policy is punctuated by two critical junctures. The first juncture was precipitated in 1990 with the entry into force of the original Merger Control Regulation, the second with the entry into force of the NMR in 2004. The path dependent policy, established at these junctures, evolved and developed as a consequence of both the application of the merger regulation framework by the European Commission and as a consequence of judicial review. The application of the original merger regulation framework revealed its successes, gaps, limitations and unanticipated consequences. The entry into force of the New Merger Control Regulation sought to bridge these gaps and address perceived limitations and unanticipated consequences, whilst maintaining the positive aspects and provisions of the original ECMR. The NMR represents a critical juncture in the evolution of EU merger regulation policy. The entry into force of the NMR resolved the anomalies, shortcomings and unanticipated consequences which had evolved as a consequence of the application of the original Merger Control Regulation. Although the effects of the application of the NMR by the European Commission have yet to crystallise, it is nevertheless clear that the concrete illustrations of the application of the NMR indicate the Commission's flexibility when it is interpreting its provisions. The NMR's impact will be gradual, as the Commission and other actors not only adapt their normative dimension and tools associated with merger regulation but also, through application of the NMR, discover the anomalies and shortcomings of the existing framework, hence the need for an amending or revised Regulation, as the merger regulation framework continues to evolve.

The entry into force of the NMR and its subsequent application by the Commission illustrates how the recast Regulation represents both a case of continuity and change. The question of whether or not the NMR will live up (or down) to the expectations of the theoretical literature analysing the content of the

recast Regulation, is reliant upon the Commission's interpretation and application of the provisions of the NMR.

The trajectory of policy has not necessarily altered from the course established by the original ECMR. Instead, as a consequence of the application of the NMR, it is clear that in most areas, the direction the merger regulation framework is taking, had already been established by the Commission prior to the entry into force of the revised Regulation. Whilst legal certainty has been enhanced by the introduction of the SIEC, the Commission, however, has been cautious when applying the provisions of the NMR. Dominance continues to play an important role in Phase I cases whilst effects based analysis is utilised more in Phase II cases. If dominance can be established, it is deemed justification, by itself, to challenge a merger. Whilst the NMR has had little impact upon horizontal merger cases, there is evidence that the Commission has applied more effects-based analysis to vertical mergers. The Commission, however, can no longer depend upon dominance alone as justification to prohibit or clear a merger. Now assessment of a transaction can include: closeness of substitution; symmetry of the market, prior to and after the transaction; countervailing buyer power; the possibility that it will remove a potential [future] competitor from the market and consider if the transaction will liberalise the market.

Flexibility has been introduced into the regime. The notification procedure is more accommodating, with more points of access for the parties to the transaction and interested parties to enter into discussion with the Commission and iron out potential problems. This interaction ensures that the actual investigation is expedient and clearance/prohibition less likely to be challenged in the Courts.

Extrapolation and analysis of examples of the Commission's application of the NMR, plus the consideration of how the merger regulation framework has changed as a consequence of the entry into force of the NMR, clearly illustrate the Commission's innovative yet cautious approach to the application of the new and revised provisions. The novel and fresh methodology, incorporated into the Commission's toolkit, indicates that there has been a change in emphasis in the normative dimension of the Commission in relation to the analysis of transactions.

Systemic change precipitated by the entry into force of the NMR, has not resulted in a vast shift in the trajectory of policy. Emphasis within the governance regime has shifted as a consequence of the whole procedure becoming more adversarial as the EU Courts are drawn within the regime.

New actors and institutions have been absorbed into the governance regime, which requires the Commission to: become more defensive if it has to justify decisions before the CFI and ECJ; reprimand Member States who try to protect national champions and thus undermine the ethos and content of the merger regulation policy and also castigate the media for trying to manipulate the environment within which decisions are taken. The Commission is also a global player, an active participant in the global merger regulation policy community, shaping the trajectory of policy. The Commission, therefore, is a multi-tasker in the merger regulation policy regime, but its main task within this regime remains the same as in the original Regulation: to ensure that competition is not impeded as a consequence of transactions taking place.

The merger regulation governance regime and its accompanying norms of governance have become more complex as a consequence of the application of the NMR and the revised merger regulation framework. New institutions and actors have been drawn into the merger regulation process. As investigations become increasingly complex, parties employ teams of specialist lawyers, economists and public relation specialists. Criticism levied by the European Courts has further sensitised the Commission to the need to conduct in-depth investigations to enable/ensure the Commission can be held to a high standard of proof and does not have to face ex-post criticism from the European Courts. The Commission's unique position as sole applicator/implementer of the merger regulation framework has been substantially weakened as the European Courts have been drawn into the governance regime, with judicial review shaping the application and path dependency of policy.

The Commission's application of the NMR must be assessed case-by-case. Each decision is unique and gives an insight into how the Commission intends to apply the provisions of the revised Regulation. At the present time the Commission

is taking a cautious approach when applying the NMR. The transition from the old to the new Regulation is seamless, yet still represents a critical juncture in the evolvement and subsequent application of the Merger Control Regulation, filling the gaps, increasing legal certainty and establishing a new set of norms and values within the Commission as the assessment of transactions requires not only a legal but also an economic toolkit. The entry into force and application of the revised Merger Regulation represents a step change rather than a radical readjustment to the merger regulation framework. The roots, or foundations, of the changes that occurred as a consequence of the revision represent a natural continuation to the evolving framework, filling in the unanticipated gaps and flaws that have emerged as a consequence of the Commission's application of the original framework. The changes do not signify a change in direct to existing policy, but characterize part of a natural progression as the framework evolves and increases in complexity. The merger regulation framework, whilst intensifying in complexity, has, as in line with EU Competition law as a whole, sought to become mores simplistic and flexible for the user – parties to the transaction. The framework has kept the elements which proved to be effective whilst at the same increasing legal certainty and flexibility. The efficacy of these revision (and unanticipated consequences and flaws) will become apparent as the Commission applies the new framework of merger control.

GLOSSARY¹

Abuse of dominant position – any anti-competitive practices (price-fixing etc) used by a dominant firm to maintain or increase its power in the market.

Ancillary restraints – agreements which impose restrictions upon parties to the concentration. The restraints/restrictions are not the main object of the Commission's investigation, but they are "related to and necessary for the proper functioning" of the concentration. (European Commission, GLOSSARY of terms used in EU competition policy).

Antitrust – area of EU competition law concerned with Articles 81 & 82 EC Treaty - the rules regulating anti-competitive agreements and practices.

Buyer power – the ability of the buyer to exert its purchasing power and negotiate favourable deals of sale.

Collective Dominance – two or more firms may possess joint, collective or oligopolistic dominance.

Collusion – coordination of firms' competitive behaviour.

Commission Notice – a non-legally binding document (which accompanies a legally-binding document, i.e. Regulation) adopted by the Commission to enable the Regulation to be applied successfully. These notices are sometimes called Guidelines and can be used by parties needing guidance when submitting, for example, merger notifications.

Commitments – proposals presented by parties to the transaction, or requirements presented by the Commission, aimed at addressing/solving the competition concerns identified by the Commission during the merger investigation.

Competition – a market condition where firms compete for buyers/ market share.

Concentration – a concentration arises when two or more parties merge, an undertaking acquires another undertaking or two or more parties enter into a full function joint venture.

Conglomerate merger – a merger between firms in related markets.

Cooperative joint venture – "embodiment of a special, institutionally fixed form of cooperation between undertakings. They are versatile instruments at the disposal of the parents, with the help of which different goals can be attained". (Notice on cooperative joint ventures, the European Commission [1993] OJ C43/2, para 1).

¹ To ensure relevance to EU competition policy I have used Commission of the European Communities, *Glossary of terms used in EU competition policy*, Directorate-General for Competition, Brussels, 2002 as my main source of reference and the Competition Commission's online *Glossary of terms used in competition matters*. Available from: http://ec.europa.eu/comm/competition/general_info/glossary_en.html#aU [Accessed 21/08/08].

Divestiture - often offered as part of a divestiture package, a divestiture requires an undertaking to sell off, for example, part of its existing portfolio of firms.

Dominant position – a firm possesses a dominant position if it has the capacity to control the market, i.e. set prices. The dominant firm holds enough market power that it can act independently of competitors, customers and consumers. It is not illegal to possess a dominant position; it is, however, illegal under EU law to abuse this position.

Downstream market – the next stage in the chain of production/distribution.

Duopoly – a market where there are two sellers or two main sellers who dominate the market.

Economies of scale – this is achieved when firms save money (for example) by increasing production.

Entry barriers – factors which hinder or prevent a company from entering a market.

Extra-territoriality – one state applying jurisdiction over another.

Foreclosure – strategic action by one firm, to prevent another firm gaining access to either the upstream or downstream market.

Full function joint venture – encompasses a wide range of operations ranging from research and design to distribution. The essential element is that the parent companies must both put resources into the venture and the venture must be jointly controlled. (Notice on the concept of a full function joint venture, the European Commission, [1998] OJ C66/1, para 3).

Hearing officer – an independent official who organises hearings and ensures they are properly conducted. S/he reports to the Competition Commissioner and his/her report is published in the official journal.

Horizontal agreement – arrangements between two or more competitors who operate in the same market.

Horizontal merger – a merger between two companies at the same level in the same market.

Implementing regulation – legislative (secondary) act which implements parts of the primary, enabling legislation.

Infringement proceedings – an action taken by the Commission against a Member State which fails to fulfil obligations set out in either the EC Treaty or secondary legally-binding legislation. This can result in a judgment being issued by the ECJ. If the Member State ignores the judgment then the Commission can open a new proceedings and the ECJ can issue a fine upon the Member State.

Joint control – whereby two, or more, entities possess the means to control another undertaking.

Joint venture – An arrangement entered into between two (or more) parent companies to achieve a specific economic goal.

Market share – a measure for an undertaking's size in a market. In terms of correlation, the larger the market share, the stronger the profit margin etc.

Monopoly – one entity (the supplier) dominates the market.

Monopsony – one entity (the buyer) dominates the demand side of the market.

Notification – firms have to provide the Commission with certain information once they have entered into an agreement.

Obligations – the Commission imposes certain requirements on the parties before a transaction can be authorized.

Oligopoly – a situation where a few (big) sellers, realising that they are interdependent, anticipate each other's actions in order to jointly dominate the market.

Potential competition – pressure is placed upon existing firms due to the possibility that new firms will enter the market.

Potential competitor – an entity will be regarded as potential competitor if it expresses an interest in entering, or there is evidence that it possesses the capacity to, enter the market.

Remedies – corrective measures presented by the Commission, or suggested by the parties to the transaction, which will restore competition to the market. These measures must be implemented by the parties before the transaction can be cleared.

Retailer – end of the supply chain, sells final product to the consumer.

Spill over effects – side effects of a transaction (sometimes unanticipated).

Substitutability – products that are interchangeable or equivalent in nature.

Tacit collusion – firms act independently but can interact when necessary. An example of tacit collusion is when one firm raises their prices so its competitors follow suit.

Undertaking – any legal venture involved in economic activity.

Upstream market – the first stage of the production distribution chain.

Vertical agreement – an agreement between two or more entities who operate at different levels of the production chain.

Vertical merger – an undertaking merges with another which operates at a different level of the production/supply chain, i.e. producer & distributor.

APPENDIX 1: REFERRALS

| REFERRALS | | | | | | | | | | | | | | | | | | 09/06 | |
|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-------|--|
| | 90 | 91 | 92 | 93 | 94 | 95 | 96 | 97 | 98 | 99 | 00 | 01 | 02 | 03 | 04 | 05 | 06 | Total | |
| Art 4(4) request (Form RS) | | | | | | | | | | | | | | | 2 | 14 | 10 | 26 | |
| Art 4(4) referral to Member State | | | | | | | | | | | | | | | 2 | 11 | 8 | 21 | |
| Art 4(4) refusal of referral | | | | | | | | | | | | | | | 0 | 0 | 0 | 0 | |
| Art 4(5) request (Form RS) | | | | | | | | | | | | | | | 20 | 28 | 30 | 78 | |
| Art 4(5) referral accepted | | | | | | | | | | | | | | | 16 | 24 | 32 | 72 | |
| Art 4(5) refusal of referral | | | | | | | | | | | | | | | 2 | 0 | 0 | 2 | |
| Art 22 request | 0 | 0 | 0 | 1 | 0 | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 2 | 1 | 1 | 4 | 3 | 15 | |
| Art 22(3) referral (Art 22.4 taken in conjunction with article 6 or 8 under Reg. 4064/89) | 0 | 0 | 0 | 1 | 0 | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 2 | 1 | 1 | 3 | 2 | 13 | |
| Art 22(3) refusal of referral | | | | | | | | | | | | | | | | 1 | 1 | 2 | |
| Art 9 request | 0 | 1 | 1 | 1 | 1 | 0 | 3 | 7 | 4 | 9 | 4 | 9 | 8 | 10 | 4 | 7 | 5 | 74 | |
| Art 9.3 partial referral to Member State | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 6 | 3 | 2 | 3 | 6 | 7 | 1 | 1 | 3 | 1 | 35 | |
| Art 9.3 full referral | 0 | 0 | 0 | 1 | 0 | 0 | 3 | 1 | 1 | 3 | 2 | 1 | 4 | 8 | 2 | 3 | 1 | 30 | |
| Art 9.3 refusal of referral | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 3 | |

Available from: European Commission, *European Merger Control – Council Regulation 139/2004 Statistics*. Available from: <http://ec.europa.eu/comm/competition/mergers/cases/stats.html> (Accessed 17/10/06).

APPENDIX 2

Lars-Hendrik Röller & Miguel de la Mano's Evaluated Cases

Phase 1 cases approved with conditions and obligations

M.3863 - TUI / CP SHIPS

M.3829 - MAERSK / PONL

M.3817 - WEGENER / PCM / JV

M.3779 - PERNOD RICARD / ALLIED DOMECQ

M.3770 - LUFTHANSA / SWISS

M.3765 - AMER / SALOMON

M.3751 - NOVARTIS / HEXAL

M.3732 - PROCTER & GAMBLE / GILLETTE

M.3692 - REUTERS / TELERATE

M.3686 - HONEYWELL / NOVAR

M.3680 - ALCATEL / FINMECCANICA / ALCATEL ALENIA SPACE & TELESPAZIO

M.3658 - ORKLA / CHIPS

M.3593 - APOLLO / BAKELITE

M.3570 - PIAGGIO / APRILIA

M.3558 - CYTEC / UCB - SURFACE SPECIALTIES

M.3544 - BAYER HEALTHCARE / ROCHE (OTC BUSINESS)

M.3465 - SYNGENTA CP / ADVANTA

M.3410 - TOTAL / GAZ DE FRANCE

Phase 2 cases

M.3687 - JOHNSON & JOHNSON / GUIDANT

M.3653 - SIEMENS / VA TECH

M.3436 - CONTINENTAL / PHOENIX

M.3431 - SONOCO / AHLSTROM / JV

M.3178 - BERTELSMANN / SPRINGER / JV

M.3696 - E.ON/MOL

My sample: contested cases between October 13 2005 and October 13 2006

Phase 1 cases approved with conditions and obligations

Art. 6(1) (b) with conditions and obligations

M.4314 - JOHNSON & JOHNSON / PFIZER CONSUMER HEALTHCARE

M.4242 - THERMO ELECTRON / FISHER SCIENTIFIC

M.4151 - ORICA / DYNO

M.4150 - ABBOTT / GUIDANT

M.4141 - LINDE / BOC

M.4137 - MITTAL / ARCELOR

M.4066 - CVC / SLEC

M.4055 - TALANX / GERLING

M.4035 - TELEFÓNICA / O2

M.3998 - AXALTO / GEMPLUS

M.3946 - RENOLIT / SOLVAY

M.3940 - LUFTHANSA / EUROWINGS

Phase 2 cases, Art.8(2) with conditions and obligations

M.4187 - METSO / AKER KVAERNER

M.4180 - GAZ DE FRANCE / SUEZ

M.4000 - INCO / FALCONBRIDGE

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E. L. R. - European Law Review.
I.C.C.R. - International Company and Commercial Law Review.
O.E.C.D.- Organisation for Economic Co-operation and Development.
OJ C - Official Journal of the European Union, C Series.
OJ L – Official Journal of the European Union, L Series.
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