REPUBLIC OF TURKEY
UNIVERSITY OF BAHÇEŞEHİR

IMPACT OF THE NEW EUROPEAN COMMUNITY MERGER REGULATION WITH AMENDMENTS TO THE OLD MERGER REGULATION

Graduate Thesis

FATMA İPEK GÜÇEL

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REPUBLIC OF TURKEY
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INSTITUTE OF SOCIAL SCIENCES

EUROPEAN PUBLIC LAW AND EUROPEAN INTEGRATION

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ABSTRACT

IMPACT OF THE NEW EUROPEAN COMMUNITY MERGER REGULATION WITH AMENDMENTS TO THE OLD MERGER REGULATION

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European Public Law and European Integration

Supervisor: Prof. Manos Maganaris

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Mergers are essential for competition law in accordance with the global economy, the companies prefer to merge in order to augment their profit and to compete effectively. In this work the main and important amendments that the new merger regulation (139/2004) will bring into European competition law system have been studied. Here the factors which accelerated the renovation of the merger regulation have been described and the main questions why the Commission needed to a reform in the merger regulation have been analyzed and whether the reform have been satisfactory enough.

The changes, the examination and the explanation of the significant amendments of the merger regulation are the main issues of this study. The reasons that forced the Commission to realize these changes were the pressure from the business community, member state authorities and the milestone of the reform was the three landmark judgments of the Court of First Instance. The Airtours/First Choice, Schneider/Legrand and Tetra Laval/Sidel were three important cases that the parties appealed the Commission's prohibition decisions. The Commission's evaluation of mergers and decision making process were strictly criticized after these appeals. The Commission sought after these severe criticism of the Court of First Instance and European Court of Justice, that a reform was necessary and required. The aim of the reform was also to bring into line the European Commission (EC) rules with United States (US) rules.

The changes were intended to lessen the concerns of the business community and the merging parties. There were arguments against these changes but at the end the most parties agreed that the changes are in favor of the merging parties and Commission. The Commission regained its power, trust and reputation that it risked to lose after annulment decisions, by improving the efficiency and the decision making process of the merger control systems.

Keywords : Competition Law, European Community Merger Regulation, Procedural Amendments, Jurisdictional Amendments

ÖZET

ESKİ BİRLEŞMELERİN DENETLENMESİ HAKKINDAKİ KONSEY TÜZÜĞÜNE YAPILAN DEĞİŞİKLERLE YENİ KONSEY TÜZÜĞÜNÜN ETKİSİ

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Globalleşen ekonomi neticesinde şirketler arasındaki rekabet artmış ve şirketler büyüyerek rekabet güçlerini arttırmak amacıyla birleşme yoluna daha çok başvurmaya başlamışlardır. 4064/89 sayılı konsey tüzüğü Birleşmelerin Denetlenmesi hakkındaki konsey tüzüğüdür. Birleşmelerin denetlenmesi tüzüğünün revizyonu amacıyla 2001 yılında yeşil kitap yayınlanmıştır. Bunun üzerine yeni bir konsey tüzüğü teklifi hazırlanmış ve konsey tarafından Avrupa Birliği mevzuatının daha kolay anlaşılabilir ve ulaşılabilir hale gelmesi amacıyla 139/2004 sayılı yeni tüzük ile 4064/89 sayılı eski tüzük yürürlükten kaldırılmıştır.

Bu çalışmada 139/2004 sayılı yeni tüzüğün Avrupa Rekabet hukukuna getirmiş olduğu önemli ve esaslı değişiklikler irdelenmiştir. Aynı zamanda birleşmelerin tanımı, neden bu konuda denetlemeye ihtiyaç duyulduğu, olumlu ve olumsuz etkileri, çeşitli oluşum şekilleri irdelenmiştir. Ayrıca Avrupa Topluluğu'nda şirket birleşmeleri hakkındaki tüzüğün yenilenmesini hızlandıran faktörler, tüzüğün gelişimi ve Komisyonun tüzükte bir reforma neden ihtiyaç duyduğu ele alınmış, bu konuyu gündeme getiren çeşitli mahkeme kararları incelenmiştir. Yapılan değişiklikler ana olarak birkaç başlık altında toplanmış ve ayrı ayrı incelemeye alınmıştır, yapılan reformun yeterli olup olmadığı üzerinde durulmuştur.

Yeni tüzükle beraber maddi ve usuli önemli ve esaslı değişiklikler yapılmış olmakla beraber sistemin özüne sadık kalınmıştır. Yapılan önemli değişikliklerin incelenmesi ve açıklanması bu çalışmanın ana konusudur. Komisyonu bu değişiklikleri yapmaya iten nedenler iş çevrelerinden gelen baskı, üye devlet yetkililerinin baskısı ve Komisyon kararlarının üç önemli davada iptal edilmesidir. Bu kararlardan sonra Komisyonun birleşmeleri değerlendirmesi ve karar verme süreci sıkı şekilde eleştirilmiştir. Bu eleştiriler üzerine Komisyon ilgili tüzükte bir reformun gerekli olduğunu görmüştür. Reformun bir diğer amacı da Avrupa Birliği rekabet hukuku kurallarını Amerikan rekabet hukuk kuralları ile aynı seviyeye getirmektir. Komisyon mahkemenin iptal kararlarıyla kaybetme riskine girdiği güven ve saygınlığı birleşmelerin kontrolü sisteminin etkinliğini artırarak ve karar verme sürecini geliştirerek yeni tüzük ile yeniden kazanmıştır.

Anahtar Kelimeler: Rekabet Hukuku, Teşebbüsler Arası Birleşmelerin Denetlenmesi Hakkındaki Konsey Tüzüğü, Usuli Değişiklikler, Yargısal Değişiklikler

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LIST OF ABBREVIATIONS

Court Of First Instance	:CFI
Competition Policy Newsletter	:CPNL
European Commission	: EC
European Court Of Justice	: ECJ
European Community Merger Regulation	: ECMR
European Coal And Steel Community	: ECSC
European Union	: EU
Hirschman Herfindahl Index	: HHI
United Kingdom	:UK
United States Of America	:USA

1.INTRODUCTION

In accordance with the globalization of the economy the notion of the competition become more and more significant. The number of mergers are increasing day by day because companies concerning globalization of the economy are preferring to merge in order to reduce cost and augment prices. Under this economy conditions mergers are unavoidable but beside their benefit mergers may raise severe competition concerns such as they may result in the undertakings acquiring or strengthening a market dominance and increase the price of products or services in the market. If mergers are so necessary also there will be a need for merger control. Until 1989 there was not any current merger regulation to control mergers in the European Union. In the European Coal and Steel Community Treaty (ECSC Treaty) provisions to control mergers in the coal and steel sectors were included. Although there was any comparable provision in the European Community Treaty (EC Treaty). Finally the member states agreed on a text of merger regulation because in the late 1980s merger activity increased significantly and in the mean time another purpose was to limit the power of the commission to review mergers.

The EC merger regulation 4064/89 (21 September 1990) was a successful regulation, until the Court of First Instance's (CFI) annulment decisions. In 2002 the CFI and European Court of Justice (ECJ) by accomplishing a severe criticism of the commission's analysis annulled three prohibition decisions of commission in Airtours/First Choice, Schneider/Legrand and Tetra Laval/Sidel cases. After these annulment decisions a reform for the commission to the merger regulation became inevitable. As a consequence of this development the new merger regulation 139/2004 on the control of concentrations between undertakings came into force on 1 may 2004 and replaced the old European Community Merger Regulation (ECMR) 4064/89. The crisis raised by the CFI's annulment decisions was discussed in chapter four of the thesis and in a detailed way in chapter six also due to the significance of the three cases depending on the weaknesses of the previous merger regulation. These cases proved that some important circumstances such as collective

dominance were not covered under the previous system, the commission's case analysis was not proper and the standard of proof was lacking in its analysis according to the ECJ and CFI decisions.

The aim of this thesis is to draw attention to the main and significant changes that the new ECMR will bring into EC competition law system by comparing to the procedures and rules stated under the old ECMR. The old regulation was causing concerns and problems for the business community, merging parties and the member state authorities, which were stated by the ECJ and CFI's annulment decisions. Mario Monti commissioner responsible for competition described the new regulation as 'a smooth revolution but a revolution nevertheless'. These reforms increased the level of economic analysis, enhanced the Commission decision making process, extended time limits, simplified referral of cases and ensured that the Commission decisions are reasonable and based on solid facts. These developments were worthwhile taking into consideration the ten new member states joining the European Union on 1 may 2004.

The thesis has seven chapters, under chapter two the description of the mergers, need of merger control, advantages and disadvantages of a merger, types of mergers such as horizontal, vertical, and conglomerate mergers are dealt. Under chapter three the history of the European merger control regulation is dealt. Under chapter four the main reason of the reform is described which are the three annulment decisions of the CFI annulling the Commission's prohibition decisions. The chapter five is an introduction to the new merger regulation by determining the changes and the purposes of the changes. This chapter covers also the definition of concentrations, joint ventures and community dimension and if there are changes concerning these issues. These procedural changes include the notification, extension of time limits in phase I and phase II investigations and the simplification of the referral system. The most important change which is the change of the substantive criteria to prohibit mergers, enhancement of the investigative powers of the Commission and increase of fines, merger defenses such as efficiencies and failing firm defense and also other changes which were not requiring the amendment of the regulation are the issue of

this chapter. Finally under chapter six a final analysis and evaluation of the amendments is done to highlight if the changes are in right direction and the main concerns raised by the CFI annulment decisions are considered. This chapter also summarizes changes and include arguments against and in favor of the changes. In conclusions section, the problems of the previous system and how much the new rules will be able to lessen the previous problems are summarized.

2. MERGERS

2.1. WHAT IS A MERGER

A merger takes place where two or more previously independent entities come together. A number of different transactions and agreements made between undertakings could have as a result an unification of the independent undertakings decision-making process. Thus to define the definition of what composes a merger is important for the purposes of any merger control legislation that every jurisdiction needs. The subject of the ECMR are ‘concentrations’ and it applies to them. According to community law, the word ‘concentration’ is the term used in the ECMR in preference to ‘merger’. “Broadly, there is a concentration where two or more previously independent undertakings merge their businesses or where there is a change in control of an undertaking (sole or joint control of an undertaking being acquired by another undertaking or undertakings.)” (Jones and Sufrin 2004, p.847).

The main question is ‘how a merger can occur?’ and the answer is a real merger happens when two different undertakings merge completely into a new entity. Where a company acquires all or a majority of the shares in another company, if as a consequence the acquiring company become able to control the affairs of the other company this would be called as a merger. In particular circumstances even the acquisition of a minority shareholding may be sufficient to meet the requirements of a merger. Another way to make occurring a merger would be the acquisition of assets, for instance a well known brand name. A joint venture company where two or more undertakings merge part of their businesses, this situation may be found to be parties to a merger. In each situation the essential question is if previously independent businesses have take place or will take place under common control.

During years the number of large mergers augmented because of the global market and competition in every sectors forced companies to restructure and consolidate their place in

this changing world. For example in 2000 Glaxo Welcome and Smith Kline merged and they created the new entity Glaxo Smith Kline. As a result of the merger in the pharmaceuticals industry the new entity become the largest pharmaceutical company in the world. Major mergers also occurred in the car industry for instance, between Daimler-Benz and Chrysler, between Ford and Volvo, between Renault and Nissan and between General Motors and Saab. “In the oil industry Exxon merged with Mobil to become the largest oil company in the world and BP Amoco merged with Arco.” (Whish 2003, p.781)

“In the world of business the process that may lead to this joining of ownership may take many different forms and may be either amicable and consensual or unwelcome and hostile” (Furse 2004, p.312).

2.2. WHY THERE IS A NEED OF MERGER CONTROL

Every regime that wants to regulate competition has to see legal control of mergers as an important and essential factor. Mergers can cause serious competition inquietudes. Especially the enterprises subject of a merger can obtain or strengthen a position of market power and as a result the market price of the products or services on the relevant market will be increased. The duty of the competition authorities is to recognize and to prohibit those mergers and such mergers can have an undesirable influence on competition or general public. Because of this bad influence the authorities should pay no attention to the benefits resulting from them. Consequently, the purposes and benefits of mergers are important. The key to efficient merger control is to recognize why and when a merger should be forbidden. On the other hand a lot of efficiency opportunities may be provided by the mergers such as the opportunity to sell a business.

Competition authorities have a tendency to consider control over mergers and acquisitions by big and dominant corporations as one of their most main affairs. Such authorities are

affected not only with the behavior of enterprises but also with the potential consequences on market structures, and remarkably on the extent of concentration and subsequent intensification in market dominance which mergers may bring about above all product and geographic markets. Any competition authority for that reason with not enough substantive and procedural control on major merger applications functions under a serious difficulty. Merger control is in particular about prediction, if the merger is permitted will the market be not as much of competitive and for that reason be damaging to consumer interests. "The policy goals behind merger control relate to two factors: the creation or extension of monopoly power, including the raising of barriers to entry for potential competitors, and secondly increasing the scope for collusion in a market which post-merger will be more oligopolistic and less competitive than was the market pre-merger" (Furse 2004, p.312). It will be noticed that the first of these two factors is connected to the control of dominant corporation behavior and in the EC dominance itself is not convicted. On the other hand in merger control there is a state of affairs where the achievement or expansion of dominance may be convicted.

The reality that mergers take place for various intentions, and that the results cannot be definite, recommends that as such rule prohibiting mergers should not be accepted and that mergers are supposed to be appraised on a case-by-case basis. "This is the process that exists in the EC and the UK, as well as the USA, although in the case of horizontal mergers there are some presumptions relating to the size of market shares pre- and post-merger which may come into play" (Furse 2004, p.314).

The merger is expected to be impeded where the consequence of a merger is to significantly reduce competition or to create or strengthen a dominant position as a result of which competition will be weakened.

The reason behind the merger control is to enable competition authorities to regulate variations in market structure by making a decision whether two or more commercial companies may merge, combine or consolidate their business into one. It has previously

been perceived that the community authorities are unwelcoming anti-competitive agreements terminated between autonomous companies (in particular horizontal ones). Mergers as expected form a more enduring and continuous variation on the market comparing to the agreements. It might be predictable for that reason that a lot of mergers in particular horizontal mergers would be prohibited.

Mergers may have an effect in accordance with the interests of individual shareholders on the other hand this is not the object for merger control. Merger control is achieved in the public interest more willingly than on behalf of shareholders. The Treaty of Rome did not include provisions on mergers it was not until the adoption of the ECMR in 1989 that efficient control could be implemented over concentrations by the European Commission, on the other hand the former Treaty of Paris of 1951 establishing the European Coal and Steel Community included explicit rules on mergers from the beginning.

Merger control is an interference with the operation of the market in which shareholders buy and sell shares as they deem appropriate free from regulatory interference (Whish 2005, p.787). The essential problem is to determine whether and if so on what grounds it is right to interfere and to avoid transactions or to require modifications to them as a result of probable detriments to the public interest. The assessment of whether a concentration should be permitted under the ECMR is built simply on the matter of competition. It is essential to recognize that merger control is most of all related to the protection of a competitive market construction. "There is a very useful paragraph in the judgment of the CFI in Gencor v. Commission (Case T-102/96 [1999] ECR II-753,[1999] 4 CMLR 971) which says precisely;
'As regards the argument that the community cannot claim to have jurisdiction in respect of a concentration on the basis of future and hypothetical behavior, namely parallel conduct on the part of the undertakings operating in the relevant market where that conduct might or might not fall within the competence of the community under the treaty, it must be stated, as pointed out above in connection with the question whether the concentration has an immediate effect, that, while the elimination of the risk of future abuses may be a legitimate

concern of any competent competition authority, the main objective in exercising control over concentrations at community level is to ensure that the restructuring of undertakings does not result in the creation of positions of economic power which may significantly impede effective competition in the common market. Community jurisdiction is therefore founded, first and foremost, on the need to avoid the establishment of market structures which may create or strengthen a dominant position, and not on the need to control directly possible abuses of a dominant position."(Whish 2005, pp. 787-788)

As a matter of fact forbidding mergers on social grounds or for industrial policy grounds may be completely in opposition to the development of competition. The measures necessary to facilitate the development of a single and common European market were taken by the EC. The merger control of the European Union was intended at the same time to examine the mergers with significant cross border effects.

2.3. ADVANTAGES OF A MERGER

In many situations the parties will affirm that the most important purpose for their merger is that the merged entity will be more well-organized. Mergers may for that reason facilitate enterprises to improve these well-organized forces of manufacture, research and progress and delivery more quickly and more economically than they could by in-house progress. The merger may lead to new and better administration to the company by employing competent managers.

A merger may supply an escape way for a company facing an otherwise inescapable insolvency. In this situation for example the option of selling the business to another may indicate that valuable benefits are maintained in production and that creditors, owners, and workers are defended from the harmful results of the enterprise's collapse.

The market integration can be made possible by cross border mergers. The need to improve the amount of national and European companies may be an objective of national or

European industrial strategy. The capability to reform or to construct national or European champions may for instance signify that the parties can in mixture continue to exist and compete more successfully on global markets, play a part of industrial and financial progress and or make easy cross border commerce.

The globalization of markets in recent years as tax and further impediments to commerce have reduced and surprisingly quick industrial revolutions have modified the characteristics and composition of markets has given occasions to companies to enlarge into bigger geographical markets. It may be that a company can realize economies of scale by internal development, in the same way in spite of this it may be that this can on the whole without difficulty be realized by external development which is by merging with other companies. It may also be that the actual cause why companies want to merge is that this will remove competition among them, improve their market strength and give them the capability to control output and increase cost.

Mergers occur, similar to nearly all trade attempts, for the most part with the purpose of increasing profits. The consequence of the merger is to decrease the competition between the participants to the merger, or where the merger causes cost cuts because of the obtaining of effectiveness as a result of the uniting of assets and fixed issues of production, permitting costs to be decreased and market shares to be augmented. If an enterprise is considering to augment its market share, the option to a merger is to develop production unilaterally. A merger may have specific benefits when an enterprise hopes to expand into a market in which it is not at present based by defeating barriers to entry, and once more preventing intense competition, which is supposed to the current desire to protect its region. Mergers in addition permit a much faster, and a further definite answer than makes a policy of internal progress. It possibly will take no more than three months for a considerable merger to generate effects. On the contrary, years are needed for similar effects to be reached compared to a competitive process. In a number of cases mergers might be forced through the wish of business leaders to administer a bigger entity, and maybe to function at a global, more willingly than regional level. Mergers can facilitate industrial restructuring,

as they can support the creation of national or European champions, and thus contribute positively to a national industrial policy (Chalmers 2006, p.1070).

It would be incorrect to consider that all mergers are a harmful item. There are a lot of means wherein they can have an advantageous effect. The most significant of these is the instance based on economic effectiveness. One of this effect is about economies of scale. It is obvious that companies will produce most professionally when they can increase economies of scale. “A certain product may, for example, be made most efficiently with a particular piece of machinery but this machinery may require a turnover of a specific amount before it is economically viable” (Craig and De Burca 2003, p.1036). A further feature of the effectiveness argument is connected with distributional effectiveness. For instance it will be more efficient when a manufacturing company in order to extend its operations in another market by merging with an existing distributor in this market can provide this without learning the skills of this new area.

On the other hand mergers as well provide the holder of a business the occasion to sell it. Entrepreneurs might be hesitant to establish a business without this option. Furthermore mergers offer a lot of additional effectiveness occasions. It has been previously noticed that a small number of people would get into trouble to set up a business if they could not sell it when they have as much as they can take or when they wanted to achieve capital profits from it. Especially smaller business owners especially may wish to sell their business. The merger regulation distinguishes the predictability and interest of mergers within the community. “Thus the third recital to the regulation acknowledges that the dismantling of internal frontiers will result in major corporate reorganization, while the fourth recital states that this is to be welcomed as one means of increasing the competitiveness of European industry on world markets”(Craig and De Burca 2003, p.1037).

2.4.DISADVANTAGES OF A MERGER

An obvious effect on competition may be created by a merger. There is a risk that enterprises may want to merge with the purpose of realizing or intensifying their market control. Even if the purpose for a merger is not dominance or the achievement of market power, it may result this way. A merger control system concentrating completely on competition matters will adopt a severe strategy in opposition to such mergers. It is questionable that even where a situation of market power is obtained or reinforced, a merger is supposed to be allowed if, for example it shows the way to better effectiveness(the cost discounts out coming from the merger are more important than the harmful influence of the merger on consumer interests as a whole), the merger will rescue a company which otherwise faces an unavoidable liquidation or the merger is confirmed at the same time as an issue of industrial or public or further policy. Whether or not the ECMR is supposed to take into consideration these issues. It is worried about that too immense economic concentration is anti democratic and restricts personal liberty and enterprise or that it has an undesirable consequence on the distribution of fortune. One of the targets of European competition should be the distribution of economic force and the protection of personal liberty. In these areas it might be supposed that a broader sort of issues should be taken into consideration in finding out whether or not a merger works in the public interest. The preservation of the ‘plurality of the press’ may be required by the interests of democracy or the ownership of certain industries such as oil and defense equipment does not pass overseas this may be required by the national security. “Mergers may mean asset-stripping, profits to share holders, rationalization, and loss of jobs” (Jones and Sufrin 2004, p.854). Mergers may cause problems when they take place in poor regions or in areas in which job loss is already extreme.

Mergers can moreover create unpleasant results on employment as a consequence may have an effect on particular regions unfavorably when industries are power cut. For these reasons member states as well as some EC institutions, notably the Economic and Social Committee were opposed to give up control of mergers to the EC as they distinguish

merger policy as an significant internal strategy instrument. Regional strategy represents an underlying principle in favor of regulation of merger progress. A merger possibly will be in charge of the validation of available factories, by way of major results on unemployment and local dynamism. A regime may perhaps prefer to benefit from merger strategy as one method of preserving a fair allocation of prosperity and employment occasions all over the country.

An additional purpose of legal arrangements, which tries to control merger activity is that mergers have been used to strip the benefits of the purchased company. Even if this may be in the short-term interests of some shareholders, it may not be in the longer-term public interest. Matters of this kind have been in a straight line promoted by experimental study, which points out that mergers regularly do not create the benefits which were anticipated of them.

2.5. TYPES OF MERGERS

2.5.1 HORIZONTAL MERGERS

Horizontal mergers are those that occur between corporations which produce the similar merchandises and function at the equivalent level of the market. Horizontal mergers are potentially the most detrimental ones to the competitive process. A horizontal merger may facilitate the new organization to agree on the costs and the products in a similar manner to a single-firm monopolist, with the same outcomes for consumer interests. In some countries indices are used to calculate the decrease of competition caused by the merger and the most known of the indices is Herfindahl-Hirschman Index which is used in the USA. "As Hovenkamp points out such mergers have two important implications for the market on which the merging firms operate:

Because the horizontal merger involves two firms in the same market, it produces two consequences that do not flow from vertical or conglomerate mergers: 1) after the merger the relevant market has one firm less than before 2) the post-merger firm ordinarily has a larger market share than either of the partners had before the merger" (Sufrin and Jones 2004, p.850). The decrease in the number of companies operating on the market and the intensification in concentration may augment competition worries. Markets under control of a sole undertaking may not provide the same competence as those reached in a competitive market. Further, that it is complicated for competition authorities to control the activities of a dominant undertaking and to notice misuse of market force. An effective merger policy try to find to avoid these obstacles by preventing enterprises from merging where the parties will acquire or strengthen a position of market power which might be misused at the spending of customers and protected by anti- competitive activities. A merger between two or more previously independent undertakings which does not show the way to the formation of individual market power may show the way to a significant increase in the concentration of a specific industry and in addition allow the undertakings operating on the market to augment cost and limit productivity, whether by means of precise or implicit coordination of their activities, coordinated effects or by means of non-coordinated, unilateral effects. In the EC the extent to which the ECMR is and has been

able to prevent mergers leading to coordinated or non-coordinated effects on oligopolistic markets has been controversial (Sufrin and Jones 2004, p. 851).

Horizontal results arise where a merger takes place among rivals in the same product and geographic markets and at the same level of the production or distribution progression. "As a general proposition horizontal mergers present a greater danger to competition than vertical ones, in the same way that horizontal agreements are treated more strictly than vertical agreements, horizontal mergers may be scrutinized both for their 'unilateral' effects and for their 'coordinated' effects, concepts that are not free from difficulty" (Whish 2005, p.780).

A large amount of the mergers taken into account have been among rivals and have augmented market shares, however certain mergers have been vertical or conglomerate. A modified set of horizontal guidelines is published by the commission. In the case of merger of two potential competitors, as a consequence competition among them will end and the next problem is what will happen if there is not enough competition from other undertakings to limit the decisions and the prices that merging entity will fix. To see what will happen the description and the review of the relevant market is considered necessary. Another possibility opposed to competition is that the merged company and an independent competitor may start to function as if they were joining together in a determined market. In general horizontal mergers constitute the greater part of the mergers.

"The key issue with horizontal mergers is that they may allow market power to be wielded, either by single firm monopolists or by collusive oligopolies" (Furse 2004, p.314). A notice on the appraisal of horizontal mergers has been developed in 2004 by the commission.

2.5.2.VERTICAL MERGERS

If firms at different stages of production in the market will merge this will be named as a vertical merger. Like horizontal mergers, vertical mergers also may cause some

competition troubles. The main concern is that vertical mergers may exclude the market or a source of supply to competitors. A provider and real or potential customer are frequently involved in vertical mergers. A lot of competition issues can be brought about by vertical mergers like the risk of foreclosure or forming a more favorable environment for collusive activities. For instance if a producer of a product and a provider of an essential element for that product merge, that merger may cause serious consequences for competing producers. If there are few or no other providers of the essential elements, the foreclosure result will be more serious. In a similar manner when a producer purchase a distributor, it will become more difficult for competitors to deliver their products. "In the USA the competition authorities have not frequently in recent times been interested in either vertical or conglomerate mergers since they consider that these mergers rarely lead to the increase of market power" (Sufrin and Jones 2004, p.852).

Vertical results may be happened where a firm possess control of another firm and more the distribution chain. A harmful result on competition can be caused by a vertical merger, especially when the market becomes blocked to third parties; we can give an example, where a firm acquires another firm which has monopoly power with respect to an important rare substance or they will able to work only by unfair idioms, and as a consequence they won't be able to compete successfully. In a number of cases that vertical matters have taken place are in the telecommunications or multimedia sector in general (Whish 2005,p.780). In general vertical mergers can cause less economic harm than horizontal mergers.

The commission considers mainly the foreclosure result when regulating this type of mergers. Despite the fact that the substantive test of the ECMR has changed, vertical mergers will be analyzed by the commission regarding to whether a dominant position is created or strengthened by the merger which can also block market access. While the commission is allowed by the new substantive test to attack mergers which has the market power and when that foreclosure result is probable. Until that time a number of mergers were blocked by the commission because of foreclosure risk, but in recent times it has

taken a peace-making point of view appreciating that mergers are required in the development of new media markets to distribute risks and cleared mergers subject to obligations to eliminate foreclosure risks.

The parties of vertical mergers must be the companies which function at different distributive stages of the same product market. The impression of vertical mergers on competition is more open to question. “In essence a vertical merger is merely one form of vertical integration: a company may relate to those down market by a number of means ranging from ordinary contract, through exclusive-distribution arrangements to vertical merger” (Craig and De Burca 2003, p.1035). Vertical connections like this can be potentially anti-competitive by means of for instance foreclosing of outlets to other producers. This same difference of opinion reschedule into the area of vertical merger, for instance the distribution of a well-known product may be increased by a merger of this type and that’s why the inter-brand competition will be encouraged.

2.5.3.CONGLOMERATE MERGERS

A merger of firms producing products which are not in the same market but which may be replaced with each other is called as a conglomerate merger. A conglomerate merger is a merger of firms which do not compete with each other in any product market and it does not give rise to a vertical integration. “Conglomerate mergers may be divided into three main types: product line extensions (where one firm, by acquiring another, adds related items to its existing products); market extensions (where the merged firms previously sold the same products in different geographical markets); and pure conglomerates (where there is no functional link whatever between the merged firms)” (Whish 2005, p.780). In recent years the concerns about the portfolio or range effects of some mergers has expressed by the commission most noticeably in the cases of Grand Metropolitan/Guinness (Case IV/M.938, OJ [1998] L 288/24) and General Electric/ Honeywell International (Case

COMP/M 2220). The effects of conglomerate mergers are generally neutral or even beneficial for competition that is recognized by the CFI in Tetra Laval v. Commission.

Any horizontal or vertical effect has conglomerate mergers. This mergers obviously do not raise competition problems because of such mergers has no horizontal or vertical effects. The need for risk lessening can be a harmless purpose from a competition perspective which motivate the conglomerate mergers. Where an undertaking wishes to spread risk it may wish to expand into another market. There may be a concern that an undertaking can use its dominant position in a market to acquire another dominant position in that other market. If a wide portfolio of products will be offered by the merged undertakings and there is relation between the irrelevant markets, this situation can occur. There is a concern about conglomerate mergers that a loss of potential competition will be caused by conglomeracy. When undertakings operating in different product or geographic markets merge, this can cause a loss of potential competition. This can be important where the undertakings operate in neighboring product markets or where they are producing the same product but in a different geographic market. It is identified as a horizontal issue the elimination of a potential competitor in both the EC and the US. "In the commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the Horizontal Merger Guidelines) it states:
A merger with a potential competitor can generate horizontal anti-competitive effects, whether coordinated or non-coordinated, if the potential competitor significantly constrains the behavior of the firms active in the market" (Sufrin and Jones 2004, p.853). In addition the concerns about purely conglomerate mergers has been demonstrated by the commission.

In a number of decisions the concern about mergers that have conglomerate effects has been indicated. "The commission seems to be concerned both with 'portfolio power' and the ability of the merged entity to leverage its power in one market to a neighboring market through product bundling, price discrimination and or predatory pricing" (Sufrin and Jones 2004, p.962).

In both GE / Honeywell(Comp/M.2220,appeal pending Cases T-209 and 210/01,Honeywell v.Commission) and Tetra Laval/ Sidel(Case comp/M.2416,annulled on appeal case T-5/02,[2002] ECR II-4381) cases the commission prohibited mergers according to their conglomerate effects. There are disagreements on both decisions, GE / Honeywell is still on appeal and the CFI annulled the decision in Tetra Laval/Sidel. However the commission's right to get involved in mergers which have conglomerate effects is supported by the CFI. In Guinness / Grand Metropolitan(Case IV/M.938,[1998]OJ L288/24) case, as it is stated by the commission that the merger in that case would raise portfolio effects. The dominant position in these markets would be strengthened by means of portfolio effects.

"The commission's decision in Guinness /Grand Metropolitan has been criticized not for its adoption of the concept of portfolio power but for failing to identify with sufficient clarity what is wrong with an undertaking's acquisition of a wider portfolio of products"(Sufrin and Jones 2004, p.963).

In a conglomerate merger, the parties are operating in different markets. When the products of the two firms are in relation and as a result selling the products together gives a competitive advantage to the merged entity, these mergers make business sense. The conglomerate mergers are efficiency enhancing as a consequence of the cost savings and for this reason, the competition concerns should not be raised in relation to the merger.

As a matter of fact the conglomerate mergers did not concern American antitrust authorities, but in opposition to American authorities the commission believes that these mergers demand examination, because of their portfolio effects and leveraging. The portfolio and leveraging approaches are connected with each other and proof of similar factors are required by them such as the relevant products should be in related markets and in at least one market the merged entity should hold a dominant position and buyers and the competitors should be weak.

These factors bring to mind that a reason may have the merged entity to influence its dominant position in one market onto the other markets. This can provide the increase of its benefits by excluding the competitors. "The Court of Justice has accepted that the commission is entitled to regulate mergers that create these kinds of anti competitive risks, but has noted that proving these effects requires great care:
The analysis of a 'conglomerate type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish" (Chalmers et al. 2006, p.1105).

Particularly the quality of the evidence produced by the commission is important, the commission will rely on the evidence to adopt a decision declaring the concentration incompatible with the common market, in view of the fact that the commission's conclusion must be supported by that evidence to prove if such a decision were not adopted, the economic development anticipated by it would be possible.

When the commission has shown once that leveraging risks take place according to the court of justice, the commission is obliged to take into account any behavioral commitment by the parties which would lessen the anti competitive risks. The merger would be cleared by the commission if the parties would promise not to engage in practices that would impede effective competition. The court of justice now set up high standard of proof for conglomerate mergers and the commission will not block another conglomerate merger, especially as the CFI exercises a close degree of analysis.

3.THE HISTORY OF THE EUROPEAN MERGER CONTROL REGULATION

The European Economic Community and its institutions such as Council of Ministers, European Parliament, Court of Justice, and European Commission were established by the Treaty of Rome in 1957. The articles of this treaty were sentencing anticompetitive arrangements between competitors and abuses of dominant position. Those articles did not point out any explicit definition of merger control. However after a period of time the community accepted that there is a need for merger control. By contrast to the EC treaty, the European Coal and Steel Treaty which had been adopted six years earlier, specifically prohibited mergers that created power ‘to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market’(art.66 para.2)(Fox 2002, p.941). As a consequence, from the beginning the member states for the most part allowed control over coal and steel mergers, giving emphasis to the deliberateness of the absence of merger control in the Rome Treaty. The EC Treaty of 1957 did not contain any provision about merger and was not aimed at controlling mergers.

A lot of business enterprises were too insignificant to be competent because of trade impediments. Mergers among firms from different member states guaranteed to support market integration. At the same time the member states did not want to give up to the community sovereignty over the configuration of their economies and many of the states considered community competence over mergers as disturbing. For that reason the competition provisions of the Treaty did not point out mergers. The agreements and current co operations was regulated by article 85 (after the change article 81) of the Treaty. If production or distribution is improved by the agreements, only under the observation of the commission they could be approved for a term of year. Furthermore the behavior of dominant firms was regulated by article 86 (after the change article 82).

Despite the fact that the ECSC Treaty included provisions to control mergers in the coal and steel sectors, the EC Treaty did not include any equivalent provision about this

issue."Jean Monnet was firmly convinced of the necessity to include competition law rules in the ECSC Treaty"(Piet Jan Slot, CMLR, Apr. 2004,p.443). The distinction between the treaties was depended on two economic sectors coal and steel because at this time these sectors were very important for the economic reconstruction of Europe. Although at drafting period of the Treaty of Rome merger provisions were not discussed, the reason behind this behavior was that the member states had given much more importance to national control over economic issues. It is also possible that the basis of the EC Treaty was different than the previous treaty to place merger rules.

After a period of time the Commission noticed that there is a gap in EC competition law because of the number of mergers increased and the formation of bigger companies would have harmful results on consumers benefits and on small companies. The Commission also noticed that the articles 81 and 82 of the EC Treaty were not sufficient in the aim of controlling mergers. The content of the articles 81 and 82 of the EC Treaty is about controlling the activities of undertakings, but not controlling the permanent effect that mergers raise on the structure of the market. For this reason articles 81 and 82 according to the general opinion cannot be applied to merger circumstances. Despite the fact that the ECSC Treaty was an old Treaty and also contained an express article about this issue. An express article was not included in the EEC Treaty because the EEC competition law system did not deal with the control of mergers. "However the application by the Commission of first article 82 and then article 81 to merger situations and the approval of this action by the ECJ, confirmed that community competition law could be applied to mergers in certain circumstances"(Furse 2004, p.321).

According to the article(66) of the previous ECSC Treaty, it was possible to stop mergers in the coal and steel sectors by the authority given by this article. The Commission with the ECJ worked on this issue to solve this problem by developing the law on articles 81 and 82 to control mergers. On the other hand these articles were not enough for merger control and in 1989 the Council of Ministers implemented the European Community Merger Regulation. Following this, the regulation 1310/97 amended the ECMR in significant issues

and enter into effect from 1 March 1998. In December 2002 the Commission published its ‘proposal for a council regulation on the control of concentrations between undertakings‘ to recast the ECMR(Whish 2005, p. 793).

3.1.Assessment of Article 82

The first case considered according to article 82 is the Continental Can case. The subject of the case is a potential competitor is acquired by a dominant firm in the packaging markets. It’s pointed out by the Commission that a behavior like this could have harmful effects on competition because a dominant enterprise is affecting the competition. For this reason, it has to be considered as an abuse of article 82. According to the ECJ decision, the article 82 is applicable when a dominant enterprise possess another enterprise and as a result decrease the competition in the market and it is not has to be realized by a forced deal. “By expressly considering not only the wording of articles 81 and 82, but also the more expansive wording of article 3(g) EC to the effect that competition in the common market should not be distorted, the Court adopted a wide interpretation of the relevant provisions”(Furse 2004, p.321). The court was given the power to the Commission despite the fact that it was not expressly in the relevant legislation to adopt temporary measures, the presence was raised of the Commission using its authority to order that where mergers involved an undertaking in a dominant position would be considered as not completed. Any lack of confidence could affect merger proposals, during the period of the agreement on merger any regulatory obstacle about the terms could cause the rejection of the proposals.

In Continental Can v. Commission(Case 6/72 [1973]ECR 215,[1973] CMLR 199) case the ECJ stated that article 82 may be applicable to mergers. The competition can be restricted to a large extent by acquisition of a competitor by an enterprise in a dominant position, and an abuse can be formed by this way. A limited control over concentrations was given to the Commission by this. However, it was always an insufficient instrument. “After Continental Can the Commission was able to use this precedent in order to exert some influence over concentrations but only once subsequently did it formally prohibit a

transaction under article 82, in the case of Warner -Lambert /Gillette(OJ [1993] L 116/21,[1993] 5 CMLR 559) which concerned a transaction that took place before the ECMR came into effect"(Whish 2005, p.796). Despite the fact that mergers are now dealt with the ECMR, it is considered by the commission that the Continental Can case is a continuing authority for the intention that it can be an abuse under article 82 to change the competitive structure of a market where as a result of the very presence of the dominant undertaking the competition on that market is before now weakened.

The insufficiency of the article 82 is declared by the Commission in its statement on merger control, the reason behind this situation was this article was applicable to mergers between enterprises which had a dominant position before the merger. In Continental Can case the ECJ gave a verdict approving the commission's notices(Piet Jan Slot, CMLR, Apr 2004,p.460).

3.2.Assessment of the Article 81

"In 1966 the Commission published a 'memorandum on the concentration of enterprises in the common market' in which it said that article 81 was not applicable to agreements 'whose purpose is the acquisition of total or partial ownership of enterprises or the reorganization of the ownership of enterprises'(Whish 2005, p.794). Article 82 was related to controlling structural changes in the market and article 81 was related to the agreements between undertakings which seems unconnected with each other .

After this 1966 memorandum, some circumstances showed that there is another complicated concern like if an undertaking possess by an agreement a minority shareholding of another undertaking but did not take on the other undertaking legal or actual control.

One of the cases related to this issue is the BAT Ltd and RJ Reynolds Industries Inc v Commission(Cases 142 and 156/84,[1987] ECR 4487,[1988] 4 CMLR 24) case. The

subject of the case was an agreement among cigarette producers, one of the parties was Rembrandt group had a controlling interest in Rothmans and Philip Morris and could give Philip Morris an intense power of control on the Rembrandt tobacco division and the issue was the consideration of the application of article 81. This agreement was reported to the Commission by the parties and after the negotiations between the parties, they dedicated the agreement to the consent of the Commission. The Commission saw this agreement as it was evidence that the option of article 81 could be applicable to agreements leading to mergers. An action was brought by two big enterprises Bat and Reynolds before the ECJ according to article 230 EC aiming to test the Commission's consent decision. The court reached a decision saying that article 81 was applicable to the agreements which lead to concentrations in the market and could be prohibited by the application of this article.

The Commission's opinion was that in the beginning article 81 would not be applicable to control mergers. The aim of the article 81 as a matter of fact is not to control mergers, it is to arrange the agreements among unrelated enterprises that's why it's hard to use it for all kind of mergers. After this Commission's view has changed and it began to use article 81 in opposition to mergers. The ECJ accepted that in Bat and Reynolds v Commission case article 81 is applicable to situations where an enterprise possess another by taking a minority shareholding of it. According to the verdict of the court article 81(1) is applicable to agreed share transactions. The judgment was not satisfactory for the business side because there were issues and doubts which were not resolved like especially the application area of article 81 to mergers. The Commission and the member states were informed about these concerns too.

The problem that the acquisition of sole control was an issue which could be resolved by the application of article 81(1) was not certain and later the implementation of the ECMR was a sign of it. According to the aims of the ECMR a merger took place where an enterprise possesses control of another enterprise directly or indirectly. The ECMR 's aim is that it alone shall apply to mergers and the power of the commission to apply articles 81 and 82 is removed. "The judgment will still be important however where direct or indirect

control is not acquired so that the ECMR does not apply"(Sufrin and Jones 2004, p.858). According to the purposes of the ECMR joint ventures are not mergers but in addition article 81 means an importance for joint ventures.

In BAT and Reynolds v Commission case the ECJ analyzed that article 81(1) could be applicable in these circumstances or not. "The ECJ held that the acquisition of a shareholding could in some circumstances restrict or distort competition in the sense of article 81(1):

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

38 that will be true in particular where ,by an acquisition of a shareholding …the investing company obtains legal or de facto control of the commercial conduct of the other company or where the agreement provides for commercial cooperation…

39 that may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan'. (Whish 2005, p.794)

"The single market considerations that were so important in determining some of the key principles of the application of article 81 have also played a role in the shaping of the merger regime and the response taken to the assessment of mergers, as has the need of industry to adapt to this change in market conditions"(Furse 2004, p.319-320).

After the ECJ's verdict about BAT and Reynolds v Commission case, according to the business part the problem was not solved and finally a need for merger control at Community level was recognized by them.

4.EUROPEAN COMMUNITY MERGER REGULATION

Community regulation of mergers took place a while ago. A specific mention of merger was made neither in article 81 and 82. As early as 1973 the Commission proposed a regulation to deal with the subject and attempted to fill this gap. However, the member states were not ready to do an agreement between themselves. Despite the fact that the member states had appreciation for that some kind of merger control was needed but they could not agree on its specific form. Central issues such as the boundary line between community and national merger control divided the member states. The member states also did not agree on the more precise form on which the community control should take. “The failure to resolve these and other issues meant that successive draft merger regulations became part of the established order of things in community law” (Craig and De Burca 2003, p.1034).

In spite of this dispute in the late 1980s, there was a considerable pressure to agree a merger regulation due to a combination of factors. “First, in 1987 the court of justice found that certain mergers fell under the Commission’s jurisdiction under article 81 EC” (Chalmers et al., 2006, p.1070-1071). By this decision the Commission was allowed to intervene in many more mergers and there was a risk that the Commission could develop a merger policy independent of member states concerns by using its powers. The member states chose to agree on a text of a merger regulation. However, they would not prefer to give the Commission unregulated discretion to review mergers under the existing treaty provisions. The uncertainty over the application of articles 81 and 82 was found objectionable by the companies and they insisted on EC merger control in particular in the late 1980s when there was an obvious increase in merger activity, which also made merger review in each member state important. Secondly the completion of the internal market created an incentive on the part of the Commission to press harder for a compromise regulation efforts which were in part helped by the presence of a powerful commissioner for competition policy Sir Leon Brittan. (Chalmers et al., 2006, p.1071)

As a consequence it became apparent that some form of EC merger control was needed and the absence of this merger control was out of the ordinary. The eventual realization that a system of European merger control was inevitable and that was conducted by a combination of Commission support, pressure from industry, the single market program and increasing numbers of mergers.

On 21 December 1989 the Council Of Ministers implemented the Original European Community Merger Control Regulation 4064/89. On 21 September 1990, which is nine months later, the regulation entered into effect. Jurisdictional, procedural and substantive rules were described by the regulation. "The EC would have exclusive competence in relation to mergers falling within the thresholds set out with certain defined exceptions, this was the fundamental issue of the new regime"(Furse 2004, p.322). The Council eventually adopted this regulation requiring pre-notification to the Commission of concentrations within its scope-those where the parties turnover exceeded the thresholds-and providing for possible prohibition by the Commission (Korah 2004, p.338).

The guidance on how the Commission interpreted various aspects of the regulations was set out in the numerous Commission notices. The first green paper reviewing the ECMR was issued in 1996 by the Commission. Different areas of merger control which might be in need of change or reform were considered in the paper. Two important issues were especially noted in the paper. Those were; a number of mergers that significantly affected trade in the member states escaped the ambit of the rules and improvement to the treatment of joint ventures was proposed by the paper. Council Regulation 1310/97 came into force on 1 March 1998 in response to the green paper. Some amendments were introduced to the ECMR by this regulation. "A new lower jurisdictional threshold was introduced into the regulation with the objective of reaching mergers which would otherwise have to be notified to three or more national competition authorities" (Sufrin and Jones 2004, p.860). The rules dealing with joint ventures and the rules setting out when concentrations involving credit and other financial institutions have a community dimension has changed by this regulation.

The operation of the jurisdictional thresholds was reported in 2000 by the Commission to the Council. According to that report, it was brought about that a significant number of transactions with significant cross border effects remained outside the community merger rules. On the other hand a more in depth analysis of the appropriate mechanisms for establishing jurisdiction was considered in the report and at the same time the other issues have been taken into account.

"On 11 December 2001 the commission published a Green Paper On The Review Of Council Regulation, mooting wide ranging changes to jurisdictional, substantive and procedural matters set out in the ECMR"(Sufrin and Jones 2004, p.860). The purpose of the green paper was to bring in an argument as to the extent to which the regime should bring into line itself more strictly with that of the USA in an effort to avoid disagreement.

In accordance with the regulation 4064/89 the test of a merger's acceptance was strongly related to the concept of dominance. In spite of this a different test was employed in the USA and the USA test was whether the merger under examination would tend to substantially lessen competition. "As the green paper recognized this would: facilitate merger parties global assessment of possible competition issues arising from contemplated transactions, by obviating the need to argue their case according to differently formulated tests and this would in turn provide competition agencies with a better basis on which to build effective cooperation in cases that are notified in several jurisdictions(para.160)" (Furse 2004, p.323).

Various issues were discussed in the green paper, like the dealing problem of mergers which do not have a community dimension but which require multiple EU filings. This means the amendment of article 1(3) thresholds to include all cases where the parties have to obtain clearance from at least three member states authorities. Assuring more flexibility and simplification in the referral system, to make provisions for referrals between the commission and national competition authorities, providing more flexibility in the use of

the articles 9 and 22(3). A revision of the substantive test for appraisal set out in the regulation which is the dominance test was necessary, the existing criteria of dominance in article 2 would be replaced by the test of whether the will cause a substantial lessening of competition. In order to leave sufficient time for submission and discussion of commitments to parties and to the commission the time limits should be revised to ensure that they are more precise and clear. "The procedural improvements which could permit the parties or the commission on occasion to "stop the clock" and as a consequence permit more time for analysis of appropriate remedies were discussed in the green paper too" (Goyder 2003, p.395).

A package of measures to reform the provisions and working of the ECMR which included a proposal for a new council regulation on the control of concentrations between undertakings was proposed by the commission as a consequence of the consultation on these issues. This reform would be a consolidated replacement of regulation 4064/89 rather than an amendment. The adoption of the new ECMR, a new implementing regulation was resulted by these proposals.

"For its first decade the commission established a reputation as a tough but fair arbiter of mergers"(Chalmers et al. 2006, p.1071). On the other hand in 2002 the European courts examined the Commission's findings in a number of merger decisions such as Schneider Electric v. Commission(Case T-310/01 [2002] ECR II-4071), Tetra Laval v. Commission(Case T-5/02 [2002] ECR II-4381), Airtours v. Commission(Case T-342/99 [2002] ECR II-2585) and as a consequence the reputation of the commission was decreased.

While improving the discussion on the dominance test, the commission wanted to lessen the high threshold at which regulation 4064/89 applied. In an effort to permit more mergers to be considered under a single one stop shop procedure the commission made an effort to change these thresholds in the earlier revisions. Eventually, this issue has become more significant in accordance with the enlargement of the EC in May 2004. The largest mergers

are considered at the community level in reality. At this level of transaction there is a risk that undertakings may face, their mergers could be considered by the authorities of a number of jurisdictions, these jurisdictions could be inside or outside the EC which can cause financial and legal risks for these undertakings. From the beginning the commission was not keen on the higher thresholds and there was a pressure on the member states to revise this higher thresholds in a descending way. "The commission was not successful in this regard although there is a commitment in the present ECMR to report on the thresholds by 1 July 2009, and the commission may present proposals to have these amended(ECMR, art. 1(4) and (5))"(Furse 2004,p.323).

The Commission has formed the competitive environment in the community by using it as a powerful tool the merger regulation 4064/89. The commission performed quickly in the first few years of action and attained appreciation for its efficiency to control its case-load. The first prohibition decision was the De Havilland merger and certainly initial disturbance and calls for amendment of the merger control procedure has started after this decision . The affected parties of prohibited mergers started taking their cases to the CFI, and the CFI annulled three commission decisions such as Airtours, Schneider Electric and Tetra Laval. After these annulment decisions of the CFI, the review of the merger control regulation is accelerated and the adoption of a series of important amendments has started after these decisions (Piet Jan Slot,CMLR,Apr.2004,p.461).

4.1.The 2002 crisis

The three verdicts of the CFI in 2002 cancelled the blocking decisions of the commission and included a disapproval about procedural and substantive parts of the commission's work. After these verdicts the need for reform has become obvious and augmented. "Commissioner Monti and the new director general of DG comp, Philip Lowe ,have been forced by such events to accelerate the process of reform already set in train by the commission's green paper published in December 2001"(Goyder 2003, p.394).

4.2.A summary of the CFI's annulment decisions

4.2.1.Tetra Laval/ Sidel Case

In Tetra Laval /Sidel case the enterprises had implemented a merger but it was stopped by the commission. After the notification of the merger, in the relevant markets, horizontal similarities were realized by the commission. The horizontal similarities was related to packaging systems for various foodstuffs and liquids. Some commitments were proposed to the commission by enterprises to solve the commission's doubts, but the commission stated that the commitments were not enough and did not accept them. "At the time at which the commission made its decision pursuant to article 8(3) of regulation 4064/89 Tetra Laval had acquired just over 95 per cent of Sidel's shares by virtue of a public bid" (Furse 2004, p.341). Some proposals were offered to the parties by the commission to fix the damage according to the article 8(4) of the regulation, the proposals involved the divestiture of the two enterprises in a very short space of time. The subject of the objection of Tetra Laval was not the divestiture decision of the commission ,Tetra Laval stated that but there was no urgency to do this, and in effect the enterprises were not competing with each other. But the commission did not accept Tetra Laval's statements. In addition the commission prohibited Tetra Laval to hold any minority shareholding or other financial interest in Sidel because possibly that would slow down the restoration of competition.

As a consequence both decisions were appealed to the CFI by the enterprises, the CFI annulled the art. 8(3) decision of the commission and stated also that the divestiture decision was invalid. "The CFI rejected arguments to the effect that the commission had breached procedural requirements, but did find that the commission had 'committed manifest errors of assessment in relying on the horizontal and vertical effects of the modified merger to support its analysis of the creation of a dominant position'(para.141)"(Furse 2004, p.341). Even more, according to the CFI the commission gave too much weight to the conglomerate effects of the merger, and did not pay attention

to the commitments offered by Tetra Laval. After this criticism and annulment decision of the CFI, the commission inserted its appeal against the CFI judgments.

4.2.2.Schneider / Legrand case

In the Schneider case of two French companies which produce electrical equipment and work internationally merged, the commission blocked this merger by stating that the merged entity would create or strengthen a dominant position in various sectors of the market, and that commitments of the Schneider were not enough to approve this merger. As a matter of fact the commission also stated that after the merger parties would have the opportunity to increase their prices for their own benefit. As a result the commission blocked the merger, which was not suitable for the interest of the common market.

A successful appeal was initiated by Schneider against the commission's decision. "The CFI found that the commission had failed properly to evaluate the geographic market, noting that there were different national geographic markets ,but referring to the Europe-wide coverage of the merged entity to show that a dominant position would be created(paras 176-7)" (Furse 2004, p.342). According to the judgment of the court, the commission could accept the situation, but it was obligatory for the commission to make it obvious for the relationships among two different geographic markets. However, the commission was not success to do such a demonstration in the case. The court also noticed that the commission did not consider the function of the wholesalers in the case and realized that the commission had failed adequately to consider the role of wholesalers and did not succeed to show whether they were not be capable to exercise a limit on the merged entity. The result of the appeal was that decision of the commission annulled by the CFI.

4.2.3.Airtours / First Choice Case

The commission blocked the proposal of the acquisition of First Choice by Airtours. The reason was that this merger of biggest travel companies in the United Kingdom could affect

the holiday market and would facilitate the parties to take action in a collectively dominant way. After the decision of the commission, Airtours appealed to the CFI by stating that the market analysis of the commission was wrong.

The CFI evaluated in its judgment the economic analysis of the commission about this case. On the other hand the Airtours / First choice case was one of the most important judgment has been given by the CFI in dealing with an appeal from the commission in a merger case in 2002. The decision of the commission which blocked the merger was annulled by the CFI and in its judgment CFI criticized the commission's procedure and its substantive assessment of the supposed collective dominance situation created by the merger. "This decision alone would have been likely to cause a radical change by the commission in the way in which it handled those notifications which raise difficult and important issues under Article 2, but just over four months later it was to suffer two further defeats"(Goyder 2003, p.392).

4.3.The Appraisal Proposals

The most important changes proposed by means of the regulation itself were extension of time limits, the commission's decision should cover ancillary restrictions, revision of article 2 and article 4, the simplification of the procedural requirements, the procedure of the notification should be more flexible.

"Article 2 , containing the substantive criteria for the assessment of concentrations should be amended; after paragraph (1) listing the matters which the commission should take into account in making its appraisal, a new paragraph (2) defines a dominant position (by one or more undertakings) "for the purpose of this regulation" as where "they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular ,prices, production, quality of output, distribution or innovation, or appreciably to foreclose

competition"(Goyder 2003, p.395). The more definite implication of the word dominance in the regulation would not affect the upcoming cases.

The revision of article 4 which ruled the notification of a concentration with community dimension to the commission was necessary. The article should give to the parties the occasion to demand that it should be submitted for examination of the member state and the member state has agree or disagree to the demand in ten days. Whenever the commission spend the twenty working days to decide, it has two possibilities, either could keep hold of the case or could deliver it to the member state concerned. Also if a concentration which did not have a community dimension and more than one member state are affected by the concentration, the parties should demand to the commission an examination of the concentration. If at least three member states have the same opinion on this issue then the commission obtain an exclusive jurisdiction in this case. These issues should be negotiated at a pre-notification stage.

The simplification of the procedural requirements provided and exercised by articles 9 and 22(3) would also be necessary.

The notification procedure of a concentration should be more flexible in order to permit to the parties to do the notification both before or after a full agreement has been entered into between the parties or a public offer has been made.

Additional time would be allowed for the Commission to reach its decision under both phase 1 and phase 2 investigations. In phase 1 investigations, the normal period for the procedure would be twenty five working days and in cases where remedies are being offered by the parties this period can be postponed to a total of thirty five working days. In phase 2 investigations, the normal period would be ninety working days with an additional regular postponement of fifteen working days, if remedies are being offered by the parties. Also if the parties request it in fifteen working days of the opening of the phase 2 investigation an extra postponement of up to twenty working days could be obtained. This

additional postponement could be started only by the commission and the parties should also approve this postponement.

"The reasoning of the commission's decision would cover ancillary restrictions on the parties obliged as part of the agreement among them"(Goyder 2003, p.395-396).

5.THE CURRENT MERGER CONTROL REGULATION

The new merger regulation was the regulation 139/2004 which was adopted and published in the official journal on 20 January 2004. This new version of the ECMR represents a big and important improvement of the EC merger regime. The Competitiveness Council on 27 November 2003 consented on the political accord for a new revised form of the ECMR. The new ECMR involves some aspect of the original 1989 regulation and the modifications done in 1997 and 2004. The commission to establish legal certainty revised the regulation by implementing a single legislative text and by including the modifications needed and wanted by the member states.

The most important purpose of the new merger regulation was to ensure the applicability of EC competition law effectively and equally all over the community. The new regulation by replacing the regulation 4064/89 introduced some amendments such as, the increase of the powers of the commission to review and block transactions which have a community dimension, enhancement of the investigation powers of the commission, increase of the fines for enterprises, share of the merger review jurisdiction(one-stop-shopping) by introducing new ways to facilitate the referral of the cases between the commission and the member states, revision of the substantive standard, and enhancement of the degree of flexibility in the review process.

In particular the division of jurisdiction between the commission and the member states and the procedural deadlines are the different points that EC merger regulation involves dissimilar to other competition law systems. When a merger is a subject to be reviewed by other competition authorities like U.S. competition authorities the consequences of these differences can be increased.

The new merger regulation which entered into effect on 1 May 2004 presented major developments and changes to the EC merger review. The new regulation will begin to affect the new member states on the same date of their accession to the European Union.

Under the new merger regulation first of all the substantive criteria has been revised and now the substantive test is more beneficial than the application of article 81(1). Secondly, the proceedings without doubt directed to a formal decision. "So the need for self assessment and the ensuing uncertainty under regulation 1/2003 are avoided"(Korah 2004, p.338). The time limits for the review process has increased, the working days to clear the transactions which raised serious concerns has increased to 105 working days when commitments are offered more than 55 working days after proceedings were started. National competition rules would not be applicable by national authorities to mergers above the thresholds. According to the new merger regulation the analysis of markets has become more pragmatic and reasonable than under article 81(1).

The ECMR was successful for the reason that it provides a right and proper one stop shop for European mergers. The parties of the merger are not obliged to inform all member states competition authorities. They should only notify the commission to obtain regulatory clearance. This procedure proved a reputation for dealing with mergers in a quick and competent manner.

The ECMR is applicable to concentrations with a community dimension. The definition of these terms is explained in the regulation. The responsibility over concentrations is distributed between the commission and the member states according to the community dimension notion. In other words only national competition legislation is applicable to concentrations which do not have a community dimension means that community law is not applicable in these cases but there could be some exceptions. However, the provisions of the ECMR are applicable to the concentrations with a community dimension. Under the terms of the ECMR, the commission's decision is resolute and binding, as the other national competition rules or community competition law is not applicable. That's why one-stop-shop is profitable only for the concentrations with a community dimension.

There is an obligation for the concentrations with a community dimension, they should notify the commission according to the requirement in accordance with the requirement

described in form CO. After the notification the phase I investigation starts. The obligation of the commission starts after this notification. Within a period of between 25 and 35 working days the commission should analyze if the concentration falls within the scope of the ECMR and if it falls within the scope, it causes serious concerns which means if it is compatible with the common market or not. Most of the merger cases are arranged within the phase I proceedings. A second phase investigation starts when the commission has severe concerns about the compatibility of the merger with the common market. The period of time to conclude the investigation is between 90 and 125 working days from the beginning of the proceedings. When the commission gives its final decision the operation of the concentration can continue.

One of the most important revision is about the procedures and strict time limits of the previous ECMR, because these time limits were insufficient for the commission to analyze a concentration. The revision of the time limits enhanced the respect for the system. "At the time of their adoption these strict time periods were in stark contrast to those that then applied under regulation 17 (there was no time limit within which an article 81 or 82 decision had to be adopted and in practice such decisions were rare)" (Sufrin and Jones 2004, p.863). For transactions subject to article 81 there is now no possibility of a clearance decision under the new system set out in regulation 1/2003. The difference for the application of the rules raised concerns about joint ventures.

The appeal procedure should also be simplified because merger cases should be resolved quickly. If a commission decision in order to prohibit or clear a merger has not been appealed in a short time the merger, the commission and the parties may be damaged.

The new Merger regulation did not change only the concept of a concentration with a community dimension which means the jurisdictional criterion. The issues that have changed by the new regulation are the concept of significantly impeding competition, referral systems between the commission and the competent national authorities, and enhancement of the investigation power of the commission and imposing fines. The new

merger regulation extended the dead lines and the time period of the investigation. According to the new regulation a concentration may be notified to the commission without making a prior notification to at least three EU member states because a new concept of deemed community dimension entered into the text of the regulation. The most important improvement seems to be the change of the compatibility criterion which is written under article 2 of the regulation. The new prohibition criterion is significant impediment to effective competition.

The reform of the merger regulation increased the efficiency and transparency of the commission's decisions and merger control system of the community. This revision ensured the merger control system's success to continue to block anti competitive mergers. The success of the merger control was improved by the new amendments.

One of the biggest amendment was the substantive test amendment. Now it is more clear that the regulation applies to all mergers which significantly impede effective competition. The new wording of the substantive criteria include the concentration's effects contrary to the old dominance test and also saved the impression of dominance which would be important in analyzing the situations after the merger.

From now on the investigations of the mergers proposed by the parties would be grounded in good and severe economic analysis of the commission. The reforms also enhanced the commission's decision-making process. The economic reasoning and analyzing of the commission evaluated after the reforms and the community courts began to do severe researches. A new chief economist with an expert team of industrial economists would be appointed in order to meet these challenges. With their involvement in the decision making process, the decision makers can profit this expert team by taking their independent and objective opinion on a case merit. The purpose of the amendments done by the new regulation were to increase the flexibility of the system by keeping the principle of the clear and binding deadlines. The extension of the deadlines would provide to the commission and the parties to prepare their case by doing more research and by taking consultation

from the member states and third parties. The notification of the transaction became possible before the conclusion of a binding agreement and there should be a good faith intent to enter into this agreement. In contrast to the rigid rules, the flexibility of the new rules should provide companies to take more time while organizing and planning their transactions and should make easier international support in merger cases.(Cpnl 2004 number 3 autumn)

5.1.JURISDICTION

5.1.1.Definition of concentrations

The ECMR aims to control the concentrations which change the structure of the market and to control the undertakings permanently. The article 3 of the ECMR describe the word ‘concentration’. In two ways a concentration happen when two or more enterprises merge their businesses or where the control of an undertaking is changed. The article is applicable to the creation of full function joint ventures too.

“The wording of article 3

1.A concentration shall be deemed to arise where a change of control on a lasting basis results from:

a-the merger of two or more previously independent undertakings or parts of undertakings or,

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

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

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

b- rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking:

3.control is acquired by persons or undertakings which:

a-are holders of the rights or entitled to rights under the contracts concerned or

b-while not being holders of such rights or entitled to rights under such contracts ,have the power to exercise the rights deriving there from

4. the criterion of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b). "(Chalmers et al.,2006, 1072-1073)

The word "merge" is not described in the regulation. The article 3(1)(a) of the regulation aims to find out the undertakings which combined their businesses which can be realized by concluding to operate as single economic entities and formed as a consequence of a transaction between two or more enterprises. 'Merger' in the regulation is used merely to refer to the type of concentration falling within article 3(1)(a)(Sufrin and Jones,2004,p.865). "Article 3(1)(b) applies where there is a change in control of an undertaking, for example: where an undertaking acquires sole control of another (even if the acquiring company previously jointly controlled the company, this still constitutes a change in control), two or more undertakings acquire joint control of another (even if one of them previously had sole control of that other) or two or more undertakings establish a joint venture company in respect of which they exercise joint control" (Sufrin and Jones 2004,p.866). As a consequence transactions which cause to an undertaking or undertakings acquiring decisive influence over another are intended to be caught by the regulation. The decisive influence may be acquired by way of the acquisition of property rights, assets or by means of shareholders agreements or may result from economic dependence.

Control or decisive influence could be obtained over another enterprise by means of an acquisition of more than 50 per cent of the share capital and more than 50 per cent of voting rights of another enterprise. The acquisition of the sole control could not be obtained by acquisition of an undertaking with more than 50 per cent of the share capital when a minority shareholder has the right to refuse the strategic decisions taken by the company. In some situations control of an enterprise could be obtained by the acquisition of a share capital less than 50 per cent. While analyzing the situations many factors should be considered. For instance these factors could be the shareholdings, special rights and veto rights of the shareholders or a management or shareholding agreement which describe these rights could be effective.

The control of the concentrations covers all the forms of the concentrations. The substantive criteria to understand this, is if there is a change of control permanently according to the article 3(1). The control of an undertaking can change when previously independent undertakings merge or control of an undertaking is acquired by the controller of another undertaking. The term acquisition could cover a direct financial purchase by contract, a purchase of shares or securities, or any other means. Control could be possessed by ownership and rights. A minority shareholder according to the particular rights attached to these shares could use its force while taking the decisions over the affairs of the undertaking. These particular rights attached to the share gave the minority shareholders a decisive influence.

According to the aims of the merger regulation concentrations must occur between undertakings and should cover the individuals as well. The ECMR did not describe the term decisive influence and where the border lines of this impression will be positioned is not entirely obvious. Solely in the most exceptional situations such as where a single person held less than 25 per cent of the share capital of an undertaking, the commission found that a decisive influence has existed. In the light of all relevant circumstances should be determined, the determination of whether there is a decisive influence in actual fact. The merger regulation refers also to persons and between undertakings must take place concentrations according to the purposes of the ECMR. It should be considered to be an undertaking for the purposes of the regulation where an undertaking is acquired by an individual by virtue of other commercial interests. In a number of undertakings a private investor which was holding interests was himself considered to be an undertaking for instance. “Member States even though they are not for the purposes of competition law considered to be undertakings, may be persons for the purposes of the regulation and public bodies are certainly encompassed within the terms of the ECMR” (Furse 2004,p.324). The ECMR is intended to catch the fact that state involvement in industry and in mergers and in recital (22) it is evidenced that recital makes reference to a general ‘principle of non discrimination between the public and the private sectors’. On the other hand if the state is

exercising its role as a public authority rather than as a commercial actor this rule does not apply.

Most of the mergers were occurred by ways of acquisition considered in article 3(1)(b), a small number of mergers are occurred under the description of article 3(1)(a). The common control of two or more undertakings could be possessed by means of an agreement or by operation of law. The definition of the concentration is illuminated in the notice on the concept of a concentration of the commission. A merger could occur when control over part of an undertaking is acquired by another undertaking. "Control may be by law, as when all the shares are acquired or de facto" (Korah 2004, p.338).

Under the aims of the merger regulation, the sort of the transactions which could be named as concentrations are mergers, takeovers and some joint venture types. All these transactions should have a permanent structural change. A merger occurred between Glaxo Welcome and Smith Kline Beecham two pharmaceutical companies. The new company has called Glaxo Smith Kline and this was a merger between two previously independent undertakings. "The takeover whereby BP Amoco acquired sole control of the whole of Castrol by way of public bid for all its share capital removed Castrol from the market"(Chalmers et al. 2006,p.1073). This concentration is the acquisition by one undertaking by public bid way the direct control of the whole of the another undertaking. By two ways the acquisition of control can be assessed, one factor is if the undertaking which acquires the other undertaking holds the majority of the shares and that's why could take strategic and important decisions about other undertakings affairs. The other way is the undertaking which acquires another undertaking become a minority shareholder and if these shares allow the owner to take decisions about acquired company business sole control would be obtained. All these rules are described under the article 3(2) of the regulation.

5.1.2.Joint Ventures

Joint ventures are an independent economic entity, this can be determined by looking if they have the material, human and financial resources to run their business and if they are independent of the parents commercially and operate on a lasting basis, in these circumstances they are examined under the jurisdiction of the ECMR. This can be done by an analysis based on fact and by case determinations.

Determining which joint ventures fall within the ECMR was the most controversial issue in the identification of transactions that fall under the scope of the ECMR. The mix kind of concerns in relation to joint ventures formed the basis of difficulties about joint ventures. The practitioners criticized the situation after that the definition of joint ventures falling within the scope of the ECMR has been widen by the commission and it looked for a revision of the ECMR. An amendment is done to the ECMR in 1997 to resolve this situation. According to the article 3(4), a joint venture falls within the scope of the ECMR provided that it operates on a lasting basis and these are called full function joint ventures by the commission. Secondly, any risk of coordination between the parties (which originally meant that the joint venture fell outside the scope of the ECMR) is still referred under article 81 EC, but relating to the procedure set out in the ECMR.(Chalmers et al. 2006,p.1075)

“The wording of article 2(4),(5) ECMR
(4) to the extent that the creation of a joint venture constituting a concentration pursuant to article 3 has as its object or effect the coordination of the competitive behavior of undertakings that remain independent ,such coordination shall be appraised in accordance with the criteria of article 81(1) and (3) of the treaty ,with a view to establishing whether or not the operation is compatible with the common market.
(5) in making this appraisal the commission shall take into account in particular:

-whether two or more parent companies retain ,to a significant extent ,activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighboring market closely related to this market,
-whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question."(Chalmers et al. 2006,p.1076)

This reform can be called as an enormous improvement because it provides the procedural efficiency of the ECMR become profitable for the parties and a simultaneous assessment of the structural and behavioral dimensions of the joint venture can be carried out by the commission. The risk of coordination between a parent and the joint venture and between the parents should be investigated by the commission according to Article 2(4) of the ECMR. In spite of this the risk of coordination between the parents has been prioritized by the commission in practice.

Where two or more undertakings form a joint venture which they control in cooperation in this situation a concentration may occur. These joint ventures should be examined under merger rules, which deal with transactions which causes structural changes on a market and they should be examined under cartel rules like article 81 which focus on agreements concluded between undertakings operating on a particular market. In these circumstances it is hard to decide which rules would be applicable. Where the joint ventures amount to a concentration within the meaning of article 3 they are examined under the merger rules in EC law. The procedural and substantive rules applying under the merger rules and under article 81 are extremely different from each other that's why the definition of concentration is as a consequence of critical importance. There was a difference in treatment received by joint ventures falling within the scope of the ECMR and those falling under article 81 and this was causing concern in industry. In general a significantly more favorable treatment was received by the joint ventures amounting to a concentration for the purposes of the ECMR. Where the concentration has a community dimension these joint ventures benefit

from one stop shop rule which means that national competition rules do not apply and where the concentration does not have a community dimension, as they are not in general subject to EC competition law.

"The commission sought to ameliorate the way in which it deals with joint ventures under article 81"(Sufrin and Jones 2004,p.869-870). In addition to this an interpretation of concentration for the purposes of the ECMR was adopted by the commission as broad as possible and the expansion of the definition of joint venture set out in the ECMR was done in 1998. All reference to coordination of the competitive behavior of the parents is now neglected by the regulation.

Article 3(4) of the ECMR expressly covered joint ventures within the definition of 'concentration'. If the creation of a joint venture perform on a lasting basis and functions as an autonomous economic entity so it shall constitute a concentration. Lasting and autonomous are two principal elements. According to the commission five years were sufficient to be considered as on a lasting basis. In 1998 the commission published its notice on the concept of full-function joint ventures under council regulation (EEC) no 4064/89 on the control of concentrations between undertakings (1998) OJ C66/1(Furse 2004,p.343). To illustrate a distinction between those joint ventures to which ECMR is applicable and those which would be analyzed under article 81 was the purpose of the notice.

If the joint venture performs only a single limited function on behalf of its parents, as a result this joint venture will not fall within the terms of the ECMR. A joint venture is subject to the ECMR when the relevant thresholds are met and is called a full function joint venture and can coordinate the activity of the parent companies. "If this is the case any such coordination is to be considered at the same time as the evaluation of the joint venture under the terms of the ECMR although this analysis will be carried out through the application of article 81" (Furse 2004,p.343).

Article 3(4) of the merger regulation widened the concept of a concentration in purpose of covering concentrative but the article did not cover co-operative joint ventures. Where two or more undertakings or persons are able to exercise decisive influence over another undertaking in this case joint control is present. By means of veto rights, a sharing in voting rights or actual control joint control may exist. Changes from sole to joint control are included in the acquisition of joint control and where strategic decisions can be rejected by more than one parent company as a result they have to reach agreement. The joint venture must perform on a lasting basis all the functions of an autonomous economic entity to be named as a concentration under the ECMR.

"Under article 3(2) of the original regulation, joint ventures were excluded where:
they gave rise to coordination of the competitive behavior of the parties amongst themselves or between them and the joint venture"(Korah 2004,p.339-340). In 1997 this provision was removed. Coordination between the joint venture and one parent is not related now, in the context of merger investigation under article 81 this may be investigated in the situation of if the merger has the object or effect of coordinating the competitive behavior of the parents between or amongst themselves, within the strict time limits stated under article 2(4). In the telecommunications sector this situation took place for the most part.

The criteria was not satisfactory enough at all times to make a distinction between the joint ventures to be treated under the regulation and those evaluated under article 81. Same as mergers, an integration which may produce efficiencies may be caused by joint ventures. On its first appearance there is less cause for concern because a joint venture is limited in scope or time. On the other hand under article 81 a much more strict control is applicable to cooperative joint ventures. "It is often unclear under what regime a joint venture comes-a fact intensive analysis of the market may be necessary to see whether the parents compete in adjacent markets and whether there would be sufficient incentives for them to coordinate their behavior"(Korah 2004,p.340). According to this much work should be done before the

notification and at the same time during the period permitted for first phase investigation. If the coordination causes parents to increase the scope of the joint venture merely to avoid coordination outside the joint venture in this situation coordination may be a proper concern for the commission and should be analyzed under the regime of the regulation. For that reason it was an appreciated improvement the deletion of article 3(2)(b). It was not suitable for the needs of contemporary cases.

5.1.3.Community Dimension

The commission has exclusive jurisdiction, subject to specific exceptions set out on the face of the ECMR, within the EC to review a concentration, where the concentration has a community dimension. Article 21(3) provides therefore that 'no member state shall apply its national legislation on competition to any concentration that has a community dimension'(Furse 2004,p.325). The one stop shop principle emphasizing the EC merger control is summarized by this provision. When the turnover of the parties exceeds the thresholds provided under article 1 of the ECMR, a concentration has a community dimension and is subject to the regulation.

"The wording of article 1 ECMR

1.without prejudice to article 4(5) and article 22, this regulation shall apply to all concentrations with a community dimension as defined in this article.

2. a concentration has a community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5.000 million; and

(b) the aggregate community wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate community wide turnover within one and the same member state.

3. a concentration that does not meet the thresholds laid down in paragraph 2 has a community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.500 million;

(b) in each of at least three member states ,the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three member states included for the purpose of point (b),the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate community wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate community wide turnover within one and the same member state.

4. on the basis of statistical data that may be regularly provided by the member states, the commission shall report to the council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

5. following the report referred to in paragraph 4 and on a proposal from the commission, the council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3. "(Chalmers et al. 2006,p.1077)

Article 5 of the merger regulation arranged the method of calculating and the commission's notice on the calculation of turnover explained this method. It took no notice of discounts and turnover taxes and transactions within groups and between parties. "The relevant turnover is that of the undertakings concerned which in a merger are the merging corporate groups and in case of acquisition of sole control, the acquiring company and acquired or target company or activity"(Korah 2004,p.342). On the other hand the total turnover of all the parents is included in the case of a joint venture. Member states may investigate the mergers below the thresholds under national law, in this case the regulation is not applicable. The joint ventures were almost half of the concentrations dealt with.

“The basic threshold criterion is significantly higher than that which was sought by the commission, both at the time of the introduction of the regime in 1989 and at the time of the 1997 revisions”(Furse 2004,p.325). This test was designed to bring within its ambit mergers that would have faced multiple notifications in the individual member states, but did not go as far as the commission required because according to the commission’s research only around 10 more mergers would be caught during a year under this test. By the end of 1 July 2009 the commission had to report on the operation of these criteria. More detailed rules relating to the way in which the turnover of the relevant parties is to be calculated is set out under article 5 of the ECMR and further clarification published by the commission supported these. Article 4(5) states the situations in which a concentration ‘is capable of being reviewed under the laws of at least three member states’. The concentration in such a case should be notified to the commission by the parties and they should indicate that they would prefer to exercise exclusive jurisdiction. It is not obligatory for the parties, but which route they will prefer is subject to their own assessment. This submission should be transmitted to the member states by the commission in these situations, and the jurisdiction will be asserted unless any of the states express their disagreement within 15 working days. “The two-thirds rule set out at the end of both article 1(2) and article 1(3) is designed to leave to member states control over those mergers in which the effects will be very substantially felt within that state, even though these may also be situations in which the community as a whole is affected”(Furse 2004,p.327). In relation to the community dimension of a concentration any explicit territorial limit is placed on the application of the criteria. It is stated in recital 9 that the geographical area of activity of the undertakings concerned should define the scope of application of this regulation and quantitative thresholds should limit it in order to cover those concentrations which have a community dimension.

“And in recital (10) there is an express recognition of the fact that this should apply ‘irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the community”(Furse 2004,p.327). As long as the

relevant thresholds are met a merger between two undertakings based outside the EC will fall within the terms of the ECMR. For instance the case in respect of the merger between Boeing and McDonnell Douglas in the USA and between Gencor and Lonhro in South Africa. A merger between two American undertakings that had been approved by the relevant authorities in the USA was blocked by the commission in General Electric/Honeywell decision."Article 7 of the decision published on the commission web site makes clear the rigidity that follows the application of these straightforward turnover criteria:

The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5.000 million, both GE and Honeywell have a community wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate community wide turnover within one and the same member state. The notified operation therefore has a community dimension."(Furse 2004,p.327)

5.2. PROCEDURAL CHANGES

5.2.1.Notification

Notifications are described under the article 4 of the merger regulation. A concentration with a community dimension must be pre-notified to the commission. The parties should notify the merger to the commission before the execution of an agreement, public bid, or an acquisition of a controlling interest or if the parties can demonstrate that they have a good intention to conclude an agreement or make a public bid. If the parties did not make the agreement or public bid but they can demonstrate that they have a good intention to make this and that's actual, a letter of intent signed by the parties of the merger or an public announcement to show the intention to make a bid can be sufficient to notify the merger. When the commission gives its final decision about the compatibility of the concentration with the regulation, a concentration with a community dimension can be considered legally accomplished.

The obligation to notify is stated in recital 34 and the legal effect in article 4(1) there is also a change to the position in old merger regulation and brings the procedures in the EC into line in respect with those in the USA. Before the revision a binding agreement was necessary for the notification but after the revision a good faith intention is enough for the notification. The parties can ask to the commission prior the approval of the transaction they projected. The good faith intention to conclude an agreement or make a public bid is necessary for the commission to accept the transaction projected. This new revision gives to parties of a merger much more flexibility before obtaining the authorization of the commission. "However "the bar on closing" prior to an authorization remains in place"(Cpnl, Special Edition,p.2). The enforcement of the one week time limit to notify a concentration was not practical for the parties and was too idealistic that is why it should be removed. An unnecessary regulatory strictness would be caused by this time limit.

The merger review process needed more flexibility and the new measures are aiming to provide the flexibility necessary. From now on, notification can be based on the good faith intention to conclude an agreement or announce a bid. Before this change a binding agreement or public bid was necessary to make the notification. The time limit of one week to do the notification after concluding the binding agreement is not required according to the new merger regulation. After the revisions were made to the old regulation the parties could notify earlier their planned merger to the commission. The plans of a merger also should be notified to the commission. After the notification the commission should give an authorization of the proposed transaction and according to the authorization the merger could advance.

"There are two exceptions: (1) a public bid in securities will not be prevented but the acquirer cannot exercise the voting rights attached to the securities pending the merger's clearance(article 7(2)); (2) the commission may grant a derogation from the suspension balancing the threat to competition and the interests of the parties (article 7(3))"(Chalmers et al. 2006,p.1083). According to the article 7 of the regulation the parties could not put into practice the concentration until the notification to the commission and the formal decision of the commission about the assessment of the notification should be concluded. On the other hand by taking the commission's permission, a public bid may be implemented if it was notified before its announcement, and the acquirer did not exercise the voting rights otherwise than with the intention of maintaining the full value of its investments. After the notification the commission should assess if the concentration is compatible with the common market. After the approval decision of the commission there will be no invalidity. "At least the danger of invalidity is reduced to unnotified mergers not involving quoted securities that are condemned"(Korah 2004,p.342).

According to the article 4(2) notifications would be made by parties jointly or by the party acquiring control. "Broadly, joint notification must be made by the merging parties in true merger cases or by those acquiring joint control in cases of joint control"(Jones and Sufrin 2004,p.899). The undertaking which acquired control has to notify in other cases. Under the

terms of the article 4(3) after the notification the commission has to publish the notification and at the same time has to protect the legitimate interest of undertakings and their business secrets.

The revision of the provision considering the notification gave more flexibility to the parties because now notification at any time prior to implementation became possible. Under the rules of the previous ECMR such flexibility was not possible. Before the new merger regulation the parties should notify the concentration with in a time limit of one week after the conclusion of the agreement or the announcement of the public bid. In practice this time limit was not enough and the commission did pay no attention to this rule.

Under the terms of article 14, fines are obliged for failure to suspend and notify a concentration, a party should pay fines when it intentionally or negligently fails to notify a concentration prior to its implementation. The new merger regulation augmented the fines. The first obligation of fine is enforced to Samsung Company. The company did not succeed to notify a concentration in time limit of the merger regulation. The commission gave this fine because the notification was too late and this could be a warning for other companies to notify a concentration in the appropriate time limit. The amount of the fine will increase according to the result that the company which failed to notify would cause on the competition.

The flexibility of the review process is enhanced by the new merger regulation because one week rule is abolished but the short review periods introduced by the regulation 4064/89 are saved in the new regulation too and for parties to file their notification with the commission it is not imposed any specific deadline in the new regulation. The parties of a merger will be free to determine when to file their notification while acting in accordance with the waiting period, suspensory obligations imposed under the new merger regulation. According to the new merger regulation to notify a transaction based upon a letter of intent become possible and it is sufficient for the companies to show that they have a ‘good faith

intention to conclude an agreement'. There is no longer a requirement of a binding agreement. It is required under the current merger regulation that the filing of the notification within one week of the execution of binding agreements to bring about the transaction or within one week of announcement of the bid in the case of public bids.

5.2.2.TIMELIMITS

5.2.2.1. PHASE I AND PHASE II INVESTIGATIONS

A more flexible timetable introduced to the time limits with procedural changes. The phase II investigations has the maximum flexibility relating to the time limits underlined by the regulation. The extension of the time limit by 15 more working days is now possible where the parties propose commitments. The commission can add 20 working days more to make available much more time to consider details and by means of the parties consent. The previous time limits were put pressure on the parties and the commission in complicated second phase merger investigations. The modification about the 15 day rule for commitments lessened the previous time limit problem.

Under the rules of the ECMR phase I and phase II investigations are used for the examination of the proceedings. The phase I investigation is applicable to the procedures leading to a first decision. The phase II investigation is applicable to the procedures which apply when a more substantial review of the notified concentration is necessary. Under article 6 of the regulation the commission has to analyze the notification when the commission receives it. According to the article the commission has 25 working days to take a decision about the notification. If the parties propose commitments 10 days more can be added to the precise time limit of 25 working days to permit commission to make the decision after examining the commitments proposed. In this procedure all the indications of days signify working days.

According to Mario Monti, the changes in time limits are aimed to give flexibility and to ensure that investigations are as it should be carried out. There had to be a necessity for an investigation to complete properly otherwise to do the assessment of remedies proposed by the parties appropriately to add supplementary time to the time limits. From now on in order to facilitate the calculation and prevent uncertainty, the time limits are determined in working days. After 25 working days the phase I investigation deadline is finished. An additional 10 working days could be added to the deadline in two situations. These situations are according to the article 6(2) when commitments are proposed by the parties or according to the article 9(2) the referral of the case is requested by a member state. The normal deadline of the phase II investigations ends after more 90 working days. When commitments are proposed by the parties just before the end of the investigation the deadline can be extended by 15 working days. An additional of maximum 20 working days could be added on the request of the parties or by taking their consent in complicated cases to the time limit.(Cpnl Special Edition,p.2) Despite the fact that time limits are forceful, the parties to forced to learn the commission's answer before the notification of the merger in order to prepare their case properly. A large amount of the mergers are cleared after phase I investigation, a small amount of mergers are submitted to second phase investigation. The commission clear these mergers when the modifications are agreed among the commission and the parties. In general review process of the new merger regulation is supported.

"The procedure under the merger regulation is not very different from that adopted by the commission when it deals with a case under regulation 1/2003 save that the need for speed results in each stage taking far less time and the commission has no discretion not to investigate" (Korah 2004,p.343). The revision made by the new merger regulation in 2004 augmented the time limits. Despite the fact that it is a good improvement to the other competition law systems, like US has more permissive time limits. From now on the time limits of the phase I and phase II investigations are much more flexible than the previous merger regulation rules. For a further 20 days the parties in phase II investigations would also have the right to ask stop the clock. The time limits stated in the previous merger regulation were not long enough to result an investigation properly, only uncomplicated

and simple cases could be dealt under these short time limits and under the previous time limits commission could not deal efficiently a difficult case. Additional time is provided by the new regulation. The parties and the commission at both first and second phase of the investigation could ask for an additional time. When the commitments are offered or the commission need much more time to analyze efficiently the market and result of concentration on the market and on competitors.

Schneider/Legrand illustrated a particular weakness of the commission’s procedure (Goyder 2003,p.564). Both parties of the merger were operating in several national markets in Europe but the commission while giving its decision did not analyzed sufficiently the markets. The commission gave its decision relying on the European markets in general but did forget to take into account the individual markets. The analyze of the commission in this case was not sufficient and right, it did not do a research widely perhaps to provide some additional time for the difficult cases may help the commission to analyze and search in a good manner the cases.

The previous time limits of one month and four months were too strict and causing problems. After the new regulation new time limits have been extended for decisions of the commission under phase I and phase II investigations. If the commission has serious concerns about the concentration then the investigation goes into an intensive stage which is second phase investigation. A considerable additional time is required when the draft commitments are presented to competitors and customers to provide that the commitments meet the requirements and they are sufficient. At first phase of the investigation the majority of the merger are cleared. At the second stage of the investigation the commission need much more time because it take advice from competitors, customers, and others to understand if the commitments offered by the parties are enough to eliminate the anticompetitive results. “Article 8(2) provides that the commission can attach obligations and conditions to such a decision made at stage II, and this less drastic remedy has enabled it to prohibit outright only 10 mergers by the end of 2002”(Korah 2004,p.354-355). More cases are cleared with commitments after phase I investigation and less after second phase

investigation. “It is said that enforcement has become tougher since Mario Monti became the member of the commission responsible for competition in the summer of 1999 but since then there have been some very large mergers with complex effects on more than one market”(Korah,2004,p.355). If the norms are changed or not it is not obvious yet. The notification that shows the way to a formal decision under stage I or II within a short time is a great advantage to the parties of a concentration over cooperative joint ventures.

The purpose of the parties is to guarantee that after the investigation the commission will release the merger. The time limits increased for phase I and II investigations permit parties more time to negotiate commitments. After these reforms a smaller number of mergers will be blocked by the commission and there will be less appeals against commission’s decisions. “While it may be in the public interest to ensure that there is effective judicial review of administrative action in many cases parties are under such pressure to ensure a merger clearance that they will accept whatever commitments are necessary to gain regulatory approval”(Chalmers et al.,2006,p.1089). After the revisions the commission kept the initiative as well in the negotiations between the commission and the merging parties.

In complicated second phase investigations as a consequence of the time limit provided for in regulation 4064/89 have often occurred timing problems and to avoid this timing problems the commission introduced these modifications. The revised reference procedure’s main inadequacies are that they would not be able to enhance jurisdictional certainty and significant delays will be added. On the commission’s reference policy there is still significant uncertainty. It is not resolved yet that the formal guidance on the situations in which references should be made has been promised by the commission. Even before the examination of substantive issues, it was added significantly to the timeline by the pre-notification procedure, for instance, 15 additional working days for references to the commission and at least 25 additional working days for references to member states. To be precise once the entire competition case has been examined the pre notification discussion

can commence only. As a consequence it is not clear yet how the pre-notification process will be useful.

As long as the parties show a good faith intention to enter into an agreement they are allowed to notify a concentration before a binding agreement has been concluded. This flexibility has introduced by the new merger regulation. For that reason on the basis of a signed letter of intent or memorandum of understanding could be made to the notifications. As a result a time advantage by starting the clock on the review process at an earlier stage will be gained by the parties.

The method of calculating the binding deadlines has changed from calendar days/weeks/months to working days by the commission. The process has become longer as a consequence. Before the first phase investigation was a month and now has become 25 working days and extended phase I investigation was six week now takes 35 working days and detailed second phase investigation was four months now takes 90 working days. Also extensions of time limits are introduced under the new merger regulation. Where the parties offer remedies to address the competition issues second phase time limit can be extended by 15 working days. Additionally at the request of the parties or with the parties approval at the commission's request the time limit may be extended by another 20 working days.

5.2.3.REFERRAL SYSTEM

The process of referrals to and from the commission will be easy by a more efficient system for merger referrals. The possibility of starting the referral process will be given to companies before they maintain the expense and the lost time involved in notifying in a jurisdiction or jurisdictions where in the end their deal will not be examined. In an EU of 25 or more member states a particularly attractive option this will be. "Under the improved system of referrals, merging parties may request the referral of a case to the commission or

to a member state or member states prior to its notification at the national or community level, an option not currently available; merging parties may request the referral of a case to the commission if it is notifiable in at least three member state if all competent member states agree the commission acquires exclusive jurisdiction for the case; the criteria to be fulfilled for referral have been simplified"(Competition Policy Newsletter Special Edition,p.2). A corrective referral mechanism is included by the procedural changes to help allocate merger cases to the best placed authority.

The introduction of a pre-notification referral system is a key change to the jurisdictional rules that allows companies to opt into or opt out of the commission's jurisdiction. If their transaction is notifiable or capable of being reviewed in three or more member states companies are free to make an application for a pre-notification referral to the commission. Within 15 working days unless one or member states the commission will be competent to review the transaction with original transaction object. If the relevant geographic market is no wider than national conversely the merging parties may request at the pre-notification stage that the commission refer a transaction to one or more member states. The reallocation of mergers to the best placed authority at an early stage of the proceedings is the aim of these changes. The merger regulation's system of turnover thresholds had failed to do so in those cases. "While the new system is clearly a significant improvement its practical effectiveness will heavily depend on companies willingness to use it despite the potential timing disadvantages and the member states reasonableness in exercising their veto rights"(Völcker,CMLR,Aug 2004,p.1060).

The complainants are suspicious that the relevant national authorities would give more generous treatment to the mergers in question than the commission motivated the applications for annulment in Philips and Cableuropa/ Aunacable cases. Those suspicions were justified during the procedure before the court.

The legality of a commission decision referring part of the merger in question to national competition authorities is allowed by the CFI to challenge by the competitors in Philips,

Cableuropa and Aunacable case. “The commission had acted within its discretion when referring all or part of its relevant investigations to the French and Spanish competition authorities according to the CFI decision”(Völcker,2004,p.1061-1062). Interesting issues about the referral system of article 9 of the regulation was raised in the judgments of the CFI in the Moulinex case. The applicants argued that the referral system undermines the one-stop principle but seems to suggest that it is for the legislature to act and the CFI is sympathetic to these arguments. “Contradictory and unsatisfactory decisions may be produced by referral to national competition authorities it is also showed by the judgments”(Piet Jan Slot,CMLR,Apr.2004,p.461).

In the handling of cases, under article 9 cases with a community dimension which may be suitable for passing over in whole or part to national competition authorities and under article 22 cases without a technical community dimension but with sufficient cross-border effect to justify assessment by the commission at the request of one or more member states, are to be welcomed. In accordance with the whole approach of the modernization program are done this latter series of proposals. The purpose is to give greater responsibility to national authorities so long as the necessary procedures to resolve whether the entire case or only certain aspects of it are to be disregarded to a member state are carried out without delay.

When there is a distinct market within that member state that will be affected by the merger, the commission has the power to refer a merger or part of a merger to a national competition authority to investigate under national competition law according to the rules set in article 9. Often the territory of more than one member state was involved because of that not many references have been made. For that reason the merger was investigated by the commission.

The commission is required to make a reference if the distinct geographic market does not amount to a substantial part of the common market. “The procedure is likely to be used more now that in non-merger cases national competition authorities will conduct so much

of the investigation" (Korah 2004,p.343). For making reference to the procedure the time limits have been extended from now on it will be easier to operate the procedure. In limited circumstances a notified concentration may be referred to a member state by the decision of the commission according to article 9. The commission investigates the concentration under the merger regulation subject to articles 9 and 22 if a concentration is above the thresholds. National authorities are competent to apply their national competition law, the regulation does not apply if the turnover is below one of the thresholds.

By achieving the correct balance between itself and the member states in merger cases the commission wishes to optimize the allocation of jurisdiction as far as jurisdiction is concerned. To make greater use of the referral mechanisms in article 9 and article 22 is the better way to proceed according to the view of the commission. "These provisions would be amended so that they more closely reflected one another and to make their use simpler the parties themselves would be involved at a pre-notification stage as to the possible use of the referral system and the commission itself would be able to request referrals" (Whish 2005,p.877). A joint request by three or more member states would give the commission exclusive jurisdiction over that case is an arguable item of the proposed amendment to article 22. The member states would not prefer to agree to this at least without an opportunity to retain or retrieve jurisdiction where within a distinct national or local market a particular merger raises competition concerns.

Under the provisions of the ECMR will be assessed concentrations with a community dimension the general rule is that and no other rule of national or community law will be applied to this mergers means that such concentrations benefit from a one-stop shop. Under any applicable national competition legislation will be assessed the concentrations which do not have a community dimension and the community law is not applicable therefore to these concentrations. The transfer of cases between the competent authorities of the member states and the commission on the initiative or invitation of the commission, the member states or the parties, to the transaction themselves at a pre-notification stage, is provided by several provisions such as articles 4(4),(5),9 and 22 in the merger regulation.

A notice on case allocation is published by the commission with the purpose of describing the underlying principle of the case referral system and practical guidance on the mechanics of the referral system is provided by this notice. The aim of the 2004 revisions of the ECMR was to facilitate re-attribution of cases over and over again with the principle of subsidiarity, for carrying out a particular merger investigation the case must be dealt by the most appropriate authority or authorities where possible and at the same time the basic principle of the one stop shop for community mergers should be preserved. The merger regulation established the system of merger control and it is consistent with the principle of subsidiarity protected in the EC treaty is stated in the commission notice on case allocation under the referral rules of the merger regulation.

The application of the principle of subsidiarity, the suitability of a concentration being examined by the authority more appropriate for carrying out the investigation ,the benefits inherent in a one-stop-shop system and the importance of legal certainty with regard to jurisdiction should be taken into consideration by the factors that decision on the referral of cases are taken. In each specific case an examination of these factors will be done in a different way. The commission and member states should bear in mind the need to ensure effective protection of competition in all markets affected by the transaction in considering whether or not to exercise their discretion to make or accede to a referral.

The core of the merger regulation is the one stop shop system. In a similar way to competition authorities and businesses the provision of a one stop shop is beneficial. When a merger is handled by a single competition agency normally administrative efficiency is increased, duplication and fragmentation of enforcement effort is avoided and as well as the treatment is confused by multiple authorities investigation, assessment and possible remedies rules.

In particular to merging firms and to businesses it normally also brings advantages ,the costs and burdens arising from multiple filing obligations will be reduced and the risk of

conflicting decisions resulting from the concurrent assessment of the same transaction by a number of competition authorities under diverse legal regimes will be eliminated. Legal certainty is very important when the jurisdiction occurs over a particular concentration. At the post notification stage over the case in question when there is a compelling reason for departing from original jurisdiction the referral should be made normally.

To the greatest extent possible a post notification should be avoided if in the same case a referral has been made prior to notification. In principle pre filing referrals should be limited to the cases where from the beginning it is relatively not complicated to establish the scope of the geographic market and the existence of a possible competitive impact so without delay it will be able to decide upon such requests. “In the cases of BP/E.ON(Case No COMP/M.2533) and Shell/DEA(Case No COMP/M.2389) the commission conducted Phase 2 investigations of the upstream markets for petrochemicals and more particularly the market for ethylene, while making article 9 references to Germany of the downstream markets for various oil products”(Whish 2005,p.820). In Princess/Carnival the commission wanted to avoid a division of the case and exercised its discretion not to refer a part of the case to the UK.

Parties to a concentration with community dimension benefit from a one-stop-shop is the basic principle of the ECMR according to article 21. The commission’s decision under the ECMR is decisive and the general rule is that to concentrations with a community dimension only the ECMR is applicable no other community law or national law is applicable to this concentrations. The commission and the business community showed great interest to one stop shop principle. There are situations at either pre-filing or post-filing stage the merger or aspects of the merger may be referred to a national authority for assessment under its domestic law.

“The wording of article 9

1.The commission may by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other member states, refer a notified concentration to the competent authorities of the member state concerned in the following circumstances.

2.Within 15 working days of the date of receipt of the copy of the notification, a member state, on its own initiative or upon the invitation of the commission, may inform the commission ,which shall inform the undertakings concerned, that:

a- a concentration threatens to affect significantly competition in a market within that member state, which presents all the characteristics of a distinct market or

b- a concentration affects competition in a market within that member state, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the commission considers that ,having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7,there is such a distinct market and that such a threat exists ,either;

a- it shall itself deal with the case in accordance with this regulation or

b- it shall refer the whole or part of the case to the competent authorities of the member state concerned with a view to the application of that state's national competition law."

Article 9 was often known as the German clause because it was initially included at the particular insistence of Germany. In the negotiations the Germans objected over loss of control and this article was added at a last stage to meet the Germans objections. The article was designed to meet the concerns that the criteria set out for the assessment of concentrations in article 2 of the ECMR might not sufficiently address local or regional issues and the national merger control might be more precise than the commission's action. The commission is permitted only to take action against concentrations which would impede competition in the common market or in a substantial part of it according to article 2 of the ECMR. The exchange of cases between the authorities is simplified by the article 9

and article 22 in order to facilitate it. It is accepted by the commission that the case will not be always allocated to the correct authority under the turnover thresholds set out in article 1. As a consequence the transfer of cases is enabled by operating as a corrective measure article 9 and 22 in order to achieve most advantageous allocation.

Article 9 was amended by the current regulation. According to the notice on allocation, the objective of article has now been broadened and is designed to ensure that a national competition authority should deal with a case when it is in the best position to do so subject to the principle of the one stop shop and legal certainty. Prior to its notification to the commission parties may request a referral of a concentration with a community dimension to a member state, this possibility is provided by article 4(4).

The commission shall adopt a decision to that effect which it shall address to the member state concerned, and shall itself deal with the case in accordance with the regulation if it considers that such a distinct market or threat does not exist. If it considers that such a distinct market is affected. Except a member state makes a request either on its own initiative or on the invitation of the commission article 9 is not activated. The provision was only added into the current regulation providing that the commission might invite a member state to make a request.

The commission must look first the requesting state at the first sight demonstrated that a distinct market exists and the concentration threatens to affect significantly competition within that member state when it receives a request from a member state. According to the previous ECMR, a request could be made by the competent authority where the concentration threatened to create or strengthen a dominant position. The commission has a discretion to deal with the case itself even where these conditions are satisfied or to make a total or partial reference of the case to the competent authority.

In the best position has to be the competition authority or authorities to deal with the case. The operation would be examined according to the competitive effects and the national

competition authority competence. A little authority is admitted to the member states under article 9. According to the ECMR, the commission is the only authority to refer the issue to member states under article 9 when a member state express concern about the effect of a merger in its territory, but if the concentration has a community dimension and potentially impedes effective competition in the common market or a substantial part of it.

"In the recitals the regulation makes it clear that the commission and competent authorities of the member states will work together forming a network of public authorities to ensure that their respective competences are applied in close cooperation, using efficient arrangements for information sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible.(ECMR recital 14)"

New ECMR made amendments to article 9, the purpose of this amendments is to make easier for a member state to request a referral from the commission and the transfer of a case to the most appropriate authority is aimed to be facilitated. For that reason such mergers may be subject to examination both at the community and national level in criticism of the one stop shop principle. The discretion of the commission must be exercised carefully and in the community in cases which have cross border effects competition law should be applied uniformly and consistently. The benefits inherent in the one stop shop system, the core of the merger regulation, the principle of legal certainty will have been regarded by the decisions on referral of cases according to the commission's notice on case allocation.

The commission has exclusive competence to review mergers that have a community dimension but there are two exceptions. Article 9, also called German clause, when the merger has effects in the requesting member state national authorities are allowed to

request that mergers should be assessed at state level. The German government had one of the most well developed national systems of merger control and insisted on this provision because they feared that the commission’s appraisal would fail to protect the German market.

A member state may take measures to protect ‘legitimate interests’ which are not protected under the ECMR itself according to article 21(4).

“The wording of article;
4.Notwithstanding paragraphs 2 and 3 ,member states may take appropriate measures to protect legitimate interests other than those taken into consideration by this regulation and compatible with the general principles and other provisions of community law.
Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.
Any other public interest must be communicated to the commission by the member state concerned and shall be recognized by the commission after an assessment of its compatibility with the general principles and other provisions of community law before the measures referred to above may be taken. The commission shall inform the member state concerned of its decision within 25 working days of that communication.”

Under the old ECMR the member state concerned had to be informed by the commission within one month of the commission’s decision(article 21/3). Member states are allowed to review mergers on the basis of national public policy considerations is the second exception to the one stop shop principle(article 21/4). In the regulation three public interests are clearly listed. “A state does not wish to find that one defense company operating in its territory is controlled by a firm that supplies weapons to unfriendly states, mergers in the media sector are subject to special rules in some member states precisely to guarantee pluralism, and member states may wish to prevent a company or an individual obtaining control of a financial institution when that person is deemed unfit”(Chalmers et al. 2006,p.1082). If the commission did not approve, the member states are not allowed to

apply their national law and block mergers on the basis of a public interest. “This provision allows member states to take steps to make any merger which the commission approves subject to additional conditions to safeguard the relevant interest”(Chalmers,2006,p.1082). When the commission blocks a merger it does not give power to the member state to authorize this merger.

“Wording of article 22 ECMR

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The commission shall inform all member states and the undertakings concerned of its decision .it may request the submission of a notification pursuant to article 4.
The member state or states having made the request shall no longer apply their national legislation on competition to the concentration."(Chalmers et al.,2006,p.1079)

The first ECMR in 1990 had a version of this provision too. The major difference between the 1990 regulation and current regulation is that previously the member states would have to establish that a merger creates a dominant position in the states making the request, in the current regulation only proof of a significant effect on competition is required. "At that time it was known as the 'Dutch clause' which was inserted at the request of the Netherlands, Belgium and Italy, on the basis that their competition laws did not address mergers and they wished the opportunity to seek the assistance of the EC"(Chalmers et al. 2006, p.1080).

The clause is reorganized to invite coordination by competition authorities by providing for joint requests because now all the member states have merger rules, perhaps to take advantage of the opportunities offered by the national competition authorities network. "However there are two weaknesses first different timescales for merger notifications in the member states make joint referral difficult, and if some states do not join in the referral the merger will be scrutinized in parallel by the commission and non-participating member states undermining the one-stop-shop principle"(Chalmers et al. 2006,p.1080).

The system for referral of cases between the commission and the national competition authorities is modified by the new merger regulation. The thresholds are set by the current merger regulation to determine whether a transaction falls within the commission's merger review jurisdiction. Since 1 May 2004 transactions which do not have a community dimension but which can be reviewed under the national merger control regimes of at least three member states can be reviewed by the commission on the request of the companies. The transaction will be considered to have a community dimension any competent member state will not object the referral request in this situation at the exclusion of the member

states the commission will have exclusive jurisdiction to review such transaction. A major step is the possibility to decide on one stop shopping. The transactions which do not have the community dimension are often reviewed by four or five different member state competition authorities. In accordance with the enlargement of the EU, new member states which have relatively low pre-merger filing thresholds will access. In many multi-jurisdictional transactions it will be easy to meet the three country criteria and subsequently the burden for companies involved in this type of transaction will be significantly lessened.

Between the European commission and the member states there is a clear separation of competencies in the area of merger control. Article 3(1) stated that when the turnover of the parties to the concentration meet the thresholds pursuant to art. 1(2) or 1(3) the commission has exclusive competence to review concentrations.

The member states are competent when concentrations fall below these turnover thresholds and in this situation the national merger control provisions are applicable. On the other hand in certain circumstances for concentrations falling below ECMR thresholds a referral system make it possible to be dealt with by the EU commission and vice versa.

"The council negotiations leading to council regulation EC no 139/2004 focused on making the referral system more flexible and effective in order to ensure that a concentration would be dealt with by the authority best placed to analyze its competitive effects and where appropriate to restore effective competition whilst taking account of the principles of subsidiarity and the "one stop shop" as well as maintaining legal certainty to the utmost extent possible"(European competition authorities 2005,p.2). These principles are referred in articles 4(5) and 22 of the regulation and referrals of cases from the member states to the commission are provided in these articles. In an efficient manner should be made the referrals of concentrations according to recital 14 of the ECMR in order to avoid to the greatest extent possible situations where a concentration is subject to both pre and post filing referrals. In applying their respective competencies the commission and the

national competition authorities should make close cooperation and consultation with efficient information sharing. The efficiency and effectiveness of the review process can be enhanced by the cooperation and coordination among competition authorities on mergers of common concern and the consistent, coordinated and non-conflicting outcomes can be achieved and the transaction costs can be reduced.

A new framework for referrals is established by the new regulation 139/2004, because the former article 22 ECMR is reviewed and by way of article 4(5) ECMR the possibility of pre-filing referrals to the EU commission is introduced. From member states to the EU Commission for referrals under articles 4(5) and 22 ECMR only concentrations within the meaning of article 3 are appropriate. Partial referrals by only some of member states capable of reviewing a concentration does not permitted under article 4(5). The commission has no discretion but has to accept that referred concentration in the situation of if any member state capable of reviewing a concentration expresses its disagreement. "By taking into consideration the specific characteristics of the concentration, a concentration will generally deserve careful analysis as a possible candidate for a pre-notification referral where potentially significant impact extends beyond national boundaries"(www.european competition authorities.com,2005,p.3).

Significantly more cases are reallocated to the best placed authority to carry out to the review and it is envisaged by the new merger regulation. The aim of the review is to provide that cases with a cross border effect are dealt at EC level and cases with local or domestic effects are dealt by national authorities. There is a little change in the existing provisions for references from the commission back to member states even though now the commission has the formal power to invite member states to request a referral. The power to initiate a reference after notification is still required by the parties, but now it is provided in the new article 4(4) a formal process prior to notification in which the parties can request a ruling on jurisdiction.

The practice is formalized by the new merger regulation and the process is simplified to some extent. A provision has recently been used to refer cases with a wider than national impact to the commission which was originally designed to allow references by member states which have no merger control laws. If the merger would otherwise have to be notified in at least three member states prior to notification notifying parties can now also request a ruling.

5.3.SUBSTANTIVE ASSESSMENT

A substantive set against which to determine whether a particular merger should be blocked must be settled by any system of merger control. Also the standard of proof should be decided by the competition authority in order to block a merger. The competition authority can prove that a merger would be harmful to competition 'on the balance of probabilities' or that the merger would have detrimental effects by showing 'beyond reasonable doubt'. Some harmless mergers might be blocked if the competition authority rely on the basis of weak evidence, on the other hand some harmful mergers might be cleared if the criteria for intervention are too demanding or if the standard of proof is set a very high level.(Whish,2005)

The test in article 2(2) and (3) of the merger regulation is the principal substantive change. A compromise between those member states that favored retaining the dominance test in its established form and the commission and those member states that were of the view that a change was needed to close any potential enforcement gap under the dominance test in certain oligopoly situations resulted into the new test. All mergers producing non coordinated effects in other words unilateral effects regardless of whether the merged entity is the market leader are now covered by the new merger regulation. "The wording of new test clearly shows that the dominance test continues to be present also and according to the guidelines 'provides an important indication as to the standard of competitive harm' for finding a significant impediment to effective competition"(Völcker,CMLR,Aug 2004,p.1059).

The newly passed substantial test for deciding whether to prohibit a proposed merger can be defined as the single most important change. Under the rules of the previous merger regulation mergers could be prohibited only when they created or strengthened a dominant market position. Mergers can also be prohibited if they substantially impede effective competition it is not obligatory that the merger create or strengthen a dominant position at

the same time. The new test is named the SIC test. The potential for prohibiting mergers had markedly increased according to the change of the criterion.

The future interpretation of the new criterion by the commission was not certain. Uncertainty will be decreased and predictability will be increased by the guidelines. The firms that want to merge will be informed on the application of merger regulation by this guidelines. In the guidelines the commission's application of merger regulation is explained in more detail. The discretionary leeway of the commission can be reduced by the guidelines and decision making can become more transparent and more predictable.

A modification of the substantive criterion used in order to ascertain whether mergers are compatible with the common market is caused by the revision of the merger regulation. If the merger creates or strengthens a dominant position is not necessary any more. A substantial impediment to effective competition is sufficient for the commission. The domain to which the new substantive test can be applied is constrained in the recital 25. The commission's power to prohibit notified mergers has been increased by the introduction of the SIC test. "The notion of the significant impediment to effective competition should be interpreted as 'extending beyond the concept of dominance only to the anticompetitive effects of a concentration resulting from the non coordinated behavior of undertakings which would not have a dominant position on the market concerned'"(Voigt and Schmidt,CMLR,2004,p.1585).

To include mergers that do create additional market power but that do not reach the threshold of a dominant position yet is the purpose of the new criterion. Unilateral price effects in industrial organization are base of non coordinated effects according to the commission. "Such non-coordinated effects which are not based on oligopolistic interdependence, are especially likely if; the merging firms have a high market share, the merging firms are producing close substitutes, the consumers find it difficult to switch to other suppliers, the remaining competitors cannot reply with increased quantities to a price increase by the merged entity, the merging firm has the capacity to hamper new market

entry"(Voigt and Schmidt, CMLR, Dec 2004). Inside the framework of the previous substantive criterion these factors have also been used. They can be applied far more restrictively under the new criterion of substantial impediment to effective competition. In order to prove the incompatibility of a merger with the common market the presence of one of these factors is sufficient. Factors such as the question if two important innovators want to merge and if a potential entrant is involved is introduced newly. A substantial impediment of effective competition can be caused by mergers between the most innovative firms in a market according to the commission. The commission can prohibit mergers between companies with small market shares that are nevertheless very innovative. A merger with a potential competitor can be proof of impeding effective competition.

In this case it will be assumed by the commission that the potential competitor is present in a certain market, in which it is in fact not present. The market shares that grow on different markets will be added. Mergers will thus be subject to the new criterion even if they are not able to create a dominant position. "The admission of this factor creates the possibility to recognize so called 'conglomerate effects', a merger would allow the transfer of a dominant position from one market to another product or regional market through leveraging, bundling, portfolio effects or financial strength"(Voigt and Schmidt 2004,p.1586). The merger guidelines published in 1982 abolished these elements in the US. The protection of competitors is caused by their use rather than a protection of competition. As a consequence the introduction of conglomerate effects into European merger control raise concerns. In drawing on these factors the commission has wide discretionary leeway in addition.

Two basic conditions must be fulfilled for a merger with a potential competitor to have significant anti-competitive effects are explained in the guidelines. "The first of these conditions is that 'the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force' and the second condition is that 'there should not be a sufficient number

of potential competitors, which could exert the same competitive pressure as the merging potential competitor'(para.60)"(Voigt and Schmidt,CMLR,2004,p.1586). In the future some potential competitor might develop into a serious competitor this expectation is a matter of subjective evaluation and not of experimental facts. According to this situation the discretionary leeway of the commission has more increased and predictability will suffer. The non coordinated effects which have been known as unilateral price effects are dealt by putting heavy emphasis in the guidelines. When two or more closely competing products are brought under common ownership unilateral effects arise. An incentive to set higher prices is hold by the post merger firm. Some of the lost sales are recaptured in higher sales of the other merging party that is why the impact of the price increase on profits is potentially smaller after a merger.

The commission relies on market shares and concentration ratios primarily in deciding whether a merger leads to a substantial impediment of competition. Useful first indications of the competitive importance of the merging parties and their competitors is provided by the market shares and concentration levels.(para 14)sufficient evidence for the existence of a dominant position may be the market shares above 50 per cent in themselves says the commission (para 17) for a dominant position even market shares below 40 per cent can be sufficient. With regard to these numbers no improvement in predictability is to be expected.

"In addition to market shares the guidelines introduce a second criterion to be used in order to ascertain whether a proposed merger is compatible with the common market or not namely the Hirschman-Herfindahl index (HHI)"(Voigt and Schmidt 2004,p.1589). For a long time in US merger policy this indicator has been used. If the concentration stay below the critical threshold values of the HHI, for firms willing to merge is not sufficient to be sure that the commission will not investigate their merger additionally.

"The commission mentions a number of factors that will make it more critical: -the merger involves a potential entrant or a recent entry with a small market share; at least one merging party is an important innovator which is however not reflected in market shares; there are

significant cross share-holdings among the market players; the merger includes a maverick firm; there are signs for coordinated behavior between the firms; one of the merging firms has a pre-merger market share of more than 50 per cent"(Voigt and Schmidt 2004,p.1590). Concerning their compatibility with the common market the commission could have serious doubts because in most mergers one of these factors is present. The uncertainty is not reduced by the introduction of HHI and as a consequence the predictability is not improved.

Comparing the new merger regulation and the old merger regulation the most important difference between them is the substantive test under which the concentration in question is to be evaluated. In the green paper a move to the SLC test was mooted by the EC commission. A fusion of the two tests is the position in the ECMR now.

The essential difficulty with the operation of the dominance test place in the application of the ECMR to cases in which mergers were taking place in oligopolistic markets where single firm dominance was not being created nevertheless it was argued that a position of collective dominance also known as joint dominance and oligopolistic dominance was being created. "In recitals 25 and 26 of the ECMR the rationale for expanding the evaluative test and the links between this and the dominance test is made clearly in the following terms:

The wording of recital 25

In view of the consequences that concentrations in oligopolistic market structures may have it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However under certain circumstances concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other as well as a reduction of competitive pressure on the remaining competitors may even in the absence of a likelihood

of coordination between the members of the oligopoly result in a significant impediment to effective competition. The community courts have however not to date expressly interpreted regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore in the interests of legal certainty it should be made clear that this regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition in the common market or in a substantial part of it should be declared incompatible with the common market. "The 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 behavior of undertakings which would not have a dominant position on the market concerned"(Furse 2004,p.328-329).

The wording of recital 26

A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and commission decisions pursuant to regulation (EEC) No 4064/89 while at the same time maintaining consistency with the standards of competitive harm which have been applied by the commission and the community courts regarding the compatibility of a concentration with the common market this regulation should accordingly establish the principle that a concentration with a community dimension which would significantly impede effective competition in the common market or in a substantial part thereof in particular as a result of the creation or strengthening of a dominant position is to be declared incompatible with the common market.

"The new test is intended to deal with situations of non-collusive oligopoly where the effect of the merger may still impede competition although the merged entity 's market share falls below the traditional dominance threshold"(Furse 2004,p.329). Under the new test the

commission's power to block transactions is enhanced in particular in cases of 'unilateral effects' where a merger may reduce competition even though it does not cause to joint or single firm dominance.

The legal test is set out at article 2 of the ECMR.
"The wording of the article 2 ECMR

1.Concentrations within the scope of this regulation shall be appraised in accordance with the objectives of this regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.
In making this appraisal the commission shall take into account:
a-the need to maintain and develop effective competition within the common market in view of among other things the structure of all the markets concerned and the actual or potential competition from undertakings located either within or out with the community
b-the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets ,any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers advantage and does not form an obstacle to competition.
2.A concentration which would not significantly impede effective competition in the common market or in a substantial part of it in particular as a result of the creation or strengthening of a dominant position shall be declared compatible with the common market.
3.A concentration which would significantly impede effective competition ,in the common market or in a substantial part of it ,in particular as a result of the creation or strengthening of a dominant position shall be declared incompatible with the common market. "(Chalmers et al.,2006, 1089-1090)

The commission realized that mergers may have anti-competitive effects even without the merger creating a dominant position and that was the reason for this change. "However for the sake of consistency article 2 retains the dominance language and the ECMR makes clear that for the vast majority of cases, the change in the substantive test will not warrant a change in assessment, that is in those mergers where the commission is able to find the creation or strengthening of a dominant position, dominance will remain the basis upon which the merger is appraised and the creation or strengthening of a dominant position allows for the presumption that the merger impedes effective competition"(Chalmers et al. 2006,p.1090).

"The CFI 's judgment in Airtours v. Commission (Case T-342/99[2002] ECR II-2585,[2002] 5 CMLR 317) in particular seems to open up a 'gap' consisting of cases that could result in one or more oligopolists, neither of which is individually dominant , being able to exert and profit from their market power following a merger ,without being dependent upon a coordinated response on the part of the other members of the oligopoly :it would seem to be clear from the Airtours judgment that this problem of non-collusive oligopoly is not covered either by single-firm nor by collective dominance"(Whish 2005,p.878). As a consequence a 'substantial lessening of competition' standard might be more appropriate according to the suggestions of some commentators.

Unilateral effects are covered now it is obvious. According to the Recital 25 the greater focus of the new test on the significant impediment to competition is reduced more willingly than on the concept of dominant position. "A merger may be forbidden even if it does not cause the merged firms and another undertaking or others to reduce competition without acting as if there was collusion but a dominant position must result for a merger to be forbidden unless unilateral effects are likely"(Korah 2004,p.351-352). The commission must declare by decision that the concentration is compatible with the common market if the criterion for prohibition is not fulfilled .

To meet the arguments of those in both the SLC and dominance camps is the purpose of the new test. The new test is much more broader than the old test. It was established in the wording of the article clearly that a merger may be prohibited even if it does not create or strengthen a dominant position but if a significant impediment to effective competition is established. On the other hand the ECMR preserves the previous decisional practice and case law of the ECJ by referring to the creation or strengthening of a dominant position. "The commission takes the view it is expected that most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance"(Sufrin and Jones 2004,p.915).

In recitals 25 and 26 of the ECMR the twin objectives of broadening the test whilst at the same time preserving the dominance case law are explained. "Mergers that will result in non-coordinated effects on an oligopolistic market even though a position of single of collective dominance may not be established will be caught by the new substantive test especially recital 25 make it obvious"(Sufrin and Jones 2004,p.915).

Through the publication of guidance the commission's appraisal of when concentrations under the regulation will significantly impede effective competition was clarified and explained.

A sound economic framework for the assessment of concentrations with a view to determining whether or not they are likely to be declared compatible with the common market is provided by the commission's guidelines. "An economic appraisal of the impact of the merger on the competitive process in order to determine whether or not it will significantly impede effective competition in particular by the creation of strengthening of a dominant position of course requires as a starting point that the relevant market be defined"(Sufrin and Jones 2004,p.917). For any assessment of the effect of a concentration on competition a proper definition of the relevant market is a necessary precondition.

Mergers which do not result in horizontal are related but result in range effects or portfolio power by increasing the range of products that the merged entity will produce has become increasing concerns of the commission. Mergers between undertakings which operated in separate but closely related product markets were prohibited by the commission in GE/Honeywell and Tetra Laval/Sidel cases. In its horizontal merger guidelines the commission's analytical approach on the competitive assessment of a concentration with horizontal effects is outlined. Once it has identified the relevant market it uses, market share and concentration thresholds as a rule to distinguish problematic mergers.(Sufrin and Jones 2004,p.925) The likelihood that the merger will result in anti-competitive effects on the market, either through non-coordinated or coordinated effects in the absence of countervailing factors is considered by the commission. After the issues whether or not countervailing factors such as buyer power new entry or efficiencies would counteract the potentially harmful effects identified are considered. Where the anti-competitive effects result from the failure of a firm rather than the merger a concentration may be permitted according to the consideration of the commission.

In France v. Commission, Société Commerciale des Potasses de l'Azote (SCPA) v. Commission(ECR I-1375 [1998] 4 CMLR 829), relying on the facts that the commission had not established that the concentration would in fact give rise to a collective dominant position on the market the commission's decision was annulled by the court. "Nonetheless the judgment was of enormous significance since the ECJ held applying an interpretation of the regulation in accordance with its purpose and general structure that collective dominant positions do not fall outside the scope of the regulation"(Sufrin and Jones 2004,p.935).

The commission's decision was annulled by the CFI on appeal in a judgment that was highly disapproving of the commission's economic reasoning. The CFI set out three criteria necessary for a finding of a collective dominant position building upon the judgments in France v. Commission(Cases C-68/94 and C-30/95) and Gencor v. Commission (Case T-102/96 [1999] ECR II-753,[1999] 4 CMLR 971). First one is there had to be sufficient market transparency to enable each member of the dominant oligopoly

to know how the other members are behaving and to monitor whether or not they are adopting a common policy. Secondly the ability to sustain the situation of tacit coordination over time the existence of restrictions to ensure that there is a long –term reason not to depart from the common policy. Third criteria is the common policies must not be susceptible from the predictable reaction of competitors or consumers.(Sufrin and Jones 2004,p.939-940)

In an oligopolistic market mergers which lessen the competitive limitations exercised by the merging parties together with a lessening of competitive pressure on the competitors left behind may result in a significant impediment to effective competition, even if there is no possibility of the members of the oligopoly coordinating their behavior.

To deal with situations in which dominance could be considered to be held by more than one party, the court supported the commission to varying degrees and the law of joint dominance in the context of both article 82 and the ECMR has developed by the commission. The starting point was Kali und Salz case for collective dominance case law. In this case on the grounds that it would cause to a situation of oligopolistic dominance a proposed joint venture was blocked. The CFI annulled the decision but the basic argument is accepted by the court that old merger regulation could be applied to positions of collective dominance. "Collective dominance is also sometimes referred to as 'oligopolistic dominance' and although this term is not preferred it gives some indication of the problems that may be encountered in markets in which there are few players and which tend towards parallel conduct, even if this falls short of a concerted practice"(Furse 2004,p.331). The commission made clearer its view of collective dominance in Gencor/Lonhro(97/26 (1997) OJ L11/30) case.

The oligopoly becomes dominant where anti competitive parallel behavior is caused by a simple modification by members of the oligopoly to market conditions. "The commission made clearer its view of collective dominance, holding that; active collusion would therefore not be required for members of the oligopoly to become dominant and to behave

to an appreciable extent independently of their remaining competitors their customers and ultimately, their consumers(para.140)"(Furse 2004,p.331).

The commission recognized in Price Waterhouse/Coopers and Lybrand(1999/152 (1999) OJ L50/27) case that some of the elements that had been mentioned in Gencor case were also factors in the accountancy market. In light of the amended ECMR the clearest statement of these principles up to now perhaps the final statement is that in Airtours /First choice case in which a merger between two companies in the UK market for foreign package holidays was blocked by the commission. The commission set out the conditions for a finding of collective dominance as product homogeneity, low demand growth, low price sensitivity of demand, similar cost structure of the main suppliers, substantial entry barriers and insignificant countervailing buyer power. The commission decision was annulled on appeal to the CFI and the CFI stated that three conditions were necessary for a finding of collective dominance in its judgment. First of all, each member of the dominant oligopoly has to be able to know how is the behavior of the other members in order to observe if they are adopting the common policy or not. For that reason for all members of the dominant oligopoly sufficient market transparency there must be to provide that they are aware sufficiently and quickly of the way in which the other members market conduct is changing. Secondly the situation of implicit coordination must continue in due course.
All the members of the dominant oligopoly can benefit if they maintain the parallel conduct. As a result in this condition the notion of punishment in respect of conduct opposing from the common policy is essential. "In this instance the parties concur that for a situation of collective dominance to be viable there must be adequate deterrents to ensure that there is a long term incentive in not departing from the common policy which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others so that it would derive no benefit from its initiative"(Furse 2004,p.332). Thirdly the commission must also establish that the expected reaction of current and future competitors as well as of consumers would not put at risk the results expected from the common policy to prove the existence of a collective dominant position to the necessary legal standard.

The CFI found that a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created have been made by the commission in the current case. As a consequence the CFI annulled the decision. "In the future it is to be hoped that arguments as to the existence or otherwise of a collective dominant position can be avoided by reference instead to the significant impediment of effective competition part of the test of article 2 ECMR rather than by shoe-horning such cases into a dominance analysis"(Furse 2004,p.333).

The purpose of the new SIC test which is the new legal substantive test in the new merger regulation, is to fill the perceived "gap" in the dominance test which was illustrated by cases such as Airtours in the European Union and Heinz in the United States. The situation where the post-merger entity's market share falls below the level required for dominance but the merger may lead to unilateral effects detrimental to competition is related to the gap. In a disciplined way beyond dominance is extended the new test and non coordinated effects are covered by the new test it is clear now, in this manner correct the problem of gap. The SIEC test extends, in a disciplined way, beyond dominance, and makes clear that the new test covers non coordinated effects, thus rectifying the problem of the "gap". "Legal certainty has attempted to enhance by the commission in the formulation of recital 25, by creating the impression that the interpretation of the SIEC test is compatible with former court judgments" (Kokkoris,ECLR,2006,p.495).

A new substantive test is introduced by the regulation 139/2004 giving the commission the power to block a transaction which "would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position." The dominance test laid down in regulation 4064/89 was replaced by the new significant impediment test. The dominance test is incorporated in the new standard but it is not limited to this test. Unilateral effects which are price increases arising because the transaction eliminates some existing competitive constraint that had been holding back the price level in the market are allowed to take into account by the

commission relying on the new substantive test. The EC competition law are brought more in line with standard applied in the United States and Canada by the adoption of the significant impediment test. Due to its dependence on dominance the previous regulation was not able to reach non collusive oligopolies in which none of the members in the oligopoly was dominant. The Commission do not need any more to extend the limits of the collective dominance test with the purpose of blocking transactions resulting in price increases without creating a single dominant position, as a result of the modification of the substantive test.

The test for prohibition was changed from the creation or strengthening of a dominant position to a significant impediment to effective competition by the new merger regulation. In particular Germany wanted to maintain the concept of dominance as part of the substantive assessment and the countries like UK, Ireland and other jurisdictions including the US which used and favored the adoption of a 'substantial lessening of competition' test. As a result, the test can be seen as a compromise between those countries. A perceived gap is intended to fill by the new test by covering cases of unilateral effects that is to say the fear is that the merged entity could raise prices even though it will not become the largest player which means sole dominance and without the need of any tacit coordination with other players which means joint dominance. On the other hand it is doubtful that the new test will result in a big change in enforcement practice. Until this time the commission has been able to extend the dominance test to apply to mergers that it found to be harmful. "In the current Oracle/PeopleSoft review, for example, any likely adverse finding would not easily fit into the dominance test"(Shearman & Sterling,2004,p.1). For software applications, this two companies are the second and third largest competitors. The company will have only 30 per cent of the market after the merger which is less than the market leader. Possibly a transaction like that would not create or strengthen a dominant position but could be interpreted as constituting a significant impediment to competition. As a consequence the language is more aligned with practice by the test and for this reason the rigor of reasoning is improved, more willingly than causing additional prohibitions. On the other hand an approach more rigorous and economic based is expected brought about a

significant increase in information that parties have to provide. “In particular, the commission will want to review in much more detail the business case for the merger, the financials prepared by bankers and analysts and internal documentation prepared in relation to the merger and markets concerned” (Shearman and Sterling LLP, Client Publication, 2004).

In the new merger regulation of 2004 the council revised the substantive test. Horizontal merger guidelines are issued by the commission to describe its analysis in harmony with the revision of the substantive test. The definition of affected markets is the beginning of the substantive analysis of an EC merger case and the affected markets are the relevant product and geographic markets. “It proceeds to an assessment of the possible competitive effects in the affected markets as well as countervailing factors, and, with the cooperation of the parties, determines whether agreement can be reached within the decision deadlines on undertakings that would remedy anticompetitive effects” (www.antitrustsource.com, january 2005, p.9).

5.4. THE INVESTIGATIVE POWERS AND ENFORCEMENT

5.4.1.Enhancement of The Investigative Powers

The rules concerning investigation and enforcement powers of the commission which are applicable to concentrations with a community dimension are provided under the merger regulation. As opposed to merger regulation only the rules on investigations and procedures in respect of the application of articles 81 and 82 EC and not in respect of concentrations with a community dimension are described by the regulation 1/2003. Under the merger regulation the powers of investigation are much more intense than the powers provided in previous regulation. To a large extent now the powers are at the level of the powers set out in regulation 1/2003.

The requests for information are covered by article 11. Under the provisions of Article 11(2) the commission is allowed to send a simple request for information to a person or undertaking and under the provisions of article 11(3) the commission is allowed to advance by means of a formal decision . If the information provided is not correct or confusing or in the case of article 11(3) is not provided within the proper time limit penalties are available. The commission is allowed to request information first without threat of sanctions and then by decision. According to the article 11(7) any natural or legal person but only with their consent may be interviewed by the commission. Under the terms of the article 11(6) all necessary information must be provided by governments and competent authorities of the member states to the commission to permit the commission to complete its task.

According to the article 13 all necessary inspections of undertakings and associations of undertakings can be performed by the commission. At the same time the commission under article 12 can ask member states to complete inspections on its behalf. The power of the commission under article 13(2) is similar to the powers described in regulation 1/2003 for instance the power to enter premises, examine books and records, take copies or extracts

from these records, seal business premises for the period of the inspection and power to ask any representative or member of staff of the undertaking for explanations.

Strengthened enforcement powers for the commission are introduced into the merger regulation by procedural changes. The enforcement powers of the commission are improved by increasing the penalties for failing to supply information and for providing incorrect or misleading information. In accordance with the new regulation the commission obtain additional powers for instance the formal right to interview witnesses and record the results.

The approval decision of the commission is so important for the parties, that is why in general there is no need for the commission to depend on its statutory powers. The requests for information are without delay in general on the same day responded by the parties by fax or email when the answer of the request is simple.

In general in the merger proceedings an important role belongs to the third parties. It is possible to address the investigation to the notifying parties but normally it is carried out in the form of written requests for information to customers, suppliers or competitors. The commission also can inquire about the opinion of the parties orally. The powers of investigation of the commission were increased by the current regulation now the powers are similar with those stated in regulation 1/2003. The procedural obligations of the commission are taken very seriously by the court of first instance. The court of first instance criticized the commission analysis in Schneider Electric SA v. Commission(Case T-310/01,[2002]ECR II-4071,[2003]4 CMLR 768) case and then the decision of the commission was cancelled because of the procedural irregularities carried out by the commission, especially in that case the commission denied the rights of defense.

The current merger regulation's upper limit of ten percent of the turnover in the previous year for lump sum fines to punish the most serious non-compliance is maintained by the new merger regulation. For instance, failure to notify transactions or to comply with the waiting period obligations or conditions.

The powers of the commission in merger investigations are now similar to the powers that it has in cartel and dominance investigations but there is an exception, the commission had no power to search homes of individuals. Explanations of facts or documents in connection with the investigation may be asked by the commission to the company's representatives. The commission can also ask for explanations to complainants, customers, or competitors. Enforcement practice did not change widely because most of these powers have been existed in some form under the previous regulation.

Under the Articles 11–13 of the ECMR the EC's investigative powers are described which include compulsory processes to obtain answers to written questions and inspection of books and records. Contrary to the US procedure, the EC does not have the power to oblige oral testimony under oath (depositions), but voluntary interviews may be taken by the commission. The ability to confirm business premises, books and records are included in the powers of the commission's to inspect undertakings.

5.4.2. Fines

In the context of merger proceedings the investigation powers of the commission are enhanced by the new merger regulation. For instance, the fines for failure to respond to information requests and for providing incorrect or confusing information in the notification were augmented to a maximum of one percent of the companies turnover in the previous year. The limit of fines for these type of non-compliance are significantly higher. In addition to this improvement the level of daily penalties that may be imposed by the commission are increased with the new merger regulation too. Five percent of the average daily group-wide turnover of the negligent undertakings would be the new limit for these

penalties. According to the equivalent limits in the new merger regulation these limits are significantly higher and depending on the type of negligence vary from 25,000 euro per day to 100,000 euro per day. When the parties did not succeed to comply with their obligations under the regulation commission have the right to impose fines and penalties. According to the new merger regulation, these penalties and fines are applicable to third parties also. When customers, suppliers or competitors of merging parties fail to present in a proper time ,correct and complete answers to requests for information sent by the commission, they are responsible, too.

In a number of situations financial penalties may be imposed by the commission according to article 14. “By virtue of article 14(2) the commission may impose fines not exceeding 10 per cent of the aggregated turnover of the undertakings concerned for intentionally or negligently failing to comply with obligations to suspend or abrogate the concentration or for implementing a concentration that has not been notified within a week”(Korah 2004,p.357). An amount of fines of between 1.000 and 50.000 ECUs may be imposed by the commission for failing to notify or notifying incorrectly or untruthfully a concentration.

“Article 15 provides for the imposition of periodic penalty payments of up to 5 percent of the average daily aggregate turnover of the undertaking concerned for each working day of delay from the deadline given in a decision to compel an undertaking to supply information, comply with an investigation or comply with any decision imposing an obligation in relation to a concentrations consummation” (Furse 2004,p.337). According to article 16 the decisions taken by the commission imposing a fine or periodic penalty can be re-examined by the Court Of Justice the same as with all matters over which the commission exercises jurisdiction.

“In BP /Erdölchemie (Case COMP/M.2624,[2004]OJ L91/40) for example the commission issued a decision imposing a fine of €35.000 on Deutsche BP for having omitted to identify important information in its Form CO (the maximum fine was then €50.000 but is now 1 per cent of the undertakings concerned turnover)”(Sufrin and Jones 2004,p.907).

The previous fines were fixed at 50,000 euro maximum, now it has changed to one per cent of the offending company's group turnover. "The existing maximum fine of 10 per cent of group turnover for implementation in breach of the suspension obligation or in breach of a condition of a decision has now been extended to cover failure to notify"(Shearman and Sterling LLP April 2004,p.3). The commission's enforcement powers are significantly extended but also a change in practice only in relation to obvious breaches of the regulation was expected.

It is provided under article 14 that the imposition of fines of up to 1 percent of the aggregate turnover of the undertakings concerned where they intentionally or negligently supply incorrect or misleading information on form CO or other submissions or supply incorrect or misleading information in response to an article 11 request or decision or fail to respond within the time specified or refuse to submit to or fail to produce required records in an investigation. Also under article 14(2) it is stated that the imposition of fines of up to 10 per cent of the aggregate turnover of the undertakings concerned where they fail to notify a concentration prior to its limitation or fail to comply with conditions of a commission decision clearing a merger or accomplish a merger in the face of a prohibition decision.

5.5. MERGER DEFENSES

5.5.1. Efficiencies

According to the merger regulation a concentration which significantly lessen competition would be prohibited in opposition to US procedure which may justify a merger that significantly lessens competition. The Commission consider that when a merged entity may reduce costs or provide a better product that would help create or strengthen a dominant position. The Commission is influenced to make improvements to this point of view. "Efficiencies are no longer an offence, but they are a defense only when they are

substantial, merger specific, verifiable and quantifiable" (Korah 2004,p.352). The objective of the commission is the consumer interests. The balance between the benefits to consumers of substantial efficiencies and the significant impediment to competition has to be succeeded by the commission. On the other hand the commission requires that the efficiencies are resulted directly from the merger.

The commission was criticized because of the efficiency defense that it utilized. The horizontal merger guidelines now take account of the commission's consideration of efficiencies. According to the merger regulation, in the common market to determine the influence of a concentration on competition, it is proper to take account of any proved and possible efficiencies proposed by the undertakings concerned. There is a possibility the efficiencies which are created as a result of the concentration can neutralize the influences on competition and also the possible damage to consumers benefits, which means that the concentration would not impede significantly effective competition in the common market or in a substantial part of it especially as a result of the creation or strengthening of a dominant position. A guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration should be published by the commission.

"The guidelines provide that efficiencies will be taken into account in the overall assessment of a merger if three conditions are fulfilled: that they benefit consumers (by lower prices or improved products); that they are a result of the merger and cannot be achieved without it(merger specificity) and that the commission is able to verify that these efficiencies will materialize" (Chalmers et al. 2006,p.1110). It is difficult for a merger creating a dominant position at the same time to satisfy the consumer benefits by lower prices or improved products. It can be realized only by a merger in an oligopoly market, if the efficiencies produced by the merger can lessen the reason for implicit collusion. It become visible that the commission is ready to take into account the efficiencies. The standard of efficiency is similar to the USA standard, in the USA efficiencies have been argued in some cases with unusual market situations.

"In GE/Honeywell (Comp/M.2220) for example the commission was particularly concerned that the merged entity would be able to offer low bundled prices for those that purchased both its aircraft engines and its avionics and non avionics systems" (Sufrin and Jones 2004,p.954). The commission was concerned about the competitors of the merged entity that can be damaged as a result of the merger. According to the approach of the commission some commentators thought that the commission protects the competitors rather than the competition itself and that decision was against mergers which create efficiencies. The horizontal merger guidelines of the commission now regulates the efficiencies. Solely substantiated efficiency claims will be taken into account by the commission. The proof to demonstrate the claimed efficiencies and that there are no less anti competitive ways of carrying out those efficiencies should be provided by the parties. When the claimed efficiencies benefit consumers, are merger specific and are verifiable, only in these conditions they will be taken into account by the commission.

5.5.1.1. Benefit To Consumers (First Requirement)

As a consequence of the merger the consumers should not be damaged. Appropriate efficiencies should be brought by the merger for instance, lower prices, new or improved products or services. Efficiencies may cause reasons to augment production and reduce output and impediments to coordinate behavior in the circumstance of coordinated effects. According to the commission's view, when the market force acquired by the undertakings become larger it will be difficult to consider if the consumers are benefiting from this merger.

5.5.1.2 Merger Specificity (Second Requirement)

The requirement of merger specificity is defined under paragraph 85 of the horizontal guidelines. When the efficiencies are a direct result of the notified merger, the competitive assessment is applicable to them and by less anti competitive alternatives cannot be achieved to a similar extent. The efficiencies are considered to be caused by the merger in

these situations and as a consequence merger specific. All the appropriate information essential to prove that there are no less anti competitive, realistic and attainable options of a non concentrative nature or of a concentrative nature than the notified merger which maintain the claimed efficiencies should be provided by the parties in right and proper time. The options that are reasonably convenient in the business situation confronted by the merging parties regarding to established business practices in the industry concerned are significant for the commission.

5.5.1.3 Verifiability (Third Requirement)

According to the commission the efficiencies should be measured if it is possible or recognized the positive effect on consumers by the parties. It will be difficult for the parties to prove the efficiencies such that the commission can be reasonably sure that the efficiencies are possible to appear and be substantial enough to neutralize a merger's potential harm to consumers.

A significant improvement for European merger policy is the explicit introduction of an efficiency defense. Under the old merger regulation, it is stated that technical in addition to economic progress had to be taken into account provided that it is to consumers benefit and an obstacle to competition is not formed. In accordance with this rule an explicit efficiency defense was introduced into the guidelines in connection with horizontal mergers. The efficiencies need to be specific to the merger, they need to be verifiable and they need to benefit consumers to play a balancing role in the decision of the commission. US merger guidelines include very similar criteria compared to horizontal merger guidelines of the commission. It is not yet clear if the efficiency defense can only be applied as a balancing factor in cases in which effective competition is significantly impeded or whether it can also be represented in cases in which a merger would create or strengthen a dominant position. More specific and precise guidelines are needed. The criteria mentioned by the commission is not accomplished by most of the mergers as a matter of fact. The discretionary flexibility of the commission will be augmented by the efficiency defense. A

reduce in predictability is caused by the present version of the efficiency defense. For EU merger policy transparency and legal certainty are always required objectives.

5.5.2. The failing firm defense

US antitrust case law determines the failing firm defense in a good way. An escape route is provided by this defense for a merger involving a firm facing an otherwise inevitable liquidation. This failing firm defense is implemented to ensure the protection of the creditors, owners and employees of small businesses and as such was concerned not with efficiency but with distributive justice.

There is an opportunity for failing firm defense within the plan of the ECMR, in two situations first of all where the deterioration of the competitive structure cannot be said to be caused by the merger and secondly where the competitive structure would deteriorate to at least the same extent in the absence of the merger.

In Kali und Salz/mdk/treuhand (Case IV/M.308,[1994] OJ L 186/30,[1994] 4 CMLR 526) case this failing firm defense principle was made out initially. The case caused the problem of if an undertaking with large market shares could combine activities with its only or main failing competitor. The Commission in its decision stated that the concentration would acquire enormous shares on the potash market in Germany and the magnesium products market of 98 per cent and 100 per cent in that order, and its decision was that the concentration did not cause the creation or strengthening of dominant position. Despite the fact that the merger was blocked the dominant position to the same extent would be inevitably achieved or reinforced by the acquiring undertaking. In that case the failing firm company defense was successful according to the commission. After the Kali und Salz case the failing firm defense or the concept of the rescue merger has become applicable more broadly by the commission. Also the failing firm defense has applied by the Commission in accordance with the criteria described in the US merger guidelines.

In a number of cases this defense has been pleaded and in BASF/Pantochim/Eurodial case (Case IV/M.2314,IP/01/984) the defense was successfully invoked by the parties. The concentration was probably caused to the acquisition of high market shares on certain base chemical markets. The Commission underlined that the approach taken by the ECJ in the Kali und Salz judgment was more extensive than the criteria explained in the Commission's own decision in that case. When the Commission considers a merger is likely to impede competition the only other way to justify it, is to prove that it is a merger with a failing firm, which would have exited the market without the merger. In BASF/Pantochim /Eurodiol case this defense was applied, BASF wanted to acquire control of the whole of the Belgian undertakings Pantochim and Eurodiol. Three chemical markets were affected by this merger. In a market with high entry barriers with two other much smaller competitors Eurodiol was the third largest supplier and BASF was the leader of the market. The merger was cleared due to the concerns that the merger raised because it created a dominant position, as a result of the application of the failing firm defense.

The competitive structure resulting from the concentration would deteriorate in a similar fashion even if the concentration did not proceed even if the concentration was prohibited, was the key requirement for a merger to be regarded as a rescue merger. The undertaking to be acquired can be regarded as a failing firm and that the merger will not be the cause of the deterioration of the competitive structure, are the key requirements. The criteria as relevant for the application of the concept of the rescue merger regarded by the Commission is the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking, there is no less anti competitive alternative purchase and the assets to be acquired would inevitably exit the market if not taken over by another undertaking.

"The approach in BASF/Pantochim/Eurodiol was reiterated by the commission in Newscorp/Telepiu (Case IV/M.2876,IP/03/478) and is adopted by the commission in its horizontal merger guidelines"(Sufrin and Jones 2004,p.960).

The notifying parties are obliged to demonstrate that there was indeed a failing firm defense and pointed out that three criteria are applicable according to the emphasis of the Commission in the notice on the appraisal of horizontal mergers. A merger which saves a failing firm should not be blocked because following the exit of the failing firm the market would also be more concentrated and according to the failure of the firm there would be social costs.

The objective of the Commission's interpretation of the failing firm defense is to avoid any appeals to non-economic policy considerations. A merger with a failing firm causes no harm to competition as a consequence it is permitted, it is not because of the merger rescues jobs which would have been lost as a result of the firm's exit. In some cases the Commission's conclusions are affected by other community interests like the wish to ensure plurality of media outlets and industrial policy considerations.

The importance of a merger in avoiding bankruptcy as well as the impact of the failing firm defense on entry in the market have been appreciated by the competition authorities and the role of potential dynamic or innovative efficiencies and the financial distress in which a company may be is also taken into account by the competition authorities. Such issues are considered in the assessment of mergers involving failing firms. The failing firm defense is explicitly mentioned in either the European Union and United States merger guidelines. A supplementary motivation has been provided to the development of the defense by case law in both jurisdictions. If mergers involving failing firms provide no other benefits and if they lead to significant impediment to effective competition they should not be allowed most of the time.

Some important and difficult issues are brought about by the application of failing firm defense and they need to be taken into consideration in the assessment of a merger. The criteria that will be applied in the assessment of the merger is concerned in these issues such as the counterfactual to a merger involving a failing firm and in addition to this the degree of financial hardship of the firm. There is a difference between the assessment of a

merger involving a failing firm and the assessment of a merger which involves non-failing firms. The pre-merger competitive conditions would be different in case of a merger of non failing firms that is why it should not be used as a standard in case of a merger involving a failing firm. Even if the merger was prohibited, pre-merger conditions of competition might not exist if one of the parties to a merger is failing. When the alternative is immediate bankruptcy and the failing firm does not receive a significant share of the gains from the merger only in this situation the merger should be allowed. If the merger is allowed this could be explained as a signal that the firm is not failing. A merger involving a failing firm is the less likely to be blocked despite the fact that the greater the weight on consumer benefits and the greater the adverse effects on competition.

The failing firm defense will arise more frequently as a consequence of the increased globalization of the marketplace and the increased competitive pressures placed on firms. The viability and profitability of the merging firms should be taken into consideration by the competition authorities while assessing the transaction. The enforcement authorities agree to the rigorous competitive effects analysis and that must be enough to make sure that valid claims of failure and changing market conditions are considered and evaluated with awareness.

The new horizontal merger guidelines are published by the Commission in order to clarify the criteria it would apply in the assessment of concentrations under the merger regulation. The notion of failing firm defense is referred by the Commission and the criteria according to which a merger involving a failing firm can be assessed is set out in these guidelines. The Commission, the CFI and the ECJ have been dealing with mergers involving failing firms prior to the publication of these guidelines as the analysis of case law will illustrate. The development of the failing firm defense doctrine is directed by the case law practice and in the guidelines this case law influenced the formulation of the failing firm defense criteria. The Commission will consider the failing firm defense according and similar to ECJ case law. Any reference to the failing firm defense was not included in the old European Community Merger Regulation. The merger may be deemed not to significantly

impede effective competition if one of the companies in the merger is a failing firm and would leave the market anyway. The deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger is the basic requirement.

In assessing the acceptability of the failing firm defense, the lack of causality between the merger and the possible worsening of the competitive structure due to the merger plays a major role. In assessing the acceptance of failing firm defense the analysis of the counterfactual, a comparison between the competitive conditions occurring due to the merger and the conditions that would prevail if the merger is blocked, are essential. The collective requirements in order to prove lack of causality among the merger and the worsening of the competitive structure that it would otherwise create are coming out as the three criteria outlined in the guidelines.

5.6.OTHER CHANGES

A change to the internal organization of the commission and the method in which most important cases are handled was necessary, too. On the other hand these other changes without amending the regulation can be implemented.

The internal organization and operation procedures of DG Comp. will be changed. The economic analysis and fact finding practices will make stronger by new separation of powers because the court of First Instance criticized it seriously in its decisions. Within DG Comp a chief economist would be appointed with a group of economists and they will be mixed up in serious and important cases. Also in certain situations a committee of experienced officials will be submitted to examine the decisions of the investigating team by giving them a necessary new look about the case and then companies will be allowed with an earlier opportunity to have access to the file. At the same time they will examine third party submissions made to the Commission in relation with the case and then the organizing of regular “state of play” meetings between the Commission and the parties during the process, so that these parties are kept fully aware of the headway of investigation

and the thought of the Commission on the merits of the case and at last, the publication of a revised and enlarged guidelines on “best practices” in the management of such cases (Goyder 2003,p.396).

6.ANALYSIS AND EVALUATION OF THE MAIN CHANGES TO THE REGULATION

The Commission had a good reputation from the first date that ECMR was implemented and the ECMR was known as a successful regulation in the EC merger control system. Unfortunately, the Commission had risked to lose its reputation after the annulment decisions of the CFI which occurred a real crisis for the Commission. In Airtours, Tetra Laval and Schneider cases the Commission prohibited those mergers and the parties appealed to the CFI, as a result the CFI annulled the prohibition decisions of the Commission. The Airtours appeal was the first success against a prohibition decision of the Commission and the others followed after this appeal.

After those annulment decisions, practitioners such as lawyers and economists dealing with this cases, companies and member state authorities agreed on the need for a reform in the regulation and encouraged the Commission to realize major changes to the merger regulation. The Commission after CFI landmark judgments sought that a reform of the ECMR was obligatory and required which was already proposed in the green paper on reform of merger regulation issued in 2001 and which raised questions about how merger procedure operates in practice. The reform was intended to develop commission's fact finding, evaluation of mergers and to bring more investigative approach into merger review process. The new regulation was necessary to modernize European competition policy in order to be able to deal with complex competition issues and extend the Commission's review process. The main areas of the dispute stated in the judgments of the CFI and ECJ were conglomerate mergers (conglomerate theories such as leveraging through tying or bundling), collective dominance and review of the substantive test. The US antitrust policy was covering efficiencies, unilateral effects in non collusive oligopolies where a market dominance is not created by the transaction. In GE/Honeywell case, the differences in approach between commission and US authorities were raising a problem. As a consequence of this case another reform's aim would be to bring the Commission antitrust policy into line with US standards in order to consider efficiencies and unilateral effects in non collusive oligopolies.

The Commission was criticized in all these cases because of its analysis and sufficiency of evidence. The economic analysis of the commission in those cases was not proper and adequate according to the ECJ and CFI decisions. These cases indicated that the competition rules were not sufficient to deal with the complex competition issues and contests of a globalized economy, high volume of transactions and the development of new theories in the assessment of market dominance. The interpretation and enforcement of competition rules must be realized with a more exact economic approach by the Commission. After the annulment decisions, it became obvious that there was a need for precise fact finding, greater transparency, properly reasoned decisions and a higher standard of proof in the Commission' decision making process.

The significance of the Airtours case;

Airtours was the first successful appeal. Before this appeal the parties were not preferring to object to prohibition decisions of the Commission due to the duration of the procedure before ECJ or CFI which was taking too much time. For instance, in Airtours the parties waited 3 years to obtain the annulment decision. After this annulment decision the CFI began to apply a new fast track procedure to review the prohibition decision and by application of the new procedure firstly to Tetra laval and Schneider cases, the annulment decisions in these cases are taken in ten months.

The Airtours decision is the first decision that the Commission blocked a merger resulting in collective dominance between more than two firms. At the same time this is the first case in which the European court annulled a Commission's decision prohibiting a merger. In all these three landmark judgments (Airtours, Tetra Laval and Schneider) the CFI criticized the sufficiency of evidence collected by the Commission. Under the old merger regulation the gap was that the unilateral conduct of non dominant firms or oligopolies was not overtly prohibited. Also under the old merger regulation, in the absence of dominance mergers detrimental to competition can be approved and mergers enhancing welfare can be blocked by reason of they are creating or strengthening a dominant position. According to

the Commission there were no gaps in the application of the merger rules but practitioners such as lawyers and economists dealing with these cases were against of this interpretation.

The problem raised in this case was the application of the ECMR to collective dominance in oligopolistic markets. The Commission decided that the competition would be significantly impeded in the common market after this merger because it will cause to the creation of a collective dominant position and prohibited the merger. The parties appealed the prohibition decision by stating that the finding of collective dominance and evaluation of the facts were wrong and the ECMR was misapplied. As a consequence of this appeal, the CFI annulled the prohibition decision on factual and legal grounds.

The Commission in its prohibition decision took into consideration to the degree of interdependence between oligopolists concluded that oligopolists would restrict output as a consequence the competition would be reduced and the collective dominant position would be created. But the Commission did not show that after the merger the market players would behave with a tacit cartel agreement. The Commission conflicted from previous case law in three important issues which are considered that tacit collusion was not necessary for the finding of collective dominance and applied the unilateral effects doctrine to the merger. The Commission argue that it is sufficient for the oligopolists to act individually in order to reduce competition among them and as a result they can act independently of competitors, customers and consumers and that a retaliation mechanism is not necessary for the finding of collective dominance and assessed that the three major tour operators would reduce competition between them by limiting in general capacity, the market structure is transparent and the other tour operators ability to compete is weakened. After this decision the criteria for the assessment of mergers in oligopolistic markets became more incomprehensible. The Commission prohibited a merger which gave rise to tacit collusion (unilateral conduct by non dominant firms) which was not covered under EU competition law. The Commission applied for the first time the collective dominance to a 4 to 3 merger in an oligopolistic market with no single dominant players and which does not have the

characteristics favoring collusion. The Commission's decision might be right concerning economic efficiencies.

According to the CFI, the Commission could not prove whether the merger would create a collective dominant position which would restrict competition in the relevant market and any substantial evidence of the three precondition for the establishment of collective dominance. These preconditions are the market has to be transparent for all members of the oligopoly and they will be aware of the other members conduct and adopt the same policy, there must be a retaliation mechanism in order to ensure that the situation of tacit collusion is sustainable over time, the policy must be able to survive the probable reaction of existing and future competitors and consumers. The CFI stated that the Commission could not prove after the merger the three major tour operators would end to compete with each other and that the Commission's conclusion about the market transparency was sufficient to be aware of the conduct of the others for the major tour operators was wrong. The Commission could not prove the competition would be impeded if four major tour operators decrease to three and misjudged the reaction of potential competitors and consumers as a countervailing force. The Commission's analysis was not based on convincing evidence and done a series of errors while assessing the fundamental factors of the assessment of the collective dominance indicated the CFI in its decision. In the mean time the Commission's prohibition did not rely on the obligatory legal standard which is the merger would give rise to collective dominant position of the three major tour operators and that would significantly impede competition in the relevant market. In this case the CFI reviewed the Commission's assessment of the facts in a very detailed way. The CFI has imposed a high burden of proof on the Commission, but the CFI did not specifically state whether tacit collusion is a precondition for the application of the ECMR to oligopolistic markets. The CFI annulled Commission decision and ruled that Commission made a series of errors of assessment and the facts are not supporting the finding of a collective dominance.

As a consequence the Airtours case showed that the collective dominance was not covered under the market dominance test. The new test is supposed to strengthen the economic

analysis of concentrations by considering the efficiency defense. At the same time, collective dominance is intended to be covered by the new test. Under the previous system the market dominance was the sole criterion for the commission to decide if the merger is compatible with the common market. Now the only investigation standard becomes the significant impediment of effective competition. The new text is a change which involves more economic thinking rather than a legalistic approach. Substantial lessening of competition test is used more importantly in US and compared to market dominance test its more effective in dealing with collective dominance and efficiency advantages. The dominance test is redefined in order to cover explicitly all anti competitive situations including tacit collusion and unilateral effects in oligopoly situations which were not covered by dominance test. UK government also in its enterprise act chose substantial lessening of competition test on the basis that it fits more with the economics-based analysis in merger control and is less legalistic, dominance test is not able to cover all anti competitive mergers. The arguments in favor of the SLC test are that this test is necessary for global convergence and in terms of economic assessment its better and also single firm and collective dominance should be covered by this test. The arguments against the test were that most EU member states and the accession countries merger control systems are preferring to use or will use the dominance approach as a consequence legal certainty will suffer.(www.lexmundi.com)

The significance of the Tetra Laval case,

The policies of the Commission concerning remedies and conglomerate mergers were causing problems in this case. According to the decisions of the ECJ and the CFI conglomerate mergers were posing less risk of competitive harm comparing to horizontal and vertical mergers. The Commission applied an intense examination and severe treatment against conglomerate mergers, ECJ and CFI found the approach of the Commission toward those mergers discriminating.

In this case the Commission rejected behavioral commitments in principle due to its first choice for structural remedies. The ECJ stated that the Commission's refuse of considering behavioral commitments suggested by merging party Tetra was improper because structural remedies are severe and when the proposed merger will cause competitive harm and its necessary to equalize the harm they should be applicable to the situation. According to this, the statement of the ECJ the approach of the Commission to the remedies should be more flexible for the advantage of the business community. The Commission after the ECJ and CFI annulment decisions had to establish less hostile approach against conglomerate mergers.

The arguments offered by the merging parties should be observed more objectively and those offered by the competitors of the merging parties more seriously by the commission in order to pass judicial examination of the ECJ and CFI.

Behavioral remedies should not be disapproved by the commission. Tetra offered to make certain behavioral commitments and the commission as a result of its long standing preference for structural remedies rejected tetra's offer that caused the rejection of the ECJ and CFI together. More flexible approach must be adopted by the commission regarding remedies as a consequence of this case.

The significance of the Schneider case,

The Commission's decision is overruled by the CFI in this case due to procedural grounds on the basis of a substantial difference between the statement of objections and the Commission's final decision. The Commission's prohibition decision violated Schneider's rights of defense because deprived Schneider of the opportunity to propose appropriate remedies. The CFI did not agree to the Commission market analysis and assessment of the effect of the transaction on the markets outside France. The commission prohibited the merger by stating that Schneider was not succeeded to present in time adequate undertakings to ensure effective competition in France and in a number of other countries.

In this case both parties of the merger were operating in several national markets in Europe, but the Commission while giving its decision did not analyze sufficiently the markets. The Commission gave its decision considering European markets in general, but forgot to take into account the individual markets. The analysis of the Commission in that case was not sufficient and right, it did not include a wide range of research.

The issues causing concerns were uncertainties in substantive decision making process of the commission, problems occurring in dealing with cases, due process was not sufficient and the merging parties need for better rights of defense. The target of the changes was to improve efficiency, transparency, legal certainty and to respond to criticism of the case analysis and procedures of the Commission.

Referral of cases is simplified in order to ensure that more transactions can benefit from the one stop shop principle. After these changes notifying parties will be able to make a request for a referral of the case from the Commission to national authorities or from national authorities to Commission before the notification. The referral provisions under the old merger regulation can only be used after the notification of a merger to the commission or national competition authorities. It was one of the weaknesses of the old merger regulation and was causing significant loss of time and the merging parties were constrained with unnecessary costs and burdens. The commission under the new system will be able to invite member states to make referrals and to invite member states to request commission to refer cases to them. A right of initiative like this was not given to the commission under the old merger regulation. The commission jurisdiction is becoming wider as a result the one stop shop principle will be extended and this improvement supported strongly by the business community. As a consequence after the changes the one stop shop would be available in more cases. Under the new system the allocation of cases under articles 9 and 22 of the ECMR would be simplified. Changes would make it easier for commission to refer cases to member states. As an argument against the changes for companies it will be hard to find out which jurisdiction will review their merger finally and the disagreements among the commission and the national authorities may encounter additional delays in the pre-

notification stage.(www.eumergercontrol.com) The one stop shop principle is preserved under the new regulation but a new degree of flexibility as to which authorities will examine mergers. The new ECMR recognize that allocation of cases to the Commission or national authorities based on turnover tests may not result in the best placed authority having jurisdiction. The new rules facilitates member states to refer to the Commission mergers that do not meet community turnover thresholds but affect trade between member states and allows merging parties to request a referral from the Commission to a member state before a community notification is made or ask for a merger that would otherwise have to be notified in three or more member states to be dealt with by the Commission. A corrective referral mechanism is included by the procedural changes to help allocate merger cases to the best placed authority. The aim of the changes is the reallocation of mergers to the best placed authority at an early stage of the proceedings. The previous merger regulation's system had failed to do so. Advantages for the merging firms and businesses are the costs and burdens arising from multiple filing obligations will be reduced and the risk of conflicting decisions resulting from the assessment of the same transaction by a number of competition authorities under diverse legal systems will be eliminated. The new system is a significant improvement, its effectiveness will depend on the companies motivation to use it.

Under the old regulation, procedural difficulties that were occurring often was the time pressure happening in complex cases and in cases involving remedies because under the old regulation the time limits were too short and strict comparing to the new regulation. With the new regulation the parties have the opportunity to stop the clock to provide more time both to the Commission and to the parties to discuss remedies in both phase of the investigation. The aim of this significant procedural change is to provide more flexibility for companies and supported by the business community. For evaluating proposed remedies to avoid a prohibition decision and for complex cases newly introduced extensions of time are in favor of the commission and the merging parties. The deadlines after the changes became more flexible. Where the parties submit remedies an automatic extension would apply. In phase 1 cases additional 10 working days, in phase 2 cases 15

additional working days and in complex phase 2 cases parties have the right to request an extension by 20 additional working days. At the second stage of the investigation the commission need more time because it take advice from competitors, customers, and others to understand if commitments offered by the parties are adequate to eliminate the anticompetitive results. The changes in time limits are aimed to give flexibility and to provide that the investigations are achieved as it should be. The parties and the Commission at both first phase and second phase of the investigation could ask for an additional time. This additional time provided under the new rules will ensure that the Commission will have much time to analyze the market efficiently and the result of the merger on the market and the commitments proposed by the parties to avoid a prohibition decision of the Commission. A significant weakness of the previous system was illustrated by Schneider case. In this case the Commission did not analyze all the relevant markets sufficiently and gave an improper and inadequate decision. Perhaps, the additional time provided under the new rules will help the Commission to analyze and search the cases in a good manner. After these changes I believe that there will be less appeals against Commission's decisions and a smaller number of the mergers will be blocked by the Commission.

The requirement that the deal has to be notified within a week from the conclusion of the binding agreement is abolished. After the change, notification became flexible similarly to US rules. The companies will have more latitude in deciding when to trigger a Commission investigation of their merger and to make easier to coordinate EC and US investigations. Before the revision, a binding agreement was necessary for the notification, but after the revision a good faith intention to proceed with a merger is enough for the notification. They will also be able to notify at any time after concluding a binding commitment. The requirement that the merger can not put into effect until the decision of the Commission is not changed. Under the old regulation, this one week time limit for the notification was causing an unnecessary strictness and its removal was effective. This new revision gives to parties of a merger more flexibility before obtaining the authorization of the Commission. After the revisions were made to the old regulation, the parties could notify their planned merger to the Commission earlier. In practice the previous time limit was not adequate. The

revision of the provision considering the notification gave more flexibility to the parties because now notification at any time prior to implementation became possible. Under the previous rules such flexibility was not possible. Before the change, the parties were under the obligation to notify the concentration within a time limit of one week, after the conclusion of the agreement or the announcement of the public bid. As a consequence the flexibility of the review process is enhanced due to the abolition of the one week rule. The parties of a merger will be free to determine when to file their notification. There is no longer a requirement for a binding agreement to notify a transaction based upon a letter of intent become possible and it is sufficient for the companies to show that they have a good faith intention to conclude an agreement.

Reform has changed the important points, which causes concerns for business community, merging parties and member states authorities. The changes are in the right direction, but they can not be considered as an extensive renewal of the previous system. On the other hand the changes will definitely enhance the efficiency of the merger control system. More flexible rules will bring European merger control into line with many other jurisdictions especially, the US rules and improve the modernization of the European merger control. The reform made by the Commission to solve the problems caused by the application of the old regulation and intended to be in favor of the merging parties and by improving the decision making process of the commission to gain the thrust that it risked to lose. As the commissioner responsible for the competition stated previously, as ‘a smooth revolution but a revolution nevertheless’.

7. CONCLUSION

In relation with the globalization of the economy an effective merger control system has been implemented and enhanced by the Commission since the first date that ECMR came into force. During this period, the Commission in accordance with the rules stated in the ECMR gave decisions about mergers involving complex and difficult analysis. The Commission had a good reputation due to its procedure and application of the merger rules. Until the successful appeals of the three cases which were all landmark judgments, the Commission continued its success. After these defeats, the Commission noticed that a review of the ECMR was obligatory and necessary in order to satisfy the complaints of the business community, merging parties, economists and the member states authorities furthermore to get back its reputation. In 2001 a green paper on the reform of merger regulation is issued by the Commission including some proposals of amendment. The green paper and the annulment decisions were the starting points of the reform of the merger regulation. The Commission sought the necessity of a review of the operation and working of the ECMR and in 2004 implemented the new merger regulation comprising significant changes.

The main reason of the reform was the three annulment decisions (Airtours, Tetra Laval, Schneider) of the CFI which raised questions about the decision making process and substantial analysis of the Commission. These appeals showed that the old merger regulation including gaps such as all anti competitive mergers were not covered and the economic analysis was not adequate. The CFI demanded more precise market and economic analysis and convincing evidence from the Commission. The old merger regulation raised questions about the procedure, substantive analysis and dealing with complex jurisdictional problems. The main and the most significant change in my opinion was the change of the substantive criteria whether to assess if a merger is compatible with the common market or not. Under the old merger regulation, the substantive criteria was the market dominance test. The Commission contented to examine only the creation or strengthening of a dominant position so that, under previous merger control practice only

mergers which were creating or strengthening dominance were prohibited. The Commission in market dominance was focusing on the market shares and high market shares were assessed as a notion of dominance.

The gap of the previous market dominance test was that it was not covering collective dominance and efficiency defense. In order to fill this gap, the new criteria of the new test is changed to the significant impediment of effective competition under the new merger regulation. With the new test the merger control is extended to cover all anti competitive effects in all oligopolistic situations. The efficiency defense arguments were considerably needed in the Commission's decision making process under the previous test, the new test allow for consideration of efficiencies and examines the effects in the post merger market. The merger control area is extended by the new test to cover all anti competitive mergers. This is the most significant change introduced by the Commission and its necessity was declared by economists, lawyers, business community. Compared to the market dominance criteria, the new test is more effective and covering all anti competitive effects.

The purpose of the changes was the improvement of the case analysis by introducing much more economic analysis because the Commission previously had an legalistic approach to cases which was criticized by the CFI and ECJ which found the Commissions decisions inadequately reasoned and convincing evidence was absent. The new test is deemed to strengthen the economic analysis by involving efficiency defense. Under the new regulation, referral of cases were simplified in order to achieve a more efficient case allocation. The timetable became more flexible so that, all these changes are in favor of the merging parties. The parties and the Commission will have more time in dealing with complex cases and when the parties propose remedies to avoid prohibition decision. Before the changes, the parties and the Commission both were under the pressure of the strict and short time limits and this would cause problems in dealing with complex cases. The powers of the investigation of the Commission are enhanced and the fines are augmented.

In my opinion the necessary changes which causes in practice problems and concerns for business community are accomplished by the Commission. The business community and the CFI supported those changes. Some argued that it's not an extensive renovation of the whole system, but again in my opinion most significant weaknesses of the previous regulation were resolved by the new regulation.

After these changes the Commission will have to apply a more flexible approach to remedies and will take into account efficiency defense of the parties which will be for the benefit of the business community. The aims of the reform was to provide more transparency, to improve efficiency of the procedure and to respond to criticism of case analysis. The more flexible rules will bring EC merger control in line with US rules and for companies it will be easier to coordinate EU and US investigations and which will also improve also the modernization of the European competition rules. After these cases, the standard of proof that Commission's applying in merger proceedings raised uncertainties and after the changes the legal certainty of the standard of proof which was previously missing in the commission decisions will be enhanced by the changes. The Commission has to retain its reputation and the trust of its community in order to be effective because the community include industrial and commercial undertakings around Europe.

Most importantly the reforms are intended to improve economic analysis. After the reforms economic analysis will be much better applied by the Commission to merger appraisal. The reforms are in right direction but of course it was not a renewal of the all merger control system, the weaknesses noticed in the criticism of the ECJ and CFI are aimed to be solved, but not all of weaknesses of the previous system were solved. The efficiency of the new rules will be approved by the improvement of the case-law in the future, as the commissioner responsible for the competition stated "a smooth revolution but a revolution nevertheless".

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