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European Merger Control

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Activity

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List of Abbreviations

ART – Article

Commission – European Commission

CM – Common Market

DG - Directorate-General

DG Competition – The Directorate-General for Competition

DSM – Digital Single Market

ECSC - (Treaty Establishing) the Coal and Steel Community

EEC - (Treaty Establishing) the European Economic Community

EC – European Community

ECJ – European Court of Justice

EEA – European Economic Area

EU – European Union/Economic Union

EUMCR – EU Merger Control Regulation (Council Regulation (EC) No 139/2004)

GDP – Gross Domestic Product

M&A – Mergers and Acquisitions

EMCR - Merger Control Regulation (Council Regulation (EC) No 4064/1989)

MS – Member State(S)

NCA – National Competition Authority

SEA – The Single European Act

SIEC – Significant Impediment to Effective Competition

SLC - Lessening of competition test

TEU - Treaty on European Union

TFEU – Treaty on The Functioning of The European Union

Chapter 1
Introduction in European Merger Control

1.1. Competition, at the border between law and economics

In our society, it has been present, from its beginning, the continuous balancing from finding solutions for more resources to human predilection to more, which, always, leaded to a competitive behaviour of the individuals, proof of these surviving and succeeding processes.

The analysis of the concept of competition appeared recently, mainly after most of the studies in economics, result of the economic crisis of the last century, but individuals' behaviour in the market has been debated long before.[1] For instance, in the book *"Politischer Diskurs",* German scholar Johann Becher presents *"polypolium"*, detrimental to the suppliers in the long run since their high concentration lowers the prices, whereas *"monopolium"* entails negative consequences for the consumers' welfare[2] as a result of the sole price maker.

An important contribution to the definition of competition comes from Sir James Stuart who concentrates on the simple competition, expressing that at the level of the buyer, it generates increases in prices, and at the level of the seller, the effect is the fall in prices. He also introduced the idea of double competition which ultimately ensures a perfectly-balanced price[3]. So, it can easily be assumed that scholars saw competition in a limited way, one which is known in neoclassical economics as the model of supply and demand for price determination.

The first big step in the conceptualisation of competition was through the publishing of the famous *"Wealth of Nations"* by Adam Smith, which indicated that the individual is *"led by an invisible hand to promote an end which was no part of its intention"*[4] and by that enacting the theory that competition leads to prosperity as individuals are pressuring suppliers to increase quality and bring added value to the market as they are following bigger margins. The same author adds that the demand is the one which *"encourages production, and thereby*

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[1] Furse, M., *Competition Law of the EC and UK.* 5th edn. Oxford: Oxford University Press, 2006, p. 3.
[2] Magnusson, L., *Was Cameralism really the German version of mercantilism?,* in Rössner, P. (ed.) *Economic Growth and the Origins of Modern Political Economy: Economic reasons of state, 1500–2000.* 1st edn. Abingdon: Routledge, 2016, p. 63-64.
[3] Stuart, J., *An Inquiry into the Principles of Political Economy: Being an Essay on the Science of Domestic Policy in Free Nations, in which are particularly considered Population, Agriculture, Trade, Industry, Money, Coin, Interest, Circulation, Banks, Exchange,* Publ. London: A. Millar and T. Cadell, 1767, p. 197.
[4] Smith, A., *An inquiry into the nature and causes of the wealth of nations*, edited by E. Cannan. Chicago: University of Chicago Press, 1976, p. 593.

increases the competition of the producers"[1] contributing to consumer's welfare. Later on, Jeremy Bentham would continue Smith's ideas by indicating that *"from high profits in trade comes influx of traders - from influx of traders, competition among traders - from competition among traders, reduction of prices"*[2]. As to the state's intervention in the market, Smith considers that *"natural liberty establishes itself of its own accord"*[3] and the state should not distort this free market.

In United States of America competition rules developed more after the appearance of the Chicago School's theories in 70's, which aimed to redefine the existing ones shaped by Harvard School. In order to identify the Chicago School's approach on competition, it has to be presumed that the antitrust law role is to develop a competitive environment so that companies have an incentive to achieve efficiencies. This school of thought criticized the status-quo of antitrust regulation based on rule of reason and proposed the consumer welfare objective, mainly due to the high possibility of increasing legal certainty by providing clear guidelines for assessment, arising from the neoclassical price theory.[4]

At European level, the concept of competition developed differently than it was presented by Smith, being a product of the theories launched in Austria and Germany by the so-called Ordoliberal thought, following the first years of embedded liberalism coming from United States of America and *"projected on to western Europe though the Marshal Plan"*.[5]

The end of the second World War brought a domination of United States of America in Europe, mainly for the rebuilding of the destroyed continent and for the idea of reconstruction it was developed a system which gave priority to financial versus industrial, international versus national and free market versus state intervention[6], the main instrument for the competition of such system being the Marshal Plan which made the struggling European countries open to be part of this economy, one in which the capital, goods and technology were supposed to circulate freely, a step towards Fordism in Europe.[7]

In relation to Merger Control, at that time in United States of America there was already important regulation applicable, as the *Sherman Act* from 1890 on antitrust regime was upgraded by the Clayton Antitrust Act in 1914 prohibiting mergers

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[1] *Idem*, p. 999.
[2] Bentham, J., *The Emancipation of the Colonies* in *The Works of Jeremy Bentham*, London, 1843, p. 4:412.
[3] Smith, A., *op. cit*., 1976, p. 914.
[4] Schmidt, I. and Rittaler, J. B., *A Critical Evaluation of the Chicago School of Antitrust Analysis*. Dordrecht; Boston: Kluwer Academic Publishers, 1989, pp. 21–37.
[5] Overbeek, H. & K. van der Pijl, *Restructuring Capital and Restructuring Hegemony: Neoliberalism and the Unmaking of the Post-War Order*, in H. Overbeek (ed.) *Restructuring Hegemony in the Global Political Economy*, Routledge, 1993, p. 11.
[6] Buch-Hansen, H., *Rethinking the history of European level merger control. A critical political economy perspective*, CBS, 2008, p. 78.
[7] Jessop, B. & Sum, N-L., *Beyond the Regulation Approach*, Edward Elgar Publishing, 2006, p. 123-151.

which *"substantially lessen competition"*[1] and, as in Europe for decades the industries were kept away from competitive pressure, especially in sectors like coal and steel, where the cartelization was the rule[2], ultimately serving as an important pawn in the development of the military power of the Nazis, the new strategy was to transfer these policies of antitrust law in the controlled areas, as a prerequisite for peace.[3]

The European Union came into existence from the wish not to repeat the errors made by the victorious powers in the interwar period, which can be seen in the American and British positions on the administration of defeated Germany, the new era having the American Protectorate governing the area and guiding them towards something else.[4]

After the war, France came with the proposal to detach big parts of the Ruhr area and of the Rhineland from Germany and transfer to French protectorate, but it met great resistance, especially from the Americans. Under the Monnet Plan of 1946–1950, designed to increase French steel production at the expense of Germany, France had absorbed from Germany the Saarland, a centre for coal mining and wanted to expand its control over other areas, but the main winning power at that moment, the United States of America, still in control of most of the western part of Germany, expressed opposition against the split-up of the occupied territories. This was mostly because they wanted to avoid the effects of similar decisions taken after the First World War, which lead to the easy fall by the poor and defeated power into an extremist doctrine.[5]

The US President Harry Truman launched a campaign for rebuilding the destroyed territories and to reshape the relations with Germany[6]: *„an orderly, prosperous Europe requires the economic contributions of a stable and productive Germany"*.

As a result, in 1949, the International Authority for the Ruhr was founded. It was an international body that set limits on the production of steel in the Ruhr area and at the same time reduced control of the most important regions and resources by all parties involved and not just Germany. In some years following, this structure would become the platform for the creation of a common decisional body, where the main European powers, winning or losing, monitored by the United States of America, would decide together on how to use their resources.

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[1] Bork, R.H., *The Antitrust Paradox. A Policy at War with Itself*, Basic Books, 1978, p. 15-49.
[2] Schmitt, H.A., *The European Coal and Steel Community: Operations of the First European Antitrust Law*, 1952-1968, „Business History Review", Vol. 38, 1964, pp.102-122.
[3] Monnet, J., *Memoirs*, Doubleday&Company, 1978, p. 351.
[4] Dumitru, O. I., Stoican, A., *European Union Law. Lecture Notes*, ASE University Press, 2020, p. 14.
[5] Dedman, M. J., *The Origins and Development of the European Union 1945-2008: A History of European Integration*, second edition, Routledge, Taylor&Francis Group, 2009, p. 36-48.
[6] More on the role of President Truman in the rebuilding of defeated Germany in Leffler, M. P., *A Preponderance of Power. National Security, the Truman Administration, and the Cold War*, Plunkett Lake Press, 2018 p. 128-152.

Following this, we arrive at the first public act beginning the construction of what today we call European Union. Conceived and, for the most part, drafted by Jean Monnet, this was a proposal to place Franco-German production of coal and steel under one common High Authority.[1]

"Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany"[2].

Mostly debated control on Ruhr area was also an issue in Merger Control, as most of the concentrated sectors of production were present there, so it was noticed a need to come with precise measures for the elimination of *"excessive concentrations of economic powers as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements"*[3].

For the implementation of the new objectives, the powers controlling and governing, under the form of protectorate, the western part of Germany stated implementing decentralisation policies in the most important sectors, like coal, steel, chemicals or banking, many companies being forced to divide into several smaller ones[4], one of the famous example being the split-up of IG Farben into three companies: BASF, Bayer and Hoechst.[5]

In the period following the end of the Second World War, all the European states struggled to rebuild, most of them experiencing economic problems, but the reforms leaded to an *"economic miracle"*[6] in which the annual growth rate increased in Germany, France and in the other Western countries, have been developed conditions for production, a stable economy and a good social security system.[7]

The immense economic transformation was clearly influenced by the international evolution, which in that period was characterised by an economic boom, qualified later as the "Golden Age", the world trade increasing ten times more than before[8], but additionally, there were different schools of thought, some coming from the more developed American system, others having their roots in the European Universities or Governments, a great influence had the one of the new social market economy launched by the ordoliberals from the so-called Freiburg school.[9]

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[1] Dedman, M. J., *op. cit*., 2009, p. 52-55.
[2] Schuman Declaration (Paris, 9 May 1950).
[3] Paragraph 12, Report on the Tripartite Conference of Berlin.
[4] Buch-Hansen, H., *op. cit*., 2008, p. 80.
[5] Goyder, D.G., *EEC Competition Law*, 2nd edition, Clarendon Press, 1993, p. 17.
[6] Davies, N., *Europe. A History*, Oxford University Press, 1996, p. 1074.
[7] Van der Wuff, R., *Neo-liberalism in Germany? The Wende in Perspective*, in H. Overbeek (ed.) *Restructuring Hegemony in the Global Political Economy*, Routledge, 1993, p. 164-165.
[8] Hobsbowm, E., *Age of Extremes. The Short Twentieth Century 1914-1991*, Michael Joseph, 1994, p. 258-261.
[9] Gerber, D.J., *Law and Competition in the Twentieth Century Europe: protecting Promotheus*,

The ordoliberalism appeared in Germany as a reaction to Weimar's Republic failure to address the economic and political situation caused by the First World War, the Great Depression and further aggravated by the Nazi regime's ascent to power. What has become known as the Freiburg School or the Ordo-liberal School was founded in the 1930s at the University of Freiburg in Germany by economist Walter Eucken (1891-1950) and two jurists, Franz Böhm (1895-1977) and Hans Großmann-Doerth (1894-1944) who wrote The *Ordo Manifesto*[1].

The school is often considered as part of German neo-liberalism, which also includes such authors as Alfred Müller-Armack, Wilhelm Röpke and Alexander Rüstow, but although these authors shared important common ground, it also existed certain differences between them, for authors of the *Ordo Manifesto* the market order being a non-discriminating, ethical order with a need of a minimum guaranteed social safety for those who are, temporarily or permanently, unable to earn a standard living by being present in this market, Müller-Armack on the other hand seeing the market order as an economically most efficient order, a technical instrument that can be used by society to produce wealth and the social policies coming just additionally.[2]

This ordoliberalism was proposed as the middle way between the two pure forms of economic orders: the centralised economy empowering a main authority to craft an economic plan for all the actors in the market, dominated by a lack of monopolies as operators do not hold enough strength to overcome others and the free market with the individuals' freedom to decide and pursue their own economic goals and to engage in any possible transactions, but with a higher probability to appear monopolies due to unregulated private interests.[3]

The ordoliberalism resided in the reconciliation of law and economics with the view of improving the decision-making process and the reasoning that for understanding and enacting law, one should understand first the economic principles.[4]

In relation to competition on the market, the ordoliberalism starts from the premise that the mar- ket should be in a constitutional order, defined by its institutional framework, and competition should be regulated in order to avoid the destruction of the market[5]. To address the indicated scope, they have introduced the concept

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Clarendon Press, 1998, p. 232-265.

[1] Böhm F., Eucken W., Grossmann-Doerth H., *The Ordo Manifesto of 1936*, in: Peacock A., Willgerodt H. (eds) *Germany's Social Market Economy: Origins and Evolution*. Trade Policy Research Centre, Palgrave Macmillan, 1989.

[2] Vanberg, V. J., *The Freiburg School: Walter Eucken and Ordoliberalism*, Freiburger Diskussionspapiere zur Ordnungsökonomik, No. 04/11, Albert-Ludwigs-Universität Freiburg, Institut für Allgemeine Wirtschaftsforschung, Abteilung für Wirtschaftspolitik, 2004.

[3] Eucken, W., *The Different Types of Economic System*, in Biebricher, T. and Vogelmann, F. (eds) *The birth of austerity: German ordoliberalism and contemporary neoliberalism*. London: Rowman & Littlefield International, 2017, p. 271.

[4] Böhm F., Eucken W., Grossmann-Doerth H., *op. cit*., 1989, p. 36–38.

[5] Eucken, W., *What Kind of Economic and Social System?*, in Peacock, A. and Willgerodt, H. (eds) *Germany's Social Market Economy: Origins and Evolution*. Basingstoke: Palgrave Macmillan, 1989, pp. 34–37.

of economic constitution as *"an embodiment of norms"*[1] which aimed to develop a regulatory framework with the objective of supplying competitive order on the basis of individual freedom.

The ordoliberals considered that the government's power is limited to providing the *"rules of the game"* through *Ordnungspolitik.* The term Ordnung (order) is the central concept in the research program of the Freiburg school ant it was related to the concept of the economic constitution upon which economies or economic systems are based[2]. According to them[3], the majority of economic orders are to be assumed as different compositions of two basic principles: the decentralised coordination of economic activities within a legal framework of the game and the principle of subordination within a centralised administrative system.

As any legal rule, the competition rules supply both rights and duties to private individuals acting on the market with the scope to prevent any abuse of their freedom. As opposed to Smith's self-regulating *"invisible hand"* resulting from the system of natural liberty, ordoliberals advocated for the *"visible hand"*[4] of law as a means for ensuring competition in the free market.

The preservation of competition was clearly an area of focus for ordoliberals and there is no doubt that the promoters of this school of thought influenced the way regulations in the field were developed in post-war Germany and some ideas can be identified in the first German competition law[5], which text was adopted after several years of delays and different drafts and did not comprise in the adopted form provisions to merger control due to the opposition of important German producers, although they represent the main form of concentration. [6]

In other places in Europe, the presence of the ordoliberal ideas were not so incisive, the state continuing to hold most of the power. For instance, in France there was a long history of economic interventionism which continued after the war, the state took control only of strategic sectors of the economy, nationalised important companies in banking system, insurance or different industries like coal, steel, transportation or electricity.

Moreover, there was developed a national planning authority for boosting the performance of the French industry[7] which came to the conclusion of a need of concentration for a better activity of the production units. As a result, France became

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[1] Böhm, F., *The Economic Constitution as the Normative Order of the National Economy*, in Biebricher, T. and Vogelmann, F. (eds), *op. cit.*, 2017, p. 115.
[2] Eucken, W., *op. cit.*, 1989, p. 240.
[3] *Idem*, p. 79.
[4] Mestmäcker, E.-J., *A Legal Theory Without Law: Posner V. Hayek on Economic Analysis of Law*. Tübingen: Mohr Siebeck, 2007, p. 22.
[5] *Gesetz gegen Wettbewerbsbeschränkungen* (GWB).
[6] Buch-Hansen, H., *op. cit.*, 2008, p. 81.
[7] Michael, C-A., *France* in Vernon R.(ed.), *Big Business and the State*, Harvard University Press, 1974.

the European country with the highest rate of mergers in the post-war period[1] indicating that the approach to competition was fundamentally different from the German neighbours.

Nevertheless, in France were implemented competition rules as a consequence of the American pressure in exchange of the financial aid for the reconstruction of Europe, worries being addressed to governments that the market would have been negatively influenced without antitrust measures[2], but some authors[3] consider that the adoption of *Decree 53-704* which added to the existing *Price Control Ordinance* three articles on competition was just an action for the sake of satisfying the international partners, but without any effect in practice, especially in the regard of mergers.[4]

Overviewing the surrounding countries, especially the ones who later joined the two above mentioned in the founding treaties of European Communities, we can notice that neither of them had a very developed competition regulation at that moment[5], fully inexistent in Belgium and Luxembourg, slightly present in the Italian Civil Code and in Netherlands there was an Economic Competition Act[6] which provided that the cartels are permitted as long as they do not abuse of their dominant position.[7]

1.2. The evolution of European Competition Policy

In the spirit of a form-based approach of ordoliberal inspiration, early European Competition Policy proposed to safeguard economic freedom, lacking tolerance towards certain practices. Although no longer applied nowadays, the Commission still preserves reminiscences of that reasoning.

Although they expressed more on the objectives of the European Communities as an entity, the European Treaties and other official acts offer provisions in relation to the functioning of the internal market as a goal of competition policy.

The European Union (EU) has its origins in the common market created by the Treaty establishing the European Coal and Steel Community (ECSC), in its article 2 being provided as objective the creation of a new platform leading, through the common market for coal and steel, to economic expansion, growth of employment, and a rising standard of living.

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[1] Venturini, G., *Monopolies and restrictive trade practices in France*, Sijthof, 1971.
[2] Pedersen, K.R., *Re-Educating European management: The Marshal Plan's Campaign Against Restrictive Business Practices in France, 1949-1953*, „Business and Economic History", Vol. 25, no. 1, 1996, pp. 267-274.
[3] Jenny, F., & A.P. Weber, *French Antitrust Legislation: An Exercise in Futility?*, „The Antitrust Bulletin", no.20, 1975.
[4] Riesenfeld, S.A., *The Legal Protection of Competition in France*, „California Law Review", vol. 48, no. 4, 1960, p. 574-595.
[5] Goyder, D.G., *op. cit.*, 1993, p. 30.
[6] *Wet economishemededinging.*
[7] Buch-Hansen, H., *op. cit.*, 2008, p. 82.

Later, the Spaak Report establishes the competition policy as an instrument for the European Communities' final objective: the fulfilment of a common market where free trade, continuous expansion and stability should prevail. Accepting that the ineffectiveness of removing trade barriers if they can be reintroduced in other forms like tariff and non-tariff barriers, it is underlined that competition rules prevent both the Member States and the private undertakings from adopting such discriminatory practices[1]. By reinforcing the objectives presented in the Spaak Report, the Rome Treaty links the existence of the common market to *"the establishment of a system ensuring that competition shall not be distorted"*[2]. Finally, Treaty of Lisbon grants exclusive competence to the European Union in establishing competition rules *"necessary for the functioning of the internal market."*[3]

The European Union grew out of the European Coal and Steel Community (ECSC), which was established in 1951, by six founding members: Belgium, the Netherlands and Luxembourg (the Benelux countries) together with West Germany, France and Italy. Its goal was to place the steel and coal resources in the hands of all the member states, thus preventing another European war, as these resources were the ones providing *"European industry with three-quarters of its energy needs"* and *"ocupied a position of unchallenged supremacy"*.[4]

This was the fulfilment of the plan developed by French civil servant Jean Monnet, who presided the first French planning board after the war, and made public by the French foreign minister Robert Schuman on May 9th, 1950, in which was stated the creation of an organised Europe, indicating that it was indispensable to the maintenance of peaceful relations[5] and proposing for a change of view, from the traditional economic cooperation to a new form called *"community integration"* with the members accepting to transfer some of their prerogatives to a new supranational entity.[6]

The *Schuman Declaration* mentioned the need of competition rules which *"in contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the organization will ensure the fusion of markets and the expansion of production"*.

As we know, the *Schuman Declaration* was a result of Jean Monnet's plan for reconstruction of France after the war, which contained also the indication of an expansion of coal production in Saarland, which was a French zone of

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[1] Spaak, P.-H., *Rapport des chefs de délégation aux ministres des Affaires étrangères,* 1956.
[2] Article 3 Treaty on Establishing the European Economic Community (1957).
[3] Article 2B Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007).
[4] Lovett, A.W., *The United States and the Schuman Plan. A Study in French Diplomacy 1950-1952*, „The Historical Journal", Vol. 39, no. 2, 1996, p. 425-455.
[5] *"World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it."*
[6] Lefter C., *Fundamente ale dreptului comunitar institutional*, Economica Publishing House, Bucharest, 2003.

occupation, and Ruhr area, under the protectorate of the United Kingdom and United States, mainly for the reason that these areas were the *”synonym for the evil German military-industrial complex”*[1] threatening its economic recovery.

After the annexation of Saarland, the plan was reconfigured, mainly due to the opposition of the Allies, and negotiations started first with Germany and after with other neighbouring countries for the creation of a common market of coal and steel which *”would open for France a new outlet for her vastly expanded steel production”* and *”assure a French coal supply from the Ruhr”*.[2]

The presence of competition rules in the first founding treaty, the one establishing the European Coal and Steel Community (ECSC) were the result of the above indicated negotiations, as the ones involved had in mind *”to rely on competition as the principle auto-mechanism of their common markets and as main force making for the technological progress and economic growth”*[3]

Notwithstanding the fact that ECSC Treaty comprised certain provisions regarding the competition policy, it is indisputable that the Member States failed in reaching an agreement for the establishment of an European level competition unit in regulation, issues like anti-cartel provisions, the power of the High Authority to intervene in the common market, on who was to determine the *modus operandi* in coal and steel sectors, the role of the unions and employers and others were issued by national actors who opposed to the transfer of power to the newly created supranational structure.[4]

The outcome of the negotiations was the final form of the ECSC Treaty which provided a common market of coal and steel products, without restrictions on imports or exports and a control of concentration in the respective industries, rule designed to ”ensure the establishment, maintenance and observance of normal competitive conditions and exert direct influence upon production or upon the market only when the circumstances so require.”[5]

As regarding direct provisions on competition, the ECSC Treaty expressed in two articles the problems related to concentrations, article 65 referring to anticompetitive agreements and article 66 presenting in detail the rules regarding mergers.

Article 65:

“All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending:

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[1] Dinan, D., *Ever Closer Union. An Introduction to European Integration*, Palgrave, 1999, p. 19.
[2] Haas, E.B., *The Uniting of Europe. Political, Social and Economic Forces 1950-1957*, Stanford University Press, 1958, p. 242.
[3] Riesenfeld, S.A., *The Legal Protection of Competition in France*, „California Law Review”, vol. 48, no. 4, 1960, p. 575.
[4] Buch-Hansen, H., *op. cit*., 2008, p. 87-92.
[5] Article 5 European Coal and Steel Community (ECSC) (1951).

(a) to fix or determine prices;

(b) to restrict or control production, technical development or investment;

(c) to share markets, products, customers or sources of supply

However, the High Authority shall authorise specialisation agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds that:

(a) such specialisation or such joint buying or selling will make for a substantial improve- ment in the production or distribution of those products;

(b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose; and

(c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other under- takings within the common market.

If the High Authority finds that certain agreements are strictly analogous in nature and effect to those referred to above, having particular regard to the fact that this paragraph applies to distributive undertakings, it shall authorise them also when satisfied that they meet the same requirements.

Authorisations may be granted subject to specified conditions and for limited periods. In such cases the High Authority shall renew an authorisation once or several times if it finds that the requirements of sub- paragraphs (a) to (c) are still met at the time of renewal.

The High Authority shall revoke or amend an authorisation if it finds that as a result of a change in circumstances the agreement no longer meets these requirements, or that the actual results of the agreement or of the application thereof are contrary to the requirements for its authorisation.

Decisions granting, renewing, amending, refusing or revoking an authorisation shall be published together with the reasons therefor; the restrictions imposed by the second paragraph of Article 47 shall not apply thereto.

3. The High Authority may, as provided in Article 47, obtain any information needed for the application of this Article, either by making a special request to the parties concerned or by means of regulations stating the kinds of agreement, decision or practice which must be communicated to it.

4. Any agreement or decision prohibited by paragraph 1 of this Article shall be automatically void and may" not be relied upon before any court or tribunal in the Member States.

The High Authority shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any such agreement or decision is compatible with this Article.

5. On any undertaking which has entered into an agreement which is

automatically void, or has enforced or attempted to enforce, by arbitration, penalty, boycott or any other means, an agreement or decision which is automatically void or an agreement for which authorisation has been refused or revoked, or has obtained an authorisation by means of information which it knew to be false or misleading, or has engaged in practices prohibited by paragraph 1 of this Article, the High Authority may impose fines or periodic penalty payments not exceeding twice the turnover on the products which were the subject of the, agreement, decision or practice prohibited by this Article; if, however, the purpose of the agreement, decision or practice is to restrict production, technical development or investment, this maximum may be raised to 10 per cent of the annual turnover of the undertakings in question in the case of fines, and 20 per cent of the daily turnover in the case of periodic penalty payments".

Article 66:

"1. Any transaction shall require the prior authorisation of the High Authority, subject to the provisions of paragraph 3 of this Article, if it has in itself the direct or indirect effect of bringing about within the territories referred to in the first paragraph of Article 79, as a result of action by any person or undertaking or group of persons or undertakings, a concentration between undertakings at least one of which is covered by Article 80, whether the transaction concerns a single product or a number of different products, and whether it is effected by merger, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control. For the purpose of applying these provisions, the High Authority shall, by regulations made after consulting the Council, define what constitutes control of an undertaking.

2. The High Authority shall grant the authorisation referred to in the preceding paragraph if it finds that the proposed transaction will not give to the persons or undertakings concerned the power, in respect of the product or products within its jurisdiction:

- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or

- to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

In assessing whether this is so, the High Authority shall, in accordance with the principle of nondiscrimination laid down in Article 4(b), take account of the size of like undertakings in the Community, to the extent it considers justified in order to avoid or correct disadvantages resulting from unequal competitive conditions.

The High Authority may make its authorisation subject to any conditions which it considers appropriate for the purposes of this paragraph. Before ruling on a transaction concerning undertakings at least one of which is not subject to

Article 80, the High Authority shall obtain the comments of the Governments concerned.

3. The High Authority shall exempt from the requirement of prior authorisation such classes of transactions as it finds should, in view of the size of the assets or undertakings concerned, taken in conjunction with the kind of concentration to be effected, be deemed to meet the requirements of paragraph 2. Regulations made to this effect, with the assent of the Council, shall also lay down the conditions governing such exemption.

4. Without prejudice to the application of Article 47 to undertakings-within its jurisdiction, the High Authority may, either by regulations made after consultation with the Council stating the kind of transaction to be communicated to it or by a special request under these regulations to the parties concerned, obtain from the natural or legal persons who have acquired or regrouped or are intending to acquire or regroup the rights or assets in question any information needed for the application of this Article concerning transactions liable to produce the effect referred to in paragraph 1.

5. If a concentration should occur which the High Authority finds has been effected contrary to the provisions of paragraph 1 but which nevertheless meets the requirements of paragraph 2, the High Authority shall make its approval of that concentration subject to payment by the persons who have acquired or regrouped the rights or assets in question of the fine provided for in the second sub- paragraph of paragraph 6; the amount of the fine shall not be less than half of the maximum determined in that subparagraph should it be clear that authorisation ought to have been applied for. If the fine is not paid, the High Authority shall take the steps hereinafter provided for in respect of concentrations found to be unlawful.

If a concentration should occur which the High Authority finds cannot fulfil the general or specific conditions to which an authorisation under paragraph 2 would be subject, the High Authority shall, by means of a reasoned decision, declare the concentration unlawful and, after giving the parties concerned the opportunity to submit their comments, shall order separation of the undertakings or assets improperly concentrated or cessation of joint control, and any other measures which it considers appropriate to return the undertakings or assets in question to independent operation and restore normal conditions of competition. Any person directly concerned may institute proceedings against such decisions, as provided in Article 33. By way of derogation from Article 33, the Court shall have unlimited jurisdiction to assess whether the transaction effected is a concentration within the meaning of paragraph 1 and of regulations made in application thereof. The institution of proceedings shall have suspensory effect. Proceedings may not be instituted until the measures provided for above have been ordered, unless the High Authority agrees to the institution of separate proceedings against the decision declaring the transaction unlawful.

The High Authority may at any time, unless the third paragraph of Article

39 is applied, take or cause to be taken such interim measures of protection as it may consider necessary to safeguard the interests of competing undertakings and of third parties, and to forestall any step which might hinder the implementation of its decisions. Unless the Court decides other- wise, proceedings shall not have suspensory effect in respect of such interim measures.

The High Authority shall allow the parties concerned a reasonable period in which to comply with its decisions, on expiration of which it may impose daily penalty payments not exceeding one tenth of one per cent of the value of the rights or assets in question.

Furthermore, if the parties concerned do not fulfil their obligations, the High Authority shall itself take steps to implement its decision; it may in particular suspend the exercise, in undertakings within its jurisdiction, of the rights attached to the assets acquired irregularly, obtain the appointment by the judicial authorities of a receiver of such assets, organise the forced sale of such assets subject to the protection of the legitimate interests of their owners, and annul with respect to natural or legal persons who have acquired the rights or assets in question through the unlawful transaction, the acts, decisions, resolutions or proceedings of the supervisory and managing bodies of undertakings over which control has been obtained irregularly.

The High Authority is also empowered to make such recommendations to the Member States concerned as may be necessary to ensure that the measures provided for in the preceding subparagraphs are implemented under their own law.

In the exercise of its powers, the High Authority shall take account of the rights of third parties which have been acquired in good faith.

6. The High Authority may impose fines not exceeding:

- 3 per cent of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 4;

- 10 per cent of the value of the assets acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 1; this maximum shall be increased by one twenty-fourth for each month which elapses after the end of the twelfth month following completion of the transaction until the High Authority establishes that there has been an infringement;

- 10 per cent of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have obtained or attempted to obtain authorisation under paragraph 2 by means of false or misleading information;

- 15 per cent of the value of the assets acquired or regrouped, on undertakings within its jurisdiction which have engaged in or been party to transactions contrary to the provisions of this Article.

Persons fined under this paragraph may appeal to the Court as provided in Article 36.

Furthermore, if the parties concerned do not fulfil their obligations, the High Authority shall itself take steps to implement its decision; it may in particular suspend the exercise, in undertakings within its jurisdiction, of the rights attached to the assets acquired irregularly, obtain the appointment by the judicial authorities of a receiver of such assets, organise the forced sale of such assets subject to the protection of the legitimate interests of their owners, and annul with respect to natural or legal persons who have acquired the rights or assets in question through the unlawful transaction, the acts, decisions, resolutions or proceedings of the supervisory and managing bodies of undertakings over, which control has been obtained irregularly.

The High Authority is also empowered to make such recommendations to the Member States concerned as may be necessary to ensure that the measures provided for in the preceding subparagraphs are implemented under their own law.

In the exercise of its powers, the High Authority shall take account of the rights of third parties which have been acquired in good faith.

7. If the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the object ives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used. If these recommendations are not implemented satisfactorily within a reasonable time, the High Authority shall, by decisions taken in consultation with the Government concerned, determine the prices and conditions of sale to be applied by the undertaking in question or draw up production or delivery programmes with which it must comply, subject to liability to the penalties provided for in Articles 58, 59 and 64".

The above provisions were the supranational rules to be applied by the High Authority (the current European Commission), the executive institution created by this first founding treaty, but, in practice, during the first five years of activity in the fields of coal and steel production, they were not very often applied.[1] The High Authority *"did not prohibit any concentrations and its enforcement of other provisions was quite limited"*[2], allowing, for instance, the former German companies who were forced by decartelisation process imposed by the Allies after the war to merge back[3].

Nevertheless, the importance of the first competition rules was acknowledged by all involved actors, as they offered the platform for the future development of this crucial area. The Commission has explicitly stated that "articles 81 and 82 of the EC Treaty are clearly inspired by the corresponding Articles 65 and 66(7)

[1] Buch-Hansen, H., *op. cit*., 2008, p. 96.
[2] Gerber, D. J., *op. cit*., 1998, p. 342.
[3] Schmitt, H.A., *op. cit*., 1964, p. 120.

of the ECSC Treaty"[1]. Having essentially the same substance, both art. 65 and art. 81 prohibit the agreements, decisions or concerted practices which have as object or effect practices encompassed in a non-exhaustive list. Also, under certain conditions, both provide for exemptions. The differences arise primarily from art. 65 not stipulating *"any conditions relating to the effect on trade"*.[2]

The European Coal and Steel Community (ECSC) was the first step towards the scope declared by the Member States to create a functional common market, but as the initial provisions regarded only the coal and steel industries, the negotiations continued and at Messina Conference in 1955 the six founding states decided to appoint a committee of representatives coordinated by Belgian Foreign Minister, Paul-Henri Spaak, for the *"development of rules assuring the free play of competition within the Common Market, particularly in such a way as to exclude all preferences of a national basis"*.[3]

The report of this committee, the so-called Spaak Report, stressed in its text the need for future provisions in competition, especially as regarding the formation of monopolies, without mentioning clearly the mergers.[4]

The result of long negotiations and Spaak Reports was the adoption of the Treaty establishing the European Economic Community (EEC Treaty) in 1957 which extended the rationale of the internal market from coal and steel common governance to removal of all trade barriers between Members States. Thus, competition rules have been again introduced in the primary law, building the two main pillars – firstly, antitrust consisting in restrictive agreements regulated by art. 85 and abuse of dominant position prohibited by art. 86 and secondly, state aid regulated by art. 92 to 94.

Article 85:

"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial

[1] European Commission (2002), *Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty*, OJ C 152, p. 5.
[2] *Idem*, p. 5.
[3] The Messina Declaration, the objective of the "Common Market" letter g).
[4] Buch-Hansen, H., *op. cit*., 2008, p. 97.

usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;

- any decision or category of decisions by associations of undertakings;

- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not;

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Article 86:

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

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

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Article 92:

"1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in

order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. However, the aids granted to shipbuilding as of 1 January 1957 shall, in so far as they serve only to compensate for the absence of customs protection, be progressively reduced under the same conditions as apply to the elimination of customs duties, subject to the provisions of this Treaty concerning common commercial policy towards third countries;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest (28);*

(e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission."

Article 93:

"1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 169 and 170, refer the matter to the Court of Justice direct.

On application by a Member State, the Council, may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 92 or from the regulations provided for in Article 94, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the

case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

Article 94:

"The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 92 and 93 and may in particular determine the conditions in which Article 93(3) shall apply and the categories of aid exempted from this procedure."

If we compare the two founding treaties, we can notice that their provisions on competition differ fundamentally, in terms of both the form and content. As regarding the form, the European Coal and Steel Community Treaty (ECSC) is a *traité-loi* providing the regulatory content, and the European Economic Community Treaty (EEC) is a *traité-cadre*, which creates a broader legal framework that needs secondary legislation or caselaw in order to produce real effects[1] .

The remaining four articles of the competition chapter provide procedural indications for the enforcement process of art. 101 and 102. As stipulated in art. 103, the Commission shall propose secondary legislation aimed to provide detailed rules for their application.

In this regard, in 1962 the Council adopted Regulation no. 17, the first regulation laying down implementation rules of art. 101 and 102, granting the Commission exclusive competence over the exemption system, described by some[2] as *"one of the most important ever enacted".*

From that moment, competition became centralized, based on a notification system under which existing and new agreements, decisions and practices of the kind described in the Treaty's Article 85 (1) had to be notified to the Commission if they were to be exempted from prohibition under Article 85 (3) In order to accelerate the process, the Commission adopted Regulation no. 19/65, 2821/71, 3976/87, 1534/91 and 479/92 for block exemptions establishing standard categories of agreements, decisions and concerted practices which were automatically deemed exempted from art. 101 (1) upon notification.

The Regulation 17 was the act by which a Competition Directorate-General within the Commission, was established to be the one enforcing the EC Treaty's competition rules and it was equipped with powers that were more extensive than those in the portfolio of any other DG as well as a significant degree of operational

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[1] Bulmer, S., *Institutions and Policy Change in the European Union: The Case of Merger Control*, „Public Administration", Vol. 72, Autumn, 1994 p. 427.

[2] Wilks, S. & I. Bartle, *The unanticipated consequences of creating independent competition agencies*, „West European Politics", Vol. 25, No. 1, 2002, p. 164.

autonomy vis-à-vis member states and other EC institutions.[1]

The Commission was the first to take initiative when mentioned the necessity of the EC merger control in its "*Memorandum on the concentration of Enterprises in the Common Market*" in 1966 and adopted the first legislative proposal in 1973.

For a long period of time there was no consensus amongst the Member States which were questioning its necessity. In the end two major points remained to be discussed: the jurisdiction (how and when the control should be transferred to the Member states from the Commission and vice-versa, what the relationship between the national and European law should be) and the appraisal criteria (if and what other factors besides competition should be taken into account, when a particular merger should be considered compatible or not with the common market). The Commission tried not only to convince the Council to pass another specific merger regulation, but it also used Articles 101 and 102 TFEU as a starting point for preventing creating a dominant position through take-overs and acquisitions.

The abuse of Article 102 was limited by its mentioning that the acquiring enterprise must have a dominant position at the moment of the merger, whereas the Article 101 could be applied to mergers only on a broader perspective because it affects mostly agreements between independent firms and it would be considered artificial to apply it to hostile take-overs.

In June 1985 the Commission issued a White Paper entitled "*Completing the Internal Market*", which did not make any reference to the merger control, but it shaped the beginning of the restructuring of the business and it contributed along with the pressure from the industry, the single market concept and the increasing number of mergers to the conclusion that the European market needed a merger control system.

Along with the overall change initiative instilled by Delors Commission in the 1980s, EU Competition Policy entered the initial phase of modernization which coincided mainly with the adoption of 1989 Merger Control Regulation introducing the last pillar of competition. This regulation was of paramount importance since it has contributed to the adoption of *"the more economic approach",* ensuring a shift towards the effects-based approach which changed the objectives that the Commission attributed to competition policy as part of the ordoliberal legacy to objectives more aligned with those of Chicago School.

The second phase of modernization was initiated by Commissioner Mario Monti who, at the beginning of his mandate, planned to enhance the role of economics in the interpretation and enforcement of EU competition rules[2], this reform being

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[1] Buch-Hansen, H., *op. cit*., 2008, p. 131.

[2] Monti, M., *EU Competition Policy*, in *Fordham Annual Conference on International Antitrust Law & Policy*, New York, 2002, p. 7.

expedited by the Court's annulments of three merger prohibitions issued by the Commission. In this regard, binding and non-binding complementary acts, aimed at reshaping the interpretation and application of primary law, have been adopted.

In its 2004 Horizontal Merger Guidelines, the Commission goes further and states explicitly that *"the aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"*[1]. On condition that efficiency gains outweigh the anti-competitive restrictions of an agreement, the Commission would be eager to declare it compatible with the internal market because it is yielding products with lower prices and better quality.

Next to the treaties and Regulations, there was another source of EU Competition Policy, sometimes more accurate and focused on the issue, the case law. The early decisions and judgements issued by the Commission and, respectively, by the European Court of Justice converged into a similar interpretation on the role of competition.

In the pivotal cases *Consten and Grundig v Commission*[2] and in *Walt Wilhelm and others v Bundeskartellamt*[3], the Commission explained that the respective agreement and concerted practice have infringed art. 85. The Court reinforced in both cases that the article aimed to prevent undertakings from restoring the trade barriers between MS so that *"the most fundamental objectives of the Community"*[4] can be fulfilled by eliminating *"the obstacles to the free movement of goods (...)"*[5], these cases supplementing the Treaties by offering for competition the role for safeguarding the internal market.

In time, the two institutions started to express differently and two important cases stand as a proof of this, *Continental Can case*[6] and in *British Airways case*[7], where the Court stated that art. 86 was aimed not only at practices causing direct damage on consumers, but also at those inflicting indirect damage *"through their*

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[1] European Commission, *Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty*. C 101/97. Brussels, 2004.

[2] Joined cases 56 and 58-64 *Établissements Consten S.à.R.L.* and *Grundig-Verkaufs-GmbH v. Commission of the European Economic Community* (1966).

[3] Case 14-68 *Walt Wilhelm and others v. Bundeskartellamt* (1969).

[4] Paragraph 8, Joined cases 56 and 58-64 *Établissements Consten S.à.R.L.* and *Grundig-Verkaufs-GmbH v. Commission of the European Economic Community* (1966).

[5] Paragraph 5, Case 14-68 *Walt Wilhelm and others v. Bundeskartellam*t (1969).

[6] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities* (1973).

[7] Case C-95/04 P, *British Airways plc v. Commission of the European Communities* (2007).

impact on an effective competition structure"[1]. In GSK case[2], the Commission explained that article 85's aim was to protect "*the welfare of final consumers (...)*"[3]. The Court insisted both in this case and in *T-Mobile case*[4] that art. 85 protected not only the competitors and consumers, but also *"competition as such"*[5]. As indicated by its decisions and reinforced in recent secondary law and non-regulatory documents, the Commission shifted its interpretation to a consumer welfare.

While presenting the measures prepared for the modernization of EU Competition Policy, Commissioner Monti suggested that the Commission perceived its enforcement from consumer welfare lens, all the effects on competition being analyzed in relation to the harm inflicted upon consumers[6]. The Court, instead, insisted these cannot be the only benchmark and the effects on the market structure were also to be considered and, by that it remained more aligned with the ordoliberal paradigm.

1.3. Purpose of merger legislation

The merger control has become a crucial procedure to be applied in current European economies, mainly due to the intensification of mergers in different old and new industries and the effects of last economic crisis and digital revolution, which have changed fundamentally the view in the field.

The main purpose of the merger legislation is to overview the concentrations of undertakings that may produce negative effects and impede competition in the European single market, as mergers eliminates the competition between the merging parties, but, additionally, they may destroy existing competitors by pressuring them and, as a result, if there is a substantial reduction of actors in the specific industry the market will be less oriented towards consumer.[7]

In order to sustain a competitive environment after a merger, the authorities have to test which will be the impact on competition, to analyse which should be the quantity and quality of evidence needed for such assessment and, in the end, determine if they allow or not the merger. For such investigation to be successful and the

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[1] paragraph 26, Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities* (1973).

[2] *GlaxoSmithKline Services Unlimited v. Commission of the European Communities* (C-501/06 P) and *Commission of the European Communities v. GlaxoSmithKline Services Unlimited* (C-513/06 P) and *European Association of Euro Pharmaceutical Companies (EAEPC) v. Commission of the European Communities* (C-515/06 P) and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v. Commission of the European Communities* (C-519/06 P) (2009).

[3] paragraph 46, Case C-501/06 P*, GlaxoSmithKline Services Unlimited v. Commission of the European Communities* (2006).

[4] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* (2009).

[5] paragraph 63, *GlaxoSmithKline Services and Others v. Commission and Others* (2009)

[6] Monti, M., *EU competition policy after May 2004*, in *Fordham Annual Conference on International Antitrust Law and Policy*. New York, 2003.

[7] Kokkoris, I. & Shelanski H., *EU Merger Control: A Legal and Economic Analysis*, Oxford University Press, 2014, p. 11.

decision to allow or reject the merger to be in accordance with the intended principles, there is a need to evaluate the possible effects in the market and there can be identified two types of such effects: non-coordinated effects and coordinated effects.[1]

It is considered that a merger produces non-coordinated effects if the displacement of the competitive constrains exercised on each other by the parties involved in the merger may increase the new undertaking's market force. This kind of effects indicate the overall detrimental welfare effects resulted from the change in price policies of the resulting post-merger undertaking. On the other hand, the coordinated effects are represented by the ones of overall detrimental welfare effects anti-competitive conduct as a result of the merger.[2]

[1] For a definition of unilateral and coordinated effects see further: *Joint US Departament of Justice and Federal Trade Commission Horizontal Merger Guidelines 1992*: https://www.justice.gov/ archives/atr/1992-merger-guidelines (accesed on 1.06.2020).
[2] Kokkoris, I., *Merger Control in Europe: The Gap in the ECMR and National Merger Legislations,* Routledge, 2010, p. 10-12.

Chapter 2
History of European Merger Control

Mergers of companies are representing today an area of high importance, for both scholars and practitioners in competition law as they lead, next to undoubtable positive effects on the business, to major changes on the market. The European market had continuously developed after the second world war and it started sensing a need for a clear legislation in the field of concentrations, following the establishment of the Single Market, mainly due to the tendency of undertakings to collaborate with the goal to benefit from the new market opportunities and, furthermore, hold the pressure coming from the American and Japanese companies[1] very active at that time on the European market, mainly stimulated by the globalisation.

We can argue that today the merger control can be considered the *"cornerstone of EU competition policy"*[2], but it wasn't always like that, as at the beginning it was hardly provided by the founding treaties, merger rules being present only in the first act, the Treaty Establishing the Coal and Steel Community (ECSC), but missing totally from the European initial platform, the Treaty Establishing the European Economic Community (EEC), later the actions to increase the Commission's powers on the merger control failed successively and only later, in 1989 we received a first act in the area, the Merger Control Regulation (MCR), reformed later in 2004 after pivotal Commission's decisions and European Court of Justice (ECJ)' cases.

Some authors[3] developed even a structure of the evolution of the merger rules, based on the pivotal moments of change of paradigm:

1. the foundations of the European merger rules provided by the specific provisions from the founding treaties of the European Communities and the Regulation no.17 from 1962[4]

2. the testing period from 70's and 80's with many debates, decisions of the Commission and cases in front of the European Court of Justice

3. the maturing period with the two Regulations enacted on Merger Control. This period was splitted by others in two, one being related with the first

[1] Scwartz E., *Politics as Usual, The History of the European Community Merger Control*, „Yale Journal of International Law", Vol. 18:607, 1993, p. 608.
[2] McGowan, L., Wilks, S., *The first supranational policy in the European Union: Competition Policy*, „European Journal of Political Research", no. 28, 1995, p. 152.
[3] Weitbrecht, A., *From Freiburg to Chicago and Beyond - the First 50 Years of European Competition Law*, „European Competition Law Review", Vol 29, issue 2, 2008, p. 81–8; Gerber, D., *op. cit.*, 1998, p. 342.
[4] EEC Council: Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty.

European Merger Regulation[1] from 1989 and a second:

4. The reform of the merger control though the second Regulation in the field[2] from 2004 accompanied by the Regulation from 2003 on the implementation of treaty provisions on competition.[3]

2.1. The presence of merger rules in the founding treaties

The origins of European Merger rules are in the first founding treaty, Articles 65 and 66 from Treaty establishing the European Community of Steel and Coal, as from the beginning, the member states, influenced by the international evolution after the war, intended not only to shift supervising control to the High Authority, but to stimulate competition.[4] The main objective of the ECSC Treaty[5], as supplied by Article 2, was to grant, through the common market for coal and steel, economic growth, lower unemployment and a higher standard of living.[6]

As a proof of the importance of the first provisions stands the European Commission Communication in which has explicitly stated that *"articles 81 and 82 of the EC Treaty are clearly inspired by the corresponding Articles 65 and 66(7) of the ECSC Treaty"*[7]. We may easily accept that, having essentially the same substance, both art. 65 and art. 81 prohibited the agreements, decisions or concerted practices which have as object or effect practices encompassed, just the evolution towards the common market differentiated the second. It should be noticed that Article 66 expressly dealt with merger control and Article 66(7) was based on dominance, as an effect of the influence of German competition.[8]

The six founding states pursued in their quest towards an European inte-

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[1] Council Regulation (EEC) No. 4064/89 of 21 December 1989, on the control of concentrations between undertakings [1989] OJ L395/0001.
[2] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of competition between undertakings (the EC Merger Regulation) [2004] OJ L24/1.
[3] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [2003] OJ L1/1.
[4] Fairhurst, J., *Law of the European Union*, 6th edition, Pearson Longman, 2010, p. 6.
[5] The ECSC Treaty expired on 23 July 2002. Thus, the coal and steel sectors are now subject to Articles 101 TFEU and 102 TFEU, former 81 and 82 EC Treaty. The consequences of this expiry are explained in the Commission's document Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, OJ [2002] C152/5, [2002] 5 CMLR 1036, Section 2: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_152/c_15220020626en 00050012.pdf. (accessed on 1.06.2020).
[6] Sauter, W., *Coherence in EU Competition Law*. 1st edn. Oxford: Oxford University Press, 2016, p. 27.
[7] Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, OJ [2002] C152/5, [2002] 5 CMLR 1036, Section 2: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_152/c_15220020626en 00050012.pdf, p. 5 (accessed on 1.06.2020).
[8] Kokkoris, I., *op. cit.*, 2010, p. 12.

gration and designed in the next treaty, the Treaty establishing the European Economic Community (EEC Treaty)[1], the common market, which was to be established in a transitional period[2], with the clear intention to expand the application of the common market of coal and steel to a common governance of all economic areas and removal of trade barriers between Members States.

As a consequence, the competition provisions had to be again placed in the text of the treaty, in a new format under the configuration of two pillars: one related to antitrust and consisting in restrictive agreements regulated by art. 85 (now article 101) and the abuse of dominant position, prohibited by art. 86 (now article 102) and another, on state aid regulated by art. 92 to 94 (now articles 107 to 109).

Articles 85 and 86 of the EEC Treaty provided the European Commission with the authority over competition[3], both articles enumerating actions by which they could control or prohibit, but the use of the phrase *"in particular"* in both cases suggests that the lists are not meant to be exclusive[4]

Differing from ECSC Treaty, the EEC Treaty doesn't mention anything concerning mergers, some authors[5] suggesting a change of view from the founding states, but there must be a clarification in relation to the comparative analysis of the texts, as ECSC Treaty was concluded in a politically and economically vulnerable Europe, with the underlying objectives of preventing another war and rebuild the countries and governing only the coal and steel industry, historically dominated by mergers[6], where explicit merger control was imperative. On the other hand, according to authors[7], the original EC member states sought to encourage, rather than restrict, concentration of European industry, having greater objectives in relation to entire market, cross-border mergers being seen as means of fulfilling the integration and growth within the internal market and undertaking developing and strengthening their European position and gain global competitiveness.[8]

However, the above mentioned reasons may not fully explain the failure to include merger control, its absence in the Treaty provisions suggesting that maybe some additional factors influenced the final text, one being a divergence of strategic interests between governments[9]. On the other hand, the Court recognised, in a later

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[1] Treaty establishing the European Economic Community (EEC Treaty): https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0023&from=EN (accessed on 1.06. 2020).
[2] Barnard, C. & Peers, S., *European Union Law,* Oxford University Press, 2014, p. 15.
[3] Scwartz E., *op. cit*., 1993, p. 610.
[4] Goyder, D. G., *op. cit.*, 1993, p. 14.
[5] Joliet, R., *Monopolization and abuse of dominant position - A Comparative Study of the American and European Approaches to the Control of Economic Power,* La Haye, Liège, 1970, p. 269.
[6] Hurwitz, J. D., *The Impact of the Continental Can Case on Combinations and Concentrations within the Common Market*, „Hastings Law Journal", 25(3), 1974, p. 486.
[7] Pappalardo, A., *Le Reglement CEE sur le controle ses concentrations*, „Revue Internationale de Droit Economique", no. 1, 1990, p. 3, 4; Bulmer, S., *op. cit*., 1994, p. 427.
[8] Damro, C. and Guay, T. R., *European Competition Policy and Globalization*. 1st edition., Basingstoke: Palgrave Macmillan, 2016, p. 15.
[9] Scwartz E., *op. cit*., 1993, p. 613.

case[1], that article 85 could apply to *“agreements between undertakings entailing a structural modification of an undertaking”.*

In conclusion, the competition provisions from EEC Treaty, especially the lack of merger control, left many questions unanswered, some authors being convinced that the action was intentional, mainly for triggering a cooperation between the national governments and between them and the main executive institution, the Commission, for the developing of new competition rules, taking into consideration the provisions left by EEC treaty.[2]

The competition policy provisions of the EEC Treaty needed to be implemented though further legislation, either at European level or together with the member states at national level, especially for the operational activities such as identifying situation not in accordance with the principle enacted and intervening by blocking or advising.[3]

The EEC Treaty in its article 87(1) placed the Council and the Commission in the legislative positions for the adoption of regulations or directives for the implementation of the principles provided by articles 85 and 86, so they decided to attribute this job to one of the Directorates General, namely Competition DG, which came with a draft of a Regulation which was adopted in 1962.[4]

The importance of this Regulation, some authors considering it as *”one of the most important ever enacted”*[5], comes from the way this special structure of the Commission, Competition DG, was placed with most of the tasks and powers in competition matters and by that opening a door to future competition unit of regulation.[6]

In the process of drafting the act, there appeared problems in relation with the degree of autonomy the Commission should have enjoyed in its decisions in competition matters, France and Luxembourg disagreeing with the proposal in which to the European executive was granted a significant autonomy and enough power to shape the competition policy[7] and, by that, to impose the measures on merger control, but the Regulation was unanimously adopted on February 6th 1962, especially because of the support of the other members.

The main provision of regulation 17 was the one empowering the Commission *“power to apply Article 85(1) and Article 86 of the Treaty”*[8] under the supervision of the Court which has the power to review its decisions.

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[1] Joined Cases 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v. Commission of the European Communities:* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61984CJ0142

[2] Goyder, D. G., *op. cit*., 1993, p. 27-30.

[3] Scwartz E., *op. cit*., 1993, p. 611.

[4] EEC Council: Regulation No 17: First Regulation Implementing Articles 85 and 86 of the Treaty

[5] Wilks, S. & Bartle, I., *op. cit*., 2002, p. 164.

[6] Buch-Hansen, H., *op. cit*., 2008, p. 102.

[7] Von der Groeben, H., *The European Community. The Formative Years*, The European Perspectives Series, 1987, p. 108.

[8] Article 9, paragraph 1, EEC Council: Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty.

The Commission was empowered to act through the Competition Directorate General and this DG reached a higher position compared with the other similar structures, even getting a certain operational autonomy in relation to member states and other European institutions, but, on the other hand, it brought unexpected issues in relation to the required notification to be addressed the Commission, by February 1963 being received around 35000 notifications from undertakings[1], a huge workload impossible to be assessed by the new understaffed structure of the Commission.

Regulation 17 developed a notification system under which the new agreements, decisions and practices covered by the treaty provisions had to be reported to the Commission if they were listed by exemption[2] Competition DG being empowered to: *"undertake all necessary investigations into undertakings"* like:

- *"to examine the books and the other premises records*
- *to take copies or extracts from the books and premises records*
- *to ask for oral explanations on the spot*
- *to enter any premises, land and means of transport of undertakings"*[3]
- *"to impose fines on firms who failed to comply with the rules in various ways"*[4]

As we can notice, there was granted a certain autonomy of operation to Competition DG, which, being overwhelmed, needed the intervention of the Council in 1965 approving the introduction of a so-called block exemption system by which allowed the DG to exclude groups of agreements from the regulation.[5]

In relation to merger control, we noticed already that the EEC Treaty didn't mention any powers for the Commission, but neither the Regulation 17, which purpose was to be the instrument of treaty's provisions application, but in 1963 there was appointed an working group which had as objective, among others, to analyse the connection between concentration and the Treaty provisions and the necessity to address notification for the undertakings with a strong position in the market for mergers or other similar cases.[6]

As a result of this task group's work, the Commission issued a Memorandum on Concentrations in 1966 through which mergers were officially acknowledged as beneficial for the EU integration objective and article 86 from the Treaty accepted as being possible to be applied to *"a concentration in which participated an undertaking*

[1] Goyder, D. G., *op. cit*., 1993, p. 50.

[2] Articles 4, 5, 6 and 8 of EEC Council: Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty on notification requirements and criteria for exemption.

[3] Article 14(1) of EEC Council: Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty.

[4] Article 15 of EEC Council: Regulation No. 17: First Regulation Implementing Articles 85 and 86 of the Treaty.

[5] Cini, M. & McGowan, L., *Competition Policy in the European Union*, Macmillan, 1998, p. 66-69.

[6] The Commission, *Seventh General Report on the Activities of the Community*, Bruxelles and Luxembourg, 1964.

having a dominant position"[1], view confirmed by the Court in Continental Can case.[2]

The Memorandum on Concentrations was a first cornerstone in the evolution of merger control legal framework, since it clarified the applicability in the field of mergers of both article 85 (now art. 101) and article 86 (now art. 102) for the first article considering it may not apply to the field, mainly due to its text configuration and because it opposed to agreements concerning market behaviour, mergers cannot be subject to ex-ante verification, they, by definition, affect market structure, eliminating competitors, which would have automatically rendered them incompatible with the exemption prospect. In the memorandum from 1966, the European Commission stated that *" it is not possible to apply Article 85 to agreements whose purpose is the acquisition of total or partial ownership of enterprises or the reorganisation of ownership of enterprises (merger, acquisition of holdings, purchase of part of the assets)"*[3], faulting the article from both over-inclusiveness and under-inclusiveness.[4]

The Commission considered that the criteria of article 85(1) was excluding acceptable mergers and for that it considered it being over-inclusive[5], on the other hand, the exception criteria in art. 85(3) was possible to create an *"industrial policy loophole"*[6] affecting the efficiency of the merger control and by that the article was considered under-inclusive.

On the other hand, the Commission concluded that article 86 (now art. 102) could applied to mergers, following the results of a comparative reasoning which highlighted that the obstacles impeding article 85 (now art. 101) from being applied were not true for the other, as it did not consider the means through which the dominant position has been acquired, but its effect, meaning the abuse itself[7].

Even so, the Commission considered that article 86 (now art. 102) was only applicable *"under certain conditions"* like when at least one of the business involved had a pre-merger dominant position, a reasoning which was challenged by some authors[8] who identified two major abuse theories, concluding that the behavioural one was the most appropriate for interpretation article 86 (now art. 102).

The European politics of the 60's can explain why the Commission refused the application of art. 85 in cases of merger control, from 1965, France pushed for a

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[1] *The Commission Memorandum on the Problem of Concentrations in the Common Market,* Brussels, 1966, p. 7–8.

[2] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61972CJ0006, accessed on 1.06.2020.

[3] *The Commission Memorandum on the Problem of Concentrations in the Common Market,* Brussels, 1966, p. 58.

[4] Scwartz E., *op. cit.*, 1993, p. 614.

[5] Hawk, B.E, *The EEC Merger Regulation: the First Step Towards One-Stop Merger Control*, „Antitrust Law Journal", 1990, Vol. 59, p. 195-196.

[6] Scwartz E., *op. cit.*, 1993, p. 614.

[7] *The Commission Memorandum on the Problem of Concentrations in the Common Market,* Brussels, 1966, p. 27-28.

[8] Joliet, R., *op. cit.*, 1970, pp. 247–250.

crisis, the so-called ”empty chair crisis”, when De Gaulle prohibited the participation in any EC decisions taken with qualified majority rather than unanimity and, even if that was triggered by the agriculture policy, the implication were huge for competition policy also.[1]

2.2. Debates, Court's decisions and failures

It is very possible that due to the French hostility, the Commission waited till early 70's to pick a case to reconfigure the merger control regulation. This is the moment of the judgement of the Court in the *Continental Can case*[2], a Court review validating the Commission's opinion that mergers could fall, although under a conditionality, within the scope of the treaty provisions.

In 1969, US-based Continental Can Undertaking Inc. (Continental Can), the largest producer of metal, plastic and paper packages, acquired shares amounting to 85.8% control of the Germany-based Schmalbach-Lubeca-Werke AG (SLW), the largest producer of metal packages for meat, fish and crustacea in Europe at that time. Continental Can also had minority shareholding in several EU-based metal packages producers, like Thomassen & Drijver-Verblifa N.V (TDV) of Netherlands. As part of its expansion plan in Europe, the American undertaking envisaged the setting up of Europemballage Corporation (Europemballage) in which it intended to transfer all of its Europe-owned shares. Continental Can would have then arranged for the holding to make an offer to purchase the remaining shares in TDV by offering the necessary funds to undertake this acquisition. Despite the Commission's notification that this operation contravened to art. article 86 (now art. 102), in 1970, Europemballage, proceeded with the foregoing acquisition. In short, Continental Can owned all of the shares in Europemballage which, in turn, had 85.8% control in SLW and 91.07% control in TDV.

In 1971, the Commission decided that Continental Can infringed article 86 (now art. 102) by abusing of its dominant position on the metal packages market in EU (held through SLW), when it acquired, though Europemballage, majority shareholding in TDV, a competitor having a strong position in the neighboring market. The Commission reasoned that an undertaking strengthening its dominant position by means of a merger and effecting in the elimination of potential or actual competition was prohibited by art. 86. Ultimately eliminating potential competition between TDV and SLW in a substantial part of the Common Market, the American undertaking was asked to stop the infringement.

The case was particularly difficult to uphold considering that no abusive conduct was employed by the involved parties, the illegality of the operation pertaining

[1] Scwartz E., *op. cit.*, 1993, p. 616.

[2] Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities* (1973).

to the intention and political considerations, i.e. American firm controlling a substantial part of the Common Market.

Issue. Continental Can requested to the Court the annulment of the Commission's decision of 9 December 1971. Thus, the issue that triggered the dispute between the parties and that was raised before the Court referred to the interpretation of art. 86 and whether it was applicable to mergers [1].

Decision. The Court annulled the Commission's decision of 9 December 1971, concluding that it *"has not, as a matter of law, sufficiently shown the facts and the assessments on which it is based"*[2].

Reasoning. Continental Can challenged the Commission's interpretation of art. 102 invoking both its literal interpretation and the comparison with art. 66 (1-6) of ECSC which the legislators deliberately did not include in the EEC Treaty as they did with art. 65 and 66(7). However, the Court did not assign much relevance to this argument. The undertaking further explained that, since art. 102 was concerned solely with behavioral harm, the structural strengthening of a dominant position though of a merger went beyond its scope.

Establishing whether the term *"abuse"* holds true for both behavioural and structural instances or not, the Court employed a teleological interpretation. It alleged that, albeit their generality, both art. 101 and 86 must be interpreted in the light of the broader EU objectives, i.e. art. 3 (f) of the EEC Treaty which stipulated that undistorted competition should be ensured in the internal market, the underlying meaning suggesting that competition, be it real or potential, must not be eliminated in the first place.

This reasoning implied that any infringement of the broad art. 3(f) EEC, infringed also art. 85 (now 101) to 106[3]. Comparing art. 85 which explicitly prohibited agreements that impeded competition with art. 102 which did not provide this condition, the Court alleged that it would be against the spirit of the EU objectives to treat agreements and mergers differently, since the articles would cancel each other. In addition, letter (c) and (d) of the non-exhaustive list of abuses provided by art. 102 epitomize indirect harm of consumers inflicted through the impact on the structure of effective competition. Thus, the Court rejected the relevance of any distinction between market behaviour/market structure practices, declaring art. 86 applicable irrespective of the means of strengthening/acquiring a dominant position.

In the end, it was the abuse that was scrutinized. In substance, the Court's reasoning was aligned with that of the Commission, both upholding for a broader interpretation of art. 86 in favour of certain mergers. Yet the decision was still annulled on ground of identified shortcomings in the Commission's appraisal of the relevant market (essential in demonstrating a dominant position relative to competitors).

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[1] *Idem*, p. 23.
[2] *Ibid*, p. 37.
[3] Hurwitz, J. D., *op. cit.*, 1974, p. 481.

To conclude, the issue was far from being settled as there was no clear guidance on the specific application of art. 86 on mergers, resulting in greater legal uncertainty.

Firstly, lack of distinction in market power degrees and of provisions similar to those of art. 101 stipulating the elimination of competition condition entailed that, in absence of any objectionable feature, mergers could strengthen a dominant position up to a monopoly without being subject to art. 86[1]. At the same time, horizontal mergers caused the elimination of a competitor though its absorption which, based on the Court's broad interpretation in terms of art. 3 (f), was abusive as a means of gaining/strengthening dominant position in the sense of art. 86.

Secondly, dilemmas arose when assessing comparatively the impact of acquisition of a dominant position through a merger involving many small market share undertakings relative to the elimination of many competitors[2]. In such case, art. 86's prerequisite of previous dominant position did not hold true, yet considering the Court's interpretation, such a merger clearly would distort competition.

Most importantly, art. 86 was not designed to allow an ex-ante control through notifications, providing only for an ex-post assessment of mergers. Thus, their divestiture in case of incompatibility was impractical since mergers imply integration of management and resources. Art. 86 constituted a flawed instrument for merger control, increasing uncertainty prevailing in this area of competition law. Thus, Continental Can case paved the way to the formulation of a more substantial measure.

Moreover, article 86 (now art. 102) covering behavioural abuses of the undertakings, the Court extended it to the merger-specific structural approach. In conclusion, 85 (now art. 101) was declared inapplicable to mergers and article 86 remained the only legal instrument available, the case secured an apparent compromise for merger control in an EU without formal legislation.[3]

Whilst, at first, the Commission had the approach as Article 85 could not be used to control mergers, later, by the mid 80s it changed the view on this issue and began to see a role of the respective provision, considering that where an agreement on a proposed merger appears between undertakings, it may allow the Commission to influence or determine the outcome[4], one case proving the new vision was *Schmalbach-Lubeca AG v. Carnaud SA case* from 1988, when the Commission concluded that the sale would infringe Article 85, as it would result in two competitors on the can market jointly controlling a third.

Following Continental Can case, numerous other cases strengthened the position of the Commission in using art. 86 (now art. 102) to prevent anti-competitive practices.

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[1] *Opinion of Mr Advocate General Roemer delivered on 21 November 1972*. ECLI:EU:C:1972:101.
[2] Hurwitz, J. D., *op. cit.*, 1974, p. 491.
[3] *Idem*, p. 517.
[4] Byrne, N., *Control of Mergers in the European Community*, „European Management Journal", Vol. 10, No. 4, 1992, p. 450.

In 1978, in *Chiquita Bananas case*[1], the Court decided to sustain the Commission's decision in the case of an American banana vendor which failed to respect art. 86 by not allowing its resellers to trade the bananas while they were still green. The court, in this case, defined *"dominance"* as the *"position of economic straight enjoyed by an undertaking, which enables it…to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."*[2]

In another case, *Hoffman-La Roche case*[3] the Court lowered the threshold defined by the *Continental Can case,* looking just for the existence of a weaker level of competition rather than the *"substantial"* effect required in the former judgement. The Court qualified the abuse as *"an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened, (and the behaviour) has the effect of hindering the maintenance of the degree of competition still existing"*[4]

Moreover, next to the cases explaining the application of Article 86, there were several ones which clarified the Commission's power to control mergers though article 86.[5] One of these cases was *Wilhelm & Ors case*[6] in which the Court held that the national authorities can apply domestic competition law in parallel with the commentary one, in case of conflict of the two the supranational one prevailing, but if the Commission evaluates as not being harmful an action of undertakings didn't automatically exclude possible national prohibition[7].

In *BRT v. Sabam case*[8], the Court held that articles 85 and 86 have direct effect, an important milestone in the interpretation of the competition rules, especially from the point of view of the future drafting of merger control regulations which had to take into account the possibility of individuals, especially companies who might use the rights coming from the treaty.

The caselaw from 60's and 70's brought in discussion the different interpretations on the treaty provisions and the Regulation enacted for their application, creating debates between the Commission and national authorities, but especially between the Commission and the undertakings and one of the main issue was the application of the provisions in merger control area.

The Court decisions recognised the possibility of article 86 to be applied to merger control, reanalysed the thresholds for evidence of dominance and abuse and

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[1] Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities. Chiquita Bananas.*

[2] *Idem*, par. 277.

[3] Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* (1979).

[4] *Idem.*

[5] For more insights on the cases which influenced the Court interpretations on merger control in that period, see.: Scwartz E., *op. cit*., 1993, p. 621-622.

[6] Case 14/68 *Wilhelm & Ors v. Bundeskartellamt* (1969).

[7] Van Bael, I. & Bellis, J.F., *Competition Law of the EEC*, 2nd edition, 1990, p. 85.

[8] Case 127/73 *BRT v. Sabam* (1974).

confirmed the primacy and direct effect of articles 85 and 86 over the national competition law.[1]

The main conclusion of the analysis of the caselaw in the period of overview is that the Court offered the Commission the necessary tools for applying the existing provisions, which, as indicated at the beginning of this chapter, were not covering merger control, to the most dynamic area in the market at that moment, the one of mergers[2], still, the Commission was not very eager to use it, Continental Can case being the only moment when was required an application of article 86 to a merger.

Nevertheless, the Commission made use of the threat of using article 86 to act against some mergers, but even that happen only several times, like in the cases BSN/Gervais/Danone or Amicon Corp/Fortia mergers, most of the important mergers of that period like Alfa Romeo/Fiat, Eagle Star/Allianz, MBB/Daimler Benz, Brown-Boveri/Asea and others not being checked by the Commission.

By the early 70's, the "Golden Age" was coming to its end, the world economies starting entering the crisis, many of them facing productivity loss, increasing unemployment and inflation[3] and the European states started shifting from the Fordist mode of growth applied till then to a neoliberal view with the *"pursue non-inflationary growth through tight monetary policy, prudent fiscal policy, reforms to make markets function better and further trade liberalization."*[4]

The big economies of the Communities have changed their economic views at the same time with the governments and, by that, reanalysed the national legislation in different fields of interests, mergers being one of them.

The first state to start the change was United Kingdom, where the Conservative Thatcher government came into power in 1979, bringing a new wave of neoliberal ideas of regulation in the government[5], the merger control rules being also affected "*to direct attention in an increasingly economic oriented direction"*[6] with changes like raising the threshold for intervention of authorities .

In France, the new socialist government lowered the minimum wage, reduced working hours and hired more people in the public sector, but what influenced a lot the market was the nationalisation process and unaccountable state aid offered[7]. All these measures leaded France in a worse situation than before and it was only by

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[1] Scwartz E., *op. cit.*, 1993, p. 621-622.
[2] Goyder, D. G., *op. cit.*, 1993, p. 235.
[3] Glyn, A., Hughes, A., Lipietz, A., Singh, A., *The Rise and Fall of the Golden Age*, in Marglin S.A., Schor J.B. (eds.), *The Golden Age of Capitalism. Reinterpreting the Postwar Experience*, Clarendon Press, 1990, p. 43-47.
[4] Ougaard, M., *Political Globalization. State, Power and Social Forces*, Palgrave, 2004, p. 90.
[5] Coates, D., *Models of Capitalism in the New Wold Order: the UK Case*, „Political Studies", Vol. 47, no. 4, 1999, p. 653; Maican, O.-H., *The legal regime of competition in United Kingdom*, „Juridical Tribune – Tribuna Juridica", volume 5, issue 1, June 2015, p. 113.
[6] Scott A., Hviid M., Lyons B. & Bright C., *Merger Control in the United Kingdom*, Oxford University Press, 2006, p. 7.
[7] Scwartz E., *op. cit.*, 1993, p. 633.

the intervention of the Minister of Finance, Jaques Delors, the future to come President of the European Commission to go back to a market economy.[1]

In relation to merger control national regulation, the legislation was amended with the idea to liberalise the market and the main amendment was the creation of Competition Council, an independent institution from the Ministry of Economics, a way toward neoliberalism.[2]

In Germany, there was a shift from left to right with the CDU regaining power with the Kohl Government, a clear signal for neoliberal policies and the actions that followed respected that, the economy increasing its internationalisation, ensuring low inflation and economic stability.[3]

In these times of decisive changes and economic hurdles, the Commission came with a proposal of a merger regulation[4] indicating the clear situation in which the Commission would have to intervene.

The regulation draft from 1973 was a complex one which stated that the Commission had the authority to review the mergers with at least one company with Community dimension, the world-wide turnover of the parties was more than 200 million ECU and more than twenty-five percent of the market share in one of the states. The criteria used for the evaluation of the effects of the merger would have been, in accordance with the proposal, the product substitution, supply and demand, financial power.

The member states, especially Italy, France and United Kingdom, could not come to an agreement due to economic and social principles on which the text was based, but even harder to accept was the power of the Commission to review the mergers, as they wanted it in the hands of the Council.[5]

The Commission returned in 1981 with another proposal after eight years in which it modified the threshold from 200 to 500 million ECU and allowed the mergers with less than twenty percent in the Community but it didn’t insert the main objection that made the previous one to fail and kept the authority, so the Council reject the proposal.

The third time, in 1984, once again, the Commission raised the threshold, the turnover at 750 million and fifty percent market share in a product part of the Community, but still failed to allow the Council to have the final decisions, being provided a consultation procedure and, as a consequence, the proposal, again, failed in the Council.

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[1] Dormois, J.-P., *The French Economy in the Twentieth Century*, Cambridge University Press, 2004, p. 24.

[2] Buch-Hansen, H., *op. cit.*, 2008, p. 150.

[3] Schmidt, V., *The Futures of European Capitalism*, Oxford University Press, 2002, p. 70.

[4] Draft Regulation of the E. C. Council Concerning Control of Concentrations between Undertakings, COM (1973).

[5] Scwartz E., *op. cit.*, 1993, p. 624.

2.3. European Merger Control Regulation (EMCR)

After all the failures in adopting a regulation in merger control and under the pressure of more and more cases, there was found a way for the adoption of a uniform regulation of European Merger Control, but it took more than 15 years of negotiations to achieve a consensus between the main actors, France U.K. and Germany[1], with the latter two having strong positions mainly due to their own national sub-units of merger control[2], but only Germany had a national regulation which was more restrictive than Commission's proposal from April 1988, mainly because it was based on pure competition criterion.[3]

The main case which by its judgement pressured more the members states in changing their views and try to end the negotiations was the *BAT case*[4] in which two tobacco companies, BAT Industries and R.J. Reynolds filed a complained having as object the agreement between Philip Morris and Rembrandt Group by which Philip Morris gained the control of Rothman Tobacco Holdings (one of the Rembrandt Group subsidiaries) and the right to decide on the future sale of its shares.

Following the investigation, DG Competition decided that the agreement had to be changed in order to be authorised, Philip Morris appealed the decision, but the Court decided to uphold most of it and started, also, interpreting the applicability of art. 85 to mergers.

Next to the previous interpretation from *Continental Can case*, the Court again, in contradiction with the Commission's view form 1966 memorandum, explained that article 85 can be applied to mergers and, by that, came to support the current Commission's position in the proposals it presented to the Council.

As an effect of the continuous struggle to get to a compromise, the thresholds, which ultimately set the number of transactions under the Commission's exclusive competence, were politically motivated giving authority to European institution only to a fraction of the transcontinental mergers.[5] The proposal used as legal basis not only art. 103 but also art. 308, by that requiring unanimous vote of the Council, reason for further difficulty in reaching a consensus.

The Council adopted, finally, on December 21 1989, Regulation 4064/89[6] (amended later in 1997), and, due to the favourable context, a period following a short

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[1] *Idem*, p. 638-651.

[2] Sturm, R., *The German Cartel Office in a Hostile Environment, Comparative Competition Policy,* Oxford: Clarendon Press, 1996.

[3] Buch-Hansen, H., *op. cit.*, 2008, p. 177.

[4] Joined cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v. Commission of the European Communities* (1987).

[5] Scwartz E., *op. cit.*, 1993, p. 653.

[6] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

recession in which member states were open to integration and fulfilment of completion of the Single European Market[1], competition policy was a tool for the achievement of the internal market.[2]

The Regulation was based on both article 83 (ex art. 87), which provides for the making of Council Regulations to implement the provisions stipulated by art. 85 (now art. 101 TFEU) and art. 86 (now art. 102 TFEU), and on article 232 (ex art. 236) granting the Council the power to intervene when actions are needed for the fulfilment of the Commission's objectives when the treaty hasn't provided them.

The main scope of this Regulation was to supply means for the prevention of concentrations having which might have negative effect on competition, as well as providing a legal framework for their assessment.[3]

The Regulation sets out a certain substantive criterion for evaluating a concentration's compatibility with the common market:

Art. 2:

"1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."

On a first reading, the requirements seem to indicate an effective competition as the sole and absolute criterion the Commission has to use in evaluation of mergers, but a deeper analysis will show us some unclarity of the text, especially regarding the

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[1] Damro, C. and Guay, T. R., *op. cit.,* 2016, p. 16.

[2] Patel, K. K. and Schweitzer, *The Historical Foundations of EU Competition Law*, 1st edition. Oxford University Press, 2013, p. 27.

[3] Kokkoris, I., *op. cit.*, 2010, p. 18.

imperatives in paragraphs 2 and 3 which have to be assessed by the Commission in relation with the paragraph 1 and the preamble which are leaning towards to economic and social criteria.[1]

European Merger Control Regulation ECMR from 1989 provided that a concentration is relative to the acquisition of control, meaning the ability to exert decisive influence on another undertaking, resulting in a substantial and durable change in the structure of the respective undertakings.

Also, the regulation distinguished between the possible operations of achieving a concentration, when independent undertakings merge into a new one and cease to exist separately, and the case of acquisition of direct/indirect control of whole/parts of other undertaking(s).

Art. 3:

"*1. A concentration shall be deemed to arise where:*

(a) two or more previously independent undertakings merge, or

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

2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1 (b).

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

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

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

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

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned, or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom."

The Regulation stipulated that a concentration had a Community dimension,

[1] Van Bael, I. & Bellis, J. F., *op. cit*., 1990, p. 324; Hawk, B. E, *op. cit*., 1990, p. 212.

and by that offering exclusive competence to the Commission when[1]:

(i) the combined worldwide turnover of all the undertakings concerned was more than 5 billion ECU and

(ii) each of at least two of the undertakings concerned achieves more than 250 million ECU turnover in the Community, unless each undertaking concerned achieves more than two-thirds of its turnover within one and the same Member State of the Community (one-stop shop principle)[2].

As regarding the applicability of the European Merger Control Regulation ECMR on collective dominance, the text is not very clear in the view that it applies to concentrations leading to the creation or strengthening of collective dominant position, in contrast to art. 86 of the Treaty (now art. 102 TFEU).

As a result of these provisions, many transactions were excluded by the reach of the Regulation and the assessment of the Commission. Some[3] considered that the mergers who were potentially most harmful to competition, vertical and horizontal ones, were the ones often falling under the threshold.

Any merger or acquisition concluded having a Community dimension had to be notified to the Commission, in advance, and the transaction could not be implemented before notification or within the first three weeks following notification.

Undertakings were under the obligation to notify EU-dimension mergers within a week from the conclusion of the agreement, announcement of the transaction, or acquisition of interest. Following the notification, a three-week suspension of any action intended to complete the merger was stipulated. Phase I entailed a preliminary review which could have resulted in three outcomes – the notified merger was beyond the scope of the regulation, the notified merger fell within its scope, but raised no serious doubts to the compatibility with the Common Market and, lastly, the notified merger fell within the scope of regulation raising also serious doubts regarding its compatibility. The last scenario triggered the initiation of proceedings known as Phase II which comprised the following procedural steps – issuance of statement of objections, access to Commission's file so that the parties could prepare their response to the objections, submission of reply to the Commission and, at request, formal oral hearings. The suspension of concentration remained valid until the final decision of investigation was issued.

Article 4:

"1. Concentrations with a Community dimension as referred to by this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.

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[1] Article 1(2) Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

[2] Scwartz E., *op. cit.*, 1993, p. 655.

[3] Pappalardo, A., *op. cit.*, 1990, p. 20.

2. A concentration which consists of a merger within the meaning of Article 3 (1) (a) or in the acquisition of joint control within the meaning of Article 3 (1) (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets."

The Regulation also mentioned procedural steps regarding referrals to the Commission or national authorities, time limits for proceedings initiation, scope of the Commission's investigative powers and request for information, fines and periodical penalty payments applied for non-observance of Commission's decisions.

ECMR also stipulated procedural steps regarding referrals to NCAs/to the Commission, time limits for proceedings initiation, scope of the Commission's investigative powers and request for information, fines and periodical penalty payments applied for non-observance of Commission's decisions or of any other obligations stemming from European Merger Control Regulation ECMR.

As in most jurisdictions, European Merger Control Regulation ECMR was based on the principle of ex-ante control, assessing and preventing mergers before their implementation[1]. However, ECMR also granted some ex-post control tools as the Commission was entitled to undertake all the necessary measures to restore effective competition, such as divestiture of an unlawful merger.

Commitments of two types allowed mergers raising competitive concerns to proceed by restoring competition in the relevant market(s) where the Commission identified potential harm. Structural remedies such as divestiture of overlapping business/assets were preferred by the Commission in merger cases for their immediate and durable applicability. For instance, in *Masterfoods/Royal Canin*[2] the merger would have resulted in a dominant position in the market for pet food from several Member States but the involved parties disposed of some business units so as to allow a new competitor to enter this market.

In contrast, behavioural remedies were less desires in merger control as they implied continuous monitoring of the merged entity's conduct by the Commission to ensure compliance with the commitment of maintaining effective competition. For instance, in *Ciba-Geigy/Sandoz case*[3] the merged entity would have acquired dominant position on the market for animal fleas' treatment because the involved parties

[1] Monti, G. *EC Competition Law*. New York: Cambridge University Press, 2007, p. 29.

[2] Case No. COMP/M.2544, *Masterfoods/Royal Canin* (2002).

[3] 97/469/EC: Commission Decision of 17 July 1996 in a proceeding pursuant to Council Regulation (EEC) No. 4064/89 (Case No. IV/M.737 - *Ciba-Geigy/Sandoz*).

held patents over key ingredients but, in order to be cleared, they pledged to grant the licenses to competitors in order not to jeopardize their access to that market.

A Community dimension merger could have been referred to a Member State if two thirds of its operations occurred in a state or if it was suspected of creating or strengthening a dominant position in a local market identified as "distinct".

On the other hand, at the request of a Member State, the Commission could review mergers outside the scope of Regulation, if they affected competition in that state and or the cross-border trade. These provisions supported those Member States which had no national merger control systems at that time.[1]

In conclusion, the European Merger Control Regulation ECMR provided a well-composed legislative framework insuring legal certainty as the provided thresholds, procedures and terms enabled undertakings preparing a merger to undertake better decisions. Some elements of this regulation were subject for further review and, also considering that mergers have more implications than cartels or abuse of dominant position, the effectiveness of the newly-adopted Regulation was to be demonstrated by case-law.

The first case to prove that utility of the European Merger Control Regulation ECMR's provisions in preventing the creation of a collective was *Alcatel case*[2] in which the proposed concentration consisted of the acquisition by Alcatel Cable S.A. of AEG Kabel, the cable business subsidiary of AEG AG. The entire cable business of AEG AG was to be transferred, subject to a prior spin-off of the cable harness activity (motor vehicle cables) which will be retained by AEG AG. Alcatel Cable will acquire 96.8 % of the shares of AEG Kabel. After examination of the notification received, the Commission concluded that the acquisition was fallen within the scope of EMCR and did not raise serious doubts as to its compatibility with the common market.

The development of the concept of collective dominance continued with the *Nestlé case*[3] which required substantial divestitures measures in order to be cleared by the Commission and not considered as a creation of joint dominance in the supply of bottled mineral water in France. The acquisition of Perrier by Nestlé would have leaded to a concentration of the two remaining big companies in the French market and by that to possible high market share, price parallelism, high entry barriers as well as collective dominance. After the investigation of the notification, the Commission considered that the acquisition was fallen within the scope of EMCR, but proposed a series of divestiture measures to parties in order to approve the merger.[4]

The first obstacle in the application of the EMCR came just two years after its adoption, the Commission prohibiting, for the first time, under the new merger

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[1] Thieffry, P., *The New EC Merger Control Regulation*, „The International Lawyer", Vol. 24, Issue 2, 1990, pp. 543–551.

[2] Case No. IV/M.165 - *Alcatel/AEG Kabel*.

[3] 92/553/EEC: Commission Decision of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No. 4064/89 Case No. IV/M.190 - *Nestlé/Perrier*.

[4] Kokkoris, I., *op. cit.*, 2010, p. 18.

rules, a concentration intended to be created in the aerospace industry. The French company Aerospatiale SNI and Italy-based Alenia-Aeritalia e Selenia Spa decided to acquire, under the form of a joint venture (called ATR), the assets of de Havilland (the Canadian division of Boeing). Both ATR and de Havilland were important manufacturers of regional aircrafts of 20 to 70 seats used in regional transportation on commuter markets.

The Commission believed that the new structure would become so strong that it was a danger for its competition, especially British Aerospace and Fokker, otherwise the main critics of the merger[1], so it decided to reject this notification, becoming the first prohibition under the provisions of EMCR, attracting frustration from French and Italian governments[2] and even the President Delors, who was in favour of the transaction[3], leading to a conclusion in the doctrine that the long negotiated Regulation was *"not an industrial policy instrument"*.[4]

In Aerospatiale-Alenia/de Havilland, the Commission used the dominance test (which was to be reformed after this case)[5] by focusing on the quantification of market power, relevant market definition and entry barriers assessments. It had as objective to demonstrate the dominant position of the merged entity.

In this case, the relevant market was defined as that of regional turboprop aircraft justified by its description by consistency with *"the overwhelming majority of customers and competitors"*[6]. In light of the merged entity's estimated market share of 50% worldwide and 65% in the EU, the Commission concluded that ATR's position in the overall commuter markets would strengthen significantly, but the Commission decided to eliminate Havilland as a competitor which would have changed the view on the market as customers, for cost saving reasons, prefer to acquire different aircraft types from the same manufacturer, in our case the new entity.

The Commission limited the investigation to basic principles of market structure and market share, identifying few competitors and possible high market share of the new merged entity, sufficient to justify impediment of effective competition whereas arguments regarding cost savings were declined and some products (like jet aircrafts)[7] and competitors excluded from the analysis of market[8].

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[1] Ross, G., *Jaques Delors and European Integration*, Oxford University Press, 1995, p. 177.
[2] McGowan L., *Competition Policy*, *Policy-Making in the European Union*, 3rd edition, Oxford University Press, 2000, p. 138.
[3] Ross, G., *op. cit.*, 1995, p. 178.
[4] Hawkes, L., *The EC Merger Control Regulation: Not an Industrial Policy Instrument: The Havilland Decision,* „European Competition Law Review", 1992, Vol. 13, no. 1, pp. 34-38.
[5] Strohm, A., *Efficiencies in Merger Control: All you Always Wanted to Know and Were Afraid to Ask*, Directorate-General for Competition. European Commission., 2004, p. 10.
[6] Commission of the European Communities (1991) *Decision of 2 October 1991 declaring the incompatibility with the common market of a concentration (Case No. IV/M053 - Aerospatiale-Alenia/de Havilland)*. L334/42. Brussels, p. 7.
[7] Monti, G., *op. cit.*, 2007, p. 29.
[8] Utton, M. A., *Market Dominance and Antitrust Policy*, 2nd edition, Cheltenham: Edward Elgar Publishing, 2003, p. 46.

In Aerospatiale-Alenia/de Havilland, efficiencies were approached only as other general considerations and, by no means, explicitly in the sense introduced by the amended European Control Merger Regulation and the Horizontal Merger Guidelines. The parties have invoked cost savings generated by management of procurement, marketing and product support which could transferred in lower prices for customers, but the Commission dismissed them.

Aerospatiale/de Havilland is considered a case raising questions about the objectives of the merger control and the ways the Commission deals with it, with two main schools of thought, one leaning towards the consumers` protection and other advocating for more factors such as industrial, social and regional policy in merger assessments.

The case represented a crucial moment in the reformation of the merger control, following the first European Merger Control Regulation and although it did not attract noted criticism at that moment for economic analysis, its aftermath constituted a reference step in the overall evolution of the merger control though raising awareness of the necessity of conducting a more thorough assessment.

The first case in which the Court annulled a Commission's decision issued based on the application of European Merger Control Regulation ECMR was *Kali und Salz case*[1]. Kali und Salz proposed intended to create a joint venture with Treunhadanstaldt, but the Commission considered it as possible to lead to collective dominance, instead the Court held that there was no proof of the possibility of creation of dominant position.

Later, the Court connected in another case, *Gencor*[2], the notion of collective dominance with the one of tacit coordination. The *Gencor/Lonhro case*[3] was the first one when the Commission prohibited a merger on the grounds of a possible creation of a position of collective dominance[4], considering that, practically, the two companies would have gain the control of a platinum group metals in South Africa, creating a new entity, Implants Ltd. and this conducted to a negative impact on effective competition within the common market.

In the period following the adoption of the European Merger Control Regulation ECMR, the Commission prohibited eight transactions, four of them in the field of telecommunication[5], the concerns being based on the possible negative vertical

[1] Joined cases C-68/94 AND C-30/95 annulling the decision *COM Kali und Salz AG/MdK/Treuhand(1998)*.

[2] Case T-102/96 *Gencor Ltd v. Commission of the European Communities*, Decision declaring a concentration incompatible with the common market, Collective dominant position (1999).

[3] Commission Decision (1996) of 24 April 1996 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No. IV/M.619 - *Gencor/Lonrho*).

[4] Kokkoris, I., *op. cit.*, 2010, p. 19.

[5] European Commission (*1996)* C*ommission Decision of 19 July 1995 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No. IV/M.490 - Nordic Satellite Distribution).* European Commission (*1995) Commission Decision of 20 September 1995 relating to a proceeding pursuant to Council Regulation (EEC) No. 4064/89 (IV/M.553 - RTL/Veronica /Endemol).* European Commission (*1998), Commission Decision of 27*

effects of the mergers. Moreover, during the same period, the Commission started considering conglomerate or ”portofolio” effects in a trilogy of cases in the field of beverages.[1]

The first important case in which the Commission and the federal agencies failed to agree on a common solution about the competitive effects of a merger was *Boieng/McDonnel Douglas case*[2], where the US Department of Justice considered the merger not affecting the competition, while the European Commission raised the problem of decreasing the number of producers of airplanes and better position on the market of Boeing in relation with its competitors, asking for remedies in order to allow the transaction.[3]

2.4. European Merger Control Reform - EU Merger Control Regulation

The analysis of the period following the implementation of European Merger Control Regulation ECMR showed that most prominent issues were in relation to the constraints imposed by both the dominance test and by the limited factors considered in the assessment generating incoherent decisions with the industrial policy. Nevertheless, there was another neglected factor by the form-based EU Competition Policy, i.e. the economic and econometric analysis in merger control.

For the Commission, the year 2002 was the worse in the application of the ECMR's provisions as the General Court annulled three of its prohibition decisions concerning the proposed mergers of *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*, leading to "unprecedented criticism"[4] in its reasoning and enforcement reliability and validity. More important than the defeat itself, was the way the Court justified the decisions, especially in the matter of standard of proof and the

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May 1998 relating to a proceeding pursuant to Council Regulation (EEC) No. 4064/89 (Case No. IV/M.993 - Bertelsmann/Kirch/Premiere). European Commission (*1998), Commission Decision of 27 May 1998 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.1027 Deutsche Telekom/BetaResearch).*

[1] European Commission (*1997) Commission Decision of 22 January 1997 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.794 - Coca-Cola/Amalgamated Beverages GB).* European Commission (*1997) Commission Decision of 11 September 1997 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.833 - The Coca-Cola Company/Carlsberg A/S).* European Commission (*1997) Commission Decision of 15 October 1997 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.938 - Guinness/Grand Metropolitan).*

[2] European Commission (*1997) Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement Case No IV/M.877 - Boeing/McDonnell Douglas.*

[3] Miller, J.A., *Boeing/McDonnell Douglas Merger: the European Commission's Costly Failure to Properly Enforce the Merger Regulation*, „Maryland Journal of International Law”, Volume 22, Issue 2, 1998.

[4] Monti, M., *op. cit.* (*EU Competition Policy)*, 2002, p. 2.

economic analysis.

In *Airtours/First Choice*, the Court argued that the Commission *"made errors of assessment in its analysis of competition"* by providing no *"adequate evidence"*.[1] To support its findings and failed to fairly assess the market conditions and to apply economic theory. These wrong conclusion of the Commission can be related to a non-observance of certain evidence like: superficial examination of certain facts (e.g. lack of entry barriers favoring potential competitors), underestimation (of the ability of the smaller tour operators to counterweight the merger impact), overestimation (of existing conditions favouring the creation of collective dominance such as product homogeneity, low demand growth, increased transparency fostering adherence/retaliation to/from a collusive outcome).

The Court argued that the Commission overlooked *"factors fundamental to any assessment"*[2] and failed to prove that the merger would lead to a collective dominant position on the market for short-time package holidays. The Decision outlined three conditions for such a collective dominance to be demonstrated: transparency, existence of creditable retaliatory mechanism and a negative impact on customers and competitors.

In another case, *Schneider/Legrand*[3], it was the analysis of the merger's impact that was overestimated, mainly from *"errors, omissions and inconsistencies of undoubted gravity"*.[4] A major issue concerned the contradicting approach used in the relevant market assessment, the Commission conducting its assessment using Union-level considerations and by that overestimating the merger impact for some relevant product markets.

Nevertheless, the first reason for the annulment of the decision was one of procedural nature, the Commission failing to hear Schneider's right opinion and, by that, infringing art. 18 (3) of ECMR which stated that its final decision must be based only on those objections on which parties have submitted their observations. Additionally, the Commission's statement of objections did not comprise all the objections forwarded in the final decision.

The third pivotal case which leaded to a reform ECMR, also from 2002, was *Tetra Laval/Sidel case*[5], in which the General Court accused the Commission for committing *"manifest errors of assessment"*[6] and failing to provide enough evidence in order to support its decision which indicated that the merged entity was expected to create a dominant position by 2005.

The Court held that the Commission failed to assess correctly the specific conditions of the market for aseptic PET filling machines (which was, in fact, highly

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[1] Judgment of the Court of First Instance in Case T-342/99 *Airtours v. Commission*, paragraph 120

[2] *Idem*, paragraph 294.

[3] Judgment of the Court of First Instance in Cases T-310/01 and T-77/02 *Schneider Electric SA v. Commission* (2002).

[4] *Idem*, paragraph 404.

[5] Judgment of the Court of First Instance in Case T-5/02 *Tetra Laval BV v. Commission* (2002).

[6] *Idem*, paragraph 141.

competitive) and to provide *"sufficiently convincing evidence"*[1] to demonstrate the creation of a dominant position in the markets for barrier technology, aseptic and non-aseptic filling machines, plastic bottle closure systems and auxiliary equipment.

On the other hand, the Commission explained that Tetra was able and had the incentives to engage in leveraging, through tying its carton packaging equipment with Sidel's PET packaging equipment. As conglomerate mergers usually raise less competition concerns a more rigorous proof of their anticompetitive effects is necessary, but, as the Court concluded, neither those incentives and prospective behavioural remedies nor the identified negative horizontal, vertical and conglomerate effects on the relevant market for liquid food packaging equipment were sufficiently evidenced by the Commission.

As a result of many cases coming after the adoption of the first European Merger Control Regulation, later, revised, in 2000 there was launched a Merger Review and its conclusions were compiled in the Commission's Green Paper published in December 2001. The 2002 General Court's annulments *"came at the right moment"*[2], indicating the necessity of such reform and forcing its implementation, a reform which was not only aimed at fixing ECMR's problems, but also at consolidating its already effective features[3].

The Green Paper was not presenting the Commission's position, but supplied possible ways to reform the existing merger control regulation by addressing a number of issues related to jurisdiction, substance and procedure, the main one being the choice between the dominance test, the one used by the Commission in the assessment of mergers and present in most of the national competition legislations, and the significant lessening of competition (SLC) test, present mainly in common-law jurisdictions like U.K., U.S, Ireland or Australia, a long debated choice which ended with the Commission choosing the Significant Impediment to Effective Competition (SIEC) test, a compromise between the two.[4]

The entering into force of the European Union Merger Control Regulation EUCMR brought a wide range of new legal and practical issues to be addressed and the years of its implementation were in large allocated to researching, debating and solving the issues.

Nowadays, the main legislative act for European merger control is the Council Regulation No. 139/2004 of 20 January 2004 (EUMCR) on the control of concentrations between undertakings which represents a reformation Regulation No 4064/89, consequence of an increasing need to address the new challenges coming from the completion of the single market and of the economic and monetary union, the enlargement of the European Union and the lowering of international barriers to

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[1] *Ibid*, paragraph 244.
[2] Monti, M., *op. cit.*, 2002, p. 1
[3] Ryan, S. A., *Reform of the EU Merger Control System — a comprehensive package of proposals*, *Competition Policy Newsletter*, Spring (1), 2003, p. 9–13.
[4] Kokkoris, I. & Shelanski H., *op. cit.*, 2014, p. 11.

trade and investment which continue to result in major corporate reorganisations, particularly in the form of concentrations.[1] The main purpose for developing of a new merger control regulation was to simplify and clarify the concentrations system, as well as the procedural aspects and to adapt the communication between the institution investigating the concentration and the undertakings involved in the transaction.[2]

The project for the regulation on control or mergers did not intend to amend the basic principles, but some significant provisions were introduced and we may refer mainly to: simplification of referral for decreasing the number or notifications and ensuring an optimal repartition of the cases; inserting the mechanism by which the states not responding within a period are presumed to have joined the referral and that the parties are authorised to request a referral at the pre-notification period.

There were several substantial changes the new European Merger Control Reform brought, but the most impactful were the procedural ones. According to the area of the reform, they may be divided into four categories, as mentioned below:

1) Augmented flexibility regarding the timetables. In the new Merger Regulation (EUMR), notification of an ex-ante merger will remain applicable, but the obligated party will be given the latitude of the time of notification, as the one-week deadline is left out. Also, it is allowed to notify the Commission even before signing a concluding document between the entities. The Commission demands a written document, signed by all parties, that may demonstrate *"good faith intention"* towards the institution. Therefore, the amendment of Article 4(1) of the European Council Merger Regulation is beneficial to the undertakings, as the early notification might save both money and time and on a macro level, they may align the timetables with the US jurisdiction.

According to the old the European Council Merger Regulation, Phase I of the procedure was to be finalized within a one-month period after the notification, starting immediately. As the competent authority might have considered a necessity for the phase II, they adopted a new decision within 4 months, without the possibility of extension of the deadline. The current regulation deadlines are expressed in working-days and the timetables are more flexible.

Merger control presumes, in most of the jurisdictions, a two stage procedure, having first the notification and collection of information needed for the competitive assessment which will lead to a clearance of the transaction or transfer into a second phase when a deeper analysis will be conducted.[3] The European

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[1] Laskowska, M., *The Control of Community Concentrations under Regulation 139/2004*, Warsaw University, 2007, p. 57.

[2] Aubanel R., *Commentaire du livre vert de la Commission sur la revision du règlement de contrôle des concentrations*, RMCUE, No. 456, 2002, p. 155.

[3] Langus, G., Lipton, V., Neven, D.J., *Standards of proofs in sequential merger control procedures*, Graduate Institute of International and Development Studies, Working Papers Series, Geneva, Switzerland, 2018, p. 2.

provisions in Merger Control[1] provide the same two phase procedure entitling the Commission to decide whether that the proposed concentration does not raise serious doubts regarding its compatibility with EU Law or the concentration raises serious doubts regarding its compatibility and initiate Phase II.

The new merger regulation provides that Phase I must be finalized in 25 days and according to the deadline might be extended 10 more days if the Commission receives a referral from a National Competition Authority from a Member State.[2] As far as Phase II is concerned, a final verdict must be presented within a period of 90 working days from the beginning of the proceedings, but it may be prolonged to 105 working days if the parties involved compromise. Both the Commission and the undertakings may request an extension of the timetables up to 20 days. This flexibility might generate a different outcome, in the advantage of the concerned parties, as there will be more research on the investigation. Advisory Committee is consulted at the end, fact which will also produce delays. Consequently, the "stop the clock" provision is a useful tool that the undertakings possess, as they may use it when necessary.[3]

2) Checks and balances and Due process. As far as the transparency and the due process are concerned, the amendments from the new regulation are related to the possibility of the parties to have access to the key documents in the Commission's file, until the Advisory Committee's implication. Moreover, they introduced the "state-of-play meetings" (which involves both the Commission and the undertakings' representatives) and "triangular meetings" (involving also the third parties), in order to discuss and clear any contradictory perspectives.

3) Increased powers of investigation. The Commission is entitled to question not only a legal person, but any natural person as well, as long as they agree on that.[4] Also, it may seal any original documents or copies related to the merger investigation, with the mentioning that it may impose sanctions up to 1% of the annual turnover for the entity concerned.[5] Despite the new regulation, the E.U. Commission failed to properly legislate to what extent they may suppress information. The Commission is not allowed to scrutinize correspondence between the parties and their lawyers.[6]

The standard of proof in Stage II is not provided by the regulation, but it was clarified by the Court in its caselaw[7]. The Commission, in second phase,

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[1] Article 6 of the Merger Control Regulation no. 139/2004.

[2] Article 10 of the European Merger Control Regulation nr. 139/2004 (EUMCR).

[3] Berg, W., *New EC Merger Regulation: A first Assessment of Its Practical Impact*, „Northwestern Journal of International Law & Business", Vol. 24, Issue 3, Spring, 2004, p. 683-717.

[4] Article 11(7) of the European Merger Control Regulation nr. 139/2004 (EUMCR).

[5] Article 13 (2) of the European Merger Control Regulation nr. 139/2004 (EUMCR).

[6] Berg, W., *op. cit.*, 2004, p. 683-717.

[7] T-5/02 - *Tetra Laval v. Commission*: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47829&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5879725 (accessed on 01. 06.2020), Case C-12/03 P, *Commission v. Tetra Laval*: https://eur-lex.europa.eu/legal-content/EN/

based on the standard of proof showing or not an incompatibility with the common market, has either to clear or to prohibit the transaction. The standard of proof is provided in terms of *"balance of probabilities",* meaning that it applies to both prohibition and clearance, and any of the decisions can be appealed in court.[1] In phase I, the Commission can allow mergers if it considers they are compatible with the common market, the standard of proof being the lack of "serious doubts", representing a more rigorous manner of clearance, still the Court provided[2] that standards of proof are the same in both stages.

4) Miscellaneous. When discussing the topic of the ancillary restraints, the reform states that *"a case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision"* [3]

As already indicated, the Commission has chosen, in the proposal of the regulation, for the merger assessment, a new tool, the Significant Impediment of Effective Competition (SIEC) and in order to determine whether or not the new substantive test changed the way the Commission evaluates the competitive effects of the mergers; several studies were conducted. The objectives of the new test were to increase the accuracy and the efficiency of the new merger regulation, while eliminating any ambiguities related to the interpretation of the old test. The findings were that even though there was no radical change, the new test proved to be more efficient as far as the competitive effects of the reform are concerned.[4]

The initial regulation (EMCR) adopted in 1990 prohibited any merger that might: *"create or strengthen a dominant position as a result of which effective competition would be significantly impeded"*. The old test, SLC, has two interpretations: on one hand, it might presume that dominance is not a sufficient condition, but it is necessary to prohibit a merger between two undertakings and on the other hand, any merger that might create or strengthen a dominant position instantly impedes effective competition. The present Regulation (EUMCR) extended the definition of the substantive SIEC test: *"A concentration which would significantly impede effective competition, in particular by the creation or*

TXT/?uri=CELEX%3A62003CJ0012 (accessed on 01. 06.2020), Case T-285/04 *IMPALA v. Commission*: https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2006.224.01.0039.01.ENG (accessed on 01. 06.2020), C-413/06 P - *Bertelsmann and Sony Corporation of America v. Impala*: http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0413&lang1=en&type=TXT&ancre= (accessed on 01. 06.2020).

[1] Versterdor, B., *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, „European Competition Journal", volume 1, issue 1, 2005, p. 3-33.

[2] Case T-79/12 *Cisco Systems, Inc. and Messagenet SpA v European Commission:* http://curia.europa.eu/juris/document/document.jsf?text=&docid=145461&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5881717 (accessed on 01. 06.2020).

[3] Duso, T., Neven, D. & Röller, L.-H., *The Political Economy of European Merger Control: Evidence Using Stock Market Data*, „Journal of Law and Economics", 2007, vol. 50, no. 3, p. 455-489.

[4] Röller, H. & de la Mano, M., *The Impact of the New Substantive Test in European Merger*, „European Competition Journal", vol. 2, no. 1, 2006, p. 9-28.

strengthening of a dominant position, in the common market or in a substantial part of it shall be declared incompatible with the common market."[1] Therefore, this test does not put an emphasis on the dominance concept being sufficient, or necessary, in order not to lead to under-enforcement, as the previous test. The authors stated very clear that a merger can be considered a threat to effective competition even in cases in which dominance is not the main issue. The example they used was about two companies sell substitute products, they have power over each other when independent, but in a post-merger situation, the customers may be constrained to buy the products, no matter the increasing price, due to lack of substitutes. On the other hand, the market share is not the only aspect to be taken into consideration when testing dominance, as in the example of oligopolistic markets where more than one entity has substantive power, even though there is no clear market leader.

The current evaluation is more flexible than the SLC one, as it can identify possible problematic mergers that the old one could not stop. For example, strengthening dominance in the SIEC Test might be interpreted not only on market shares, but also on other details that were neglected before. To be more precise, the article gives a simple example related to the insignificant mergers that at a first glance might not affect competition, but the collective anti-competitive effect may be large.

As part of the reform package, the Commission also introduced guidelines on the assessment of both horizontal and non-horizontal (vertical and conglomerate) mergers in order to increase legal certainty and to reinforce the shift towards the "more economic approach" by clarifying the economic principles guiding its reasoning in the assessments of each merger type. Based on the extended scope of SIEC, the guidelines indicated other sources for competition concerns. In case of horizontal mergers, these lead to coordinated and non-coordinated effects (in oligopolistic markets), mergers with a potential competitor, mergers creating/strengthening merged entity's buyer power (in upstream markets). In case of non-horizontal mergers which are more benign than horizontal mergers (they do not entail loss of direct competitors within the same relevant market), these refer solely to coordinated and non-coordinated effects.

Illustrative of the new approach brought by the reformed new Merger Control Regulation was the investigation of Commission in the case *Ryanair/Aer Lingus* merger[2], where it conducted a deep analysis, comprising cross-section and fixed-effects with huge amount of collected data generated an impressive amount of both quantitative and qualitative evidence, thus increasing transparency and legal certainty

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[1] Article 2 (3) of the European Merger Control Regulation nr. 139/2004 (EUMCR).

[2] For an analysis of this case see Dumitru, O. I., *The Impact of Aerospatiale - Alenia/De Havilland and Ryanair/Aer Lingus Cases on the Reform of European Merger Control*, „Perspectives of Law and Public Administration", Volume 9, Issue 1, May 2020, p. 39-41.

in response to the standard of proof issue raised by the caselaw before the new regulation.

Ryanair intended to acquire the control of Aer Lingus though obtaining all its shares by public bid. Subsequently to gradually acquiring shares of Aer Lingus which, by November 2006, amounted to 25.17% of its share capital, Ryanair finally made an offer to Aer Lingus' management for the entire share capital. Ryanair and Aer Lingus were by far two of the largest airlines serving the Irish aviation, having around 80 per cent of intra-Europe flights from and to Ireland. This was the first time the Commission had to assess a proposed merger of the two main airlines in a single country, with both operating from the same "home" airport – Dublin. It was also the first time the Commission had to assess a merger of two "low-cost" airlines, operating on a "point-to-point" basis.

The Commission decided that the merger would have harmed consumers by creating a monopoly or a dominant position on 35 routes where Aer Lingus and Ryanair competed against each other. This would had reduced choice and, most likely, would have led to price increases for consumers travelling on these routes. During the investigation, Ryanair offered remedies. The Commission assessed them thoroughly and carried out several market tests. However, the remedies proposed fell short of addressing the competition concerns raised by the Commission.

The Commission applied the SIEC test allowing for a more dynamic analysis and despite a first conclusion of dominant position identified, it still *"has carefully analyzed"*[1] other factors to see if the position is ameliorated or aggravated. The European Commission's analysis indicated that their merger would have created a monopoly on 22 of the 35 overlap routes while the merged entity would have had a combined market share of more than 60 per cent on further 13 routes. On those 22 of the routes, the merger would have left customers with a monopoly. According to SIEC test, dominant position is not sufficient to demonstrate market power, so the Commission also paid attention to the behavioral implications, like the ability and the incentive of the merged entity to engage in the anticompetitive practices set out by the Horizontal Merger Guidelines.

The Commission identified a series of important barriers of entry on all overlapping routes which deemed the entry of potential competitors "unlikely". These included high entry costs given the Ryanair's and Aer Lingus' strongest brand and experience on the concerned routes, as well as the high risk of merging parties' aggressive retaliation relative to new entrants. Most airlines were unlikely to enter into direct competition against a merged Ryanair/Aer Lingus in Ireland. The likelihood of entry is further reduced by peak-time congestion at Dublin airport and other airports on overlap routes. The Commission prohibited the proposed merger because it *"would significantly impede effective competition (...) in particular as a result of*

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[1] European Commission Decision of 27/06/2007 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.4439 – *Ryanair/Aer Lingus*): https://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf (accessed on 1.06.2020), par. 351.

the creation of a dominant position."[1]

Another pivotal case coming after the adoption of the new merger control regulation is *Sony/BMG case*[2] which brought a new view in the analysis of collective dominance/coordinated effects.

After some years after the adoption and implementation of the new merger regulation, European Merger Control Regulation nr. 139/2004 (EUMCR), scholars[3] have performed deep analysis on the enforcement after the introduction of the SIEC. The first conclusions were that the number per year of notifications increased considerably, that many of mergers notified to the Commission were in a direct connection with the global M&A, but, more interesting, that the prohibited transactions decreased from 1 per cent to 0.1 per cent clearances with remedies.

The authors who developed the study consider that a lower number of prohibitions could indicate an improved predictability which helped the undertakings to select better the transactions which are more likely to be approved by competition authorities.

It seems that in adopting the internal measures, it was the Commission's aim to *"adopt changes, as radical as needed, to ensure that merger investigations are conducted in a manner which is more thorough and more firmly grounded in economic reasoning and to further strengthen the due process guarantees built into [its] merger proceedings*"[4].

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[1] *Idem*, par. 1240.

[2] European Commission Decision of 03/X/2007 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.3333 *Sony/BMG*).

[3] Maier-Rigaud, F. and Parplies, K., *EU merger control five years after the introduction of the SIEC test: what explains the drop in enforcement activity?*, „European Competition Law Review", vol. 20, no. 11, 2009, p. 565–79.

[4] Monti, M., *Merger Control in the European Union: A Radical Reform*, European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002.

Chapter 3
European Merger Control Procedure

The merger procedure in the European Union is described very clearly in the regulations and also in the DG Competition Best Practices on the conduct of EC merger proceedings 20/01/2004. First of all, the entities that fall in the thresholds mentioned by the Regulation have to notify the European Commission about it, having as a legal basis the Council Regulation (EC) No. 139/2004.

The pre-notification phase has an informal character, which implies that no data gathered from the parties can be officially used in this investigation, although the Commission is not obliged to mention all the sources of information. The representatives of the Commission have some discussions with the parties in order to help them prepare the notification, while making sure they understand every detail of the case, in order to decide whether the transaction is being problematic. They also inform the companies about what data they are going to need to release in the future. It may last several months, as meetings are being conducted, both with the parties and the stakeholders. One important thing to be mentioned is that the Commission appreciates, in practice, those parties that are being actively involved in this phase and try to initiate contact.

Phase I starts as soon as the Commission considers it has all the necessary documentation to complete the notification and it has to bring a final response within twenty-five days, with the possibility of applying an extension of ten days if the parties propose remedies, in order to be analyzed. If the DG Competition considers that the remedies are beneficial, they accept the closing of the transaction, but on the contrary, they open Phase II of the investigation, which is far more complex. The hearing is being supervised by the Hearing officer, but he does not intervene in any direct way. After the completion of this hearing, the Commission organizes a panel in order to make a decision. A greater presence of the senior management can be remarked, as well as evaluating the impact of the remedies, by applying a Market Test. This last phase takes sixty days, in order to have all the necessary consultancies, both with the parties and with the stakeholders and it finalizes with the official opinion of the Directorate General for the Competition/Commissioner, which subsequently is officially published on the website.

Consequently, the parties or any other stakeholder may appeal to the General Court and ultimately to the Court of Justice in order to contest the decision of the European Commission with respect to the merger verdict.

3.1. Jurisdictional matters: concentrations

The EUMR applies to concentrations which create significant structural

changes and the effects are visible outside the national borders of any Member States. The Commission has exclusive jurisdiction to investigate and apply this regulatory framework to any concentration having or deemed to have an EU dimension. The Directorate General for Competition (DG Comp), is responsible for, inter alia, the conduct of the merger control investigation. Furthermore, there is a referral system used to divide competences between the Commission and the national competition authorities (NCAs) of the European Economic Area (EEA) countries, so that transactions are reviewed by the best-placed authority to assess their outcomes and overall impact on the competition.

The regulation defines the concentration which is deemed to arise when *"a change of control on a lasting basis"* comes as a result from either a merger between two or more previously independent undertakings or an acquisition of control over one or more, whole or just parts, of undertakings by one or more undertakings/persons.[1]

In relation to the idea of control, the regulation provides that control over an undertaking usually consists of rights or contracts which grant the power to exercise *"a decisive influence"*[2]. A decisive influence is that when a party, depending on the share ownership structure, acquires enough decision-making power to make strategic commercial changes concerning the undertaking e.g.: adoption of the annual budget, major investments, business plan updates, key management appointment, etc. Control can be held solely or jointly, meaning that the decisive influence over the whole undertaking or just certain parts of it can be exercised by either one undertaking or more. Sole control can be acquired together with a majority of voting rights derived from a majority shareholder position in the target ownership structure. However, even a minority shareholder position can offer control in special circumstances depending on the rest of the shareholders implication into the decision-making process and their number of shares. Negative sole control is gained where the acquirer receives veto rights with the power to block major strategic decisions. Joint control can be acquired under the same circumstances as the sole control, but the different aspect is that two or more parties choose to align their interests by virtue of an express or tacit agreement, or they are forced to cooperate in order to avoid a deadlock situation.[3]

The EU dimension of a concentration is established with respect to certain turnover thresholds, thus being determined whether the EUMCR applies to it or not. There are two sets of thresholds in force: a set of original thresholds from 1989 and a set of alternative thresholds decided upon in 1997 when the original regulation was amended. It is taken into consideration the net turnover obtained from ordinary commercial activities, in the preceding audited financial

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[1] Article 3(1) European Merger Control Regulation nr. 139/2004 (EUMCR).

[2] Article 3 (2) European Merger Control Regulation nr. 139/2004 (EUMCR).

[3] Todino, M., Fattori, P. & Pera, A., *European Union.* in: I. K. Gotts (ed.) *The Merger Control Review,* 3rd ed., Law Business Research, 2012.

year, of all the undertakings concerned. Such cases have special features, thus additional special provisions regarding the calculation of the turnover are provided in a Notice dedicated to turnover calculation (1998). For banks, the turnover is mainly constituted by interest and commissions, while for insurance companies, insurance or reinsurance premiums are taken into account.

A concentration has an EU dimension if the following thresholds are met at the same time: the aggregate worldwide turnover of all the undertakings concerned exceeds EUR 5 billion; and the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR 250 million.[1]

The concentrations meeting the previously outlined tests will be assessed in a single procedure, by the Commission and the Member State shall not apply their own national legislative framework on competition to any concentration having an EU dimension with the exception of several referral cases which will be further discussed in details[2].

The one-stop shop principle is applied, the parties not having to comply with multiple national filings; as each of them would impose its own procedural and substantive criteria, companies now benefit from cost reductions, less bureaucracy and uncertainty regarding the outcomes of the whole process.[3]

Furthermore, the one-stop shop principle is extended to a broader range of transactions that used to be subject to merger control by three or more NCAs in the European Union. If the competent national authorities do not react to the referral within 15 days of receiving the submission, the merger will be examined by the Commission with respect to the one-stop shop principle.

This second calculation is introduced where the original thresholds are not satisfied. It is necessary to analyse whether the alternative tests are met:[4]

- a lower worldwide turnover, all the undertakings engaging a combined worldwide turnover which exceeds EUR 2.5 billion;

- all the undertakings generate a combined EU-wide turnover which exceeds EUR 100 million in each of at least three Member State,

- each of at least two of the undertakings concerned generate a turnover which exceeds EUR25 million in each of the already identified three Member State;

- a lower EU-wide turnover – each of at least two of the undertakings concerned generate a combined EU-wide turnover which exceeds EUR 100 million.

However, even if the original or the alternative thresholds are met, the two-thirds corrective means that an EU dimension cannot arise when each of the undertakings concerned engages more than two-thirds of its EU-wide turnover in

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[1] Article 2(1) European Merger Control Regulation nr. 139/2004 (EUMCR).

[2] Art 21(3) European Merger Control Regulation nr. 139/2004 (EUMCR).

[3] Kekelekis, M., *EC Merger Control Regulation: Rights of Defence, a Critical Analysis of DG COMP Practice and Community Courts' Jurisprudence,* Kluwer Law International, 2006, p. 29.

[4] Provided by Art. 1(3) European Merger Control Regulation nr. 139/2004 (EUMCR).

one and the same Member State. If applicable, then there is no obligation to make a notification to the Commission. This rule aims at avoiding any overlapping jurisdiction situations. The transaction will be examined by the national authority of that state since it is better placed than the Commission to investigate its potential impact on the competition.

The two sets of thresholds are purely jurisdictional with the view to establish if the Commission or a national authority is the one having jurisdiction over a certain concentration. The agreement between the parties involved in a concentration does not have to be signed or performed within the EU territory.[1]

3.2. Notification procedure

The EUMCR clearly states that it is compulsory for a concentration meeting the thresholds to be formally notified to the European Commission. Notification must be made following the date when the agreement is concluded, prior to its implementation, and conversely, the concentration shall not be implemented before it is notified or until it has been issued a clearance decision. Where an intended agreement or bid would result in a concentration having an EU dimension, the notifying parties have to demonstrate to the Commission a concrete plan to enter into an agreement or they have to publicly announce their good faith intention to make a public bid.

Depending on the concentration's nature, the following are responsible to notify it: the merging parties in true merger cases, the acquirer of control for an acquisition of sole control, the acquirers of joint control for an acquisition of joint control, and the undertakings sharing control of the newly created full-functioning joint-venture.

DG Competition made available a Best Practices document in 2004 with detailed guidance of the review process. The parties involved in the merger are encouraged to participate in pre-notification consultations with at least two weeks before the intended formal notification of the deal. These meetings are valuable for the parties in the way that they get recommendations and confirmation from DG Competition regarding several sensitive issues: jurisdictional competences over the proposed concentration are established, possible competition concerns are clarified, negotiation of specific waivers from the obligation to supply certain information to be provided in the form or the case may qualify for the Simplified Procedure, awareness of the deadlines under which the Commission operates.

The Form, used to notify those concentrations qualified for the normal procedure, is in fact not a form, but a framework providing guidance on how the large amount of information requested must be presented. It is divided into 11 sections, each asking for specific facts to be supplied, as follows:

Section 1 – description of the concentration;

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[1] Colino, S. M., *Competition Law of the EU and UK,* Oxford University Press, 2011, p. 363-364.

Section 2 – information on notifying party (parties) and the nature of the undertaking's activities;

Section 3 – nature of the concentration (ownership structure and control over undertakings);

Section 4 – data regarding the undertakings' turnover and the value of the transaction;

Section 5 – copies of all supporting documents analysing the concentration;

Section 6 to *Section 8* – market definitions (relevant product market, relevant geographic market, affected markets);

Section 9 – overall market context and any efficiencies probable to result from the concentration;

Section 10 – co-operative effects of a joint venture (if applicable).

Attached to the notification, the final *Section 11* provides that the representatives of the undertakings concerned must sign a declaration in good faith in order to certify the veracity of the information supplied.[1]

DG Competition has to ensure that the form is accurately filled in with all the information requested for the investigation. The notifying party (or parties) must fully complete the form or provide, if applicable, a reasonable explanation why the information requested is not available. Otherwise, the notification is considered incomplete and will not be effective until the date on which the Commission receives all the necessary information. In most cases, notifications deemed to be incomplete are caused by limited or no pre-notification contacts cause, but this risk can be reduced by engaging parties in pre-notification consultations.[2]

The Commission introduced the Simplified Procedure in order to reduce costs and inconvenience for parties involved in concentrations which are unlikely to raise competition concerns with a Short Form available for such transactions to be notified. Compared to the full notification form, this one requires much less information for the parties to supply: the market definition, market shares and any other document critical to the subject matter of the investigation.

According to the Notice issued by the Commission, the following concentrations are eligible to be notified under the Simplified Procedure:

- joint control acquisition of an undertaking where the joint venture has turnover less than EUR 100 million in the EEA and its total assets value is less than EUR 100 million in the EEA, at the time of notification;
- concentrations resulted from conglomerate mergers where there are no horizontal or vertical market overlaps between the activities of the undertakings concerned (they don't share the same product and geographic market);
- a merger or sole/joint control acquisition where, in terms of horizontal

[1] Dabbah, M. M. & Lasok, P., *Merger Control Worldwide*, Cambridge University Press, 2005, p. 399.

[2] Harrison, D., Anderson, D. & Johnson, P., *EU merger control*, Berwin Leighton Paisner, 2015, p. 9.

relationship overlaps, the combined market share of all the undertakings concerned is less than 20% and, in terms of vertical relationship overlaps, the individual or combined market share is less than 30%;

- a party's joint control over an undertaking becomes sole control;
- the total market share of the undertakings concerned is less than 50% and the increase in the market share as a result of the merger is *de minimis*.

The Commission reserves the right to launch a full investigation and its acceptance decision of a Short Form submission varies on a case-by-case basis. The notice will be published in the Official Journal of European Union with the conclusion whether the concentration qualifies for a simplified procedure or not. The Commission will normally issue an unconditional "short-form clearance decision" within 25 days from receipt of notification.

Moreover, for parties involved in transactions which ultimately prove to not qualify for the simplified procedure, an informal way to speed up the process would be to prepare a draft of the Standard Form, then engage in cooperative discussions with the Commission during the pre-notification period in order to avoid misunderstandings or drawbacks during Phase I.

The is also a super-simplified procedure which requires a shorter version of the Short Form to be filled in, only for certain transactions. Joint ventures active outside the territory of the EEA are those benefiting from this advantage because they do not give raise to reportable markets (all relevant product and geographic markets where the joint venture itself and at least one of the acquiring parties is engaged in business activities). The notifying parties have to describe the transaction, their business activities and supply turnover information to the Commission. In the case where the transaction does give rise to reportable markets, then section 6 and section 7 of the Short Form must be completed as well with the market definitions and all the necessary information on them.

DG Competition has to consider completed the notice, then it publishes the names of the parties, the case number, the date of the notification and the provisional phase I end date on its website. It must also constantly update this information page with other key dates during the review process. All national authorities will receive copies of the Form submitted within three working days. A notice inviting third parties to express their observations must be published in the EU Official Journal.

The regulation clearly prohibits for concentrations to be "*implemented either before its notification or until it has been declared compatible with the common market"*.[1] The Commission can grant a derogation when it receives a reasoned request coming from the parties involved in the concentration, during the pre-notification period.[2] All implications arising from such a derogation must

[1] Article 7(1) European Merger Control Regulation nr. 139/2004 (EUMCR).
[2] Article 7(3) European Merger Control Regulation nr. 139/2004 (EUMCR).

be taken into consideration, therefore the Commission may impose certain conditions or obligations with the main scope that competition would not be eventually affected.

There is an automatic derogation of this suspension in the case of *"public bid or a series of transactions in securities including those convertible into other securities admitted to trading on a maket such as a stock exchange"*[1] provided that the concentration must be notified to the Commission immediately after the announcement of the intention to launch the bid and the acquirer will put to use its voting rights only where they are necessary to preserve *"the full value of its investments"*[2].

After receiving the notification, the appraisal procedure of concentrations is subject to clearly-defined time limits. Commission has an initial period of 25 working days to assess whether the notified concentration falls within the scope of regulation or not. If the answer is a positive one, then it must analyse whether it raises serious doubts regarding its compatibility with the internal market.[3]

Phase I investigation begins with market test questionnaires to be answered by customers, suppliers, and competitors of the undertakings involved in the concentration. This period can be extended to 35 working days in the case of referrals to the national authorities or where the undertakings concerned offer remedies with the purpose to render the concentration compatible with the internal market.

After the Phase I investigation period, the Commission must reach a decision as follows:

a) No jurisdiction – the concentration lacks an EU dimension and therefore, it does not fall within the scope of the EUMR;

b) Unconditional clearance – the deal may proceed because it does not raise concerns regarding its full compatibility with the internal market;

c) Launch of Phase II – if appropriate remedies are not submitted in due time and the deal is still under serious doubts concerning its compatibility with the internal market, then the Commission will start a more detailed investigation;

d) Clearance subject to commitments – even where the concentration is raising serious competition concerns, it can be declared as compatible with the internal market only if a state of play meeting was convened on or around the 15th day during Phase I but no later than the 20th day following notification, the Commission accepts the parties' proposal of appropriate commitments regarding their future behaviour in business so that any anti-competitive deviations will be corrected.[4]

Where the Commission considers that the concentration raises serious

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[1] Article 7(2) European Merger Control Regulation nr. 139/2004 (EUMCR).

[2] Lorenz, M., *An Introduction to EU Competition Law*, Cambridge University Press, 2013, p. 295-296.

[3] According to Art. 10(1) European Merger Control Regulation nr. 139/2004 (EUMCR).

[4] Kaczorowska, A., *European Union Law,* Routledge, 2016, p. 991.

doubts about its compatibility with the internal market, a second in depth investigation will be launched. It is held a state of play meeting with two weeks before the Phase II initiation date. This meeting is aimed at ensuring transparency and efficiency of the decision making process.

Phase II investigation opens with the Commission presenting its arguments which lead to concerns regarding the impact of the concentration on the internal market. The notifying parties can submit written remarks to it. Such meetings are usually convened at five different points during Phase II review period, keeping in mind the end goal to facilitate communication between the parties and DG Comp, and clarify key facts and issues.

Moreover, the Commission can summon interested third parties to participate in debates during the meetings. As the investigation advances and it is acknowledged that the transaction will not significantly impede effective competition, then Commission adopts an unconditional clearance decision.

Nevertheless, if the investigation proves that the concentration will become a significant impediment to effective competition, then DG Competition holds another state of play session. The hearing is not public, but it will be attended by the DG Competition team responsible for the case and other specialists in the legal and economic field and, supplementary, by interested third parties and national authorities representatives who may present their own perspective on the subject matter of the investigation.

The time limits corresponding to the Phase II investigation are laid down in the Art. 10(3)(4) EUMCR. For instance, the final decision must be concluded within a period of 90 days from the initiation of this phase, but the period can be extended as follows:

- to 105 working days where commitments are offered by the parties after the 55th day,

- to 125 working days for complex cases either at the request of the parties within 15 days from the start of Phase II

- at the initiative of the Commission with the parties' consent.

In some cases, on account of the parties' failure to supply the information required for the investigation, the Commission can suspend the works and, as a consequence, the verification process is delayed, beyond the statutory timetable.

The Commission has to adopt a decision at the end of the Phase II investigation, as follows:

a) unconditional clearance – the concentration is concluded to be compatible with the internal market;

b) clearance subject to conditions – the concentration is declared compatible with the internal market only if the parties concerned comply with the commitments they have proposed; or

c) prohibition – the concentration is incompatible with the internal market and no adequate remedies have been proposed.[1]

In case the Commission fails to adopt a final decision within the prescribed timetable, the regulation[2] provides that the concentration shall be declared as compatible with the internal market.

The Commission must publish its decision in the Official Journal and, if applicable, attach to it the Advisory Committee remarks with reference to the remedies proposed. The Commission must ensure that all information disclosed regarding the concentration does not reveal any business secret or hinder the parties' interests.[3]

3.3. Substantive assessment of the merger and outcome of the process

In the assessment of a merger, the Commission must ensure that the objective to maintain and develop effective competition is reached by taking into account all factors of influence over the undertakings concerned as well as the market where they are doing business. The effects of a merger are evaluated based on a comparison between the competitive circumstances that would result after the notified merger is implemented and the counterfactual, meaning the circumstances that would have prevailed without it, monitoring at the same time possible chains of cause and effect which might arise for the long term.

The Commission issued a Notice which offers guidance so that the relevant market is properly defined before the appraisal of any concentration. According to this Notice the relevant market comprises:

- the product market – all products/services regarded as interchangeable or substitutable by the consumer in terms of characteristics, intended use and price;

- the geographic market – the geographic area where the undertakings concerned supply with products/services and the competition features of this area are different from its neighbouring ones.

When it comes to the product market, parties may prefer to define a broader one so that their market share appears to be lower, or on the contrary, a narrower product market definition where no horizontal overlap is discovered might work in their advantage. The parties may be willing to argue for a geographic market as wider as possible with the scope that their market share seems lower, or in other cases a narrower geographic market may ensure no horizontal overlaps.

The Horizontal Merger Guidelines[4] provide that horizontal mergers may

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[1] *Idem*, p. 992.

[2] Art. 10(6) European Merger Control Regulation nr. 139/2004 (EUMCR).

[3] Furse, M., *op. cit*., 2006, p. 113-116.

[4] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004.

harm effective competition when they produce non-coordinated or coordinated effects.

Non-coordinated or unilateral anti-competitive effects occur in a market with a single-firm dominance or in oligopolistic markets with only a few major players where, as a result of reduced competitive pressure, prices increase, freedom of choice decreases, innovation is slowed down and ultimately one undertaking either strengthens or gains a dominant position. In order to assess possible non-coordinated effects resulting from the notified concentration, the Commission must take into consideration a series of factors and conditions, as follows:

• closeness of competition may become an issue if the merging undertakings sell substitutable products. In the absence of other close substitutes, competitors cannot constrain their behaviour, especially regarding pricing. The degree of substitutability is high where, for example, there are two producers with products that customers consider as their first and second choice and, in this situation, the risk that they will significantly raise prices following the merger is also high. However, this risk is reduced where it is relatively easy and affordable for other competitors to change their production accordingly to the newly created conditions in the market.

• customers are affected in such a way that they are left with a limited number or even no other suppliers to buy from, their bargaining power is low, and therefore they become vulnerable to price increases.

• the merged undertakings seek to increase prices, especially where they seize weakness in their competitors' ability to recalibrate their business. In this situation, it must be carefully assessed if the actual or potential competitors have enough capacity to boost output and sales in order to constrain this predisposition towards dominance.

• substantial expansion in market share of one player will not raise competition concerns if barriers for new entrants are low and the other market participants still have space to enlarge their business. However, issues along the supply chain may arise if the merging parties have certain intellectual property rights which considerably limit competitors' access to either supply of inputs or demand for outputs. Moreover, restricted access may lead to higher costs or a decrease in the quality of their products/services.

• There might be the case where the market share value of a merger does not reveal its real market power and influence on the market. Therefore, not only the current position of the merger must be taken into consideration, but also its long-term potential to develop.

In certain oligopolistic markets, a horizontal concentration may favour a tacit collusion between its main players, resulting in a collective dominance. They would be able to coordinate their business activities and furthermore monitor and punish those members trying to cheat or step out of the agreement, and thus, significantly cause harmful coordinated effects on competition.

In the Non-Horizontal Merger Guidelines, The Commission focused on the limited set of circumstances in which vertical and conglomerate concentrations may give rise to competition concerns.

According to the Guidelines[1], vertical mergers between undertakings with high market powers may significantly harm competition through input foreclosure or customer foreclosure. Foreclosure means that competitors have restricted access to either suppliers or distribution channels, so the Commission's review must focus on the availability of several alternatives for competitors after the transaction is closed.

Conglomerate mergers cause anti-competitive effects when the products of the parties involved in the transaction are complementary, the newly resulted portfolio of brands increasing their market power, situation which favours bundling and tying foreclosure. Bundling can be pure – two products are sold exclusively in a package, in a *"fixed proportion"*, and mixed – two products are sold together at a discounted price, but they are also available to be bought individually.

The creation of a full-function joint venture becomes incompatible with the EU's internal market if it has as its object or effect the co-ordination of their parents' competitive behaviour.[2] In the case where its parents are active on the same market as the joint venture or on downstream/upstream/neighbouring markets from that of the joint venture, spill-over effects appear. Such effects may prove to be prohibited anti-competitive behaviours as provided by the Art 101(1) TFEU, so the Commission will initiate a Phase II investigation to establish the compatibility of the joint venture with the internal market. The parties can remove the risk of prohibition only by offering commitments in order to eliminate all spill-over effects or to prove that the Art 1(3) TFEU criteria are satisfied.

While the merger control legislation sheds light on the anti-competitive implications of a merger, the merging undertakings can bring into discussion the anticipated economic gains of it in the relevant market and use them as an efficiency defense. Thus, when appraising concentrations, the merger regulation indicates that it is appropriate for the Commission to consider any valid efficiencies which may prove to counteract its anticompetitive effects.

3.4. Third parties' interventions, remedies and judicial review

Third parties' intervention is critical due to the fact that their involvement is necessary in the assessment of concentrations which appear to impede competition. Third parties having a *"sufficient interest"*[3] in the notified merger can be: any customer, consumer organisation, supplier, competitor, employee, or their

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[1] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, paragraph 30.

[2] According to Art. 2(4) European Merger Control Regulation nr. 139/2004 (EUMCR).

[3] According to Art. 18(4) European Merger Control Regulation nr. 139/2004 (EUMCR)

representatives. They are involved in the review process from the moment the Commission published the announcement in the Official Journal that consultations with any interested third parties are open, and they can submit their comments. The Commission sends questionnaires to third parties with the purpose of obtaining a more accurate definition of the circumstances under which the merger is taking place.

Interested thirds parties can express their opinions on the concentration both in writing and at oral hearings. Triangular meetings are particularly designed for the Commission to communicate with the third parties. Under certain confidentiality conditions imposed, interested third parties have access to a nonconfidential adaptation of the form and, if applicable, they also participate in the market test of the proposed remedies.

Remedies accepted by the Commission are set out in the latest revised Notice on remedies from 2008[1]. This Notice aims at providing guidance with regards to the undertakings' way of making commitments in order to modify a concentration and thus eliminate competition concerns. It is highlighted that the notifying parties are those responsible to propose and engage in adequate commitments. They must prove to the Commission that the proposed remedies are feasible and long-standing enough to guarantee that the competition concerns will not eventually materialize.

The notifying parties are strongly encouraged to submit a draft of the remedies and a standardized form with detailed information describing the proposed commitments and the terms for implementation.

The final formal commitment is officially submitted to the Commission only after the team assigned to investigate the case is reviewing the proposals and approves them. The commitments shall be signed by an authorised representative of the parties concerned. The parties shall also provide a non-confidential version of their commitments with the view to be tested by the Commission together with all interested third parties.

Remedies are evaluated based on their potential to completely remove the competition issues, timeliness, particularities of the market in question and practicality. For the Commission to accept the remedies, the parties must also assume the obligation to implement them within a brief timeframe and make sure they fully eliminate the competition issues to be caused by the merger.

The Commission cannot accept remedies if they can produce effects at least equal in terms of success at removing competition issues to those resulted after a divestment. However, it might be even impossible for the Commission to evaluate compliance with non-structural commitments because the monitoring activity depends on the involvement of other market participants which may not

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[1] Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 (Text with EEA relevance), OJ C 267, 22.10.2008.

have the ability to observe and report such behaviour or they may not be interested in collaborating with the Commission as they do not get any advantages out of it.

Moreover, monitoring behavioural commitments may prove to be quite costly for the Commission which is a major drawback. Divestiture is widely preferred over the behavioural commitments, but the Commission takes into account the particularities of each case and issue the most appropriate decision in order to control concentrations with an adverse impact on the competition.

The procedure allows the parties to submit remedies both during Phase I and Phase II of the investigation. Parties can put forward remedies even before the formal notification. Even if pre-notification consultations are encouraged, in this case the Commission may be reluctant to take into consideration a remedy proposal before it manages to learn about third parties' opinions.

If the Commission identifies *"serious doubts"* with regard to the merger during the Phase I investigation, then parties can propose remedies so that the concentration can be cleared subject to conditions, otherwise the transaction has to be further investigated during the Phase II of the review procedure.

During Phase I, there is a 20 days time limit to submit remedies and the investigation is automatically extended from 25 to 35 days. Even if this timeframe may prove to be way too short to acknowledge what competition issues to address, it is possible for the parties to manage to submit complex remedies and avoid a prohibition decision.

During Phase II, parties have 65 days to submit remedies and if they are submitted after the 55th days from the initiation of the Phase II, then the investigation is extended from 90 to 105 days. Moreover, if the level of complexity requires, then 20 days are added up so that remedies can be properly evaluated.

The Commission will issue a prohibition decision if the proposed remedies cannot solve the competition concerns during Phase II and the merger notification is not withdrawn. On the other hand, if the Commission gives its approval on the remedies, then the concentration is cleared, but the parties are obliged to ensure compliance with their commitment. The Commission can subsequently revoke its clearance decision if it proves to be based on incorrect information or the parties breach an obligation attached to it.

Chapter 4
Perspectives European Merger Control

Merger control in the European Union is carried out with the aim of protecting consumer welfare, the purpose of the European Union Merger Regulation being to sustain an effective and well-functioning European single market by effectively ensuring that concentrations will not bring an adverse impact on competition. Such concentrations eliminate competitive constraints that exist between the merging parties as well as between the merging parties and third parties. Where this reduction has a substantial adverse effect on overall market competition, the market will be less oriented towards consumer and efficiency goals.

The European Union Merger Control represents one of the three pillars of the European Competition Law, along with antitrust and state aid. In the context of globalization and fast development of the markets, including the digital economy, amendments of the Merger Control were essential for a competitive and innovative European single market[1]. This is why the Reform of the European Merger Control was implemented in 2004, after the Commission published several papers, in which it explained the importance of making some changes in order to not only increase competitiveness in the European Union, but also on the international level. These new procedures implied the increased reliance on the economic analysis, through the establishment of the Chief Economist position within the Merger Control Department, after several famous Commission's decisions were appealed to the Court of First Instance, which decided to overrule them. Airtours/First Choice and Schneider/Legrand, as well as Tetra Laval/Sidel cases raised some pertinent questions regarding the importance of the economic analysis, that already represented a trend on the international level.

The European Merger Control went through a lot of changes during the past decade and a lot of effort was put into the competition system that we are currently having. There are always things to be improved and new challenges are to be addressed, the digital economy with its unique and dynamic features being only one of them. Unlike our predecessors, we know for sure that European single market works, that is no longer just an aspiration, but something we have already achieved. An environment where innovation and fair competition are promoted already exists and all we have to do is to ensure the continuous improvements are done to update the European Union Merger Control system to the coeval context. Ultimately, the European Union's future perspectives do not lie in becoming more like other economic powers in the world, but more like itself.

One of the major challenges the European Union Competition Law faces

[1] About the European Union's digital single market see Dumitru, O. I., Tomescu, A. V., *European consumer law in the digital single market*, „Juridical Tribune – Tribuna Juridica", volume 10, issue 2, June 2020, pp. 231-233.

at the present moment is related to the digital market. There are two main reasons for which experts are considering this subject problematic. The first one is related to the policy aspect, as the big question is whether or not the rules applied today for the competition are also valid for the digital economy. The second one concerns the practical approach of the matter, as the digital economy is constantly changing, so there is a higher level of uncertainty involved.

The complexity of the digital economy lies in three main aspects. To begin with, the customers in this context can also be intermediaries, so the concept of clientele broadens. Secondly, for this relatively new market, price is not all that matters. Quality may be considered primarily a competitive advantage. Last but not least, we may agree upon the fact that the improvements in technology have mainly beneficial effects, especially in relationships with the clientele. Even so, we cannot neglect the negative aspects, such as the inequality of the bargaining powers, the biased list of the clients or the problems related to maintain privacy.[1]

There are several unique ways in which the digital economy shapes durable power. Some good examples of successful digital players on the market would be Facebook, which owns all three biggest social applications: Facebook, Instagram and WhatsApp. According to StatCounter Global Stats, Facebook has a market share of 72.03% in May 2020. Moreover, Google has a market share of 91.54% of the search engines market. Microsoft has a market share of 72.9 % as of February 2020. These being considered, we may agree that digital markets have some features that allow companies to reach monopolistic market shares more often than the offline ones.

One of these unique features that is considered to be problematic is represented by the high barriers to entry, as they oppose new entrants. Even though some of the barriers that are in common markets, are also part of the digital ones, they may have different outcomes.

A very good example in this regard is Apple, who tried in 2012 to create a specific Maps Application to compete with Google Maps, but they did not manage to convince their customers to give up on the latter. A second barrier to entry is represented by the outcomes of using a network. It is to be mentioned that even though networks are less powerful for start-ups, they become significant when the market is matured and the levels of innovation are decreasing. Thirdly, the digital massive companies vehemently oppose new entrants. The simple presence of these giants is enough to impede the promotion of innovation and to discourage new companies to enter the market. For example, Facebook tried to buy Snapchat, as it became really popular among youngsters, but when the latter refused, Facebook Inc. tried to introduce features that resemble these on Snapchat.[2]

The idea that competition is so powerful in the digital markets that we do

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[1] Ezrachi, A., *EU Competition Law Goals and The Digital Economy*, Oxford Legal Studies Research Paper No. 17, 2018.

[2] Newman, J., *Antitrust in Digital Markets*, „Vanderbilt Law Review", Vol. 72, 2019.

not need too much critical examination is nothing but a myth, mainly due to the fact that even though the customers are just *"a click away"* to switch to a competitor, they first need to be informed about the process itself. Therefore, the clientele makes its choice online after conducting the necessary research, including price-related information. These being taken into account, even though the elasticity of demand may be higher in the digital markets, this does not justify the absolute presence of effective competition, without any deviating behaviour.

As already known, the European Union antitrust envisages a competition system that has in the centre of it the consumer welfare. Even though it is not the only goal the European Union competition law is pursuing, it is the most important. Some other goals would be represented by consumer well-being, efficiency and innovation, plurality and economic freedom, market integration, fairness and effective competition structure.[1]

Consumer well-being implies the economic, tangible approach of the concept of consumer welfare, which is more abstract and complex. As they are quite hard to measure, the European Union competition institutions have measured these concepts using consumer surplus benchmark, but only to approximate the welfare and well-being of the consumers.[2]

The fierce competition in terms of innovation is even more of a reason to encourage antitrust law to be enforced in the digital markets, as they are not self-correcting, as stipulated by some people, who hold the view that the predecessors of Google and Facebook constituted at that time high barriers to entry. Even though MySpace and Yahoo represented competition for Facebook and respectively, Google, there is no room for comparison for the mere reason that in 2008, the online space was in its infancy. More than a decade later, it is hard for a garage start-up company to even get close to giants like Facebook or Google.

Obviously, this is a major threat to innovative companies that want to enter the market and add value for their customers. Innovation, also known as dynamic efficiencies in the competition law, must be protected at all costs, as it ensures a free market system and maximizes efficiencies and promotes fairness and integrity. These being considered, it is absolutely necessary to prevent excessive and long-termed market power, as digital markets are more inclined to encourage this type of behaviour that is detrimental to effective competition and subsequently, to customers.

Even though the plurality and economic freedom are difficult to be managed, as in the digital economy context, which is really vast, companies may abuse their dominant position in order to distort the information for their own benefits. *"The values of plurality and freedom may also draw attention to search engine manipulation effects. Illustrative are ranking biases, search suggestions and search engine manipulation effects which have attracted attention in recent*

[1] Ezrachi, A., *op. cit.*, 2018.
[2] *Idem.*

years due to their potential causal connection with the outcome of certain political elections"[1]. The media manipulation is now being accompanied by social networks which, based on some algorithms and data structures, may shape people's minds in unexpected ways. This is where the users' freedom is being attacked and the law must intervene.

The proper function of the European Union competition system is essential to ensuring the market integration of the domestic markets of all Member States. If there are improvements of the merger control, the barriers between the national markets are going to be diminished. For example, exports and imports are going to be encouraged, if there is no contractual obligation with respect to online markets. If the substitutability between digital products is being increased, then geo-blocking goals are eliminated.

Both from the ethical and practical points of view, the concept of fairness is embedded in the merger control rules of the European Union. Some practices that are being conducted by dominant actors on the online market are more likely to be discriminatory towards its customers, so being able to counter-attack this abuse through competition law is important. This is also related to the privacy concept discussed previously, as this violation may lead to incomplete or distorted information, as well as exploitation of the clients.[2]

Last but not least, effective competition structure needs to be preserved in order to ensure that the customers not only are not harmed by the uncompetitive practices, but also that the actors on the market are not intending to generate detrimental effects through their actions. This calibrated structure limits the barriers to entry, in order for the competition to be as active as possible, as well as promoting innovation, having as a mere scope the maximization of the satisfaction for the consumers, at a lower cost.

These being said, the European Union Merger Control Regulation envisages the full spectrum of these above-mentioned goals, that converge into the concept of consumer welfare. The online markets, which are complex and dynamic, amplify the importance of these main goals, as the digital economy facilitates the durable power on the market, as previously explained. Implicitly, the authorities have to adapt to this relatively new market in order to ensure the existence of fair competitive practices that promote innovation and equity in the digital market.

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[1] Newman, J., *op. cit*., 2019.

[2] Ezrachi, A., *op. cit*., 2018.

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