EVOLUTION OF THE EU MERGER REGULATIONS EXPLAINED BY RELEVANT CASE STUDIES

INTERNSHIP PROJECT REPORT

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Lagardere/Nataxis/VUP Case, IV/M.2978
LIST OF ABBREVIATIONS

EEC – European Economic Committee
TEC – Treaty of European Committee
EU – European Union
EC – European Committee
ECSC – European Coal and Steel Community
Euratom – European Atomic Energy Community
SEA – The Single European Act
TFEU - Treaty on the Functioning of the European Union
ECMR – European Committee Merger Regulation
EUMR – European Union Merger Regulation
SO – Statement of Objections
SIEC – Significantly Impeding Effective Competition
Para. – Paragraph
Vol. – Volume
Pg. – Page
CHAPTER 1
THE TREATY OF ROME 1957

The Treaty of Rome was the founding treaty of the European Economic Community (EEC), which later became the European Union (EU). Also known as the Treaty of the European Community (TEC), all the subsequent European treaties have built upon or amended the Treaty of Rome and its provisions still form the majority of EU treaty law. The treaty focused overwhelmingly on economic co-operation, but it also set out a wider political vision for an ever closer union to eliminate the barriers which divide Europe.¹

1.1 HISTORY

In Europe, many industries had traditionally been shielded from competitive pressures, either through private arrangements or through regulatory interventions. This was evident in key industries such as coal and steel. In the steel sector, cartelization was the rule rather than the exception and had become an international phenomenon in the 1920s and 1930s, where the International Steel Cartel consisting of members from seven European countries had controlled a significant proportion of world production and exports. In the coal sector, private and state monopolization was widespread in countries like Germany, France, Belgium and the Netherlands.²

In 1951, the Treaty of Paris was signed, creating the European Coal and Steel Community (ECSC). The Treaty of Paris was an international treaty based on international law, designed to help reconstruct the economies of the European continent, prevent war in Europe and ensure a lasting peace. The aim was to pool Franco-German coal and steel production, as these two raw materials were the basis of the industry (including war industry) and power of the two countries. The proposed plan was that Franco-German coal and steel production would be placed under a common High Authority within the framework of an organisation that would be open for participation to other European countries. The underlying political objective of the ECSC was to strengthen Franco-German cooperation and banish the possibility of war.³

The treaty was to form the world’s first anti-cartel agency and included antitrust provisions. However, the weak implementation of the provisions, led to the unpopularity of the treaty. In 1957, the Treaty of Rome created the EEC. The three most significant influences on this treaty were: the German network that demanded a strong competition regime, the importance of the strengths and weaknesses of the ECSC treaty and the influence of the US Antitrust model.⁴

¹http://www.civitas.org.uk/eufacts/FSTREAT/TR1.htm (Visited on 5th July 2012)
⁴Venturini, G Monopolies and restrictive trade practices in France, Leyden, (1971), Sijthoff. Pg.57
The Treaty establishing the EEC affirmed in its preamble that signatory States were "determined to lay the foundations of an ever closer union among the peoples of Europe". In this way, the member states specifically affirmed the political objective of a progressive political integration.

In fact, the brand new institution could also be called a customs union. As a consequence, the EEC was colloquially known as "Common Market". The member countries agreed to dismantle all tariff barriers over a 12-year transitional period. In view of the economic success that free commercial exchanges brought about, the transitory term was shortened and in July 1968 all tariffs among the EEC States were abrogated. At the same time, a common tariff was established for all products coming from third countries.

The Treaty of Rome also established the prohibition of monopolies, some transport common policies, and the grant of some commercial privileges to the colonial territories of the member States. The Treaty of Rome thus, signified the triumph of a very realistic and gradualist approach to building the EU.

The original central pillars of the competition law of the European Community (EC) were Articles 85 and 86 of the Treaty of Rome, which have been applied in many different situations and to a great variety of agreements and practices.

To sum up, a process put in motion in which progressive economic integration was paving the way to the long term objective, the political union.

1.2 AMENDMENTS BROUGHT ABOUT SINCE TREATY OF ROME

The Treaty of Rome, the original full name of which was the Treaty establishing the European Economic Community has been amended by successive treaties significantly changing its content.

The Merger Treaty (or Brussels Treaty) was a European treaty which combined the executive bodies of the ECSC, European Atomic Energy Community (Euratom) and EEC into a single institutional structure.

The Single European Act (SEA) was the first major revision of the 1957 Treaty of Rome. The Act set the European Community an objective of establishing a Single Market by 31st December 1992, and codified European Political Cooperation, the forerunner of the European Union's Common Foreign and Security Policy.

The 1993 Treaty of Maastricht established the EU with the EEC becoming one of its three pillars, the EC. Hence, the treaty was renamed the TEC.

The Treaty of Nice was signed by European leaders on 26th February 2001 and came into force on 1st February 2003. It amended TheMaastricht Treaty and the Treaty of Rome. The Treaty of Nice reformed the institutional structure of the EU to withstand eastward

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5Articles 85 and 86 were renumbered as Articles 81 and 82 of the Treaty on the European Committee (TEC) respectively and later to Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) respectively.

expansion, a task which was originally intended to have been done by the Amsterdam Treaty, but failed to be addressed at the time.

When the Treaty of Lisbon came into force in 2009 the pillar system was abandoned, and hence the EC ceased to exist as a legal entity separate from the EU. This led to the treaty being amended and renamed as the Treaty on the Functioning of the European Union (TFEU).

1.3 ABSENCE OF MERGER LAWS IN TREATY OF ROME

The treaty of Rome by which the EEC was established did not contain any express merger control provisions. The Treaty of Rome’s principal competition law rules were contained in Article 85 and 86.\(^7\)

Article 85 concerns agreements or concerted practices between undertakings, such as price fixing or market sharing agreements which restrict competition and affect trade between the member states of the EEC. Such agreements are “prohibited” and “void” unless granted exemption by the Commission on the ground that the agreements offers benefits which outweigh its anti-competitive detriments.\(^9\)

Article 86 prohibited the abuse of a dominant position by one or undertakings. “Dominant” means having such a large market share that the undertaking can act without regard to its competitors or customers.\(^10\)

It is important to note that it was not illegal under Article 86 to hold a dominant position, but only the abuse of such a position by conduct such as excessive pricing, predatory pricing, refusal to supply, and discrimination between customers without objective justification.

Although, Article 85 and 86 were, by their literal terms, capable of being extended to certain type of mergers, but this was not their intended functions. Article 85 and 86 were merely meant to regulate the commercial activities of companies and not mergers which concern the structure of the companies involved.\(^11\)

The Commission recognised that merger control was not among EEC’s existing functions as published in the 1966 memorandum on the concentration of enterprises in the common market.\(^12\) In this memorandum, the Commission examined the extent to which mergers could be controlled by Articles 85 and 86. The Commission concluded that Article 85 was concerned only with cartel-type agreements between independent undertakings and not with agreements “whose purpose is the acquisition of total or partial ownership of undertakings.”\(^13\)

\(^8\)Ibid, Pg.3
\(^9\)Ibid, Pg.4
\(^10\)Michelin v. Commission, 1983 E. COMM. CT. J. REP. 3461, 3503 Para. 30 (case 322/81)
\(^12\)Ibid
\(^13\)Ibid at para 58
In addition, the Commission did acknowledge a certain scope for applying Article 86 to concentrations viz. when the effect of a concentration is the monopolization of market.

Initially the Commission recognised the omission of merger control regulations in the Treaty and in early 1970’s; the Commission regretted the lack of merger control authority and began to work on the Merger Control Regulation. The regulation was first proposed in 1973 but some member states refused to pass the new regulations and refused to examine the possibilities that it could have offered for control of mergers.

However, the Commission was provided an opportunity to apply the provisions of Article 85 and 86 in merger in the following cases which ultimately led to the adoption of the 1973 regulation.
CHAPTER 2
IMPORTANT CASE STUDIES

2.1 THE CONTINENTAL CAN\textsuperscript{14} CASE

FACTS:

Continental Can Company Inc. was a New York based company manufacturing metal packages, packaging materials of paper and plastic, and machines for manufacturing and using those packaging materials.\textsuperscript{15}

Through a succession of share purchases in 1969 it acquired 85.8 per cent of the share capital of Schmalback-Lubeca-Werke AG (SLW), a German company active in the same market. In the same year it entered into discussions with the Metal Box Company Ltd relating to the creation of a European holding company for packaging in which certain of its licensees would participate.\textsuperscript{16}

In February 1970, an agreement was signed between Continental Can and a Dutch Company Tomassen&DrijverVerblifa [TDV] under which the Europemballage Corporation was set up in Delaware, and this latter corporation made an offer for the shares of TDV.\textsuperscript{17}

In March 1970, the Commission contacted the undertakings drawing their attention to the possible illegality of the arrangement, and Metal Box withdrew from its planned participation. In April 1970, Europemballage carried out the purchase of shares in TDV, and on 9 April 1970, the Commission opened a procedure under Regulation 17/62.\textsuperscript{18}

On 9 December, the Commission made its decision, finding that a breach of Article 86\textsuperscript{19} had taken place. The Commission found that Continental Can, through SLW, occupied a dominant position ‘over a substantial part of the common market for light packaging for preserved meat, fish and crustacea and on the market in metal caps for glass jars’, and that it had abused this dominant position by the purchase of shares in TDV and hence an appeal was made.\textsuperscript{20}

\textsuperscript{14}\textsuperscript{14} Europemballage Corporation and Continental Can Co. Inc. v Commission case 6/72 [1973] CMLR 199
\textsuperscript{16} De Gruyter, Walter, Legal and Economic Analyses on Multinational Enterprises and EEC Merger Control, Volume 1, European University Institute, Pg.175
\textsuperscript{17}Ibid
\textsuperscript{18}Supra n.6, at Pg.385
\textsuperscript{19} Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
\textsuperscript{20}Furse, Mark., Competition Law of the EC and UK 6e, Chapter 14, Oxford Higher Education, Oxford University Press, 2008
FINDINGS:

Continental Can disputed the power of the Commission to apply EC competition law to the activities of a US-based corporation. The ECJ held that it had acted through its subsidiary, Europemballage, and that its conduct could be attributed to the parent company. Thus the Court held that the transaction was ‘to be attributed not only to Europemballage, but also first and foremost to Continental’.  

It was, the applicants said, contrary to the intentions of the authors of the Treaty to apply the principles set out in Article 86 of the treaty to the merger situations. None of the examples of conduct set out in the article included mergers, and there was nothing in the conduct undertaken by Continental Can which in any way flowed from its alleged dominant position. However, the Court pointed to the wording of Article 86 which made reference to ‘any abuse’, and the question for the Court was whether the word abuse ‘refers also to changes in the structure of an undertaking, which lead to competition being seriously disturbed in a substantial part of the Common Market’.

The list of practices set out in the article was, the Court held, merely illustrative, and was aimed broadly at practices that would be detrimental to consumers either directly, but also through their impact on the competition structure. In light of this analysis ‘the strengthening of the position of an undertaking may be an abuse . . . regardless of the means and procedure by which it is achieved.

In order to find that there was an abuse, however, it was necessary for it to be established that Continental Can held a dominant position in a relevant market. The decision made by the Commission referred to three separate markets, but did not set out in any substantial detail how those three markets differed from each other, and why they should be considered separately.

Similarly, ‘nothing is said about how these three markets differ from the general market for light metal containers, namely the market for metal containers for fruit and vegetables, condensed milk, olive oil, fruit juices and chemico-technical products’.

The Court found that the Commission appeared to be uncertain as to its approach to market definition throughout the decision, and had drawn distinctions between different conditions under which packagers could themselves supply the products, but had not set out any proper criteria for differentiating among them, or for evaluating the power of this supply-side substitution. The decision was annulled on the grounds that it did not sufficiently show the facts and the assessments on which it was based.

21 Supra n.16, Pg.175
22 Supra n.16, Pg.86
24 Supra n.6, at Pg.386
25 Supra n.16, Pg.175
CASE COMMENT: -

In Continental Can v Commission the ECJ had to consider whether a corporate acquisition (a merger) could constitute an abuse. The Court ruled that it was contrary to Article 86EC for a dominant undertaking to reduce or restrict competition by acquiring a significant competitor. The case is unusual in that it was decided under Article 86 EC, but at the time there were no merger control provisions in the Treaty of Rome or any European Merger Regulation.

Continental Can argued that structural measures to strengthen a dominant position by way of merger did not amount to an abuse under Article 86 EC. This was rejected by the Court, which held that Continental Can had abused its dominant position by eliminating competition in the relevant market by acquiring (through its Belgium subsidiary Europemballage) almost 80 per cent in a Netherlands metal can manufacturer – TDV. Contrary to the opinion of Advocate General Roemer, the Court decided that Article 86 EC could not only be used for practices where the concerned undertaking used its market power but also for practices where the undertaking strengthened its market power. The Court clarified that the word ‘abuse’ also refers to changes in the structure of an undertaking, which led to the disturbance of competition in the Common Market.

The Court ruled: ‘… abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one … it can … be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer’s freedom of action in the market such a case necessarily exists if practically all competition is eliminated.’

The case is important in that the ECJ concluded that Article 86 EC is not only ‘… aimed at practices which may cause damage to consumers directly, but also to practices that are detrimental to consumers through their impact on an effective competitive structure …. ’ This means that not only exploitative abuses but also exclusionary abuses are covered by the prohibition. This implies that the object of the provision is not only to protect consumers from exploitation by dominant undertakings, but also to protect the competitive process itself.

The ECJ was concerned about the damage to the competitive structure of the market, as the acquiring company had market power and concluded that Continental Can had abused its dominant position by acquiring a competitor. Some may argue, like the ECJ, that by protecting the structure of the market consumers are indirectly protected, but this is not the same as consumer welfare in economic terms. This is not to say that the ECJ was wrong in their decision, the Court may well have been right, but the case clearly shows that the ECJ did not interpret the protection of competition using economic efficiency principles.
2.2 THE PHILIP MORRIS \textsuperscript{26} CASE

FACTS:-

In 1987, Commission efforts received a dramatic and unexpected boost. In November 1987, the ECJ handed down a ruling on a long-simmering row in the tobacco sector between the Commission and Philip Morris.\textsuperscript{27}

As issue in the case was whether Philip Morris’ proposed acquisition of Rothmans Tobacco would result in a distortion of competition in violation of Article 85\textsuperscript{28}.

Two of Philip Morris’ chief rivals, RJ Reynolds and British American Tobacco (BAT), weighed in on the matter. RJ Reynolds and BAT claimed that to allow Philip Morris a controlling interest in Rothmans would, in effect, allow it to influence conditions in the European tobacco market. The resulting distortion of competition would clearly violate the enumerated prohibitions in Article 85(1)\textsuperscript{29} without contributing positively to either production/distribution or technological progress; thereby it would fail to qualify for exemption from prohibition under Article 85(3).\textsuperscript{30}

After consulting with the Commission about these concerns, Philip Morris offered to amend the deal. Satisfied with the changes, the Commission granted Philip Morris an exemption under Article 85(3).

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} Cases 142 and 156/84 \textit{BAT and R.J. Reynolds v. commission and Philip Morris} [1987] ECR 4487; [1988] 4 CMLR 24
\item \textsuperscript{27} Supra n.6, at Pg.388
\item \textsuperscript{28} 1. The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
\begin{itemize}
\item (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
\item (b) limit or control production, markets, technical development, or investment;
\item (c) share markets or sources of supply;
\item (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
\item (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
\end{itemize}
\item 2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
\item 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
\begin{itemize}
\item any agreement or category of agreements between undertakings,
\item any decision or category of decisions by associations of undertakings,
\item any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
\begin{itemize}
\item (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
\item (b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
\end{itemize}
\item Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
\item Doleys, T.J., \textit{The origins of EU Merger Control}, Kennesaw State University, Georgia, USA, Pg.21 (2006)
\end{itemize}
\end{itemize}
\end{footnotesize}
FINDINGS:-

However, as soon as the Commission decided to grant the exemption, RJ Reynolds and BAT lodged a complaint with the ECJ under Article 173 (now Article 230) to have the exemption overturned.

The firms pushed their claim that the acquisition would allow Philip Morris powerful leverage of Rothmans, notwithstanding emendations to the deal. They argued that Philip Morris might, among other things, use its privileged position to seek control of Rothmans in the future, thereby accomplishing by stealth what it could not secure overtly.

The Court, unconvinced by the argument presented by RJ Reynolds/BAT, ruled in favour of the Commission/Philip Morris.

However, in a ruling whose importance to the story of merger control is rivalled only by that issued in the Continental Can case, the Court argued that while acquisitions of equity interest did not constitute prima facie evidence of anticompetitive behaviour, such acquisitions might nonetheless serve as an instrument to that end. By stressing a test of “legal or de facto control” and reaffirming the Commission’s authority to evaluate transactions falling within the ambit of Article 85, the Court came extremely close to declaring that Article 85 could in fact be used to evaluate mergers and acquisitions.31

The upshot of the decision was that the Commission no longer was forced to prove “dominance” – as it had to in order to employ Article 86 prohibitions32 – it had only to show that a takeover might be carried out with the intention of reducing effective competition. In so arguing, the Court intimated for the first time that Article 85, long held by the Commission to be a legally questionable basis for merger control, might in fact be used for just that purpose.33

2.3 EFFECT OF THE ABOVE CASES:-

The combined effect of these two cases, with greater significance to the Philip Morris Case and albeit to a lesser extent, to Continental Can, lies in the pressure that was exerted on the member states to accept a formal Merger Control Regulation over the uncertain prospects for merger control under Article 85 and 86 and therefore it was to demonstrate that both the Articles 85 and 86 could be applied to mergers where the jurisdictional requirements of the Articles were satisfied.

32 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.
33 Supra n.6, at Pg.389
Thus, the uncertainty as to the Commission’s merger control powers created by *Philip Morris* and *Continental Can* was magnified by the Commission’s subsequent interventions. This provided the commission to re-launch its proposal for a merger control regulation.

The EC Commission then brought forward proposals to introduce an effective merger control regime, relying on Article 308 of the Treaty, under which the EC may give itself the power to perform tasks necessary to the attainment of the objectives of the EC, when the express power to do so is not otherwise given by the Treaty. The Commission’s 1986 proposal was amended and was again submitted in 1988 after the *Philip Morris* judgment.34 At that time the Commission declared its ambition of having the Regulation adopted by the end of 198835 but the discussions and alterations continued until 1989 where the regulation was adopted.36 This regulation came in force on 20th September 1990, and set shape for the EC merger regime which remains in place following subsequent amendments, and the enactment of Regulation 139/2004, which replaced the earlier regulation.

34Draft Merger Control (Antitrust) Regulation, 31 O.J. EUR. COMM. (No. 3 130) 4, [1988 Antitrust Supp.] 4 COMM. MKT. L.R. Pg.472,475
CHAPTER 3
EC MERGER REGULATION (ECMR) 1989

The EC Merger Regulation ("the ECMR") was adopted by the Council of Ministers in 1989 after intense debates concerning the need of a European merger control system.\(^{37}\) When the ECMR came into force on the 21\(^{st}\) September 1990, it consequently prescribed that a concentration which has a community dimension and "creates or strengthens a dominant position as a result of which competition would be significantly impeded in the Common Market or a substantial part of it" was caught by the ECMR. It was fairly predictable that a Market Dominance test ("the MD Test") would be established in EC competition law, since the legal terminology was familiar and the notion of "dominance" was already established by the ECJ in its application of Article 82 EC Treaty.

The concept of dominance was, however, not defined under the ECMR and consequently was to be dealt with by the Commission in its decisions. Till 2002, the Commission had taken decisions in over 2000 merger cases.\(^ {38}\) Over the years, it came to adopt a dynamic approach in its application of the notion of dominance under the ECMR. The MD test evolved and the Commission found the test to be sufficiently flexible to apply to new situations, such as the concept of oligopolistic markets.

The ECMR\(^ {39}\) covers transactions where there is a change of control which causes a lasting structural change. Such transactions may, depending on the activities of the businesses involved, cause a concentration of market power and it is for this reason that they are subject to merger control under the ECMR. In the case of mergers and acquisitions there is generally clear change of control causing a structural change to occur. A take-over, for example, involves a change of control from the original entities to the purchasing entities and hence an alteration of the structure of the industry.

3.1 PRINCIPLES OF EUMR

I. The exclusive competence of the Commission to review concentrations of Community Dimensions.  
II. The mandatory notification of such concentrations.  
III. The consistent application of market-oriented, competition based criteria and  
IV. The provision of legal certainty through timely decision making.

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\(^{37}\) Council Regulation 4064/89 on the control of concentrations between undertakings [1990] O.J. L257/13  
\(^{39}\) ECMR was changed to EUMR when the EC ceased to exist and the EU was born at the Treaty of Lisbon in 2009.
3.2 1996 GREEN PAPER AND COUNCIL REGULATION (EC) 1997\textsuperscript{40}

In 1996 the Commission issued its first green paper reviewing the EUMR. The Paper looked at several areas of Merger Control which might be in need of a change or reform. In particular, it noted that a number of mergers that significantly affected trade in the Member States escaped the ambit of the rules and it proposed improvements to the treatment of joint ventures.

In response to the Green Paper, Council Regulation 1310/97, which came in force in 1998, introduced some amendments to the EUMR. An additional jurisdictional threshold was introduced into the regulation with the objective of reaching mergers which would otherwise have to be notified to three or more national competition authorities. Any of the other Green Paper proposals were also introduced: for example, changes were introduced to the rules dealing with joint ventures and to the rules setting out when concentrations involving credit and other financial institutions have a Community Dimension.

3.3 2001 GREEN PAPER\textsuperscript{41}

In 2000 the Commission had to report to the Council on the operation of the jurisdictional thresholds. The report concluded that, despite the change to the jurisdictional thresholds, an important number of transactions with significant cross-border effects remained outside the Community merger rules. It considered, however, that a more in-depth analysis of the appropriate mechanisms for establishing jurisdiction was required and that other issues should be considered at the same time. It thus embarked on a comprehensive review of the Regulation and in 2001 the Commission issued a Green paper which mooted a wide range changes to the jurisdictional, substantive and procedural matters set out in the EUMR.

\textsuperscript{40} Jones, Alison., *EC Competition Law*, 4\textsuperscript{th} Edition, Oxford University Press, 2011 at Pg.864

\textsuperscript{41} Ibid
CHAPTER 4
CURRENT MERGER CONTROL REGULATION\textsuperscript{42}\textsuperscript{43}

After intensive negotiations and discussions, the EUMR agreed for a new regulation and this was adopted in 2004. The 2004 regulation incorporates elements of 1989 regulation with amendments brought about in 1997 and 2004. The regulation is supplemented by an implementing regulation and a number of Commission Notices which provide guidance as to the interpretation of various provisions of the EUMR. The following notices were of importance:

i. Commission Consolidated Jurisdictional Notice\textsuperscript{44} on the concept of concentration, undertakings concerned the calculation of turnover, and on the concept of full function of Joint Ventures.

ii. Notice on simplified procedure for the treatment of certain concentrations.\textsuperscript{45}

iii. Notice on remedies.\textsuperscript{46}

iv. Notice on restrictions directly related and necessary to concentrations.\textsuperscript{47}

v. Notices on the appraisal of both horizontal and non-horizontal mergers.\textsuperscript{48}

vi. Notice on case allocation under the referral rules of the Merger Regulation.\textsuperscript{49}

vii. Notice on access to file.\textsuperscript{50}

\textsuperscript{42} Council Regulation (EC) 139/2004
\textsuperscript{43} Supra n.40 at Pg.865
\textsuperscript{44} [2008] OJ C95/1
\textsuperscript{45} [2005] OJ C56/32
\textsuperscript{46} [2008] OJ C267/1
\textsuperscript{47} [2005] OJ C56/24
\textsuperscript{48} [2004] OJ C31/5 and [2008] OJ C265/6
\textsuperscript{49} [2005] C56/2
\textsuperscript{50} [2005] OJ/C 325/7
CHAPTER 5

EUMR THRESHOLDS

In addition to a change of control certain turnover thresholds must also be exceeded for the EUMR to apply. The purpose of this rule is to ensure that the Commission is only required to assess larger transactions which may have an impact within the EU. This rule therefore provides a cut-off point and ensures that the Commission’s resources are directed towards transactions that are more likely to create substantive competition issues. It is important to note, however, that transactions which do not meet these thresholds may be subject to national merger control in a number of Member States.

There are two alternative sets of thresholds and if a transaction satisfies either set then it is subject to the EUMR.

I. The EUMR will apply to a merger, acquisition, or joint venture if:

1. The combined aggregate world-wide turnover of all the parties (in all cases the figures include turnover of the whole of their groups and also the turnover of any controlling shareholders in the parties) exceeds € 5 billion; and
2. At least two parties to the transaction each have an EU-wide turnover in excess of € 250 million.

II. Alternatively, the EUMR will apply to an acquisition, merger or joint venture where:

1. The combined aggregate world-wide turnover of all the parties is more than € 2.5 billion; and
2. In each of at least three Member States, the combined aggregate turnover of all the parties is more than € 100 million; and
3. In each of the three Member States in (2) the aggregate turnover of each of at least two parties is more than € 25 million; and
4. The aggregate EU-wide turnover of each of at least two parties is more than € 100 million

Even if either or both the tests set out above are met the EUMR will not apply to a transaction if all of the parties involved achieve more than two-thirds of their aggregate EU-wide turnover in one and the same EU State. The purpose of this rule is to filter out transactions which are more likely to have important national implications and therefore should be dealt with by the Member State in question. (Refer to the following flow chart for the procedure of the EUMR Thresholds)

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51 Supra n.6 at Pg.392,393
52 Dilly, James., EC Merger Control, Martineau Lawyers UK
53 EU Competition Law Rules Applicable to Merger Control, European Competition Commission, Competition Handbooks, Brussels 2010
5.1 EU MERGER REGULATION THRESHOLDS – FLOWCHART\textsuperscript{54}

Original Test

Is the combined worldwide turnover of all undertakings concerned more than €5 billion?  
\begin{align*}
\text{YES} & \quad \Downarrow \\
\text{Is the EU turnover of each of at least two undertakings concerned more than €250 million?} & \quad \Downarrow \\
\text{YES} & \quad \Downarrow \\
\text{Does each of the undertakings concerned achieve more than two-thirds of its EU turnover within one and the same Member State?} & \quad \Downarrow \\
\text{NO} & \quad \Downarrow \\
\text{EU Merger Regulation applies} & \\
\end{align*}

Alternative Test

Is the combined worldwide turnover of all the undertakings concerned more than €2.5 billion?  
\begin{align*}
\text{YES} & \quad \Downarrow \\
\text{Is the turnover of each of at least two undertakings concerned more than €100 million?} & \quad \Downarrow \\
\text{YES} & \quad \Downarrow \\
\text{In each of at least three Member States is the combined national turnover of all undertakings concerned more than €100 million?} & \quad \Downarrow \\
\text{YES} & \quad \Downarrow \\
\text{In each of at least three of these Member States is the turnover of each of at least two undertakings more than €25 million?} & \quad \Downarrow \\
\text{YES} & \quad \Downarrow \\
\text{EU Merger Regulation does not apply} & \\
\end{align*}

\textsuperscript{54}The EU Merger Regulation, An overview of the European Merger control rules, Slaughter & May, March 2012

23
CHAPTER 6
CONCENTRATIONS

To understand ‘Concentrations’\(^{55}\) under EUMR it is essential to understand the meaning of ‘Control’, which is an essential element of any scheme of merger or acquisition. According to Article 3(1) the term ‘concentration’ covers the case where two separate undertakings merge into a single body, and also the more common situation where one person or undertaking acquires ‘direct or indirect control’ of the whole or part of another.\(^{56}\)

‘Control’ is defined in Article 3(2) as ‘rights, contracts or any other means which either separately or in combination … confer the possibility of exercising decisive influence on an undertaking’ whether this occurs through share ownership, voting or management agreements, or through any other form of rights operating on the undertaking.

It is also important to consider the extent to which the acquiring company has rights which affect the commercial strategy and detailed financial management of the company acquired, as opposed to those rights which relate simply to proprietary protection of its investment. It could include an acquisition either of 100\% of the shares of a target company or a lesser percentage sufficient in practice to enable such ‘decisive influence’ to be exercised and also cover cross-shareholdings, cross-directorships and a variety of other means exercising control.\(^{57}\)

6.1 FACTORS OF ASSESSMENT OF CONCENTRATIONS

6.1.1 COLLECTIVE DOMINANCE OR CO-ORDINATED EFFECTS

Collective dominance (sometimes also referred to as “coordinated effects”) implies a situation in an oligopolistic market where a small amount of firms each have high market shares, without being individually dominant. After a merger, the firms are able to compete less strongly with each other in the market. This is the result of an altered market structure with fewer firms in the market and the merged entity having a larger combined market share. The market’s new structure enables two or more firms to achieve and maintain a “tacit understanding” not to compete effectively and thus increase prices.\(^{58}\)

The firms in a collectively dominant market are interdependent and constantly try to match each other’s marketing strategy to maximise profits.\(^{59}\) Since they assume a less aggressive form of competitive behaviour the competition in the market is at a minimum.

\(^{55}\) Concentrations: Mergers, acquisitions of control or, creation of joint ventures that “perform on a lasting basis all the functions of an autonomous economic entity.”

\(^{56}\) Supra n.6, at Pg.398

\(^{57}\) Ibid


A merger could result in a market structure which facilitates for firms to create or strengthen a collective dominant position in an oligopolistic market. Furthermore; collective dominance can appear in diverse forms. The firms can, for instance, coordinate their price behaviour, limit their production or output, or divide the market (for example geographically) between themselves.

According to the Commission’s Horizontal Merger Guidelines, there are four necessary conditions to establish a finding of collective dominance:

a. The possibility of reaching a common understanding;

b. The ability of firms to monitor each other to ensure that the terms of coordination are adhered to;

c. The existence of a credible deterrence mechanism which can be activated if firms deviate;

d. The fact that externals cannot undermine the coordination.

6.1.2 CASE STUDIES:

A. Gencor/Lonrho Case 60

FACTS:-

Gencor Ltd is a company incorporated under South African law which operates in the mineral resources and metals industries. It holds 46.5% of Implats, the rest of whose capital is spread amongst third parties. Implats is a South African company bringing together Gencor's activities in the platinum group metals (PGM) sector.

Lonrho plc. is a company incorporated under English law which operates in various sectors, in particular in mining and metals. It holds 73% of Eastplats and Westplats (LPD), companies incorporated under South African law which bring together Lonrho's activities in the PGM sector. Gencor has a 27% stake in LPD.

Gencor and Lonrho proposed to acquire joint control of Implats and then to grant Implats sole control of LPD. 61

FINDINGS AND DECISION:

Following that transaction, Implats would have held sole control of LPD, eliminating competition between those two undertakings, so far as concerns not only PGM mining and production in South Africa but also the marketing of PGMs in the Community where Implats and LPD achieved significant sales. Thus, the market would no longer have been supplied by three South African PGM suppliers, but by two (Implats/LPD and Amplats, the leading supplier worldwide).

61 Supra n.6, at Pg.422,423
The South African Competition Board did not oppose the concentration in the light of South African competition law. Gencor and Lonrho notified the series of agreements relating to the concentration to the European Commission, as required by Community law.

By decision of 24 April 1996, the European Commission declared that the concentration was incompatible with the common market on the ground that it would have led to a collective dominant position on the part of the entity arising from the concentration and Amplats in the world platinum and rhodium market.

Gencor brought an action before the Court of First Instance for the annulment of that decision by the Commission. Gencor contended in particular that Regulation No 4064/89 was concerned only with mergers carried out within the Community. The Commission could not apply it to a transaction which related to economic activities carried on in a non-member country and had been approved by the appropriate authorities of that country (in this case South Africa). Therefore, Gencor argued, the regulation was inapplicable to the concentration, given that the main field of activity of the undertakings carrying out the transaction (here the mining and refining of PGMs) was in South Africa. It added that the principle of territoriality of laws, a fundamental principle of public international law, applied to the Community. 62

The Court examined first of all whether the Community mergers regulation applied in this case and then whether its application to a concentration of this kind was contrary to public international law.

The Court pointed out that the regulation applies to all concentrations with a Community dimension. Under the regulation, a concentration has a Community dimension if a number of conditions relating to the volume of turnover, in particular in the Community, are met. The regulation does not require, on the other hand, that in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out on Community territory. The Community legislation ascribes importance to the criterion of sale within the common market rather than to that of production. Gencor and Lonrho carry out sales in the Community to a value of more than ECU 250 million, the threshold set by the regulation in order for it to apply.

The Court also referred to the regulation's objective of ensuring that competition is not distorted in the common market. Concentrations which, while relating to mining and/or production activities outside the Community, create or strengthen a dominant position, thereby significantly impeding effective competition in the common market, thus fall within the scope of the regulation.

The Court then found that it was compatible with public international law to apply the regulation, in view of the foreseeable, immediate and substantial effect of the concentration in the Community. The Court concluded that the Commission's decision was not inconsistent with either the Community mergers regulation or rules of public international law.

The Court stated, finally, that the Community legislation also applied to collective dominant positions and not only to individual dominant positions. There is a collective dominant

position where the dominant position is held by the undertaking which results from the concentration (in this case Implats/LPD) and one or more undertakings not involved in the concentration (in this case Ampltas).

The Court reached this conclusion by relying on the objective of the regulation: to ensure that the process of reorganising undertakings does not inflict damage on competition. If it were accepted that only concentrations creating a dominant position for the parties to the concentration were covered by the regulation, the regulation would lose its effectiveness.

The Court therefore dismissed the action brought by Gencor and confirmed the Commission’s decision.63

**B. Kali und Salz Case**

**FACTS:**

France and two French companies, SCPA and EMC, challenged the Commission's decision of 14 December 1993, in which it declared the concentration between Kali und Salz AG, Mitteldeutsche Kali AG and the Treuhandanstalt compatible with the common market, The Court of Justice annulled that decision.

On 14 July 1993 the Commission, pursuant to Regulation (EEC) No 4069/89 on the control of concentrations between undertakings, was notified of a proposed concentration between Kali und Salz AG ("K+S"), a subsidiary of the BASF chemicals group, and Mitteldeutsche Kali AG ("MdK"), whose sole shareholder is the Treuhandanstalt ("Treuhand"), a public-law institution entrusted with the task of restructuring the undertakings of the former German Democratic Republic. K+S essentially operate in the potash, rock salt and waste disposal sectors. MdK combines all the activities of the former German Democratic Republic in the potash and rock salt sectors. The concentration plan was for MdK to be converted into a private limited company (MdK GmbH), to which K+S would contribute its potash and rocksalt activities and TheTreuhand would contribute DM 1 044 million. K+S would have 51% and Treuhand 49% of the shares and voting rights in the joint venture so created. In the Commission’s opinion, the concentration could create a collective dominant position on the Community market apart from Germany and Spain.65

**FINDINGS AND DECISION:**

The companies involved in the proposed concentration then offered to enter into certain commitments, in order to dispel concern that the concentration would create an oligopolistic dominant position on that market. Accordingly, by Decision 94/449/EC of 14 December 1993 relating to a proceeding pursuant to Regulation No 4064/89 (Case No IV/M.308 - Kali + Salz/MdK/Treuhand), the Commission declared the proposed concentration compatible with the common market, subject to compliance with the following commitments: K+S and MdK would withdraw from the Kali-Export GmbH export cartel in which K+S and SCPA worked

64 Case No IV/M. 308 Kali und Salz, OJ [1994] L 186/38
together; K+S and MdK would set up their own distribution network in the Community, in particular in France, and they would terminate the current cooperation with SCPA as distribution partner on the French market. Those conditions were intended above all to loosen existing links between K+S and SCPA, a subsidiary of the French group EMC.66

The relevant product market concerned potash-salt-based products for agricultural use, which included both potash sold for direct application in agriculture and potash sold for use in the manufacture of compound fertilisers. As to the geographical market of the product in question, the Commission identified two distinct markets:

- With respect to the German market, the Commission found in the contested decision that the planned concentration would lead to a de facto monopoly, since the market shares of K+S and MdK were 79% and 19% respectively, and concluded that the effect of the proposed concentration would be to strengthen the dominant position of K+S on the German potash market. However, in the Commission's opinion, the proposed concentration was not the cause of the strengthening of the dominant position of K+S on the German market - its dominant position would be strengthened even if the concentration did not proceed - because MdK would soon withdraw from the market if it was not acquired by another undertaking, its market share would then be absorbed by K+S, and it could be practically ruled out that an undertaking other than K+S would acquire all or a substantial part of MdK.

- With respect to the Community market apart from Germany, the Commission stated in its decision that, as a result of the proposed concentration, two entities would enjoy a dominant position: K+S/MdK and SCPA. The Commission's analysis was based, first, on its finding that supply outside the K+S/MdK and SCPA grouping was fragmented and came from operators who did not appear to be able to attack the total market share of about 60% held by the duopoly, and, second, on the strong probability that there would be no effective competition between K+S/MdK and SCPA, in part because of their long-standing close commercial links.67

By application lodged in February 1994, France asked the Court of Justice to annul the Commission's decision. The Court of First Instance, with which SCPA and EMC had lodged corresponding applications against the Commission, which is supported by Kali und Salz GmbH (formerly MdK) and Kali und SalzBeteiligungs-AG (formerly K+S), declined jurisdiction in order to enable the Court of Justice to rule on the application for annulment.68

The Court rejected the French Government's complaint that the Commission failed to comply with its obligation to cooperate with the national authorities and made an incorrect assessment of the effects of the concentration on the German market. That institution was also criticised for having made an incorrect assessment of the effects of the concentration on the Community market apart from Germany. On this point, the Court first held that collective dominant positions (oligopolies) do not fall outside the scope of the Community regulation on the control of concentrations between undertakings. It then considered the complaint that the Commission had misapplied the concept of a collective dominant position by concluding that a collective dominant position between K+S/MdK and SCPA would be created which was likely to impede significantly competition in the Community market apart from Germany. The Court found that the cluster of structural links between K+S and SCPA,

66 Supra n.40 at Pg.1051
68 http://ec.europa.eu/competition/mergers/cases/index/by_year_1993.html (Visited on 9th July 2012)
which, as the Commission itself conceded, constituted the core of the contested decision, was not in the end as tight or as conclusive as that institution sought to make out, and also that it had not been shown that there was no effective competitive counterweight to the grouping allegedly formed by K+S/MdK and SCPA. The Court accordingly held that it was apparent that the Commission had not established that the concentration would give rise to a collective dominant position on the part of K+S/MdK and SCPA liable to impede significantly effective competition in the relevant market. It therefore annulled the Commission's decision in its entirety.69

C. Airtours/First Choice Case70

FACTS:

The Commission decided to directly prohibit the planned Airtours/First Choice merger. The case concerned a hostile acquisition in the market for holiday packages in the UK. The Commission held in its decision that the acquisition of First Choice by its competitor Airtours would create a collective dominant position post-merger on behalf of three companies (Airtours/First Choice; 31 %, Thomson Travel Group; 27 %, Thomas Cook; 20%).

The decision was appealed to the Court of First Instance (CFI). On appeal, the CFI concluded that the Commission failed to establish the existence of a collective dominant position and annulled the Commission’s decision. In paragraph 62 of its judgment, the CFI laid down three conditions which have to be fulfilled in order to establish a finding of collective dominance:

a. Market transparency; the market has to be sufficiently transparent for the firms to be able to monitor each other’s behaviour and thus tacitly create a common policy.

b. Sustainability and the existence of a retaliatory mechanism; the common policy must be sustainable over time. This is achieved through ensuring the punishment of deviating firms.

c. The absence of competitive constraint; externals, such as current and future competitors and consumers, should not be able to jeopardize the existence of the common policy.

Furthermore, the CFI criticised the Commission severely for the lack of sufficient evidence to prove a collective dominant position and hence established a high burden of prove. The ruling of the CFI in the Airtours/First Choice case also boosted the debate on so called non-collusive oligopolies, which, according to the wording of the CFI's judgment, would not be caught by the EUMR.

69 Supra n.6, at Pg.422
70 Case IV/M.1524, Commission decision of 22nd September 1999 (2000 O.J. L93/1)
**D. IMPALA v. Commission Case**\(^{71}\) and Bertelsmann AG and Sony Corporation of America v. IMPALA Case\(^{72}\)

**Facts:**

A concentration was notified to the Commission on 9\(^{th}\) January 2004 to be effected between Bertelsmann AG and Sony Corporation of America. It would involve a merger of the respective parties global recorded music businesses (artists affected included Bob Dylan, Pink, the Foo Fighters, and Kasabian, among many others). On 12\(^{th}\) February 2004 the Commission made a decision under Article 6(1)(c) EUMR, and on 24\(^{th}\) May 2004 the Commission sent a statement of objection (SO) to the parties, indicating that it believed the concentration to be incompatible with the internal market in that it would strengthen a collective dominant position in the recorded music market, and in the wholesale market for licences for online music. However, the parties submitted substantial further economic evidence to the Commission which on 19 July 2004 made it its Article 8(2) clearance decision, although the case was one of only 22 per cent cleared without any commitments being made. The applicants—who were not parties to the merger—lodged an appeal, and the GC agreed to the use of the fast track procedure. The applicants relied on five grounds, all of which went to the substance of the decision, in that they argued that the Commission had erred in finding that the concentration, as amended by the parties, would not create or strengthen either individual or coordinated dominant positions.

**Findings:**

The GC accepted that, under art. 263 TFEU, Impala had standing to bring a challenge to the decision taken by the Commission. The leading case in relation to collective dominance (coordinated effects) was Airtours, and the GC substantially followed the approach set out therein. It argued that although the conditions set out in Airtours were necessary they could be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations, and phenomena inherent in the presence of a collective dominant position. In the present case prices had been aligned over the previous six years, even though the products were differentiated (as each CD album is different), and prices were held at a stable level even though demand had fallen. The GC held that in the absence of evidence to the contrary this would indicate the existence of a collective dominant position when combined with an oligopolistic market and stable market shares. It was unusual for the Commission to have taken one position in its SO and then to make a volte-face in its clearance of the merger. Although the GC stressed that the Commission was not obliged to explain its decision by comparison with the SO, it did state that the fundamental U-turn in the Commission's position may indeed appear surprising, particularly in view of the late stage at which it was made. The relevant question, however, was not of the extent to which the final decision differed from the SO, but that of whether the final decision was sufficiently reasoned. The GC found that the part of the decision dealing with transparency in the market (a requirement for a finding of collective dominance) was 'insufficient', and that there was inconsistency between the arguments relied on in court and those advanced in the decision itself. The GC further pointed to numerous sources of transparency on the market, although the Commission had not found that the market was sufficiently transparent to permit a collective dominant position to exist. In this respect, the evidence, as mentioned in the decision, does not support the conclusions drawn from it. The GC annulled the Decision.

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\(^{71}\)T-464/04 [2006] 5CMLR 19-GC
\(^{72}\)C-413/06 [2008] ECR I-0000-CJI
It was not until 3 October 2007, some three years and ten months after the merger was first notified to the Commission that final clearance was given in a second decision (see IP/07/1437). This second decision was also challenged by Impala before the GC (it is worth noting that in 2008 the Commission adopted a third decision approving Sony Corporation of America's acquisition of Bertelsmann's 50 per cent holding in the capital of Sony BMG, which has not been challenged).

In 2008, the GC set aside the ruling of the GC annulling the first decision. The principal argument the GC relied on was that there was deficient reasoning. However, in analysing the approach of the GC, the Court of Justice found that it had in fact erred in law. The GC had also pointed to the concerns raised in relation to collective dominance that were contained in the Statement of Objections (SO) and criticized the Commission for a lack of reasoning in abandoning these concerns. The Court of Justice found that complex assessments were involved and as such, the conclusions in the SO, the Court reasoned, must be considered provisional only. It is 'inherent in the nature of the SO that it is provisional and subject to amendments to be made by the Commission in its further assessment on the basis of the observations submitted to it by the parties and subsequent findings of fact'.

The position that the application of the three-step Airtours test could be relaxed in the event that there is indirect evidence of oligopolistic conduct—for instance, when parallel prices occur—was not contested; however, the Court disagreed with the GC's assessment of the Commission's conclusions. It estimated that the GC had applied an unduly 'mechanical' approach and had misinterpreted the principles concerning market transparency. Importantly, the Court of Justice found that the GC had relied on Impala's unsubstantiated allegations and documents which were classified as confidential. Thus the GC committed an error of law in relying as a basis for annulling the decision on these documents which the Commission could not have employed as a basis for reaching its own decision.

The case was referred back to the GC for reconsideration. On 30 June 2009 the GC declared Impala's appeal 'devoid of purpose', since Impala would have to challenge the third Commission decision in order to undo the merger, and the GC would have to adjudicate on the two previous challenges before coming to a decision on the third. Given the length of such a process, even if Impala was to succeed it would be very difficult to dismantle the merger by the time the GC had adjudicated, and therefore a judgment on the challenged merger no longer has any practical interest. As a consequence, the GC considered that there was no need to adjudicate on the matter.

Case Comment:-

When the GC annulled the Commission decision, concerns were raised about the risk that clearance decisions could be overturned on appeal, as it could go some way to undermining a system based on compulsory pre-merger notification and review. The fact that a merger could be legal at the time of its consummation, based on a full review by the Commission, and then subsequently be deemed to be illegal on the grounds that its review was defective raised, to say the least, problems.\(^\text{72}\) In the light of Schneider Electric SA v Commission case T-351/03, judgment of 11 July 2007 it was feared that the Commission may be required to pay damages to parties whose mergers have been incorrectly blocked. More worrying were

\(^{72}\)Buck, T., 'Watchdog Reels at Sony/BMG Ruling', Financial Times, 13 July 2006
the problems that could arise were a consummated merger to be unravelled following a failure of the Commission to block a merger that has been cleared in error.

Although the ruling of the Court of Justice does not answer the questions above, it appears to have restored commercial certainty. Furthermore, the Court did make some important clarifications. It shed light on the legal nature of the SO, which is to be considered provisional and non-binding. This, it argued, is the only interpretation that ensures an equal standard of proof for the evidence presented by the parties after the SO has been drafted. Despite annulling the judgment of the GC, the Court of Justice did not accept the argument put forward by the parties that a notified concentration ought to be presumed to be compatible with the internal market. In addition, it is clear that mechanical application of tests to determine the likelihood of tacit collusion is unacceptable; the authority applying these needs to take into consideration the specific circumstances of the particular case. Following this decision, it is to be hoped that in future arguments as to the existence or otherwise of a collective dominant position can be avoided by reference instead to the SIEC part of the test of Article 2 EUMR, rather than by shoehorning such cases into a dominance analysis.  

6.1.3 RELEVANT GEOGRAPHIC MARKET

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

The objective of defining the Relevant Geographic Market is to determine the area in which undertakings will genuinely be competitors of the concentration. Obviously the geographic scope of the market can also have a critical impact on the outcome of the case. In the assessment of the relevant product market, both demand and supply side substitution will be relevant in assessing the area comprising the geographic market. The commission has relied in its merger decisions on evidence such as current geographical pattern of purchases, price differences between areas, past evidence of diversion of orders to other areas, basic demand characteristics, views of customers and competitors, trade flow patterns and barriers.

6.1.4 CASE STUDIES:

A. Volvo/Scania Case

In 1999 Volvo underwent fundamental structural changes through the sale of its private car production side to Ford Motor Co. Volvo then acquired a large shareholding in Scania AB, Volvo’s largest Swedish competitor within the field of trucks and buses. On August 6, 1999

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74 Colino, Sandra Marco., : Competition Law of the EU and UK 7e
75 Commission Notice on the definition of the relevant market for the purposes of Community Competition Law [1997] OJ C372/5 para.8
76 Supra n.40 at Pg.1016
77 Case IV/M.1672, [2001] OJ L 143/74
AB Volvo reached an agreement with Investor AB, the then main holder of the shares in Scania AB, to acquire voting control in Scania. Volvo also announced that the company would make a public tender offer to acquire the remaining minority.

In accordance with EC Merger Regulation, Volvo notified the Commission of the plans to acquire with Scania. Following the first stage investigation, which gave rise to serious concerns whether the merger was compatible with the rules and regulations of the Common Market, the Commission decided to proceed with phase two according to Article 6(1)(c) of the Merger Regulation, resulting in deeper and more thorough investigations into the proposed merger. During the following negotiations and proceedings, efforts were made by both parts to solve issues threatening to put an end to the merger. These efforts did not seem to move the deal any further, and the final decision to block the proposed merger was made on 14 March 2000.

The proposed merger received a lot of attention, both in and outside Sweden, partly due to its symbolic and precedent value, depending on the discussion how small markets such as Sweden would be able to develop large companies that would be able to compete internationally, within the European Market, as well as outside the Community. The merger between Volvo and Scania would have made the company the largest truck company in Europe. After the decision had been made, there was an extensive debate whether the decision had been correct.

The Commission concluded, however, that the relevant geographic market were still national in scope, in particular: the parties charged different prices and earned different profit margins in the different states; technical specifications varied and in some Member states regulatory barriers existed, purchasing tended to be done on a national basis and distribution and service networks acted as a severe barrier to entry to manufacturers who did not have a well-developed network. This conclusion seriously affected the outcome of the case since the parties had market shares of approximately 90% on the Swedish market and were the only significant competitors there.78

B. Alcatel/Telettra Case79

The merger involved the acquisition by Alcatel of a controlling interest in Telettra. Both companies were involved in the supply of telecommunications equipment in the Spanish Market. The acquisition resulted in an aggregate market share of 80% for both microwave and line transmissions. Moreover, the Spanish telecommunications operator, Telefonica, had a strong position in the Spanish market as a monopolist; it also had minority shareholding in both companies and a known policy at that time of purchasing only from local suppliers. Notwithstanding these factors, the merger was cleared, largely because of assurances received from Telefonica that not only would it cease to hold any share interest in any of the companies, but would abandon its previous preference for a local purchasing and would treat foreign suppliers equally. This was a decision taken in the knowledge that the Commission was itself in the process of seeking to liberalize the telecommunication equipment market through the Community. Had this general policy trend not been in evidence, the merger might

78 Hemmingsson, Elisabeth., The Volvo/Scania Merger: An analysis of the EC Merger Process, Gothenburg School of Economics and Commercial Law, 2002
well have been prohibited. It was only against the background of these changing conditions that the Commission regarded the high market shares of the two parties as no longer representing market dominance, because they would be counterbalanced by the power of a monopolistic purchaser willing to acquire its supplies from both local and foreign sources.\(^{80}\)

Hence the Commission permitted Alcatel to acquire a controlling interest in Telettra even though the concentration would lead to acquisition of an aggregate 80% of the Spanish market. The commission took into account the fact that it was, at that time, taking steps to liberalize the telecommunications equipment market through the Community. This meant that in due course the Spanish monopsonistic purchaser, Telefonica would be able to purchase products from both local and foreign sources.\(^{81}\)

### 6.1.5 RELEVANT PRODUCT MARKET

Relevant product market comprises of all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products characteristics, their prices and their intended use.\(^{82}\) While making an assessment, the Commission places emphasis on demand side substitution. This entails a determination of the range of products which are viewed as substitutes by the consumers. In addition, supply side factors are relevant where suppliers can switch production to the relevant products in the short term without incurring significant additional costs or risks. The Commission relies on a range of evidence in support of a particular definition of market. Thus evidence of past behaviour, quantitative tests, the views of the customers and competitors, consumer preference, physical characteristics, price and switching costs, etc. may be relevant.\(^{83}\)

In many case the parties to a merger may prefer a broad market in which their market shares are lower. It will be much harder for the parties to persuade the Commission to clear a merger affecting narrowly defined market in which they have, say a 70% share in the market than in a broadly defined one in which they have, for example 30% share. On some occasion, however, a narrower product market definition may work to the parties’ advantage; since this could result in a finding that there is no or less significant horizontal overlap in the products they produce.\(^{84}\)

### 6.1.6 CASE STUDY:

#### A. Nestle/Perrier Case\(^ {85}\)

Nestle and Perrier between themselves were dominant in bottle source water in France and owned a number of leading brands. Their total market share was some 60% and their main

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\(^{80}\) *Supra* n.6, at Pg.415  
\(^{81}\) *Supra* n.40 at Pg.1018  
\(^{82}\) Commission’s Notice on the definition of the relevant market for the purposes of the Community competition law [1997] OJ C372/5, Para. 7  
\(^{83}\) *Supra* n.40 at Pg.1012  
\(^{84}\) Ibid  
competitor was BSN with some 22% and remainder by other small companies. There were no legislative barriers to entry to the French market if foreign manufacturers wished to enter, but it appeared that such attempts had always been unsuccessful.

A relevant factor was that the great majority of sales were made to large supermarkets or hypermarkets, which were aware of their loyalty of the customers to the well-known brands owned by the leading French companies. In their view it was unlikely that the long-standing preference for the local product from French springs.

In this case, the Commission also for the first time held that the test contained in Article 2 of the Regulation can be applied not only to the single firm dominance but also to the situation of “joint dominance”. In this case, the Commission authorized the takeover of French company Perrier by Nestlé, subject to imposed conditions. The Commission found, that the merger would create a situation of joint dominance in the mineral water market. The Commission based its decision inter alia on the following factors: Nestlé, Perrier and BSN held together around 85% share in the relevant market, the market was characterized by high degree of transparency, ability to monitor competitors’ behaviour, entry barriers and inelastic demand. In addition, Commission took account that the commitment of Nestlé to sell part of Perrier to BSN would increase the symmetry in the market.

Based on these factors, the Commission held that the merger would lead to joined dominance and allowed the merger only subject to condition that Nestlé would sell part of its mineral water brands. The factors analysed by the Commission and the decision taken in this case demonstrate that the Commission took into account the findings of the theory of coordinated effects. Thus, the case Nestle/Perrier was the first case where the Commission applied the notion of joint dominance. Needless to say, this was regarded as an innovative approach, since it is not obvious from the wording of the Art. 2(3), that it could be applied to collective dominance.

However, such approach is in line with economic analysis, since it takes into account anticompetitive coordinated effects of mergers.86

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86 Ostrovskis, Valerijus., The New European Regulation of Horizontal Mergers: Did it Have Any Practical Effect?, European Master in Law and Economics Programme, University of Rotterdam and University of Bologna, 2007
CHAPTER 7
PROHIBITION OF MERGERS

7.1 APPLICATION OF ‘SIEC’TEST

The substantive test under the original merger regulation turned on as to whether the merger could create or strengthen ‘dominance’. The new test is whether the merger will ‘significantly impede effective competition’ (SIEC). The most conspicuous change in the new EUMR is the language of Article 2, Sec. 3, which changes the substantive test for merger prohibition. The old EUMR applied the ‘dominance test’; the new EUMR changed this to the SIEC test. The Recital 25 to the new Merger Regulation explains, the introduction of the new test is to permit the commission to prohibit mergers in oligopolistic markets which do not create or strengthen dominance but nevertheless have non-coordinated effects that restrict competition. The practical effect of the test is to expand is to expand the scope of Merger regulation.

This “more-effects-based approach” had two main objectives. First, it aimed at providing merging firms with enhanced guidance so as to better anticipate and gauge the competitive issues raised by a contemplated transaction. Secondly, it was intended to enable the Commission to assess individual transactions based on their likely impact on consumer welfare, without an overly strong reliance on structural parameters.

The main features of the SIEC Test are as follows:-

- It is an effect based competition test which focuses on the issues essential to an analysis of the impact concentrations have on competition.
- It extends in a disciplined way beyond dominance while closing any perceived gap and covering all possible anti-competitive merger scenarios resulting higher prices, reduced output, less choice or innovation etc.
- It preserves continuity by ensuring the continued relevance of the case law and practice under the dominance test.
- It avoids any unnecessary confusion between merger analysis and the analysis under Article 101 of the EC Treaty.
- It does not entail a lowering of the intervention threshold.
- It aims at solving the issues of legal certainty and the adoption of the Horizontal Merger Guidelines explores the manner in which the Commission will apply the SIEC Test in the future.

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87 Supra n.6, at Pg.416
89 Regulation 139/2004 on the control of concentrations between undertakings (“the EC Merger Regulation”) [2004] OJ L24/1
The adoption of the test aims at consolidating international convergence with regard to Merger control, aligning to an appraisal standard used in many other jurisdictions worldwide.\textsuperscript{91}

Hence, it can be summed up that the Commission can now prohibit all mergers which have anti-competitive ‘unilateral’ or co-ordinated effects.

### 7.1.2 UNILATERAL-EFFECTS CASE OR DOMINANCE OF A SINGLE COMPANY

It is a case where the merged entity will have the ability, alone, to behave independently of competitors and customers known as ‘Single Firm Dominance’. Once the product and geographic markets relevant to the merger have been determined, the degree of dominance which it will confer in those markets has to be considered next. The essential element of dominance is the ability to behave independently of its competitors, customers and consumers; in other words to be largely free from the pressures imposed by competition as to price, quality and conditions of business. A degree of dominance cannot be measured, in any market, but has to be assessed in light of several factors. The principal factors involved are\textsuperscript{92}:

1. The aggregate of the market shares which the combined undertakings will have, provided that these are of a relatively durable nature rather than merely temporary. The concept of dominance has to strike a balance between existing facts and likely future developments. In the case of AKZO v. Commission\textsuperscript{93}, it was established that a market share of 50\% or more may in itself be evident of a dominant position, less than 25\% raises no presumption, whereas 25-40\% will have a low presumption and market share up to 60-70\% will be difficult to be refuted as not having dominant position.

2. The relation of the market share of the merging undertaking to those of other companies will be relevant. For example, the merging companies have 40\% and 20\% respectively and no other company has more than 5\%, the gap itself in a market share will make it far easier for the combined entity to operate free of the pressures of competition. On the other hand if there was a competitor in the market with a 30\% share, genuine competition could at least be anticipated from that source of the two merging companies. However, other factors need to be examined relating to the strengths of the undertakings, such as their individual product range, customer strength base, past market share, strength of various buyers in the relevant markets.

3. It is clear, that certain sectors likely to be characterised by volatility of market share, whereas others, perhaps the more traditional industries, may show a marked degree of stability. For example, in an industry where innovation and R\&D plays an important part in the competitive struggle, market shares are likely

\textsuperscript{91}Supra n.22, Pg.46
\textsuperscript{92}Supra n.6, at Pg.418,419
\textsuperscript{93}Case C-62/86 ECR I-3359 [1993] 5 CMLR 215
to vary and are a less certain indicator of market power. On the other hand are the industries as in the case of TetraPak/Alfa-Laval\textsuperscript{94} where the acquiring company with a market share exceeding 90% maintained consistently for a considerable number of years in the sale of aseptic carton-packaging machines for milk, supported by a wide range of technological advantages over all its competitors.

4. Commercial strengths of various kinds can in general play an important part in buttressing the benefits of substantial market share. Intellectual Property Rights, as in the case of TetraPak may be relevant, if they cover a wide range of the necessary technology for entry into the industry as licences may not be available from the dominant company, or may be available only on disadvantageous terms. Such a company as a market leader for a number of years may also be skilled at making of aggressive use of patent rights to discourage competition. Other factors that need to be taken into account in analysis of commercial strengths include:

a) Forecast of likely product demand and changing patterns of raw material supply and product development in the industry, the time and cost required to enter in the market, high initial start-up costs.

b) Whether there are over-capacities in neighbouring geographic and product markets.

c) Whether the market is in general over- or under-supplied.

d) The development of community harmonization of technical standards, and directives on public procurement.

e) Whether the undertakings concerned hold a portfolio of a substantial number of brands in the same geographic market.

7.1.3 CASE STUDIES

A. Air France/KLM Case\textsuperscript{95}

In Air France/KLM the Commission dealt with the largest airline merger in Europe to date. The Commission considered that the merger would eliminate or significantly reduce competition on domestic and international routes. The Commission cleared the merger in phase 1 subject to a complex package of remedies and after extended discussions with the notifying parties and the respective governments.

The Commission’s press release in this case openly acknowledges that the Commission welcomes the merger as part of the necessary consolidation of European airlines. It also and stresses the benefits of the merger to passengers, who benefit from cost savings, increase in the number of destinations and better connections. These considerations indicate clearly that the Commission took into account the efficiencies resulting from the merger; on the other hand, the clearance decision itself does not mention these efficiencies, as analytically they cannot easily be fitted into a dominance-oriented analysis.\textsuperscript{96}

\textsuperscript{94} Case IV/M68 [1992] 4 CMLR M81
\textsuperscript{95} Commission decision of February 11, 2004, Case IV/M.3280
\textsuperscript{96} Weitbrecht, Andreas., Partner, Latham & Watkins LLP, \textit{EU Merger Control in 2004}, E.C.L.R., 2005
After lengthy negotiations and after rejecting a request by the French authorities to refer the merger partially to France, the Commission approved Lagardère’s acquisition of Vivendi Universal Publishing (VUP, now renamed Editis), subject to the commitment to sell substantial parts of the target. VUP is the market leader in the publishing, marketing and distribution of French-language books. Lagardère, owner of Hachette, was the second player in the market. It is also active in book retailing, broadcasting and newspaper publishing and distribution.

According to the Commission, the merger would have resulted in a dominant group with seven times the turnover of that of the nearest rival. The new entity would be vertically integrated to a much greater degree than any competitors; it would control access to the ‘‘raw material’’ (well-known authors) and access to sales outlets that can only absorb a limited annual output of books. Consequently, Lagardère was only allowed to acquire assets amounting to about 40 per cent of VUP, relating essentially to academic and reference works.98

7.1.4 NON-COORDINATED EFFECTS CASES99

A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that result from the merger, since the merging firms price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market.

Generally, a merger giving rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger. Furthermore, mergers in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition. The Merger Regulation clarifies that all

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97 Commission decision of January 7, 2004, Case IV/M.2978
98 Supra n.96
99 Ibid
mergers giving rise to such non-coordinated effects shall also be declared incompatible with the common market.\textsuperscript{100}

A number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. However all of these factors need to be present for such effects to be likely; nor should this be considered an exhaustive list:

7.1.5  **MERGING FIRMS HAVE LARGE MARKET SHARES**

The larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the assessment.

7.1.6  **MERGING FIRMS ARE CLOSE COMPETITORS**

Products may be differentiated within a relevant market such that some products are closer substitutes than others. The higher the degree of substitutability between the merging firms’ products, the more likely it is that the merging firms will raise prices significantly.\textsuperscript{101} For example, a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the parties has been an important source of competition on the market may be a central factor in the analysis\textsuperscript{102}. High pre-merger margins may also make significant price increases more likely. The merging firms’ incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes\textsuperscript{103}. It is therefore less likely that a merger will significantly impede effective competition, in particular through the creation or strengthening of a dominant position, when there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers.

When data are available, the degree of substitutability may be evaluated through customer preference surveys, analysis of purchasing patterns, estimation of the cross-price elasticity’s of the products involved, or diversion ratios. In bidding markets it may be possible to

\textsuperscript{100} Recital 25 of the Merger Regulation
\textsuperscript{101} Case IV/M.1672, [2001] OJ L 143/74
\textsuperscript{102} Procter & Gamble/VP Schickedanz, OJ L 354, 21.6.1994
\textsuperscript{103} Volvo/Renault - Case IV/M.1980
measure whether historically the submitted bids by one of the merging parties have been constrained by the presence of the other merging party.\textsuperscript{104}

In some markets it may be relatively easy and not too costly for the active firms to reposition their products or extend their product portfolio. In particular, the Commission examines whether the possibility of repositioning or product line extension by competitors or the merging parties may influence the incentive of the merged entity to raise prices. However, product repositioning or product line extension often entails risks and large sunk costs and may be less profitable than the current line.

**7.1.7 CUSTOMERS HAVING LIMITED POSSIBILITIES OF SWITCHING SUPPLIER**

Customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers\textsuperscript{105} or because they face substantial switching costs.\textsuperscript{106} Such customers are particularly vulnerable to price increases. The merger may affect these customers' ability to protect themselves against price increases. In particular, this may be the case for customers that have used dual sourcing from the two merging firms as a means of obtaining competitive prices. Evidence of past customer switching patterns and reactions to price changes may provide important information in this respect.

**7.1.8 COMPETITORS ARE UNLIKELY TO INCREASE SUPPLY IF PRICE RISES**

When market conditions are such that the competitors of the merging parties are unlikely to increase their supply substantially if prices increase, the merging firms may have an incentive to reduce output below the combined pre-merger levels, thereby raising market prices.\textsuperscript{107} The merger increases the incentive to reduce output by giving the merged firm a larger base of sales on which to enjoy the higher margins resulting from an increase in prices induced by the output reduction.

Conversely, when market conditions are such that rival firms have enough capacity and find it profitable to expand output sufficiently, the Commission is unlikely to find that the merger will create or strengthen a dominant position or otherwise significantly impede effective competition.

Such output expansion is, in particular, unlikely when competitors face binding capacity constraints and the expansion of capacity is costly\textsuperscript{108} or if existing excess capacity is significantly more costly to operate than capacity currently in use. Although capacity


\textsuperscript{105} Ibid

\textsuperscript{106} Case IV/M. 986 — Agfa Gevaert/DuPont, OJ L 211, 29.7.1998

\textsuperscript{107} Case COMP/M.2187 — CVC/Lenzing

\textsuperscript{108} Supra n.104
constraints are more likely to be important when goods are relatively homogeneous, they may also be important where firms offer differentiated products.

7.1.9. MERGED ENTITY ABLE TO HINDER EXPANSION BY COMPETITORS

Some proposed mergers would, if allowed to proceed, significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete. In such a case, competitors may not, either individually or in the aggregate, be in a position to constrain the merged entity to such a degree that it would not increase prices or take other actions detrimental to competition. For instance, the merged entity may have such a degree of control, or influence over, the supply of inputs\textsuperscript{109} or distribution possibilities\textsuperscript{110} that expansion or entry by rival firms may be more costly. Similarly, the merged entity's control over patents\textsuperscript{111} or other types of intellectual property e.g. brands\textsuperscript{112} may make expansion or entry by rivals more difficult. In markets where interoperability between different infrastructures or platforms is important, a merger may give the merged entity the ability and incentive to raise the costs or decrease the quality of service of its rivals\textsuperscript{113}. In making this assessment the Commission may take into account, inter alia, and the financial strength of the merged entity relative to its rivals\textsuperscript{114}.

7.1.10 MERGER ELIMINATES AN IMPORTANT COMPETITIVE FORCE

Some firms have more of an influence on the competitive process than their market shares. A merger involving such a firm may change the competitive dynamics in a significant, anticompetitive way, in particular when the market is already concentrated\textsuperscript{115}. For instance, a firm may be a recent entrant that is expected to exert significant competitive pressure in the future on the other firms in the market.

In markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with ‘pipeline’ products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products\textsuperscript{116}.

\textsuperscript{109} Case T-221/95, Endemol v Commission, [1999] ECR II-1299
\textsuperscript{110} Case T-22/97, Kesko v Commission, [1999], ECR II-3775
\textsuperscript{112} Commission Decision 96/435/EC in Case IV/M.623 — Kimberly-Clark/Scott, OJ L 183, 23.7.1996
\textsuperscript{113} Commission Decision 99/287/EC in Case IV/M.1069 — Worldcom/MCI, OJ L 116, 4.5.1999
\textsuperscript{114} Case T-156/98 RJB Mining v Commission [2001] ECR II-337
\textsuperscript{115} Supra n.104
\textsuperscript{116} Case IV/M.1846 — GlaxoWellcome/SmithKline Beecham
CHAPTER 8
COMPARISON OF INDIAN AND EU MERGER REGULATIONS

Many competition laws/regulations, do not in fact use the term mergers, rather they prefer to use expressions such as combinations (India) or, concentrations (EU) to describe the transactions that are dealt with or can be dealt with by merger control laws.

Within the European Community, all concentrations that have a community dimension are required to be reviewed by the Commission under the EUMR\textsuperscript{117} Article 3 (1) of the Regulation defines that, a concentration shall be deemed to arise where a change of control on a lasting basis results from, a merger of two or more previously independent undertakings or parts of undertakings, or the acquisition of direct or indirect control of the whole or parts of one or more other undertakings.

Therefore, a concentration is said to arise under two circumstances, i.e.

a. When there is a merger of previously independent undertakings, or
b. When there is an acquisition of control of an undertaking.

Such a merger or acquisition of control of an undertaking will be deemed to be a concentration that attracts the regulation under ECMR only if the change of control is on a lasting basis. Therefore, in the EU, it is the acquisition of control, which is of importance and acquisition of assets or shares would constitute concentrations if they lead to acquisition of control.

In India, the Competition Act, 2002 regulates combinations that consist of mergers, amalgamations and acquisitions\textsuperscript{118} with a view to ensure that there is no adverse effect on competition in India. An acquisition where the acquirer is acquiring control, shares, voting rights or assets of the enterprise will be considered as a combination\textsuperscript{119}. If such a combination meets the specified threshold levels under section 5 (a), it is subject to regulation by the Competition Commission of India. An acquisition of control by a person over an enterprise when such a person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or substitutable goods or service is also considered to be a combination\textsuperscript{120} if the same meets the requisite threshold level under section 5 (b). Further, every enterprise created by way of merger or amalgamation that meets the requisite threshold level stipulated under section 5 (c), shall also be considered to be a combination that shall be regulated by the Commission.

Therefore in India, for the merger regulation to be attracted, the transaction firstly has to be considered to be a combination as stated under section 5 of the Act. To be considered as a combination, the transaction can either be a an acquisition, as stated in section 5 (a)

\textsuperscript{117} EUMR, Art. 1(1)
\textsuperscript{118} The Competition Act, 2002, sec. 5
\textsuperscript{119} The Competition Act, 2002, sec. 5 (a) (i)
\textsuperscript{120} The Competition Act, 2002, sec. 5 (b) (i)
or acquiring control, as stated in section 5 (b) or a merger or amalgamation. Such an acquisition, acquisition of control, merger or amalgamation has to further meet the stipulated threshold limits.

An acquisition is defined under section 2 (a) as a means to directly or indirectly acquire shares, voting rights or assets of any enterprise or control over management or control over assets of any enterprise\(^\text{121}\).

The Competition Act, 2002 has envisaged a more inclusive list of transactions to be caught by regulatory authorities in comparison to the EUMR. A combination such as Type A Acquisition under the Competition Act, 2002 is analogous to a concentration under Article 3 (1) (b) EUMR which is an acquisition by securities or assets of the direct or indirect control of the other undertaking. The Type A Acquisition is also an acquisition of control, shares, voting rights or assets\(^\text{122}\). Further, the definition of “acquisition” under section 2 (a) includes control over management and the meaning of “control” under the explanation to section 5 includes controlling the affairs or management of the acquired enterprise. This therefore, is similar to the understanding accorded to the term control under the EUMR. Control as per Article 3 (2) of the EUMR means the possibility of exercising decisive influence on an undertaking. A commonsensical understanding of ‘controlling the affairs or management of an enterprise’ would mean, the ability to exercise decisive influence on an undertaking”. Therefore, Type A Acquisition under section 5 (a) (i) of the Competition Act, 2002 is similar to a Concentration under Article 3 (1) (b) of the EUMR.

Apart from regulating acquisitions of control, shares, voting rights or assets in general, the Competition Act, 2002 also provides for regulation of horizontal arrangements under section 5 (b). The EUMR merely state the conditions that would cause a transaction to be caught by merger regulations and the threshold limits beyond which such transactions are subject to scrutiny by regulatory authorities. Therefore every transaction, be it a horizontal or vertical merger or an acquisition is to be notified if they meet the threshold limits.

The Competition Act, under section 5 has embraced all kinds of arrangements in an extensive manner. The difference between EUMR and Competition Act lies in this behalf. While in EUMR, the acquisition of control (direct or indirect), is a primary requirement for an acquisition to be a concentration, in Indian law, control is only one criterion for determining whether an acquisition is a concentration.

\[8.1\] **EXEMPTION FROM FILING NOTIFICATION**

With respect to provisions regarding exemptions to transactions, there are a number of issues that the Commission must look into, inorder to strengthen the Merger Regulations. Firstly, all types of intra-group combinations, mergers, demergers, reorganizations and other similar

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\(^{121}\) The Competition Act, 2002, sec. 2 (a)

transactions should be specifically exempted from the notification procedure and appropriate clauses should be incorporated in sub-regulation 5(2) of the Regulations. They should be treated at par with acquisitions within the group mergers under Item 8 of Schedule 1 Exemptions since these transactions do not have any competitive impact on the market for assessment under Section 6 of the Competition Act.

Secondly, Conglomerate acquisitions or acquisition of assets by parties not in the same line of business should be exempted, as they are not likely to have an appreciable adverse effect on competition within the relevant market in India. Since acquisition of „control” is the crucial factor from competition law perspective, conglomerate acquisitions must be seen in light of Section 5(b) of the Act which covers acquisition of control in similar, identical or substitutable goods or services.

8.2 NOTIFICATION DEADLINES AND WAITING PERIODS

The Indian merger control regime being a nascent one has much to learn from the EC regime. In context of waiting periods, the Indian regime has to be strengthened so as to bring about balance between the objectives of the Commission and the overall objectives of a nation towards economic development. The merger control law should also imbibe provisions that would make the merger review process simpler, but at the same time meet the interests of the stakeholders as well as the Commission.

Firstly, the Commission should encourage pre-notification consultations like the EUMR. This reduces the burden on the Commission to look into a larger number of irrelevant or simple cases. This also saves the time for stakeholders who do not have the luxury of time.

Secondly, the merger control regime in India, should adopt a merger review process based on a working day system like in the EUMR. Both the phase I and phase II periods consist of thirty days and one hundred and eighty days inclusive of non-working days. This further becomes a problem since the combinations are deemed to be approved on the expiry of the two hundred and ten day limit. A regime similar to the EU regime will give the Commission the much-needed time to efficiently scrutinize the combinations. Thirdly, phase II of the merger review process should not be limited by time since this would deter the efficient working of the merger review process. The Indian regime should imbibe the provision from the EUMR and not restrict the process to a mere two hundred and ten days.

Another suggestion is to adopt the EU practice of allowing derogations from the suspension of combination obligation, if it is satisfied that the detriment to the notifying parties or to a third party resulting from the suspension exceeds the threats to competition posed by the transaction. Additionally, in times of economic regress, the Commission should show some flexibility and issue accelerated clearance decisions even in cases that raised significant competition concerns requiring remedies.

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8.3 PENALTIES

The European authorities can interfere and prohibit a transaction under certain circumstances. Implementing a notifiable merger before clearance has been obtained or after a prohibition decision has been issued would expose the companies concerned to fines of up to 10% of their aggregate annual worldwide group turnover. The Commission may also impose periodic penalty payments of up to 5% of average daily worldwide group turnover for each day that an infringement persists and fines of up to 1 per cent of aggregate worldwide group turnover may also be imposed in certain circumstances, for example, where misleading or incorrect information is supplied.

Further, even the penalties imposed by the CCI are considerably lesser and hence it does not compel the parties to comply with the provisions of the Act. For non-furnishing of information on combinations, the Commission imposes a mere 1% of the total turnover or the assets, while the European counterparts impose a fine of 10% of the total turnover. Further, for furnishing wrong information or for suppressing material facts the maximum fine imposed is Rs.1 Crore, while under the ECMR the fine imposed is 1% of the total world turnover. In order to ensure stricter compliance and deter parties from providing wrong or misleading information, the Commission must increase the amount of fines imposed.

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123 EUMR, Article 14 (2)
124 EUMR, Article 14 (1)
CHAPTER 9
CONCLUSION

The merger control law in India has all the elements of a progressive law and has imbibed several practices from the EU regime. Despite its nascent existence, it has achieved tremendous success. However, there are a number of lessons that it still has to learn from the veteran anti-trust regimes of the world. As suggested at various junctures, the merger control regime in India has to develop a stronger set of provisions relating to waiting periods, filing fees and penalties. It should further observe the ICN guidelines while applying the local effects test and determinelocal nexus with respect to both acquirer enterprises along with target enterprises. This would avoid scrutinization of acquisitions that may not have an adverse impact on the competition.

Further, The Competition Act, 2002 causes much confusion with respect to the terminology of acquisition. The repetitiveness caused by a combined reading of section 5 with the relevant definition causes must be eliminated. Further, there is a need for reconsidering the provisions relating to waiting periods. Introducing the working days concept as opposed to an all-inclusive 210 days, would increase the possibility of quality output by the Commission. The need for qualitative determination of control as opposed to mere quantitative assessment based on shares, voting rights, securities or assets is imminent. A shift from a lenient regime that imposes insignificant amount of fees and penalty is also the need of the hour. Lastly, the grey area of joint ventures must be looked into by the Commission and all the existing loopholes are to be plugged.
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