



**THE SUBSTANTIVE TEST IN THE REGULATION 139/2004/EC
AND THE U.S. SUBSTANTIAL LESSENING OF COMPETITION TEST**

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LL.M. SHORT THESIS

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Abstract

This thesis examines areas of convergence between the European Union and the United States in substantive assessment of mergers, focusing in particular on the effects of change of the substantive test introduced by the EC Merger Control Regulation 139/2004/EC. In order to evaluate the degree of convergence between both regimes of merger control in the area of substantive analysis of mergers, developments in statutory laws, merger guidelines, as well as in courts' and competition authorities' decisions from both sides of the Atlantic will be analyzed. While there is an ongoing convergence in certain areas of individual merger assessment criteria in the European Union and United States, significant disparity in policies may substantially slow down any attempts for a broader convergence. It will be argued, however, that removal of the requirement to establish dominance in challenging mergers and inclusion of unilateral effects analysis in the European Union merger control, combined with improvement of economic rationale used by the European Commission, brought the two merger control regimes more in line in substantive merger assessment. In consequence, the European Commission's substantive assessment allows for a more accurate prediction of outcomes of merger assessment, which is a significant development for the global business community.

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List of Abbreviations

| | | |
|-------------------------|---|---|
| 1989 ECMR | - | Council Regulation (EEC) No. 4064/89 of 21 st December 1989 on the control of concentrations between undertakings (OJ [1989] L 395/1–12) |
| 2004 ECMR | - | Council Regulation (EC) No. 139/2004 of 20 th January 2004 on the control of concentrations between undertakings (OJ [2004] L 24/1–22) |
| Antitrust L. J. | - | Antitrust Law Journal |
| CFI | - | the Court of First Instance |
| Commission | - | the European Commission |
| DoJ | - | the U.S. Department of Justice |
| ECJ | - | the European Court of Justice |
| EC Treaty | - | Treaty establishing the European Community (OJ [2002] C 325/33-184) |
| E.B.O.L.R. | - | European Business Organization Law Review |
| E.C. L. R. | - | European Competition Law Review |
| FTC | - | the Federal Trade Commission |
| Hanse L. R | - | Hanse Law Review |
| Har. L. Rev. | - | Harvard Law Review |
| J. Comp. L. & Econ. | - | Journal of Competition Law & Economics |
| N.Y.U. L. Rev. | - | New York University Law Review |
| SIEC test | - | significant impediment to effective competition test |
| SLC test | - | significant lessening of competition test |
| Thund. Int. Bus. Rev. | - | Thunderbird International Business Review |
| U. Pa. J. Int. Econ. L. | - | University of Pennsylvania Journal of International Economic Law |
| U.S.C. | - | United States Code |
| Wash. U. L. Q. | - | Washington University Law Quarterly |

1. INTRODUCTION

After the CFI annulled three of the Commission's decisions in 2002¹, the Commission's reputation suffered a wave of serious critique coming from both sides of the Atlantic, due to an alleged lack of sound economic grounding in its argumentation. Coupled with a fierce discontent, expressed by the U.S. competition authorities officials after prohibition of the *GE/Honeywell* merger in 2001 as to application by the Commission of theories rejected a long time ago in the U.S., it triggered a movement towards a major reform of the EU merger control system, characterized *inter alia* by a want of greater convergence with the U.S. regime.

The adoption of a new substantive test for assessment of competitive harm of mergers in the EU was one of the focal points of the 2004 reform of European merger control. The EU merger control policy, since its crystallization in the form of the 1989 ECMR, has been undergoing constant development. It is evident that in this process there has been a strong influence of the U.S. merger control experience – the oldest of the merger control systems. Both the EU and the U.S. jurisdictions are by far the most influential among over eighty merger control regimes around the world requiring some kind of obligatory merger notification². Therefore, convergence in the substantive assessment of mergers by competition authorities has been strongly supported by practitioners and academics alike, because costs of compliance with merger control and risk of conflicting outcomes have increased considerably³.

¹ Namely: Case T-342/99, *Airtours plc v Commission*, [2002] ECR II-2585; Case T-310/01, *Schneider Electric v. Commission* [2002] ECR II-4071; Case T-5/02, *Tetra Laval BV v. Commission* [2002] ECR II-4381.

² A.B.A. Section of Antitrust Law, *Competition Laws Outside the United States*, Ch.1, 13 (2001).

³ Michael G. Egge et al., *The New EC Merger Regulation: A Move to Convergence*, Antitrust, Fall 2004, at 37.

This paper examines the developments of substantive tests in the EU and the U.S. competition authorities' and courts' decisions, with a particular focus on effects of the shift from the dominance test to the SIEC test in the EU, concluded with the adoption of the 2004 ECMR. The principal questions raised will be, firstly, what the improvements of the EU merger control regime resulting from the 2004 reform are, and, secondly, to what extent the change of the substantial test have brought the two regimes of merger control together.

The SIEC test was inspired by the U.S. SLC test and their wordings seem to be to a large extent similar. There are, however, differences in application of the tests due to deeply rooted differences in policies underlying merger control in the EU and the U.S. and still strong influence of previous merger control approach in the EU, traditionally giving much weight to factors supporting finding of a dominant position. It will be argued that, even though the SIEC test "filled the gap" existing under the dominance test and, therefore, allows now consideration of the so-called unilateral effects in substantive merger assessment, it remains so far difficult in practice to apply the non-coordinated effects theory. This is not only due to a lack of sufficient backup from case law in the EU, but also because the fact that the doctrine of unilateral effect in the U.S. is still developing.

This thesis, however, will argue that a move towards a more effects-based assessment of competitive harm in the EU has been already made, while at the same time the 2004 is only a part of the ongoing process of evolution of the EU merger control regime, still "young" – when compared with the U.S. system. Examination of the 2004 EU Horizontal Guidelines and the U.S. Horizontal Merger Guidelines 1992/97 will demonstrate main areas of convergence between the EU and the U.S. substantive merger control analysis, with a particular focus on the explicit articulation of possible efficiency gains. Furthermore, it will be noted, that recognition of the consumer welfare standard in the 2004 EC Horizontal

Merger Guidelines is an even more important improvement of the EU substantive merger assessment than introduction of the SIEC test, while at the same time is an area of convergence with the U.S. merger appraisal. As a last point of the thesis analysis will be a conclusion, that approach to portfolio effects, which has been one of the most distinct areas of divergence between the EU and the U.S., still remains an open question.

It should be noted at this point, that merger control is a field of law highly influenced by economic theories. This paper will examine only the legal implications of the substantive merger analysis, referring to economic ideas in a simplified manner and only where it will be necessary in explaining legal concepts.

The remainder of this thesis is structured as follows: Chapter 2 briefly lays down the development of the SLC tests in the U.S., from the implementation of the Clayton Act⁴ in 1914, through case law demonstrating a switch from structural to an effects-based approach, until the newest U.S. Horizontal Merger Guidelines 1992/97, which embody the current U.S. approach to merger control in practice. Chapter 3 sets forth a brief history of the substantive tests in the EU, from the introduction of the dominance test, through case law broadening the scope of the dominance notion, until the adoption of the SIEC test and the EC Horizontal Merger Guidelines in 2004. While Chapters 2 & 3 are rather introductory, constituting – however – a basic reference for the next chapter, Chapter 4 examines the reasons behind the change of the substantive test in the EU and, more importantly, its effects, focusing on convergence with the U.S. SLC test. Therefore, Chapter 4 contains most of the comparative analysis of the two substantive tests. Finally, Chapter 5 briefly concludes the whole thesis with a contention that the EU SIEC test and the U.S. SLC have several points of

⁴ 15 U.S.C. § 18 (1914).

convergence, however, a close convergence is rather unlikely, mainly due to differences in underlying policies.

2. EVOLUTION OF THE U.S. MERGER APPRAISAL TEST

2.1. Merger control under the Sherman Act and introduction of the Clayton Act

The U.S. merger control dates back to the 19th century. In 1890, with the adoption of the Sherman Act⁵, a possibility to challenge mergers arose based on general provisions of Section 1 and 2 of the Act⁶. The need for a specific regulation for merger control resulted in adopting the Clayton Act in 1914. The current test for measuring anticompetitive behavior is regulated by Section 7 of the Clayton Act, which prohibits any:

person engaged in commerce or in any activity affecting commerce [from acquiring], directly or indirectly, the whole or any part of the stock or [...] assets of another person engaged in commerce or in any activity affecting commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be *substantially to lessen competition, or tend to create a monopoly*⁷. (Emphasis added)

Early interpretation of Section 7 of the Clayton Act was developed by the so-called Structural School, which construed “competition” in the “substantial lessening of competition” test

⁵ 15 U.S.C. § 1 (1890).

⁶ Section 1 prohibited mergers which constituted agreements in restraint of trade, and Section 2 prohibited mergers that actually created monopoly power.

⁷ Originally, Section 7 referred only to acquisition of stocks, which was hardly an effective merger safeguard. Besides, it originally referred solely to “corporations”, which significantly narrowed the application. Limited applicability of that provision and rise of the so-called rule of reason approach in application of Section 1 and 2 of the Sherman Act (*see, Standard Oil Co. of New Jersey v. United States*, 221 U.S. (1911) for the general application of the rule of reason and *Columbia Steel Co. v. United States*, 334 U.S. 495 (1948) – for application of the rule of reason in merger environment), as well as growing concerns about the increasing concentration of industries, led to adoption of the Celler-Kefauver Antimerger Act 15 U.S.C. § 18 (1950), which amended Section 7 of the Clayton Act to include acquisition of other types of assets than stock and other types of entities.

based on non-economic concerns⁸. In consequence, at that time concentrations were presumed to economically harm competition.

2.2. The Structural approach and the 1968 Merger Guidelines

The first Supreme Court judgment interpreting Section 7 was *Brown Shoe v. United States*⁹, where the Court expressed a belief that the Congress, in drafting the 1950 amendment, wanted to retain “local control” over industry and protect small businesses¹⁰. Chief Justice Warren, delivering the majority opinion, concluded that “tendencies toward concentration in industry are to be curbed in their incipency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time”¹¹.

The Structural approach towards interpretation of Section 7 was acknowledged in *United States v. Philadelphia National Bank*¹². The Supreme Court observed here that:

⁸ Such as protection of small business and prevention of adverse political consequences arising from accumulation of economic power. “The possibility of lower costs was brushed aside in the legislative deliberations and there is every reason to believe that Congress preferred the noneconomic advantages of deconcentrated markets to limited reductions in the cost of operations there is every reason to believe that Congress preferred the noneconomic advantages of deconcentrated markets to limited reductions in the cost of operations.” (Derek Bok, *Section 7 of the Clayton Act and the Merging of law and Economics*, 74 Har. L. Rev. 226, 318 (1960)).

⁹ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962). The Court held, that a merger of a shoe manufacturer and a seller, which was the third largest by dollar volume in the US, with the eighth largest entity by dollar volume among shoe-sellers, being at the same time a large manufacturer of shoes, could lessen competition substantially in retail sale of shoes in a vast majority of cities and their surroundings in which they both sold through their own outlets or outlets controlled by them, therefore it should be prohibited under the Clayton Act.

¹⁰ *Id.* at 316.

¹¹ *Id.* at 346.

¹² *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Action was brought under both the Sherman Act and the Clayton Act in order to prohibit a proposed merger of two Philadelphia banks in a highly concentrated market. The district court held for the defendants after trial, and the plaintiff appealed. The Supreme Court held that the merger was illegal under the Clayton Act and was required to be enjoined.

Intense congressional concern, revealed in 1950 Clayton Act amendment, with trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. [...] [A] merger which produces a *firm controlling an undue percentage share of the relevant market*, and results in a *significant increase in the concentration of firms in that market* is so *inherently likely to lessen competition substantially* that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.¹³ (Emphasis added).

The Court prohibited the merger relying on combined market shares and overall concentration in the relevant market exceeding specified levels, and created a presumption of illegality¹⁴.

In *United States v. Von's Grocery Co.*¹⁵ the Supreme Court took an even more strict approach, deciding that the proposed merger violated Section 7 because it would lead to a further diminution in the number of independent players in the market. This holding constituted a *per se* illegality standard for virtually all but truly marginal horizontal mergers¹⁶.

¹³ *Id.*, at 363.

¹⁴ Although theoretically the presumption was rebuttable, subsequent Supreme Court horizontal merger decisions from the 1960s showed that these factors (market shares and concentration level in the relevant market) were very often conclusive in practice. See, e.g., *United States v. Aluminium Co. of America (Alcoa-Rome)*, 377 U.S. 271 (1964); *United States v. Continental Can Co.*, 378 U.S. 441 (1964).

¹⁵ *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

¹⁶ *But cf.*, the dissenting opinion of Justice Stewart, joined by Justice Harlan, which pointed out that there were other factors than declining number of grocery stores which should be taken into account in order to assess the level of grocery competition. Referring to the *Philadelphia National Bank* case, it was argued in the dissenting opinion that a market share of 7.5% does not constitute an "undue percentage" of the market, and the increase of 1.1% is not significant. See, *Von's Grocery Co.*, 384 U.S. 270 (1966), at 302.

The Supreme Court once again followed the strict line towards merger control in *United States v. Pabst Brewing Co.*¹⁷, where it used a contorted definition of the relevant geographic market in order to block an acquisition by the tenth largest brewer in America of Blatz, the eighteenth largest¹⁸.

Following the early case law on Section 7 of the Clayton Act, clearly affected by the Structural school, the DoJ issued in 1968 first Merger Guidelines¹⁹. The Guidelines highlighted as the main role of Section 7 to “preserve and promote market structures conducive to competition”²⁰, whereas “emphasis on market structure generally produce[s] economic predictions that are fully adequate for the purpose of [the] statute”²¹. The structural factors used in the Guidelines would not alone be conclusive only in exceptional cases, where the Department’s enforcement activity would be based on a more complex evaluation²².

¹⁷ *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966). The Supreme Court held that, while the tenth largest brewer in the United States acquired the assets of the eighteenth largest brewer in the United States, the government proof which showed, *inter alia*, that after the merger the acquiring brewer had 4.49% of the industry's total national beer sales, 23.95% state of Wisconsin beer sales and 11.32% of beer sales in Wisconsin, Illinois and Michigan, and that there had been a history of concentration in the beer industry, was satisfactory enough to establish a violation of statute prohibiting mergers whose effect may be substantially to lessen competition, or tend to create a monopoly, in each and all of the three areas.

¹⁸ As Justice Stewart observed in *Von's Grocery*, “[t]he sole consistency [with the line of Supreme Court’s decisions since the 1950 amendment] is that, in litigation under § 7, the Government always wins”. *Von's Grocery*, 384 U.S. 270 (1966), at 301.

¹⁹ U.S. Department of Justice 1968 Merger Guidelines, available online at: <http://www.usdoj.gov/atr/hmerger/11247.htm>. The merger guidelines are not binding even with respect to the enforcement agencies themselves, but as a matter of practice the agencies generally adhere to the principles set forth in them so that they retain their usefulness as instructional and planning tools for the business and legal communities (Robert Schlossberg (ed.), *Mergers and Acquisitions. Understanding the Antitrust Issues*, 22-25 (2nd ed., 2004)).

²⁰ 1968 U.S. Department of Justice Merger Guidelines, *supra*, § 2. Rationale of the focus of the DoJ on the market structure provided in the Guidelines was that conduct of individual entities in the market “tends to be controlled by the structure of that market, i.e. by those market conditions which are fairly permanent or subject only to slow change” , e.g., the number of entities selling in the market, relative sizes of their market shares, substantiality of barriers to entry. Hence, “a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct, such as use of inefficient methods of production or excessive promotional expenditures” (*id.*).

²¹ *Id.* The Guidelines pointed out, that “an enforcement policy emphasizing a limited number of structural factors also facilitates both enforcement decision-making and business planning which involves anticipation of the Department's enforcement intent” (*id.*).

²² *Id.*

Some indications of how any proposed concentration was supposed to be evaluated by the enforcement agencies was also provided²³.

However, the strict Structural approach of U.S. merger control, as adopted by courts and enforcement agencies in the 1960s, was to be questioned in subsequent cases, where more economic and less populist ideas proved to be more appropriate. Already in the 1970s the Supreme Court gave examples of a more economically oriented approach in deciding antitrust cases with more elaborate reasonableness standards²⁴. The case *United States v. General Dynamics Corp.*²⁵ showed a shift to a more qualitative than quantitative appraisal of mergers. Here the Supreme Court upheld the district court's decision to approve a merger of two leading coal producers, even though a rapid decline in the number of coal producers had occurred²⁶. Justice Stewart²⁷, delivering the Court's opinion, returned to his *Brown Shoe* reproach that "statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects"²⁸. Although given the

²³ *Id.*, §§ 5 & 6. In a highly concentrated market (i.e. a market in which the shares of the four largest entities amount to approx. 75% or more) the DoJ would ordinarily challenge mergers where the acquiring and acquired firm account for a market share of respectively 4% and 4% or more, of 10% and 2 % or more, 15% or more and 1% or more. In a less concentrated market (i.e. market in which the shares of the four largest entities amount to less than approx. 75%) the respective percentages were as follows: 5% and 5% or more, 10% and 4% or more, 15% and 3% or more, 20% and 2% or more, 25% or more and 1% or more. More stringent standards applied to markets not wholly unconcentrated in which there was a significant trend toward increased concentration (*id.*, § 7). The Guidelines referred there to markets in which the "aggregate market share of any grouping of the largest firms in the market from the two largest to the eight largest has increased approximately 7% or more of the market over a period of time extending from any base year 5-10 years prior to the merger".

²⁴ It is not coincidental that the alteration of approach occurred simultaneously with the departure of Chief Justice Warren and Justices Black and Fortas, all of whom had cultivated a populist reading of Section 7.

²⁵ *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

²⁶ The merger increased the concentration of the top two firms in the market by over 10% and resulted in the two largest firms now controlling about half of the sales.

²⁷ Dissenting in *Von's Grocery* case.

²⁸ *General Dynamics Corp.*, 415 U.S. 486 (1974), at 498. Since "[e]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete" (*id.*, at 501), the Court took market share factor only as a basis for future analysis of the proposed merger's competitive effect.

narrow facts of the case²⁹ it was not immediately clear if a new trend in adjudication is suggested, subsequent Court's merger decisions required an economically more rigorous definition of the relevant market and assessment of the future competitive capability of the merging parties³⁰. That shift of attitude towards merger assessment was strongly related to the rise of the so-called Chicago school, which based its merger appraisal on more economic factors and Stigler's "A Theory of Oligopoly"³¹.

2.3. Rise of the Chicago School, the 1982 and 1984 Merger Guidelines

The DoJ issued another version of the Merger Guidelines, first in 1982³², then a refined and clarified version in 1984³³. Although here the first step of assessment was also based on market structure analysis and concentration thresholds were established with a presumption of anticompetitiveness, the 1982 version of Guidelines departed from the Structural school approach of 1968 Guidelines. Concentration factors were believed to be significant, nevertheless not determinative for the outcome of appraisal. The 1982 Guidelines introduced a new means for ascertaining concentration levels in given markets, the Herfindahl Hirshmann Index (*hereinafter*, HHI)³⁴, which was used to set up threshold standards to be

²⁹ The Court decided that the acquired entity's exhausted coal reserves together with long-term contracts were strong enough indications that its disappearance as an independent entity from the market would not harm competition (*id.*, at 509-510).

³⁰ See, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *United States v. Connecticut National Bank*, 418 U.S. 656 (1974).

³¹ See, George J. Stigler, *A Theory of Oligopoly*, 72 *Journal of Political Economy* 44 (1964).

³² U.S. Department of Justice 1982 Merger Guidelines, available at: <http://www.usdoj.gov/atr/hmerger/11248.htm>.

³³ U.S. Department of Justice 1984 Merger Guidelines, available at: <http://www.usdoj.gov/atr/hmerger/11249.htm>.

³⁴ As the Guidelines provide, "[T]he HHI is calculated by summing the squares of the individual market shares of all the firms included in the market [...]. Unlike the traditional four-firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms. It also gives proportionately greater weight to the market shares of the larger firms, which probably accords with their relative importance in any collusive interaction." (*id.*, § II A).

applied by the DoJ³⁵. The Guidelines gave an additional list of criteria that would be taken into account in merger appraisal³⁶. The 1984 Merger Guidelines refined their merger analysis towards a slightly more lenient course to emphasize the potential importance of non-structural criteria³⁷.

Subsequent case law confirmed the departure from Structural ideas as most of the judges refrained from relying simply on the structural criteria alone, while scrutinizing the cases at hand applying more sophisticated and intensive analyses of market structure and firm behavior³⁸.

2.4. Modern approach to merger control – the 1992 Horizontal Merger

Guidelines

While with respect to non-horizontal mergers the relevant provisions of the 1984 Merger Guidelines continued to apply, in 1992 the DoJ together with the FTC issued a revised

³⁵ In consequence, if a merger resulted in post-merger market concentration ratio of 1000 (“unconcentrated” market), it was “unlikely” that the Department would challenge such a merger, whereas it would be “more likely than not” that they would challenge a merger if the post-merger market concentration ratio was between 1000 and 1800 (“moderately concentrated” market) with a rise of over 100. The Department would be “likely” to challenge a merger if the HHI exceeded 1800 (“highly concentrated” market) and the increase exceeded 100 (*id.*, § II A(1)).

³⁶ Such as: ease of entry, nature of the product and terms of sale, information about specific transactions and buyer market characteristics, conduct of firms in the market and market performance (*id.*, § II B & C).

³⁷ The 1984 Guidelines intended, by “stating its policy as simply and clearly as possible [...] to reduce the uncertainty associated with enforcement of the antitrust laws in this area” (U.S. Department of Justice 1984 Merger Guidelines, *supra*, § 1).

³⁸ See, e.g., *Hospital Corp. of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986); *United States v. Archer-Daniels-Midland Co.*, 781 F.Supp. 1400 (S.D. Iowa 1991); *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990). In *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), the Court of Appeals relied on *General Dynamics* in pointing out that “[i]nstead of accepting a firm's market share as virtually conclusive proof of its market power, the [Supreme] Court carefully analyzed defendants' rebuttal evidence” (*id.*, § 38). According to the Court of Appeals, the Supreme Court had “adopted a totality-of-the-circumstances approach to [Section 7 of the Clayton Act], weighing a variety of factors to determine the effects of particular transactions on competition” whereas “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness” (*id.*, § 8).

version of the Merger Guidelines³⁹, only for horizontal mergers. The 1992 Merger Guidelines state that their “unifying theme [...] is that mergers should not be permitted to create or enhance market power or to facilitate its exercise”⁴⁰. Whereas the 1982 and 1984 versions of the Guidelines focused on competitive effects of a dominant firm and collusion, the 1992 Guidelines point out that the circumstances may also allow a single firm, which is not a monopolist, to exercise market power through unilateral or non-coordinated conduct⁴¹. The 1992 Guidelines confirm also the importance of market concentration factor in merger appraisal. Thresholds of HHI which the agencies are supposed to rely on when carrying out their initial assessment remained relatively unchanged as set up by the 1982 Guidelines.

As for coordinated effects, the Guidelines are clear that concerns are raised not only with express, but also with tacit collusion⁴². The Guidelines explicitly acknowledge that a higher market concentration leads to a higher risk of collusion⁴³. Furthermore, the Guidelines provide a list of factors regarding market conditions which are conducive to reaching terms of coordination and detecting and punishing deviations from those terms⁴⁴.

When it comes to unilateral effects, the Guidelines provide innovative examples of situations in which different specific factors describing the relevant market influence the probability of unilateral effects. Firstly, where the market features substantial product

³⁹ U.S. Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, available at: <http://www.usdoj.gov/atr/hmerger/11250.htm>.

⁴⁰ *Id.*, § 0.1.

⁴¹ *Id.*, § 2.2: “A merger may diminish competition even if it does not lead to increased likelihood of successful coordinate interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output”. Introducing this novel concept of so-called “unilateral effects” attracted much focus and development in this field of antitrust both in subsequent judiciary decisions and agency practice.

⁴² *Id.*, § 2.1.

⁴³ *Id.*

⁴⁴ *Id.* The Guidelines also point out the role of so-called maverick firms in preventing collusion between competitors (see, Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects under the Antitrust Laws*, 77 *N.Y.U. L. Rev.*, 135 (2002)); on the other hand, take-over of a maverick firm may facilitate collusion.

differentiation, the merger might have anti-competitive effects if a significant share in the market is accounted by consumers who see the products of the merging parties as their first and second choices, while other firms are unlikely to reposition their product lines closer in product space to the offerings of the merging parties⁴⁵. The price elevation will be greater, the closer the substitute products of the merging firms are⁴⁶. Secondly, where products are relatively undifferentiated and it is capacity which primarily distinguishes firms and shapes the nature of their competition, the merger may still have anti-competitive effects if it provides the merged firm with a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales⁴⁷. In consequence, the merged firm may find it profitable unilaterally to raise price and suppress output. However, to cause harm to competition by such unilateral effects the merger must concern a substantial part of the customers in the market, which led the Guidelines to create some kind of a “safe-harbor” including the merging entities’ combined market share of less than 35%⁴⁸.

It is worth noting, that since 1975 the Supreme Court has not considered substantive issues of merger control⁴⁹. In consequence, the enforcement agencies’ role in merger control expanded, especially if coupled with the pre-notification requirement⁵⁰ which resulted in most merger cases being scrutinized *ex ante* and the enforcement agencies acting as some

⁴⁵ U.S. 1992 Horizontal Merger Guidelines, *supra*, § 2.21.

⁴⁶ On calculation of diversification ratio, *see*, Carl Shapiro, *Mergers with Differentiated Products*, Address before the American Bar Association and the International Bar Association, *The Merger Review Process in the U.S. and Abroad*, Washington D.C., (November 9th, 1995); available online at: <http://www.usdoj.gov/atr/public/speeches/shapiro.spc.htm>.

⁴⁷ U.S. 1992 Horizontal Merger Guidelines, *supra*, § 2.22.

⁴⁸ *Id.*, § 2.211 & 2.22.

⁴⁹ *See, United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975).

⁵⁰ *See*, Hart-Scott-Rodino Antitrust Improvement Act 15 U.S.C. §18A (1976).

kind of quasi-regulatory bodies⁵¹. After issuance of the 1992 Horizontal Merger Guidelines an increased focus of the enforcement agencies on unilateral effects theories could be observed. However, both FTC and DoJ continued challenging mergers alleging coordinated effects as well. Most cases concerned mergers to duopoly, e.g. *FTC v. Cardinal Health, Inc.*⁵² and *United States v. Premdor, Inc.*⁵³, however, the agencies contested also mergers in less concentrated markets⁵⁴. It, nevertheless, does not mean that it would have been impossible to have a merger cleared if it led to a highly concentrated market, providing that structural data where being offset by factors facilitating competition. In *Union Pacific Co./Southern Pacific Transportation Co.* case⁵⁵ the DoJ contested a proposed merger between two of the three major rail carriers in the western United States, because of creation of a duopoly that allegedly would facilitate price coordination. The Board, however, despite recognizing high concentration, gave a green light to the merger, because it identified a number of factors which suggested facilitation of competition⁵⁶. *Union Pacific* therefore shows a radical departure from the Structural ideas.

⁵¹ E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 Wash. U. L. Q., 997 (1986).

⁵² See e.g., *FTC v. Cardinal Health, Inc.*, 12 F.Supp.2d 34, (D.D.C. 1998) – dual mergers between main players in the drug wholesale market; preliminary injunction granted because the defendants would likely have an increased ability to coordinate their pricing ability.

⁵³ *United States v. Premdor, Inc.*, not reported in F.Supp.2d, 2002 WL 1816981 (D.D.C.) (Competitive Impact Statement, August 3rd, 2001, available at: <http://www.usdoj.gov/atr/cases/f9000/9017.htm>) – acquisition of the largest of only three significant manufacturers of molded doorskins by one of the two manufacturers of molded doors. The DoJ approved the merger conditional on divestiture, approved by the District Court.

⁵⁴ See, e.g., *United States v. Alcoa, Inc. & Reynolds Metals Co.*, not reported in F.Supp.2d, 2001 WL 1335698 (D.D.C., 2001) – DoJ found the characteristics of the market conducive to coordination (homogenous products, inelastic demand, high transparency, high entry barriers, history of coordination), whereas Reynolds was a potential maverick, therefore eventually, in a consent decree, required divestiture in the markets for both smelter and chemical grade aluminum. See also: *Shell/Texaco* (FTC Dkt No C3803 21 April 1998), *Degussa Aktiengesellschaft* (FTC Dkt No C3813 19 June 1998), *Exxon Corporation* (FTC File No 97 10007 10 August 1998).

⁵⁵ *Union Pacific Co./Southern Pacific Transportation Co.*, 1 S.T.B. 233, 1996 WL 467636 (S.T.B. 1996), heard by the Surface Transportation Board.

⁵⁶ Such as, *inter alia*, heterogeneity of the transportation service, lack of transparency, use of long-term contracts, existence of economies of scope and high demand elasticity.

In *FTC v. H.J. Heinz, Co.*⁵⁷ the FTC wanted to block the acquisition of Beech-Nut by Heinz⁵⁸. The market consisted of virtually three players, with Gerber as the market player number one with at least 65% market share. The FTC claimed a threat of coordinated effects⁵⁹, pointing out the fact that retail sellers tend to stock two brands, namely Gerber and one of the two others. Heinz and Beech-Nut were therefore in a strenuous battle against each other for the “second slot” on shelves of chain retailers. On the other hand, Heinz based its defense on probable high post-merger efficiencies, which would strengthen the merged entity in the fight for customers against Gerber, and thus benefit the consumers. The Court of Appeals reversed the District Court’s judgment for defendant, because it believed that the two post-merger entities might find coordination too tempting (“[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination”)⁶⁰.

The year 2002 brought an interesting clearance decision of two proposed transactions regarding P&O Princess Cruises plc⁶¹. It was argued that creating either a friendly “dual-listed company” with Royal Caribbean Cruises, Ltd. or a hostile acquisition of Princess by Carnival Corporation would result in a duopoly⁶². In their final decision, considering both coordinated and unilateral effects, the Commission decided by a bare majority not to take any enforcement action. As to unilateral effects, the FTC assumed that neither merger involved

⁵⁷ *FTC v. H.J. Heinz, Co.*, 246 F.3d 708 (C.A.D.C. 2001).

⁵⁸ Respectively, the third largest producer of baby food in jars in the US and number two in the market. The merger would have induced an increase of HHI by 510 points to the level of 5285 in the market.

⁵⁹ FTC relied on factors such as: homogenization of the cost structures post merger (Gerber’s and the new entity’s), substantial entry barriers, evidence of some collusion in the past.

⁶⁰ *H.J. Heinz, Co.*, 246 F.3d 708 (C.A.D.C. 2001), at 724. Although the efficiency claim proved to be insufficient to rebut the structural presumption, it seems that this court decision confirmed not only continued role of concentration in the U.S. horizontal merger analysis, but also that the structural presumption is rebuttable (Andrew R. Dick, *Coordinated Interaction: Pre-Merger Constraints and Post-Merger Effects*, 12 George Mason Law Review 65 (Fall 2003)).

⁶¹ *Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc* and *Carnival Corporation/P&O Princess Cruises plc* (FTC file No. 021 0041). FTC’s Statement available at: <http://www.ftc.gov/os/2002/10/cruisestatement.htm>.

⁶² Market concentration data were as follows: in case of the former merger the HHI would rise from 2800 to 3700, while in case of the latter – to 3800.

uniquely close competitors, while two large competitors and a substantial “fringe” of other competitors would be likely to replace any lost competition by repositioning or expanding their product lines⁶³. The FTC dismissed also possible reservations as to coordinated effects, recognizing intense competition in the cruising industry as well as “maverick” theory, since none of the firms seemed to be one⁶⁴. Furthermore, the FTC claimed there was no easy way to monitor prices in such a complex market with a large number of different products⁶⁵. Possibility of coordination on quality was rejected as strong unilateral incentives to cheat on any such coordination would have existed because new ships with new amenities are highly profitable and are a means of differentiating a competitor from its rivals⁶⁶. In the FTC’s decision, however, two of five Commissioners dissented⁶⁷, hence the decision was some kind of a “close call”⁶⁸.

Merger cases after 1992 based on unilateral effects concerned mainly transactions in markets with differentiated products. Most famous case involved the proposed merger of two of the three leading office superstore chains in the U.S., namely Staples and Office Depot⁶⁹.

⁶³ See, § II C (1) of the FTC’s Statement.

⁶⁴ *Id.*, § II C (2)(a).

⁶⁵ *Id.*, § II C (2)(b). It would also be difficult and costly to redeploy enough ships to non-North American markets or coordinate on capacity in the number of ships built in order to affect North American prices (*id.*, § II C (2)(d)).

⁶⁶ *Id.*, § II C (2)(c).

⁶⁷ See, Dissenting Statement, available at: <http://www.ftc.gov/os/2002/10/cruisedissent.htm>. The dissent suggested a number of different theories of potential anticompetitive effects, while its prime concern was the potential for coordinated interaction among the remaining market participants regarding both pricing and capacity issues. The dissenting members pointed out also that neither of the parties concerned had sufficiently rebutted the presumption of anti-competitive harm prescribed by the Horizontal Merger Guidelines in concentrated markets, therefore the proposed mergers should be assessed in the context of a full trial on the merits.

⁶⁸ For examples of other cases raising both unilateral and coordinated effects, see: *Coca-Cola/Dr. Pepper* (117 FTC 735 1994) – the merger would have brought together the firms with the largest and fourth largest shares of the market for soft drinks concentrates and syrups; *Alcoa, Inc. & Reynolds Metals Co.* (see: footnote 54); the U.S. DoJ’s Complaint: *US v. WorldCom, Inc. and Sprint Corporation* (available at: <http://www.usdoj.gov/atr/cases/f5000/5051.htm>) – pressures from both the US DoJ and the EU led ultimately to terminating the merger by both companies on July 13th, 2000.

⁶⁹ *FTC v. Staples, Inc.*, 970 F.Supp. 1066 (D.D.C. 1997). FTC case No. 1:97CV00701, available at: <http://www.ftc.gov/os/caselist/cn197cv00701.shtm>.

Based on a survey⁷⁰ carried out by the FTC, an economic expert estimated that removal of Office Depot from the market would lead to a price increase of approximately 9% in overlap markets⁷¹. In *FTC v. Swedish Match*⁷², involving a proposed acquisition of one of Swedish Match's primary direct competitor, National Tobacco Company, L.P., the FTC also based its challenge on the differentiated product theory. The FTC's allegations of anticompetitive effects of the merger considered two main factors, i.e. high price-cost margin of National and high diversification ratios, which would support large price increases⁷³.

The enforcement agencies in the US, since the introduction of 1992 Merger Guidelines, have been gradually relying more on unilateral effects theory than on coordinated effects in challenging horizontal mergers. It has been explained that such a strategy may have several reasons, predominantly it is that "[w]ithin the agencies, unilateral effects cases are perceived by many to be easier to analyze and more likely to gain economic support. Outside of the agencies, however, unilateral effects cases are no bargain"⁷⁴. It is a clear suggestion addressed to antitrust enforcers by James, that "[w]here the predicate facts are present and substantial adverse effects are clear, enforcement action is appropriate. Rather, it suggests the

⁷⁰ The survey showed that in places where Staples and Office Depot competed prices were lower than in places where Staples did not face such competition. Similarly, where Staples faced competition of Office Depot and the third competitor (OfficeMax), the prices were lower than in places where Office Depot did not compete.

⁷¹ Although the FTC complaint was criticized *inter alia* for a narrowed relevant product market (see, William A. Niskanen, *Antitrust and the Staples-Office Depot Merger*, Cato Institute website, http://www.cato.org/pub_display.php?pub_id=6131), the district court granted a preliminary injunction.

⁷² *FTC v. Swedish Match*, 131 F.Supp. 2d 151 (D.D.C. 2000). FTC File No. 002 3201, available at: <http://www.ftc.gov/os/caselist/c3970.shtm>.

⁷³ The defendants ultimately lost before the district court because their defense based on entry and efficiencies failed to rebut the presumption of harm to competition. See also, *United States v. Long Island Jewish Medical Center*, 983 F.Supp. 121 (E.D.N.Y., 1997), the DoJ's Complaint available at: <http://www.usdoj.gov/atr/cases/longis0.htm> - a challenge to a merger in oligopolistic markets under the unilateral effects theory.

⁷⁴ Charles A. James, *Rediscovering Coordinated Effects*, Address presented at the American Bar Association, Annual Meeting, Section of Antitrust Law, Washington, DC, August 13th, 2002, available at: <http://www.usdoj.gov/atr/public/speeches/200124.htm>. It must be noted that according to the US antitrust enforcement system the agency must convince the court that anticompetitive effects are probable to occur, therefore this approach seems even more plausible.

need for the agencies to sharpen their analytical tools with regard to coordinated effects. In other words, unilateral effects should not be the theory of choice simply by default”⁷⁵.

Although the U.S. antitrust law has been unquestionably developing over the decades, further improvements in merger analysis is awaited. It is expected that at least three basic factors will influence the changes in merger antitrust: firstly, a persistent tension between the longstanding concern with social and political effects of large mergers and the realization that large corporate consolidations can confer important economic benefits on society; secondly, a continuing search for an adequate, and thus satisfactory, theoretical basis for anticompetitive effects in merger environment; finally, the Supreme Court’s silence on substantive merger issues since 1975, which enhanced the role of enforcement agencies⁷⁶.

⁷⁵ *Id.*

⁷⁶ Ernest Gellhorn et al., *Antitrust Law and Economics in a Nutshell*, 474-475 (5th ed. 2004).

3. EVOLUTION OF THE EU MERGER APPRAISAL TEST

3.1. Introduction of the EC Merger Regulation 4046/89

Unlike the ECSC Treaty⁷⁷, the EC Treaty does not contain any provisions to deal with mergers. Initially, the Commission and the ECJ tried to remedy the lack of regulation by applying Articles 81 and 82 of the EC Treaty to mergers⁷⁸. It turned out rather quickly, however, that these provisions were quite inadequate for merger control⁷⁹, therefore in 1989 the Council of Ministers adopted ECMR 1989. Adoption of the ECMR 1989 was preceded by several proposals of the Commission, in earlier versions of which⁸⁰, surprisingly, the substantive test proposed did not mention “dominance” whatsoever. For the first time the concept of dominance was included in the substantive test in the revised draft submitted by the Commission in March 1988⁸¹, the subsequent proposal⁸², however, again left dominance out of the test. Eventually, the 1989 ECMR formulated the substantive test as follows: “A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market”⁸³.

⁷⁷ Treaty establishing the European Coal and Steel Community, signed in Paris on April 18th, 1951, entered into force on 24 July 24th, 1952 (not published; see, http://europa.eu/scadplus/treaties/ecsc_en.htm).

⁷⁸ See, Joined Cases 142/84 and 156/84, *BAT and Reynolds v. Commission*, [1987] ECR 4487 (Art. 81); Case 6/72, *Europemballage Corp. & Continental Can, Inc. v. Commission*, [1973] ECR 215 (Art. 82).

⁷⁹ See, EEC Competition Services Study No. 3, Brussels, [1966] 26 CMLR 1-30.

⁸⁰ See, proposals: OJ C 92, 31.10.1973, p. 1; OJ C 36, 12.2.1982, p. 3; OJ C 51, 23.2.1984, p. 8; OJ C 324, 17.12.1986, p. 5.

⁸¹ See, OJ C 130, 19.5.1988, p. 4 – „Concentrations shall not be compatible with the Common Market where they give rise to or strengthen a dominant position in the Common Market or in a substantial part thereof”.

⁸² See, OJ C 22, 28.1.1989, p. 14 – „[...] create or strengthen a position as a result of which the maintenance or development of effective competition would be impeded in the Common Market”.

⁸³ Art. 2(3) ECMR 1989.

The wording of the 1989 ECMR suggested at first glance that prohibited were mergers which led to single-firm dominance. That was the understanding that could be inferred from Commission's early decisions, approving mergers that could have raised possible anti-competitive concerns as for oligopoly situations⁸⁴. It did not, however, take much time until concerns about the actual scope of the term dominance arose.

3.2. Development of the application of the EC Merger Regulation 4046/89 to collective dominance

In *Varta/Bosch* decision⁸⁵ the Commission for the first time noticed that “[t]he existence of an equally strong competitor [...] could lead for several reasons to alignment of the behaviour of both competitors. In particular the absence of other large actual competitors able to counter any alignment of the behaviour of the main competitors on the Spanish market is noted”⁸⁶. Subsequently, in *Alcatel/AEG Kabel*⁸⁷ the Commission carried on consideration of oligopoly situations, however, it rejected in this case a direct request of the German Federal Cartel Office⁸⁸ to apply collective dominance theory⁸⁹. The Commission finally felt ready to introduce the concept of oligopolistic dominance in *Nestlé/Perrier*⁹⁰. In this case, concerning

⁸⁴ See, Case IV/M004 *Renault/Volvo* [1990] OJ C281/2; Case IV/M098 *Elf/BC/CEPSA* [1991] OJ C172/8.

⁸⁵ Case IV/M.12 *Varta/Bosch* [1991] OJ L320/26.

⁸⁶ *Id.*, par. 32.

⁸⁷ Case IV/M.165 *Alcatel/AEG Kabel* [1992] OJ C6/0.

⁸⁸ Bundeskartellamt (see, <http://www.bundeskartellamt.de/wEnglisch/index.php>).

⁸⁹ Case IV/M.165 *Alcatel/AEG Kabel* [1992] OJ C6/0, par. 22 - “[I]n contrast to the German law on restrictive practices [...] EC merger control does not contain a legal presumption of the existence of a collective dominant oligopoly as soon as certain companies attain a certain combined market share. [...] Under the Regulation such a presumption which amounts to a reversal of the burden of proof does not exist. On the contrary, the Commission would have to demonstrate in all cases that effective competition could not be expected on structural grounds between the leading companies in a highly concentrated market”.

⁹⁰ Case IV/M.190 *Nestlé/Perrier* [1992] OJ L356/1. A few months earlier the ECJ had accepted that concept under Art. 82 of the EC Treaty in the *SIV v. Commission* (Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA and Others v. Commission* [1992] ECR II-1403).

a classic oligopoly on the French bottled water market, the Commission decided to introduce the concept of collective dominance as embraced by the scope of the 1989 ECMR “dominance”. The case considered a proposed take-over by Nestlé of Perrier, two of the main three competitors in the market (third was BSN), therefore it was a classic three-to-two merger situation. The Commission based its findings on market concentration (very high in this case, even in the pre-merger market), market shares of each player in the relevant market concerned and the market characteristics (two suppliers would be homogeneous, similar cost structures of three main brands of suppliers, history of cooperation between competitors, high market transparency)⁹¹. An additional factor which alerted the Commission was the Nestlé and BSN robust reaction to an attempt by an external player (Ifint) to acquire Perrier. The Commission was, however, ready to clear the merger providing some conditions are fulfilled, such as divestiture of several Nestlé brands in order to render a third party an active competitor⁹². Nevertheless, the decision has been welcomed as introducing the concept of collective dominance which widened the interpretation of Art. 2(3) of the 1989 ECMR.

For the first time European courts had a chance to express their voice on collective dominance after the *Nestlé/Perrier* decision in a case concerning a joint venture between two potash producing companies: Kali und Salz and Mitteldeutsche Kali AG. Based on the level of concentration⁹³, the market characteristics and the existence of structural links between

⁹¹ Other factors considered were: very high production cost-price margin, barriers to entry, history of price parallelism, no sufficient countervailing buying power, low demand elasticity, product homogeneousness and maturity of technology.

⁹² This move of the Commission has been, however, criticized for not taking into account pro-competitive effects of asymmetry between Nestlé and BSN (Frédéric Jenny, *Economic Analysis, Anti-trust Law and the Oligopoly Problem*, 1 E. B. O. L. R., 55-56 (2000)).

⁹³ Even though significantly lower than in *Nestlé/Perrier*, the Commission regarded the market shares of remaining two main competitors as sufficient to justify finding of collective dominance. Besides, the Commission found it likely that the concentration’s market share would even increase further post-merger.

undertakings⁹⁴, the Commission's decision⁹⁵ stated that the joint venture would lead to creation of a dominant duopoly, however, it would have allowed the concentration had the links existing between the undertakings been severed. In an appeal from the Commission's decision, the ECJ held⁹⁶ that, firstly, the 1989 ECMR should apply also to collective dominance, based on a functional interpretation of its provisions⁹⁷, because, if the 1989 ECMR would encompass only single dominance, "[t]he Regulation would thus be deprived of a not insignificant aspect of its effectiveness, without that being necessary from the perspective of the general structure of the Community system of control of concentrations"⁹⁸. As to substantive issues, the ECJ held that if a collective dominant position is alleged the Commission must take into account, "using a prospective analysis of the reference market"⁹⁹, if the proposed concentration:

leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers¹⁰⁰.

⁹⁴ Exceptionally close links existed between Kali und Salz and SCPA (a French state-owned potash distributor – the main competitor of the post-merger entity), because of both companies running a joint venture in Canada (Potacan), activity in an export cartel in Vienna (Kali-Export GmbH), and long-established supply links between the firms .

⁹⁵ Case No. IV/M.308 *Kali und Salz/MdK/Treuhand* [1994] OJ L186/38.

⁹⁶ Joined Cases C-68/94 and 30/95, *France and Others v. Commission* [1998] ECR I-1375.

⁹⁷ This was because "the textual and historical interpretations of the Regulation, and in particular Article 2 thereof, do not permit its precise scope to be assessed as regards the type of dominant position concerned"; see, *id.*, par. 168.

⁹⁸ *Id.*, par. 171. This was despite the Attorney General's Opinion to the contrary; see: Opinion of the AG Tesouro in Joined Cases C-68/94 and 30/95 *France and Others v. Commission* [1998] ECR I-1375, par. 84-98.

⁹⁹ Joined Cases C-68/94 and 30/95 *France and Others v. Commission*, par. 221.

¹⁰⁰ *Id.*

According to the ECJ, in such situations a close examination of each individual circumstances which are “relevant for assessing the effects of the concentration on competition in the reference market” is warranted¹⁰¹, whereas the Commission is granted a certain discretion, “especially with respect to assessments of an economic nature”¹⁰². Subsequently, the ECJ went on to justify its annulment of the Commission’s decision due to certain flaws in the economic analysis of the effects of concentration and lack of warranted finding of a necessary legal standard that the joint venture would result in a collective dominant position apt to significantly impede effective competition¹⁰³.

Affirmation by the ECJ that the 1989 ECMR embrace also collective dominance raised some opposition, yet the case seem to have established firmly a widening of the scope of “dominance”. A positive answer to the question whether structural links are a necessary condition of finding a collective dominance, left open after *France v. Commission*, was finally brought in 1999 by the CFI in *Gencor v. Commission* case¹⁰⁴. In its decision¹⁰⁵ the Commission prohibited the merger of Gencor and Lonrho because of post-merger market concentration¹⁰⁶ and market characteristics factors, as well as taking into account the existence of multi-market contacts and structural links between the firms. The Commission regarded the market characteristics as encouraging oligopolistic dominance because of the supply side similarities¹⁰⁷, a high degree of market transparency and entry barriers, as well as

¹⁰¹ *Id.*, par. 222.

¹⁰² *Id.*, par. 223.

¹⁰³ Crucial to the ECJ’s decision was the fact, noted in the Commission’s decision, that MdK would have withdrawn from the market anyway. It was thus difficult to reconcile the Commission’s finding of a “substantial addition” of MdK to K&S with the “failing firm defense” for MdK, confirmed by the ECJ.

¹⁰⁴ Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753.

¹⁰⁵ Case No IV/M.619 *Gencor/Lonrho*, EC Commission Decision of April 24th, 1996.

¹⁰⁶ The merger would remove an active competitor, LPD, from the market; see: *id.*, par. 205.

¹⁰⁷ The merger, it was argued, would create two similar producers with the same size and similar cost structures; *id.*, par. 182.

an alleged previous tendency towards oligopolistic dominance¹⁰⁸. On the demand side the Commission considered no countervailing buying power and a rather high demand inelasticity, while the product side analysis was characterized by homogeneity and mature technology. In consequence, the Commission came to a conclusion that “[t]he transparency of the market and the product homogeneity in combination with the other demand and supply characteristics have created a situation conducive to oligopolistic dominance”¹⁰⁹. On appeal, the CFI, firstly, reiterated the ECJ’s holding in *France v. Commission* as to applicability of the 1989 ECMR to collective dominance. Secondly, the CFI affirmed significance of large market shares in constituting a strong indication of the existence of not only single dominance, but also of a collective dominant position. The CFI also pointed at coinciding interests of the main market players after the merger¹¹⁰ and other factors conducive to collusion, mentioned in the Commission’s decision. The CFI concluded that “anti-competitive parallel conduct would, economically, have constituted a more rational strategy than competing with each other, thereby adversely affecting the prospect of maximising combined profits”¹¹¹. As to requirements of collective dominance, the CFI pointed at its decision in the *SIV* case under Art. 82, which referred to a situation where “two or more independent economic entities [...] being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market”¹¹². The nature of these “economic links” was elaborated by the CFI:

¹⁰⁸ *Id.*, par. 160-172.

¹⁰⁹ *Id.*, par. 159.

¹¹⁰ *See*, Case T-102/96, *supra*, par. 224-263.

¹¹¹ *Id.*, par. 236.

¹¹² Joined cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA and Others v. Commission*, par. 358.

[T]here is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative.¹¹³

The CFI, on the grounds of market structure and cost similarity, held that the Commission was warranted in the conclusion that the proposed merger would have created a collective dominant position. What is important here is that the CFI confirmed the possibility of establishing collective dominance based purely on links constituted of oligopolistic interdependence.

The Commission sought to widen the concept of collective dominance even further in the *Airtours*¹¹⁴ case. In its decision¹¹⁵ the Commission blocked a hostile acquisition by Airtours of 100% shareholding in First Choice¹¹⁶. According to this controversial decision, the merger

¹¹³ Case T-102/96, *Gencor v. Commission*, par. 276. "That conclusion is all the more pertinent with regard to the control of concentrations, whose objective is to prevent anti-competitive market structures from arising or being strengthened. Those structures may result from the existence of economic links in the strict sense argued by the applicant or from market structures of an oligopolistic kind where each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice" – par. 277.

¹¹⁴ Case T-342/99, *Airtours plc v. Commission*.

¹¹⁵ Case IV/M.1524 *Airtours/First Choice*, OJ [2000] L 93/1, EC Commission Decision of September 22nd, 1997.

¹¹⁶ Respectively: the second and fourth largest tour operators in the UK for short-haul package holidays.

would have created a dominant triopoly¹¹⁷. The Commission argued, that it is not necessary for finding of collective dominance that the competitors behave “*as if* there were one or more explicit agreements (e.g. to fix prices or capacity, or share the market) between them”, but it is sufficient if the merger makes it *rational* for the oligopolists to act in ways which will substantially reduce competition between them and as a result be able to exercise a collective dominant position¹¹⁸. It has been noted in the Decision, that the market at hand had some particular characteristics, which needed to be taken into account¹¹⁹. After laying down the market concentration statistics¹²⁰, the Commission proceeded in the Decision to highlight that the gap between larger and smaller competitors would increase after the merger because of removing First Choice (the only medium-sized player) from the market. Other arguments raised by the Commission included: homogeneity of suppliers¹²¹, high market transparency, post-merger increase of barriers to entry¹²², alleged past tendency towards collective dominance, low buying power and elasticity of demand, and product homogeneity¹²³. The Commission also stated that a strict punishment mechanism is not a necessary condition for finding a collective dominance¹²⁴. In consequence of an appeal, the CFI rendered a judgment¹²⁵ annulling the Commission’s decision. The Court took into consideration

¹¹⁷ The merged entity with Thomson and Thomas Cook.

¹¹⁸ Case IV/M.1524 *Airtours/First Choice*, par. 54.

¹¹⁹ Such as high levels of capacity utilization, increased vertical integration and existing commercial links between the integrated companies (*id.*, paras. 59-71).

¹²⁰ The three post-merger major players would have a total share of 83% of the market. The Commission used the HHI to indicate a large (over 450 points) increase from 1700 to over 2150. It is worth reminding that according to US Guidelines (there were no merger guidelines in the EU at that time) a HHI of 1000-1800 was an indication of a moderately concentrated market, which raised serious competitive concerns with a change of 100 points or more (*id.*, par. 139).

¹²¹ It was because of vertical integration of all major competitors and same cost structures. However, asymmetries were noted.

¹²² Caused by economies of scale and substantial consolidation in the industry.

¹²³ *Id.*, par. 87 and subsequent.

¹²⁴ *Id.*, par. 150.

¹²⁵ Case T-342/99, *Airtours plc v Commission*.

Airtours' arguments as to the definition of collective dominance and set forth some general thoughts on the collective dominance concept in merger control. The CFI claimed, that:

A collective dominant position [...] may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC [...] and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.¹²⁶

This statement of the CFI aligned the concept of collective dominance in EU merger control with the notion of coordinated effects used in the US. The judgment lays down three necessary conditions for collective dominance: the market must be sufficiently transparent, so to enable monitoring by the oligopolists to adopt and maintain a common policy; there must be an adequate retaliation mechanism preventing members of the oligopoly from deviation; there must be no (potential) competitors' or buyers' countervailing power¹²⁷. In other words, the common policy between oligopolists needs to be shown not only to be economically plausible, but also possible to be adopted by them and sustainable. It is also not sufficient that oligopolists know that interdependent market conduct is profitable. In the case at hand, the CFI concluded, that the conditions have not been fulfilled¹²⁸. According to the CFI, in that

¹²⁶ *Id.*, par. 61.

¹²⁷ *Id.*, par. 62.

¹²⁸ Firstly, the complexity of planning procedures, marketing and product developing in such a particular market made tacit collusion rather impossible (*id.*, par. 169). Secondly, the Commission, failed to prove that any retaliation mechanism existed (*id.*, paras. 171-172).

particular market, maintaining such a mechanism would be very difficult¹²⁹. The Commission also failed to show that the foreseeable reaction of current and future competitors and consumers would not jeopardize the anti-competitive effects if the common policy¹³⁰. The CFI reproached the Commission for poorly economically and factually grounded arguments¹³¹.

3.3. Unilateral effects under the EC Merger Regulation 4046/89

The CFI's criticism of the Commission's decision in *Airtours* has been confirmed in the academic and legal practice circles, with the most persistent accusation that the Commission tried to force the circumstances of the case into the straightjacket of collective dominance, which it simply did not fit in¹³². Motta suggested that prohibition of the merger in *Airtours* was justifiable but on the basis of unilateral effects¹³³. In consequence, an idea of stretching

¹²⁹ *Ibid.*, par. 197.

¹³⁰ The Commission did not prove that either the other or potential new competitors would not be able to increase capacity to take advantage of the opportunities afforded by the large players restricting their capacity (*id.*, par. 214). As to consumers reaction, it was not sufficient for the Commission to argue that such a countervailing power does not exist because they act in isolation. The Commission should have assessed whether customers would be able to react to a price by switching to smaller tour operators or other types of holidays, as it was in this case (*id.*, par. 274).

¹³¹ The Court, however, did not particularly comment on the fact that in the case at hand it was a four-to-three merger, not three-to-two, as before. Although economic theory does not preclude that market power can be exercised by more than two competitors collectively (*see, e.g.*, Frederic M. Scherer & David Ross, *Industrial Market Structure and Economic Performance*, 277 (3rd ed. 1990)), it seems that an antitrust enforcement agency should have a greater burden to prove that the market structure and the incentives would be altered (collective dominance involving more than three or four suppliers would be particularly difficult to prove, because of the complexity of the interrelationships involved (*see, Case No. IV/M.1016, Price Waterhouse/Coopers & Lybrand*, OJ L 50/27). Similarly to the US antitrust agencies, the Commission also showed some willingness to challenge a merger which would leave more than four competitors in the market (*see, e.g.*, Case No IV/M.1383, *Exxon/Mobil*, EC Commission Decision of September 29th, 1999).

¹³² "In the recent *Airtours/First Choice* case, the Commission has applied the concept of joint dominance to an industry whose features (among others, absence of product homogeneity and high variability of market shares over time) are considerably different than those which characterised industries involved in previous cases of collective dominance" (Massimo Motta, *EC Merger Policy and the Airtours Case*, 21 E.C.L.R. 199 (2000), 199).

¹³³ "Contrary to the EC merger regulation, an approach inspired by economic thinking would not require the Commission to prove a high likelihood of dominance, but it would centre the assessment on the extent to which

the concept of collective dominance arose, in order to embrace unilateral effects¹³⁴. It has been, however, correctly suggested that the *Airtours* judgment's language clearly precludes covering unilateral effects, which assume no common policy, with the concept of collective dominance¹³⁵. This led to the conclusion that the 1989 ECMR does not cover unilateral effects, therefore there is a “gap” in the enforcement, which needs to be filled¹³⁶.

3.4. Introduction of the EC Merger Regulation 139/04 and the 2004 Guidelines on the assessment of horizontal mergers

In consequence of a long debate as to the future shape of EU merger control, especially about the wording of a new substantive test, after the, already mentioned *supra*, fierce critique of the Commission following the three 2002 CFI judgments, on May 1st 2004, a new Regulation (2004 ECMR) came into force¹³⁷. The substantive test has been changed from the dominance test to a “significant impediment to effective competition test”. Recital 28 of the 2004 ECMR states that, in order to explain the Commission's appraisal of concentrations under the Regulation, the Commission is supposed to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market. In

the merger would lead to price increases. The *Airtours*/First Choice merger would then have little hope to go ahead” (*id.*, at 207).

¹³⁴ John Vickers, *Competition Economics and Policy*, Speech on the occasion of the launch of the new social sciences building at Oxford University (October 3rd, 2002), available at: www.ofc.gov.uk/shared_ofc/speeches/spe0702.pdf.

¹³⁵ Neil Horner, *Unilateral Effects and the EC Merger Regulation – How The Commission Had its Cake and Ate it Too*, Hanse L. R., March 2006, at 31.

¹³⁶ For a discussion of the “gap” and reasons behind the reform of EU merger control, *see, infra*, Chapter 4.

¹³⁷ On the same day the Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ [2003] L 1/1–25) came into force.

consequence, on February 5th, 2004, the Commission issued Horizontal Merger Guidelines¹³⁸. The Guidelines explicitly indicate, that there are two main types of competitive harm, i.e. coordinated effects and non-coordinated effects¹³⁹. The Guidelines also refer to market share and concentration levels, which provide useful first indications of the market structure and of the competitive importance of the merging entities and their competitors¹⁴⁰. According to the well-established case law, large market shares of 50% or more may be evidence of a dominant position, however, it is not conclusive¹⁴¹. In order to assess the overall market concentration level the HHI is used as an initial indicator of the absence of competition concerns¹⁴², however, as opposed to the US guidelines, the EC Guidelines do not establish a presumption thereof¹⁴³.

¹³⁸ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ C 31/5-18 (*hereinafter*, 2004 EC Horizontal Merger Guidelines).

¹³⁹ *Id.*, par. 22.

¹⁴⁰ *Id.*, par. 14.

¹⁴¹ *Id.*, par. 17.

¹⁴² *Id.*, par. 16.

¹⁴³ For further consideration of the impact of the 2004 ECMR and the 2004 EC Horizontal Merger Guidelines, *see, infra*, Chapter 4.

4. THE U.S. “SLC TEST” AND EU “SIEC TEST”: A MOVE TOWARDS CONVERGENCE?

4.1. Main differences between the “SLC test” and the “dominance test”

4.1.1. Underlying policy

Over the last years there have been a broad and growing cooperation between Brussels and Washington, which resulted *inter alia* in adoption of the EC Market Definition Notice¹⁴⁴, based on the U.S. DoJ and FTC Horizontal Merger Guidelines 1992/97, or cooperation in assessment of many transatlantic mergers¹⁴⁵. Accordingly, the EC Commission officials expressed their beliefs that even between the American and European merger assessment standards evaluating competitive harm there is hardly any difference. As former EC Commissioner for competition policy put it:

Our rules prohibit mergers that lead to the creation or strengthening of a dominant position, while US law prohibits mergers where the effect ‘may be substantially to lessen competition, or tend to create a monopoly’. While you might think that the application of these seemingly different tests would at times lead to divergent outcomes, that has not been our experience. The main reason why we do not see such divergence, in my view, is that both EU and US authorities are applying *the same analytical framework when examining the competitive effects* likely to result from a proposed

¹⁴⁴ Commission notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C 372/5 (*hereinafter*, EC Market Definition Notice).

¹⁴⁵ See, e.g., Case IV/M.1069 *MCI/WorldCom* (1998); Case COMP/M.1741 *MCIWorldCom/Sprint* (2000).

merger: We share a common understanding of what the correct micro-economic analysis of these operations should be.¹⁴⁶ [Emphasis added]

However, on the other side of the Atlantic, the views as to the transatlantic convergence at the same time were completely different. The DoJ officials, referring to recently the most prominent merger illustrating differences between U.S. and EU policy – *GE/Honeywell*¹⁴⁷, were pointing out:

[...] a simple, but rather fundamental, doctrinal disagreement over the economic purposes and scope of antitrust enforcement. What led the U.S. to clear the transaction – the prospect that it would make the combined firm a more effective competitor – was the very reason the E.U. opposed it. The E.U. believed that a more effective GE would discourage its rivals, prompting disinvestment or exit from the market. In sum, we appear to disagree over the meaning of competition.¹⁴⁸

These opposing opinions show the basic difference in EU and U.S. policy, *i.e.*, it seems that the supreme objective of US antitrust laws is protection of consumers, whereas EU antitrust policy focuses on many objectives¹⁴⁹. The Commission decisions seem to lack the strong consumer welfare language, used frequently in the U.S.¹⁵⁰. The difference in perceiving competition, mentioned by James, refer mainly to the ways in which in their development both systems have approached models of competition and measures of anticompetitive harm. The European model has adhered to the structural view of markets, disallowing creation or

¹⁴⁶ Mario Monti, *EU-US Cooperation in the Control of International Mergers: Recent Examples and Trends*, Talk to the Institute for International Economics, Washington D.C. (March 30th, 2001).

¹⁴⁷ Case No COMP/M.2220 *General Electric/Honeywell* (2001).

¹⁴⁸ Charles A. James, *Reconciling Divergent Enforcement Policies: Where Do We Go From Here?*, Address presented at the Fordham Corporate Law Institute, 28th Annual Conference on International Law and Policy, New York (October 25th, 2001), available at: <http://www.usdoj.gov/atr/public/speeches/9395.htm>.

¹⁴⁹ Main of which are, according to the EC Treaty, competition and the creation of a common market among Member States (*see, e.g.*, Art. 3(1) & 4(1) EC Treaty).

¹⁵⁰ Cento Veljanovski, *EC merger Policy after GE/Honeywell and Airtours*, 49 Antitrust Bulletin 153 (2004).

strengthening of dominance out of fear that a large firm will get too much from the merger against its competitors. That fear resembles early Structural theories, which were abandoned in the U.S. not later than in the 1980s. It has also led the EC Commission to a fatal conclusion, that harm to competitors means harm to competition, for which it has been criticized¹⁵¹. The aversion to mergers that generate advantages, noticeable in Commission decisions, has characterized also EU approach to efficiencies, where this concept has been traditionally perceived in categories rather of an “offence” than a “defense” in merger control appraisal. On the other hand, the U.S. antitrust authorities and courts have been rather welcoming lower prices and other post-merger efficiency gains (unless predatory) because they are perceived as procompetitive¹⁵². In October 2002, Deputy Assistant Attorney General in the Antitrust Division of the U.S. DoJ, explicitly set out main principles of “sound antitrust enforcement”: protecting competition, not competitors; recognizing the central role of efficiencies in antitrust analysis; basing decisions on sound economics and hard evidence; acknowledging the limits to our predictive capabilities, remaining flexible and forward-looking; imposing no unnecessary bureaucratic costs¹⁵³. American antitrust theory sees therefore efficiencies as socially desirable, since mergers that generate efficiencies will force smaller competitors “to improve, rather than worsen, their competitive performance”¹⁵⁴. Therefore, if strong enough, competitors are always assumed to be able to find new strategies to survive. It shows an enormous faith in self-regulation of the market in the U.S. On the other hand, European approach demonstrates a tendency towards a regulatory approach, with

¹⁵¹ *Id.*

¹⁵² *Id. See, e.g., Case IV/D-2/34.780 Virgin/British Airways* [1990] OJ L30/1, where the EC Commission treated loyalty and fidelity rebates as abuse, whereas when Virgin sued British Airways supporting the same theory, the claim was rejected.

¹⁵³ Deborah Platt Majoras, *Antitrust Going Global in the 21st Century*, speech presented at the Federal Bar Association, Corporate and Association Counsels Division, and American Corporation Counsel Association, Northeast Ohio Chapter, October 17th, 2002, available at: <http://www.usdoj.gov/atr/public/speeches/200418.htm>.

¹⁵⁴ Robert H. Bork, *The Antitrust Paradox : A Policy at War with Itself* 252 (1st ed. 1978).

an interventionist assumption that any entity, if given enough power and in appropriate conditions, will normally do everything to achieve a position of a monopolist¹⁵⁵. Having in mind a possibility of such a strategic behavior, the EU competition authority would commence investigation as to whether the merger will result in long-term injury to competitors, and only in consequence – to consumers¹⁵⁶.

It has been raised that the European merger control is more interventionist than in the U.S.¹⁵⁷ However, Lévêque's recent research data¹⁵⁸ do not confirm this statement, but rather indicate a possibility of an opposite conclusion. After giving rationale behind the opinion that EU merger net is tighter¹⁵⁹, Lévêque goes on to examine statistics of EU and U.S. merger control. While figures from respective EU and U.S. competition authorities seem difficult to compare and therefore are hardly conclusive, assessment of 75 major transatlantic mergers¹⁶⁰ suggests a rather careful approach to ascertaining which system is in practice more interventionist. What is most striking, according to the research paper, the U.S. antitrust agencies seem more stringent on internal EU mergers than on internal U.S. mergers¹⁶¹, while the Commission has apparently taken a much more lenient approach towards internal U.S. mergers than towards internal U.S. mergers¹⁶². To a similar conclusion as to interventionism

¹⁵⁵ Yusaf H. Akbar & Gabriele G.S. Suder, *The New EU Merger Regulation: Implications for EU-U.S. Merger Strategies*, 48 Thund. Int. Bus. Rev. 667, 676 (2006).

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., Veljanovski, *supra*.

¹⁵⁸ François Lévêque, *Merger Control: More Stringent in Europe than in the United States?*, Working Paper (November 2007), <http://www.cerna.ensmp.fr/Documents/FL-MergerEUvsUS.pdf>.

¹⁵⁹ Namely: much broader aims of EU merger control, emphasis on market share rather than market power, unfavorable treatment of vertical and conglomerate mergers in the EU, coordinated effects theory based on structural factors, and disregarding efficiency gains (*id.*).

¹⁶⁰ *Inter alia*, Philip Morris/Nabisco, AOL/Time Warner, Glaxo Wellcome/Smith Kline, Exxon/Mobil, MCI/Worldcom Sprint.

¹⁶¹ 91% of EU/EU mergers were cleared with remedies by the U.S. competition authorities, compared with 82% of US/US mergers (Lévêque, *supra*).

¹⁶² 91% of EU/EU mergers were cleared with remedies by the EU competition authorities, compared with 48% of US/US mergers (*id.*).

came Veljanovski¹⁶³ based on statistical data from 2000. He also noted that the statistics are misleading considering a much higher thresholds for notification in EU competition law¹⁶⁴. The EC Commission seems, therefore, not significantly more interventionist than US antitrust agencies, the statistics rather indicate that the intervention level's tendency to increase over years¹⁶⁵.

4.1.2. *Notion of dominance*

The differences between the dominance test and SLC test have been subject of very intense debates. Formulation of the substantive test in 1989 ECMR left too much for interpretation. In consequence, some commentators regarded the SLC test as the prevailing and the only economically sensible competition test, while others thought that notion of dominance evolved to such an extent that in practical terms both tests are more or less the same. The words of Commissioner Monti in one of his speeches expressed the opinion that:

It doesn't require any great legal or economic insight to see that these are tests which could, in the hands of creative interpreters, result in widely differing outcomes. This has not happened, however, because the *economic rationale underpinning merger control by enforcement authorities and courts in our jurisdictions is very similar*. The body of precedent built up by the European Commission and the European Courts over a decade regarding the interpretation of the dominance test has shown a remarkable coincidence of analysis with the wealth of interpretative precedent that has been built up in the US over a much longer period with regard to the Clayton Act. A European practitioner who

¹⁶³ Veljanovski, *supra*.

¹⁶⁴ *Id.* Author actually argues that according to recent studies the EC Commission might be even too lenient, clearing possible mergers with anticompetitive effects.

¹⁶⁵ *Id.*

picks up the US Merger Guidelines, or who delves into one of the US Court's latest merger judgments, will - I think - be struck by the extent to which our respective seemingly different tests are used in similar ways.”¹⁶⁶ [Emphasis added]

The belief as to an extraordinary convergence in substantive assessment of mergers seems, however, not very well founded.

The concept of dominance, distinctive for the 1989 ECMR, is not central in the U.S. merger analysis. Instead, the notion of “substantive lessening of competition”, as formulated in Section 7 Clayton Act, is relevant. Some guidance as to the exact meaning of that notion emerged with the introduction of the 1982 U.S. Merger Guidelines¹⁶⁷. It seems, therefore, that US substantive test in merger control, as well as the whole merger policy, is based firmly on economic science¹⁶⁸.

The test in Art. 2(3) of the 1989 ECMR focused on the extent to which “effective competition [...] is significantly impeded” by a merger which “creates or strengthens a dominant position”. It has been argued that if the notion of dominance was here construed in economic terms as market power, while effective competition is measured by way of assessing the effect on consumer welfare, the “dominance test” and the “SLC test” are fairly similar¹⁶⁹. In practice, however, that has not been the case, because dominance was neither

¹⁶⁶ Mario Monti, *Antitrust in the US and Europe: A History of Convergence*, Speech 01/540, General Counsel Roundtable – American Bar Association, Washington DC (November 14th, 2001), available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/540&format=HTML&aged=1&language=EN&guiLanguage=en>.

¹⁶⁷ The Guideline's main theme is that “mergers should not be permitted to create or enhance ‘market power’ or to facilitate its exercise”, while “market power” is defined as the “ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time” (1982 U.S. Merger Guidelines, § I).

¹⁶⁸ William J. Kolasky, “*Sound Economics and Hard Evidence:*” *The Touchstones of Sound Merger Review*, Address presented at *Mergers & Acquisitions: Getting Your Deal Through in the New Antitrust Climate*, The American Bar Association Section of Antitrust Law and The Association of the Bar of the City of New York, New York (June 14th, 2002), available at: <http://www.usdoj.gov/atr/public/speeches/11304.htm>.

¹⁶⁹ Veljanovski, *supra*; that was the EC Commission's approach after criticisms had been raised after *GE/Honeywell*.

defined in the 1989 ECMR, nor is it an economic concept¹⁷⁰. The concept of dominance was defined for Art. 82¹⁷¹ purposes in *United Brands v. Commission* as “[...] a position of economic strength enjoyed by the undertaking which enables it to prevent effective competition in being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”¹⁷².

As the wording of the dominance test suggests, mergers having a European dimension were subject to a two-limb test, where “creation or strengthening of dominance” was just a first step, while – on the other hand – “significant impediment to effective competition” should also be established. The exact relationship between the notions of “dominance” and “effective competition”, both used by the EU legislator in the “dominance test”, has always been confusing. Whish refers in his papers to “effective competition” as a useful benchmark found in regulatory areas, more descriptive rather than prescriptive¹⁷³. As stated in *Air France* case¹⁷⁴, the Commission must approve a concentration if the transaction does not create or strengthen a dominant position and competition is not as a result significantly

¹⁷⁰ *Id.* See also, Kai-Uwe Kuhn, *Closing Pandora’s Box? Joint dominance after the Airtours judgment*, Michigan Law and Economics Research Paper No. 02-013, (October 5th, 2002), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=349521 (“[...] [T]he concept of a dominant position is only an empty verbal shell until filled with economic meaning”).

¹⁷¹ *I.e.*, abuse of a dominant position.

¹⁷² Case 27/76 *United Brands v. Commission* [1978] ECR 207, par. 65. This phrase has been often treated as a definition of dominance in subsequent court decisions (*see, e.g., Case 6/72, Europemballage Corp. & Continental Can, Inc. v. Commission*) and in the EC Commission’s notices (*see, EC Market Definition Notice*, par. 10). However, the notion of dominance raised some concerns as making little economic sense. It has been argued that no firm can act independently of its competitors or suppliers since ultimately they will have a restraining effect. On the other hand, this definition seems more sound if the ability to act to an “appreciable extent” independently is construed in the context of giving the ability to “significantly impede effective competition” (Veljanovski, *supra*).

¹⁷³ Richard Whish, *Competition Law*, 153 (4th ed. 2001).

¹⁷⁴ Case T-2/93 *Air France v. Commission* [1994] ECR II-323.

impeded¹⁷⁵. The issue was finally clarified in *Schneider* case¹⁷⁶, where the CFI concluded that “[...] any dominant position that the merged entity might have is not shown by the [EC Commission’s] Decision to constitute a significant impediment to effective competition on those markets for the purposes of Article 2(3) of Regulation No 4064/89”¹⁷⁷.

Furthermore, dominance understood under Art. 2(3) of the 1989 ECMR has to be distinguished from dominance under Art. 82 of the EC Treaty. In *Kali & Salz*¹⁷⁸ the ECJ drew a parallel between the notion of dominance under the 1989 ECMR and under Art. 82 of the EC Treaty¹⁷⁹. On one hand, it seems unlikely that the legislator intended to introduce two different meaning of “dominance” within one body of competition laws. On the other hand, however, if the notion of “substantial impediment to effective competition” in dominance test is seen as a qualification of the notion of “dominance”, argument that there might be actually two different meanings does not seem unreasonable any longer¹⁸⁰. It is also worth noting, that dominance under Art. 82 examines *ex post* behavior of a dominant firm, while the 1989 ECMR “dominance” refers to the likely behavior of the entity created with the merger (*ex ante*)¹⁸¹.

¹⁷⁵ *Id.*, par. 79; confirmed in Case T-290/94, *Kayserberg v. Commission*, [1997] ECR II-2137, par. 184, and Case T-221/95 *Endemol Entertainment Holding BV v. Commission* [1999] ECR II-1299.

¹⁷⁶ Case T-310/01, *Schneider Electric v. Commission*.

¹⁷⁷ *Id.*, par. 380.

¹⁷⁸ Joined Cases C-68/94 and 30/95 *France and Others v. Commission*.

¹⁷⁹ Since collective dominance, the Court argued, would fall within the ambit of Art. 82, it should also fall within the scope of the 1989 ECMR (*id.*, par. 165). If so, that is an argument why unilateral effects are not covered by the dominance test, since they certainly do not fall within the ambit of Art. 82 (Sven Volcker, *Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control*, 25 E.C.L.R. 395, 408 (2004)).

¹⁸⁰ This view can be also supported with the argument, that while Art. 82 “dominance” is concerned more with a static analysis of market structure in order to assess possibility of an abuse of dominant position, the 1989 ECMR concept of “dominance” ought to be embedded in a more dynamic analysis of competitive conditions in a post-merger market structure (Kyriakos Fountoukakos & Steven Ryan, *A New Substantive Test for EU Merger Control*, 26 E.C.L.R. 277, 280 (2005)).

¹⁸¹ Veljanovski, *supra*.

4.1.3. Definition of the relevant market

In application of both the EU dominance test and the U.S. SLC test, the first step of the assessment is defining the relevant market. Both jurisdictions define the relevant market in two dimensions: product market and geographic market.

According to EC Market Definition Notice, a “relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use”¹⁸². The relevant geographic market is defined as “compris[ing] the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”¹⁸³. The EC Market Definition Notice follows the ideas presented in the US DoJ and FTC Horizontal Merger Guidelines¹⁸⁴. The EC Market Definition Notice introduces the so-called hypothetical monopolist test (HMT)¹⁸⁵, utilized in the US merger control under the name “SSNIP test”¹⁸⁶. The test is designed to give an answer, if a hypothetical monopolist could permanently increase relative prices in the products and areas considered by 5% to 10% above the “prevailing price”. In practice, however, the EC Commission proved not to have applied the test consistently; it is rather rare that the market definition has been analyzed by the Commission meticulously and quantitatively, or focused

¹⁸² *Id.*, par. 7. See also, Case 6/72, *Europemballage Corp. & Continental Can, Inc. v. Commission*.

¹⁸³ EC Market Definition Notice, par. 8.

¹⁸⁴ See: U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, issued April 2nd, 1992 (version revised April 8th, 1997), par. 1.1. and 1.2., available at: <http://www.usdoj.gov/atr/public/guidelines/hmg.htm> (*hereinafter*, U.S. Horizontal Merger Guidelines 1992/97).

¹⁸⁵ EC Market Definition Notice, par. 17.

¹⁸⁶ SSNIP – Small but Significant and Non-transitory Increase In Price (*see*, U.S. Horizontal Merger Guidelines 1992/97, § 1.11).

on whether and undertaking can profitably raise prices above the competitive level¹⁸⁷. Instead, the principal focus has been on informal assessment of exchangeability in use, similarity of characteristics and absolute prices¹⁸⁸. However, the approach to market definition in EU and U.S. antitrust is alike.

What is worth noting, it has been often claimed, that – in order to succeed in challenging a merger – the Commission has been defining an overly narrow relevant market¹⁸⁹. These accusations do not seem, however, justified in the absence of convincing evidence that they have been systematically delineating narrower markets than in the U.S.¹⁹⁰.

The approach of both EU and U.S. jurisdictions to relevant market definition has been, therefore quite convergent even before the 2004 EU reform, which can be attributed mainly to the introduction of EC Market Definition Notice, based vastly on the U.S. Horizontal Merger Guidelines 1992/97.

4.1.4. Approach to market share statistics

The issue how market share data is used to trigger competition concerns has been probably one of the most significant differences between EU and US merger control practice. In both EU and U.S. jurisdictions, the next step after establishing the relevant market is to calculate market shares of the firms concerned, other competitors and the overall market concentration.

¹⁸⁷ Veljanovski, *supra*.

¹⁸⁸ See, Case T-342/99 *Airtours plc v Commission*, paras. 20-48.

¹⁸⁹ Veljanovski, *supra*.

¹⁹⁰ Martin I. Algie & Brian D. Kewley, *Market Definition: Competition Law and Practice* (1998). It has also been contended, that the EC Commission deliberately narrows the definition of geographical market as a sign of bias against smaller (Nordic) countries (the so-called „Nordic” or small country complaint, following a blocked merger of Volvo and Scania (Case COMP/M.1672 *Volvo/Scania* (2000))). There are, however, several reasons justifying such narrower market definitions in EU than in the US. Firstly, the main objective of EC competition law is to maintain common market and, consequently, remove barriers to internal trade, and secondly, within the EU there are many structural and institutional differences between Member States (Veljanovski, *supra*).

Market share statistics have been used to assess the possible market power, which the entities concerned may be able to exercise. In turn, the more concentrated the market is, the more probably it is that the merger will follow anticompetitive effects.

Under the EU dominance test, delineating the relevant market allowed to proceed with a structural analysis by the Commission. Although, for the needs of practice some thresholds have been established¹⁹¹, dominance in particular cases has been determined on a case-by-case basis, taking into account, besides market shares statistics the overall conditions of competition in the relevant market¹⁹². Without clear-cut and economically well-founded rules, such as the U.S. thresholds of HHI, the EU market share statistics analysis has been criticized for undue reliance on static factors, and therefore inaccuracy leading to economically flawed decisions. According to well-established case law, a combined market share of 40-45% was an indication of creating a dominant position, the higher the market share was, the stronger was the indication.

The US merger control has been focusing rather on the increase of market concentration than on the structure itself. As already mentioned *supra*, the US antitrust agencies and courts has been relying extensively on the HHI, which takes into account the overall market structure, giving more weight to larger players. The HHI factor, although according to the U.S. Merger Guidelines establishes rebuttable presumptions, it is only a starting point for further analysis, and other factors are often analyzed as well. As such, the HHI had not been used, with rare exceptions, in the EC merger control until their introduction in the 2004 EC Horizontal Merger Guidelines.

¹⁹¹ *E.g.* where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it (Recital 15 of the ECMR 1989).

¹⁹² *E.g.* relative size and market shares of the competitors.

4.1.5. Inclusion of unilateral effects in oligopolistic markets – the “gap”

Development of the theories of competitive harm in the EU and U.S. led to establishing two types of competitive harm, *i.e.* unilateral and coordinated effects¹⁹³. It has been argued, that there is a general divergence in antitrust merger enforcement policy between the EU and U.S., based on different legislative aims and tradition, referring to 1989 ECMR’s greater focus on creation or strengthening of dominant positions, while U.S. law has been focusing more generally on the structure of the entire market and preventing oligopolistic coordination¹⁹⁴. In other words, it is possible to conclude that the EU merger control has been traditionally more alert in the Commission’s decisions and court judgments to unilateral effects, while the U.S. antitrust authorities have been focused on coordinated effects of mergers. Although since the *Kali & Salz* judgment the oligopoly effects have been increasingly under consideration of the Commission, the basic assumptions have been transposed from single to collective dominance analysis, which probably could have never led to satisfactory results¹⁹⁵.

As it has already been mentioned *supra*, the development of the interpretation of the concept of dominance under the 1989 ECMR allowed the Commission to challenge not only mergers leading to creation or strengthening of a single dominant position, but also to prohibit concentrations creating not only firms with a large market share but also relatively small market share, though in a market conducive to anticompetitive effects, such as tacit collusion or coordinated effects¹⁹⁶. It was obviously an important development, because

¹⁹³ Under the dominance test in EU termed single and collective dominance.

¹⁹⁴ Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. Pa. J. Int. Econ. L. 825, 833-834 (1999).

¹⁹⁵ This also explains EU’s major focus on duopolies than oligopolies in collective dominance analysis.

¹⁹⁶ See, Case T-102/96 *Gencor v. Commission*. However, even before the *Gencor v. Commission* case was decided, a tendency to treat dominance with some sensitivity to the importance of dynamic analysis has been shown in the Commission’s application of the substantive test in 1990s. The Commission indicated willingness

economic theories were clear that collective dominance might be as harmful to competition as single firm dominance. The evolution of the concept of dominance gave some comfort that a slightly modified dominance test under 1989 ECMR could be still an efficient substantive merger control standard.

While it was true as to collective dominance, attempts to embrace within the notion of dominance also unilateral effects in non-collusive oligopoly situations ended up with a different outcome. Unilateral effects refer to the ability of post-merger entities to raise prices because of removal of competitive constraints resulting from a merger, irrespective of their competitors' behavior. The problem with the dominance test was that, in order to be able to prohibit such a merger, the Commission would have no other choice but to define an extremely narrow and thus completely artificial relevant market. The true market dynamics are therefore ignored, since they do not rely on the competitors' market shares, rather on substitutability of their products¹⁹⁷.

Advocates of retaining the dominance test argued that their test was capable of blocking mergers such as in *FTC v. H.J. Heinz, Co.*¹⁹⁸ using collective dominance theory¹⁹⁹. This degree of flexibility would, however, lead to a severe distortion of the dominance concept.

to focus more on consideration of removal of pre-merger competitive constraints instead of simply applying a purely structural market share analysis based on the notion of dominance (*see, e.g., Case IV/M.42 Alcatel/Telettra* [1991] OJ L122/48; *Case COMP/M.1684 Carrefour/Promodes* (2000), *Case COMP/M.2337 Nestle/Ralston Purina* (2001)).

¹⁹⁷ Horner, *supra*, at 27. As already mentioned *supra*, it is possible to calculate the proportion of customers which would be lost on a given price increase by means of diversification ratios. It seems therefore that unilateral effects analysis differs significantly from the market share analysis employed in standard dominance test analysis (*id.*).

¹⁹⁸ *H.J. Heinz, Co.*, 246 F.3d 708 (C.A.D.C. 2001).

¹⁹⁹ Derek Ridyard, *The Commission's New Horizontal Merger Guidelines – An Economic Commentary*, The Global Competition Law Centre Working Paper Series, GCLC Working Paper 02/05, Brugge: College of Europe, at 5, available at: <http://www.coleurop.be/content/gclc/documents/DR%20GCLC%20paper%20March%202004.pdf>. Ridyard also questions suitability of cases frequently given as an examples of “gap cases”, which would not have been encompassed by the dominance test, *i.e. H.J. Heinz, Co.* and a UK case *Lloyds TBS Group Plc/Abbey National Plc*.

Applying collective dominance analysis, which always considers some kind of “common policy” between competitors in the market²⁰⁰, to a unilateral effects situation (where by definition no common policy can be assumed) seems to be a sufficient argument against these contentions.

Before the 2004 ECMR was introduced, the EC Commission had hardly had any experience with unilateral effects²⁰¹. While, because of obvious reasons, no case has been decided solely on the basis of unilateral effects, some authors saw elements of unilateral effect analysis used to support challenges based on dominance concept²⁰². Nevertheless, it has been noted that the Commission applied a unilateral effects analysis to only a limited extent and the unilateral effects analysis was supplementary and was employed solely in order to strengthen finding of dominance²⁰³. Hence, even though the Commission showed some appreciation of the existence of unilateral effects analysis, there was no definite answer whether the dominance test can be stretched to the extent that would cover unilateral effects²⁰⁴. It could be argued with much more certainty that the Commission was rather unprepared to deal with unilateral effects at that stage²⁰⁵.

²⁰⁰ See, Joined Cases C-68/94 and 30/95 *France and Others v. Commission*, par. 221.

²⁰¹ Horner, *supra*, at 28.

²⁰² See, e.g., Fountoukakos & Ryan, *supra*, 282. E.g., in *Volvo/Scania* (Case COMP/M.1672 *Volvo/Scania* [2001] OJ L143/74) and *Volvo/Renault* (Case COMP/M.1980 *Volvo/Renault*, EC Commission Decision of September 1st, 2000) mergers the Commission considered particularly that each firms’ products were close substitutes. In *Philips/Agilent* (Case COMP/M.2256 *Philips/Agilent*, EC Commission Decision of March 2nd, 2001) the Commission allowed a merger resulting in creation of a clear market leader on the grounds of the merging firms’ products not being close substitutes. Similarly, in *Barilla/BPL/Kamps* (Case COMP/M.2817 *Barilla/BPL/Kamps*, EC Commission Decision of June 25th, 2002) the Commission highlighted close substitutability of product to circumvent the problem of delineating the correct relevant market. In a more recent case *GE/Instrumentarium* (Case COMP/M.3083 *GE/Instrumentarium*, EC Commission Decision of September 2nd, 2003) the Commission scrutinized bidding data provided by the competitors in the market and supported finding dominance by the conclusion that GE was by far the most frequent “runner up” to Instrumentarium in several national markets.

²⁰³ Volcker, *supra*, 398. See also, Case COMP/M.2537 *Philips/Marconi Medical Systems*, EC Commission Decision of October 17th, 2001.

²⁰⁴ Horner, *supra*, 29.

²⁰⁵ *Id.*

The ECJ's definition of dominance in *United Brands* left, however, some room for deliberation as to encompassing unilateral effects within its scope. Two possible ways of extending the notion of dominance have been proposed: either to cover unilateral effects by the notion of collective dominance, or assume that each of the oligopolists in the market enjoys the position of dominance, which result in creating a rather awkward situation of having more than one dominant player in one market²⁰⁶. Both possibilities are, however, legally risky, and entail stretching of the concept of dominance to an intolerable level, leaving uncertainty as to what else could be identified as "dominance" with such an infinitely flexible approach²⁰⁷. Furthermore, if such an approach had been approved, the Commission would have been using that analysis in an opportunistic manner²⁰⁸.

A final answer to the question if the "gap" indeed existed was brought by the CFI in *Airtours*²⁰⁹. Connecting by the CFI of challenging a merger under collective dominance with proving material risk of tacit collusion seems to have sufficiently precluded "passing off" unilateral effects under the "label" of collective dominance²¹⁰.

4.1.6. Treatment of efficiencies

As already mentioned, the EU and U.S. merger control policy have traditionally differed significantly as to treatment of efficiencies. In the U.S. efficiency gains can be invoked in

²⁰⁶ *Id.*

²⁰⁷ *Id.*, 30.

²⁰⁸ *Id.*

²⁰⁹ Case T-342/99 *Airtours plc v Commission*.

²¹⁰ *Id.*, par. 62. The CFI has been, however, criticized for the *Airtours* judgment, because they addressed directly only the issue of collective dominance, while failed to clarify whether collective dominance doctrine can be applied to unilateral effects (see, Ioannis Kokkoris, *The Reform of the European Merger Regulation in the Aftermath of the Airtours Case – The Eagerly Expected Debate: SLC v. Dominance Test*, 26 E.C.L.R. 37, 41 (2005)). Nevertheless, this criticism does not seem to be well founded in the light of the plain language of *Airtours*.

order to give a merger a green light despite possible harm to competition resulting from the merger, as long as the benefits brought by efficiencies outweigh the anticompetitive effects²¹¹. As the former U.S. Treasury Secretary stated: "[T]he goal is efficiency, not competition. The ultimate goal is that there be efficiency"²¹². According to FTC Commissioner Thomas Leary, the main issue in merger control is whether the merger will result in a price increase²¹³. These views correspond with the current economic theory, which suggests that in many circumstances, mergers, while increasing market concentration, can lead to significant benefits to consumers²¹⁴. If it is believed that market power results from being more efficient, then a concentration between two such efficient companies would certainly fail if it does not make use of the potential efficiencies²¹⁵. It would be a result of a current or future competitor who would enter the market and reduce the market position of the post-merger entity²¹⁶.

On the other hand, returning to Commissioner Monti's words, EU competition policy relies on the assumption, that the best means of protecting consumer welfare is active maintenance of competition, therefore any merger reducing competition should be prohibited, even if it generates efficiency gains²¹⁷. This view is based on an economic premise that once

²¹¹ The EC Commission, Green Paper on the Review of Council Regulation (EEC) No. 4064/89, Brussels, 11th December 2001, COM(2001) 745/6 final, par. 170. However, even the US merger control does not allow this defense in case of so-called "mergers to monopoly" (John Cook & Christopher Kerse, *EC Merger Control*, 274 (4th ed. 2005).

²¹² Lawrence H. Summers, *Competition Policy in the New Economy*, 69 Antitrust L. J. 353, 358 (2001).

²¹³ Thomas B. Leary, *Efficiencies and Antitrust: A Story of Ongoing Evolution*, ABA Section of Antitrust Law 2002 Fall Forum Washington, D.C. (November 8th, 2002), available at: <http://www.ftc.gov/speeches/leary/efficienciesandantitrust.shtm>.

²¹⁴ Akbar & Suder, *supra*, 671.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ "Actually, the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market" – Mario Monti, *The Future for Competition Policy in the European Union (Extracts): Merger control: Issues highlighted in the context of the GE/Honeywell Merger*, Speech delivered at Merchant Taylor's Hall, London (July 9th, 2001), available at:

entities become larger (e.g. in result of a concentration) they can actively try to create barriers to entry that would prevent potential rivals from undermining their dominant position, which reflects the so-called “entrenchment” theory, rejected in the US decades ago²¹⁸. The Commission’s Green Paper noticed critiques under the 1989 ECMR that dominance test did not allow for a proper consideration of efficiencies that may result from mergers. It pointed out, however, that the issue of efficiencies had by that time only been raised in a limited number of decisions under the Merger Regulation, and the precise scope for taking such considerations into account may not have been fully developed²¹⁹. Fortunately, the Commission was open to a debate on how, and the extent to which, efficiencies should be taken into account in competition analysis, what ultimately resulted in their explicit recognition in the 2004 ECMR and 2004 EC Horizontal Merger Guidelines.

4.1.7. Treatment of portfolio effects

While US merger control does not use “portfolio effects”²²⁰ theory in challenging mergers, using a dominant position to gain a competitive advantage in a neighboring market has been perceived as an abuse of a dominant position in the EU²²¹. This divergence has been a much debated issue on both sides of the Atlantic. When the *GE/Honeywell* case was being examined in Europe, American commentators were outraged by the fact that the Commission

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/340&format=HTML&aged=0&language=en>

²¹⁸ Akbar & Suder, *supra*, 671.

²¹⁹ The EC Commission, Green Paper on the Review of Council Regulation (EEC) No. 4064/89, *supra*, par. 170.

²²⁰ Called also “bundling” or “conglomerate effects”.

²²¹ Unless the firm can show a legitimate business justification for its conduct; *see*, Case C-333/94P *Tetra Pak Rausing S.A. v. Commission* [1996] ECR I-5951. For instances of application of this theory, *see*, merger cases in the beverage sector: Case IV/M.794 *Cola Enterprises/Amalgamated Beverages GB* [1997] OJ L218/15; Case IV/M.833 *Coca-Cola/Carlsberg A/S* [1998] OJ L145/41; Case IV/M.938 *Guinness/Grand Metropolitan* [1998] OJ L288/24.

used “portfolio effects” theory as a major anticompetitive result of the merger to back their position. When the theory is applied to mergers, it shifts the focus from concerns over increased concentration in a defined product and geographical market to the alleged ability of a dominant entity in one market to “leverage” its market power on to related markets as they apply to mergers with conglomerate and vertical aspects involving potential substitutes and complements²²². In the Commission’s eyes, when a merger increases the range of products perceived by consumers as “complementary”, the merged entity could be able to leverage its market power in strong brands onto weaker brands and tying them together, excluding at the same time other brands²²³. The Commission, analyzing portfolio effects theory in the *Guinness/Grand Metropolitan* merger²²⁴, highlighted several elements which should be taken into account: greater flexibility to structure prices, promotions and discounts; economies of scale and scope in sales and marketing; greater potential for tying; the threat of refusal to supply becomes stronger²²⁵. According to Veljanovski, these factors are hardly compelling, since the first factor is not anticompetitive, second – merely reflects the Commission’s view that efficiencies arising from mergers are anticompetitive rather than benefiting consumers’ welfare by lower costs and prices²²⁶. The third and fourth factor could provide grounds for some legitimate concerns by tying the sale of weaker products to the purchase of the brand

²²² Veljanovski, *supra*. This theory nevertheless has to be applied very carefully and in exceptional circumstances, since its focal point is not immediate effect on consumer welfare, but possibility of exclusionary or foreclosure effects on rival firms competing not with the product in which the merged entity is dominant, but the one in which it is not (*id.*).

²²³ *Id.*

²²⁴ Case IV/M.938 *Guinness/Grand Metropolitan*.

²²⁵ According to the Commission the merged entity would “[...]enjoy a number of advantages. In particular, his position in relation to his customers is stronger since he is able to provide a range of products and will account for a greater proportion of their business, he will have greater flexibility to structure his prices, promotions and discounts, he will have greater potential for tying, and he will be able to realise economies of scale and scope in his sales and marketing activities. Finally the implicit (or explicit) threat of a refusal to supply is more potent.” – *Guinness/Grand Metropolitan*, par. 40.

²²⁶ Veljanovski, *supra*.

where it had market power; these, however, do not always bring about anticompetitive effects²²⁷.

The same concerns arose in the *Tetra Laval/Sidel* case²²⁸, where the Commission found two separate packaging markets, carton (Tetra was producing carton packaging equipment and consumables) and PET (Sidel was the main producer of PET packaging equipment, in particular of the Stretch Blow Moulding Machines – SBM). It should be noted, that according to the Commission’s contention, in the future cartons and plastic packaging would be alternatives in a delineated “sensitive sector” of beverages (milk, juices, tea/coffee based drinks). Possible future competition concerns were founded on two grounds: firstly, elimination of Sidel from the market would reduce competitive pressures in the future, and secondly, the merged entity could leverage its dominance in cartons onto the SBM machines market by offering customers carton purchases on favorable conditions, to the detriment of its rivals. The CFI, however, annulled the Commission’s decision – instead of on the basis of portfolio effects – because the Commission did not convince the Court that Tetra would be likely to engage in such practices.

Acceptance of the portfolio effects theory in EU merger control has been criticized by the U.S. antitrust authorities²²⁹, which departed from that idea already in the 1982 Merger Guidelines in response to legal and economic criticism²³⁰. The current position of the DoJ was articulated in the Court of Appeal’s opinion in *Berkeley Photo v. Eastman Kodak Co.*²³¹:

²²⁷ *Id.*

²²⁸ Case T-5/02 *Tetra Laval BV v. Commission*.

²²⁹ Veljanovski, *supra*.

²³⁰ During the conglomerate merger boom in the US (1965-1975), the Supreme Court stated the so-called “entrenchment doctrine” providing grounds for challenging a concentration, providing it strengthened an existing dominant position by efficiencies, a broader range of products (portfolio effects) or getting access to substantial financial resources; *see, FTC v. Procter&Gamble*, 368 U.S. 568 (1967).

²³¹ *Berkeley Photo v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

“[s]o long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth”. The U.S. doctrine therefore believes that this approach benefits consumers, even if such practices are undertaken by a dominant firm. The U.S. case law line is that it is not unlawful for a firm with a monopoly in one market to use its monopoly power in that market to gain a competitive advantage in neighboring markets, except if by so doing it serves either to maintain its existing monopoly or to create a probability of gaining a monopoly in the neighboring market as well²³². The DoJ verbalized the divergence between the U.S. and the EU as for portfolio effects as follows:

We are concerned, therefore, that the range effects theory as applied will lead antitrust regulators to disapprove efficiency-enhancing mergers on the basis of highly speculative and unprovable theories of competitive harm. Without a high standard of proof, range effects theory runs the risk of becoming an ill-defined, catch-all theory that allows antitrust regulators to challenge virtually any merger on the basis of vague fears of ‘dominance.’ [...] In summary, we found no factual support for any of the key elements of the range effects theories of competitive harm with respect to the *GE/Honeywell* merger. To the contrary, we concluded that to the extent those theories were based on the argument that the merged firm would have the ability and incentive to offer customers lower prices and better products, that meant the merger should benefit customers both *directly* -- through the lower prices and better products offered by the merged firm -- and *indirectly* -- by inducing rivals to respond with their own lower

²³² William J. Kolasky, *North Atlantic Competition Policy: Converging Toward What?*, Address before the BIICL Second Annual International and Comparative Law Conference, London, England (May 17th, 2002).

prices and product improvements. That, in our view, was a reason to welcome the merger, not condemn it.²³³

4.2. Reasons behind the change of the substantive test

While the change of the substantive test in EU competition law had been preceded by a vigorous international debate, the intensity of the discussion raised even more after the release of the Green Paper on the review of 1989 ECMR in 2001. The Commission presented there some arguments for and against the change of the substantive test²³⁴.

The main reason for a change was, according to the Commission, that switching to an SLC test would allow an alignment of assessment criteria applied in EU merger control with those applied in other major jurisdictions (e.g. U.S., Canada, Australia)²³⁵. Such an alignment would have been certainly beneficial to any firms wishing to merge on a global scale, since the assessment of antitrust issues arising from such a transaction would no longer need to address various standards of differently worded tests. Moreover, the alignment would allow antitrust agencies, especially European and American, to work on a more effective underpinning for the moving forward international cooperation, driven by a still increasing number of multinational cases.

On the other hand, the Commission set forth reasons why the dominance test should be preserved. Firstly, the concerns focused on the importance of existing case law under the dominance test and a possibility of it to become redundant after removal of the dominance

²³³ The U.S. Department of Justice, Antitrust Division, *Range Effects: The United States Perspective* 4 & 23 (2001) Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers, available at: <http://cybersafe.gov/atr/public/international/9550.htm>.

²³⁴ See, the EC Commission, Green Paper on the Review of Council Regulation (EEC) No. 4064/89, *supra*, paras. 159-169.

²³⁵ *Id.*, par. 160.

concept from the test²³⁶. This would, in consequence, lead to an increase of uncertainty as to the standards of merger control appraisal. Secondly, it was pointed out that most Member States have brought their merger control laws into line with the dominance test²³⁷, and therefore the change would benefit to the greater international alignment, but – at the same time – to a greater disparity within the EC²³⁸. The Green Paper reflected also the Commission’s view, that – in general – the steps of application of both dominance and SLC tests are quite similar and, in consequence, a vast majority of cases would be under both tests bring similar outcomes²³⁹. To support the flexibility of the concept of dominance, the Commission highlighted its evolution over the years. Even though it mentioned the possibility that the dominance notion might not cover unilateral effects, the Commission seemed not to attach great significance to that, treating the issue more in theoretical categories than as a practical problem. Instead, the Commission emphasized that a more “open-ended SLC-test” would rather result in a higher degree of legal uncertainty²⁴⁰.

After the CFI overturned in 2002 Commission’s prohibitions of three mergers: *Airtours/First Choice*²⁴¹, *Schneider/LeGrand*²⁴² and *Tetra Laval*²⁴³, a wave of criticism came addressed to the Commission’s poor economic methodology and analysis²⁴⁴. In the debate over reform three different stances towards the reform of the substantive test could be discerned: a pro-dominance test position, a pro-SLC test position and a position preferring a

²³⁶ *Id.*, par. 161.

²³⁷ Though with exceptions, e.g. the UK, Ireland.

²³⁸ The EC Commission, Green Paper on the Review of Council Regulation (EEC) No. 4064/89, *supra*, 161.

²³⁹ *Id.*, par. 162.

²⁴⁰ *Id.*, par. 165.

²⁴¹ Case T-342/99, *Airtours plc v Commission*.

²⁴² Case T-310/01, *Schneider Electric v. Commission*.

²⁴³ Case T-5/02, *Tetra Laval BV v. Commission*.

²⁴⁴ *See, e.g., id.*, par. 132 – “[...]In these circumstances, the Court finds that the Commission made a manifest error of assessment in so far as it relied on the horizontal effects of the modified merger to support its finding that a dominant position on those PET markets would be created for the merged entity through leveraging.”

hybrid solution, as formulated in the already existing French and Spanish legislation²⁴⁵. Since, in order to cover the “gap” in merger control enforcement, existing under the dominance test, and enhance the clarity of legal provisions, the focus shift ought to be made on dynamic rather than static market effects, the SLC test was perceived as much better suited, since it concentrated on changes to competition, not on the market structure, and it did not require any desperate attempts to encompass any type of exercising market power by the notion of dominance²⁴⁶. In particular, the SLC test was capable of addressing issues in oligopolistic markets, since it was directly based on an economic analysis of competition, as opposed to the dominance concept.²⁴⁷

The economic analysis presented by the Commission in the *GE/Honeywell* decision was heavily criticized by the American authorities, because the Commission focused on theories of competitive harm which had been rejected by the U.S. antitrust agencies decades before²⁴⁸. In the light of divergent outcomes between the U.S. and EU examinations of the *GE/Honeywell* merger²⁴⁹, significance of the argument in favor of adopting an SLC-based test in order to facilitate international mergers increased.

²⁴⁵ Horner, *supra*, 33.

²⁴⁶ Kokkoris, *supra*, 43.

²⁴⁷ *Id.*

²⁴⁸ Such as bundling, conglomerate effects, monopoly leveraging and lack of recognition of efficiencies.

²⁴⁹ Case COMP/M.2220 *General Electric/Honeywell*.

4.3. Effects of the change of the substantive test in EU merger control

4.3.1. Closing the „gap” and the problem of under-enforcement

The main reason for changing the substantive test for assessment of mergers in EU merger control was, as already mentioned *supra*, to dispose of the requirement of proving creation or strengthening of a dominant position in order to successfully challenge a merger. In consequence of that change, mergers that previously would have escaped challenge because of not creating or strengthening a dominant position, yet which could have had anti-competitive effects, are now captured by the test, taking full account of the overall competitive effects of such merger²⁵⁰. Recital 25 of the 2004 ECMR states explicitly, that:

[t]he notion of ‘significant impediment to effective competition’ in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

It thus explicitly confirms that the primary function of the new test is to close the “gap” existing under the dominance test. Moreover, Section 22(a) of the 2004 Horizontal Merger Guidelines recognizes explicitly non-coordinated effects as a new category of competitive harm. Apart from non-coordinated anticompetitive effects of creating or strengthening a dominant position of a single firm, covered under the dominance test of 1989 ECMR, the Guidelines mention also unilateral effects resulting from:

²⁵⁰ Lars-Hendrik Röller & Miguel de la Mano, *The Impact of the New Substantive Test in European Merger Control*, European Commission, 9 (January 22nd, 2006), available online at: http://ec.europa.eu/dgs/competition/economist/new_substantive_test.pdf. Examples of mergers raising such considerations are: a pre-emptive take-over of a potential entrant by an incumbent, acquiring by an incumbent control thru merger of a barrier to entry, mergers resulting in raising rivals costs, etc. (*id.*).

mergers in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition.²⁵¹

It is evident, therefore, that the Commission can now apply unilateral effects theories in cases where it previously could apply only collective dominance theories²⁵².

It has been nevertheless noticed, that the Commission's movement towards an effects-based approach has not started with the introduction of the SIEC test, but has been already gradually developing for a while, whereas the ECMR 2004 with its new substantive test is only strengthening the increasing deviation from a structural approach to merger enforcement²⁵³. What is more, this process is likely to be gradual, since case-handlers need to get used to the new regulation and guidelines, whereas more knowledge of industrial economics is required²⁵⁴.

It has been noted, that the threshold for finding unilateral effects under the SIEC test seems much lower than the threshold for finding collective dominance²⁵⁵. While, after *Airtours*, the Commission must prove existence of three cumulative conditions are met, the 2004 Horizontal Merger Guidelines set forth only a non-exhaustive list of factors, which indicate only probability of occurring unilateral effects, and do not need to be all present in

²⁵¹ 2004 EC Horizontal Merger Guidelines, par. 25.

²⁵² Francis Dethmers, *Collective Dominance under EC Merger Control – After Airtours and the Introduction of Unilateral Effects is there Still a Future for Collective Dominance*, 26 E.C.L.R. 638, 642 (2005).

²⁵³ Röller & de la Mano, *supra*, 13.

²⁵⁴ *Id.*

²⁵⁵ Dethmers, *supra*, 642.

order to establish likelihood of anticompetitive effects²⁵⁶. It has been raised, that such a situation may lead to collective dominance analysis being dominated by unilateral effects analysis²⁵⁷. This conclusion, however, does not change the fact that the primary task of merger control is not to “distinguish between individual rivalry and tacit collusion when they occur but, rather, to assess the competitive impact of a proposed merger, and therefore the likelihood that they will occur in the future”²⁵⁸.

In order to measure the early impact of the new test, Röller and de la Mano’s tried to identify a “gap case”, which would be a proof of the new SIEC test making a difference in merger control enforcement²⁵⁹. According to their research, based on cases notified in 2004 and 2005, the Commission has not departed from dominance except for in a few cases²⁶⁰. Thus, the notions of single and collective dominance seem to be still crucial in assessment of competitive harm of mergers. The Authors went on to give examples of a few cases where dominance seemed to be less important. In *Lufthansa/Swiss* merger²⁶¹ no reference to the creation or strengthening of a dominant position was made, but it was argued that Swiss was a direct competitor to Lufthansa and the acquisition would thus eliminate or significantly reduce competition in a number of intra-European routes²⁶². More likely to be identified as a “gap” case was the *Siemens/VA Tech* merger²⁶³, where Siemens sought to take control of VA

²⁵⁶ Horner, *supra*, 35-36. These factors include situations where: merging firms have large market shares, merging firms are close competitors, customers have limited possibilities of switching supplier, competitors are unlikely to increase supply if prices increase, merged entity able to hinder expansion by competitors, merger eliminates an important competitive force (2004 EC Horizontal Merger Guidelines, paras. 26-37).

²⁵⁷ Dethmers, *supra*, 643.

²⁵⁸ Marc Ivaldi et. al., *The Economics of Unilateral Effects*, European Commission, Interim Report for DG Competition, Final Draft, IDEI, Toulouse, 7 (November 2003).

²⁵⁹ Röller & de la Mano, *supra*, 13.

²⁶⁰ *Id.*

²⁶¹ Case COMP/M.3770, *Lufthansa/Swiss* (2005).

²⁶² However, this case does not seem to be a “gap case” because of considered barriers to entry resulting from very high market share of the parties (Röller & de la Mano, *supra*, 15).

²⁶³ Case COMP/M.3653 *Siemens/VA Tech* (2005).

Tech, while holding a minority shareholding with no control in one of two VA Tech's main competitors (SMS)²⁶⁴. However, the Commission pointed out also that SMS and VA Tech seemed the market leaders of a highly concentrated market, which makes it possible to challenge under the old dominance test²⁶⁵. Among vertical mergers, Röller and de la Mano pointed at *Apollo/Bakelite*²⁶⁶, where the Commission argued that the vertical effects would reinforce the market position of Bakelite, an analysis – an approach more in line with the equilibrium effects analysis – instead of arguing that it would allow Bakelite to acquire dominance downstream, as expected under the dominance test²⁶⁷. Possible input foreclosure effects in the market for fire alarm systems in Scandinavian countries were considered in *Honeywell/Novar*²⁶⁸. This merger would result in the main upstream component supplier becoming a competitor on the market for systems downstream. The Commission decided, however, to clear the merger because system suppliers, who depend on the merged entity for its component supplies (especially ESMI), could find alternative suppliers and if they were not a close competitor of Novar, therefore it believed that the merged firm would not profit from a significant increase of prices²⁶⁹. A possible “gap case” was identified by the Authors in the Hungarian merger of *E.ON/MOL*²⁷⁰, where MOL was a quasi-monopolist in the supply of wholesale gas and E.ON. had a strong commercial presence in downstream markets²⁷¹. The Commission reasoned that the merged firm would have both the ability and incentive to

²⁶⁴ The Commission stressed here the limited importance of market shares, emphasizing that SMS and VA Tech were close competitors.

²⁶⁵ Röller & de la Mano, *supra*, 15-16.

²⁶⁶ Case COMP/M.3593 *Apollo/Bakelite* (2005).

²⁶⁷ Röller & de la Mano, *supra*, 16.

²⁶⁸ Case COMP/M.3686 *Honeywell/Novar* (2005).

²⁶⁹ This case also is not likely to be the “gap” case, since the input foreclosure concerns were eventually dropped.

²⁷⁰ Case COMP/M.3696 *E.ON/MOL*, EC Commission Decision of 21st December, 2005.

²⁷¹ *Id.*, par. 281.

raise cost of access to wholesale gas to rivals downstream²⁷². Furthermore, there were strong indications that the potential losses from reduced sales at wholesale level would be more than offset by increased gas prices in retail gas markets, therefore it was likely that the merger would significantly impede effective competition, even without E.ON. gaining dominance downstream, therefore, as Röller and de la Mano argue, the *E.ON/MOL* merger could be a possible “gap” case²⁷³. The review of above cases allowed the Authors to conclude that as for vertical mergers several cases illustrate Commission’s explicit equilibrium effects analysis in the assessment of the competitive harm.²⁷⁴

4.3.2. *Enhanced clarity and the problem of over-enforcement*

Introduction of the SIEC test was not only supposed to cover the possible “gap” cases, but also, by eliminating dominance as a necessary condition for challenging a merger, shift the attention from pure static market factors to principal economic considerations, such as the likelihood of reduction of competition. In consequence, the SIEC test should no longer allow the Commission to challenge mergers just on the basis of market structure data, leading to a prohibition of pro-competitive mergers²⁷⁵. However, Röller and de la Mano find in their research no case which would clearly prove that the Commission under the SIEC test considers that creation or strengthening of dominance might be insufficient to challenge a proposed merger²⁷⁶. Case law sample considered in their paper indicate that dominance is still

²⁷² *Id.*, par. 282.

²⁷³ Röller & de la Mano, *supra*, 16. The merger was finally cleared conditional upon the unbundling of production and transmission from wholesaling and storage (*see*: Case No. COMP/M.3696 – *E.ON/MOL*, EC Commission’s Decision of December 21st, 2005, Commitments to the European Commission, Sec. B (I)).

²⁷⁴ Röller & de la Mano, *supra*, 16.

²⁷⁵ Examples of such procompetitive mergers include mergers: involving firms selling distant substitutes, generating efficiencies, creating countervailing buying power vis-à-vis dominant buyers, with *de minimis* impact and mergers where single dominance replaces collective dominance (*id.*, 12).

²⁷⁶ *Id.*, 17.

predominantly based on high market shares²⁷⁷. There are, however, cases implying that high market shares are not necessarily conclusive²⁷⁸. Finally, Röller and de la Mano draw readers' attention to case *Novartis/Hexal*²⁷⁹, where dominant position was established on the basis of merging parties being close substitutes²⁸⁰. Although not explicitly, the Commission used here analysis typical for unilateral effects²⁸¹. The Commission cleared the merger with conditions, however, it relied on consideration of a possible threat of creating a position of single dominance. It seems, therefore, that still in rather exceptional cases founding of a dominant position would not be sufficient to challenge a merger. However, the Commission has showed a move towards effects-based based approach in cases in which firms are distant competitors, where even with high combined market shares, dominance may not necessarily be conclusive. It seems, therefore, that dominance under the new SIEC test remains an important and often sufficient factor, although there is something more required than just high market shares in order to identify dominance and challenge a merger, especially when the firms sell distant products.

²⁷⁷ See, e.g., Case COMP/M.3779 *Pernod Ricard/Allied Domecq*, EC Commission Decision of June 24th, 2005. According to the Commission's findings the merger created or strengthened a dominant position in several relevant markets, where often the combined market share exceeded 50%.

²⁷⁸ See, e.g., Case COMP/M.3178 *Bertelsmann/Springer/JV*, EC Commission Decision of May 3rd, 2005 – even though a combined market share was over 50%, the Commission decided to clear the merger with remedies, because it concluded that competitors within and outside Germany were able to shift, free or expand capacity and thus exercise a competitive constraint on JV (*id.*, paras. 118-153). Similarly, in Case COMP/M.3687 *Johnson & Johnson/Guidant*, EC Commission Decision of May 3rd, 2005, product homogeneity and lack of capacity constraints helped the parties to avoid prohibition of the merger despite high market shares (exceeding 70%). In another case (Case COMP/M.3544 *Bayer Healthcare/Roche (OTC. Business)*) in one of the markets a combined market share found was around 55-60% (10-15% overlap), but existence of other substitutes diminished possibility of raising prices.

²⁷⁹ Case COMP/M.3751 *Novartis/Hexal*, EC Commission Decision of May 27th, 2005.

²⁸⁰ Röller & de la Mano, *supra*, 17.

²⁸¹ The Commission argued that the concentration would lead to combining two products, which a substantial number of consumers would regard as their first and second choice.

It has been raised that the new SIEC test might in fact facilitate a higher level of interventionism of the Commission²⁸². The Commission, however, has stressed that the shift to SIEC test was not supposed to lower the threshold of intervention, but to widen the scope coverage²⁸³. According to Director General of the Commission's Directorate General for Competition, “[t]he test could not be interpreted as a lowering of the intervention threshold”, because “the ‘SIEC’ already constitutes the base-line threshold for assessing the compatibility of mergers with the common market, in particular for interpreting the concept of creation or strengthening of a dominant position”²⁸⁴. Lowe also pointed out that the European courts have interpreted the old dominance similarly, i.e. applying language closer to the SIEC test than the dominance test, even under the 1989 ECMR²⁸⁵. Despite the Commission’s assurances of no intention to lower the thresholds, in *VNU/WPP/JV* decision²⁸⁶ under new Merger Guidelines, the Commission referred to a presumption of illegality for three-to-two mergers²⁸⁷. It therefore suggests, contrary to the Commissions assertions, that a more interventionist approach has been taken²⁸⁸. Many thus argue, that the SIEC test widened

²⁸² Fountoukakos & Ryan, *supra*, 292.

²⁸³ *Id.*

²⁸⁴ Philip Lowe, *Implications of the Recent Reforms in the Antitrust Enforcement in Europe for National Competition Authorities*, Italian Competition/Consumers day, Rome (9th December, 2003), available at: http://ec.europa.eu/comm/competition/speeches/index_2003.html.

²⁸⁵ *Id.* (see, e.g., Joined Cases C-68/94 and 30/95, *France and Others v. Commission*, par. 221; Case T-342/99, *Airtours plc v. Commission*, par. 58, citing Case T-2/93 *Air France v. Commission*; Case T-102/96 *Gencor v. Commission*, par. 170, 180 and 193).

²⁸⁶ Case COMP/M.3512 *VNU/WPP/JV*, EC Commission Decision of September 15th, 2004.

²⁸⁷ *Id.*, footnote 7.

²⁸⁸ This marks a contrast with past practice of the EC Commission, where cases of three-to-two mergers under collective dominance were cleared unconditionally in 74%, in many cases due to inability to fulfill the necessary elements of prohibition under collective dominance (Francis Dethmers, *supra*, footnote 32). See also, Case COMP/M.3516 *Repsol YPF/Shell Portugal*, EC Commission Decision of September 19th, 2004; Case COMP/M.3197 *Candover/Cinven/Bertelsmann-Springer*, EC Commission Decision of July 29th, 2003.

the scope of EC merger control below the traditional threshold related to establishing single-firm dominance²⁸⁹.

Although 2004 Merger Guidelines were introduced in order to preserve legal certainty and limit an unpredictable extension of the SIEC test to new cases, market share presumptions, HHI-based standards and market definition seem to provide the Commission with a significant and almost unlimited scope for intervention below the level of single dominance²⁹⁰. As already mentioned *supra*, according to well-established case law the typical threshold recognized by the Commission for finding dominance has been 40-50%, even though the old merger test referred to 25%²⁹¹. Nevertheless, cases *Syngenta CP/Advanta*²⁹² and *Carrefour/Promodes*²⁹³ showed a somewhat different picture, where the Commission was ready to find competitive concerns in markets where mergers resulted in market shares much below the traditional 40%, which may suggest a trend towards a lower intervention threshold²⁹⁴. Traditionally used in the U.S. merger control HHI standards included in the 2004 EC Horizontal Merger Guidelines specify that mergers will be reviewed on the basis of non-coordinated effects only when aggregate HHI is between 1000-2000 and rises by at least 250 points. The same will happen if the aggregate HHI is above 2000 and rises at least by 150 points²⁹⁵. It has been pointed out that these thresholds are inconsistent with the indicative market share threshold of 25%, which tends to undermine their usefulness²⁹⁶. At first glance, these thresholds, compared to American standards, do not seem that low, since according to

²⁸⁹ Ridyard, *supra*, 2.

²⁹⁰ Simon Baxter & Francis Dethmers, *Unilateral Effects under the European Merger Regulation: How Big is the Gap*, 26 E.C.L.R. 380, 383 (2005).

²⁹¹ Recital 15 of the 1989 ECMR.

²⁹² Case COMP/M.3465, *Syngenta CP/Advanta*, EC Commission Decision of August 17th, 2004.

²⁹³ Case COMP/M.1684, *Carrefour/Promodes*, EC Commission Decision of January 25th, 2000.

²⁹⁴ Baxter & Dethmers, *supra*, 384.

²⁹⁵ 2004 EC Merger Guidelines, paras. 19-21.

²⁹⁶ Baxter & Dethmers, *supra*, at 384.

the U.S. Horizontal Merger Guidelines 1992/97 the threshold for a “highly concentrated market” is 1800 HHI. However, if taking into account American practice, which shows that the antitrust agencies tend to challenge mergers that would lead to a HHI in post-merger market far above 2000 points²⁹⁷ the EU HHI thresholds may yet seem low. The Commission, therefore, has been criticized for adopting unreasonably low thresholds, which do not follow the US enforcement practice and undermine rather than reinforce legal certainty²⁹⁸. Moreover, a risk of adopting by the Commission an approach resulting in more narrowly defined product markets and corresponding higher market shares in unilateral effects analysis (focusing on differentiated product markets) has been identified²⁹⁹. Such a tendency was evident in the *Oracle/PeopleSoft* decision, where the Commission analyzed bid data to determine that Oracle, PeopleSoft and SAP were particularly close competitors³⁰⁰. The *Oracle* decision has been, however, welcomed by William Kolasky³⁰¹, as reaching consistency with the American decision referring to the same merger, applying similar reasoning and with similar reliance on empirical data to support the decision³⁰².

As indicated by the above, the new SIEC test has the potential to be broader than the old dominance test. If this will results in a more interventionist merger control depends mainly on

²⁹⁷ David Scheffman et. al., *20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, available at: <http://www.usdoj.gov/atr/hmerger/11255.htm>.

²⁹⁸ Ridyard, *supra*, 9.

²⁹⁹ Baxter & Dethmers, *supra*, 385.

³⁰⁰ Case COMP/M.3216, *Oracle/PeopleSoft*, EC Commission Decision of October 26th, 2004, par. 136.

³⁰¹ William J. Kolasky, served as a Deputy Assistant Attorney General in the Antitrust Division of the U.S. DoJ in 2001-2002.

³⁰² William J. Kolasky, *GE/Honeywell: Narrowing, but not Closing, the Gap*, Antitrust, Spring 2006, at 69 (decision in Case COMP/M.3333 Sony/BMG [2005] OJ L62/30 was also given as an example of effectiveness of the EU reform).

how the Commission will choose to exercise its discretion and evidentiary requirements before the courts³⁰³.

4.3.3. Other points of improvement and convergence

The main aims of the new EC merger legislation has been discussed – the alleged “gap”, whether it in fact existed or not, has been “filled”, although enhanced clarity which was supposed to be brought by the new substantive regulation still remains an open question. How did the 2004 reform, however, additionally improve the quality of legal solutions in European Union merger control and did the convergence between EU and U.S. merger control go any further?

4.3.3.1. Policy

It seems that the EU and U.S. appear to use methodologies that are similar in many aspects, but, due to different principal economic models, assumptions and values, they come to different conclusions³⁰⁴. As already mentioned *supra*, the American antitrust doctrine has been showing an immense confidence in market forces, which is characteristic of the U.S. *laissez-faire* thinking and the Chicago School of competition. The European way of perceiving competition, on the other hand, is more tainted by a regulatory approach and a belief, that any entity would strive, in normal circumstances, for a monopoly position when the conditions are favorable. Due to these still persistent differences in merger control policy,

³⁰³ Horner, *supra*, 38.

³⁰⁴ Akbar & Suder, *supra*, 675.

some skepticism as to the possibility of a significant substantive convergence has been expressed³⁰⁵.

The main difference between the US and EU approach still remains the interpretation of efficiencies and approach to portfolio effects. While in the U.S. lower prices achieved through mergers are seen as procompetitive, the EU assumes that lower prices are rather likely to result from strategic behavior, intended to eliminate competitors. In the U.S. it is regarded that cost savings resulting from mergers, which lead to lower prices, may in the long run provoke strong enough competitors to develop a new, innovative strategy, which will benefit the consumers. The idea then has been always to “protect competition, not competitors”,³⁰⁶.

With such a divergence in merger control policy, a convergence in substantive criteria of merger assessment, which was the aim of the recent reform in EU competition law, may hardly lead to fully corresponding results in individual cases. It is, however, possible that a more considerable similarity could be achieved by active juridical interventions of the CFI in overruling and modifying the Commission’s decisions³⁰⁷.

4.3.3.2. The EU and US Merger Guidelines

The new 2004 EC Horizontal Merger Guidelines brought two important developments: for the first time the EU merger control explicitly acknowledges efficiencies as a counterbalance to anticompetitive effects³⁰⁸, and for the first time in a quasi-legislative instrument or “soft

³⁰⁵ *Id.*, 679.

³⁰⁶ *See, Brown Shoe Co.*, 370 U.S. 294 (1962).

³⁰⁷ *Id.*

³⁰⁸ *See*, Recital 29 of the 2004 ECMR.

law” the Commission has included the consumer welfare-price effects standard³⁰⁹. These developments, together with setting up a new Chief Economist’s Office in Brussels are seen as one of the most prominent points of convergence with the U.S. merger control system, probably even more important than introduction of the SIEC test itself³¹⁰. The SIEC test, at least on paper, seems exactly the same as the SLC test applied in the U.S. However, it is the underlying policy and their interpretation which decide how much similar the two tests are. As indicated *supra*, the EU and U.S. merger control policies differ significantly. Taking into account these differences and the fact that, despite switching to a “SLC-like” test in the EU, the Commission pronounced unwillingness to depart from established case law under the dominance test, it is highly unlikely that the Commission will extensively refer to American body of precedents. Application of the substantive tests in EU and U.S. has, however, a chance to become closer, due to the fact that the 2004 EC Horizontal Merger Guidelines follow to quite a considerable extent the U.S. Horizontal Merger Guidelines 1992/97.

To begin with, both the U.S. and EU Guidelines show similarity in respect with the relevant product and geographic market definition as the first step of merger analysis. They both apply the so-called SSNIP test as principal criterion for defining the relevant market³¹¹, while the assessment of other common elements for market definition is also similar³¹².

³⁰⁹ Egge et al., *supra*, 39 (see, 2004 EC Horizontal Merger Guidelines, par. 8: “Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms”).

³¹⁰ Egge et al., *supra*, 39.

³¹¹ 2004 EC Horizontal Merger Guidelines, par. 10 (reference to the EC Market Definition Notice); U.S. Horizontal Merger Guidelines 1992/97, §§ 1.0-1.2.

³¹² *E.g.*, they rely on evidence of demand-side substitutability (EU – EC Market Definition Notice, paras. 13 and 20, US - § 10), although the EU Guidelines consider also the supply-side substitutability, whereas in the US Guidelines it is considered at a later stage. Besides, both Guidelines recognize that evidence of sustainable price discrimination may support narrower market definitions (EU – EC Market Definition Notice, par. 43; US - §§ 1.12 and 1.22).

The second step prescribed by both Guidelines is identification and assessment of the overall market concentration level and respective shares of all competitors³¹³. Both EU and U.S. Merger Guidelines provide for fairly comparable combined market share thresholds for unilateral market power analysis, although the EU market share thresholds may seem somewhat more stringent³¹⁴. In order to measure market concentration both Guidelines introduced the HHI in coordinated market power analysis³¹⁵. As already mentioned *supra*, although the EU thresholds may seem at first glance higher than in the U.S., practice shows that the U.S. antitrust agencies apply much higher thresholds than prescribed by the Guidelines.

Both Guidelines identify also two main types of possible anticompetitive effects of horizontal mergers, i.e. unilateral and coordinated effects³¹⁶. The unilateral effects analysis in both Guidelines distinguish between differentiated and non-differentiated product markets, while the coordinated effects analysis is also similar in both Guidelines recognizing both express and tacit coordination³¹⁷.

According to both EU and U.S. Guidelines, a proposed merger would normally not raise any anticompetitive effects issues, as long as post-merger it would be sufficiently easy to

³¹³ EU – 2004 EC Horizontal Merger Guidelines, paras. 14-21; US - §§ 1.3-1.5.

³¹⁴ EU – paras. 17-18: a combined market share of 50% or more indicates a strong (but rebuttable) presumption of unilateral market power, while a market share between 40-50% indicates a weaker inference of unilateral market power; and a share below 25% indicates a presumption of no unilateral market power. US – §§ 2.211-2.22: unilateral market power concerns are presumed absent if the combined-firm share is below 35%.

³¹⁵ EU – paras. 19-20; US – § 1.51. However, in the EU the HHI thresholds are not absolute, since even within the “safe harbors” constituted below these HHI thresholds certain industry characteristics might trigger competition concerns (*e.g.*, EC Horizontal Merger Guidelines, par. 20).

³¹⁶ EC – paras. 22-57; US - §§ 2.0-2.2.

³¹⁷ EC – par. 39; US - § 2.1. Similarly, both Guidelines refer to three conditions for coordinated effects: 1) a merger must increase the likelihood that competitors will reach a common understanding on the terms of coordination, 2) means for effective monitoring of firms’ behavior must exist, 3) an efficient deterrent mechanism must exist (EU – paras. 44-55; US - §§ 2.11-2.12). Analogous are also industry characteristics affecting the likelihood of sustained coordination (EU – paras. 39-57; US - §§ 2.1-2.12).

enter the market³¹⁸. Entry barriers are scrutinized employing a similar three-step entry analysis, which focuses on the timeliness, likelihood and sufficiency of entry³¹⁹.

A slightly different approach is presented to countervailing buying power by the U.S. Guidelines, which do not include a separate section, as the EU Guidelines, yet the section on coordinated effects³²⁰ recognizes that significant buyers are able to facilitate deviations from coordinated behavior.

Most importantly, however, the EU Guidelines followed the U.S. Guidelines in explicit recognition of efficiencies which bring benefits likely to outweigh the anticompetitive effects of the merger³²¹. The EU Guidelines require evidence that efficiencies are a “direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives”³²². A somewhat less rigorous merger specificity requirement was implemented in the U.S. Guidelines, which take into account 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 effects”³²³. Both Guidelines focus on efficiencies to the extent that they are most likely to be objectively verifiable and quantifiable³²⁴. As Gifford and Kudrle noted, the European merger

³¹⁸ EU – Section VI; US – Section 3.

³¹⁹ EU – paras. 69-75; US – §§ 3.2-3.4. In this respect, the EU Guidelines describe more precisely the types of barriers that might deter, delay or minimize the pro-competitive effects of entry. Unlike the U.S., the EU Guidelines refer to so-called “incumbent advantages”, some of which resemble former EU tendencies to characterize synergies and other benefits generated by a merger as “competitive advantages” reinforcing finding of market power, thus being the so-called “efficiencies offence” (Brian A. Facey & Henry Huser, *Convergence in International Merger Control: A Comparison of Horizontal Merger Guidelines in Canada, the European Union, and the United States*, Antitrust, Fall 2004, 46).

³²⁰ § 2.12.

³²¹ EU – Section VII; US – Section 4 (1997 revised version).

³²² Par. 85 – so-called “merger specificity”.

³²³ Section 4.

³²⁴ EU – par. 86; US – Section 4.

control applies a consumer surplus standard³²⁵, which means that only the effect of the merger on consumer welfare is looked at³²⁶. The EU Guidelines require the efficiencies to be “passed-on” to consumers in the form of reduced prices, increased output, quality or enhanced innovation³²⁷. Although it has been argued that the welfare standard in the U.S. Guidelines is the same, Kolasky and Dick argue³²⁸ that in fact what the U.S. merger control have been provided with is a hybrid of consumer welfare and total welfare standard³²⁹. That means that efficiencies which are passed on to consumers are given more weight, nevertheless other efficiencies can be also taken into account as an important factor mitigating the anticompetitive effects, so that the pass-on requirement became less strict³³⁰.

According to Röller and de la Mano’s research, efficiencies nevertheless still play a minor role in merger investigations in the EU³³¹. In practice, no case in the EU has been yet cleared purely on efficiency grounds³³². In the past, most efficiency arguments in EU cases have been

³²⁵ Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 Antitrust L. J. 423, 458 (2005).

³²⁶ See, An Renckens, *Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining The Efficiency Defense*, 3 J. Comp. L. & Econ. 149, 155-156 (2007). However, not only the effect on prices is considered, but also consequences for product quality, service and innovation (*id.*).

³²⁷ Par. 79-81.

³²⁸ William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, Celebration of the 20th anniversary of the Guidelines (June 10th, 2002), available at: <http://www.usdoj.gov/atr/hmerger/11254.htm>.

³²⁹ See, Renckens, *supra*, 157.

³³⁰ Renckens, *supra*, 162.

³³¹ Röller & de la Mano, *supra*, 18. The *Procter&Gamble/Gillette* decision (Case COMP/M.3732 *Procter&Gamble/Gillette*, EC Commission Decision of July 15th, 2005) was a noteworthy exception. The Commission’s decision stated, that “[i]t has also to be taken into account that enlarging the product portfolio might bring efficiencies to retailers and customers, for example benefits from having only one partner to negotiate with (“one-stop-shop”), suppliers having stronger innovation capacities, and economies of scale and scope (e.g. offering a full truckload of the same product or even a full truckload of products from the same factory).” (*id.*, par. 131). It was nevertheless the countervailing buying power, rather than efficiencies, which tilted the balance against portfolio effects.

³³² *But cf.*, Case COMP/M.4057 *Korsnäs/Assidomän Cartonboard*, EC Commission Decision of 12th May, 2006, paras. 57-64, which was the first case in which the Commission explicitly recognized, as an argument in favor of clearing the concentration, merger-specific efficiencies that could be passed on to consumers.

disregarded³³³, or even construed as an anticompetitive argument (“efficiency offences”)³³⁴. In U.S. practice, in most cases considering efficiency arguments they have usually been held insufficient to offset the anticompetitive effects of the merger³³⁵. Efficiencies in the US have been recognized but merely in the light of efficiencies in a way to enhance consumer welfare, yet because the pass-on requirement is not clearly stated in the guidelines, the most common argument to ignore efficiencies is that they are not merger-specific³³⁶.

It is noteworthy, that in November 2007 the Commission has adopted EC Non-Horizontal Merger Guidelines³³⁷, preceded for the first time by a public consultation of the Draft Guidelines, in response to which thirty two papers were submitted containing various commentators’ opinions. The EC Non-Horizontal Merger Guidelines regarding general assumptions refer extensively to the 2004 EC Horizontal Merger Guidelines³³⁸. Issuance of specific guidelines focused on theories of competitive harm characteristic to non-horizontal mergers, which additionally proclaim a basic premise that non-horizontal (*i.e.* vertical and conglomerate) mergers are generally viewed as precompetitive³³⁹ and in only a small fraction of situations may raise anticompetitive concerns, indicates that the Commission is prepared to

³³³ See, *e.g.*: Case IV/M.53 *Aerospatiale-Alenia/de Havilland*, EC Commission Decision of September 9th, 1991; Case IV/M.126 *Accor/Wagons-Lits*, EC Commission Decision of April 28th, 1992; Case IV/M.490 *Nordic Satellite Distribution*, EC Commission Decision of July 19th, 1995; Case IV/M. 1313 *Danish Crown/Vestjyske Slagterier*, EC Commission Decision of March 9th, 1999; Case IV/M.619 *Gencor/Lonrho*, EC Commission Decision of April 24th, 1996.

³³⁴ See, *e.g.*: Case IV/M.856 *British Telecom/MCI(II)*, EC Commission Decision of May 14th, 1997; Case IV/M.50 *AT&T/NCR*, EC Commission Decision of January 18th, 1991.

³³⁵ See, *e.g.*: *FTC v. University Health Inc*, 938 F.2d 1206 (11th Cir. 1991); *H.J. Heinz, Co.*, 246 F.3d 708 (C.A.D.C. 2001); *Staples, Inc.*, 970 F.Supp. 1066 (D.D.C., 1997); *Cardinal Health, Inc.*, 12 F.Supp.2d 34, (D.D.C. 1998); *Swedish Match*, 131 F.Supp. 2d 151 (D.D.C. 2000).

³³⁶ Renckens, *supra*, 162.

³³⁷ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, available at: http://ec.europa.eu/comm/competition/mergers/legislation/draft_nonhorizontal_mergers.pdf (see, Press release IP/07/1780 (November 28th, 2007), available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1780&format=HTML&aged=0&language=EN&guiLanguage=en>).

³³⁸ *Id.*, par. 6.

³³⁹ *Id.*, paras. 11-14.

treat such cases with adequate attention. However, it is unclear if the business community shall treat issuance of these Guidelines as a signal of enhanced enforcement in this area or simply as a clarification of the Commission's approach towards non-horizontal mergers³⁴⁰. On the other side of the Atlantic, the last time U.S. antitrust enforcement agencies issued guidelines on non-horizontal mergers was in 1984³⁴¹, reflecting their approach that horizontal mergers pose much more significant competition concerns, while non-horizontal mergers are generally perceived as precompetitive³⁴².

To sum up, although the US and EU substantive tests somewhat differ, the respective merger guidelines adopt a similar analytical framework to assess the likely competitive effects of horizontal mergers. Introduction of the new test in 2004 resulted in the Commission facing in its merger analysis a new type of competitive harm, undeveloped by the European case law, therefore prone to tracking the U.S. experience. The 2004 ECMR and 2004 EC Horizontal Merger Guidelines clearly state that the EU wanted to keep up with the U.S. in applying unilateral effects theory. As the U.S. experience teaches, however, there are not many situations in which antitrust authorities can rely on unilateral effects analysis in challenging a merger, where there is no evidence of a leading firm dominance³⁴³. The *United States v. Oracle Corp.* case³⁴⁴ is an example that American courts, in considering possible unilateral effects, still are unwilling to leave traditionally used tools for defining markets and assessing market power³⁴⁵. The Court, with an affirmation of the SSNIP test for showing

³⁴⁰ Alexandr Svetlicinii, *Assessment of the Non-Horizontal Mergers: Is There a Chance for the Efficiency Defense in EC Merger Control*, 28 E.C.L.R. 529, 538 (2007).

³⁴¹ U.S. Department of Justice 1984 Merger Guidelines, *supra*.

³⁴² *Id.*

³⁴³ Egge et al., *supra*, 40.

³⁴⁴ *United States v. Oracle Corp.*, 331 F.Supp. 2d 1098 (N.D. Cal. 2004).

³⁴⁵ Egge et al., *supra*, 40.

localized competition, suggested that a unilateral effects case is still, in essence, about merger to dominance in a properly defined relevant market³⁴⁶.

4.3.3.3. Portfolio effects

As it has been discussed *supra*, treatment of portfolio effects is one of the issues that have raised major dissonance between EU and U.S. antitrust enforcement agencies. The most prominent recent example causing fierce international debate was the Commission's prohibition of GE's proposed merger with Honeywell International³⁴⁷. Four years after the fact, the CFI delivered a judgment in the Honeywell's appeal case, while – what has to be noted – it was still embedded in the old regime of 1989 ECMR. The transatlantic debate over the *Honeywell* decision focused mainly on the Commission's conglomerate effects theories.

The CFI ruled that the Commission was not justified in its allegations based on bundling theories, because it did not convince the Court that the post-merger firm would have bundled sales of GE's engines with Honeywell's avionics and non-avionics products. In absence of such bundled sales, the fact that the merged entity would have had a wider range of products than its competitors was not sufficient to establish that dominant positions would have been created or strengthened for it on the different markets concerned³⁴⁸. The CFI, however, agreed with the Commission as to its findings that the merger would have created or strengthened pre-existing dominant positions, while in each of those markets the creation or strengthening of a dominant position would have resulted in effective competition being

³⁴⁶ *Id.*, 41.

³⁴⁷ Cases T-209/01, *Honeywell v. Commission*, and T-210/01, *General Electric v. Commission*, [2005] ECR II-5527.

³⁴⁸ *See*, T-210/01, *General Electric v. Commission*, par. 470.

significantly impeded in the common market³⁴⁹. These grounds were sufficient for the CFI to uphold the Commission's decision, nevertheless, it was of little practical importance since the transaction had been already abandoned a long time before. An important doctrinal consequence follows, however, from that judgment. On one hand, the CFI treats conglomerate theories with strict standards of competitive harm assessment, while, on the other hand, a more relaxed approach applies when it comes to its horizontal theories³⁵⁰. As Kolasky has noticed, the dissonance between different parts of the CFI's judgment leaves the divergent outcomes of *GE/Honeywell* merger control in the US and EU unresolved – the U.S. DoJ, with the same facts as the Commission was looking at, could hardly find any horizontal overlaps, which the CFI held were so serious to warrant prohibition of the entire merger³⁵¹. It has been argued, that the CFI's judgment upholding the prohibition of the merger, based on the horizontal overlaps between the GE and Honeywell, the CFI returned to a purely structural analysis which does not correspond with the court's much more economically sophisticated analysis of conglomerate effects theories presented in the Commission's decision and of the Commission's coordinated effects theory of competitive harm in *Airtours*³⁵². Taking into account the want of convergence with the U.S. substantial analysis criteria, this judgment might have been in fact a step back³⁵³.

Moreover, as for the portfolio effects, the CFI applied old the standards already developed in *Tetra Laval*, not trying to invent any novel concepts. Kolasky also argued, that the threshold for dominance in Europe is lower than the threshold for monopolization in the

³⁴⁹ *Id.*, par. 732.

³⁵⁰ Kolasky, *GE/Honeywell...*, *supra*, 70.

³⁵¹ *Id.*

³⁵² *Id.*, 76.

³⁵³ The judgment has been also criticized for applying new definitions of the relevant markets, supported only by "fragments of anecdotal evidence and opinion testimony from opponents to the merger", instead of requiring the Commission to back those definitions with solid empirical data, as the US courts normally demand (*id.*).

U.S.³⁵⁴, therefore the two jurisdictions still apply very different methodologies in determining dominance³⁵⁵. It is nevertheless worth noting, that the part of the judgment rejecting Commission's theories on portfolio effect the merger might bring some more comfort to those concerned with the potentially far-reaching consequences of the Commission's use of those theories, especially in the U.S.

³⁵⁴ That was because the court upheld the Commission's finding that GE was dominant in the market for engines for large commercial jet aircrafts, although concluded that the Commission had made manifest errors of assessment in finding that the merger would strengthen GE's existing dominant position in that market or create a dominant position in the markets in which Honeywell operated.

³⁵⁵ *Id.*, 71.

5. CONCLUSION

The 2004 merger control reform in the EU was just a point in an ongoing process of evolution of the substantive merger assessment standards. Looking from that perspective, expecting sudden revolutionary changes seems unwise. Gradual development of the EU merger control regime shows that this process is not an easy one, especially when every change of law must be consulted within a group of 27 Member States. The Commission, every now and then, has been accused of being vulnerable to political pressure, such as in the recent decision prohibiting the *Ryanair/Air Lingus* merger³⁵⁶, yet the allegation does not seem to be justified³⁵⁷. It should be rather concluded, that on the way to improve the EU standards for substantive analysis of mergers and to bring a further convergence with the U.S. regime, there are hurdles such as different underlying policies (especially regarding the economic models), which will take time to overcome, and probably never a full convergence of EU and U.S. approach to merger control will take place. It also has to be borne in mind, that even if the EU introduced exactly the same SLC test as it is used in the U.S., different outcomes of decisions would remain always a possibility.

The EU has introduced a number of new economic ideas in the substantive merger analysis, which are probably at the fullest embodied in the 2004 Horizontal Merger Guidelines – the most prominent example of convergence with the U.S. standards. There is a noticeable process in the EU towards accentuating market assessment criteria characteristic to an effects-based approach to merger control. By far the most important development was the alignment with the U.S. Horizontal Merger Guidelines 1992/97 as to recognition of efficiency

³⁵⁶ Case COMP/M.4439 *Ryanair/Aer Lingus*, EC Commission Decision of June 26th, 2007.

³⁵⁷ See, Stephen Castle & Nicola Clark, *European Regulator Blocks Ryanair Bid for Aer Lingus*, New York Times (June 28th, 2007), <http://www.nytimes.com/2007/06/28/business/worldbusiness/28ryanair.html>.

gains and a consumer welfare standard. It has been, however, argued that neither the EU nor the U.S. have yet implemented a true “efficiency defense”, but only a weaker form of taking into account efficiencies in the overall assessment of particular mergers³⁵⁸. No merger has been yet cleared solely on the grounds of efficiencies, therefore, future development of this field shall be awaited.

The Commission’s claim expressed in 2001 in the Green Paper, that if the “gap” really existed it was a rather negligible margin of cases³⁵⁹, finds now a somewhat better justification, since after “closing the gap” in 2004 became a fact, finding of a “gap case” to prove that the switch to the SIEC test brought a significant difference has not been an easy task. On the other hand, introduction of new theories, especially in such a complicated field of law as merger control, will definitely take time to produce satisfactory results, as shown by the U.S. competition authorities’ practice, which does not yet show an unconditional trust in the unilateral effects theory.

What could be a more worrying aftermath of the adoption of the SIEC test are the suggestions raised that, in departure from a more static substantive merger analysis, the Commission has now more leeway in assessment of competitive harm, which could lead to lowering the threshold of interventionism. If that will really be the case depends on the way the Commission will use that discretion, although several statistical data, invoked in this paper, do not suggest that the EU merger control enforcement has ever been more interventionist than in the U.S. Widening the room for discretionary decisions in the appraisal process, however, translates to the Commission’s decisions being permanently more difficult

³⁵⁸ Renckens, *supra*, 152.

³⁵⁹ EC Commission, Green Paper on the Review of Council Regulation (EEC) No. 4064/89, *supra*, par. 166.

to predict³⁶⁰. Lack of a final resolution of the portfolio effects in the EU also contributes to that effect.

Fifteen years ago the U.S. system of merger control regime was described as more “user-friendly competition law”, because it was more transparent regarding policy and definitely more consistent³⁶¹. Taking into account the convergence with the U.S., especially improvements in economic rationale of Commission’s decisions, maybe soon the EU merger control will be labeled by someone likewise.

³⁶⁰ Arndt Christiansen, *The „more economic approach” In the EU merger control – A critical assessment*, Deutsche Bank Research, Working Paper Series, Research Notes 21 (March 1st, 2006), available at: www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000196093.pdf.

³⁶¹ Sergio Baches Opi, *US/EU Merger Control. How Should the US Experience Influence the Enforcement of Council Regulation 4064/89 on the Control of Concentrations between Undertakings?*, Leuven Law Series, Centre for Advanced Legal Studies, 70 (1997).

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U.S. Department of Justice 1982 Merger Guidelines

U.S. Department of Justice 1984 Merger Guidelines

U.S. Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines

U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, issued April 2nd, 1992 (version revised April 8th, 1997)