

## THE ROLE OF EFFICIENCIES IN MERGER CONTROL: COMPARATIVE EU-USA PERSPECTIVE

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### ULOGA UČINKOVITOSTI U KONTROLI KONCENTRACIJA IZMEĐU PODUZETNIKA – KOMPARATIVNA PERSPEKTIVA EU-USA

*U više navrata susreli smo se sa situacijom u kojoj prekoatlantska koncentracija biva odobrena u jednoj jurisdikciji, a zabranjena u drugoj. Oprečne odluke mogu, između ostalog, počivati na različitoj ulozi učinkovitosti pri ocjeni koncentracija. Bit ovog problema sastoji se u pitanju treba li dopustiti da potencijalne učinkovitosti koncentracije prevladaju njezin mogući antikompetitivni učinak.*

*Autorica analizira pristup Europske unije i Sjedinjenih Američkih Država prema učinkovitostima u kontekstu kontrole koncentracija, pokušavajući odgovoriti na pitanje je li s reformom europskih pravila o kontroli koncentracija iz 2004 i 2007. godine, postignuta potpuna konvergencija između EU i SAD-a. Iako se može primijetiti da su danas njihova pravila vrlo slična, autorica drži da bi razlike mogle ustrajati budući da je za očekivati da će se formalno ujednačena pravila tumačiti i biti primijenjena drugačije u ove dvije jurisdikcije. Navedeni zaključak izvodi se iz analize zakonodavne povijesti dviju jurisdikcija, političkih ciljeva koji prožimaju relevantna pravna pravila, kao i postojeće prakse koja će vjerojatno biti primijenjena na nova pravila.*

**Ključne riječi:** tržišno natjecanje, kontrola koncentracija, učinkovitosti.

## Introduction

In the last decade the world faced a proliferation of merger control systems aimed at insuring the efficient functioning of markets by protecting free competition. While effectively preventing the distortion of markets by prohibiting anticompetitive merger practices, multiplicity of merger control regimes might also discourage entrepreneurs from engaging in these practices. Numerous diverging merger control rules result in high costs and complexity of having to comply with different information requirements and different time schedules. Moreover, multiplicity of different merger regimes raises the concern that different reviews may yield different results. It is along this line of reasoning that the EU and US – two of the biggest markets in the world and each other's main business partners – engaged in a serious debate over the differences between their jurisdictions with a view to overcoming the identified differences to the maximum degree possible and, thereby, stimulating healthy rivalry. One of the most important identified differences analyzed in this paper, is the role of efficiencies in merger appraisal in the two jurisdictions.

The role of efficiencies came at the center of international attention on July 3, 2001 when the Commission of the European Union blocked the \$42 billion merger (billed the “largest industrial deal in history”<sup>1</sup>), between *General Electrics and Honeywell*,<sup>2</sup> after it had already been approved by the United States Department of Justice with some minor concessions, raising serious questions on the policy divergence between the EU and USA. Unlike the US, which views mergers as legal even when raising serious competitive concerns if they create efficiencies, until 2004 the EU “has refrained from adopting an explicit efficiency defense and efficiencies have rarely, if ever, played an important role in decisions to clear mergers or accept restructuring proposals”<sup>3</sup>. EU has traditionally treated efficiencies more as an offence than a defense. This means that while the US allowed mergers that generated efficiencies to proceed even though they were raising anticompetitive concerns, the EU rejected the consideration of efficiencies as an offsetting factor to the finding of dominance. This view appears to have transpired in the highly politicized outcome of GE / Honeywell case, opening doors to a wide transatlantic academic debate over the treatment of efficiencies in the two jurisdictions.<sup>4</sup> The debate resulted, *inter alia*,

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<sup>1</sup> Kolasky, W. Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, *Conglomerate Mergers and range Effects: It's a Long Way From Chicago to Brussels*, George Mason University Symposium, Washington, 2001, p. 3 available at <http://www.usdoj.gov>

<sup>2</sup> Case COMP/M. 2220, *General Electric/Honeywell*, OJ L 48/1, 18/02/2004

<sup>3</sup> Greaney, T. L., *Not for Import: Why the EU Should Not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures*”, Saint Louis University Law Journal, 2000, 444 STLULJ 871 at 889.

<sup>4</sup> The scholars have written extensively on the proper role of efficiencies in the merger appraisal both from the comparative legal perspective and the economic theory perspective. *See e.g.* Brodley, J.F., *Proof of Efficiencies in Mergers and Joint Ventures*, Antitrust Law Journal 1996, 64 ANTITRLJ

in a package of reforms of the EU merger control rules affecting efficiencies. In 2004, the Council approved a new legal text of the Merger Regulation<sup>5</sup>, Council Regulation No. 139/2004 on the Control of Concentrations between Undertakings<sup>6</sup> (hereinafter 2004 Merger Regulation), modernizing the merger

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575; Camesasca, P.D., *The Explicit Efficiency Defense in Merger Control: Does it Make a Difference*, European Competition Law Review, E.C.L.R. 1999, 20 (1), 14-28, 1999; Colley, L., *From Defense to "Attack"? Quantifying Efficiency Arguments in Mergers*, European Competition Law Review, E.C.L.R. 2004, 25 (6), 342-349, 2004; Conrath, C.W. Widnell N.A., *Efficiency Claims in Merger Analysis: Hostility or Humility?*, George Mason Law Review, 1999, 7 GMLR 685; Davies J., Schlossberg R., Jaspers M.B., Scholomiti K., *Efficiencies – a changing horizon in horizontal merger control*, Getting the Deal Through – Merger Control 2007, Freshfields Bruckhouse Deringer, available at [http://www.gettingthedealthrough.com/narrative\\_pdf.php?id=11](http://www.gettingthedealthrough.com/narrative_pdf.php?id=11), Fackelmann CH.R., *Dynamic Efficiency Considerations in EC Merger Control: An Intractable Subject or Promising Chance for Innovation*, 2006, University of Oxford, Centre for Competition Law and Policy Working paper No. L-09/06, available at <http://ssrn.com/abstract=910465>; Goldman C.S., Knable Gotts, I; Piaskoski M.E., *The Role of efficiencies in Telecommunications Merger Review*, Federal Communication Law Journal, 2003, 56 FCLJ 87; Greaney, T.L., *Not for Import: Why the EU Should not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures*, Saint Louis University Law Journal, 2000, 44 STLULJ 871; F. Ilzkovitz, Roderick Meiklejohn, EUROPEAN MERGER CONTROL: DO WE NEED AN EFFICIENCY DEFENCE?, Edward Elgar Publishing, 2006; Jaspers M. B., *EU: Commission Takes Closer Look at Efficiencies*, 2006, Global Competition Review, G.C.R. 2006, Nov. 41; Knable Gotts, Ilene; Goldman, Calvin S. *The Role of Efficiencies in M&A Global Antitrust Review: Still in Flux?*, 29 International Antitrust Law and Policy, Fordham Corporate Law Institute 201,(Barry E. Hawk ed. 2003); Kocmut M., *Efficiency Consideratins and Merger Control- Quo Vadis, Commission*, European Competition Law Review 2006., E.C.L.R. 2006, 27 (1), 19-27; Kolasky W.J.; Dick, A.R., *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, Antitrust Law Journal, 2003, 71 ANTITRLJ 207; Kolasky, *Lessons From Baby Food: The Role of Efficiencies in Merger Review*, Antitrust, 2002 Antitrust 82; Lagerlöf, J.and Heidhues P., *On the Desirability of an Efficiency Defence in Merger Control*, 2005, International Journal of Industrial Organisation 827, ISSN 0167-7187; Luescher, C., *Efficiency Considerations in European Merger Control- Just Another Battle Ground for the European Commission, Economists and Competition Lawyers*, European Competition Law Review, E.C.L.R. 2004, 25 (2), 72-86, 2004; Muris T.J., *The Government and Merger Efficiencies: Still Hostile After All These Years*, George Mason Law Review, 1999, 7 GMLR 729; Noel, *Efficiency Considerations in the Assessment of Horizontal Mergers Under European and US Antitrust Law*, European Competition Law Review, E.C.L.R., 1997. 458; Rosenthal M., Pate R.H., Shores R., *Efficiencies and remedies under ECFR*, 2006., G.C.R. 2006, Nov. Supp. (The European Antitrust Review 2007), 31-36; Schmidt I. L.O., *The Suitability of the More Economic Approach for Competition Policy: Dynamic vs. Static Efficiency*, European Competition Law Review, 2007, E.C.L.R. 2007, 28(7), 408-411; Svetlicinii A., *Assessment of Non-horizontal Mergers: Is There a Chance for the Efficiency Defence in EC Merger Control*, European Competition Law Review 2007; E.C.L.R. 2007, 28 (19), 529 – 538; Werden, G. J., *An Economic Perspective on the Analysis of Merger Efficiencies*, Antitrust 1997, 11-SUM ANTITR 12; Vasconcelos H., *Efficiency gains and structural remedies in merger control*, 2007, Centre for Economic Policy Research, No. 6093, available at [www.cepr.org/pubs/dps/DP6093.asp](http://www.cepr.org/pubs/dps/DP6093.asp); Yde P.L., Vita M.G., *Merger Efficiencies: Reconsidering the "Passing-on" Requirement*, Antitrust Law Journal, 1996, 64 ANTITRLJ 735; Areeda, Hovenkamp& Solow, ANTITRUST LAW, 92<sup>nd</sup> ed., Aspen Law & Business 1998 Vol. IVA, a 9E.

<sup>5</sup> Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings; OJ L 395, 30/12/1989 (hereinafter 1989 Merger Regulation).

<sup>6</sup> Council Regulation No. 139/2004 on the Control of Concentrations Between Undertakings, OJ L 24 29/01/04.

regime and encompassing a decade of interpretative findings into a formal body of law. The new Regulation is a part of a package of comprehensive reforms launched in 2001 that includes Horizontal Merger Guidelines on the appraisal of mergers between competitors<sup>7</sup> and a series of non-legislative measures intended to improve the decision-making process. Some of these measures are contained in a set of Best Practices on the conduct of merger investigations and decision-making process, and they range from issues of economic indicators to rights of the defense.<sup>8</sup> More recently, in 2007, the issue of efficiencies was once again revisited by the EU Commission, this time in the context of non-horizontal mergers in the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings. In these recent reforms, the EU seems to have moved towards a more liberal approach to efficiencies, but there may still be important discrepancies between the two jurisdictions.

Although few would contest the desirability of convergence of merger control systems, as such process is important for the efficient functioning of the global market, the EU undertook cautious steps in terms of efficiencies and rightly so. In fact, the right question was not whether convergence is a desirable and legitimate aim, but rather what are the costs of achieving this aim and what is the likelihood of its success? Let us not forget that adopting foreign legal solutions is always a sensitive question as it might require a substantive change in values and thinking. Moreover, success of legal transplants aiming at full convergence across jurisdictions having different legal and political traditions is very doubtful. These points seem to have a lot of bearing when it comes to convergence of laws between EU and USA.

Having in mind the above said, the discussion in this paper includes an analysis of respective legislative histories and applicable policies that facilitate shedding light upon blurry areas of law and defining parameters of possible future developments. I argue that rules that have been formally aligned may still be interpreted and applied differently in the two jurisdictions. In fact, the experience shows that the wording of rules is less important than the manner in which those rules are interpreted and applied. The interpretation and application of rules is to a large extent influenced by the pursued policy goals which are, on their turn, strongly influenced by juridical and political tradition of respective

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(hereinafter 2004 Merger Regulation).

<sup>7</sup> Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings [2004/C 31/03]; OJ C 31 05/02/04, (hereinafter EU Merger Guidelines).

<sup>8</sup> Other non-legislative measures include a creation of a post for Chief Competition Economist in the Directorate General for Competition; appointment, for all in-depth merger investigations, of a peer review panel composed of experienced officials; allocation of additional support staff to the Commission's hearing officers; See, *Commission adopts comprehensive reform of EU merger control*, Brussels, 11 December 2002, IP/02/1856 and Monti, M., *EU gives itself new merger control for 21<sup>st</sup> century*, Speech – Brussels, 20 January 2004; IP/04/70.

jurisdictions. As professor Whish nicely put it, “competition policy does not exist in vacuum: it is an expression of the current values and aims of society and it is as susceptible to change as political thinking generally. Different systems of competition law reflect different concerns, an important point when comparing the law of the US and the EC.”<sup>9</sup> For this reason I carry out a systematic analysis of competition policy underpinnings and the existent legal practices likely to be applied to new rules, only to conclude that while approaching the economic efficiency based US approach, the EU should nevertheless stand strong in protecting its own values and traditions because not everything can nor should be explained and justified by economic models of efficiency.

### *1. Treatment of efficiencies in the US*

The debate over the role of efficiencies in the merger antitrust analysis started when in 1968 Oliver Williamson proposed that the cost savings generated by a merger could justify otherwise anticompetitive combinations.<sup>10</sup> In the lack of any explicit congressional intent on efficiencies in the language or legislative history of Section 7 of the Clayton Act, the issue of efficiencies became a highly debatable issue among scholars. The main point of disagreement was, and to a certain extent still is, the question of whether the Congress sought only to promote allocative efficiency or it intended to promote the consumer welfare.<sup>11</sup> “Allocative efficiency is achieved by maximizing overall societal welfare, or total surplus, without accounting for the distributive consequences of a merger.”<sup>12</sup> According to this view it is irrelevant who is the beneficiary of the created cost savings, is it the created monopolist or the consumers. It is exactly on this preposition that the advocates of the consumer welfare approach differ from the allocative efficiency proponents. Consumer welfare approach considers distributive goals to be the most important. The idea behind it is that the Congress could not have intended to have an unfair wealth transfer from consumers to firms with market power.<sup>13</sup> It is believed that the consumers are

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<sup>9</sup> Whish R., *COMPETITION LAW* Oxford University press, fifth ed. 2005, p. 17; see also Jabsen and Stevens, *Assumptions, goals and dominant undertakings; the regulation of competition under article 82 of the European Union*, 1996, 64 *Antitrust law Journal* 443.

<sup>10</sup> Williamson, O., *Economies and an Antitrust Defense: The Welfare Tradeoffs*, 58 *Amer. Econ. Rev.* 18 (1968) in ABA Section of Antitrust Law, *MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES*, 2000, p. 145.

<sup>11</sup> *See id.*, p. 144-145.

<sup>12</sup> The proponents of this view consider that any merger where the reduced costs of the merged firm (5-10 %) outweigh the deadweight loss of the monopoly (defined as a total value of the goods that are lost to society as a result of monopolistic pricing) brings about efficiency and thus, should be excused by antitrust authorities. *See id.* Williamson, O. *supra* note 10; Bork, R.H. & Bowman W.S., *The Crisis in Antitrust*, *Columbia Law Review*, 65 *Colum. L. Rev.* 363 (1965).

<sup>13</sup> Lande, R.H., *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, *Hastings Law Journal*, 34 *Hastings L.J.* 65, 68 (1982) cited in ABA Section of Antitrust Law, *supra* note 10, p. 145.

entitled to the consumer surplus.<sup>14</sup> Consequently, only those potentially illegal, but cost saving mergers that benefit consumers should be excused by the antitrust authorities.<sup>15</sup> On this issue both the antitrust agencies and the courts agree by being much more favorable to the consumer welfare approach.

### ***1.1. Judicial development of efficiencies***

In spite nowadays being an established judicial and administrative practice to consider efficiencies in the antitrust analysis, this has not always been the case. In the early case law the courts have been reluctant to accept efficiencies as a ground for excusing an otherwise anti competitive merger. The first case to be heard in front of the Supreme Court under the amended Section 7 was *Brown Shoe v. United States*.<sup>16</sup> In that case the court recognized the potential benefits to consumers of the vertical integration discussed before it, however it decided not to give much weight to such efficiency given the perceived Congressional intent to balance in favor of competition over efficiency.<sup>17</sup> With such a ruling the court disregarded efficiencies beneficial to consumers to promote fragmentation and low concentration.<sup>18</sup>

Likewise, in the case *United States v. Philadelphia National Bank*<sup>19</sup> the court rejected the efficiencies that might be created to excuse a merger which is likely to substantially lessen competition.<sup>20</sup> Some years later, in the case *FTC v. Procter & Gamble Co.*,<sup>21</sup> the Court again dismissed the efficiency defense declaring that: “[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition.”<sup>22</sup> Indeed, the Procter and Gamble decision seemed to treat efficiencies more as an

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<sup>14</sup> Consumer surplus is defined as the difference between the amount consumers would have paid for the quantity consumed and the amount actually paid.

<sup>15</sup> The problem with this view is one of a practical nature as the “scholars favoring it were unable to create an applicable test for determining when efficiencies justify a merger, which at the same time ensures that consumer surplus is passed on to consumers.” See ABA Section of Antitrust Law, *supra* note 10, p. 145.

<sup>16</sup> *Brown Shoe v. United States*, 370 U.S. 294 (1962).

<sup>17</sup> The Court stated: “But we cannot fail to recognize Congress’ desire to promote competition, through the protection of viable, small, locally-owned business. Congress appreciated that the occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.” See *id.* at 344

<sup>18</sup> ABA Section of Antitrust Law, *supra* note 10, p.146-147.

<sup>19</sup> *United States v. Philadelphia National Bank* 374 U.S. 321 (1963).

<sup>20</sup> The court stated that “a merger the effect of which may be substantially to lessen competition is not saved because, on some ultimate reckoning of social and economic debits and credits, it may be deemed beneficial.” See *id.* at 371.

<sup>21</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

<sup>22</sup> See *id.* at 580.

offense than as a defense.<sup>23</sup> In 1986, in the case *Cargill Inc. v. Monfort of Colorado Inc.*<sup>24</sup>, the Court implicitly overruled the Procter & Gamble precedent interpreting this prior decision to hold that a merger could be found to violate Section 7 because it would make an already leading firm more efficient.<sup>25</sup> The Supreme Court held that it would be inimical to the purposes of the antitrust laws to prohibit a merger just because it would lead to increased efficiency and lower prices. Accordingly, the Court concluded that the “threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.”<sup>26</sup>

In time, the attitude of the courts towards efficiencies changed even more. They began to accept that efficiencies may rebut a prima facie anti competitive merger based on high concentration. In 1991, in the case *FTC v. University Health, Inc.*<sup>27</sup> the 11th Circuit was deciding exactly on this issue i.e. whether the defendants efficiency based arguments rebutted the FTC’s prima facie case that the merger was likely to result in increased prices. The Court held that “an efficiency defense [...] may be used in certain cases to rebut the government’s prima facie showing in a Section 7 challenge.”<sup>28</sup> The Court based its view on the assumption that the potential efficiencies resulting from an acquisition are of a great importance for predicting whether such acquisition would substantially lessen competition. In fact, the Court stated that “evidence that a proposed acquisition would create significant efficiencies benefiting consumers is useful in evaluation the ultimate issue- the acquisition’s overall effect on competition.”<sup>29</sup> At the same time the Court qualified this view by stating that “[...] once it is determined that a merger would substantially lessen competition, expected economies, however great, will not insulate the merger from a Section 7 challenge”.<sup>30</sup> In other words the court is to consider efficiency defenses only to the extent they may contribute in proving a merger or an acquisition not to substantially lessen competition.

In *United States v. Country Lake Foods, Inc.*,<sup>31</sup> the court found the efficiencies relevant “[...] not so much as an independent factor justifying the proposed acquisition, but as further evidence that the proposed acquisition will enhance competition.”<sup>32</sup> The claimed efficiencies would, according to the court,

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<sup>23</sup> Kolasky, W.J.; Dick, A.R., *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, *Antitrust Law Journal*, 2003, 71 *Antitr. L. J.* 207 at 212.

<sup>24</sup> *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104 (1986).

<sup>25</sup> Kolasky, W. J., Dick, A.R., *supra* note 23, at 224.

<sup>26</sup> *See id.* at 116.

<sup>27</sup> *FTC v. University Health, Inc.* 938 F. 2d 1206 (11<sup>th</sup> cir. 1991).

<sup>28</sup> *See id.* at 1222-23.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* citing *FTC v. Procter & Gamble Co.* 386 U.S. 568, 579 (1967) and *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963).

<sup>31</sup> *United States v. Country Lake Foods, Inc.* 754 F. Supp 669 (D. Minn. 1990).

<sup>32</sup> *See id.* at 680.

enable the firms to “have similar recourses [to that of the market leader] derived from the benefits of economics of scale.”<sup>33</sup>

Some years later, in the case *FTC v. Butterworth Health Corp.*<sup>34</sup>, the court rejected FTC argument that the district court had omitted legal error by allowing the merging hospitals to rebut the FTC’s prima facie case with evidence of efficiencies. The court held that the efficiencies are so great and they represent “savings that would, in view of defendants non profit status and the Community Commitment, invariably be passed on to consumers.”<sup>35</sup> This trend continued and in the same year the Court, in the case *United States v. Long Island Jewish Medical Center*<sup>36</sup>, decided in favor of a merger of two nonprofit hospitals on the grounds of claimed efficiencies. The court stated that “the defendants must clearly demonstrate that the proposed merger itself will, in fact, create a net benefit for the health care consumer”<sup>37</sup> for the efficiency defense to be feasible.

## 1.2. Efficiencies in Horizontal Merger Guidelines

This development has been wildly influenced by the Merger Guidelines, which already in 1968 introduced efficiencies as an element of analysis in merger cases, recognizing that in some “exceptional cases” efficiencies might justify a merger that would otherwise be subject to challenge.<sup>38</sup> The 1982 Merger Guidelines provided that the Department of Justice (hereinafter DOJ) would consider efficiencies only in “extraordinary cases” keeping the 1968 standard. This time however, the wording was considered to be even more restrictive, as it treated efficiencies as an affirmative defense and not as part of the agency’s competitive effects analysis.<sup>39</sup>

The section on efficiencies was subject to major revision in 1984 as a result of DOJ’s experience in reviewing merger cases. The new version introduced four major changes to the treatment of efficiencies.

First, the efficiencies would not serve any longer as a defense to a potentially anti competitive merger, but instead they are to be considered as another element of agency’s analysis of the proposed merger, and accordingly it moved from the “defense section” to the “competitive effects” section.<sup>40</sup> Under this approach the DOJ would “not balance expected efficiencies against expected anticompetitive

<sup>33</sup> *See id.*

<sup>34</sup> *FTC v. Butterworth Health Corp.*, 946 F. Supp 1285 (W.D. Mich 1996), aff’d, 121 F 3d 708 (6<sup>th</sup> Cir. 1997).

<sup>35</sup> *See id.* at 1301.

<sup>36</sup> *United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121 (E.D.N.Y. 1997).

<sup>37</sup> *See id.* at 147.

<sup>38</sup> US Department of Justice, Merger Guidelines, § 10 (1968).

<sup>39</sup> US Department of Justice, Merger Guidelines § 10 A (1982).

<sup>40</sup> Kolasky, W. J.; Dick A.R., *supra* note 23, at 220.



consequences”, instead it would look at efficiencies in determining whether the merger was anticompetitive at all.<sup>41</sup>

Second, the new version on efficiencies explicitly recognized that the primary benefit of mergers to the economy is their efficiency enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers.<sup>42</sup>

Third, the criteria applied by the agencies in evaluating efficiencies were expanded and clarified. The agencies would consider efficiency claims whenever, they are established by clear and convincing evidence<sup>43</sup> and whenever they are significant.<sup>44</sup> This approach loosened up the “substantial” standard from the 1982 version and eliminated the wording of the previous version that required the parties to show that the claimed efficiencies were “already enjoyed by one or more firms in the industry”.<sup>45</sup>

Finally, the new version introduced a more exhaustive list of efficiencies including economies of scale, better integration of production facilities, plant specialization, and lower transportation costs.<sup>46</sup>

The last major revision took place in 1997, and this version is the current official agencies’ approach to efficiencies. This final version of the Merger Guidelines emphasizes that the primary benefit of mergers to economy is their potential to generate efficiencies, giving a list of benefits that might result from a merger.<sup>47</sup> This is not an exhaustive list nor does it imply that all efficiencies are excusable. In fact, according to the Merger Guidelines, in order to be entitled to consideration the efficiencies have to be cognizable. Cognizable efficiencies are “merger-specific, verified, and must not rise from anticompetitive reduction in output or service”.<sup>48</sup>

Merger-specific efficiencies are defined as those efficiencies that are “likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive means.”<sup>49</sup> In other words, those are the efficiencies that cannot be achieved through other less anticompetitive means. This approach taken by the agencies has been criticized on the ground that omitting to consider

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<sup>41</sup> See *id.*, see also *60 Minutes with J Paul McGarth - Interview*, 54 *Antitr. L.J.* 131, 141 (1985).

<sup>42</sup> US Department of Justice, Merger Guidelines § 10 A (1984).

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> US Department of Justice, Merger Guidelines §10 A (1982).

<sup>46</sup> U.S. Department of Justice, Merger Guidelines § 4 (1984).

<sup>47</sup> US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (hereinafter US Merger Guidelines) § 4 (1992, revised 1997).

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

non-merger-specific efficiencies frustrates the very purpose of the analysis, i.e. determining if the merger is anticompetitive.<sup>50</sup>

Due to the fact that efficiencies are difficult to verify and quantify (partly because much of the information is in the possession of the merging firms), the Merger Guidelines require the merging firms to substantiate efficiency claims. Substantiating efficiency claims help the agencies to verify, by reasonable means, the likelihood and magnitude of each asserted efficiency, how and when each would be achieved, how each would influence the merged firm's ability and incentive to compete and why each would be merger-specific.<sup>51</sup> Moreover, the agencies will not consider claims if they are vague or speculative or otherwise cannot be verified by reasonable means.<sup>52</sup> Finally, according to the Merger Guidelines the cognizable efficiencies must not arise from anticompetitive reductions in output or service.<sup>53</sup> This provision emphasizes that not each cost saving from the perspective of the merging firm is efficiency for the purposes of the antitrust analysis. In fact, consumers have to benefit from the reduction of costs created by the merger in order to be excusable on the grounds of efficiency.

The Merger Guidelines state that if "cognizable efficiencies are of such character and magnitude that the merger is not likely to be anticompetitive in any relevant market, such merger will not be challenged by the agencies".<sup>54</sup> In making such a determination the agencies will consider "whether such efficiencies would be likely to reverse the merger's potential harm to consumers in the relevant market, e.g. by preventing price increases in that market".<sup>55</sup> The greater the potential adverse competitive effect of a merger (as indicated by the HHI and post-merger HHI, the potential adverse competitive effects and the timeliness, likelihood and sufficiency of entry), the greater must be cognizable efficiencies in order for the agencies to conclude that will not have the anticompetitive effect in the relevant market.<sup>56</sup> The experience of the agencies show that efficiency claim will be most likely successful when the likely adverse effects of the merger, absent the efficiencies, are not great, as efficiencies almost never justify a merger to monopoly or near monopoly.<sup>57</sup>

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<sup>50</sup> See e.g. Garza., D. A., *The New Efficiencies Guidelines: The same old Transparent Wine in a More Transparent Bottle*, ANTITRUST, Summer 1997, at 7 cited in ABA Section of Antitrust Law, *supra* note 10, p. 162.

<sup>51</sup> US Merger Guidelines, *supra* note 47, § 4.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> Agencies have found that certain types of efficiencies are more likely to be cognizable than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable firms to reduce the marginal cost of production, are more likely to be predisposed to verification, merger-specific, and substantial, and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those related to research and

The most heated debate over the 1997 revision on efficiencies relates to the above mentioned disagreement on whether or not the efficiency gains should be passed on to consumers.<sup>58</sup> Most economists supported and still do, the total welfare approach arguing that “the resource savings benefit society and that any wealth transfer from consumers to producers should be irrelevant”.<sup>59</sup> The Merger Guidelines however do not make a clear cut rule on this issue as it states that the agencies will also consider effects of cognizable efficiencies with no short-term, direct effects on prices in the relevant market.<sup>60</sup> Those efficiencies that immediately benefit consumers through lower prices and increased output will receive the most weight whereas other efficiencies will be considered to the extent they can be proved and can be shown ultimately to benefit consumers.<sup>61</sup> Such an approach taken by the agencies resembles more a “hybrid consumer welfare/total welfare model than one or the other”.<sup>62</sup> Moreover, in the footnote of the Merger Guidelines, the agencies addressed the issue of those mergers that might be anticompetitive in one market and yet having enhancing efficiencies in another market. Restating the general principle that the agencies will normally assess competition in each relevant market affected by the merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market, “the agencies still retain a prosecutorial discretion to consider efficiencies that are inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect without sacrificing the efficiencies in other market(s) [...] Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small”.<sup>63</sup>

While the courts have supported mostly the strict consumer welfare approach rejecting efficiencies claims that have inadequately proven the benefits of consumers and thereby demonstrated that protection of consumers from unfair transfers of wealth is the judiciary’s general perception of Section 7,<sup>64</sup> former F.T.C. Commissioner has suggested that “virtually all cases worthy of prosecution have both wealth transfers and [aggregate economic] welfare losses.”<sup>65</sup> The

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development, are potentially substantial but are generally less predisposed to verification and may be the result of anticompetitive output reductions. Yet others such as those relating to procurement, management, or capital cost are less likely to be merger specific or substantial, or may not be cognizable for other reasons.; *See id.*

<sup>58</sup> Pitofsky R., *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195 (1992) cited in Kolasky, W. J., Dick, A. R., *supra* note 23, at 230.

<sup>59</sup> *See id.*; Also Mitja Kocmut, *Efficiency considerations and merger control-quo vadis*, Commission, E.C.L.R. 2006, 27 (1), 19-27.

<sup>60</sup> US. Merger Guidelines, *supra* note 47, § 4.

<sup>61</sup> Kolasky, W. J., Dick A.R., *supra* note 23, at 230.

<sup>62</sup> *See id.*

<sup>63</sup> US. Merger Guidelines, *supra* note 47, § 4.

<sup>64</sup> ABA Section of Antitrust Law, *supra* note 10, p. 156.

<sup>65</sup> Calvani, T., *Rectangles and Triangles: A Response to Mr. Lande*, Antitrust Law Journal, 58 Antitrust L.J. 657, 657 (1989) cited in Gavil, A.I., Kovacic, W.E., Baker, J.B., ANTITRUST LAW

differences between the total welfare and the consumer welfare approach however should not be considered as a purely academic debate since they express a value judgment underlining a particular policy choice.

## ***2. The EU historical treatment of efficiencies under the 4064/89 Merger Regulation***

The original draft of the 1989 Merger Regulation permitted mergers to be approved when they “contribute to the attainment of the basic objectives of the Treaty in such a way that, on balance, their economic benefits prevail over the danger they cause to competition.”<sup>66</sup> This proposal promoted the balancing attitude towards efficiencies weighing against each other the benefits of a proposed merger and its detriment to competition.

This provision, however, was not included in the final version of the Merger Regulation due to the inability of the Council to “resolve completely the differences between Member States favoring industrial, regional and social policy considerations (e.g. Spain, Portugal and France) and Member States favoring the competition-based analysis more akin to the US model of antitrust review (e.g. Germany and the United Kingdom)”<sup>67</sup>. Some Member States, objected to the inclusion of efficiency defense on the ground that it would be used as a complement to industrial policy. It was believed that the “EU industrial policy, aimed at safeguarding and ensuring the competitiveness of European industry’, might support the creation of the Eurochampion in circumstances where that Eurochampion would be dominant and impede effective competition within the common market.”<sup>68</sup>

### ***2.1. “Technical and economic progress”***

The final version of the 1989 Merger Regulation was a result of a political compromise and thus it did not include any explicit provision on efficiency defense but instead it only opened a window to considerations of efficiencies in the overall appraisal of a merger.

Art 2 (1) (b), which was taken over in its entirety by the 2004 Merger Regulation, provides that in making the appraisal the Commission will take into account, *inter alia*, “the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to

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IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY, Thomson West, 2002.

<sup>66</sup> Proposal for a Regulation, [1989] O.J. C22/14, Recital 16.

<sup>67</sup> Hawk, B., *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, *Antitrust Law Journal*, 1990, 59 ANTITRLJ 195 at 213.

<sup>68</sup> Jones, A., Sufirin B., *EC COMPETITION LAW, TEXT, CASES AND MATERIALS*, Oxford University Press, 2002, p. 798.

competition.”<sup>69</sup> Moreover, considering that the Merger Regulation excludes from its wording a more general reference to improvements in production and distribution, it may be understood to cover only efficiencies resulting from innovation, which is rather limited in scope.<sup>70</sup> Finally, the difference between the two provisions arises out of the wording referring to the passing-on requirement. While the Art. 81 (3) requires only a “fair share” of benefit to be passed on to consumers, the Merger Regulation Art 2 (1) (b) does not set to what extent the consumers have to benefit from the technological and economic development achieved by the merging parties. Therefore, according to the regulatory solution put forward in the Merger Regulation, the efficiencies are limited to the technological and economic development and may be taken into account as long as they: a) are to consumer advantage; and b) do not form the obstacle to competition.

Requirement of consumer advantage relates to the choice of welfare standard applied in merger analysis. As already pointed out, the choice of welfare standard is the most important and debated issue in the context of efficiencies as it defines the ultimate goal of competition law. As pointed out earlier there are two basic approaches to the welfare standard: to consider those efficiencies that are passed on to consumers, i.e. the consumer welfare standard<sup>71</sup>, or to take in consideration efficiencies that maximize social welfare irrespectively of whether or not they are passed on to consumers, i.e. total welfare standard which is thus the sum of consumer and producer surplus<sup>72</sup>. The difference between the two standards rests on the allocation of welfare within a society.<sup>73</sup> Unlike US, The

<sup>69</sup> 1989 Merger Regulation Art 2 (1) (b), *supra* note 5.

The explanatory notes of the Merger Regulation indicated that “the concept of technical and economic development progress must be understood in light of the principles enshrined in Article [81(3)] of the Treaty, as interpreted by the case law of the Court of Justice. [1990] 4 CMLR 314 point (d); “The wording of Art 81 (3), however, differs from the [Merger Regulation] in that, under Article 81 (3), the EU Commission may only authorize agreements if they contribute ‘to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of possible benefit’ Thus under Article 81, efficiencies are not a defense but a requirement.” Knable Gotts, I., Calvin S., Goldman S., *The Role of Efficiencies in M&A 2002* in Fordham Corp. L. Inst. 201, 242-61 (Barry Hawk ed., 2003), p. 220; See as well Ilzkovitz & Meiklejohn *European Merger Control: Do We Need an Efficiency Defense?*, Paper prepared for the 5<sup>th</sup> Annual EUNIP Conference, Vienna, Nov. 29<sup>th</sup> –Dec 1<sup>st</sup>, 2001, available at [http://www.wifo.ac.at/~luger/ilzkovitz\\_fmeiklejohn.pdf](http://www.wifo.ac.at/~luger/ilzkovitz_fmeiklejohn.pdf).

<sup>70</sup> Knable Gotts, I., Calvin S., Goldman S., *supra* note 69, p. 220.

<sup>71</sup> For consumer welfare approach in a comparative broader context of competition law see e.g. Malinauskaitė J. *The Development of „Consumer Welfare“ and its Application in the Competition Law of the European Community and Lithuania*, International Company and Commercial Law Review 2007, I.C.C.L.R. 2007, 18 (10), 354-364.

<sup>72</sup> See *id.* p. 250.

<sup>73</sup> From the total surplus standard view, it is not important who the beneficiary of created efficiencies is, i.e. whether the efficiency gains are passed on to producers or consumers, since the society as a whole is better off. This approach thus “assigns an equal weight both to the loss in consumer welfare and the corresponding gain to shareholders. In other words, the transfer of wealth on surplus is viewed as ‘neutral’. From the total surplus standard view, it is not important

EU has been much more explicit and straight forward in making this policy choice. In fact, it unequivocally adopted in the Article 2 (1) (b) of the Merger Regulation a view that efficiencies should benefit consumers even if there is no indication to what extent the passing – on requirement has to be achieved in order to satisfy this criterion.<sup>74</sup> The view that the efficiency gains have to ultimately benefit consumers has been supported in numerous occasions by the Commission.<sup>75</sup> According to this policy choice, consumer welfare is valued more than producer welfare and thus even when a merger would result in productive efficiency gains, but would raise prices to consumers, it would not be allowed by the EC rules.<sup>76</sup>

The problem in treating efficiencies in the EU arises out of the second criterion put forward in Art 2 (1) (b), i.e. that the efficiencies should not form an obstacle to competition. This criterion forms an obstacle in considering efficiencies at all. Due to this condition, “it was widely believed [...] that the Commission would not treat efficiencies as a defense to a merger that created or strengthened a dominant position, and that it might even view efficiencies as an additional reason for prohibiting a merger on the ground that they would further entrench the merged firm’s dominant position.”<sup>77</sup>

The reason behind this belief is the economic reality of efficiencies. In fact, it is impossible to divide mergers in those that encourage collusion or increase market power and those that create efficiencies. “Many mergers do both at once [...] Horizontal mergers may create substantial efficiencies even as they

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who the beneficiary of created efficiencies is, i.e. whether the efficiency gains are passed on to producers or consumers, since the society as a whole is better off. This approach thus “assigns an equal weight both to the loss in consumer welfare and the corresponding gain to shareholders. In other words, the transfer of wealth on surplus is viewed as ‘neutral’.” Conversely, the consumer welfare approach considers the distributive goals to be the most important, and thus only those mergers that create efficiencies directly passed on to consumers in the form of price decrease, improved quality of goods or innovation may be excused by antitrust authorities. *See id.* p. 251; Alistar, L., *THE EC MERGER REGULATION: SUBSTANTIVE ISSUES*, Sweet and Maxwell, London, 2003, p. 428.

<sup>74</sup> 2004 Merger Regulation Art. 2 (1) (b), *supra* note 6.

<sup>75</sup> See e.g. Thirty-Second Report, *The Review of the EU Merger Regulation*, July 23, 2002, HL Paper 165 ([...] The commission confirmed that under its proposed efficiencies test the parties would have to show that the efficiencies would be passed on to the consumer); Monti M., *Review of the EC Merger Regulation – the Reform Package*, speech of November 7, 2002, Brussels ([...] Efficiency claims should only be accepted when the Commission is in a position to conclude with sufficient confidence that the efficiencies generated by the merger will enhance the incentive of the merged entity to act pro-competitively for the benefit of consumers[...]).

<sup>76</sup> Bishop, Walker, *THE ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT*, Sweet and Maxwell 2002., p. 26.

<sup>77</sup> Kolasky, W., *North Atlantic Competition Policy: Converging Toward What?* speech before BIICL Second Annual International and Comparative Law Conference, London, England, May 17, 2002 at 3, citing, Frederick Jenny, *Competition and Efficiency, in Antitrust in a Global Economy*, 1993 Corporate Law Institute, Fordham U. School of Law (B.Hawk, ed.1994).

facilitate collusion or enlarge market power.”<sup>78</sup> Consequently, it is unlikely that a merger claiming efficiencies would at the same time be found not to create a dominant position as the two outcomes are almost mutually exclusive. Accordingly, the requirement that a technical and economic progress should not form an obstacle to competition makes it unlikely that the dominant firm will be able to assert efficiencies as a defense since any improvement in efficiency may enhance its market power.<sup>79</sup> The first merger prohibition under the Merger Regulation, *Aerospatiale-Alenia/de Havilland*<sup>80</sup> stressed out that point. The Commission examined a variety of efficiencies – cost savings to be achieved through rationalization of parts procurement, marketing and product support, one-stop shopping, improved management and protection against currency fluctuations – only to find these efficiencies to enhance the merged firms’ market power, i.e. power to behave independently of its competitors. The Commission did not set any explicit principle for treating efficiencies but its finding seems to imply that “most efficiency arguments will be unavailing in the case of finding dominance”<sup>81</sup>.

Furthermore, technical and economic progress achieved by the merged parties may give them the possibility to outrun their competitors which contributes to the creation or strengthening of dominance.<sup>82</sup> This has been an important consideration in cases *DuPont/ICI*<sup>83</sup> and *Shell/Montecatini*<sup>84</sup>. In both cases the Commission required the undertakings concerned that sought to provide comparable or shared efficiency benefits for competitors before allowing the transaction to proceed. DuPont involved a merger between two top ranking R&C facilities in the field of nylon fiber business which was not viewed by the Commission as an efficiency that would ultimately benefit consumers, but quite the contrary, it was viewed as a key factor which would give the merging firms a dominant position in the relevant market because it would outdistance the remaining competitors. Therefore, in order to clear the merger, the Commission required the firms to transfer to a third party a freestanding research and development facility of comparative quality to those operated by DuPont and ICI.<sup>85</sup> Likewise, in *Shell*, before the EC allowed the concentration to

<sup>78</sup> Hovenkamp, H., *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE*, West Publishing Co, 1994, p. 446.

<sup>79</sup> See, Ilzkovitz F., Meiklejohn, *supra* note 69, at 13; Goldman, C.S, Knable Gotts, I., Piasloski, M.E., *The Role of Efficiencies in Telecommunications Merger Review*, Federal Communications Law Journal, 2003, 56 FCLJ 87 at 114.

<sup>80</sup> Case IV/M. 53, *Aerospatiale – Alenia / de Havilland*, O.J. L 334/42, 5/12/1991, at 65-69.

<sup>81</sup> Greaney, T. L., *Not for Import: Why the EU Should Not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures*”, Saint Louis University Law Journal, 2000, 444 STLULJ 871, at 890.

<sup>82</sup> Cook C.J., Kerse, C.S., *E.C. MERGER CONTROL*, 3<sup>rd</sup> ed., Sweet & Maxwell, London, 2000, p. 177.

<sup>83</sup> Case IV/M 214, *DuPont/ICI* O.J. L 7/13, 13/01/1993.

<sup>84</sup> Case IV/M 269 *Shell/ Montecatini* O.J. L 332/48, 22/12/1994.

<sup>85</sup> Case IV/M 214, *DuPont/ICI* O.J. L 7/13, 13/01/1993, at 33-34.

proceed, the parties were required to proffer undertakings that would preserve a second independent source of polypropylene technology licensing.

The false hopes raised by the “technological and economic development” provision were observed in joint venture context as well. In the joint venture case *MGS/Media Service*<sup>86</sup>, the Commission stated that even though the new joint venture established to operate in the digital TV-pay would indeed contribute to the development of the digital television, such efficiency would hinder competition because of the dominant position that the new joint venture would establish in the relevant market. In assessing the impact of the technological development of the joint venture the Commission stated that “the reference to [the] criterion in Article 2 (1) (b) of the Merger Regulation [contribution to technical and economic development] is subject to the reservation that no obstacle is formed to competition [...] [T]he foreseeable effects of the proposed concentration suggest that it will lead to a sealing-off and early creation of a dominant position on the future markets for technical and administrative services and to a substantial hindering of effective competition on the future market for pay-TV.”<sup>87</sup> Accordingly, the Commission prohibited the proposed joint venture to proceed. There has been a sequence of cases where the Commission used the same reasoning for prohibiting mergers that would have achieved some form of efficiencies. In *Nordic Satellite Distribution*<sup>88</sup> the Commission prohibited a merger on the grounds that conditions set out in Art 2 (1) (b) had not been met since the proposed merger would have created obstacles to competition as well as creating efficiencies. Similarly in the case *Gencor/Lonrho*<sup>89</sup> the Commission found that the merged entities would have an increased market power which would form an obstacle to competition and even if some efficiency would be achieved it would not benefit the consumers.

Even though the Commission did not take over the explicit efficiency defense in cases where the proposed merger was likely to result in a dominant position, in a number of cases it seemed to take efficiencies into account implicitly when deciding on whether or not the merging parties would give raise to dominance at all.<sup>90</sup> “Quite instructive for the Commission’s willingness to take efficiencies into account implicitly while shaping its decision is the principle formulated in *Cyanamid/Shell*,<sup>91</sup> where a finding of dominance was avoided as ‘an analysis

<sup>86</sup> Case IV/M.469, *MGS/Media Service*, O.J. L364/1, 31/12/1994.

<sup>87</sup> *See id.* at 100.

<sup>88</sup> Case IV/M 490, *Nordic Satellite Distribution*, O.J. L 53/20, 02/03/1996.

<sup>89</sup> Case IV/M.619, *Gencor /Lonrho*, O.J. L 11/30, 14/01/1997, at 214 (decision upheld on appeal in Case T-102/96 *Gencor v. Commission* [1999] E.C.R. II –753).

<sup>90</sup> Case IV/M 042 *Alcatel/Teletra* O.J. L 122/48,17/05/1991; Case IV/M 354 *American Cyanamid/Shell* O.J. C 273, 09/10/1993; Case IV/M 477 *Mercedes-Benz/Kässbohrer* O.J. L 211/1, 06/09/1995; Case IV/M 580 *ABB/Daimler-Benz* O.J. L 11/29, 14/01/1997 ; Case IV/M 315 *Mannesmann/Valourec/Ilva* O.J. L102/15, 21/04/1994; Case IV/M 986 *Agfa-Gevaert/DuPont* O.J. L 211/22, 29/07/1998.

<sup>91</sup> Case IV/M 354 *American Cyanamid/Shell* O.J. C 273, 09/10/1993.



focusing on market share alone is not particularly probative in a dynamic R&D-intensive industry'. As a result, the Commission has been prepared to approve a very high market shares, especially in innovative markets."<sup>92</sup>This implicit consideration of efficiencies in the merger appraisal, however, has never been formally recognized and thus the lack of transparency made such considerations unreliable and unpredictable.

More recent good example was GE/Honeywell merger case. In 2000, the US-based industrial conglomerate General Electric (GE), a leading producer of jet engines for large commercial aircraft and large regional jets, entered into negotiations for a takeover of Honeywell, as well a US-based company specialized in manufacturing systems for small regional and corporate jets and of avionics and non- avionics systems. In October, the deal was signed by which GE was to acquire the entire share capital of Honeywell for a \$42 billion price, thereby making Honeywell its wholly owned subsidiary. According to the requirements of the Hart-Scott-Rodino Act the parties immediately notified their deal to the American Department of Justice (DOJ), and four months later, to the European Union Commission on the grounds of the EC Merger Regulation. On May 2001, the DOJ approved the merger with some minor concessions while the Commission, on July 3, concluded that the merger is incompatible with the common market on the grounds of conglomerate, vertical and horizontal effects, and thereby blocked the deal.<sup>93</sup> Although a number of aspects of Commission's reasoning were criticized by the Court of First Instance as not sufficiently substantiated, most notably its analysis of conglomerate and vertical effects, the prohibition to merge was upheld on the grounds of horizontal effects to competition.<sup>94</sup> While criticizing the Commission, the Court of First instance did confirm that in some cases conglomerate mergers may have anticompetitive effects. This view appears to be uncommon on the other side of Atlantic, considering that already by 1992, US Merger Guidelines omitted completely horizontal effects of non-horizontal mergers thereby making the 1984 Guidelines the official source of non-horizontal mergers. The reasoning underlining this view was the belief that conglomerate mergers do not pose a threat to effective competition.<sup>95</sup>

Following the GE/Honeywell case the international community reacted fiercely to the Commission's decision. The debate overgrew the issue of efficiencies and shifted in a more fundamental area posing the question whether the two jurisdictions diverge significantly in their substantive analysis and even more importantly, in their values, philosophy and goals of antitrust in general.

<sup>92</sup> Camesasca, P. D., *The Explicit Defense in Merger Control: Does it Make the Difference*, European Competition Law Review, 1999, ECRL 1999, 20 (1), 14-28 at 25.

<sup>93</sup> Case COMP/M. 2220, *General Electric/Honeywell* OJ L 48/1, 18/02/2004.

<sup>94</sup> Case T-210/01 *General Electric Company v. Commission of the European Communities*, [2005] ECR II-5575, 14 December 2005.

<sup>95</sup> See e.g. Antitrust Division Submission For *OECD Roundtable On Portfolio Effects In Conglomerate Mergers Range Effects: The United States Perspective* Date Discussed: 10/19/01; available at [http://www.usdoj.gov/atr/hmerger/11709.htm#N\\_2\\_](http://www.usdoj.gov/atr/hmerger/11709.htm#N_2_).

### **Different treatment of efficiencies: mere divergence in substantive analysis or a fundamental divergence in competition policies?**

The theory of bundling, as applied by the Commission, was identified to be the main area of divergence in substantive analysis between the two jurisdictions.<sup>96</sup> This inevitably led the public discussion towards a more substantive concern, “namely, that the Commission had failed to recognize that antitrust policy was supposed to protect competition, not competitors”<sup>97</sup>. This opinion has been voiced by many<sup>98</sup>, including the US Assistant Attorney General Charles James who, in his comments on the divergent outcome in GE/Honeywell case, declared that while “clear and longstanding US antitrust policy holds that antitrust laws protect competition, not competitors, the EU’s decision reflects a significant point of divergence”<sup>99</sup>. Charles James concluded that “what led the United States to clear the transaction – the prospect that it would make the combined firm a more effective competitor- was the very reason the EU opposed it.”<sup>100</sup> The analysis of GE/Honeywell case may indeed be interpreted in such a way. The EU Commission considered “the effects of near-term lower prices resulting from mixed bundling as part of one of its theories of competitive harm, [while] the DOJ disagreed strongly with this approach, expressing the view that any such price discounts would be beneficial to customers (and akin to the passing on of the traditional types of efficiencies that may arise in a merger).”<sup>101</sup> This approach of the DOJ reflects what is a well established principle under the

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<sup>96</sup> The Commission identified the relevant markets to be the market for jet aircraft engines, avionics and non-avionics systems and engine starters. One of the main Commission’s concerns was that the merged firm would have the possibility to engage in “bundling”. Bundling would enable strengthening of GE’s already dominant position in the market for aircraft engines (for large commercial aircraft) forcing rivals out of business and consequently raising prices. Moreover, bundling would enable GE to create a dominant position in small engines, avionics and other aircraft systems. Court of First instance held that The Commission, as far as conglomerate effects based on bundling practices are concerned, is required to prove the ability and interest to engage in mixed bundling which it failed to do. In the absence of such proof the Commission erred in concluding that the mere fact of having a wider range of products is enough proof that dominant position will be created. The findings of CFI were incorporated in Non-horizontal Guidelines.

<sup>97</sup> Swaine.E.T., *Competition, not Competitors, nor Canards: Ways of Criticizing the Commission*, University of Pennsylvania Journal of international Economic Law, 2002, 23 UPAJIEL 597 at 599.

<sup>98</sup> See e.g. Kolasky, W.J., *supra* note 1; Holland, E.E., *Using Merger Review to Cure Prior Conduct: The European Commission’s GE/Honeywell Decision*, Columbia Law Review, 2003; 103 CLMLR 74; Kauper T.E., *Merger Control in the United States and the European Union: Some Observations*, Saint John’s Review, 2000, 74 STJLR 305; Hochstadt, Eric, S., *The Brown Shoe of the European Union Competition Law*, Cardozo Law Review, 2002, 24 CDZLR 287; Knable Gotts, Ilene; Goldman, Calvin S. *supra* note 1.

<sup>99</sup> Press release No. 01-303, US department of Justice, Statement by Assistant Attorney General Charles, A. James on the EU’s Decision regarding the GE/Honeywell Acquisition (July 3, 2001) available at <http://www.usdoj.gov/atr/public/pressreleases/2001/8510.htm>.

<sup>100</sup> James, C. A., *Reconciling Divergent Enforcement Policies: Where do We go From Here?* Fordham Corporate Law Institute, 2002, 2001 Fordham Corp. L. Inst. 1, 3 (2002).

<sup>101</sup> Knable Gotts I., Calvin S., Goldman, S., Goldman, *supra* note 69, p. 225.

US law, i.e. that the antitrust laws “do not protect competitors from mergers that will make the merged firm more efficient, even if they fear they may as a result be forced from the market”<sup>102</sup>, because “the goal is efficiency, not competition”.<sup>103</sup>

On the other hand Commission’s analysis focused on the prediction that rivals would be forced to exit the market, re-entry or new entry being unlikely because of high barriers to entry and very long industrial cycle.<sup>104</sup> This finding indicated that the Commission is “primarily concerned with the exclusionary effects a merger could create, which in turn could diminish the ability of competitors to compete”.<sup>105</sup> In defending its decision, the EU Commission denied that it blocked the merger because of the efficiencies it would create, contending that the parties

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<sup>102</sup> Kolasky, W., *supra* note 1, p.5 referring to the case *Monford of Colorado, Inc. v. Cragill, Inc.*, 479 US 104, 114-117 (1986) in which the court concluded that “Competition for increased market share is not activity forbidden by the antitrust laws. It is simply vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result for it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.”

<sup>103</sup> Summers, L. H., *Competition Policy in the New Economy*, *Antitrust Law Journal*, 69 *Antitrust L.J.* 353, 358 (2001).

<sup>104</sup> Drauz, G., *Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law*”, 25 *Fordham Int’l L.J.* 885, at 903.

<sup>105</sup> Kauper E.T., *supra* note 97, at 322.

Critical to this concern was the Commission’s assessment of long-term consequences of bundling, i.e. its predicament as to what is likely to happen in the long run on the market. Long-term analysis is not an essential predictive element in the US merger review because it is believed that such analysis is too speculative. Besides the belief that such long-term predictions cannot be scientifically proven to a sufficient degree, and therefore should not be crucial in making the final decision, in the US there is much more confidence in the self-correcting nature of markets. This confidence is especially strong when, as it was belied to be the case in GE/Honeywell, the market is “populated by strong rivals and strong buyers, who will usually find ways to protect themselves from an aspiring monopolist. See Kolasky W., *supra* note 1 p. 7; *see generally*, Hovenkamp, H., *Post-Chicago Antitrust: a Review and Critique*, 2001, *Columbia Business Law Review*, *Colum. Bus. L. Rev.* 257 at 259.

As Hochstadt put it, the US reasoning goes along the following lines: “Short-term benefits of the merger are necessarily more certain than the potential long-term harms. If efficiencies are not realized, there is no benefit, but there is also no harm. If the efficiencies are realized, the harms may still not be. Rivals may find ways to respond and, even if they don’t, customers may behave strategically so as to preserve competition. Finally, even if the rivals exit, the prices charged by a more efficient monopolist may be lower than the prices charged by a small group of less efficient competitors.” Conversely, the EU Commission reasons that creation of efficiencies through bundling enable merging firms to strengthen the dominant position, forcing other participants from the market which would in long run harm consumers because the dominant firm would abuse its position by increasing prices and lowering the quality of goods”. [Hochstadt, Eric, S., *supra* note 97, at 372]; Shapiro, an economic expert for GE in GE/Honeywell case and a professor in business strategy, expressed the same opinion by stating that the “GE/Honeywell case exposed very deep and fundamental differences of approach on doctrine between the United States and the European Union [...] In the EU, [there is] hostility towards large firms that are perceived as powerful becoming more efficient, whereas in the United States efficiencies are welcomed, even if they

did not “provide a clearly articulated and quantified defense in terms of efficiency”<sup>106</sup> and maintaining that price cuts that would result from mixed bundling were not “real” efficiencies, but were just a type of “strategic pricing” on the side of the merged firm.<sup>107</sup> In addition, the somewhat skeptical view towards efficiencies in general, results from a legitimate concern that even those mergers that are likely to produce efficiencies may fail to do so.<sup>108</sup>

Considerations for competitors rather than the process of competition is not uncommon to the European legal and economic thought which strongly influenced the EC competition law. Such considerations can be traced back to the influence of the Freiburg School of ordoliberalism<sup>109</sup> on the interpretation of EC competition rules. Ordoliberalist were concerned that anti democratic tendencies and excessive concentration of economic power were in a causal relationship, and thus large enterprises were distrusted. “Ordoliberal values did not rely on long term process of self –healing of the overall society. Instead they protect the individual economic freedom of action as a value in itself against any impairment of excessive economic power.”<sup>110</sup> Beneficiaries of such thinking were small and medium sized enterprises.. Focus was “primarily humanistic rather than being rooted in efficiency or economic values”<sup>111</sup>, a view somewhat still traceable in EC policies. It is difficult to make a clear cut answer whether it

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mean strengthening a company that is already a leader. That’s a fundamental difference.” Shapiro, *Antitrust: Convergence or Divergence* - Roundtable discussion, Antitrust 18 (Fall 2001) at 7.

<sup>106</sup> Monti, M., *Antitrust in the US and Europe: A History of Convergence*, Speech of November 14, 2001 Speech /01/540.

<sup>107</sup> Assertions that the EU policy treats efficiencies as offence more then defence led González-Díaz, head of the Unit of the EU Merger Task Force and the lead EC attorney on the GE/Honeywell to oppose strongly such assertions. Gonzalez – diaz stated: “the Commission opposed the GE/Honeywell deal because [...] it was likely to lead to foreclosure effects and ultimately to damage consumer welfare. The Commission has nothing against efficiencies, and has never prohibited or interfered with a deal that was shown to be likely to lead to significant efficiencies. We do not have an efficiency offence doctrine in Europe, and I completely disagree with anyone who claims that the heart or the core of our concerns in GE/Honeywell or in any other case was that the transaction was going to be procompetitive, in the sense that consumers were going to be better off.” González-Díaz, *Antitrust: Convergence or Divergence* – Roundtable discussion, Antitrust 18 (Fall 2001) at 8.

<sup>108</sup> This opinion has been expressed by the former EU Commissioner Mario Monti, who said that “contrary to the impression that is sometimes created, mergers do not always generate efficiencies. Indeed, many transactions fail to deliver the efficiencies they are billed as likely to achieve.” Monti., M., *Review of the EC Merger Regulation- Roadmap for the Reform Project*”, Speech of June 4, 2002, Speech 02/252.

<sup>109</sup> Whish R., *supra* note 9, p. 19; More on Ordoliberalism in Gerber, David J., *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS*, Oxford, 1998 chapter VII; also Gerber David J., *Constitutionalizing the Economy: German Neoliberalism, Competition law and the new Europe* (1994) 42 American Journal of Comparative Law 25.

<sup>110</sup> Venit James S., *Cooperation, Initiative and Regulation – a Cross Cultural Inquiry*, available at [http://www.iue.it/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Venit.pdf](http://www.iue.it/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Venit.pdf) p. 8.

<sup>111</sup> *Id.* citing Gerber, David J., *supra* note 108 at 36.

was the traditional socio-ethical attitude towards competition that underpinned the EC Commission decision or a different application of economic theories. Either way there is nothing shameful in a tradition rooted in fairness, and it should not be so easily denied.

Some commentators believe that a skeptical view towards efficiencies results from “a more static tradition that places greater confidence in the utility of governmental intervention in markets.”<sup>112</sup>, and more importantly that it is a reflection of non-economic goals pursued by the Commission. It is suggested that while the US’ only antitrust goal is the protection of consumers’ welfare by ensuring the economic efficiency of the market, the EU pursues a number of goals, which besides the shared goal of protecting consumers’ welfare and ensuring the efficient functioning of the market, include as well, political and social goals.<sup>113</sup> Historically, this was indeed the case.

The original goal of the European Union was uniting the Member States’ national economies into one, common, market. In the words one of the most eminent legal authorities, “market integration has been elevated in competition cases to an end in itself”<sup>114</sup>. At that time the merger control appeared to be very instrumental in achieving this goal, since it “seek[ed] to ensure that private companies do not erect private barriers to trade while governmental actors and institutions seek[ed], for political and economic motivations, to raze national barriers to trade.”<sup>115</sup> For that reason, originally the EU adopted a more lenient policy towards business reorganizations, thereby stimulating the merging activity which in turn, facilitated the integration of the market. Once however, the market was considered to be integrated, steps towards the preservation of this market took place. Starting at that time and ever since, the EU has a tendency of protecting small and medium sized business believing that the participation of smaller businesses would ensure a competitive market and such competitive market would benefit consumers<sup>116</sup> and would safeguard the pluralistic democracy. In the words of the former EC Competition Commissioner Karel Van Miert: “The aims of European Community’s competition policy are economic, political and social. The policy is concerned not only with promoting efficient production but also achieving the aims of the European treaties [...] To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power.”<sup>117</sup>

<sup>112</sup> *Id.* p. 27, referring to Tyson, L., *The New Laws of Nations*, N.Y.Times, July 14, 2001, at A 29.

<sup>113</sup> See e.g. Ruffner, T. L., *The Failed GE/Honeywell Merger: The Return to Portfolio Effects Theory?*, DePaul Law Review, 2003, 52 DPLLR 1285 at 1302.

<sup>114</sup> Ireland, D., Discussion Paper, *Interactions Between Competition and Trade Policies: Challenges and Opportunities*, Canadian Bureau of Competition Policy, Nov, 1992, 1-2.

<sup>115</sup> Hochstadt E.S., *supra* note 97, at 319.

<sup>116</sup> Schmitz S., *The EU Decision in GE/Honeywell*, University of Pennsylvania Journal of International Economic Law, 2002, 23 UPAJIEL 539 at 543.

<sup>117</sup> See Ruffner, T.L., *supra* note 112, fn. 117.

The fear of such concentration can be interfered from the statutory language of the 1989 Merger Regulation and its adoption of the “dominance test” for the assessment of mergers which was meant to keep market leaders from becoming even more dominant and prevent new mergers from creating such dominance. The idea of dominance was preserved in 2004 reform being the threshold of the newly introduced *substantial lessening of competition* test (SLC test).<sup>118</sup> Even though the policy to promote small and medium sized businesses<sup>119</sup> was rather consistent, on occasions concerns over the competitiveness of the European market with the American and Japanese markets influenced the merger review process. It was believed that the merger control system had the potential of being used to create Euro-champions which would be able to compete more effectively on the global market. Former Commissioner, Karel Van Miert expressly said that the EC industry “must be able to compete on the world stage” and competition policy must facilitate a “realignment and restructuring of industry”<sup>120</sup>, which raised a legitimate concern that the Commission “may use its discretion in defining market dominance to encourage the development of large European corporations with the ability to match the large corporations in the US and Japan”.<sup>121</sup> Moreover, considering the constant concerns of the Member States over their own national markets, on occasions political pressures were exercised to create national champions which would benefit particularly an individual country within the EU.

Looking at the past practice of the EU Commission, cases can be identified where these concerns transpired and consequently considerable balancing between competition policy goals and others such as industrial and social goals took place. The case *Aerospatiale – Alenia/de Haviland*<sup>122</sup> from 1991 caused significant political controversy as it was believed to have been subject of political balancing between industrial and competition policy concerns. It was believed that the proposed merger would lead to the creation of a powerful Franco-Italian global competitor which would positively affect those states. Accordingly, the merger was supported by the French and Italian governments, that is, at that time the Commissioner for Industry and the President of the

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<sup>118</sup> Article 2 (2) and (3) of the 2004 Merger Regulation provide that a concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

<sup>119</sup> On protection of small and medium sized businesses see for e.g. Craig, Paul; De-Burca Grainne, *EU Law*, Oxford University Press, p. 891; Fox, E., M., *Toward World Antitrust and Market Access*, American Journal of International Law, 1997, 91 AM.J.Int'l L.2, at 2.

<sup>120</sup> See Davies J.; Lavoie C., *EEC Merger Control: A Half-Term Report Before the 1993 Review?* World Competition Law and Economics Review 1993, 16 WORLD COMPETITION L.& ECON. REV. 27, at 28.

<sup>121</sup> See O'Toole T., P., *The Long Arm of Law' – European Merger Regulation and Its Application to the Merger of Boeing & McDonnell Douglas*, Transnational Lawyer, spring 1998, 11 TRNATLAW 203 at 221.

<sup>122</sup> Case IV/M 53 *Aerospatiale – Alenia/de Haviland* [1991] O.J. L 334/42, [1992] 4 CMLR M2

Commission. They exercised considerable pressure to clear the deal even though it was found that it would lead to the creation of the dominant position which would operate as a significant impediment to competition.<sup>123</sup> The consideration of industrial policy goals and the political balancing arising thereof, is facilitated by the fact, that following the second phase of investigation, the final decision is made within a College of Commissioners, i.e. not only the Commissioner for Competition but all Commissioners responsible for other policy areas within the community. On this occasion the, Sir Leon Brittan, the Former Commissioner for Competition managed to push through a solely competition based decision and the merger was prohibited. Some years later however, in *Mannessmann/Vallourec/Ilva*<sup>124</sup>, the Commissioner for Industry was more successful in promoting his views. In that case the Merger Task Force wanted to prohibit the merger on the grounds of collective dominance that would arise as a result, but the deal was strongly supported by the Commissioners responsible for industry and the result was a deadlock within the College of Commissioners. "Since the Commission had not voted to prohibit the merger, the decision was rewritten to avoid clearance by default (which would have occurred had the Commission failed to deliver a formal decision in time)."<sup>125</sup> The Commission denied such allegations claiming that what led to the deadlock, was the Commissioners' disagreement over the relevant market. This strong denial of industrial policy concerns in the case is, however, rather odd considering that just one year prior to this decision the Commission declared that "it is inconceivable that competition policy could be applied without reference to the priorities fixed by the Community" which include industrial policy and the environment and that "far from being the direct opposite of industrial policy, competition policy is an essential instrument, with clear complementarity between the two policies."<sup>126</sup>

Besides cases in which industrial policy concerns were predominant, it is possible to observe cases where social considerations played an important role. In *Perrier*<sup>127</sup> case the Court of First Instance stated that in assessing whether a concentration is compatible with the common market, social effects of that operation has to be taken into consideration, referring to the thirteenth recital of the 1989 Merger Regulation which required that the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in article 130a.<sup>128</sup> Similar considerations took place in the case *Kali und Salz*<sup>129</sup> where the

<sup>123</sup> Jones, A., Sufrin B., *supra* note 68, p. 799, fn. 353.

<sup>124</sup> Case IV/M 315 *Mannessman/Vallourec/Ilva*, O.J.L 102/15, 21/04/1994.

<sup>125</sup> Jones, A., Sufrin B., *supra* note 68, p. 800.

<sup>126</sup> Twenty-third Report on Competition Policy, 1993, 13, 14, 90-1.

<sup>127</sup> Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vittel and Others v. Commission* [1995] ECR II-1247.

<sup>128</sup> *See id.* at 38- 39.

<sup>129</sup> Case IV/M 308, *Kali Salz/MdK/Treuhand*, OJ C 275/3, 03/09/1998.

Commission in the review process took into consideration the fundamental objective of strengthening the Community's social and economic cohesion. In this case, the Commission observed that the concentration would lead to a de facto monopoly, however it decided to clear the mergers on the grounds of the failing firm defense. It concluded that absent the merger one of the parties (MdK) would be forced to close its operation. The Commission, *inter alia*, observed that a foreclosure was likely to lead to serious consequences for the structurally weak regions of East Germany. On this ground the Commission rather approved the deal which would otherwise be considered detrimental for competition. On appeal, the European Court of Justice, however, stated that "while the objective of economic and social cohesion mentioned in Articles 2 and 3(j) [...] must be taken into account in assessing concentrations, it cannot in any case justify an authorization which frustrates the essential aim of Community control of concentrations, namely the protection of competition. Ultimately, the Commission could authorize the concentration by reference to the objective of economic and social cohesion only if the notifying undertakings had entered into precise and adequate commitments to open the relevant market to competition."<sup>130</sup> Even though the court with this decision gave precedence to competition policy goals, it nevertheless, accepted the consideration of social and economic cohesion in the assessment procedure.

Finally, a concentration that distorts competition by creation or strengthening of dominance may, under Article 21 (3) of the 1989 Merger Regulation, be precluded by an individual member State. Under Article 21 (3) Member States may take steps to protect legitimate interests which are not taken into consideration under the Merger Regulation. Legitimate concerns include public security, the plurality of media and supervision over financial and investment institutions, notwithstanding the Commission's exclusive jurisdiction to assess mergers with the Community dimension. Under the legitimate interests principle, a member state may prohibit or take other enforcement action against a merger that has been approved by the Commission under the Merger Regulation, but it cannot approve a merger already prohibited by the Commission not it can in any other way preempt enforcement action imposed by the Commission on competition grounds.<sup>131</sup> Although rarely, this right was exercised on several occasions. For example, a legitimate interests involving public security was invoked the case *IBM France/ CGI* where the French authorities notified to Commission that it had taken measures in respect of two subsidiaries of CGI that worked for the French Ministry of Defense and were involved in a merger, previously cleared by the Commission.<sup>132</sup>

<sup>130</sup> Joined cases C – 68/94 and C- 30/95, *French Republic v. Commission*, at 99.

<sup>131</sup> Hawk, Huser, EUROPEAN COMMUNITY MERGER CONTROL: PRACTITIONER GUIDE, Kluwer Law International, 1996, p. 113; *See also*, Jones, C.; González-Díaz, E., THE EEC MERGER REGULATION, C. Overbury ed., 1992, p. 49.

<sup>132</sup> Twenty- third Report on Competition Policy from 1993, para 321.



It is quite clear that even though the economic analysis did play a crucial role in the assessment of mergers, on occasions, other considerations and goals were considered and balanced against the pure competition goals.<sup>133</sup>

The early development of the antitrust laws in the US was not very different. Originally, the main concern was the raising power of trust - giant company combinations – in response to which Sherman act was enacted. “After the enactment of the Sherman Act, there was considerable opinion in the United States that the interests of small businesses should play an important role and that it was Congress’ intention to protect those interests from too-mighty market players.”<sup>134</sup> This approach, which was promoted in the 1960’s, very soon became highly criticized by the so called Chicago School which quite the contrary promoted an antitrust policy whose exclusive goal would be maximization of consumer welfare equated with economic efficiency, and which should not be weighted against any other policy. According to the Chicago School, the determination of economic efficiency should arise from an economic analysis. Soon this view was supported by the American courts and incorporated in their assessment of mergers. Chicago School was supplemented by what is termed a Post-Chicago teaching, which recognized the risk of protecting competitors in the name of protecting competition, and elaborated an even more detailed economic assessment of mergers based on the game theory. A clean distinction was made, between harm to competitors that is harmful to competition and harm to competitors that is the result of competition. These new findings were implemented in the American antitrust assessment making US merger policy deeply rooted in the modern economic theory recognizing market efficiency as its only policy goal.

## **2.2. Shift in efficiency treatment in 2004.**

It was the debate resulting from the outcome of the case *GE/Honeywell*<sup>135</sup> that induced the Commission to reconsider its treatment of efficiencies in the merger control. Even though in the aftermath of the public debate on *GE/Honeywell*, the Commission explicitly denied that it treats efficiencies as an

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<sup>133</sup> The summarised case law indicating plurality of goals nicely fit the categorization of EC competition law goals recently offered by A. Jorge Padilla: Fairness goals (which include fairness, the protection of economic freedom, the protection of rivalry and the competitive process and the protection of small and medium-size firms); welfare and efficiency goals (which cover both of the principally discussed welfare objectives, i.e., the goal of consumer welfare and that of total welfare) and market integration goals (which deal with the goal of a single European market and the reduction of obstacles to cross-border trade). The author argues that EC should shift from fairness to welfare standard in its competition policy as US did in the past. See A. Jorge Padilla, *From Fairness To Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law*, available at [http://www.iue.it/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Padilla-Ahlborn.pdf](http://www.iue.it/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Padilla-Ahlborn.pdf).

<sup>134</sup> Schmitz S., *supra* note 115, at 546.

<sup>135</sup> Case COMP/M. 2220, *General Electric/Honeywell*, OJ L 48/1, 18/02/2004.

offence<sup>136</sup> it still decided to open a debate on the proper role of efficiencies in the EC Merger control. In the Green Paper published in 2001, the Commission stated that it is “aware of and supports the ongoing debate on how, and the extent to which, efficiencies should be taken into account in competition analysis” and accordingly it invited views as to the proper role and scope of efficiency consideration in the field of merger control.<sup>137</sup> There was a substantive amount of replies to the invitation of the Commission. Most of the respondents considered that the Commission “should, as part of a sound economics-based merger control policy, take efficiencies into account in conducting its analysis of the overall effects likely to be produced by a proposed merger”<sup>138</sup>. The respondents agreed that the Commission lacked clarity about the precise consideration that should be given to efficiencies and stressed out that it had raised the issue of efficiencies on a very limited number of decisions. For that reason, it was advanced that the Commission should clearly articulate its views in the Guidelines.<sup>139</sup> As far as the role and scope of efficiency considerations are concerned, different views had been expressed. Some of the commentators felt that efficiency considerations ought to be taken into account only as an element in the overall assessment procedure, while others felt that they ought to be taken into account as a factor mitigating the finding dominance, i.e. they favored the articulation of an “efficiency defense” and explicitly ruling out the existence of the “efficiency offence”.<sup>140</sup> The latter group proposed efficiencies to be merger specific, i.e. efficiencies which can only be achieved via the merger and not by other means; to be passed on to consumers; and not to arise out of standard cost-savings synergies but such as to give raise to the reduction in the marginal cost of production which usually takes place with mergers whose efficiencies result

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<sup>136</sup> The former EU Commissioner for Competition Policy, Mario Monti said: “ I would like to [...] refute the assertion that the European Commission, when dealing with conglomerate mergers, is in fact applying what was been dubbed an ‘efficiency offence’. Indeed, we distinguish clearly between – on one hand – mergers leading to price reductions that are the result of strategic behavior on the part of the dominant firm, the purpose of which is to eliminate or marginalize competitors with a view of exploiting consumers in the medium term, and – on the other – mergers which will objectively lead to significant and durable efficiency gains that are likely to be passed on to the consumer. [...] When the merging parties do not provide a clearly articulated and quantified defense in terms of efficiencies [...] it is much harder for an antitrust authority to clear the transaction that is likely to lead to foreclosure effects, because if foreclosure takes place and competitors are marginalized, there is no guarantee that the prices are going to be maintained at least over the medium and longer term, at the low level that the merged entity might strategically set them at in order to foreclose competition.”; Monti, M., *Antitrust in the US and Europe: A History of Convergence*, *supra* note 105.; See as well Monti, M. *Review to the EC Merger Regulation – road map for the reform project*, *supra* note 107.

<sup>137</sup> Green Paper on the Review of the Council Regulation (EEC) No 4064/89, COM (2001) 745/6 final, (hereinafter Green Paper), para 172.

<sup>138</sup> Green Paper on the Review of Council Regulation (EEC) No 4064/89 (“Merger review”) – Summary of the replies received, European Commission, Competition DG (hereinafter Green Paper Summary of replies).

<sup>139</sup> *See id.* para 114-115.

<sup>140</sup> *See id.* para 119, 121, 125.

from technological development and innovation.<sup>141</sup> Moreover, most of the respondents felt that the burden of proof should rest with the parties.<sup>142</sup>

The Commission took many of the forwarded comments into consideration and adopted most of them. To begin with, the Commission introduced an entire section on efficiencies in the Merger Guidelines attempting to clarify its approach towards efficiencies and made explicit reference to efficiencies in the Recitals of the 2004 Merger Regulation. In the Recital 4 of the 2004 Merger Regulation, the Commission recognized that mergers may be in line with the requirements of dynamic competition and are capable of increasing the competitiveness of industry, thereby improving the growth and the living standard in the Community.<sup>143</sup> Moreover, in recital 29 it explicitly expressed that “in order to determine the impact of a concentration on competition in the common market, it is appropriate to take account any of substantiated and likely efficiencies put forward by the undertakings concerned”<sup>144</sup>. The Commission recognized that it is possible that the efficiencies brought about by the concentration counteract the effects on competition that it might otherwise have, in particular the potential harm to consumers and in such a situation the Commission would find the concentration not to impede effective competition, in particular as a result of the creation or strengthening of a dominant position.<sup>145</sup> This view is a dramatic change from its previous attitude towards efficiencies, as the Commission appears to be willing to balance the benefits of claimed efficiencies against their potential harm, allowing the possibility that the balance might be on the side of efficiency gains even in cases of finding dominance which was out ruled in its previous case law.<sup>146</sup> This general approach to efficiencies has been developed in the Merger Guidelines of 2004.

According to the Guidelines, in order to assess whether a merger would significantly impede competition, in particular through the creation or strengthening of dominance, the Commission will perform an overall analysis of competitive harm of the merger including the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.<sup>147</sup> The Commission thus took over the language of the 1989 Merger Regulation which indicates that it views the wording “technical and economic development” to be a sufficiently effective legal tool for properly addressing efficiencies in the merger context.

<sup>141</sup> See *id.* para 120.

<sup>142</sup> See *id.* para 122.

<sup>143</sup> EU Merger Guidelines, *supra* note 7, para 76.

<sup>144</sup> 2004 Merger Regulation, *supra* note 6, recital 29.

<sup>145</sup> See *id.*

<sup>146</sup> On the appropriateness of existing theoretical foundations of the economic approach to efficiencies see more in Schmidt I.L.O. *The suitability of the more economic approach for competition policy: Dynamic vs. Static efficiency*, European Competition Law review 2007, E.C.L.R. 2007, 28 (7), 408-411.

<sup>147</sup> EU Merger Guidelines, *supra* note 7, para 76, referring to Art. 2 (1) of the 2004 Merger Regulation taken over in its entirety from the 1989 Merger Regulation.

For the Commission to take account of efficiency claims and be in a position to decide that as a consequence of efficiencies there are no grounds for declaring the concentration under investigation to be incompatible with the common market, such efficiencies cumulatively have to benefit consumers, be substantial, timely, be merger specific, and verifiable.<sup>148</sup>

As to the benefit to consumers, the Guidelines stress out that the relevant benchmark is that “consumers will not be worse off as a result of the merger” and for that purpose, efficiencies should be “substantial and timely and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur”<sup>149</sup>.

It is very interesting to note that this language does not seem to require a strict pass-on requirement as one would have expected. A condition in which the consumers are not any “worse off as a result of a merger” may indicate that the Commission will in the future be willing to consider those efficiencies which will be shared between consumers and producers as such an allocation of efficiency gains resulting from a potentially dominant position may be reflected on consumers in such a way as not to make them any worse off, but not necessarily any better off either. The wording introduced may open the door for developments in the area of efficiencies if the need may occur. In the context of international convergence that may be very well the case, because, as it has been stressed out in the comments to the Green paper, it seems that currently there is “no international consensus regarding how this public policy choice should be made”. Today there already are jurisdictions which allow a trade – off to be made between consumer and producer benefits, such as Canada and Australia<sup>150</sup>, while others, such as EU, only allow efficiencies providing consumers benefits to be taken into account. The influence of the developments in the economic theory is crucial in the potential switch of view and as it stands, economists favor allowing a producer-consumer trade-off.<sup>151</sup> For the time being, however, it is reasonable to expect that the Commission will in its analysis place considerably much more weight to efficiencies which will directly benefit consumers. This conclusion can be deducted from numerous statements made by the EU Commission<sup>152</sup> and from the following interpretative paragraphs of the Merger Guidelines which emphasize that the direct benefit to consumers is a crucial factor in the positive consideration of efficiencies.<sup>153</sup>

<sup>148</sup> EU Merger Guidelines, *supra* note 7, para 78.

<sup>149</sup> *See id.* para 79.

<sup>150</sup> *See*, Green Paper summary of replies, *supra* note 137, para 124; *see also* Knable Gotts I., Calvin S., Goldman S., *supra* note 69, at 230-242.

<sup>151</sup> *See*, Green Paper summary of replies, *supra* note 137, para 124.

<sup>152</sup> *See e.g.* Monti, M., *supra* note 135; Commission Paper at the OECD Roundtable, *Competition Policy and Efficiency Claims in Horizontal Agreements*, OECD/GD (96) 65, p. 53.

<sup>153</sup> EU Merger Guidelines, *supra* note 7, para 80 stress out that there is the “need to ascertain whether efficiencies will lead to a net benefit to consumers”; and para 84 stress out that the efficiencies have to be “passed on, to a sufficient degree, to the consumer”.

The Guidelines contemplate different kind of efficiencies that a proposed merger may generate. Among those that are likely to be positively assessed by the Commission, are cost savings in production or distribution that give the merged entity the ability and incentive to lower prices following the merger.<sup>154</sup> In this context, cost efficiencies that lead to reduction in variable or marginal costs are more likely to be relevant in the assessment of efficiencies than those which lead to a reduction in fixed costs, as the former ones are more likely to result in lower prices for consumers.<sup>155</sup> Besides the efficiencies originating from cost savings, the Commission considers as well those efficiencies that result from R&D and innovation, as the consumers may benefit from new or improved products and services.<sup>156</sup>

As a general principle, the Commission will place emphasis only to efficiencies which are substantial. "This is consistent with Areeda, Hovenkamp & Solow's recommendation to ignore minor efficiencies on the basis that 'ordinary' efficiencies are already taken into account in that antitrust treats mergers more benignly than cartels, notwithstanding that both eliminate competition between previously independent companies."<sup>157</sup> To that extent, the Guidelines stress out that "greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realized, and to be passed on, to a sufficient degree, to the consumer."<sup>158</sup> For that reason it is very unlikely that the Commission will positively assess efficiencies in the cases of mergers creating or strengthening a monopoly or near monopoly position in the relevant market.<sup>159</sup>

Moreover, the efficiencies have to be timely, which means that the Commission will assign less weight to efficiencies that are expected to materialize later in the future.<sup>160</sup>

Finally, in the context of benefit to consumers, the Guidelines state that the efficiencies should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.<sup>161</sup> In other words the Guidelines contemplate that "it will not be possible to trade off gains to consumers in one market against losses in a second market".<sup>162</sup> This approach seems to be correct in principle, as allowing such a trade off would discriminate between two categories of consumers.<sup>163</sup> However, there may be occasions in

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<sup>154</sup> See *id.* para 80.

<sup>155</sup> See *id.*

<sup>156</sup> See *id.* para 81.

<sup>157</sup> Alistar, L., *THE EC MERGER REGULATION: SUBSTANTIVE ISSUES*, Sweet and Maxwell, London, 2003, p. 441.

<sup>158</sup> EU Merger Guidelines, *supra* note 7, para 84.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.* para 83.

<sup>161</sup> See *id.* para 79.

<sup>162</sup> Alistar L., *supra* note 155, p. 447.

<sup>163</sup> See *id.* p. 447, fn. 5.

which such a trade off would be reasonable and more efficient, and those are situations when the merger gives rise to competition concerns in a small market and achieves gains in a much larger market.<sup>164</sup>

The latter seems to be the approach taken by the US agencies and thus represents a point of divergence in treating efficiencies even after the EU merger control reform of 2004. The US Horizontal Merger Guidelines provide that: “the agency normally assesses competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agency in its prosecutorial discretion will consider efficiencies not strictly in the relevant market but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in other markets. Inextricably linked efficiencies rarely are a significant factor in the Agency’s determination not to challenge a merger. They are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant markets is small.”<sup>165</sup>

Besides benefiting consumers, being substantial and timely, the efficiencies must as well be merger-specific and verifiable. Merger-specific efficiencies are those that are “a direct consequence of a notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives”<sup>166</sup>. The Commission will only consider alternatives which are reasonably practical, and not merely theoretical, taking in particular into account the established business practices in the industry concerned.<sup>167</sup> This approach is aligned with the US provisions, which similarly state that the “agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects [...] Only alternatives that are practical in the business situation faced by the merging firms will be considered.”<sup>168</sup>

Finally, the efficiencies have to be verifiable “such that the Commission can be reasonably certain that the efficiencies are likely to materialize, and be substantial enough to counteract a merger’s potential harm to consumers”<sup>169</sup>. The requirement is essential in the context of evaluating efficiencies as the efficiency claims are prospective and, as predictions, are inherently uncertain and often fail to materialize.<sup>170</sup> To that extent, where possible the information on the efficiencies and benefit to consumers should be quantified. “A quantitative analysis seeks to identify the *minimum required efficiencies* necessary to ensure (in case of a price standard) that the merger will not result in an increase in

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<sup>164</sup> *See id.*

<sup>165</sup> US Merger Guidelines, *supra* note 123, section 4, fn. 36.

<sup>166</sup> EU Merger Guidelines, *supra* note 501, para 85.

<sup>167</sup> *See id.*

<sup>168</sup> US Merger Guidelines, *supra* note 47, section 4.

<sup>169</sup> EU Merger Guidelines, *supra* note 7, para 86.

<sup>170</sup> Alistar L., *supra* note 155, p. 442.

prices relative to the likely prices in the absence of a merger, and quantifies the *qualifying efficiencies* to determine whether the latter outweigh the former.”<sup>171</sup> However, there are many occasions in which the necessary data are not available and in such cases “it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. In general, the longer the start of the efficiencies is projected in the future, the less probability the Commission may be able to assign to efficiencies actually being brought about.”<sup>172</sup> It is upon the merging parties to provide all information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realized.<sup>173</sup> The relevant evidence include in particular, “internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts’ studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.”<sup>174</sup>

In 2007 the treatment of efficiencies was once again addressed, this time in the Guidelines on non-horizontal mergers<sup>175</sup> which encompass judicial findings of relatively recent case law criticizing Commission’s assessment on conglomerate mergers and thus provides very useful information on the assessment criteria to be applied by the Commission. Guidelines recognize that non-horizontal mergers are generally less likely to distort competition<sup>176</sup> and that they provide substantial scope for efficiencies which is a big step in direction of convergence with the US standards of efficiencies to conglomerate mergers. The differences still persist. Namely, while the US almost does not prosecute conglomerate mergers as they are considered not to a threat to competition at all and thus were completely omitted from the Merger Guidelines which consequently in 1992 became Horizontal merger guidelines alone, the EU approached conglomerate mergers with much more caution. Non-horizontal Guidelines make cross-references to Horizontal Guidelines when it comes to efficiencies and thus it is to be concluded no special treatment in terms of efficiencies is granted for non-horizontal mergers. Rules appear to be complementary to those contained in Horizontal guidelines.<sup>177</sup>

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<sup>171</sup> See *id.* p. 442-443; See also Dalkir and Warren- Boulton, *PRICES, Prices, Market Definition, and the Effects of merger Staples- Office depot (1997)*, published in Kwoka & White eds., *THE ANTITRUST REVOLUTION* (3<sup>rd</sup> ed. Oxford UP, 1999) p. 143.

0EU Merger Guidelines, *supra* note 7, para 86.

<sup>173</sup> See *id.* para 87.

<sup>174</sup> See *id.* para 88.

<sup>175</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

<sup>176</sup> On that point see Bishop. S., Lofaro A., Rosati F., *Turning the Tables: Why vertical and conglomerate mergers are Different*, *European Competition Law Review*, 2006., E.C.L.R. 2006, 27 (7), 403-406.

<sup>177</sup> For a more comprehensive review of Non- horizontal merger guidelines see for e.g. Wija M., *EC Merger Control: Does more Economics Bring Increased Legal Certainty in the Assessment*

### 2.3. Policy differences might persist

It is a fact Commission did decide to devote an entire section on efficiencies in the newly introduced Horizontal Merger Guidelines, made explicit reference to efficiencies in the recitals of the new Merger Regulation and issued Non-horizontal guidelines addressing efficiencies and thereby aligned impressively its treatment with the US approach. Reading the numerous statements of the former EU Commissioner Mario Monti, one would assume that the EU indeed overtook the same purely efficiency driven approach, without interference of any other consideration.<sup>178</sup> However, legal convergence between jurisdictions always bares the risk of false appearances due to different meaning and values attributed to the same wording and more importantly due to differing historical context, policy considerations and differing economical and juridical assumptions<sup>179</sup> all of which rest at the bottom EU - USA differences.

To begin with, to the best of my knowledge there was no merger case excused on the grounds of efficiencies following the 2004 reform, which is alone an indicative fact. Furthermore, in the Horizontal Guidelines the Commission did not go as far as to adopt the US assumption that the main purpose of mergers is to create efficiencies. In the Recital 4 of the 2004 Merger Regulation, the Commission only recognized that mergers may be in line with the requirements of dynamic

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*of Conglomerate Mergers*, International Trade Law & Regulation 2008, Int.T.L.R. 2008, 14 (3), 61-74; Svetlicinii A., *Assessment of the Non-horizontal Mergers: is There a Chance for Efficiency Defence in EC Merger Control*, European Competition Law Review 2007, E.C.L.R. 2007, 28 (10), 529-538; Bishop, S., *(Fore) closing the Gap: The Commission's Draft Non-horizontal Merger Guidelines*, European Competition Law Review 2008, E.C.L.R. 2008, 29 (1), 1-4; Alese F., *(Fore) closing the Gap: The Commission's Draft Non-horizontal Merger Guidelines- a Response to Simon Bishop*, European Competition Law Review 2008, E.C.L.R. 2008, 29(3), 196-200, Petrasincu A., *The European Commission's New Guidelines on the Assessment of Non-horizontal Mergers- Great Expectations Disappointed*, European Competition Law Review 2008, E.C.L.R. 2008, 29 (4), 221-228.

<sup>178</sup> The former Commissioner said that “[...]in substantive terms, our analysis is clearly grounded in sound economics and there is little to distinguish the approach we set out to that of our US counterpart agencies, including the possibility of taking efficiencies into account.” On another occasion the Commissioner said that much of the convergence between EU and US has been “the result of an organic process: we are both grappling with the same evolving economic realities and are both exposed to the same evolution in economic thinking.” Monti, M., *Antitrust in the US and Europe: a History of Convergence*, *supra* note 105.

<sup>179</sup> The elements of differentiation were drawn by *Hawk* in the context of article 82 to my mind equally applicable in the context of efficiency treatment in merger control. Hawk stated: “Differing historical contexts such as the greater role of public companies and state-created monopolies in the EU, differing policy considerations such as the EU’s traditional embrace of fairness, and differing underlying economic and juridical assumptions about, among others, market erosion and the capability of authorities and courts to identify and remedy anticompetitive conduct all explain the traditionally broader scope of Article 82 compared with Section 2.” Barry E. Hawk, “*Article 82 and Section 2: Abuse and Monopolizing Conduct*”, in Wayne D. Collins, ed., *Issues in Competition Law and Policy*, ABA Section of Antitrust Law, forthcoming 2007. cited in Venit James S., “*Cooperation, Initiative and Regulation – a Cross Cultural Inquiry*”, available at [http://www.iue.it/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Venit.pdf](http://www.iue.it/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Venit.pdf) p. 12 fn 47.



competition and are capable of increasing the competitiveness of industry, thereby improving the growth and the living standard in the community.<sup>180</sup> Even though this view is a dramatic change from its previous attitude towards efficiencies - as the Commission appears to be more willing to balance efficiencies against their potential harm - some shade of doubt still lingers on considering that the former EU Commissioner Mario Monti, stated that “it is appropriate to maintain a touch of ‘healthy skepticism’ with regard to efficiency claims, particularly in relation to transactions which appear to present competition problems.”<sup>181</sup> Moreover, some believe that the “explicit recognition of efficiencies as a mitigating factor of affirmative defense, would probably result in more harm than good. If seen as an affirmative defense, competition authorities will initially take a hostile position to an otherwise procompetitive transaction, and issues of proof might become overwhelming. Instead, the overall competitive assessment of a transaction should not be rigid, solely quantitative analysis, but a dynamic, quantitative and qualitative review. In order for this reform to take place, there must be a philosophical change in economic thinking.”<sup>182</sup> Whether such predictions will indeed materialize and whether philosophical change in economic thinking, if necessary, will indeed take place is difficult to predict. This reservation is emphasized by the fact that the main point of concern, i.e. the diverging policy objectives, may still be a legitimate area of concern. Reading the recitals of the new Merger Regulation, it can be concluded that other policies may on occasions continue to play an important consideration in the merger analysis. Recital 2 of the Merger Regulation restates the Art. 4 (1) of the Treaty establishing the European Community, which provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition which is thus the main principle underlining the merger control system.<sup>183</sup> Within this broad principle, however, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty establishing the European Union.<sup>184</sup> Respectively these articles read: “The Community shall have as its task [...] to promote throughout the Community [...] a high level of employment and social protection, [...] a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising standard of living and quality of life, and economic and social cohesion and solidarity among Member States.” Similarly Article 2 of the Treaty establishing the European Union provides that it set itself, *inter alia*, the objective “to promote economic and social progress and a

<sup>180</sup> 2004 Merger Regulation, *supra* note 6, Recital 4.

<sup>181</sup> Monti M., *Review of the EC Merger Regulation- Roadmap for the Reform Project*, *supra* note 107.

<sup>182</sup> Hochstadt, E.S., *supra* note 97, at 386.

<sup>183</sup> 2004 Merger Regulation, *supra* note 6, Recital 2.

<sup>184</sup> *See id.* Recital 23.

high level of employment, and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion [...]” Furthermore, recital 19 restates that the Merger Regulation is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by the Merger Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.<sup>185</sup> It is quite obvious that achieving the main goals of the Treaty is after all the most important aim and thus may override any other policy within the Union. “It would be a mistake, [therefore], to explain these differences with the assertion that the [EU] Merger Regulation reflects simply an arbitrary set of compromises. Rather it reflects a coherent set of policy choices drawn from the traditions of the EC.”<sup>186</sup>

### *Conclusion*

In this paper I have tried to give an answer to a question whether full convergence in treatment of efficiencies between EU and USA has been achieved through the developments in EC merger control rules. In order to approach this issue comprehensively, I made a comparative analysis of legislative history, judicial practice and more importantly of policy objectives underpinning the normative aspect of competition, with a view of encouraging the preservation of a typically European legal perspective.

Traditionally, the difference between the two jurisdictions has been quite substantive. While the US relatively early abandoned the pursuit of any other goal but pure economic efficiency, the EU traditionally pursued a number of economic, political and social goals in order to achieve the aims of the European Treaties. EU shifted quite substantively from the multiplicity of goals as well as its ordoliberalistic ideas visible in the early development.

Today the two set of rules seem to be in perfect alignment and yet the EU context surrounding the rules indicates some caution and reservation. It is unlikely the same rules will have the same epilogue in practice as there is a lot of room for different application of the same rules. The expected differences arise out of different significance and ideals attributed to the same words, differing historical context, policy considerations as well as legal and economical assumptions. Europe is unlikely to depart completely from its fairness based tradition, and rightly so as this is a worthy legal legacy.

I would like to conclude by invoking a nice analogy brought forward by Jams Venit in a broader context of competition law convergence: “Linguistically, we are in a situation analogous to the one described by Abraham Lincoln in his second inaugural address near the end of the north American Civil War when he

<sup>185</sup> See *id.*, Recital 19.

<sup>186</sup> Kauper, T., *supra* note 97 at 358.

noted of the two opposing sides that “both read the same Bible and pray to the same God; and each invokes His aid against the other....”<sup>187</sup>

### Summary

## THE ROLE OF EFFICIENCIES IN MERGER CONTROL: COMPARATIVE EU-USA PERSPECTIVE

In more than one occasion a proposed transatlantic merger was cleared in one jurisdiction and prohibited in another. Opposing decisions may rest, *inter alia*, on different approaches towards efficiencies in merger appraisal. Essentially, the issue is whether potential efficiencies generated by a proposed merger should be treated as an offsetting factor in finding of anticompetitive concerns.

The author analyses the EU and USA approach towards efficiencies in merger appraisal, trying to answer the question whether full convergence on this issue has been achieved by the 2004 and 2007 reform of merger control rules in the EU. Although it can be observed that today the two approaches appear to be strikingly similar, the author argues that discrepancies may still persist, as the rules that have been formally aligned are most likely to be interpreted and applied differently in the two jurisdictions. To substantiate the argument the author performs an in depth analysis of respective legislative histories, policy objectives underpinning legal rules, and the existent legal practices likely to be applied to new rules.

**Key words:** *competition, merger control, efficiencies.*

### Zusammenfassung

## DIE ROLLE DER WIRKSAMKEIT BEI DER KONZENTRATIONS-KONTROLLE VON UNTERNEHMERN – KOMPARATIVE PERSPEKTIVEN DER EU UND USA

Mehrere Male begegnet man der Situation, dass transatlantische Konzentrationen in einer Jurisdiktion zugelassen wurden und in einer anderen verboten. Die widersprüchlichen Entscheidungen können u.a. auf der unterschiedlichen Rolle der Wirksamkeit bei der Beurteilung der Konzentration beruhen. Der Kern dieses Problems besteht in der Frage ob es zugelassen werden sollte, dass die potentielle Wirksamkeit der Konzentration deren möglichen antikompetiven Effekt überwindet.

<sup>187</sup> Venit James S. *supra* note 109 p. 13.

Die Autorin analysiert die Auffassung der Europäischen Union und der Vereinigten Staaten von Amerika über die Wirksamkeit im Kontext der Konzentrationskontrolle indem sie versucht die Frage zu beantworten, ob mit der Reform der europäischen Regeln zur Konzentrationskontrolle von 2004 und 2007 eine völlige Konvergenz zwischen der EU und den USA erreicht wurde. Obwohl zu bemerken ist, dass deren Regeln heute sehr ähnlich sind, meint die Autorin, dass Unterschiede weiter bestehen könnten, da zu erwarten ist, dass die formal vereinheitlichten Regeln in beiden Jurisdiktionen unterschiedlich interpretiert und angewandt werden. Dieser Schluss wird aus der Analyse der Geschichte beider Gesetzgebungen gezogen, sowie der politischen Ziele, die die relevanten Rechtsregeln durchdringen und der bestehenden Praxis, die wahrscheinlich auf die neuen Regeln angewandt wird

**Schlüsselwörter:** *Marktwettbewerb, Konzentrationskontrolle, Wirksamkeit.*

#### Sommario

### **IL RUOLO DELLE EFFICIENZE NEL CONTROLLO DELLE CONCENTRAZIONI FRA IMPRENDITORI – PROSPETTIVA COMPARATA FRA UE E USA**

In diverse occasioni ci siamo trovati dinnanzi a situazioni nelle quali una concentrazione di oltreoceano era consentita in una giurisdizione, mentre era vietata in un'altra. Del resto, decisioni contrastanti possono fondarsi sul differente ruolo delle efficienze in occasione della determinazione della concentrazione. Il nocciolo di questa questione consiste nel domandarsi se si debba permettere che le potenziali efficienze della concentrazione prevalgano sul suo possibile effetto anticompetitivo.

L'autrice esamina l'approccio dell'Unione Europea e degli Stati Uniti alle efficienze nel contesto del controllo delle concentrazioni, cercando di dare una risposta alla domanda se attraverso la riforma delle regole del controllo delle concentrazioni del 2004 e del 2007 sia stata raggiunta appieno una convergenza tra l'UE e gli USA. Sebbene si possa osservare che oggi le loro regole sono molto simili, l'autrice ritiene che le diversità potrebbero perdurare, giacché è prevedibile che le regole formalmente uniformate vengano interpretate ed applicate diversamente in queste due giurisdizioni. Si giunge a detta conclusione attraverso l'analisi delle storie legislative di queste due giurisdizioni, degli scopi politici che permeano regole giuridiche rilevanti, come pure dall'esame della prassi esistente, la quale verosimilmente verrà applicata alle nuove regole.

**Parole chiave:** *competizione di mercato, controllo delle concentrazioni, efficienza.*