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The Evolution of the European Court of Justice's Standpoint on Merger Control

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A mamma, papa, Eli e Gio
Xchévoicsiete

E seguo il ritmo dei lampioni sul lungomare del mondo

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Introduction

Merger control represents a cornerstone of Competition law, serving as a critical mechanism to maintain market competitiveness by preventing excessive concentration of market power.

The central claim of this dissertation is that the Court of Justice of European Union (CJEU) has had a pivotal role in the progress and advancement of merger control regulation, despite the fact that its position is usually underestimated and not considered as important as it actually is. Indeed, while the role of the CJEU, and along with the General Court and as well as of the national Courts securing the right and lawful application of competition law is well-known, merger control has not been considered the typical area in which the jurisprudence of the CJEU had a material impact. To be clear, this does not originate from a sort of dislike of merger control issues by the CJEU but simply by the fact that, given the time sensitive nature of mergers, in the vast majority of cases when a merger is prohibited or subjected to heavy remedies that lead to the abandonment of the deal, then appealing it in court is not a real viable option. In fact, by the time the case is decided, 6-7 years will have passed and naturally deal-making cannot be waiting for such a long time. Thus, the CJEU case law discussed in this dissertation represents the exception to the rule and, for this reason, each of these judgments has a unique value in shaping merger control law in the EU.

This work will prove this to be wrong.

This thesis delving into the complex framework of merger control and tracing its evolution through the analysis of landmark cases that have shaped the history of merger control, aims at demonstrating that the CJEU does play a key role in this crucial area of competition law.

The work is divided in three main chapters, each focusing on a different aspect of the CJEU jurisprudence on merger control. Starting with a necessary illustration what merger control is, it continues with a compilation of all the important cases decided by the CJEU under the EUMR and analyzing their evolution. This dissertation shows the path followed by the CJEU jurisprudence in relation to some of the major procedural and substantial aspects of merger control which are analyzed in depth. More specifically:

Chapter 1 is an overview on the discipline of merger control in the European Union. It discusses some of the most important aspects of the subjects, from the reasons why firms want to merge, to when a concentration exists and the role of the definition of control, to briefly refer to the effects that anticompetitive mergers may generate and the impact that they may create on the markets. Furthermore, the initial chapter will analyze the normative history of the merger control system in Europe and how the current regulatory framework has been reached. It also illustrates the relationship between the most important institution of this subject in Europe, the Commission and the CJEU, which will be further touched throughout the different judgments in the following paragraphs. Lastly, it briefly highlights the differences between the American and the European system of merger control.

Chapter 2 illustrates and analyses the CJEU case law on some of the most controversial issues surrounding the merger control system in European Union. The CJEU judgments on some of the aspects already mentioned in Chapter 1, such as the definition of control or the Commission's power of investigation, are analysed in more detail here by going through some of the most important judgments dealing with them. In addition, two of the most controversial merger control issues in Europe in recent times, the gun- jumping risk (i.e. the violation of the standstill obligation prior to receiving clearance) and how to get hold of killer acquisitions when these fall below the relevant turnover thresholds, are evaluated in the light of the case law of the CJEU and the cases that have dealt with these phenomena.

Chapter 3 deals with the key substantive aspects of merger control and their evolution. In particular, this chapter includes an in-depth analysis of the relevant legal test that needs to be showed to prohibit or condition a merger, the so-called Significant Impediment to Effective Competition (SIEC) test and how its interpretation and application has been influenced by case law. In addition, other substantive aspects of mergers, such as efficiencies and quantitative and economic analysis, are also and the subject matter of the CJEU case law analysed in Chapter 3.

In addition, this dissertation demonstrates the importance that both the CJEU and the General Court have had in refining some of the procedural standards governing mergers within the EU, ensuring that merger control not only prevents the formation of market power by modifying the structure of the market but is also consistent with industrial and economic policy. It aims at providing a comprehensive understanding of the legal and economic implications of mergers and the regulatory responses to potential threats to a competitive market structure.

By examining the historical development, current practices and future challenges of merger control, the thesis hopes to provide an additional contribution to the ongoing debate on how best to balance the interests of market efficiency, consumer welfare and economic integration in an increasingly globalised world.

It does so in a way which, to this date, has not been followed by most authors in this field, that is trying to focus exclusively on the case law of the supreme court of the EU on merger control and on the principles that derive from it.

CHAPTER 1:

OVERVIEW ON MERGER CONTROL

1. Terminology

A merger is the combination of two separate undertakings merging fully into a new entity. For example, the creation of Anheuser-Busch InBev was the result of the unification of three international beverage companies- Interbrew (Belgium), Ambev (Brazil) and Anheuser-Busch (United States).[1] Competition law includes further transactions within the definition of merger, for example, a merger may be seen in a company A acquiring all, or the majority of, the shares in B, and thus resulting in A being able to control the strategic business decisions over B.

Under the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings hereinafter referred as the EUMR, the definition of merger also includes acquisitions of minority shareholders provided that the acquirer, A, gains the '*possibility of exercising decisive influence'* over the strategic commercial behaviour over the company B.[2] Differently, under the *Enterprise Act*, a merger exists when the acquirer, A, will have at least material influence over B. For example, through the acquisition of assets of a well-known brand company, or when a Newco is found by the two companies' part of the merger.

Whatever is the nature of the merger, the question must always be whether previously independent businesses have come or will come under common control with the consequence that, in future, resulting in a less competitive than before the merger.

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[1] Anheuser-Busch InBev, *2021 Annual Report*, available at: https://www.ab-inbev.com/assets/pdfs/AB%20InBev%20-%202021%20Annual%20Report_FINAL.pdf, pp189.

[2] See the paragraph on the 'meaning of concentration' Chapter 2 par. 1.1.

The term '*merger*' will be used in the following chapters and paragraphs to illustrate all the aspects of this phenomenon. The synonymous '*concentration*' will also be used.

Many systems of competition law in order to protect the market from mergers, may subject their realization to the approval of competition authorities. The latter have the duty to assess whether the merger will have adverse horizontal, or vertical or conglomerate effects. All these effects will be better illustrated in the following paragraphs, however, here there will also be a briefly explanation.

Horizontal effects occur when a merger involves two companies operating on the same geographic market and at the same level of production and/or distribution cycle.

Vertical effects occurs when two firms active at different, but complementary, levels of the market merge.

Conglomerate effects may verify when the merger two companies, which are not direct competitors between each other, result in the creation of a company which will use its marker power in two different, but possibly related, markets to foreclose competition.

2. Main Reasons for Company Mergers and Acquisitions

The reasons why merger happen can be divided in three main categories. Companies may decide to merge respectively to seek (i) the maximization of profits, (ii) the shareholder wealth, or (iii) an increase in the value of the firm. While the first two reasons pursue the goals of increasing market power (i.e. the ability to control prices and efficiency of the relevant company), the last is more focused on the growth of the company itself. Within the first two reasons, the object will be achieved if there is a reduction in firms' costs. While those mergers falling in the third category of reasons will not have similar effects, but the entire operation may bring to a decline of the efficiency and market power, given transaction costs of bringing the two companies together. [3]

[3] K. Gugler, D. C. Mueller, B. Burcin Yurtoglu, C. Zulehne, *The effects of mergers: an international comparison*, International Journal of Industrial Organization, 2002.

One the argument in favouring mergers is the maximization of profits. The latter might occur throughout the achievement of economies of scale and scope: a firm will produce goods at the lowest marginal cost where it is able to operate at the minimum efficient scale. More specifically, where it operates with a smaller scale than this then marginal costs will increase and there will be a consequent loss of allocative efficiency. There are three kinds of economies of scale: product-specific scale, where marginal costs result in lower overall costs; plant-specific scale, where the overall use of multi-product plant is made more rational; and firm-specific scale resulting in lower overall costs. Economies of scale, which arise from the carrying of one or more activity, can also be achieved through internal growth, however, it is more easily for it to be achieved with external growth, like mergers. Whereas economies of scope represent the economic benefits generated from carrying on internal or external activities.[4]

Merger can be beneficial in the part where the merged firm may be able to operate more efficiently. For instance, the merged firm may be better at carrying out research and development, or it may have improved access to loan and equity capital than it would have had if it remined alone. Or it may be better at managing the skills of its constituent parts. [5]

Firms, within one Nation State or one political group like the EU, may also decide to merge to become National or European Champions. These mergers can also be encouraged by Governments to increase the competition of these firms on international markets. [6]

The possibility of a merger serves as a crucial incentive for a firm's management to perform efficiently. If shareholders are unhappy with the management's performance, they may choose to sell their shares to a bidder who can offer better results. This competition for control of firms drives overall efficiency. It is argued that takeovers should not be excessively regulated, as they are an essential component of competitive

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[4] R. Whish and D. Bailey, *Competition Law (10th edition),* Oxford University Press, Oxford, United Kingdom, 202, pp. 923.

[5] *Ibid* para. (C) pp. 857.

[6] *Ibid* para. (D) pp. 857-858.

markets. Over-regulation can distort the market for corporate control and diminish its effectiveness in promoting efficient management.[7]

Mergers are also seen as an exit-door for those companies that wish to do so. Investors are less inclined to set up a new firm if exits barriers are blocked. It is common practice to set up an innovative firm which might decide to be sell to reward the risk taken.

Some mergers may be fuelled by speculative greed of individuals or companies or the personal vanity of a particularly swaggering senior executive. Other mergers are simply generated by fears. Undertakings do not want to feel behind in the process of industry consolidation of a market. Other merges because they feel it as an exciting activity, or because they believe it to be the only way to solve an issue.[8]

Lastly, firms merge to increase their market power and obtain the ability to restrict output and raise prices. The aim of merger control systems, both in the European Union and the UK, is that of disincentivize and preventing cases of firms merging with the sole scope of increasing their market power. In fact, in case of lack of a merger control system, firms would be able to reach this goal.[9]

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[7] *Ibid* para. (E) pp.858.

[8] *Ibid*. para. (F), pp. 858-859.

[9] *Ibid*. para. (G), pp.

3. The Effects of Merger: Horizontal, Vertical and Conglomerate

Mergers are typically categorized based on their effects into three types: horizontal, vertical, and conglomerate.

The former occur when actual or potential competitors decide to fuse. The Horizontal Merger Guidelines[10] further distinguishes the effects of horizontal mergers into two categories: unilateral or non-coordinated effects and coordinated effects.[11]

Non-coordinated effects arise any time the merged firm or any other firm is able to enforce increased market power on itself.

To better explain this phenomenon, we consider the company AB, which is the results of the merging between company A and company B. Non-coordinated effects will occur in case AB will be able to exercise market power throughout the increase of prices. In other words, if A had increased prices for its products prior to the merger, customers would have had switch to B. However, after the merger, AB can benefit from both the increase of prices from A and that of profits from B.

Furthermore, an additional company C may also benefit from the merger if AB decides to raise prices. In such case, customers would divert to C, which may in return raise its own prices without the need to coordinate its behaviour with that of AB. This last scenario is known as '*non-collusive oligopoly'*. [12]

The closer are the products supplied by the undertakings part of the merger, the more intense are the anticompetitive effects. A merger happening between manufacturers of two similar products would allow them to increase the price of the product of the first undertaking without having any substantial decrease on the sales volume since consumers

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[10]European Commission, *'Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings'* [2004] OJ C31/03, (further referred as '*Horizontal Merger Guidelines*').

[11] *Horizontal Merger Guidelines (supra* note 10) para. 22.

[12] R. Whish and D. Bailey, *Competition Law (10th edition*), Oxford University Press, Oxford, United Kingdom, 202, pp. 909-911.

would switch to the second undertaking who kept its original price.[13] This mechanism might be eliminated if other competitors of the companies at stake offer a product which can easily substitute the one sold by the merging parties.[14] For horizontal mergers, the loss of actual or potential competition between the merging firm is the primary effect of competitive constrain, which may lead to the creation of a dominant position and the increase of prices as result of the horizontal concentration.

Differently, coordinated effects occur when the firm, after the merging, is more inclined to coordinate its behaviour with the other firms operating in the market and thus detriment competition. For instance, AB is more likely to coordinate its behaviour with C and D, than with A and B independently. The market structure that generates after the operation reduces the intensity of competition between the undertakings and amends towards the creation of an oligopolistic structure.[15]

Coordinated effects must be proven by hard evidence or a detailed analysis of current market conduct of the parties in the light of market conditions. The General Court, in the *Airtour*[16] and *Impala*[17] judgments, set out some criteria that needed to be considered to determine whether a concentration may or may not result in coordinated effects.

The first is the *'the reaching of terms of coordination'* between the firms. Competitive companies are more likely to merge if they can reach a common perception as to how

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[13] L. Moritz, *An Introduction of EU Competition law (2013)*; Cambridge University Press; June 28, 2013, pp. 251-253.

[14] Decision of 2 September 2009, Case COMP/M.3083- *GE/Instrumentarium*, available at https://ec.europa.eu/competition/mergers/cases/decisions/m3083_en.pdf. In the specific case the Commission figured out that the market power of the competitors (Philips, Siemens and others) of the two merging firms, overstand the impact that GE and Instrumentarium had on the concerning market (para. 244 et seq).

[15] D. Canapa, *Trademarks and Brands in Merger Control: An Analysis of the European and Swiss Legal Orders (International Competition Law Series),* Kluwer International Law, 2016.

[16] Judgment of 9 November 2023, *Altice Group Lux Sàrl v Commission*, Case C-746/21, EU:C:2023:836.

[17] Judgment of 10 July 2008, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (*further refer as *Impala*), Case C-413/06 P, ECLI:EU:C:2008:392.

their activities should be coordinated which may be done by charging the same prices or aligning their behaviour on output and expansion capacity.[18]

Secondly the *'transparency'* of the market, which states that coordination is possible as long as the coordinating undertakings can monitor each other. A sufficiently credible '*deterrence mechanism'* is also necessary to avoid a possible deviation of the undertakings from the coordination. In other words, it must be costly for these undertakings to exit the market.

Thirdly *'no reaction of outsiders'* is demanded to reach a successful coordination and prevent a possible jeopardization of the market by the other competitors.[19] The concerned undertakings must be free from competitive constrains from other competitors of the market.

Vertical effects happen in cases where two companies, operating at different but complementary levels of the market for the final product, decide to merge, as for example, when company A produces a raw material for the product produced by company B.[20] At first sight, the consequences deriving from this kind of merge do not seem to be harmful to competition, however, following an in-depth analysis, it comes out that vertical mergers may foreclose competition by both raising the rivals costs (input foreclosure) and/or reducing the rivals revenue (customer foreclosure),[21] or facilitate the creation of

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[18] *Horizontal Merger Guidelines*, (*supra* note 10) para. 44.

[19] Judgment of 6 June 2002, *Airtours v Commission*, Case T-342/99, ECLI:EU:T:2002:146, para. 62. *Inter alia*; Judgment of 10 July 2008, *Bertelsmann AG & Sony Corporation of America v Impala*, Case C-413/06, ECLI:EU:C:2008:392, para123-124.

[20] R. Whish and D. Bailey, *Competition Law (10th edition*), Oxford University Press, Oxford, United Kingdom, 202, pp. 372.

[21] Input Foreclosure arises in situations where the merging firm has market power on the upstream level (for example the production or collection of raw materials), and it may create the incentive for the combined entity to preclude its competitors on the downstream market, or it might also stop supplying rivals of its downstream entity, denying the access to the input. This kind of foreclosure leads to immediate price effects: the merged firm can rise rival's cost by increasing their input prices.

Customer Foreclosure occurs where the downstream firm (the one selling the product) solely purchases from the upstream division of the combined firms post-merger. The effects of this foreclosure are apparently less harmful than those of the Input one. Because of this operation, unintegrated firms may have a smaller market-action which could make difficult for them to cover fixed costs, however here coordinated effects on the market. For example, foreclosure may occur when firm A, operating in an upstream market, merges with firm B in a downstream market, gaining access to a crucial downstream product. The merged entity, AB, might then deny upstream competitors access to the distribution system, excluding them from the downstream market. Conversely, if firm B in the downstream market merges with Firm A, which has significant market power over an essential raw material or input in the upstream market, AB may restrict downstream competitors' access to that input. As a result, downstream competitors may struggle to secure the raw material or face discriminatory terms, impairing their ability to compete effectively.

Additionally, vertical mergers may deter competitors to compete in the concerning market, and thus negatively affecting the consumers. This kind of result is also reconducted to the non-coordinated effects of mergers , which generates a foreclosure any time they involve a non-horizontal merger, i.e. '*where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete'*.[22] In such cases the Commission will base its substantive appraisal on the enforcement of the *Airtours* criteria mentioned for the horizontal mergers, by taking in consideration the specifics of potential vertical operations.[23]

Conglomerate effects involve '*a situation in which two or more companies selling different types of products or services joint together to form a larger company. In the case of conglomerate mergers, the two parties are not usually direct competition with each*

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prices are not likely to change; unless the unintegrated rivals exit the market and the merged firm decide to raise prices above competitive level, in the long term.

European Economic & Marketing Consultants. Input and Customer Foreclosure: European Commission, *'Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings'* [2008] OJ C265/07, (further refer as 'Non-horizontal Guidelines'); *inter alia* C. Jones & L. Weinert, *EU Competition Law: Mergers and Acquisitions: Volume II - Merger Law*, Claeys & Casteels Pub (1st edition), July 1st 2006.

[22] *Non-horizontal Guidelines (supra* note 21) para. 18.

[23] *Ibid*. para. 79-90

other'.[24] At most these kinds of mergers are considered as not having a negative impact on Competition in general, however these transactions are typically viewed as promoting competition: they enable the integration of complementary skills and assets, enhance interoperability, and foster innovation.

Nevertheless, competition-related issues may also arise with these categories of mergers. The most common concern is represented by the threat of foreclosure: thereby '*the combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of bundling and tying* [25] *or other exclusionary practices*'. The analysis of the foreclosure effects includes a three-steps process enacted by the Commission to check if the merged entity would have the ability to foreclose the overall competitive effects of the concentration.[26] In essence, a merged entity will result in efficiency gains where the merged entity AB is capable of offering complementary products that do not compete with one another to a customer desiring both. In such case, the theory of harm may be represented by AB deciding to tie together the two complementary products in a way to foreclose competitors, or to price a bundled package of both of them to similar effect. Intervention against conglomerate mergers requires the support of a strong theory of harm.

4. What is the Function of Merger Control Systems?

The aim of merger control is to impede mergers and acquisition that would substantially increase the market power of undertakings, and consequently, depriving consumers of the benefits of effective competition. This aim follows the general goal of competition law

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[24] *Definition of conglomerate merger from the Cambridge Business English Dictionary © Cambridge University Press.* Available at https://dictionary.cambridge.org/dictionary/english/conglomerate-merger.

[25] S. Stremersch & G. J. Tellis *Strategic Bundling of Products and Prices: A New Synthesis for Marketing*, Journal of Marketing, January 2002. Bundling is the process of selling two products together in fixed proportions it can be pure (if the products are available only as a bundle) or mixed (products are available both as standalone basis and bundled at discount).

[26] M. Rosenthal & S. Thomas, *European Merger Control*; Back/Hart; January 1, 020 pp.96.

which is to provide rules designed to protect the steps of competition, thereby maximizing consumer welfare.[27]

In accordance with the Neo-classical economic theory, perfect competition is the key to reach maximization of social welfare, and consumer welfare, which is commonly known as the maximization of consumer surplus[28] is also maximized.

Overall, mergers can negatively impact competition, as market consolidation may reduce competitiveness, potentially leading to a decrease in consumer welfare.[29] For this reason a system for the regulation of mergers is deemed necessary.

It has been questioned whether the consequences of a merger, such as creation or strengthening of market dominance, were not sufficiently prevented by the already existing laws on competition, such as Article 102 TFEU.[30]

One answer is seen in the fact that mergers control is not only useful to prevent future abuses: it is also, and mostly, about maintaining markets competitive and guaranteeing consumers better outcomes. Furthermore, investigation of unilateral conducts of dominant firms operating in the market is usually long and complex, and they only happen after the operation bringing to that result is already concluded.[31]

On the other hand, the peculiarity of merger control is represented by the *ex-ante* analysis of the concerned parties which is suitable to prevent in advance any possible detrimental

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[27] D. Canapa, *Trademarks and Brands in Merger Control: An Analysis of the European and Swiss Legal Orders (International Competition Law Series),* Kluwer International Law, 2016, pp. 402.

[28] The consumer surplus represents the welfare or benefit enjoyed by consumers who pay a price lower than the price they would have been willing to pay. It is graphically showed in the area below the demand curve and above the price in the market (available at https://www.khanacademy.org/economics-finance-domain/microeconomics/consumer-producer-surplus/consumer-producer-surplus-tut/a/lesson-overview-consumer-and-producer-surplus#:~:text=Definition,the%20price%20in%20the%20market).

[29]R. Whish and D. Bailey, *Competition Law (10th edition*), Oxford University Press, Oxford, United Kingdom, 202, pp. 372.

[30] See Article 102 of the TFEU

[31] Judgment of 25 March 1999, *Gencor v Commission*, Case T-102/96, EU:T:1999:65, para. 106.

effect on the market and, allow consumers to obtain a significant outcome out of it.[32] The competition authority is called to evaluate whether a merger might lead to harmful effects on competition in the future.[33] Therefore, unlike cartels or other abusive practices, where investigations occur after the irregular conduct has taken place, merger control requires the competition authority to adopt a forward-looking approach, predicting the potential future effects that the merger may have on the market.

Due to the predictive nature of merger control, the authority responsible for assessing a merger must meet three key requirements: develop a 'theory of competitive harm' explaining why the market may become less competitive for consumers post-merger, provide evidence supporting this theory, and carefully evaluate the counterfactual scenario.[34]

The theory of competitive harm, or simply *'theory of harm'* represents the negative outcomes that the merger might create on the market structure after its conclusion. In order to demonstrate the theory of harm, the competition authority should explain how competition might get harmed after the merger, namely, what kind of effects the transaction will create on the market in respect to the nature of the merger. For the identification of the theory of harm from the analysis of the different effects which may derive from a merger, it is necessary to refer to the previous paragraph of this chapter ('the effects of merger').

After the identification of the theory of harm, the competition authority must reproduce reliable evidence in support of its theory, necessarily based on facts. The Investigative

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[32] R. Whish and D. Bailey, *Competition Law (10th edition*), Oxford University Press, Oxford, United Kingdom, 202, pp 1001-1002. See further C. Bonnet and J.P. Schain, *An Empirical Analysis of Mergers: Efficiency Gains and Impact on Consumer Prices* [2020], 16 Journal of Competition Law & Economics1.

[33] Judgment of 20 May 2010, *Commission v Tetra Laval BV,* Case C-12/03 P , EU:C:2005:87, para. 42.

[34] M. Motta & M. Peitz, *Intervention triggers and underlying theories of harm, Expert advice for the Impact Assessment of a New Competition Tool*; Directorate-General for Competition, European Commission, B-1049 Brussels. Available at https://competition-policy.ec.europa.eu/system/files/2021-03/kd0420575enn.pdf.

Techniques Handbook, identified under the name ICN,[35] listed a series of elements which may be used as evidence in a merger review, for example: corporate strategy documents, documents produced for the purpose of the merger, descriptive evidence for participants in the market and written response to requests for information from the competition authority. For example, when it comes to challenge a merger on conglomerate grounds, the Court of Justice of European Union, further referred as CJEU, requested the Commission to produced highly factual evidence considering that the confine of cause and effect between the merger and the predicted adverse effects *'are dimly discernible, uncertain and difficult to establish'*.[36]

Lastly, the competition authority should make a comparison on how the situation would have changed whether the merger goes ahead or not: the competitive situation before the merger is referred to as *'the counterfactual'*.[37] Most of the time the counterfactual is the situation before the transactions, however, it may happen that the authority might consider possible imminent scenes like the entrance of further operators in the market, or the failing of one of the merging firms.[38]

A system of merger control is useful not only to protect competition and consequently consumers welfare, but it may also be used as a mean of prohibiting mergers on public interest ground or for general reasons of industrial policy. Several are the laws enforced

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[35] International Competition Network, ICN Investigative Techniques Handbook for Merger Review (June 2005) available at: https://www.internationalcompetitionnetwork.org/wp content/uploads/2018/05/MWG_HBInvestigativeTechniques.pdf.

[36] Judgment of 15 February 2005, *Commission v Tetra Laval*, Case C-12/03, ECLI:EU:C:2005:87, para. 44.

[37]See International Competition Network, *ICN Merger Guidelines Workbook* (April 2006), para 2.9 and 2.10, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_MergerGuidelinesWorkbook.pdf.

See also Swedish Competition Authority, *The Pros and Cons of Counterfactuals* (2013), available at <www.konkurrensverket.se>.

[38] *Ibid*.

in the different Member States meant for prohibit mergers for social and public interests.[39] Those are often criticized for being the direct antagonists of the process to competition.[40]

Part of the doctrine argues that mergers may create disruptive effect upon the management of one or both merged firms and may result as negative into their long-term perspective. After the creation of the merger, it is more likely that the corporate asset of the involved companies will change since new shareholders will be implemented. This especially occurs for target companies in the contest of takeover bids. The revision of the subjective asset after the merger does not guarantee that shareholders' decision will always lead to the optimal outcome in the public interest, even if they might secure the most favourable financial deal for the shareholders personally. [41]

Moreover, a common issue with takeovers is that they tend to prioritize short-term profit over the long-term potential and sustainability of the companies involved. On these perspectives, some studies have shown how stockholders of acquiring firms experience a statistically significant wealth loss of about 10% over five years after the merger completion date.[42]

Concentration of wealth is another socio-political argument that may raise after undertakings of such size decide to further implement their power and thus create a

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[39] See OECD Roundtable Public interest considerations in merger control (2016), available at www.oecd.org/competition <http://www.oecd.org/competition>.

[40] In Germany the head of the Monopoly Commission resigned when the Minister for Economics approved a merger between two supermarkets, Endeka and Kaiser's Tengelemann, that both the Bundeskartellamt and the MonopolyCommission considered to be anti-competitive. See Monopoly Commission, Press Release (17 March 2016) http://www.monopolkommission.de.

[41] Johnston W. J. & Oh J.-H., *How Post-Merger Integration Duration Affects Merger Outcomes*, September 2020, Journal of Business and Industrial Marketing.

[42]Agrawal, Anup, Jeffrey F. Jaffe, & Gershon N. Mandelker. *The Post-Merger Performance of Acquiring Firms: A Re-Examination of an Anomaly*, The Journal of Finance 47, no. 4 (1992): pp. 1605–21, available at https://doi.org/10.2307/2328956.

disbalance distribution of wealth. This problem was of significant concern in the US and in order to prevent this result merger control provisions laws were strengthened.[43]

Mergers might even conduct to the closure of factories or offices and thus lead to serious unemployment. Mostly for this concern, private equity funds have, in recent years, strongly opposed to these operations. Markets has no reason to care about a fair and balanced distribution of wealth and job opportunities, however, it should be in the interest of Governments to adopt territorial policies that can somehow prevent these issues. [44]

A common scenario in merger procedures involves a domestic firm being acquired by a foreign company, which often aims to keep decision-making and profits within its home country. To prevent this, in 2005 the OECD called for merger systems to treat foreign firms equally to domestic ones in similar circumstances.[45] As a result, numerous British companies have ventured into international markets, notably the United States which complicated the argument for protecting British firms from foreign takeover attempts. An example of this may be seen in the strong resistance emerged against Pfizer's proposed acquisition of AstraZeneca in 2014, which was ultimately abandoned.[46]

Moreover, other cases of interventions of public authorities against foreign takeovers is represented by situations in which there is a lack of reciprocity between the laws of the two countries involved in the procedure. For instance, if country A restricts inward investment while country B allows it, there could be grounds for preventing a takeover by a company from country A of a company in country B. Moreover, the EU has currently implemented laws establishing a system to evaluate foreign takeovers and investments

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[43] Decision of the U.S. Supreme Court of June 25,1962; *Brown Shoe Co v United States*; 370 US 294, 344; available at https://tile.loc.gov/storage-services/service/ll/usrep/usrep370/usrep370294/usrep370294.pdf.

[44] Oh J-H & Johnston W. J., *How Post-Merger Integration Duration Affects Merger Outcomes*, Journal of Business and Industrial, September 2020, DOI: 10.1108/JBIM-11-2019-0476.

[45] OECD (2005), *Recommendation on Merger Review*, OECD publishing on 23 March 2005, available at https://legalinstruments.oecd.org/en/instruments/195#mainText.

[46] J. A. Quelch & J. Weber, *Pfizer and AstraZeneca: Marketing an Acquisition* (A),Harvard Business School, available at https://www.hbs.edu/faculty/Pages/item.aspx?num=47802.

based on security and public policy concern similarly, the UK government has enhanced its authority to assess the national security implications of foreign investments.[47]

Special consideration is necessary when it comes to the merging happening in sectors of the economy like the electronic and print media. Examples of special regimes applied in these fields are the Communication Act 2003[48] applied in the UK, which contains special provisions on media mergers, or the exceptional regime valid for mergers in the water industry.[49] At the same time in the European Union Article 21(4) EUMR[50] which observes Member States may have a *'legitimate interest'* in investigating a merger on further grounds than the harm to competition.

Serious interests have been shown on the environmental impact of mergers leading to high emissions. If on the one hand mergers may conduct to an improvement of innovation and application of '*green'* technologies;[51] on the other most of the European countries,[52] including the one applied in European Union, have not yet incorporated sustainability as a factor to be considered in merger control. Fortunately, the Commission is also exploring how merger control could support the sustainability goals of the EU's Green Deal, which seeks to achieve carbon neutrality in the EU by 2050.[53]

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[47] R. Whish and D. Bailey, *Competition Law (10th edition*), Oxford University Press, Oxford, United Kingdom, 202, pp 875–876.

[48] Communications Act 2003, UK Public General Acts, available at https://www.access-info.org/wp-content/uploads/ukpga_20030021_en.pdf.

[49] R. Whish and D. Bailey, *Competition Law (10th edition*), Oxford University Press, Oxford, United Kingdom, 202, pp 875–876 and pp 1017-1018.

[50] See Art 21(4) of the EUMR: legitimate interest clause.

[51] See Eg Decision of the German Economics and Energy Minister of 19 August 2019 to approve a joint venture between Miba and Zollern, which had been prohibited by the German competition authority, because it would reduce emissions.

[52] Greece has stated in its competition law that issues sustainability may be relevant to the assessment of a merger. See *Hellenic Competition Commission Staff Discussion Paper Sustainability Issues and Competition Law* (2020) pp. 97–108, available at https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf.

[53] European Commission*, The European Green Deal*, 22 September 2020, available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

Lastly, the last years another concerning aspect for competition arise killer acquisitions. Killer acquisitions consist in the acquisition of young firm whose prospective innovation represent an important future threat to an historical undertaking of that market.[54] Because these firms lack the required turnover to fulfil the turnover thresholds under Article 1 EUMR and so they cannot be caught by the EUMR. Given the incrementation of this phenomenon, both national and European competition authorities and courts have been discussed a way to prevent the threat to competition that these concentrations may create. In fact, these transactions highlighted the importance that some factors different from turnover, might have on competition on particularly innovative and dynamic markets like the pharmaceutical and digital platform ones. As reported in the paragraph above, the Commission lack of jurisdiction may be overstepped by Member States referring under Article 22 or 4(5) EUMR, as it happens in the *Facebook/Whatsapp* case of 2014.[55]

5. The Evolution of European Merger Control: from the EC Treaty to the Regulation 4064/89

The origins of merger control might be traced back to Article 66 of the ECSC Treaty,[56] which mandated the notification of certain mergers and acquisitions within the coal and steel sectors to the High Authority and subsequently to the Commission. However, with the evolution of the European Community and the formulation of the EC Treaty,[57] explicit provisions regarding merger control were omitted. The rationale behind this exclusion has been argued by scholars as a strategic move to promote, rather than impede, concentration at the European level. However, this singular motive alone does not fully account for the absence of Merger Control in the EU establishing Treaty.

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[54] Cunningham C., Ederer, F. & Ma S., *Killer Acquisitions* (April 19, 2020). Journal of Political Economy, Vol. 129, No. 3, pp. 649–702, March 2021 , Available at SSRN: https://ssrn.com/abstract=3241707 or http://dx.doi.org/10.2139/ssrn.3241707.

[55] Decision of 3 October 2017, Case No COMP/M.7217 - FACEBOOK/ WHATSAPP, Office for Publications of the European Union L-2985 Luxembourg, C(2014) 7239 final. Available at https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

[56] Treaty establishing the European Coal and Steel Community, ECSC Treaty, [1951].

[57] Consolidated Version of the Treaty on European Union [2002] OJ C 340/145.

Other factors, such as divergent strategic interests among and within member governments of the Community, have also been cited as justifications.[58] In its Memorandum on Concentration[59] in 1966, the Commission tried several attempts to introduce a specific merger rule at Union level, since neither Articles 81 nor 82 of the EC Treaty were sufficient to deal with the raising of concentration activities around Europe.[60]

The Memorandum on Concentration suggested that '*a concentration of enterprises which has the effect of monopolizing a market should be treated as improper exploitation of a dominant position within the meaning of Article 86, except where special circumstances are present'.*[61] In other words, to address concerns of both over-inclusiveness and under-inclusiveness regarding concentrations, the Commission recommended to the Council that Article 82 of the EC Treaty be utilized specifically to oversee concentrations that resulted in monopolies

Nevertheless, it was not until 1973, with the *Continental Can* judgment,[62] that the CJEU approved and picked up the proposal made by the Commission in the Memorandum. This judgment represented the '*best known'* example of the CJEU's use of *'teleological approach'* to analyse the Treaty of Rome, and it embodied the first of several decisions potentially increasing the Commission authority.[63] The relevance of this judgment is highlighted in the interpretation given by the CJEU of Article 82 of the EC Treaty. The CJEU gave right to the interpretation given by the Commission of Article 82 EC Treaty

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[58] E. Schwarts , *Politics as Usual: The History of European Community Merger Control* [1993], pp7.

[59] *Memorandum on the Problem of Concentrations in the Common Market*, Competition Series, No. 3, 1966, para. 58, supra note 34, at 14.

[60] EEC Competition Services Study No. 3, (Brussels, 1966).

[61] B. E. Hawk*, The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, Antitrust Law Journal Vol. 59, No. 1, 38TH ANNUAL SPRING MEETING (March 21-23, 1990), pp. 195-235 (41 pages), published by American Bar Association 195, 196 (1990).

[62]Judgment of the Court of 21February 1973, *Europemballage Corporation and Continental Can Company v Commission*, Case C-6/72, ECLI:EU:C:1973:22.

[63] Relevant on these perspectives has the been the Judgment of 14 February 1978, *United Brands Co. & United Brands Continental B. V. v. Commission*, Case C-27/76 ECLI:EU:C:1978:22.

as banning mergers that strengthen a dominant position, and it confirmed that it might have been applied to concentrations that strengthened a pre-existing dominant position.

In substance, the *Continental Can* case law stated that the adjudicating authority must demonstrate that the acquirer, already in a dominant position within a specific market, has further solidified its control by acquiring another undertaking within that same market '*substantially impeded competition' by 'leaving] only undertakings dependent, in their conduct, on the dominant undertaking*' on that market.[64] After the *Continental Can* judgment, the CJEU has been confirming and strengthening the Commission's power to use Article 82 to pre-empt practices it considered anti-competitive.

On this matter, the *United Brands Co. & United Brands Continental B. V. vs Commission* judgment,[65] was decisive for the new definitions given to the concepts of '*dominance'* and '*abusive'*. Differently from *Continental Can* where dominance was considered to only be present in situations of full elimination of competition, in the *United Brands vs Commission* the CJEU cleared out that an undertaking will easily be found to have a dominant position any time it owns a market share which is significantly higher than that of its next competitors, and any strengthening of that position may be abusive, even if it is due to structural change.[66] Further decisions[67]of the CJEU were relevant to highlight three important results of the CJEU's jurisprudence: '*they recognized the application of Article 82 to merger control, they established and then lowered thresholds for proving*

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[64]Judgment of February 21 1973, *Europemballage and Continental Can*, Case C-6/72, ECLI:EU:C:1973:22, para. 26.

[65] *United Brands Co. & United Brands Continental B.V. v. Commission* (*supra* note 56)*,* para. 207.

[66] Van Bael & J.F. Bellis, *Competition Law of the EEC*, (2d ed. 1990), published by University of Michigan.

[67] Judgment of 13 February 1969, *Wilhelm & Ors v. Bundeskartellamt*, Case 14/68, ECLI:EU:C:1969:4. In this judgment it was established that a national competition authority may apply domestic competition law paralleling Community decisions only if 'the application of national law' does not 'prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement [EC law]. While in the Judgment of 27 March 1973, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior*, Case 127/73, ECLI:EU:C:1974:25. Here the Court considered Art 85 and 86 Treaty of Rome as having 'direct effect' , so they could be directly invoked by individuals before national courts, as long as they treated under the CJEU's jurisprudence.

dominance and abuse; and they established the supremacy of EC competition law over domestic competition law and gave EC law 'direct effect'.[68]

Differently, the Commission disproportionately applied Article 81 of the EC Treaty to all transactions where minority shareholdings in competitors were acquired by agreement or where joint venture companies were created, potentially restricting competition among the parents or between the parents and the joint venture.[69]

The pivotal case in this area is *Philip Morris*. The case focused on the American tobacco company, Philip Morris, acquiring joint control in Rothmans International, a smaller competitor in an oligopolistic market. Following the complaints of two rivals, Philipp Morris reduced its influence in the joint venture to the level approved by the Commission. Nevertheless, the two competitors still brought the case before the CJEU. The judgment delivered by the CJEU in 1987 was used as platform from which to test potentially explosive dicta, as in the *Continental Can* judgment. The CJEU, by confirming the Commission's decision, clarified that even though the acquisition by a company of a minority shareholding in a competitor does not constitute a conduct restricting competition, such an operation may be interpreted in an extensive mode as a way for the acquiring company '*to obtain legal or de facto control of the commercial conduct of other companies*'.[70]

Moreover, the CJEU stressed that in '*[oligopolistic and stagnant] markets any attempted takeover is liable to result in restriction of competition*' and therefore is likely to violate Article 81 EC Treaty.[71]

The CJEU further added that Article 81 EC Treaty solely applies because the agreements at issue were '*entered into by companies which have remained independent*.' So, Article

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[68] E. Schwartz, *Politics as Usual: The History of European Community Merger Control*, Vol. 18:607, 1993, Yale Journal of International Law, pp. 608-661.

[69] C. Jones & L. Weinert, *EU Competition Law: Mergers and Acquisitions: Volume II - Merger Law*, Claeys & Casteels Pub (1st edition), July 1st 2006, para. 1.7.

[70] Judgment of 17 November 1987, *British American Tobacco Company Ltd. And R.K. Reynolds Industries Inc. v Commission ECR,* joined cases C-142 and C-156/84, ECLI:EU:C:1987:490.

[71] See Article 81 of the EC Treaty.

81 EC Treaty is not at stake if the parties of the agreement lose their independence. In conclusion, whilst the CJEU did not want to expand the application of Article 81 to the acquisition of sole control, considerable uncertainty has arisen regarding the extent to which the article applies to the acquisition of shares in competitor companies.[72]

Further rulings of the CJEU on the application of Article 81 EC Treaty to mergers[73] along with these Commission successes, prompted industry demands for clarification regarding the jurisdiction of both the Commission and member states, as well as the substantive standards each would employ in future merger control cases.[74]

Following the CJEU's judgment in *Continental Can*, in July 1973, the Commission proposed its first draft on merger regulation. [75] The peculiarity of the draft was the absence of the word dominance, the Commission indeed defined as incompatible with the internal market '*any merger that would enable firms to 'acquire or enhance the power to hinder effective competition'*. Furthermore, the text aimed at resolving the pure-competition-versus-industrial policy debate by allowing for the exemption of concentrations, when found by the Commission, to sectors receiving 'priority treatment' on industrial policy ground with the previous opinion of an Advisory Committee of experts appointed by Member States.

The proposed regulation failed the test before the Member States in the Council. In the debate two were the main concerns discussed by the Council: the jurisdictional scope of the regulation, and on which ground the Commission should have had evaluated a merger. Mergers should be evaluated solely on their effects on competitions or even reflect industrial policy goals such those under Article 81 EC Treaty?[76]

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[72] M. Siragusa, *Current Procedural Aspects of Mergers and Takeovers*, 1989 Fordham Corp L. Inst 509.

[73] See Reasons for the Failure of British Caledonian' (Wikipedia) available at https://en.wikipedia.org/wiki/Reasons_for_the_failure_of_British_Caledonian.

[74] W. Dawkins, *Competition Lawyers Strike A Bonanza in Brussels : The European Market*, FIN. TIMES, Sept. 5, 1988, at 4.

[75] *Commission Proposal for a Regulation of the Council on the control of the concentrations between undertakings* (OJ 1973 C 92/1).

[76] See Article 81 EC treaty (ex Art 85 Treaty of Rome).

On the latter case, the Commission could have approved anti-competitive mergers based on the Article 81's factors. Between 1981 and 1984, the Commission proposed two new versions of the Regulation No 4064/1989[77] based on the same substantive grounds of the original version with the sole raising of the thresholds for establishing a dominant position. They were both rejected by the Council.

It was not until 1989 that the Merger Regulation was finally approved. With such Regulation, the Commission banned any concentration creating or reinforcing a dominant position, and respectively defined concentration '*as a transaction whereby a person or an undertaking acquires control of other undertaking*s', while control is described as '*rights or contracts which ... make it possible to determine how an undertaking shall operate*'.[78] Considering the requests of Member States to include non-competition criteria when it comes to the approval of a merger, the Commission, under Recital 13 of the Merger Regulation,[79] would consider factors other than mere dominance, including *'improving the production and distribution…promoting technical or economic progress, or…improving the competitive structure within the Common Market'*. [80]These criteria could be considered only insofar as the merger did not block competition.

In December 1989, after twenty months of further discussion, the Council working group, with the considerable personal participation of the then Competition Commissioners, Peter Southerland until 1988 and Leon Brittan from 1989, finally adopted the Council Regulation No 4064/1989 on the control of concentration between undertakings.

The substantive test agreed on 23 December 1989, focused on whether a concentration *'… creates or strengthens a dominant position as a result of which effective competition*

[77] *Amended Proposal for a Council Regulation on the control of concentration between* undertakings, OJ 1982 C36 *and [1988] OJ C 130/05*.

[78] *Amended Proposal for a Council Regulation on the control of concentration between undertaking*s, (88/C 130/05) Article 3(1) and (3) *Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings*.

[79] See Recital 13 of the EUMR.

[80] *Ibid*.

would be substantially impeded…'.[81] The result of this test was nothing more than the *'historical compromise'* between those Member States, such as France, pushing towards a more industrial policy-oriented approach to mergers, and those like Germany which opted the pure market structure approach.

Finally, the Commission set the thresholds for worldwide turnover at 2,000 million EUR and Community turnover at 100 million EUR.[82] However, those Member States as for example UK, Germany, France, who insisted and prevailed on higher thresholds, contemporary agreed to a review clause to allow national authorities to intervene under qualified majority on a proposal from the Commission.[83]

With the final adoption of the Regulation 4064/89 the 'Community *as a whole will have, for the first time, a single framework within which takeovers and mergers of a community dimension can be dealt with, recognizing the importance of maintaining fair competition throughout the single market*'.[84] The Regulation No 4064/89, in the words of Article 3(g) of the EC Treaty, constitute '*a system ensuring that competition in the internal market is not distorted*'.[85]

In the final version of the Regulation No 4064/89, the substantive criteria to evaluate mergers' compatibility with the common market set out in Article 2 (2) and (3) of the text,[86] are more clearly based on pure competition than in the earlier drafts of the Regulation No 4064/1989. Nevertheless, upon scrutinizing Article 2 (2) and (3) of the Regulation No 4064/1989 in conjunction with Article 2 (1) of the same provision, it

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[81] See Article 2(3) of the EUMR.

[82] See Article 1 of the EUMR.

[83] Article 1(3) Regulation 4064/1989.

[84] L. Kellaway, *EC Ministers Hand Brussels the Power to Vet Large Mergers*, FIN. TIMES, Dec. 22, 1989, at2.

[85] See Recital 2 of the EUMR.

[86] See Article 2 of the Regulation 4064/89 para. 2 'A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market'. At Par 3 of the Regulation 4064/89 'The thresholds laid down in paragraph 2 will be reviewed before the end of the fourth year following that of the adoption of this Regulation by the Council acting by a qualified majority on a proposal from the Commission'.

becomes evident that the Commission, when assessing the compatibility of mergers with the common market, may take industrial policy objectives into account as a basis for exempting anti-competitive conducts.

The Regulation No 4064/89 could consolidate merger control at the Community level. To simplify, the 'Community dimension' of a transaction was expressed throughout turnover thresholds: the case falls within the Commission jurisdiction anytime the thresholds under Article 1 of the Regulation are satisfied. Due to its secondary legislation nature, the Merger Regulation cannot exclude any Commission power under the EC Treaty, including those given by Article 81 and 82 of the EC Treaty as interpreted in the *Continental Can* and *BAT & RJ Reynolds* judgments. The Commission would be able to act, justified under Article 81 and 82 via Article 85 of the EC Treaty, even against concentration below the requested thresholds. However, it has never acted under these provisions, not only because of the adoption of merger control rules at national level, and furtherly because the procedure under Article 85 of the EC Treaty is complicated and does not permit the Commission to investigate, adopt final decision and imposed fines as it can under the Regulation.[87]

Furthermore, the CJEU granted Article 82 EC Treaty '*direct effect'* through the *Continental Can* judgement, so it could be directly invoked by a third party before where it is believed that a concentration amounted to an abuse of a dominant position under the *Continental Can* case-law, regardless of the thresholds imposed by the Regulation.[88]

On regard of Article 81 EC Treaty, the CJEU ruled that national courts - as opposed to national competition authorities - may not apply Article 81 EC Treaty if no EC regulation to implement Article 85 has been adopted.

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[87] C. Jones & L. Weinert, *EU Competition Law: Mergers and Acquisitions: Volume II - Merger Law*, Claeys & Casteels Pub (1st edition), July 1st 2006, par 1.21.

[88] *Ibid*. par 1.5.

The Regulation No 4064/89 has been further revised in 1997 with three main amendments.[89]

Firstly, distinction between *'concentrative'* and *'cooperative'* joint ventures was abolished.[90] Secondly, the jurisdictional thresholds, expanding the Commission's authority to encompass cases involving three or more Member States that fell below the thresholds settled by the Merger Regulation was lowered.

Thirdly, Article 6 had been amended in the part where it did not have explicit authority to accept undertakings during Phase I.

Furthermore, the Court introduced a '*simplified procedure*' for unproblematic transactions, based on standard templates and where only the parties which fully satisfy the requirements can have access;[91] and it delivered its Market Definition Notice[92] to better clarify its approach to market definition for merger and antitrust cases.

On 11 December 2001, the Commission issued a Green Paper on the Review of the Merger Regulation[93], prompted in part by criticisms stemming from its decisions to prohibit or abandon numerous cases following thorough investigations.[94] This initiative marked the beginning of a more rigorous approach to conducting in-depth investigations.

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[89] Council Regulation (EC) N 1310/97 of 30 June 1997 amending Regulation (EEC) N 4064/89 on the control of concentrations between undertakings, OJ 1997 L 180, p.1.

[90] Merger Regulation distinguishes between joint ventures that have 'as object or effect the coordination of the competitive behavior of undertakings which remain independent' (cooperative joint ventures) and 'joint ventures performing on a lasting basis all the functions of an autonomous entity, which [do] not give rise to coordination of the competitive behavior of the parties amongst themselves or between them and the joint venture' (concentrative joint venture). Only the latter were deemed to fall within the scope of the Merger Regulation. See Article 3 (2), and note 7 par. 2.118 of the Regulation No. 4064/1989.

[91] Commission Notice on a simplified procedure for the treatment of certain concentrations under Council Regulation *(EEC) No 4064/89*, OJ 2000 C 217/32 (further refer as 'Jurisdictional Notice').

[92]Commission Notice on the definition of relevant market for the purposes of Community competition law [1997], OJ C372.

[93] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2000) 745/6 final.

[94] See Commission Press Release IP/00/258 of 14 March 2000 ,Alcan/Pechiney (2000), M.1715, and Commission Press Release of 5 October 2000,Time Warner/EMI (2000), M.1852, P/00/1122 (recorded music).

Despite the initial scope to assess the need for amending existing jurisdictional to broaden the range of transactions falling within the Commission's competence, the Green Paper later shifted its focus towards proposing modifications to the Merger Regulation to tackle challenges arising from '*global mergers, monetary union, market integration, enlargement, and the need for cooperation with other jurisdictions*'. [95] This act was not positively received by the CJEU. As a matter of fact, in the first months of 2002, the Court of First Instance rendered three judgments that annulled prohibition decisions adopted by the Commission,[96]two of which *Schneider and Tetra Laval*, were decided under the Green Paper's assessment.

In substance, the Green Paper's aim was not limited to the increasing of the thresholds, but it also aimed at expanding the Commission's referral provisions and evaluating the relevance of the dominant test. In December 2002, one year after the adoption of the Green Paper, the Commission approved the White Paper which included a '*comprehensive merger review package*'.[97]

The Paper proposed a reform on the pre-existing notification and authorization systems, as well as a general wide-ranging revision of Horizontal Merger Guidelines, a Draft Horizontal Merger Notice,[98] Draft Best Practices Guidelines[99], and further procedural and housekeeping improvements.

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[95] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2000) 745/6 final, pp. 6, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0745.

[96] More specifically, the judgments annulled by the Court were: *Airtours v Commission* (T-342/99), *Schneider Electric v Commission* (T-310/01), *Tetra Laval v Commission* T-5/02.

[97] Commission Press Release, IP/02/1856 of 11 December 2002, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1744.

[98] Draft Commission Notice on the appraisal of horizontal merger under the Council Regulation on the control of concentrations between undertakings, OJ 2002 C 331/03.

[99] DG Competition Draft Best Practices Guidelines on the conduct of the EC merger control proceedings.

5.1 The Upcoming of the Regulation 139/2004

The Merger Review program of 2002- 2004 sought to negotiate the remaining unresolved issues outlined in both the Green and White Paper documents.

Following two years of discussions within the Council working group, the European Merger Regulation[100] was finally approved, ushering in new assessment criteria and procedural protocols for merger control.

The consolidated version of the Merger Regulation, mostly referred as EUMR, replaced, and collected the four jurisdictional Notices adopted by the Commission in 1998 under Council Regulation No. 4064/89.[101]

The 2004 Regulation includes provisions concerning notification procedures to the Commission, time constraints, the right to be heard, access to documents, handling of confidential information, and remedies. The two central changes made by the Regulation consisted in: the revised substantive test (SIEC test) and the revised referral test.

The former version of the SIEC test considered the dominant position sufficient and necessary to prohibit a merger which creates a significant impediment to competition,

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[100] Council Regulation (EC) N 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, (further refer as the EUMR).

Other relevant documents currently enforced are:

- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2024.
- Commission Regulation (EC) N 802/2004 implementing Council Regulation (EC) N 139/2004 (the 'implementing Regulation') and its annexes (From CO, Short Form CO and Form RS), OJ L 193, 30.04.2004.

[101] The Four Jurisdictional Notices adopted by the Commission in 1998 under Council Regulation No. 4064/89 were:

- Notice on the concept of concertation
- Notice on the concept of full-function joint ventures
- Notice on the concept of undertakings concerned
- Notice on calculation of turnover

consequently the merger control only concentrated on the market structure and not on the competitive effects. Controversy, in the recent approach the legislator discussed on the fact that a merger may lead to anti-competitive effects even if it does not result in the creation or the strengthening of a dominant position[102], it is sufficient that the merger lead to a significant impediment of effective competition in the relevant market or a substantial part of it. The focus is now on the effect of the transaction rather than on the change of the market structure as before, however the legislator kept the concept of dominance as the standard for assessing the significant impediment to effective competition.

On the other hand, the Revised Referral is a mechanism of interaction between the Commission and the Member States according to which, a merger notified to one party can be referred to the other and vice versa. The system has been recast to facilitate the allocation of cases between EU and the NCAs (national competitors): the former post-notification referral under article 9 and 22[103] has been completely revised, and a new pre-notification referral mechanism has been introduced[104]. The genuine innovation lies in the fact that the merging parties can initiate the referral process themselves prior to submitting a formal filing in EU jurisdictions.

Other significant changes brought by the EUMR are: the elimination of the filing deadline requirement and the possibility to notify before the conclusion of a binding agreement, the implementation of a more flexible timetable , the introduction of the stop-the-clock provisions through which the Commission has the power to '*stop the clock'* with the agreement of the merging party and have more time for the verification, the increasing of fines and periodic penalty, a clarification of the Commission's restorative power. In particular, the commission can request the parties to restore the situation prior to when the concentration was implemented and a new treatment of ancillary restraints.

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[102] L.H. Röller & M. De La Mano, *The Impact of the new Substantive Test in European Merger Control*, European Competition Journal 2006.

[103] See Articles 9 and 22 Regulation 4064/89.

[104] See Article 4(4) & (5) of the EUMR: the former dealing with cases being referred from the Commission to a Member State, and the latter for cases to be referred from three or more Member States, collectively, to the Commission.

On the procedural side, the EUMR, brought the creation of the post of chief economist which consists in a team of experts' economist appointed to issue empirical analysis and assess the competitive effects of concentrations, which contribute to the shifting of merger enforcement from a '*form-based'* to an '*effect-based'* analysis.

The establishment of the peer review panel is another important change made through the EUMR. The peer review panel is used during the second phase of the merger control procedure in order to assess the strength of the factual evidence and the underlying theories of harm. With its latest version, the peer review panel contributed to certain investigations being abandoned and, to the strengthening of additional evidence in other cases.

In conclusion, the EUMR, by giving to both the notified and the third parties companies a greater degree of transparency on the daily handling of the cases, aimed at improving the standards of the Commission's decisions process. Furthermore, it allowed the merging parties to give early access to 'key documents' who may oppose the clearance of the Commission or give prove that the remedies proposed by the parties are not enough to solve the Commission's concerns.

During the years, the EUMR has been frequently amended, especially in the part providing the format for the mergers simplified procedure.[105]

6. The Concept of Concentration

European Union law gives the European Commission (Commission) jurisdiction under the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EUMR) if a concentration, with a community dimension takes place as defined in Article 1 (2), (3) of the EUMR.

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[105] Major acts implementing the Regulation 139/2004

- Commission Implementing regulation No 139/2004 of 5 December 2013 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 336.

The notion of concentration is included under Article 3(1) EUMR stating that '*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'.[106]

In addition, under Article 3(4) EUMR 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).[107] A Joint Venture is defined as a business agreement where multiple parties combine resources to achieve a specific goal, such as a new project or business activity. Each participant shares in the profits, losses, and costs, while the JV remains a distinct entity from their other business interests.

The concept of concentration is more focused on a qualitative rather than a quantitative dimension: '*concentration*' is any operation that results in a lasting chance in the control of undertakings concerned and, consequently, in market structure.[108]

To simplify, under Article 3 EUMR distinguishes three general categories of concentrations: Article 3(1) (a) EUMR mergers and Article 3(1) (b) EUMR acquisitions of control, and Article 3(4) joint venture.

Control may be acquired by one undertaking alone or by several undertakings jointly. Control may also be acquired when one person controls, either solely or jointly, at least one other undertaking. The term '*person'* is extended to public bodies, private entities and natural persons. Control can be acquired directly by the person holder of the rights or

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[106] See Article 3 (1) of EUMR.

[107] See Article 3(4) of EUMR.

[108] See Recital 20 of EUMR.

are entitled to rights conferring control under the contract, or indirectly from the person or undertaking having in fact the real power to exercise the rights resulting from this interest.

Control may also be acquired through investment funds. These are usually set up in form of legal partnerships and the investors participate as limited partners. In this case control is usually exercised by the company setting up the fund, which operates as a mere investment vehicle. However, in case of contractual arrangements with the investment company where the general partner merely constitutes a company structure whose acts are performed by persons linked to the investment company, the investment company generally acquires indirect control under Article 3(1)(b) and 3(3)(b) EUMR, and is entitled to exercise the rights conferred upon the investment fund. [109]

Control is defined by the Merger Regulation under Article 3(2) as '*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 under- taking'.

Therefore, it is not necessary for the parties to declare the intention of acquiring control or to actually exercise influence over the acquired company, since the mere possibility of exercising decisive influence is sufficient to fall within the meaning of the article. Additionally, the General Court's case law argues on that the possibility of exercising that influence under the EUMR must be effective.[110]

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[109] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95 , pp. 1–48, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0416(08)#ntr18-C_2008095EN.01000101-E0018 ('Jurisdictional notice') para. 11-15.

[110] Judgment of 23 February 2006, *Cementbouw v Commission*, T-282/02, ECLI:EU:T:2006:64, para. 57-58. In the specific case the CJEU clarifies that the mere notification to NCA of the proposed pooling agreement for the conclusion of the transaction is not enough to prove that, as a result of that notification, the three shareholders acquired the possibility of exercising decisive control over CVK before the second group of transaction was concluded.

Notwithstanding the presence of an agreement between the parties, control will not be given if the acquirer is not standing in a position to exercise the rights normally conferring control, such as the acquisition of property rights and shareholders agreements, or, exceptionally, purely economic relationships, as a situation of economic dependence which may lead to control on a de facto basis.[111]

Control can be acquired either by a single entity, sole control, or by multiple entities acting together, joint control.

The Commission's practice has clarified that sole control can be acquired in two distinct ways: either by the acquirer gaining the ability to unilaterally determine the strategic behaviour of an undertaking, or by obtaining exclusive veto rights over the target company's strategic decisions, which constitutes negative control.[112] In the first scenario, the essential requirement of taking alone strategic decision on the target company may led to the consequences that, in companies where strategic decisions are taken by specific quorum, the acquisition of a majority of share capital may sometimes not be sufficient to obtain sole control.[113]

See also available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0416(08)#ntr18-C_2008095EN.01000101-E0018

[111]Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, para. 9.

For example,

- Decision of the Commission of 21 November 2001, *Usinor/Arbed/Aceralia*. Case No COMP/ECSC.1351, https://ec.europa.eu/competition/mergers/cases/decisions/ecsc1351_en.pdf
- Decision of the Commission of 25 September 1992, *CCIE / GTE*, Case IV/M.258, available at https://ec.europa.eu/competition/mergers/cases/decisions/m258_en.pdf .
- Decision of the Commission of 27 March 1996, *Martin Corporation/Loral Corporation*, Case IV/M.697, available at https://ec.europa.eu/competition/mergers/cases/decisions/m697_en.pdf.

[112]C. Jones & L. Weinert, *EU Competition Law: Mergers and Acquisitions: Volume II - Merger Law*, Claeys & Casteels Pub (1st edition), July 1st 2006, para. 2.18.

[113] Jurisdictional Notice, para. 13 for an acquisition of control via exercising control by the general partner of a partnership

Nevertheless, in certain cases, sole control can also be acquired through '*qualified minorities'* if the target company's organizational structure grants specific decision-making rights to them. For instance, minority shareholders might have the authority to manage the company's activities and shape its business policy.[114]

In cases of acquisitions of control, a concentration occurs where the control of an undertaking is newly acquired by one or more persons already controlling at least one or more undertakings. The EUMR extends the definition of the word '*person'* to individuals, public bodies and private entities,[115] and clarifies that the former's acquisition of control is considered as concentration only if the individual, either solely or jointly, controls at least one other undertaking.[116]

The concept of a merger, as referenced in Article 3(1)(b) of the EUMR, is not explicitly defined within the EUMR. However, a merger can be understood as the consolidation of two independent undertakings of equal standing into a new entity. According to the Concentration Notice,[117] mergers can occur on either a legal or economic basis. A legal merger arises if (i) two independent undertakings amalgamate into a new undertaking and cease to exist as two separate legal entities [118]or (ii) where one undertaking is absorbed

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[114] Decision of the Commission of 26 May 2005, *TPG/Apax/Tim Hellas*, Case No COMP/M.3785M.3785, available at https://ec.europa.eu/competition/mergers/cases/decisions/m3785_20050526_20310_en.pdf.

[115] See Article 3(3) of the EUMR: Control is acquired by persons or undertakings which:

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

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

[116] Decision of the Commission of 16 May 1991, *Asko/Jacobs/Adia* (1991), Case No IV/M.082, available at https://ec.europa.eu/competition/mergers/cases/decisions/m82_en.pdf. In this decision a private individual, controlling further undertakings, acquired joint control and was considered an undertaking concerned under the Merger Regulation; Decision of the Commission of 23 May 1995, *Saudi Aramco / MOH*, Case No IV/M.574, available at https://ec.europa.eu/competition/mergers/cases/decisions/m574_en.pdf.

[117] Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89) OJ C 66, 2.3.1998, para. 1.

[118] Merger of equals.

by another,[119] the latter maintains its identity and the former ceases to exist as a legal entity.[120]

Furthermore, paragraph 10 of the Concentration Notice associates the meaning of merger to the combination of the activities of previously independent undertakings resulting in the creation of a single economic unit. For instance, when two or more independent undertakings establish contractually a common economic management or the structure of a dual listed company. The operation is a merger when it leads to a de facto amalgamation of the undertakings concerned into a permanent single economic unit. Such a '*de facto amalgamation*' may only be established on contractual arrangements; however, it can further be reinforced by cross-shareholding between the undertakings forming the economic unit.

EU Competition Policy includes into this definition a series of further transactions. For example, when company A acquiring most of the shares of company B, and thus, in some cases, may be enough to qualify the transaction as a merger. Under the EUMR, to qualify an acquisition of shares from Company A to Company B as a merger, it is necessary to verify whether A will acquire '*the possibility of exercising decisive influence*' over the strategic commercial behaviour of B.[121] At the same time, for the Enterprise Act, control is acquired in cases where A has at least *'material influence'* over B.[122]

Other operations that can result in a merger are the acquisition of assets,[123] or two or more undertakings which merge themselves in the creation of a new company as single

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[119] Merger by absorption.

[120] Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 [1998] OJ C 66, at para. 6.

[121] R. Whish and D. Bailey, *Competition Law (10th edition*), Oxford University Press, Oxford, United Kingdom, 202, pp 877-879.

[122] Enterprise Act 2002 (UK Public General Act) available at https://www.legislation.gov.uk/ukpga/2002/40.

[123] Decision of the Commission of 26 June 1997, *Blokker/Toys 'R' Us*, Case M 890 available at https://ec.europa.eu/competition/mergers/cases/decisions/m890_19970626_664_en.pdf

Judgment of 16 December 2015, *Société Coopérative de Production SeaFrance v CMA* [2015] UKSC 75 (UK law) EWCA Civ 487.

economic unit.[124] This second perspective may occur even in cases where the single undertakings maintain their individual legal personality but contractually establish a common economic management. Illustrations of this merger in economic terms in the Commission's practice are: the establishment of Dual Listed Companies,[125] the merging of global operations among professional service firms which often involves a consolidation of partnership networks through contractual agreements,[126] or the implementation of a unified organizational framework to oversee the economic management of all entities involved.[127] Once these concepts are clarified, the essential question that should be asked under competition law is whether the market, where these operations occur, will somehow be less competitive than before the merger.

Lastly, a concentration is also constituted through the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity under Article 3(4) of the EUMR. A joint venture is fully functional when: (i) enjoys operational autonomy, (ii) has activities beyond one specific function for the parents, (iii) deals with its parents on an arm's length basis after a start-up period; and (iv) is intended to operate on a lasting basis.

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[124] Here acquires relevance what is known under the name of 'Joint Venture' , which is a business agreement business arrangement in which two or more parties agree to pool their resources for the purpose of accomplishing a specific task, that can even consist in the setting of a new company. Joint Venture (JV): *What Is It and Why DO Companies Form One by Marshall Hargrave* (Feb 2024), available at https://www.investopedia.com/terms/j/jointventure.asp

[125] A Dual Listed Company is a company created of mor.e than one registered corporation that operates as a single business. An example is the 'Barrick Gold' company, that is a Canadian gold mining company that has its stocks listed on both the Toronto Stock Exchange (TSX) and the New York Stock Exchange (NYSE). Because of the listings on two different exchanges, Barrick is said to be a dual-listed company.

Corporate Financial Institute , Dual Listing available at https://corporatefinanceinstitute.com/resources/equities/dual-listing/#:~:text=Dual%20listing%20is%20when%20a,of%20a%20dual%2Dlisted%20company.

[126] Decision of the Commission of 20 May 1998, Price *Waterhouse/Coopers&Lybrand*, Case No IV/M.1016, available at https://ec.europa.eu/competition/mergers/cases/decisions/m1016_19980520_590_en.pdf *inter alia* Decision of the Commission of 27 August 2002, *Ernst & Young/Andersen Germany*, Case No COMP/M.2824. available at https://ec.europa.eu/competition/mergers/cases/decisions/m2824_en.pdf

[127] See '*Gleichordnungskorzen*' in German Law or certain '*Groupements d'Intérêt Economique'* in French Law.

Operational autonomy requires that the joint venture must have sufficient resources to operate independently on the market. It must own a management dedicated to its day-to-day activities and be able to carry on the business activities provided in the joint venture agreement.

Additionally, in order for a joint venture to be fully functional does not need to take over one specific function of its parents' activities. Partial joint venture will be analysed by Article 101 of the TFEU[128] or by National Competition Authorities (NCAs).

When examining a full-function joint venture it is important to consider its relationship with the parent companies. The joint venture may depend on sales or purchases from its parents; however, this is allowed if it does not overstep the three years period. In long period, a joint venture is fully functional when it sells more than 50% of its output to the market, or, otherwise, when it operates on a '*trade market'*. A trade market is where relationships between suppliers and distributors relies, and where different supplies are available for the concerned product. In such a case, a joint venture may be considered fully functional when it demonstrates that it has the necessary facilities, and it is likely to obtain a substantial portion of its supplies not only from its parents but also from other sources. [129]

Furthermore, a full-functional joint venture must operate on a lasting basis, and thus, cannot be solely established for a limited or short period of time. A joint venture created to construct a specific project would not be on a lasting basis.[130]

Finally, determining whether a joint venture is fully functional is crucial for assessing its reportability under the EUMR. In fact, a fully functional joint venture is reportable to the Commission under Article 3(4) EUMR. Otherwise, the joint venture may be subject to *ex-post* control under Article 101 TFEU by both National or Union competition authorities.

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[128] See Article 101 of the TFEU.

[129] Jurisdictional Notice para. 97-102.

[130] Jurisdictional Notice para. 103-104.

6.1 When Concentrations have Community Dimension

As aforementioned, under the EUMR aims at preventing merger having a Union Dimension which may alter concentration in the concerned market.

For a company to have a Union Dimension, the merger must meet the meaning of concentration under Article 3 of the EUMR and fulfilled the turnover thresholds under Article 1 of the EUMR[131]. The latter have been settled to facilitate the provision of a mechanism for determining the allocation of jurisdiction and identify when a concentration has a Community dimension.[132]

Article 1 of the EUMR sets out two alternative criteria identifying when a merger has a Union dimension one in Article 1(2), and the other in Article 1(3).

Article 1(2) EUMR established three different criteria to be fulfilled for a concentration to have Union Dimension:

(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. Article 1(2) EUMR is used to demonstrate that there must be a minimums worldwide basis level of activities and another minimum level within the EU, and to exclude purely domestic transactions.

Article 1(3) EUMR provides an alternative basis of jurisdiction to Article 1(2) EUMR. A concentration not meeting the thresholds under Article 1(2) EUMR can still have a Community dimension if its:

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[131] See Article 1 of the EUMR.

[132] Jurisdictional Notice para. 124.

‘*(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’.

Article 1(3) EUMR aims at giving a jurisdiction to the Commission for concentrations not having a Union dimension as stated in Article 1(2) EUMR, but still are expected to have a substantial impact in at least three Member States. Article 1(3) indeed requires for lower turnover thresholds and for a minimum level of activities of undertakings concerned in at least three Member States.[133] An example of concentrations falling within the meaning of this article was Rya*nair/Aer Lingus I.*

The starting point for determining whether a concentration has a Community dimension it to identifies within the meaning of ‘*concerned undertaking’* of Article 1EUMR. Taking Article 3 defines the undertakings concerned as those ‘*participating in a concentration’*. Once the latter have been identified, the second step to take for determining the jurisdiction is to calculate their turnovers as set out in Article 5 EUMR.[134] Article 5 (4) EUMR provides that the aggregate turnover of an undertaking concerned shall be calculated by adding together turnover of their subsidiaries, parents and affiliates because of direct or indirect links with the latter. The subparagraphs of Article 5(4) EUMR provides criteria to determine which group turnover should be added to that of the individual undertaking concerned in the transaction. Article 5(5) EUMR as regard joint ventures not falling within the meaning of Article 3(4) EUMR, turnover between the latter

[133] Jurisdictional Notice para. 126.

[134] See Article 5 of the EUMR.

and their parents should be excluded from the total calculation, while turnover between joint venture and third parties should be apportioned equal between its parents. To establish the potential Union dimension of a transaction it is important to determine where turnovers arise: the latter should be attributed to the place where the customer is located.

Establishing when a concentration has a community dimension is fundamental for the exercise of the 'one-stop-shop' principle under Article 21 EUMR,[135] which states that concentrations having a Union dimension fall under the exclusive jurisdiction of the Commission. Article 21(1) EUMR excludes the application of Regulation 1/2003 and others for concentrations having a Union dimension under Articles 1 and 3 of the EUMR. In fact, differently from the enforcement of Article 101 and 102 TFEU which can be exercised by both National and European Competition Authorities; the *ex-ante* control of the EUMR for the mergers with Union dimension is solely given to the Commission. On this regard, Article 21 (3) EUMR states that no member State shall apply its national legislation on competition to such concentrations.

The '*one-stop-shop'* principle did have significant benefits for the avoiding fragmentation and duplication of enforcement effort, as well as potentially incoherent treatment by multiple authorities. It usually results beneficial for the businesses as it eliminates the risk of conflicting decisions that can arise when multiple competition authorities, operating under different legal regimes, assess the same transaction concurrently.[136]

Notwithstanding what stated in the previous paragraph, Article 21(4) EUMR allows from a reattribution to a case from the Commission to national competition authorities in cases where a Member State may take appropriate measure in relation to a concentration where this is necessary to protect a '*legitimate interest'*. Moreover, the Commission's Notice on Case Referral in respect of concentrations[137] delivers a detailed guidance on the

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[135] See Article 21 of the EUMR.

[136] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02) available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005XC0305%2801%29 (further referred as '*Case Referral'*) para. 11.

[137] *Ibid*..

reattribution of jurisdiction under the EUMR, both on the guiding principles[138] and on the mechanism system.[139] In other circumstances a concentration with a Union dimension may be referred by the Commission to a Member State under Articles 4(4) and 9 of the EUMR; or, conversely, it can be referred from the Member State to the Commission under Articles 4(5) and 22 EUMR.

7. The Role of the European Courts in Merger Control

The European Merger Control, and more in general, the European competition law, is an administrative system where the Commission has a broad duty *'to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in light of those principles*'.[140]

In the field of merger control, the Commission has the power to investigate, and deliver decisions aiming at clearing, prohibiting, or undoing notified transactions, in compliance with what mentioned in the EUMR. To guarantee the safeguard of administrative power within the Commission, decisions taken by it can be challenged before the European Courts, respectively the Court of Justice and the General Court (or Court of First Instance), under the grounds set out in Article 263 TFEU. These grounds include: the lack of competence, infringement of an essential procedural requirement infringement of the treaty or any other rule of law or misuse of the power.

Articles 261 TFEU[141] and 16 of the EUMR[142] assign to judicial review also fines and periodic penalty payments. Decisions can be contested by any natural or legal person that is directly or individually addressed or affected by it.

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[138] *Ibid*. para. 8.

[139] *Ibid*. para. 46-82.

[140] Joined Cases T-305/94, T-306/94, T-307/94, T-316/94, T-325/94, T-328/94, T329/94 and T-335/94, *Limburgse Vinyl Maatschappij v. Comm'n, 1999* E.C.R. 11-931, para. 149.

[141] See Article 261 of the TFEU.

[142] See Article 16 of the EUMR.

The most common procedure before the European Courts in the merger field is the action for annulment of Commission decisions. In its early acting stage, appeals under the Regulation No 4064/1989 were very few. It was not until the late 1990s that the European Union did not start to express a general disquiet about the Commission's position in relation to mergers.[143] Principally, what was mostly under the attention was the Commission's combination of powers vested in it and the insufficient judicial control of its work by the European courts.

In the following years, the Commission raised exponentially the number of prohibition decisions, and, in response, the General Court answered with a series of annulments to these decisions taken by the Commission.[144] These judgments were essential for the General Court to prove that it was quite ready to look into both the Commission's findings of fact and the interferences drawn from them, in order to ascertain whether its analysis was flawed due to obvious errors in the assessment. Furthermore, it pushed the Commission to be more rigorous in its investigations, and they contributed at mitigate the

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[143] Between 1999 and 2001, the Commission prohibited eight concentrations;

- Commission Decision of 22 September 1999, *Airtours/First Choice*, Case IV/M. 1524, 2000 OK L93/1; available at https://ec.europa.eu/competition/mergers/cases/decisions/m1524_en.pdf
- Commission Decision of 14 March 2000, *Volvo/Scania*, Case COMP/M. 1672, 2001 OJ L143/74; available at https://ec.europa.eu/competition/mergers/cases/decisions/m1672_en.pdf
- Commission Decision of 28 June 2000, *MCI Worldcom/Sprint*, Case COMP/M.1845; available at https://ec.europa.eu/competition/mergers/cases/decisions/m1741_en.pdf
- Commission Decision of 31 January 2001, *SCA/Metsä Tissue*, Case COMP/M.2097, 2002 OJ L57/1;available at https://ec.europa.eu/competition/mergers/cases/decisions/m2097_en.pdf
- Commission Decision of 10 October 2001, *Schneider Electric/Legrand*, Case COMP/M.2283;available at https://ec.europa.eu/competition/mergers/cases/decisions/m2283_20011010_610_en.pdf
- Commission Decision of 17 October 2001, *CVC/Lenzing*, Case COMP/M.2187; available at https://ec.europa.eu/competition/mergers/cases/decisions/m2187_en.pdf
- Commission Decision of 30 October 2001, *Tetra Laval/Sidel*, Case COMP/M.241 available at https://ec.europa.eu/competition/mergers/cases/decisions/m2416_62_en.pdf

Between 1990 and 1998, the Commission prohibited 10 transactions.

[144] Judgment of 6 June 2002, *Airtours v Commission*, Case T-342/99, ECLI:EU:T:2002:146, Judgment of 11 July 2007, *Schneider Electric v Commission*, Case T-351/03, ECLI:EU:T:2007:212., Judgment of 25 October 2022, *Tetra Laval v Commission,* Case T-5/02, ECLI:EU:T:2002:264.

general concern on the excessive power of the Commission and the unsteady control by the jurisdictional institutions.[145]

The EU Courts do not have unlimited discretion on reviewing the Commission merger clearance or prohibition decisions. In the first place, only acts producing legal binding effect may be appealed under Article 263.[146] For example, decisions like those taken under Article 6(1)(c) EURM to initiate a Phase II investigation[147], or a letter from the Commission and an opinion about the commitments offered in an earlier stage, cannot be appealable. Moreover, the EU Courts have the ultimate word in the analysis of matters of law and facts, however, the Commission still enjoys a 'margin of discretion' in relation to complex economic matters. In this area, the EU Courts could only evaluate whether the Commission relied on accurate, reliable, and consistent evidence; whether that evidence is complete of all relevant information, and whether the evidence is sufficient to sustain the decision resulting from it.[148]

As previously mentioned, natural and legal persons can start a proceeding against a decision that is addressed to them, or which is addressed to another person, but it directly or individually affects them. An intriguing question of this matter is whether, in situations where the parties to the transaction have offered commitments to the Commission as a condition for being allowed to proceed, can then appeal to the General Court that the Commission had no right to insist on remedies. As a response to this argument, in *Cementbouw v Commission* judgment,[149] the CJEU clarified that the Commission does not lose jurisdictions when, after the concerned parties put into effect the proposed commitment, the transaction no longer falls within the EC merger control thresholds.

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[145] Further pivotal annulments of prohibition decisions delivered by the General Court are: *MCI World Com v Sprint* see *supra* note 144 , Judgment of 7 March 2017, *UPS v Commission*, Case T-194/13, ECLI:EU:T:2017:144. Judgment of 28 May 2008, *Commission v CK Telecoms UK Investments*, Case T-399/16, ECLI:EU:T:2020:217.

[146] See Article 263 of the EUMR.

[147] Judgment of 11 July 2007, *Schneider Electric v Commission*, Case T-351/03, ECLI:EU:T:2007:212.

[148] Judgment of 25 October 2022, *Tetra Laval v Commission,* T-5/02, ECLI:EU:T:2002:264. para. 39.

[149]Judgment of 23 February 2006*, Cementbouw Handel & Industrie BV v Commission* ,Case T-282/02, ECLI:EU:T:2006:64, par. 292 and 321.

The Commission's jurisdiction must not only be defined when the duty to notify arises, but it is determined in the form it is actually put into effect and not solely in the form in which the concentration is notified.[150] Parties have the right to appeal against a decision of the Commission to retain a commitment that is no longer necessary due to a change of circumstances.[151]

Third parties that demonstrate that a decision creates a directly or individually concerns to them are allowed to start a proceeding against it. Under Article 18 (4) EUMR natural and legal persons having a sufficient interest in the case can both be heard during the Commission's administrative procedure and have the standing to appeal it.[152] With the *Petrolessence SA v Commission* judgment,[153] the General Court claimed that, in some cases third parties that were not involved in the administrative procedure have also been found to have standing to appeal. Following a settled case-law '*measures which produce binding legal effects capable of affecting an applicant's interests by bringing about a significant change in his legal position are acts or decisions against which an action for annulment may be brought under Article 230 EC*'.[154] To give certainty that a decision has effects of that kind, it is necessary to examine its substance.[155] Third parties in the liquidation phase have been confirmed not to have an interest in the final judgment of the CJEU.[156]

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[150]Clearly Gottlieb Steen & Hamilton LLP, *C-202/06P Cementbouw Handel & Industrie BV v Commission*, EC Competition Report, October-December 2007, pp. 1.

[151] Judgment of 16 May 2018, *Deutsche Lufthansa AG v Commission*, Case T-712/16, ECLI:EU:C:2021:608, para. 47-139.

[152] Judgment of 8 March 1995, *Airfrance v Commission*, Case T-2/93, ECLI:EU:T:1994:55, para. 42-47.

[153] Judgment of 3 April 2003, *Petrolessence and SG2R v Commission*, Case T-342/00, ECLI:EU:T:2003:97.

[154] Judgment of 11 November 1981, *IBM v Commission*, Case 60/81,ECLI:EU:C:1981:264, para. 9, and Judgment of 29 January 2002, *Van Parys and Pacific Fruit Company v Commission*, Case T-160/98 , ECLI:EU:T:2002:18, para. 60.

[155] Judgment of 16 September 2004, *Metro-Goldwyn-Mayer Lion v OHMI - Moser Grupo Media (Moser Grupo Media),* Case T-342/02, ECLI:EU:T:2004:268, par. 37 to 42.

[156] Judgment of 19 June 2009, *Socratec v Commission*, Case T-269/03, ECLI:EU:T:2009:211.

As a response to the long-time taken to obtain a judgment from the General Court, the legislator designed the so called *'expedited procedure'*[157] which enables the Court to deal with cases more quickly than usual. Before this procedure was put into force, obtaining a judgment from the General Court took so long that most of the time the process was essentially without purpose. Especially for prohibition decisions, the long period of gap between Commission's prohibition decision and the eventual General Court's successful appeal made anyways result impossible to proceed with the deal. The request for an expedited procedure can be made by the referring Court or Tribunal, in case of a reference for a preliminary ruling, and by the applicant or the defendant, in the case of a direct action. Relevant judgments decided with this procedure have been the *EDP v Commission*[158] judgment and *Impala v Commission*,[159] respectively decided in 7 and 21 months. Until 19 January 2021 the General Court delivered 12 merger control judgments using the expedited procedure.[160]

8. Principal Differences Between EU and US Merger Control

The two most important merger control systems enforced nowadays are the EU and the US.

Both have the central goal to guarantee a fair competition and protect the consumer welfare, however they differ in both substantial and procedural aspects.

In the United States, the main actors in the merger enforcement are the Federal Trade Commission (FTC) and the Department of Justice (DOJ), whose responsibility is delivered under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act)[161]

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[157] Article 151 of the Official Journal of the European Union J [2015] L 105/1.

[158] Judgment of 21 September 2005, *EDP v Commission*, Case T-87/05, ECLI:EU:T:2005:333.

[159] Judgment of 13 July 2006, *Impala v Commission*, Case T-464/04, ECLI:EU:T:2006:216.

[160]R. Whish and D. Bailey, Competition Law (10th edition), Oxford University Press, Oxford, United Kingdom, 202,pp. 942.

[161] Hard-Scott-Rodino,*Antitrust Improvments Acts of 1976*, 15 USC 1311 note.

and Section 7 of the Clayton Act.[162] Just like the EU Commission, the U.S. enforcement agencies investigate proposed transaction for potential competition issues, however, they differ in the part where they are not allowed to prohibit a transaction. In the U.S. merging control system, the competent authority to block a merger is the federal district Courts, which acts on behalf of actions raised by the agencies.

While the EU merger control system is an administrative system where the Commission oversees decisions on each case notified to it, the US merger review is viewed like an administrative procedure, under the threat of a court procedure. Nevertheless, after the enforcement of the HSR Act companies fulfilling the thresholds required by the law, are called upon to notify the transaction to the DOJ and the FTC and observe a waiting period to let the agencies reviewing the operation. Furthermore, with the HSR system, most companies whose merger is not smooth, seek for negotiation remedies rather than challenge the agencies before court.[163]

Another relevant difference concerns the transparency characterizing the EU system particularly present during Phase II of the merger control review, where the Commission is eventually called to clear the merger if it more likely for it to be anticompetitive or to accept remedies. Here the Commission provides the notifying parties the followings prospects: the decision of the Statement of Objections,[164] the possibility to access to the Commission file wherein the notifying parties receive non-confidential versions of all documents in the file both exculpatory and inculpatory, and the chance for them to be heard at a formal Oral Hearing before a Hearing Officer and the Member State. The Hearing represents an opportunity for the Commission and the interested parties to present their case to a different audience.

On the other hand, in the U.S., agencies tend to not diffuse the information gathered during Phase II of the procedure since they are under no obligation to uncover their current thinking as requested to the EU Commission. As a result, the second phase of US

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[162] Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (2006).

[163] W. J. Kolasky, *Address Before the George Mason University Symposium: Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels* , published on 9 November 2001, United States.

[164] See Art 6(1) (c) of the EUMR.

merger review turns to be more extensive than second phase applied in the EU system.[165] Furthermore, while the EU merger review works within fixed deadlines settled in the Regulation, the US process is more open-ended.

In the EU system, the Commission can consider a merger notification as valid only when all the required submission are fulfilled. In accordance with the Regulation, the Commission has a wide discretion is deciding what documents and other annexes the parties should submit to make the notification effective.[166] On the other hand, the Hart-Scott Rodino Act only requests for very little information in the initial investigation, that is mostly because extensive material are usually demanded in the second phase.

Moreover, in the US, merger provisions are simultaneously enforced by the States and the Federal Agencies, and some regulatory agencies have the power to review mergers under a different standard, which is public interest, and the review process may be affected in various ways due to the interaction of these agencies.

Controversy, in Europe the sole enforcer of EU merger provisions is the Commission, and the other regulatory agencies have very little influence on merger reviews, consequently public interest consideration are less relevant. In addition, taking in consideration that member states have no part in the enforcement of the regulation it is statable that EU merger control system is more centralized than the US. However, the decentralized characteristic of the US system may lead individual State to deal with transactions independently from the federal agencies; while in Europe, due to the central and unique position held by the Commission, there is a constant and close cooperation between it and the Member States.

When it comes to the evaluation of the standards for a merger review the outcomes will differ whether the merger is analysed in the US or in EU.

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165 W.E.Kovacic, Mavroidis, e Neven, *Merger Control Procedures and Institutions*. Working Paper, Columbia Law School,2014.

166 See Article 5 of the EUMR.

In the European traditional approach, the merger was considered in light of whether it would have created or strengthened a dominant position in the market[167]. Controversy, in new Merger Regulation in 2004, the SIEC test (significant impediment of effective competition) does not require the creation or strengthening of a dominant position as the sole necessary condition to talk about an impediment effective competition, but it considers as a possible threat any merger that may lead to a significant impediment of effective competition.[168] The most recent European test enables a more effects-based approach when analysing concentrations, and it is even closer to the US 'substantial lessening of competition' procedure.

Indeed, the US merger control standards consider whether a proposed merger will either: (a) reduce the field to a few companies, or (b) grant a single firm complete dominance over the market.[169] If the proposed merger falls into any of these two fields, then it is substantially lessened of competition, and it will thus be prohibited.

In the decision-making process, some scholars found the US system to be more amenable to political influence than in the EU. Here the sole influence is exercised by member states pursuing their national interests and, due to the lack of national enforcement, the system is generally more centralized than the American. However, in both jurisdictions cases in which political influence has been used in practice seems very rare.

Furthermore, competition authorities may be considered as more competent in the US rather than the EU. The former are indeed more worried to lose their position and will consequently be more focused to exercise their mandate. On the other hand, the European correspondents, who owns the position regardless of their work in competition, would end up spending significant time on issues unrelated to competition enforcement[170].

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[167] See Article 3 of the Regulation No 4064/1989.

[168] See Article 2 of the EUMR.

[169] O. Altman, *Callmann on Unfair Competition, Trademarks & Monopolies* (4th Ed. 2004), published by Clark Boardman Callaghan.

[170] *Supra* note 165.

Lastly, the Commission, in analysing conglomerate mergers, evaluates if competitive harm could occur through foreclosure competitors, while, in the US, this kind of merger is usually considered as efficient-enhancing and it is mostly never challenged. However, it is notable that the Commission as well, rarely deal and impede conglomerate mergers.[171]

There have been situations in which mergers occurring in one territory have affected the legislation of the other territory. More specifically, two of the most relevant mergers happening in the US touched EU competition law for the market relevance they had underneath European competition law: the *Boeing/McDonnel Douglas* merger and the *GE/Honeywell* merger. The former was concluded after the Boeing obliged itself to make changes in order to avoid that the Commission would block the transaction. In the *GE/Honeywell* case, after the Commission still required for further divestures to allow the merger, the concerned company decided to give up on the operation.[172] These are the only two examples of situations where the two legislations interact.

Nowadays, cooperation among the agencies occurs on a daily base is reported on the agenda, even though concerns on divergent outcomes and illusory satisfaction from common position are still present. For instance, the procedural and substantial differences may affect the outcomes of the decisions in situations where one agency wants to pre-commit and complete the merger before the other still has had the chance to review it[173]. Or one agency may decide to delay its review when it believes that it will be easier for the other agency to request for appropriate remedies.[174]

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[171] C. Jones & L. Weinert, *EU Competition Law: Mergers and Acquisitions: Volume II - Merger Law*, Claeys & Casteels Pub (1st edition), published on July 1st 2006.

[172] K. Fugina, *Merger Control Review in the United States and the European Union: Working towards Conflict Resolution.* , 26 Nw.J. Int'l L. & Bus. 471 (2005-2006).

[173] Decision of the Commission of 21 January 2010, *Oracle/ Sun Microsystem*, Case COMP/M 5529. Here the DOJ closed its investigation on the merger a few days before the Commission opened its second stage investigation.

[174] Decision of the Commission of 29 March 2010, *Cisco/Tandberg* , Case No COMP/M 5669, available at https://ec.europa.eu/competition/mergers/cases/decisions/m5669_2153_2.pdf and Decision of the Commission of 26 January 2011, *Intel/Mcafee*, Case No COMP/M 5984 available at https://ec.europa.eu/competition/mergers/cases/decisions/m5984_1922_2.pdf.

The idea of creating a super-national organization to deal with multi-jurisdictional merger in a balanced and operative way, is far away from being reached. It is unconceivable that current institutions operating in the merger control would give up part of their jurisdiction to allow the setting of a more generalized organization with the power to pass directives for countries to implement. Anyways, as global economy becomes the norm, when any time a concentration touching on two or more territorially different markets it is demanded to the competent authority to analyse the operation in the context of how it affects the international market '*Global markets demand globally conceptualized law*'.[175] However, it will be possible to start thinking about the realization of a global organized merger control system, only once national, communitarian and, most importantly federal laws would finally be standardized.[176]

[175] T. Winslow, *The OECD's Global Forum On Competition and Other Activities*, 16 antitrust 38 (2001).

[176] *Supra* note 165.

CHAPTER 2:

PROCEDURAL ASPECTS OF MERGER CONTROL

1. The Meaning of Control

Article 3(1) of the EU Regulation No. 139/2004,[177]also known as Merger Regulation and following defined as EUMR, highlights that concentration only exists where a change of control occurs on a lasting basis, consequently temporary operations do not lead to any structural change in the market.

The Commission Jurisdictional Notice[178] deals with the definition of a concentration and helps with the understanding of what expressed in Article 3 EUMR. For instance, Article 3(1) (a) and (b) respectively distinguishes two kinds of operations resulting in a lasting change of control: mergers and acquisition. Acquisitions, however, are more common and the Commission discussed this operation from paragraph 11 to 123 of its Jurisdictional Notice.[179]

Article 3(2) of the EUMR defines control as the potential to wield decisive influence of an undertaking based on rights, contracts, or alternative methods, whether independently or in conjunction, while taking into account the factual and legal considerations at play.[180]

There is no need from the acquirer to demonstrate that the control is actually exercised since the mere possibility of exercising effective definite influence is enough for it to exist.[181]

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[177] See Article 3 of the EUMR.

[178] Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ 98/C 66/02, (further referred as '*Jurisdictional Notice'*)

[179] *Ibid*. para. 11-123.

[180] C. Jones and L. Weinert, *EU Competition Law Volume II: Mergers & Acquisitions,*.pp. 75-127.

[181] Jurisdictional Notice (*supra* note 178) para. 7.

Control is conferred as long as the acquirer is in a position to exercise the rights in Article 3(2) EUMR. Its acquisition is regulated in the Jurisdictional Notice at paragraph 10 and subsequent. The Jurisdictional Notice specifies that a concentration may occur on a *de jure* or a *de facto* basis, depending on whether the acquisition of control depends on a number or equal or factual elements; or it may take the form of sole or joint control.[182]

An acquisition of control throughout a *de jur*e basis occurs, for example, through the acquisition of shares or assets, or also on a contractual basis.[183]

On the contrary, control on a *de facto* basis occurs whenever control is acquired through factual elements leading to a permanent change in the structure of the market. *De facto* acquisitions of control are for example very long-term supply agreements or credits provided by the supplier or customers, associated with structural links, conferring decisive influence.[184]

Furthermore, sole control materializes in two alternative scenarios: when obtaining the instruments to decide alone on the strategic behaviours of the undertaking (positive control); or in case the acquirer owns the solo veto power over the acquired company's strategic behaviours (negative control).[185] On the other hand, joint control arises when two or more undertakings act in common to decide on the acquired company's commercial policy.[186]

Sole control usually emerges any time the acquirer obtains the majority of the voting rights of another company. However, the essential aspect in these instances is that the acquirer can autonomously enforce strategic decisions on the acquired undertaking, which explains why sole control may also be obtained through qualified minority

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[182] *Ibid*. para. 16.

[183] *Ibid*. para. 17-18.

[184] *Ibid*. para. 20.

[185] R. Whish and D. Bailey, *'Competition Law'* (10th edition), Oxford University Press, Oxford, United Kingdom, 2021 pp. 880.

[186] *Ibid*.

shareholdings.[187] This kind of control is known as *de jure control*, as the acquirer, even throughout the purchase of a small number of shares, retains the ability to unilaterally determine the strategic behaviour of the acquired company.[188]

Minority shareholding can also obtain *de facto control*. In fact, given the widely dispersive nature of the shares, it is very much possible for the shareholder to secure a majority at the shareholders' meeting.[189]

Conversely, joint control takes place when two or more independent undertakings have the chance of exercising decisive influence over another undertaking. Each of the companies in question can exercise decisive influence, thereby taking veto strategic decisions over the other. The acquisition of joint control can be established on a legal or *de facto* basis. Differently from sole control, where one specific shareholder owns the power to determine the strategic commercial behaviour of an undertaking, joint control, is defined by the potential for a deadlock situation due to the ability of two or more parent companies to veto proposed strategic decisions. Consequently, these shareholders must reach a consensus in establishing the commercial policy of the joint venture.[190]

The acquisition of joint control is '*de facto*' when minority shareholders would not act against each other in exercising their rights in relation to the joint venture.

What is essential to determine the existence of joint control is the existence of a mutual dependency between the undertakings so that each one of them can give a vital contribution to the operation. There must be a commonality of interests among the shareholders otherwise a joint control would normally be excluded. The acquired company of the operation can also not be fully acquired, as it will only partially be owned by the acquirer. In cases of partial control what is necessary is that the assets transferred must constitute a business to which a market turnover has to be attributed.[191]

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[187] Jurisdictional Notice (*supra* note 178) para. 51-56.

[188] *Ibid*. para. 13.

[189] *Ibid*. para. 14.

[190] *Ibid*. para. 18- 19.

[191] *Ibid* para. 19.

Control can also be acquired by a person, just in case where the latter has yet the control over at least one or more undertakings, where the term 'person' indicates also public bodies and private entities, as well as natural person. Acquisitions of control by natural persons results in a lasting structural change to the undertakings only if those natural persons engage in further economic activities independently or control at least by one other undertaking.[192]

Article 3(3) EUMR,[193] states that typically, individuals or entities obtain control by possessing or being entitled to rights that confer control within the relevant contracts.

Furthermore, there are situations where control is acquired by the person behind the operation which is exercising control over the acquired company. In other words, control is acquired by a person or undertaking holder of the controlling interest different from who hold the real power to exercise the right conferring control. In these situations, a person or undertaking acquires the controlling interests and exercise the rights thought another person or undertaking, which is only behaving as a mere intermediary or a vehicle.[194]

Article 3(2) EUMR allows for the acquisition of control on a contractual basis. An example is a contract granting the acquirer the right to use the assets of an undertaking. These contracts must necessarily be of long duration since just in these cases they can result in a changing of control.

The Concertation Notice[195] states that the raising of a situation of economic dependency may lead to a *de facto* change of control. This may happen where long-term supply agreements, in compliance with structural links, confer decisive influence on the decisions of the company.

In the following paragraph it will be analysed one of the most significant judgments in the area of control under the EUMR. *Austria Asphalt*, indeed, focuses on the acquisition

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[192] *Ibid*. para. 12.

[193] See Article 3 of the EUMR.

[194] See Article3(3)(b) of the EUMR.

[195] Commission Notice on Case Referral in respect of concentrations, OJ 2005/C 56/02.

of control under the EUMR, and, most importantly on the legal relevance of joint venture and the significance of '*full functionality'*.

1.1 C-248/16, *Austria Asphalt v Bundeskartellnwalt*

As mentioned above, the main proceedings focusing on the role of control in concentration, and on the interpretation of Article 3 EUMR is the case of *Austria Asphalt,*[196] decided by the CJEU on the 7 September 2017.

The case was referred to the CJEU on a preliminary ruling under Article 267 TFEU by the Austrian Supreme Court. The Austrian Supreme Court demanded the CJEU whether Articles 3(1)(b) and (4) of the EUMR imply that in cases of a change from sole to joint control over an existing business, it is to be considered a concentration only if the company, whose control has shifted, now operates as a separate economic entity on a long-term basis. The CJEU answered positively to the question and clarified that a joint venture, formed of two or more companies, one of which was previously under the sole control of a single parent, constitute a concentration solely when the joint venture as an independent player on the market. In essence, a transition from joint to sole control of an existing undertaking is a notifiable concentration under the EUMR only if the resulting joint venture operates as a '*full-function'* joint venture post-transaction.

The facts of the case are the followings.
Austria Asphalt (AA) and Teeger Asdag AG (TA) were two international construction companies operating mostly in the area of road network, and subsidiaries of Strabag SE and Porro AG respectively. Mürzzuschlag asphalt plant, the company object of the acquisition, fully owned by TA, exclusively supplied asphalt to the Porro group. On August 2015, AA and TA proposed an acquisition of joint control over Mürzzuschlag to the Austrian competition authority, intending to convert it into a joint venture jointly controlled by TA and AA. In October 2015, the Federal Cartel Prosecutor deemed the transaction a concentration under Article 3(1) (b) EUMR. Austria Asphalt appealed this

[196] Judgment of 7 September 2017, *Austria Asphalt v Bundeskartellanwalt*, C-248/16, EU:C:2017:643.

decision before the Austrian Supreme Court arguing under Article 3(4) EUMR that as both acquirers exclusively benefitted from Mürzzuschlag's asphalt the operation could not qualify as a concentration due to the acquired company not functioning as a fully independent joint venture. The lack of a consolidate interpretation of the Articles 3(1)(b) and (4) EUMR from the Commission, prompted the Austrian Supreme Court to seek a preliminary ruling before the CJEU in September 2017. The object of the request was to clarify the concept of '*creation of a joint ventur*e' and the general criteria for determining when a concentration arises in cases where one acquirer previously held sole control over the acquired company.

The entire ruling of the CJEU revolves around the concepts of control and full functionality of joint ventures, and more specifically on the connected interpretation of Article 3(1) (b) and 3(4) of the EUMR.

Firstly, the CJEU elaborated a comprehensive interpretation of Articles 3(1) (b) and 3(4) EUMR. The former emphasizes that a concentration arises whenever there is a lasting change of control resulting from the transaction. On the other hand, Article 3(4) argues that in case of joint venture, the acquired company undertaking must perform all the functions of an autonomous economic entity. The central issue addressed by the CJEU pertains to the differential treatment applied in scenarios where the joint venture results from the transitioning of the sole control of an existing undertaking to joint control.[197]

In the concerning case Mürzzuschlag was previously solely controlled by TA, thereby sole control already existed prior to the transaction. Based on this statement, the CJEU concluded that, while the transaction inevitably results in a change of control on a lasting basis for the acquired company, triggering the application of Article 3(1) EUMR, it still remains ambiguous whether the condition of the '*full functionality*' required for establishing the acquisition of control over a joint venture as reported under Article 3(4) EUMR should also apply to cases where the acquired company already existed prior to the transaction.

[197] *Austria Asphalt v Bundeskartellanwalt* (*supra* note 196) para. 19.

Recognizing the complexities on the application of Article 3(4) EUMR to this particular case, the CJEU opted for an interpretation guided by the purpose and structure of the provisions of the EUMR.[198] For instance, Recitals 5 and 6 of the EUMR[199] clarify that the EUMR aims at regulating concentrations that could significantly impede competition in the common market,[200]and thereby are liable of affecting the structure of competition in the European Union.[201] In this context, the critical factor for a concentration to be relevant under the EUMR is its potential to impact market structure.

Considering the present case, Mürzzuschlag was not created ex-novo from the operation of TA and AA, but it already existed on the market under the sole control of TA.

The question arises: should the requirement of *'full functionality'* apply, even though the joint venture of the transaction between TA and AA does not result in a new company but merely represent a shift from sole to joint control of a pre-existing one?

If only Article 3(1) (b) EUMR were to apply, the outcome would have been straightforward: the transaction triggered a concentration solely for the existence of a lasting change in control. However, since the operation resulted in a joint venture Article 3(4) EUMR was involved.

A restrictive interpretation of the wording of Article 3(4) EUMR would have resulted in a differential treatment between new joint venture and those arising from a change of control where in the former required the full functionality element and the latter did not. In the concerning scenario, the acquisition of joint control over Mürzzuschlag by AA and TA fall within the second option. Therefore, the operation would have constituted regardless of the presence of the full functionality. However, the operation would not be considered a joint venture under Article 3(4) EUMR since Mürzzuschlag was neither '*created'* nor '*independent*' on the market but rather, a transfer of control from TA to TA and AA jointly, nevertheless it might have still result in a concentration under the EUMR.

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[198] *Idib.* para. 20.

[199] See Recital 5 and 6 of the EUMR

[200] See Recital 5 of the EUMR.

[201] See Recital 6 of the EUMR.

Thus, in accordance with the restrictive interpretation of Article 3(4) EUMR, transactions not forming new joint ventures do not require full functionality, in other words, the operation would be deemed a concentration regardless of the acquired company's independence on the market.

In the concerning scenario, as observed by the Advocate General Kokott in his opinion,[202] Mürzzuschlag joint venture solely produced for its parents' companies, AA and TA, without significant presence on the market beyond this. Following this interpretation Mürzzuschlag might still be classified as a concentration despite lack of full functionality.[203]

In contrast, the applicant advocates a more extensive interpretation of Article 3(4) EUMR, arguing that a joint venture constitutes a concentration only in cases where it operates independently and has a significant impact on the market. Therefore, the acquisition of Mürzzuschlag by AA and TA could not be considered a concentration, as the acquired company solely supplied asphalt to its parent companies, rendering its operations ineffective on the market and subsequently failing to qualify as an independent operator. In fact, Mürzzuschlag existed only as long as AA and TA required its asphalt.

To answer to the issue, to the CJEU considered suggestions from the Advocate General Kokott's Opinion. The Opinion of Advocate General Kokott suggested to go through the CJEU's case-law on the interpretation of Article 3 EUMR to grasp the scope of application of Article 3(4) EUMR to the concerning transaction.[204] When a wording interpretation is not feasible, one must consider the context and objectives of the rules in question.[205] Paragraph 29 of the Opinion of Advocate General Kokott proposed

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[202] Case C 248 /16, *Austria Asphalt v Bundeskartellanwalt* SA[2017], EU:C:2017:322, Opinion of Advocate General Kokott.

[203] *Ibid*. para. 21.

[204] *Ibid.* para. 23.

[205] Inter alia, Judgment of 8 September 2015, *Spain v Parliament and Council*, C-44/14, EU:C:2015:554, para. 44, and, to the same effect, Judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, para. 31.

clarification from Recital 8 of the EUMR[206], asserting that the EUMR applies to transactions inducing significant structural changes on the market, and whose impact goes beyond the national boarder of the concerning member state. The concept of '*change'* in the structure of the market is recalled by the Recital 20 [207]which emphasizes that a joint venture falls within the EUMR as long as it brings about lasting change in control of the undertakings concerned and therefore in the market structure.

The Advocate General Kokott further states that a change of structure of the market is closely linked to a change in the control structure of active market undertakings. [208]This led to the presumption that, if an undertaking cannot operate independently- and thus do not perform in full functionality- its operations would not significantly impact the market, and subsequently alter its structure.

In the present case, even after AA and TA jointly acquired Mürzzuschlag, the operations of the latter solely benefitted AA and TA, lacking any impact on the broader market. Applying EUMR to a joint venture without an independent market presence and whose change in the control structure does not alter market structure would contradict EU law.[209]

On that point, the CJEU emphasized that the lack of distinction between the so called new joint venture and those resulting from a change of control is justified by the fact that changes in market structure are not contingent on how the joint venture is established but on the '*actual emergence it creates into the market*',[210] *i.e.* on the way it performs on a lasting basis with all the functions of an autonomous economic entity.[211]

Therefore, Article 3(4) EUMR, interpreted within the meaning of the EUMR's general scheme, implies that a joint venture to be considered as a concentration under Article 3(1) (b) EUMR, must induce lasting market structure effects and function autonomously on

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[206] See Recital 8 of the EUMR

[207] See Recital 20 of the EUMR

[208] Opinion of Advocate General Kokott (*supra* note 202) para. 30.

[209] *Ibid*. para. 31

[210]*Austria Asphalt v Bundeskartellanwalt* (*supra* note 196) para. 24.

[211]*Ibid*.

the market,[212] and that cannot happen if the undertaking's operations have no effect or little effect on the market.

Furthermore, the CJEU added that the application of the EUMR to such cases would result in breach of the meaning of the Regulation No. 1/2003,[213] which applied to anti-competitive actions of all the other concentrations not governed by the EUMR.

Considering the structure of the European legal system, the application of the EUMR excludes that of the Regulation No. 1/2003. The EUMR indeed only applies to those concentration falling within the meaning of Article 3 EUMR.[214] The interpretation allowing an undertaking previously solely then jointly controlled to fall within the meaning of concentration under the EUMR despite not performing all functions of an autonomous economic entity would contravene Article 21(1) of the EUMR, which allowed the application of the EUMR solely for concentrations falling under Article 3 EUMR.[215] Moreover, applying the EUMR to these types of transactions would exempt them from the enforcement of the Regulation No. 1/2003. The Advocate General adds that the operation's exclusion from the EUMR's scope does not imply reduced scrutiny, as national competition authorities prioritize enforcement of EU antitrust law through Regulation No. 1/2003.[216] Furthermore, the relevance of the Recitals placed prior to the EUMR's articles[217] serve as an additional confirmation that the EU merger control regime has the purpose of focusing on the structural aspects of business activities rather than the

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[212] See inter alia *Austria Asphalt v Bundeskartellanwalt (supra note 196)* para. 28 and Opinion of Advocate General Kokott (*supra* note 202) para. 38.

[213] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) OJ L 1, 4.1.2003. (further referred as 'Regulation 1/2003').

[214] See Article 21(1) of the EUMR.

[215] See inter alia *Austria Asphalt v Bundeskartellanwalt* (*supra* note 196*)* para. 34 and Opinion of Advocate General Kokott (*supra* note 202) para. 37.

[216] *Austria Asphalt v Bundeskartellanwalt* (*supra* note 196) para. 34.

[217] See Recitals 5,6,8,20 of the EUMR.

behavioural ones as the latter remained subjected to the prohibitions under Article 101 and 102 TFEU.[218]

With Paragraphs 91 to 93 of the Commission Notice,[219] the Commission claims that an acquisition of control by one or more undertakings constitutes a concentration as long as the former will lead to a structural change on the market, regardless on whether the acquirer would maintain its full functionality or not. Controversy, for the arising of joint venture from an acquisition of joint control, full functionality represents a compulsory parameter for the transaction to be considered a concentration under Article 3(1) (b) EUMR. [220]

The Commission further specified that full functionality, and therefore economic independence of the acquired company,[221] meant that the joint venture '*must operate on a market, performing the functions normally carried out by undertakings operating on the same market*'.[222] For instance, joint venture had to be able to conduct on a lasting basis and within its area of competence, its business activities, which include day-to-day operations and access to sufficient resources such as finance staff, tangible and intangible assets. There was no need for the joint venture to be autonomous in the strategic decision-making process. In fact, if that was the case, it would have been impossible to define the joint venture as jointly controlled by the parent companies, and thus the conditions laid down in Article 3(4) EUMR would have never been verified with.[223]

Within the *Austria Asphalt* case, the joint venture resulting from the acquisition of joint control of the AA and TA, could not be considered as a concentration since it lacked the full functionality parameter. Mürzzuschlag was reserving most of its asphalt production

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[218] See Articles 101 and 102 TFEU.

[219] Commission 'Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Commission Notice on the control of concentrations between undertakings)' COM (2008), OJ C 95, 16.4.2008, para. 1-48.

[220] *Ibid*. para. 92.

[221] *Ibid*. para. 93.

[222] *Ibid* para. 94.

[223] *Ibid* para. 93.

to its parents' companies (AA and TA). At paragraph 97 of the Commission Notice, the Commission highlighted that the significant presence of the parent companies in the business relations of the joint venture was a factor to be taken when assessing full functionality.[224] A case where the joint venture achieves most of its turnover from its parent companies could result in a fully functional entity just in cases where it was demonstrated that the joint venture deals with its parents' companies on the basis of normal commercial conditions.[225] Hence, if the joint venture would reserve equal treatment to its parent companies as it does to third parties. The larger were the commercial relationships with its parents' companies the clearer as to be the evidence that the joint venture deals with its parents' companies at arm's length on the basis on normal commercial conditions. [226] The Commission presumed that in a scenario where at least 20% of the joint venture's predicted sales would go to third parties, the acquired company may be considered fully functional as long as it operates with its parent companies in the same commercial way as with third parties.[227] Nevertheless, this threshold was merely indicative, a case-by-case analysis was required for the finding of operational autonomy in situations of strong relationship between joint ventures and its parents.

This judgement was decisive for the CJEU in interpretating of Article 3 EUMR, which should be understood to mean that a concentration occur when control is transferred on a lasting basis from sole ownership to joint ownership of an existing entity.[228] However, under Article 3(4) this transition is only classified as a concentration if the resulting joint venture operates autonomously and consistently fulfils all the functions of an independent economic entity over time.

The CJEU finally clarified that full functionality was the sole discriminator that should be considered by the concerning parties to decide whether or not to refer a case of raising

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[224] *Ibid* para. 97.

[225]*Ibid* para. 98 See also Commission Decision of 9 April 1996, *Zeneca/Vanderhav* (Case IV/M.556; and Commission Decision of 3 July 1996, *Bayer/Hüls* (Case IV/M.751).

[226] Commission Notice on the control of concentrations between undertakings, para. 99.

[227] *Ibid*. para. 98.

[228] See Article 3(1)(b) of the EUMR.

of a joint venture to the Commission under the EUMR. A full function joint venture should thus be subjected to the EUMR, whether it was formed as a new entity or from an existing subsidiary. However, those not caught by the EUMR were not excluded from the chance of being caught by Member States' national merger control rule or by EU/National competition law under the Regulation No. 1/2003.

1.3 Conclusions

The *Austria Asphalts'* case-law was fundamental to clarify when the notification of joint ventures revolves around the presence of the full functionality criterion. The Commission based its points on paragraph 91 of the Commission Notice, which cleared out that there is no need to verify the presence of full functionality to affirm the existence of a concentration in cases where a plurality of undertakings acquire control over another undertaking.

Some scholars argued on the possibility of considering the full-functionality criteria also for situations falling exclusively under Article 3(1)(b) EUMR and paragraph 91 of the corresponding Commission Notice. The application of full functionality as a general criterion to assess an acquisition of control by several undertakings as a concentration, would result in Article 3 (1) (b) EUMR only covering changes of control between undertakings as the *Austrian Asphalt* case, while Article 3(4) EUMR would exclusively refer to the creation of new independent joint venture. However, as aforementioned, this interpretation was expressly rejected by the CJEU since it would have led to a situation of an unjustified differential treatment between new created joint venture, to whom the full functionality would apply; and existing undertaking, to whom the full functionality would not apply.

The uncertainty on this topic dates to when the Regulation No. 4064/89 was enforced. Here the legislator tried to reserve to the Regulation No. 4064/89 those joint ventures '*perform*[*ing*] *on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties* *amongst themselves or between them and the joint venture*'.[229] This provision which created a distinction between concentrative and cooperative joint ventures, was highly criticized due to difficulties in providing predictable outcomes.

Throughout several subsequent notices,[230] the Commission applied the rule according to which all full-function joint ventures were covered by the notification requirement. The concept of '*full functionality'* was kept with the EUMR and its corresponding notice.

The *Austria Asphalt* judgment was decisive to finally understand when a joint venture results in a concentration, and it is thus notifiable under Article 4 of the EUMR. The resolution of the issue can mostly be attributed to interpretation of the Recitals of the EUMR, highlighting the role of the market structure in defining the scope of the notification requirement. In substance, a coherent and comprehensive interpretation of the Articles 3(4) and 3(1)(b) of the EUMR in compliance with Recitals 8 and 20 of the EUMR would finally lead to a resolution of the issue.

The CJEU in the present judgment evaluates the idea of market structure as an additional factor to be considered when interpreting the concept of concentration, as for example under Article 3(4) of the EUMR. The definition of market structure is not directly provided by the EUMR, and neither by the CJEU in its judgment nor by the Advocate General in her Opinion seems to explain it. From paragraph 24 of the CJEU decision and paragraph 31 of the Opinion it may result that the change on the market structure depends on the number of undertakings active on the market.[231] Nevertheless, market structure

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[229] Article 3(2) second paragraph of the Regulation 4064/89.

[230] Commission '*Notice regarding the concentrative and co-operative operations under Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between* undertakings', OJ L 395, 30.12.1989, para. 1-12.

Commission '*Notice on the distinction between concentrative and co-operative join ventures under Council Regulation (EEC) No. 4064/89 of 21 December 1989, on the control of concentrations between undertakings*', OJ C 385, 31.12.1994, para. 1-5.

[231] See *Austria Asphalt v Bundeskartellanwalt* (*supra* note 196) para. 24 "(...) as regards its effects on the structure of the market, the realization of such effects depends on the actual emergence of a joint venture into the market (...)'read in compliance with para. 31 of the Advocate General's Opinion 'if an establishment does not have an autonomous presence on the market, it follows that any change in the control structure of that establishment cannot have the effect of changing the structure of the market'.

differs in relation to the market model concerned. The role of market players changes in relation to their market shares, which translate into market power, specific for that market structure model. For example, a market can still be considered as an oligopoly even though many companies are active within it. For instance, when these companies do not own a large proportion of the market share, and subsequently their operations cannot create any impact on competition within that market. These theories create a strong link between the economic purpose of merger control and clarity of the law, resulting in a necessary economic evaluation of transactions for the concerned undertaking when it comes to the decisions on what is and what is not notifiable under the EUMR.

For defining a concentration as notifiable clarity of the law is essential. Under this perspective, the CJEU's position in the *Austria Asphalt* judgment has been criticized in the part where it took into consideration each undertaking's market position via their market shares giving very little importance to the economic perspective. However, not all the elements relevant in an economic perspective significant for the construction of the market structure are relevant under the legal perspective of the definition of a concentration. Purely economic aspects, such as the minority shareholding not amounting to control, cannot constitute the base of the change of market structure for jurisdictional purpose.[232] In conclusion, the definition of market structure under the EUMR is still unclear, and a more comprehensive definition is necessary to give full enforcement to the outcome of the *Austria Asphalt's* judgment.[233]

The *Austria Asphalt's* ruling is a milestone the EUMR's case-law, and it represented the point of inceptions of further decisions of the Commission related to the legal relevance of the acquisition of joint control, as for example, in the decision on ENI S.p.A. and

[232] See e.g. Commission Decision of 29 January 2005, Siemens/VA Tech (COMP/M.3653) OJ L 24.

[233] A. Bielecki *'Into the Grey Zone. What Do We (Don't) Know About Types of Concentrations Between Undertakings Under EU law After Austria Asphalt?'*, Yearbook of Antitrust and Regulatory Studies, published January 1st, 2020.

AcegasAps S.p.A[234] joint acquisition of Isogas, where the Commission did not assess the full-functionality nature of the acquired company.

2. The Duty to Notify and its Consequences: The Gun-Jumping

Article 4 EUMR[235] imposes the duty to notify on a specific Form CO any concentration with a community dimension under the parameters of Article 1(2) and (3) EUMR.[236]

Article 4(1) specifies that the transaction must be notified before its implementation and after the conclusion of the agreement, the announcement of public bid, or the acquisition of controlling interests. In cases where the undertakings demonstrate to the Commission '*a good faith intention*' to conclude the agreement or to make a public bid, the notification may occur as long as the parameter of Article 1 EUMR are meet.

The duty to notify lies upon the parties of the merger or the acquirers of joint control, in respect to whether the concentration falls within the scope of Article 3(1) (a) or 3 (1) (b) of the EUMR. In all the other cases, the duty falls upon the party acquiring the control of one or several acquired companies. Article 4(4) and (5) EUMR, designing the *'pre-notification referral'* which allow parties, prior to any notification, to make reasoned submission for the reallocation of cases under Member State's national law or EU law respectively.[237]

As previously mentioned, notifications need to be made throughout the official Form CO which must be submitted to the Commission accompanied by other attached documents. Afterwards the notification is sent to the Merger Registry, which register the time of

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[234]Commission Decision of 11April, ENI / ACEGASAPS / JV, 2011, Case No COMP/M.6068 declaring a concentration to be compatible with the common market, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011M6068.

[235] See Article 4 of the EUMR.

[236] See Article 1 of the EUMR.

[237] See Article 4(2) of the EUMR.

arrival. From that moment on the merger review timetable starts running.[238] In some specific cases, the Commission allows for the submission of Short Form CO.[239]

The Best Practice on the conduct of the EC merger control proceedings,[240] published by the DG Comp in 2004, strongly suggests pre-notification discussions to be held in strict confidence with the authority two week before the notification. This phase might be helpful to both parties and authorities to make clarification on the nature of the concentration, and in case request a reallocation of the case. Furthermore, the pre-notification discussion is helpful to understand what kind of information must be reported in the Form CO. Submitting incorrect or misleading information in a Form CO allows the Commission to impose fines under Article 14(1) (a) and 14 (1)(b) EUMR.[241] Fines can also be imposed when the concerned undertakings fail to notify a concentration prior to its implementation outside the field of application of Article 7(2) and (3) EUMR.[242]

Article 7 EUMR provides that a concentration, with a Union dimension or pursuant to Article 4(5) EUMR, shall not be implemented either before notification or before approval by the Commission. This major principle of the EUMR is commonly referred to as '*standstill obligation'*. As an exception, in instances of public bids, implementation may proceed under the condition that the concentration is promptly notified to the authority and that the acquiring party refrains from exercising the voting rights associated with the shares in question. Article 7(3) EUMR gives the Commission the possibility to grant a derogation from the obligation of suspension imposed in the former paragraphs of the article.

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[238] Commission's Communication pursuant to Regulation 802/2004 on the number and format in which notifications should be delivered to the Commission OJ [2014] C 25/4.

[239] The procedure allowing for the submission of these kinds of Forms is set out in the Commission 'Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004' COM 2015 366 final, OJ [2013] C 366/5.

[240] Commission *'DG Competition Best Practices on the conduct of EC merger proceedings'* published on 20/01/2004.

[241] See Article 14 of the EUMR (For example: Facebook was fined of €110 million by the Commission fined for providing misleading information during the Commission's investigations on its acquisition of WhatsApp in 2014. Commission Decision of 18 May 2017, *Facebook/WhatsApp*, Case M 8228,).

[242] See Article 7 of the EUMR.

Implementation under Article 7(1) EUMR has been explained throughout the *Ernst & Young* judgment,[243] in compliance with the purpose of the standstill obligation, as operations leading to a lasting change of control. Control is thus the discriminatory factor that distinguishes operations of implementations and those that are mere preparatory works for the concentration.[244]

Article 14(2) EUMR allows the imposition of fines, up to the 10% of the worldwide turnover of the concerning undertakings when it breaches the so called '*standstill period'* reported in Article 7(1) EUMR.

The infringement under Article 7(1) EUMR differs from that under Article 4(1) EUMR since the former is of substantive nature involving the implementing or the beginning to implement a concentration before its approval or prior to the notification; and the latter is of procedural nature concerning the failure to notify a concentration. The infringements of both Article 7(1) EUMR 4(1) EUMR is generally known as '*gun-jumping'*. This expression derives from sports as it aims at picturing a situation where the athlete starts the race before the gun is fired. This is exactly what happens in '*gun-jumping'* cases: the undertaking not only fails to notify a concentration with a community dimension, but it starts its implement prior to the notification.[245]

The discipline of *Gun-Jumping* has been object of several decisions of both the CJEU and the General Court. Starting from two Commission decision taken respectively in 1998 and 1999, up to most recent cases dating to this year. Some cases of focusing on this topic, such as *Marine Harvest*, *Canon/Toshiba Medical systems* and *Altice Group Lux V Commission*, will be discussed in the following parts.

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[243] Judgment of 31 May 2018, *Ernst & Young P/S v Konkurrencerådet*, C-633/16, EU:C:2018:371.

[244] *Ibid*. para. 41-50.

[245] R. Whish and D. Bailey, *'Competition Law'* (10th edition) , Oxford University Press, Oxford, United Kingdom, 2021 pp. 904.

2.1 C-10/18 P, *Mowi* ASA v European Commission

The *Marine Harvest* decision[246] has gained significance for the following reasons: the interpretation and scope of application of Article 7(2) EUMR in relation to the meaning of '*single concentration*' within EU merger control, the clarification of the connection and relationship between Article 4(1) and 7(1) EUMR, and the imposition of the corresponding fines of Article 14(2) EUMR.

The case concerned Marine Harvest's acquisition of control over Morpol before the approval from the Commission was decided by the CJEU on 4 March 2020.

The company Marine Harvest changed into Mowi ASA, however in the present paragraph it will be referred as Marine Harvest.

The CJEU illustrated instances of misapplication of the provision, particularly in cases where the acquisition of control did not result from public bid, or the creeping takeover. Furthermore, the possibility of the Commission of imposing two fines for the breaching of the standstill principle under Article 14(2) EUMR has been confirmed.

Marine Harvest and Morpol were two companies active in the market of farming and primary processing of Salmon. Both settled in Norway, even though a great part of their business operations took part worldwide.

The facts of the case traces back to December 2012 when Marine Harvest acquired 48.5% of Morpol's share capital through a Share Purchase Agreement with Friendmall Ltd. ('Friendmall') and Bazmonta Holding Ltd ('Bazmonta'), referred to as the 'December Acquisition'. Following this acquisition, Marine refrained from exercising its voting rights, as per Article 7 (2) (b) EUMR. At the time, Morpol was primary owned at 48.5% by Friendmall Ltd. and Bazmonta, both controlled by Jerzy Malek[247], with the remaining

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[246] Judgment of 4 March 2020, *Mowi ASA v European Commission*, Case C-10/18 P,ECLI:EU:C:2020:149.

[247] *Ibid*. note 39 para. 15, 50 and note n 8 Mr Malek owned 85.5% of the shares in Friendmall. Bazmonta was a fully-owned subsidiary of Friendmall. In particular, Marpol was owned at 48.5% by Friendmall Ltd. ('Friendmall') and Bazmonta Holding Ltd, ant the remaining shares were placed on the Oslo Stock Exchange, and thus belong to a multitude of shareholders. Note 39 para. 15, 50 and note n 8.

ownership dispersed among arbitrary stockholders due to its listing on the Oslo Stock Exchange. In January 2013, Marine Harvest launched a public bid to acquire the remaining shares of Morpol, reaching 87.1% control by March 2013 and full ownership by November 2013.The transaction was notified to the Commission on 9 August 2013, and after discussions and the submission of commitments under Article 6(2) EUMR, the Commission approved the transaction on 30 December 2013.

However, the case gained significance following the Commission's issuance of the Statement of Objections in March 2018 under Article 18 of the EUMR. In this act, the Commission reported Marine Harvest's violation of Article 4(1) and 7(1) of the EUMR for failing to notify the December Acquisition, which the Commission argued resulted in Marine Harvest de facto gaining sole control over Morpol. Consequently, the Commission, imposed a EUR 10 million fine for breaching the notification duty before implementation Article 4 (1) EUMR and the standstill obligation under Article 7 (1) EUMR which prohibits the implementation of a concentration before the Commission approval.

The General Court upheld the Commission's decision in October 2017, leading to the appeal of two grounds of the General Court's judgment before the CJEU. In its ruling, the CJEU addressed the application of Article 7(2) EUMR, and the infringement of the principles of *ne bis in idem*, the set off principle, or the principle governing concurrent offences.

In the first ground of appeal the CJEU discussed on the meaning of Article 7(2) EUMR and on its application to the specific case. Article 7(2) EUMR represents a derogation to the general standstill obligation, which allows the applicant to implement a concentration before the approval of the Commission as long as the concentration is notified without delay under Article 4 EUMR. Article 7(2) EUMR acts to facilitate public bids and creeping takeovers by which control under Article 3 EUMR is acquired in situations where it is challenging to determine which specific individual, or block of shares obtained from multiple previous shareholders grants the acquirer *de facto* control. In this respect, it would be really complicated to understand when the standstill obligation comes at stake. Article 7(2) EUMR aims at providing a sufficient degree of legal certainty throughout the exclusion of such cases from the prohibition to implement the concentration before the conclusion of the notifications or the issuance of any clearance decision by the Commission, thereby the notification of all the transactions that would lead to the acquisition of the control of the acquired company.[248]

The ruling of the CJEU on this matter upheld the findings of both the General Court and the Commission. The Commission's argument, supported by the General Court, centres on the notion that Article 7(2) EUMR does not apply in this particular case, as Marine Harvest gained control over Morpol through a single transaction rather than a series of transactions as stipulated by the provision. The December Acquisition alone was sufficient to confer sole *de facto* control of Morpol to Marine Harvest, even though Marine Harvest completed the acquisition of Morpol's shares in November 2013.[249] After the December Acquisition, Marine Harvest gained the ability to exercise decisive influence over Morpol, thereby falling within the definition of control outlined in Article 3(2) EUMR and thus effectively controlled over it by virtue of its substantial shareholding, enabling it to determine the company's fate.

The derogation from the prohibition of implementing transactions whereby control under Article 3EUMR is acquired, is allowed inasmuch as control is acquired by multiple sellers or transactions in securities, and this is not the case.[250] The argument raised by the applicant according to which the public bid contributed to the acquisition of the control the derogation was enforceable, was not accepted by the CJEU. Marine Harvest based its statement on the fact that the two transactions, the one happening in December and the public bid, were linked by condition under Norwegian law,[251] thus were part of a '*single*

[248] *Mowi ASA v European Commission* (*supra* note 246*)* para. 102.

[249] *Ibid*. para. 55 to 58 (After the December 2012 Acquisition Marine Harvest owned 48.5% of the Marpol's shares from , and since the acquired company was placed on the public bid, the remaining shares were widely dispersed among a large number of shareholders. All of the shareholders, expect for Marine Harvest, owned less than 6% of the shares each. Given that maximum 72% of the shares participated to the decision-making meetings, Marine Harvest, with her simple majority, could exercise alone de facto control over Marpol over before acquiring the majority of its shares).

[250] *Ibid.* para. 37.

[251]*Ibid*.para. 214.

concentration' interpreted in light of Recital 20 of the EUMR, and thus Article 7(2) EUMR could be applied.

The CJEU in compliance with the General Court , did not accept this broad interpretation given by the applicant to Article 7(2) EUMR. The CJEU claimed that Article 7(2) EUMR is an exception to the general principle of the standstill obligation therefore it must be interpreted narrowly.[252] Allowing an interpretation of a provision under the EUMR as that of Article 7(2) EUMR by solely using the Recitals as referral cannot be accepted. The Recitals indeed may be used as a support for the interpretation of the EUMR but they can never have legally binding force.[253] The CJEU pointed out that it is wrongful to use Recital 20 EUMR to extend the application of a provision which is already restrictive by nature, Article 7(2) EUMR.[254] Furthermore, Recital 20 EUMR makes fall within the meaning of a '*single concentration'* multitude transaction where each one of them contributed to the acquisition of control under Article 3 EUMR, and since in the specific case only one transaction was necessary to achieve a change of control even that provision is irrelevant for extending the application of Article 7(2) EUMR.[255]

Following the position according to which the December Acquisition was just one of the transactions contributing to the acquisition of the acquired company's control, the applicant did not notify it under Article 4(1) EUMR.

This conduct led the Commission to impose two separate fines upon the applicant, under Article 14(2)(a) and (b) EUMR[256] for the concurring violation of Article 4(1) EUMR, when it failed to notify the December Acquisition, and of Article 7(1) EUMR for implementing the concentration prior to the notification.

In the second ground of appeal the applicant claimed before the CJEU the violation of the principles of (i) ne bis in idem, for being sanctioned twice for the same conduct, (ii) the

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[252] *Ibid*. para. 58.

[253] *Ibid*. para. 43-44.

[254] *Ibid.* para. 47-48.

[255] *Ibid* para. 64.

[256]See Article 14(2) of the EUMR.

‘*set-off principle’* by the Commission when it did not consider the first fine when imposing the second, and (iii) the *‘concurrent offences’*, when it was punished for committing two offences with the same objective.[257]

For the principle of ne bis in idem, the CJEU clarified that it does not apply in the specific case since it was constructed with the aim of protecting from the repetition of prosecution for criminal sentence, which has no relation at all with the situation at stake.[258]

For the set-off principle, the CJEU agreed with the view of the General Court, according to which that principle could not be invoked in a scenario where several penalties are imposed in a single decision by the same authority. In that respect, the Court case-law highlights that there must be a ‘*a previous punitive decision’*, meaning a decision where *‘penalties for infringements of the cartel law of a Member State have already been borne by the same undertaking for the same action, and not where two fines have been imposed by the same authority in a single decision’*.[259] Which was not the case for Marine Harvest. Moreover, when claiming the breaching of the principle, the applicant pointed out the disproportionate nature of the penalties, without giving any explanation to its point.[260] For these reasons, the CJEU rejected that ground of appeal.

As for the ‘*concurrent offences’* the argument of the applicant revolved around the idea that Article 7(1) and Article 4(1) EUMR pursue the protection of the same legal interest, in particular, that ‘*no permanent or irreparable damage to effective competition is caused as a result of the early implementation of concentration*’.[261] More specifically, according to the applicant the breaching notification under Article 4(1) EUMR is nothing more than a more specific offence, which can be therefore subsumes the more general offence in

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[257]*Mowi ASA v European Commission* (*supra* note 246*)* para. 69-74.

[258] *Ibid*. para. 80-82.

[259] Judgment of 26 October 2017, *Marine Harvest V Commission*, Case T-704/14, EU:T:2017:753, para. 342.

[260]*Mowi ASA v European Commission* (*supra* note 246*)* para. 85.

[261]*Ibid*. para. 71.

Article 7(1) EUMR. That has been claimed as the infringement of governing concurrent offences.

With its decision the CJEU clarified how the so called '*gun-jumping'* can result in two separate violations and subsequently the imposition of two fines.

The CJEU firstly recalled the '*technocratic'* distinction already exposed by the General Court[262] between the two concerning Articles, holding that, while the violation under Article 4(1) EUMR can be defined as an '*instantaneous infringement'*, because it only involves the lacking of the notification; that under Article 7(1) EUMR is indeed *'continuous'* and it is trigger by the infringement of the former, since it consists in a behaviour of the undertaking of not respecting the compulsory waiting period before the implementation of the concentration.[263]

So, under the conducts' perspective, the Court added that while Article 4(1) EUMR may be interpreted as '*an obligation to act*' since the undertaking is obliged to notify the concentration prior to its implementation; controversy Article 7(1) EUMR implies '*an obligation not to act*', considering that the undertaking is prohibited to implement the concentration before its notification or approval.[264]

In relation to this, it is significant the interpretation reported by the Advocate General Opinion,[265] which observed that since the infringement of Article 4(1) EUMR necessarily entails the infringement of Article 7(1) EUMR, this should have led to the conclusion that the latter provision takes precedent over the other.[266] He adds that by rejecting the statement that the infringement of Article 4(1) EUMR was a more specific offence of the infringement under Article 7(1) EUMR, the General Court did not consider a reverse

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[262]*Marine Harvest v Commission* (*supra* note 259). para. 302, 352 and 361.

[263] *Supra note* 43 para. 89 and 113.

[264] *Marine Harvest V Commission* (*supra* note 259) para. 302.

[265] Case C-10/18 P, *Marine Harvest V Commission* SA [2019] ECR I-795, Opinion of Advocate General Tanchev.

[266] *Ibid* para. 154.

scenario. In other words, it did not discuss on whether Article 7(1) might be a more specific offence of Article 4(1) EUMR. The Advocate General challenged what stated by the General Court that there is '*no primary applicable provision'* in the present case since, as the facts show, arguing that only one possible scenario was considered.[267]

Nevertheless, this relationship of '*specify*' and '*priority*' brought by the applicant before both the Courts and later sustained by the Advocate General, was based on an interpretation of the principle of concurrent offences given by international law. The application of the concurrent principle, as interpreted under international law, would have result in a prioritization of one provision over the other, which would require the presence of '*primarily applicable provision'* which is absent in the present case.[268]

The General Court also add that the relationship between Article 4(1) and Article 7(1) EUMR is not mutual. If on the one hand an infringement of Article 4(1) EUMR automatically results in an infringement of Article 7(1) EUMR, the converse is not true. The CJEU observes in this sense that it is possible to infringe Article 7(1) EUMR without infringing Article 4(1) EUMR for example in situations where the applicant, after notifying the concentration, complete its implementation before obtaining the approval of the Commission.[269]

Furthermore, the CJEU adds that if the interpretations raised by the applicant had to be accepted, then Article 14(2)(a) EUMR would result redundant. In other words, if the violation of Article 4(1) EUMR would be punished under the provision applied for the violation of Article 7(1) EUMR, since the two conducts are considered one the more specific illustration of the other; there would be no need to provide a specific provision for the sole violation of Article 4(1) EUMR.

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[267] *Ibid*. para. 157.

[268] *Marine Harvest V Commission* (*supra* note 259) para. 345, 372.

[269] *Ibid*. para. 294-295 and *Mowi ASA v European Commission* (*supra* note 246*)* para. 101-102.

In essence, by applying the appellant interpretation, an undertaking infringing both the duty to notify and that of not respecting the standstill period, would be put at an advantage respect to an undertaking solely infringing the standstill obligation.[270]

However, no illegality of Article 14(2)(a) EUMR was raised before the General Court.[271] Here the Advocate General again argued in favour of the applicant stating that the Court should not rule on the illegality of Article 14(2)(a) EUMR before it decides that fines cannot be given separately under that rule and Article 14(2)(b) when implementation concentration breaking both Articles 4(1) and 7(1) EUMR.[272] In fact, the EUMR did not specify whether the Commission should apply fines under Article 14(2) (a)(b) EUMR when both the conditions were satisfied. However, there is no provision under the EUMR which says that the Commission should imposes two separates' fines, one under point (a) and the other under point (b), when both the requirements were fulfilled.

Regardless of the Advocate General's viewpoint, the CJEU finally rejected the last ground of appeal, and generally declared the appeal as inadmissible with the subsequent order to Marine Harvest to pay the cost of the proceeding.[273]

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[270] *Mowi ASA v European Commission (supra* note 246*)* para. 114.

[271] *Ibid*. para. 110. The applicant actually raised the illegality of Article 14(2)(a) EUMR before the CJEU as last ground of appeal (para. 121-123). However, the Court argued that it is forbidden to raise for the first time before the Court of Justice a plea of law which has not previously been raised before the Court of First Instance. Allowing such behaviour would mean leaving the Court of Justice a wider ambit of operation than that of the General Court, which be in an the absurd scenario since the CJEU has limited jurisdiction under EU law. (CASE C-10/18 P para. 126-127).

[272] Opinion of Advocate General Tanchev (*supra* note 265) para. 162-163.

[273]*Mowi ASA v European Commission (supra* note 246*)* para. 129.

2.2 T-609/19, *Canon Inc. v European Commission*

The *Canon/Toshiba* judgment[274] served as a foundational precedent for subsequent decisions by the General Court and the CJEU regarding the scope of Article 7(2) EUMR. It has also clarified the relationship between the penalties imposed under Article 4(1) EUMR and Article 7(1) EUMR in '*gun-jumping'* cases. In relation to this second point, a recent judgment of the General Court of May 2022, confirmed the Commission's possibility to impose two differential fines for a failure to notify prior to implementation.[275]

The Canon/Toshiba facts case developed as following.
Canon Inc. acquired control over Toshiba Medical Systems Corporation (TMSC)[276] through a two-step's procedure in March 2016. It formerly created a securitization vehicle, MS Holding, throughout which acquired 95% of TMSC's shares. At the same time, it bought the remaining 5% of TMSC's shares and call options on the shares previously acquired by MS Holding (interim transaction). After notifying the transaction in August 2016 and obtaining the approval in September 2016, Canon Inc. exercised its option right and acquired full control over TMSC (ultimate transaction).

The Commission issued a Statement of Objection against Canon Inc in July 2017, and subsequently adopted a final decision on the matter in June 2019 imposing two fines totalling €28 million over Canon Inc for failing to notify a concentration (Article 4(1) EUMR) and for implementing it before its clearance (Article 7 (1) EUMR). The Commission argued that the so called '*interim transaction'* had partially implemented the single concentration consisting in the acquisition of TMSC and had subsequently infringed Articles 4(1) and 7(1) EUMR.

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[274]Judgment of 18 May 2022, *Canon Inc. v European Commission*, Case T-609/19, EU:T:2022:299.

[275] *Ibid*.

[276] Toshiba Medical System Corporation (TMSC) was a company specialized in medical system fully owned by Toshiba Corporation ('Toshiba').

The General Court agreed with the Commission's statement and further noted that the *'interim transaction'* put forward by Canon Inc prior to the final acquisition, was sufficient to partially implement the acquisition of control over the acquired company. On this point, the General Court elucidated that an act of control implementation, violating Article 7(1) EUMR, does not exclusively entail a definitive and lasting change of control over the acquired company, but may also involve a single action that, combined with others, contributes to the acquisition of control as outlined in Article 3 EUMR. In that perspective, Recital 20, as also interpreted by the CJEU in the *Marine Harvest* judgment, includes under the meaning of '*single concentration'* a series of transactions '*linked by condition'* (closely connected),[277] allowing a scenario where a concentration results from a series of connected transaction each one of them contributing to a lasting change of control over the acquired company.

Furthermore, the General Court rejects the assertion made by the applicant that a partial implementation of a concentration would constitute a partial acquisition of control. The notion of acquisition of control can only exist in its entirety, although individual transactions may contribute to the eventual outcome (lasting change of control), when the acquisition of control can be attributed to a single transaction, that transaction alone would constitute a concentration as defined in Article 3 EUMR.[278] Thus, it falls under the power of the Commission to assess whether the contested actions contributed, fully or partially, in fact or in law, to the change of control of that undertaking before the clearance date. And thus, whether that single transaction is part of a series of other closely connected transactions which contributed to the acquisition of control, or alone constitute a single concentration. In this instance, Canon Inc was able to exercise partial control over TMSC following the conclusion of the '*interim transaction'*, as it had the authority to decide the ultimate purchaser's identity.

Consequently, the General Court determined that the Interim Transaction was essentially for effecting a change of control of TMSC, thus falling within the purview of Article 7(1)

[277] *Canon Inc. v European Commission* (*supra* note 274) para. 51.

[278] *Canon Inc. v European Commission* (*supra* note 274) para. 4.

EUMR, and by extension, Article 4(1) EUMR, wherein the transaction in question contributed, either wholly or partially, in fact or in law, to the change of control of that undertaking.[279]

In conclusion, the General Court stated that the Commission should carry on investigation not only before the acquisition of control, but also before its implementation. Such case represents the first time in which the General Court recognized a breach of the notification and standstill obligation in the context of a single concentration.

2.4 C-746/21, *Altice Group Lux Sàrl v Commission*

The CJEU's viewpoint on gun-jumping and the chance of double fines imposition was clarified and confirmed with the *Altice/PT Portugal's* judgment.[280]

In the present decision the CJEU confirmed what stated in the *Marine Harvest*'s judgment about the imposition of two separate fines in case of breaching of the standstill rule and the failure to notify. This judgment offers further guidance for concentrations when the transactions might give the acquirer improper influence over the acquired company, namely 'gun-jumping'.

The facts of the case developed as following.
Altice Europe NV (Altice) and PT Portugal SGPS SA ('PT Portugal') are two companies operating in the telecommunication market. On December 9th, 2012, Altice signed with Oi SA, through its subsidiary Altice Portugal SA, a share purchase agreement (SPA) for the acquisition of PT Portugal's control ('Transaction Agreement'). The conclusion of the acquisition required the approval from the Commission, which was issued on 20 April 2015, after the submission of the official notification Form in February 2015. Whist the approval of the concentration from the Commission, the latter kept on investigating on

[279] *Canon Inc. v European Commission* (*supra* note 274) para. 73.

[280] Judgment of 9 November 2023, *Altice Group Lux Sàrl v Commission*, Case C-746/21, EU:C:2023:836.

the operation for an eventual breach of Articles 7(1) and 4(1) EUMR. In 2018, the Commission fined with two distinct charges Altice for implementing PT Portugal acquisition before notifying it (Article 4(1) EUMR), and at the same time for closing the transaction prior the delivery of the clarence decision from the Commission (Article 7(1) EUMR). Following, Altice appealed to the decision before the General Court in September 2021. The appeal was dismissed, however the fined imposed upon Altice for breaching the notification obligation under Article 4(1) EUMR was reduced by 10% on the ground that Altice had previously informed the Commission of the SPA before their signing, and afterwards, it had submitted a case-team allocation request and participate in pre-notification discussion with the Commission. Altice appeal to the General Court's ruling, which was finally decided with the 9 November 2023's judgment.

The CJEU initially addressed the distinction between infringements under Article 4(1) EUMR and Article 7(1) EUMR, which pursue '*autonomous objectives'* and impose separate obligations: the notification obligation and the standstill obligation. Despite the applicant's argument recalling a rejected interpretation in the Marine Harvest case,[281] asserting that both articles serve a single objective, aiming to '*seeks to ensure the effectiveness of the system of ex ante control of concentrations that have a community dimension*'.[282]

The CJEU upheld what already stated in *Marine Harvest*:[283] Article 4(1) EUMR and Article 7(1) EUMR pursue autonomous objectives within the framework of the 'one stop shop' system outlined in Recital 8 EUMR.[284] Article 4(1) EUMR imposes an obligation

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[281] The Court had already stated in Marine Harvest that Article 4(1) and Article 7(1) of the EUMR pursue autonomous objectives, and thus provide for autonomous fines for breach of each of those obligations. See Judgment of 4 March 2020, *Mowi ASA v European Commission*, Case C-10/18 P, EU:C:2020:149, para. 103 to 105.

[282] *Altice Group Lux Sàrl v Commission* (*supra* note 280) para. 42 and 52.

[283] *Mowi ASA v European Commission* (*supra* note 243), para. 103.

[284] Recital 8 EUMR '[…] Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity […]'.

to notify the concentration before implementation, while Article 7(1) EUMR imposes an obligation to notify the concentration before implementation, while Article 7(1) prohibits implementation before its notification and approval.[285]

The Advocate General Collins also examined the distinction between the two provisions in her Opinion emphasizing their differing nature [286].

She noted that, on the one hand Article 4(1) EUMR triggers the notification obligation post-agreement but pre-implementation, focusing solely on notification without a standstill obligation. Conversely, Article 7(1) EUMR centres on suspending concentration by prohibiting parties from implementing it either before notification or until it is declared compatible with the internal market. In the latter case, when determining fines, the Commission evaluates the extent and duration of implementation, whereas for breaches of Article 4(1) EUMR, it only considers if, when and how implementation occurred, basing its assessment solely on these elements.[287]

The CJEU further clarified the grounds for imposing fines in cases of gun-jumping. Altice, in its appeal, argued that imposing separate fines for breaches of Article 4(1) and Article 7(1) of the EUMR violated the principle of proportionality. However, the CJEU dismissed the appeal, citing the rationale outlined in the Marine Harvest judgment. It affirmed that the Commission's ability to levy two distinct fines for breaches of Article 4(1) and Article 7(1) EUMR is justified by the distinct objectives of these provisions and by the existence of Article 14(2)(a) and (b) of the EUMR, which stipulate different fines for infringements of each provision. In line with established case-law, the imposition of two penalties for the same conduct by the same authority in a single decision does not inherently contravene the principle of proportionality.[288]

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[285]*Altice Group Lux Sàrl v Commission* (*supra* note 280) para. 52-53.

[286] C-746/21 P, *Altice Group Lux Sàrl v European Commission* SA[2023] ECR I-361, Opinion of Advocate General Collins.

[287] *Ibid*. para. 17-18.

[288] *Altice Group Lux Sàrl v Commission* (*supra* note 280) para. 72.

This judgment has also contributed significantly to elucidating the notion of '*implementation*' as outlined in Articles 4(1) and 7(1) of the EUMR. Article 7 EUMR defines '*implementation*' as any operation resulting in a lasting change in the control of the undertaking.[289] To grasp the distinction between a '*concentration*' and the '*implementation of a concentration*' reference to Article 3 of the EUMR was indispensable. Article 3 EUMR stipulated that a concentration arises whenever there was a '*change of control on a lasting basis'*.

Thus, any transaction contributing, even partially, to the lasting change of control over the acquired company constituted an implementation of a concentration.[290] The distinguishing factor between the two lies in the presence of a lasting change of control. While a permanent change of control was prerequisite for a concentration to arise, the change of control concurring to its implementation may even be temporary in nature.[291]

This interpretation aligns with the notion of a '*single concentration'* established in the *Canon/Toshiba* judgment.[292] The latter clarifies that the implementation of a 'single concentration' may occur, as per Recital 20 of the EUMR, through a single operation or multiple partial operations linked by conditions or in form of securities.[293]Additionally, the *Ernst & Young* judgment of 2018[294] elucidated that transactions not directly associated with a permanent change of control can still contribute to the implementation of a concentration when their aggregation results in such a change over the acquired company.[295] Therefore, the execution of any such transactions without prior notification

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[289] *Ibid*. para. 137.

[290] *Ibid.* para. 145.

[291] *Ibid*.

[292]*Canon Inc. v European Commission* (*supra* note 274).

[293] Here the General Court stated that if the parties might achieve the implementation of a concentration through a single or a plurality of transactions, but only the former would be prohibited, then the efficacy of Article 7(1) EUMR and the subsequently the prior nature of the merger control regulation would be reduced. (*Canon Inc. v European Commission* (*supra* note 90) para. 80).

[294] Judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371.

[295] *Altice Group Lux Sàrl v Commission* (*supra* note 280) para. 153.

and the observance of the standstill period constituted a breach of both Articles 4(1) and 7(1) EUMR, as each one of them contributes in part to the implementation of the concentration.[296]

The CJEU added that a share purchase agreement (SPA), particularly the exchange of information between the acquirer and its acquired company as occurred in the present case, can constitute an implementation of concentration insofar as these exchanges contributed to demonstrating that the applicant had exercised decisive influence over the acquired company.[297]
The CJEU further ruled on the significance of the '*veto rights*' in conjunction with the possibility of exercising decisive influence over the acquired company.

As scrutinized by the General Court in paragraphs from 109 to 133 of the contested judgment,[298] the powers and entitlements vested in Altice through the SPA surpassed what was requisite for safeguarding the value of PT Portugal's business. Instead, they enabled the acquirer to shape the acquired company's commercial policy, thereby facilitating the exertion the of control over it. In accordance with the definition provided in the Consolidate Jurisdictional Notice,[299] '*veto rights*' are those rights conferring control over certain decisions, or the authority to determine the management structure or commercial policy of the undertaking.[300] The examples delineated some of the rights conferred upon Altice in the SPA agreements with Oi[301], which, as inferred from the preparatory clauses

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[296] *Ibid*. para. 150.

[297] *Ibid*. para. 185-187, Judgment of 22 September 2021, *Altice Europe NV v Commission*, Case T-425/18, EU:T:2021:607, para. 239-241, C-746/21 P, Opinion of Advocate General Collins (*supra* note 286) para. 34-35.

[298] Judgment of 22 September 2021, *Altice Europe NV v Commission,* Case T-425/18, EU:T:2021:607

[299] Commission 'Consolidated Jurisdictional Notice under Regulation No 139/2004 on the concentrations between undertakings' OJ 2008 C 95, para. 1; (further referred as 'The Consolidated Jurisdictional Notice').

[300] *Altice Europe NV v Commission* (*supra* note case 297) para. 114.

[301] See Article 6.1(b) of the SPA between Altice and Oi for the acquisition of PT Portugal. See Altice/ PT Portugal (Case M. 7993), Commission Decision number 2418 [2018].

and the conduct of the acquired company prior to the acquisition, afforded the acquirer the capacity to exercise decisive influence form the signing date on 9 December 2014, predating the notification in February.[302]

The case of *Altice v Commission* provided further clarification on the Commission's role and obligations concerning fines under Article 14 of the EUMR.

Altice's appeal questioned on whether the Commission could levy on identical fines for infringements under Articles 4(1) and 7(1) of the EUMR.
The Commission defended its position before the General Court, asserting its discretion to impose identical fines under Article 4(1) and 7(1) of the EUMR, provided that their assessment was justified based on nature, gravity and duration of the infringement, as outlined in Article 14(3) of the EUMR. Altice argued that, in terms of duration, a continuous infringement, like that under Article 7(1) EUMR could not be equated quantitatively with an instantaneous infringement, such as Article 4(1) EUMR, due to that the latter's lack of duration.[303] However, the General Court sided with the Commission, citing the absence of duration as the reason for the incomparability between the two infringements.[304]

Supporting the General Court's decision, the Advocate General emphasized in her Opinion[305] the illogical nature of Altice's argument that nothing in the EUMR justifies the General Court's perspective on the incomparability of the two infringements, particularly when Altice itself acknowledged the difference in duration between them[306]. Additionally, Advocate General maintained the distinction in nature between the two infringements in the points 17 and 18 of the Opinion, stating that Article 4(1) EUMR

[302] *Altice Europe NV v Commission* (*supra* note case 297) para. 132.

[303] *Altice Group Lux Sàrl v Commission* (*supra* note 280) para. 223.

[304] *Altice Europe NV v Commission* (*supra* note case 297) para. 324.

[305] C-746/21 P, *Altice Group Lux Sàrl v Commission* SA[2023] ECR I-361, Opinion of Advocate General Collins para. 87.

[306] *Ibid*. para. 87.

entails a procedural obligation requiring the applicant to notify after the conclusion of the agreement and prior to its implementation, while Article 7(1) EUMR imposes a substantive obligation prohibiting the parties from implementing a concentration before notifying or obtaining approval from the Commission.[307]

The CJEU ultimately affirmed that the Commission has the authority to impose equal fines for violations of Articles 4(1) and 7(1) of the EUMR. However, it underscored the Commission's obligation to provide adequate justification for the imposition of fines, a requirement that was found lacking in the present case.[308]

Furthermore, the Advocate General highlighted the Commission's need to follow its Fining Guidelines[309] when calculating fines for antitrust violations, noting the absence of such guidelines for merger control poses and the resulting challenges in predicting fine levels for merger control. The Advocate General argued that increased transparency in fine setting for merger control infringements, particularly for cases where detection is not straightforward like in Articles 4(1) and 7(1) of the EUMR, would allow undertakings to assess the potential fines in advance and eventually include the associated risk of non-compliance in the cost-benefits of the merger analysis. To prevent such uncertainties, the Commission's deterrence when imposing fines, especially for unforeseeable behaviours, should be reinforced through adequate legal protection, including adherence to EU law principles such as proportionality and equal treatment.[310]

[307] *Ibid*. para. 17 and 18.

[308] *Altice Group Lux Sàrl v Commission* (*supra* note 280) para. 229.

[309] European Commission 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance)' COM (2006) C 210/02.

[310] Opinion of Advocate General Collins (*supra* note 286) para. 81.

2.3 Conclusions

To conclude, the CJEU confirmed the Commission's broad discretion in penalizing gun-jumping violations through these judgments. It clarified that two separate fines can be imposed when an applicant implements a concentration before notifying it, despite both infringements are restored in a single action. As a matter of fact, this scenario breaches two provisions under the EUMR: Article 4(1) for failing to notify, and Article 7(1) for the premature, albeit partial, implementation of the concentration.

The CJEU also clarified the definition of '*implementation of a concentration*' under Article 4 EUMR. It established that a permanent acquisition of control over the acquired company is not necessary for implementation to occur. Instead, any transaction contributing to the lasting change of control over the acquired company is part of the implementation of a *'single concentration'* and must be notified under Article 4(1) of the EUMR.

The CJEU utilized Article 7(2) EUMR to further elucidates the expression *'single concentration'*. In particular, it stated that if multiple transactions occur but only one results in a lasting change of control, then that transaction cannot be included in the definition of *'single concentration'* under Recital 20 of the EUMR. Applying exceptions under Article 7(2) of the EUMR to such transactions would be unlawful.

Furthermore, the CJEU allowed the Commission to levy two different sanctions in case of *'gun-jumping'*: one failing to notify, and the other for disregarding the standstill period. This conclusion was supported not only by the existence of the two provisions of Article 14 (2)(a) (b) EUMR, but also by the fact that Articles 4(1) and 7(1) EUMR pursue two autonomous objectives in the context of the '*one-stop-shop'* system of the EUMR. Nevertheless, the Commission must justify any fine imposed for violations of the Articles 4(1) and 7(1) EUMR on the grounds listed in Article 14(3) EUMR.

Overall, the CJEU's case-law strongly reinforces the Commission's rigorous approach towards failure to file and gun jumping in EUMR. It affirmed that in instances of gun jumping occurring before a transaction is notified to the Commission severe and distinct sanctions are most likely to be imposed for both the failure to notify and the violation of the standstill obligation.

3. Article 22: The Referral of Concentration without a Union Dimension and Killer Acquisitions

Article 22 of the EUMR[311] enables Member States to refer cases to the Commission even if the requirements under Article 1(2) and (3) EUMR are not satisfied, upon request of one or more national authorities.

This provision, known as '*Dutch clause*' , was introduced throughout the Regulation No. 4069/89. Its original purpose was to provide legal protection to Member States without their own merger control regime, such as the Netherlands.[312] Over time, as most Member States developed their own merger control system, Article 22 EUMR evolved into a *'useful corrective instrument'*, allowing for the reassessment of merger cases by either Member States or the Commission when deemed appropriate.[313]

For Member States to refer a case under Article 22 EUMR two essential conditions must be met; the concentration must affect trade between Member States, and it must pose a significant threat to competition within the requesting State's territory. In other words, the Commission must assess the concentration's impact on future intra-EU trade between Member States and its effect on competition within the requesting Member State's territory.[314]

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[311] See Article 22 of the EUMR.

[312] Christopher e Baker McKenzie, *EU Competition Law Volume II: Mergers & Acquisitions*. pp. 75-127.

[313] Communication from the Commission: Report from the Commission to the Council on the operation of Regulation No 139/2004, COM (2009) 281 final, 18 June 2009, para. 21.

[314] See Article 22 (1) of the EUMR.

The procedural aspects of the Article 22 EUMR govern all the elements related to the referral process by Member States, including timeline, information exchange between national competition authorities in joint referrals, the content of the request, and the scope of the Commission investigations.[315] Article 22(1) EUMR imposes a 15 working-day time limit from the notification or knowledge of the concentration by the concerned Member State to make the referral.

Article 22(2) EUMR allows any Member State, other than that making the request, to join the referral afterwards. Upon receiving an Article 22 EUMR request, the Commission is obligated to inform all the competent authorities in other Member States on the ongoing operation *'without delay'*. Other Member States have 15 working days from notification to join the request during which all national time limits pertaining to the concentration are suspended until the jurisdictional matter is resolved.[316] The suspension of the national time limits ceases to exist once a Member State declares of not wanting to join the request.[317]

The decision of different Member States to refer a transaction to the Commission, does not prevent the national competition authorities of the other States to deal with the investigations themselves. In such case there will be two parallel procedures: one with the Commission's jurisdiction and the other with the national law of the Member States which decide to keep their jurisdiction on the matter.[318]

Once the referral is concluded, the Commission enjoys of 10 workings days to decide on its acceptance, with silence considered as a positive response. All the parties involved

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[315] K. J. Cseres, '*Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities, Journal of European Competition Law & Practice'*, Volume 14, Issue 7, October 2023, pp. 410.

[316] See Article 22 para. 5 of the EUMR.

[317] See Article 22 para. 2 third part of the EUMR.

[318] G. De Stefano, R. Motta, and S. Zuehlke, *«Merger Referrals in Practice-Analysis of the Cases under Article 22 of the Merger Regulation»*.Journal of European Competition Law & Practice, Volume 2, Issue 6, December 2011, pp. 538.

must be informed of the Commission's decision.[319] If the Commission decides to examine the transaction, Member States who joined the request are precluded from applying their national laws starting from that moment onward. Additionally, the Commission may invite Member States to submit a formal notification under Article 4 EUMR,[320] through the so called '*invitation letter*'. Once the Commission's jurisdiction is established, the case can proceed under the EUMR.[321]

Article 22 EUMR does not explicitly specify which are the cases referrable to the Commission by Member States. Both Member States and the Commission have broad discretion in deciding when to make or accept a referral. While Member States rely on state law to determine when a concentration may significantly affect the national internal market, the Commission, through its Notice on case Referral[322] has established two main categories of cases suitable for referral under Article 22 EUMR. These include cases involving markets with a geographic scope wider than national borders and those with a narrower scope. In both scenarios, the concentration's primary economic impact must be linked to these markets.[323]

The statistics have shown that by June 2024 the referral made under Article 22 of the EUMR were 54, and around 10% of those were rejected.[324]

In September 2020 the European commissioner for Competition Margrethe Vestager delivered a speech on how factors, differently from prices and turnover, make a

[319] See Article 22 (3) of the EUMR.

[320] See Article 22 (3) third part of the EUMR.

[321] See Article 22 (4) of the EUMR.

[322] Commission 'Notice on Case Referral in respect of concentrations' [2005] OJ 2005/C 56/02 (Notice on case referral).

[323] *Ibid*. para. 4.

[324] Search results on Commission website, case register. Available at: https://competition-cases.ec.europa.eu/search?caseInstrument=M&decisionTypesM=~139_2004:201310&pageNumber=2&sortField=caseLastDecisionDate&sortOrder=DESC.

transaction worth of the attention of competition authorities.[325] The Commission responded to the warning of European Commissioner with the Guidance on the application of the referral mechanism set out in the Article 22 of the EC Merger Regulation ('Guidance') of 2021.[326] Such act aimed at enabling Member States to refer a case to the Commission regardless of the Union or the national thresholds as long as the concentration meets the two substantive requirements under Article 22(1) EUMR.

The EC Merger Regulation Guidance was adopted to prevent the spreading of the so called '*killer acquisitions'*, consisting of the acquisition of young firm whose prospective innovation represent an important future threat to an historical undertaking of that market. This procedure indeed results in a killing of the acquired company before it even raises, of the product or the project it is developing or and consequently creating negative effects on the market.[327] Given the wide margin of interpretation that these Guidelines leave, Member States have adopted different approaches to them. For instance, the German and Cypriote National Competition Authorities had stated that they would not use Article 22 EUMR when the national competition authority did not have jurisdiction under its national law to investigate such transaction. Also, the position of the Commission on whether to accept a referral over a transaction which does not meet the national thresholds is still uncertain.[328]

Just recently, the General Court dealt with the *Illumina/Grail* case,[329] which precisely fit what described so far for instance. While the Commission is still holding its breath

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[325] Speech of the IBA 24th Annual Competition Conference, '*The Future of EU Merger Control'*, 11 September 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_20_2884

[326] Communication from the Commission 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of case' [2021] OJ C113/1.

[327] H. Oertel, '*The european commission's jurisdiction over killer-acquisitions, A* Proposal', University of Amsterdam, published on 1 July 2022.

[328] K. Czapracka, M.Harjula, M. Israel, Dr. T. Kuhn, J. Marthan, S.Sakellariou-Witt, N. Frie : *Will the European Commission lose its ability to review below-threshold deals?*, White & Case LLP 26 March 2024. Available at 'https://www.whitecase.com/insight-alert/will-european-commission-lose-its-ability-review-below-threshold-deals'.

[329] Judgment of 13 July 2022, *Illumina/ Grail LLC v Commission*, Case T-227/21, EU:T:2022:447.

waiting for the judgment of the CJEU, the General Court ended up enabling the Commission to review a merger referred to it by a Member State's authorities, where the latter lack any competence to review it, since the merger in question falls below the thresholds set out in their national legislation on merger control. A recent Opinion of the Advocate General Emiliou[330] set aside the General Court's approach to calling-in certain non-reportable transactions for review under Article 22 EUMR. However, the definite resolution from the CJEU's Grand Chamber should be expected by the end of the year.

3.1 T-227/21, *Illumina/ Grail LLC v Commission*.

The *Illumina/GRAIL* case concerns a decision occurring in the pharmaceutical sector which touches upon fundamental principles of EU law, such as the scope of Article 22 EUMR and the respect of the *'standstill obligation'* under Article 7 EUMR. The case focuses on the acquisition of GRAIL by Illumina in 2021.

Illumina was a company active in the global genomic sequencing area, which developed, manufactured, and commercialized next generation sequencing (NGS) systems aiming at detecting cancer or selecting appropriate therapies for oncological patient.

GRAIL was a healthcare company operating in multi-cancer early detection through the development of blood-based tests utilizing genomic sequencing alongside innovative data science tools. GRAIL was engaged in the development of the product 'Galleri' a cancer detector in asymptomatic patients from a blood sample, when receiving the offer from Illumina.

On February 2021, the Commission sent an '*invitation letter'* under Article 22(5) EUMR to the concerning national competition authorities inviting them to request a referral under Article 22 EUMR to review the transaction at European level. The transaction between the two companies did not implement any national filing thresholds given that, because of its youth, GRAIL had not yet produced any relevant revenues in the EU territory.

[330] Joined Case C-611/22 P and C-625/22, *Illumina v Commission*, ECLI:EU:C:2024:264, Opinion of Advocate General Emilou.

The French Competition Authority (ACF) accepted the invitation and send a referral request in March 2021. The request was joined by Belgium, Greece, Iceland, the Netherland, and Norway in compliance with Article 22(2) EUMR. The Commission accepted the request in April 2021 and delivered its negative decision on the transaction on 6 September 2022. On July and October 2023, the Commission fined the two companies for breaching of Article 7(1) EUMR in the part where they had implemented the transaction before the delivering of the decision on the case; and issued restorative measures under Article 8(1) (a) EUMR for Illumina ordering to adopt a '*divestment plan'* for the disposal of GRAIL and restore the situation to the moment before the acquisition.

However, the appeal held by Illumina in July 2022 was focused on the erroneous jurisdiction of the Commission in reviewing transactions that did not meet either EU or national filing thresholds. The General Court gave right to the Commission and recognized its ability to review below-thresholds mergers under Article 22(1) EUMR. Illumina and GRAIL seek the annulment of the General Court's decision through the appeal held in September 2022. The CJEU has not yet delivered its response.

In the meanwhile, the Advocate General Emiliou delivered his Opinion on March 2024[331] requesting the CJEU to annul the General Court's judgment and the Commission Decision accepting the request of the AFC to examine the Illumina/Grail concentration. Moreover, the Advocate General requested the payment of the costs of the proceedings for the Commission, and of their own costs for the French Republic, the Kingdom of the Netherlands, the European Free Trade Association Surveillance Authority and Biocom California

The decision of the General Court developed in four significant grounds.

At first, the General Court justified the broader interpretation of Article 22(1) EUMR through four main lenses: literal, historical, contextual, and teleological. Each interpretation endorsed the conclusion that any concentration could have been subjected to a referral at the European level, irrespective of national jurisdiction.[332]

[331] Opinion of Advocate General Emilou (*supra* note 330).

[332] *Illumina/ Grail LLC v Commission* (*supra* note 329) para. 151.

Secondly, the General Court clarified the meaning of the concept of '*made known to Member States*' reported in the second subparagraph of Article 22(1) EUMR. The CJEU ruled that the publication of the announcement of the transaction is not enough to trigger the 15-working day period for the referral: Member States should obtain sufficient material to be able to examine whether or not the merger qualifies for the request under Article 22 EUMR.[333]

Thirdly, even though the General Court recognized that the Commission took too long to send the '*invitation letter'* under Article 22(5) EUMR after receiving the complaints, this behaviour could not implement the violation of the principle of legal certainty and '*good administration'* as long as it did not affect the '*right of defence'* of the undertaking concerned.[334]

Lastly, the change of policy of the Commission regarding the scope of Article 22 EUMR in the present case did not breach the principles of protection legitimate expectations and legal certainty. The General Court clarified that to rely on the principle of protection of legitimate expectations parties should receive precise, unconditional and consistent assurances, deriving from authorized, reliable sources, as it is for the Court of Justice case-law.[335]

On September 2022, Illumina and GRAIL claimed the annulment of the General Court judgment on the base of three pleas.[336]

Firstly, they challenged the erroneous interpretation of Article 22(1) EUMR delivered by the General Court's on the basis of literal, historical, contextual and teleological approaches; arguing that the broader scope given to Article 22(1) EUMR finds no justification within these grounds.

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[333] *Ibid*. para. 204.

[334] *Ibid*. para. 223.

[335] *Ibid*. para. 254.

[336] Appeal brought on 30 September 2022 by Grail LLC against the judgment of the General Court (Third Chamber, Extended Composition) delivered on 13 July 2022 in Case T-227/21, Illumina v Commission (Case C-625/22 P) OJ (2022/C 451/15).

The second plea concerned the legal errors made by the General Court in the first instance when rejecting the applicant request to derive legal consequences from the *'unreasonable period of time'* taken by the Commission to send the '*invitation letter'* under Article 22(5) EUMR, and when not recognizing the violation of the right of defence of the undertakings in the procedure leading to the final decision.

Lastly, the applicant focused on the legal inaccuracies of the contested judgment's assessment regarding the legitimate expectations and legal certainty stemming from the unequivocal and specific assurances provided by the Commissioner for Competition Executive Vice President of the Commission.

All the pleas submitted to the CJEU by the applicant might be contained in the following question: does Article 22(1) EUMR enable the Commission to review a merger referred to it by a Member State's authorities, where the latter lack any competence to review it, since the merger in question falls below the thresholds set out in their national legislation on merger control?

While the General Court positively responded to the question, the Advocate General expressed its contradictory perspective to the judgment of the General Court throughout the Opinion delivered on March 2024. At first the Advocate General discussed on the four grounds of interpretations of the General Court.

Regarding the literal interpretation, the Advocate General agreed with the Court when it stated that Article 22(1) of the EUMR does not explicit exclude referrals requests by Member States with a national control system that does not catch the below-thresholds concentrations.[337] However, the meaning of *'not excluding'* cannot be equated to that of '*expressly stated'*, The literal interpretation of *'not excluding'* will not automatically include this kind of transaction within the meaning of Article 22(1) EUMR.[338] Furthermore, the Advocate General finds two further grounds according to which a literal interpretation of Article 22 EUMR would not include those concentrations not covered by National competition. First, the word '*referral'* is associated, in most of the different

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[337] *Illumina/ Grail LLC v Commission*, (*supra* note 329) para. 89-95.

[338] Opinion of Advocate General Emilou (*supra* note 330) para. 57.

translation of the EUMR to cases that were actually or potentially brough before the national authorities and then referred, so transferred, to the Commission.[339]

Second, considering the substantial requirement under Article 22(1) EUMR, in order for a concentration to be reported it needs to '*threaten to significantly affect competition within the territory of the Member State or States making the request*'. This means that the concentration requires somehow a sort of effect at national level. In that perspective, the interpretation given by the General Court attributing Article 22 EUMR to a '*corrective mechanism*'[340] to refer to control at Union level all the concentrations which impede effective competition in the internal market would not comply with the references that the Article makes to restrictions of competitions occurring at Member State level.

As for the historical interpretation, the Advocate General argued that the documents on which the General Court relied on have limitations demonstrating the EU legislature's intention. The Advocate General based her statement of four main points. Firstly, the Court could not use documents solely reporting Commission's view (the two Green Papers of 2001 and 2003, the 2003 Commission Proposal and the 2009 Staff Working Paper)[341] as decisive factors for the CJEU's interpretation of the provision. Secondly, the historical documents used by the General Court are not sufficiently clear to affirm their support of the General Court's conclusion of the appealed decision;[342] according to which Article 22(1) EUMR enables Member States with a national merger control system to refer cases that did not fall within that system. This perspective was also enhanced in the third point of the Advocate General's argument, which claims that, when read in their entirety, those historical documents contradict with the conclusions that the General Court's draw from them. Finally, the broad scope given to Article 22 EUMR supported

[339] *Ibid*. para. 65.

[340] *Illumina/ Grail LLC v Commission*, (*supra* note 329) para. 142.

[341] All the documents on which the General Court relied on for the historical interpretation are listed in para. 97 of the contested decision (Case T-227/21, Illumina V Commission).

[342] Opinion of Advocate General Emilou (*supra* note 330) para. 83.

by the historical interpretation is absurd when read in conjunction with some of the preparatory works of the EU institutions, such as the Council.[343]

Regarding the contextual interpretation, the Advocate General notes that, while there were elements favouring the inclusion of concentrations failing to meet the thresholds set by Member States' national laws in the referral mechanism under Article 22(1) EUMR, there are significantly more arguments advocating for a narrower interpretation of the mentioned article.[344]

Lastly, for the teleological interpretation the Advocate General highlights two specific objectives that shed the light on the meaning of Article 22(1) EUMR. The former pertains the dual scope of Article 22 EUMR. One scope encompassed the historical aspect of the Article, allowing for the referral mechanism in those Member State with no merger control regime. The other scope relates to the '*one-stop-shop'* objective, which permitted to refer at Union level a merger notified or notifiable in several Member States to avoid parallel proceedings. However, no reference was present in relation to a third objective functioning as *'gap-filling function'* for those concentrations falling below both the EU and the national thresholds. In summary, the teleological approach of Article 22(1) EUMR was incorrect as it did not only fail to comply but also disrupts the balance of some of the objectives pursued by the EUMR. These objectives included precise allocation of competences between national competition authorities and the Commission, establishment of an efficient *one-stop-shop* system, and creation of an efficient and predictable system that offers legal certainty to merging parties.

Furthermore, the Advocate General also pointed out additional inaccuracies in the General Court's interpretation of Article 22(1) EUMR, particularly concerning concentrations not reportable at the national level.

Firstly, the Advocate General argued that this extension of the scope of Article 22 EUMR, as stated by the General Court, would place a substantial number of cases under the Commission's jurisdiction, thereby violating the principle of institutional balance under

343 *Ibid*. para. 110.

344 *Ibid*. para. 170.

Article 13(2) TEU.[345] Additionally, a fundamental aspect of the EUMR, as the thresholds, would become merely relative.[346]

Secondly, the broad interpretation given by the General Court of Article 22(1) EUMR might create conflicts with the principle of territoriality of EU law, according to which for a concentration to be reported under the EUMR it should present foreseeable, immediate and substantial effects in the territory of the Union.[347]

Thirdly, the broad interpretation under Article 22(1) EUMR creates conflicts with the principle of proportionality and equality under EU law. Undertakings, with small or non-existent turnovers at European level would be those more at risk than undertakings with significant activities. Differently, the latter can decide to submit the case under the *one-stop-shop* system established by the EUMR or at, alternatively, simply notify the transaction at national level. The principle of equality was breached in the part where it treats situations, which were substantially different, in the same manner without any proper justification.[348]

On regard of the extension of the scope of Article 22(1) EUMR as a way to include killer acquisitions, the Advocate General argued that the latter could better be prevented through the enforcement of Article 101 and 102 of the TFEU. Killer Acquisitions, given their actual or potential effect of impeding potential competing undertaking at an early stage, fell perfectly within the definition given to '*abuse of dominant position'* by the CJEU in the *European Superleague Company's* judgment[349]. The latter argued that the abuse of dominant position was established when a conduct not *'only has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market(s) concerned, but also where it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing*

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[345] See Article 13(2) of the TEU.

[346] Opinion of Advocate General Emilou (*supra* note 330) para. 215- 219.

[347] *Ibid*. para. 221-222.

[348] *Ibid*. para. 224-226.

[349] Judgment of 21 December 2021*, European Superleague Company SL v Fédération internationale de football association (FIFA)* Union of European Football Associations (UEFA), C333/21,EU:C:2023:1011.

undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation'.[350]

Moreover, the use of the ordinary anticompetitive measures would allow the authorities to do not predict the undertaking's future behaviour to evaluate the potential significant impediment to competition, but they would be able to examine both pre- and post-merger evidence and also impose on the undertaking the obligation to bring the infringement to an end. [351]

As for the second ground of appeal, Illumina and GRAIL raised concerns regarding the prolonged duration taken by the Commission to issue the '*invitation letter'* under Article 22(5) EUMR, contending that it infringed upon their right of defence by not affording them the opportunity to provide response. Initially, the Advocate General concurred with the interpretation put forth by the General Court regarding the term '*made known to the Member States*' as stipulated in the second paragraph of Article 22(1) EUMR, affirming that Member States must be informed of the merger to commence the 15-working-day period. However, while acknowledging the General Court's acknowledgment of the Commission's delayed response, the Advocate General asserted that such delay did not amount to a violation of an essential procedural requirement. To establish such a violation, the parties would need to demonstrate that had the Commission acted within a reasonable time, the possibility and suitability of the merger being subjected to Article 22 EUMR would have been different[352], which was not evident in such case. Furthermore, the Advocate General aligned with the General Court's viewpoint, expressed in paragraph 240[353] of the appealed decision, which posited that an infringement of the reasonable time principle, as the one submitted by the applicant, can justify the annulment of a decision

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[350] *Ibid*. para. 131.

[351] Opinion of Advocate General Emilou (*supra* note 330) para. 229-232.

[352] *Ibid*. para. 247; this test is known as '*standard test for procedural errors'*.

[353] *Illumina/ Grail LLC v Commission*, (*supra* note 329) para. 240-241.

only if it constitutes an infringement of the right of defence of the undertaking concerned. However, given the insubstantial evidence presented by the applicant to substantiate the breach of their defence right, the second ground of appeal should be dismissed.

In the last ground of appeal, the applicant challenges the breach of the principles governing the protection of legitimate expectations and legal certainty. Once again, the Advocate General was on the General Court's side. Regarding the breach of the principle of legal certainty, the Advocate General contended that the applicant failed to present any argument distinct from those pertaining to the breach of legitimate expectations. The applicant asserted that, based on the Commission's previous case-law, it did not anticipate the acceptance of such a referral; hence, the abrupt change in the Commission's policy could not have been foreseen. However, the applicant did not provide any relevant argument to support the claim that the Commission, through its case-law, had created a precise, unconditional, and consistent assurance regarding its policy shift. Indeed, the speech delivered by the Commissioner for Competition outlining the Commission's reassessment of the application of Article 22 EUMR could not be deemed to fulfil the three requirements necessary to provide assurance regarding the Commission's altered perspective on the application of Article 22 of the EUMR.[354]

This case was pivotal in the development of the role of Article 22 EUMR for preventing killer acquisition. Indeed, GRAIL fully reflects the ideal acquired company for killer acquisition in pharmaceutical sector, considering its innovative nature and, more specifically, the fact that it had innovative ongoing research on multi-cancer screening test. The Galleri project was indeed described by the ex-Illumina's president Francis deSouza as '*one of the most promising new tools in the fight against cancer*'.[355] Furthermore, it was the General Court itself to state that '*Grail's importance for competition was not reflected in its turnover*',[356] and that the operation fully satisfied the

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[354] Opinion of Advocate General Emilou (*supra* note 330) para. 262.

[355] llumina, Inc., '*Illumina to Acquire GRAIL to Launch New Era of Cancer Detection*' ,published by Press Release on 21 September 2021,https://investor.illumina.com/news/press-release-details/2020/Illumina-to-Acquire-GRAIL-to-Launch-New-Era-of-Cancer-Detection/default.aspx.

[356] *Illumina/ Grail LLC v Commission*, (*supra* note 329) para. 11.

conditions set out in paragraph 45 of its Notice on Case Referral in respect of concentrations.[357]

The *Illumina/GRAIL* judgment was also crucial for the clarification of the relevance of the '*information letter*' and its relationship with the standstill obligation under Article 7 EUMR. Such letter represents an intermediate and preparatory measure for the contested decision, and it might not include the standstill obligation under Article 7 EUMR. The contested decision in the present case illustrated the Commission's final position on the acceptance of the referral request which brought the concentration at issue within the scope of the regulation only once the contested decision was adopted.[358]

Regardless of all the principles on the role and enforcement of Article 22 EUMR deriving from this case, the transaction of Illumina and GRAIL became an emblematic example for understanding when a concentration might be detrimental of competition aside from the overcoming of the thresholds.

From a first consideration, the acquisition of GRAIL by Illumina should not result in a negative outcome for competition considering that the two companies did not act at the same stage of the production scale. However, the two parties were engaged in a vertical relationship glued by the presence of NGS systems: Illumina produced and supplied NGS systems for genetic and genomic analysis, while GRAIL used them to develop cancer detection test.

The Commission, in the contested decision, found that Illumina, by acquiring GRAIL, would have gained the ability to engage in foreclosure against GRAIL's rivals. To clarify, Illumina would have refused to supply its NGS systems to GRAIL's rivals, increased their prices, degrade their quality and delayed supplies. By cutting access to its NGS technology, Illumina would have put GRAIL's rivals in a disadvantage position by impeding them the access to an essential input for their development. Furthermore, this behaviour would have been destructive for the innovation as well. The innovation race for the development and commercialize of early cancer detection tests in which GRAIL's

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[357] *Ibid*. para. 24.

[358] *Ibid*. para. 78-79.

and its rivals were involved into would have been neutralized with this transaction. GRAIL and its rivals counted on Illumina for the acquisition of the NGS's system to improve and run their test, and, seeing that it was the only efficient operator on the market, they could have gone anywhere else.

On Illumina's perspective, the acquisition would have been very beneficial. Considering that its turnover was only in a small portion generated by GRAIL's rivals' purchases, it may have decided to foreclose the gate already today rather than postponing it to a later stage. This would as well advantage GRAIL's leader project Galleri, while enjoying a first mover preference, was already competing with several other players involved in the developing of early-detection cancer test.[359]

The Commission, after having accepted the referral under Article 22 and have concluded an in-depth investigation, obliged Illumina to adopt a series of restorative measure to avoid an effective impediment to competition and restore the situation to the moment before the completion of the acquisition. In its divestment plan, approved by the Commission last April, Illumina guaranteed GRAIL's independence from Illumina as to the moment before the acquisition. GRAIL will continue operating as viable and competitive business, and the innovation race with its rivals will be ensured. The entire plan will be put into action in a timely manner so that the previous situation can soon be restored.[360]

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[359] European Commission, Press release : *«Mergers Commission prohibits acquisition of GRAIL by llumina .pdf».* Brussels, 6 September 2022.

[360] Commission - Press release: *'Commission approves Illumina's plan to unwind its completed acquisition of GRAIL*', published on 12 April 2024.

While this work was being printed, (Judgment of 3 September 2024, Illumina GRAIL, Joined cases C-611/22 P and C-625/22 P) the CJEU handed down its judgment, substantially putting an end to this saga. The CJEU's judgment gave right to Illumina, ruling that the Commission had no grounds to have reviewed, and ultimately, prohibited, Illumina's planned acquisition of GRAIL. Additionally, the CJEU stated that Member States cannot refer a transaction to the Commission under Article 22 EUMR when the latter is not caught by their own merger control regime. In particular, the CJEU set aside the General Court and Commission's position and claimed that they were based on an incorrect literal, historical, contextual and teleological interpretation of the law. The CJEU found out that the Commission's interpretation of Article 22 EUMR is prone to upset the balance between the various objectives sought by the EUMR. Moreover, the CJEU underlined the fundamental significance of turnover thresholds in achieving this objective, serving as a safeguard for predictability for those involved. As a respond to this restrictive interpretation of Article 22 EUMR given by the CJEU, a number of Member States have

3.3 C-449/21, *Towercast v Autorité de la concurrence and Ministère de l'Économie*

Apart from *Illumina/GRAIL*, another relevant case related to the legislative scope of a concentration which has not been notifiable under either European or national merger control law is *Towercast*.[361]

The facts of the case developed as following.
Télédiffusion de France (TDF) and Itas were two companies active in the digital terrestrial television (DTT) broadcasting sector in France. On 13 December 2016 TDF acquired sole control over Itas. The operation was not notified either to the Commission under the EUMR or to the French competition authority under the French Commercial Code since it was considered below the required threshold for both cases. Additionally, no referral under Article 22 EUMR was submitted.
On 15 November 2017, Towercast, a French company also providing DTT broadcasting service in France, argued that the acquisition of Itas by TDF constituted an abuse of dominant position inasmuch as that acquisition of control hindered competition on the upstream and downstream wholesale market for DTT broadcasting by significantly strengthening the dominant position of TDF. In June 2018, a statement of objection was sent to TDF infrastructure and TDF infrastructure Holding, considering their power to prevent, restrict or distort competition on downstream wholesale market for DTT broadcasting services, a practice prohibited under the French Commercial Code and Article 102 TFEU. On 16 January 2020, the French Competition Authority considered that the complaint brought by the two companies was not appropriate to continue, so, in March 2020 Towercast brought an action challenging the CJEU decision. Towercast

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already introduced alternative thresholds to cover 'killer acquisitions' (for example Germany and Austria back in 2017) or *ex officio* powers to call in transactions that do not meet the relevant financial thresholds (such as Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia and Sweden). EU Member States that are competent to examine a transaction in that way can still refer that transaction for the Commission's review. Illumina/GRAIL—ECJ Finds European Commission Review of Below-Threshold Mergers Unlawful, Debevoise & Plimpton, 9 September 2024, available at https://www.debevoise.com/insights/publications/2024/09/illumina-grail-ecj-finds-european-commission.

[361] Judgment of 16 March 2023, *Towercast v Autorité de la concurrence and Ministère de l'Économie*, C-449/21, EU:C: 2023:207.

based their request on the ground of validity of Article 102 TFEU; the concerning company believed that the fact that the concentration might have avoided the application of the EUMR because it lacked the required thresholds, it did not prevent Article 102 TFEU[362] from being applied. The applicant based their statement on the *Continental Can*[363] case-law recalling the full validity and direct effect of Article 102 TFEU to concentration between undertakings, so that it could be applied without the need of the preventive adoption of a procedural Regulation No 4064/1989.

The central question of the present case is whether is it impossible *'in principle'* to apply independently the rules on competition which stem from primary law to an operation which is (i) capable of meeting the definition provided in Article 3 EUMR; (ii) has not been the subject of any prior control, either on the basis of EU law or on the basis of the national law applicable to concentration operations; and (iii) does not give rise, by reason of the fact that such an operation is below the thresholds for *ex ante* control, to any risk of the EUMR and the Regulation No. 1/2003 being applied cumulatively or of any contradictory outcome arising from a double – *ex ante* and *ex post* – analysis. Furthermore, considering the differential application given by Member States to Article 21(1) EUMR, the Paris Court of Appel also asked the CJEU, whether Article 21(1) EUMR had to be interpreted '*as precluding a national competition authority from regarding a concentration which has no community dimension within the meaning of Article 1 [thereof], is below the thresholds for mandatory ex ante assessment laid down in national law, and has not been referred to the European Commission under Article 22 of [EUMR], as constituting an abuse of a dominant position prohibited by Article 102 TFEU, in the light of the structure of competition on a market which is national in scope?'*.[364]

This judgment has been remarkable for the part in which the CJEU clarified on the jurisdiction of national competition authorities and National Courts on reviewing acquisitions by dominant entities under abuse of dominance rules, such as Article 102

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[362]See Article 102 of the TFEU.

[363] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities,* Case C 6/72, ECLI:EU:C:1973:22.

[364] *Ibid*. para. 29.

TFEU,[365] when those acquisitions are not notifiable under EU or national merger control law. Additionally, the CJEU also discussed on the enforcement of Article 102 TFEU as to prevent the so called '*killer acquisitions'* alternative the extension of the scope of Article 22 EUMR, as already mentioned by the Advocate General in the *Illumina/Grail's* judgment.

The significant request reported in paragraph 29 of the present judgment pertains to whether, a concentration lacking a community dimension as defined in Article 1 EUMR, and failing to meet the mandatory thresholds for *ex ante* review under national law or referral to the Commission pursuant to Article 22 EUMR; remains liable to an *ex-post* review in light of Article 102 TFEU due to the establishment of an abuse of dominant position in a market confined to a national jurisdiction.

The Advocate General Kokott summarize the request in its Opinion[366] to the following question: can Article 21(1) EUMR preclude the application of Article 102 TFEU? [367]

The Advocate General's Opinion follows the object of the judgment of the CJEU, however, he differed in the explanation of the points. In substance, both the Advocate General and the CJEU aimed at assessing the relationship between the Article 102 TFEU, an act primary EU law, and the EUMR, an act of secondary EU law; and concluded that authorities, national or European, can initiate an investigation on the abuse of dominance under Article 102 TFEU following the completion of a non-notifiable merger. They added that, while on the one hand the EUMR focuses on an *ex-ante* control of the concentrations within the limits set by Article 1 EUMR, Article 102 TFEU provides an *ex-post* assessment of abuse of dominance.

Both the CJEU and the Advocate General concluded that merger control aimed at preventing future abusive behaviours, Article 102 TFEU prohibits the creation and/or the strengthening of a dominant position in the first place.

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[365] See Article 102 of the TFEU.

[366] C-449/21, *Towercast v Autorité de la concurrence and Ministère de l'Économie*, SA [2022], ECLI:EU:C:2022:777, Opinion of Advocate General Kokott.

[367] *Ibid*. para. 28.

The CJEU initiated its analysis with the interpretation of Article 21(1) EUMR. This provision bared the application of additional EU secondary legislation, such as Regulation No. 1/2003, to mergers falling within the scope of Article 3 EUMR with a Community dimension. In parallel, Article 21(1) EUMR did not preclude the application of additional laws to mergers falling under Article 3 EUMR which did not meet European or national thresholds, nor have they been referred by the Commission under Article 22 EUMR.

The CJEU stated that the goal of merger control was preventing concentrations which would result in lasting damage to competition. Thereby, although the EUMR was a procedural tool applicable to the prior and centralized examination of concentrations whose impact on the market goes beyond the national border of any Member State, the central scope of EU competition law remained that of permitting effective control of all concentrations in relation to their effect on the market. Hence, excluding a concentration from the meaning of the EUMR did not mean doing the same from that of Article 102 TFEU.[368]

As stated by Recital 7 and 9 of the EUMR, [369] the Regulation itself was originally constructed to support Articles 101 and 102 TFEU in preventing competition to concentrations, and '*to establish a system of control ensuring that competition is not distorted in the internal market of the European Union*'.[370] The EUMR was thus created as a sort of support for Article 101 and 102 TFEU, and established a mechanism of prior control for certain concentrations which, nevertheless, could not result as precluding a competition authority to capture a concentration under Article 102 TFEU in other cases.[371] The CJEU further highlights that the definition of '*concentration'* set out in Article 3 EUMR was solely substantial and that, it must be read in light of its context, in particular, it must be read in conjunction with Article 1 and Recital 7 and 9 of the EUMR. Accordingly, the fact that those concentrations falling within the scheme of the EUMR were reviewed prior to their implementation, did not exclude concentrations with below-

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[368] *Towercast v Autorité de la concurrence and Ministère de l'Économie,* (*supra* note 361) para. 36-37.

[369] See Recitals 7 and 9 of the EUMR.

[370] *Towercast v Autorité de la concurrence and Ministère de l'Économie,* (*supra* note 361*)* para. 39.

[371] *Ibid*. para. 40.

thresholds turnover to be object of an *ex-post* control, such as that under Article 102 TFEU.[372]

Besides, while certain national competition authorities did not acknowledge the direct applicability of a primary legal provision like Article 102 TFEU, the CJEU highlighted that such provision was a primary law act which must always remain suitable and it should not be excluded from application when one of more undertakings engage in an abuse of dominant position within the internal market or in a substantial part of it, which resulted in affecting trade between Member States. The CJEU enshrined the principle that, despite the inapplicability of secondary laws as stated in Article 21(1) EUMR to concentrations defined in Article 3 EUMR, those concentrations falling within the scope of Member State's law did not preclude National Competition Authorities from applying Article 102 TFEU to concentrations, when establishing the existence of an abuse of dominant position.[373] The latter was verified whenever the level of dominance attained, for instance following a merger, would substantially impede competition, meaning only undertakings whose behaviour depended on the dominant entity still active on the market.

In summary, the CJEU concluded that Article 21(1) EUMR could not be interpreted in a manner that prevented national competition authorities from conducting *ex-post* reviews of mergers falling below thresholds at both national and Union level, provided they resulted in an abuse of dominant position under Article 102 TFEU, in the light of competitive landscape.

As aforementioned, although the Advocate General reached the same conclusion as the CJEU, she placed emphasis on different key points.

In particular, the Advocate General centred her Opinion on the principle of the hierarchy of norms, being Article 102 TFEU a provision of primary law, its enforcement could not be blocked or modified by a rule of secondary law such as Article 21(1) EUMR. Given the role of the EUMR, which was that of strengthening the provisions under Article 101 and 102 TFEU and ensuring together the protection of competition in the internal market,

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[372] *Ibid*. para. 41.

[373] *Ibid*. para. 43-52.

such a provision could not '*alone*' limit the purpose of the referenced Articles of the TFEU. On its defence, the TDF claimed that when a concentration did not meet neither National nor European thresholds, it could not be subject of an *ex-post* review by application of Article 102 TFEU. The Advocate General replied by saying that, the thresholds at national or Union level, such as Article 21(1) EUMR, were not capable to exclude the direct applicability of Article 102 TFEU.

The Advocate General sustained the idea that if a concentration did not meet the required thresholds to receive an *ex-ante* control, it did not mean that the same concentration might not be reviewed with an *ex-post* control when an abuse of dominant position is encountered. She explained her point by arguing that, while the EUMR protects the market before the creation of the damage, Article 102 TFEU was pushing more towards a protection of something that had already been infringed. The EUMR could not be considered as '*lex specialis*' because: it derogated other provisions of EU law which are considered as '*secondary*' and, in compliance with what said in Recital 6 of the EUMR. The EUMR was indeed the only instrument applicable to the legal assessment of the effect of concentrations on competition in the internal market. Thereby, the assessment of an anticompetitive effect of a concentration will be firstly attributed to merger control law. Nevertheless, such association would not exclude that the same concentration can also be verified under Article 102 TFEU in cases where it affects competition in the internal market by strengthening or/and creating a dominant position. Indeed, based on the idea that the EUMR was born as a way to strengthening the protection of competition internal market together with Article 101 and 102 TFEU as can been seen from Recital 7 of the EUMR, leads to a possible scenario where the application of the Regulation would not exclude a possible subsequent application of Article 102 TFEU.[374]

The Advocate General also discussed on the meaning and relevance of referrals under Article 22 EUMR, and how concentrations referred under that provision could be excluded from the review *ex-post* under Article 102 TFEU in case of abuse of dominant position. The Advocate General argues that, just like Regulation No. 1/2003, Article 22 EUMR was a secondary norm, and subsequently could not exclude anyhow the

[374]Opinion of Advocate General Kokott, (*supra* note 366) para. 44-46.

application of Article 102 TFEU. Furthermore, Article 22 EUMR, just like Article 102 TFEU, aimed at filling the gap that had been emerging lately in the protection of competition in the internal market, particularly in relation to killer acquisitions, which, as aforementioned, regarded the acquisitions of those companies operating in the same or neighbouring market of the acquirer whose turnover was irrelevant at both national and union level. The aim of such operations was stopping the development of the acquired firm in order to eliminate them as competitors and protect their position on the market.[375]

Some scholars claimed that one of the methods to avoid these scenarios was to uphold the ability of national competition authorities to invoke Article 102 TFEU when such scenarios arise. This approach had also been supported by the Advocate General of the *Illumina/Grail's* case when discussing on the potential extension of the scope under Article 22 EUMR to those concentrations which did not meet the national thresholds of the requesting Member State in order to include and prevent killer acquisition.

In this context, the Advocate General Kokott agreed with the Advocate General for *Illumina/Grail,* when noting that a measure of protection from killer acquisitions could already be found under Article 102 TFEU. This Article was enforceable *ex-post* to mergers that proved to be anticompetitive and, in particular to those that '*the actual or potential effect – or even the object – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures …, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation'*.[376] Which, would perfectly fall within the meaning given to 'killer acquisitions'.[377]

The CJEU also concurred with the jurisprudence established in the *Continental Can's* judgment which affirmed that Article 102 TFEU[378] was able to legitimately extend to

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375 *Ibid*. para. 46-48.

376 *Towercast v Autorité de la concurrence and Ministère de l'Économie, (supra* note 361) para. 131.

377 Opinion of Advocate General Kokott, (*supra* note 366) para. 228.

378 Article 102 TFEU corresponds to Article 86 under the EEC Treaty.

concentrations due to its direct applicability. Moreover, the CJEU acknowledged that no further measures were required for its implementation, given its unambiguous, precise, and unconditional nature. [379] The *Towercast* judgment added that the latter could be applied to concentrations as long as they did not fall within the thresholds set at European or National level.[380]

At the same time, after the introduction of the EUMR, which constituted a specific system applicable to all concentration operations under Article 3 EUMR, the judgment of '*Continental Can'* became devoid of purpose.

At first, the *Continental Can's* doctrine focused on the prevention of mergers with a negative effect on competition considering the Article 86 of the EEC Treaty. However, following the upcoming of the EUMR which aimed at exclusively at controlling and preventing mergers at EU level, the new interpretation of *Continental Can* became more oriented towards the necessity to extend the application of Article 102 TFEU. Simultaneously, Article 102 TFEU retained its significance, even with the recognized primacy of the EUMR in merger regulation. In fact, in compliance with Recital 7 EUMR and with the *Continental Can's* case law, the object of the EU Treaties is that of maintaining the most effective and complete protection of competition within the common market.[381]

Continental Can's case law was declared of '*becoming obsolete'* by the Advocate General Kokott on the *Austria Asphalt's* Opinion.[382] In particular, the Advocate General Kokott claimed that it was necessary to distinct between two scenarios: the former where the concentration is not subjected to no *ex-ante* control and thus Article 102 TFEU can be applied *ex-post* by national competition authorities , and that where the merger control is priorly subjected to the merger control. In the latter case, the Advocate General discussed,

[379] *Towercast v Autorité de la concurrence and Ministère de l'Économie, (supra* note 361) para. 23,24 and 51.

[380] *Ibid*. para. 23-24.

[381] *Ibid* para. 54 inter alia Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, Case C-6/72, EU:C:1973:22, para. 25.

[382] Case C 248 /16, *Austria Asphalt*, EU:C:2017:322, Opinion of Advocate General Kokott (*supra* note 202).

in light of the application of the *Continental Can* case law of a potential applicability of Article 102 TFEU to those mergers that had be previously checked under the merger control. In substance, a double check: one *ex-ante* under the EUMR, and one *ex-post* under Article 102 TFEU.

The approach of '*lex specialis derogate lex generalis*' supports the idea that Article 21(1) EUMR, as a *lex specialis*, excluded the possibility of realization of the double control. In fact, a concentration which was already considered as compatible with the internal market could no longer be challenged under other provisions of EU law, such as Article 102 TFEU, inasmuch as the undertaking concerned did not engage in practices that could constitute an abuse under that provision after the operation.[383] So, Article 102 TFEU could only be applied for those concentrations operated by an undertaking with a dominant position.

Lastly, the Advocate General stated that a different interpretation of the relationship occurring between Article 21(1) EUMR and Article 102 TFEU should be interpreted differently than what established in paragraph 29 of the Opinion, in compliance with the principle of legal certainty.[384] Nevertheless, the CJEU did not expressly ruled on exclusion of the application of Article 102 TFEU to cases reviewed under the EUMR, even though such a scenario seems rather impossible.

Furthermore, some national authorities requested that the interpretations allowing operations below the thresholds to be challenged under Article 102 TFEU before national authorities and courts should not be applied retroactively from the date the rule came into effect, meaning prior to the delivery of the judgment. However, such request was rejected by the CJEU. Limiting the temporal effects of a judgment, added the CJEU, might solely be done in application of legal certainty, when two essential criteria were fulfilled: '*those concerned must have acted in good faith and there must be a risk of serious difficulties*'[385]. In the present case, the interpretation given by the CJEU on the application of Article 102

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[383] Opinion of Advocate General Kokott, (*supra* note 366), para. 60.

[384] *Ibid*. para. 64-67.

[385] *Towercast v Autorité de la concurrence and Ministère de l'Économie, (supra* note 361) para. 57.

TFEU was simply the continuation of a well-established case-law which recognized in the latter direct effect without the need to implement it with secondary law.[386] The Advocate General agreed with the CJEU on that point.[387]

3.4 Conclusions

Finally, both of these rulings have to be proven pertinent in delineating the interpretation applied to the expansion of the jurisdictional scope of Article 22 EUMR, especially concerning the phenomenon of '*killer acquisitions'*.

On the other hand, the definitive ruling from the CJEU regarding the *Illumina/Grail* case is still pending, the CJEU has already articulated its stance in *Towercast* which appear to align with the Advocate General's position in the *Illumina/Grail's* case.

In substance, the central issue concerns the extension of the scope of Article 22EUMR resulting from the Commission Guidance of 2021, which allowed a referral request under Article 22 EUMR by Member States although the concentration at stake does not meet the national thresholds. This interpretation was approved by the General Court in *Illumina* but rejected by the CJEU in its most recent judgment of *Towercast*. In *Towercast* the CJEU claimed that the phenomenon of killer acquisitions could solely be prevented through the application of Article 102 TFEU. The latter, due to its primary law nature and its direct applicability could be enforced *ex-post* by national competition authorities under Regulation 1/2003[388] against mergers that did not meet either EUMR or national thresholds to intervene against anticompetitive effects that the latter may create on the market. Article 102 TFEU became applicable whenever an undertaking exploited its

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[386] *Ibid*. para. 58-61.

[387] Opinion of Advocate General Kokott, (supra note 366) para. 64-67.

[388] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102] of the [Treaty on the Functioning of the European Union] (Council of the European Union) [2003] OJ L 1/1 (Regulation 1/2003 '*Transparency Regulation'*).

dominant position, thereby obstructing competition within the internal market or a significant portion thereof. As a result, only firms whose conduct was contingent upon that of the dominant entity persist in the market.

In relation to the interpretation given by the Advocate General of *Illumina/GRAIL* and that of *Towercast*, killer acquisitions offered a pragmatic description of a '*by object'* abuse of dominant position.[389] Throughout the *'killing'* of the acquired firm or its innovative projects, the acquiring firm aims at maintaining its market position or reducing competition in the concerning market. In substance, killer acquisition had the actual or potential effect of impeding potentially competing undertakings at an earlier stage to enter in the market, and subsequently preventing the growth of competition resulting in the detriment of consumers by limiting production, product or alternative service development or innovation.[390]

Moreover, by prioritizing the application of Article 102 TFEU over the extension of the scope of Article 22 EUMR, the authorities would have avoided the necessity of forecasting the future conduct of the undertaking in question, a requirement typically encountered by the Commission during the evaluation of potential mergers under the EUMR. Conversely, through the enforcement of Article 102 TFEU, competition authorities would have had the capacity to scrutinize both pre-merger documents and post-merger evidence to ascertain whether the acquisition in question leads to the acquirer's abuse of dominant market position.

Additionally, the protective scope against anticompetitive behaviour provided by Article 102 TFEU surpassed that of the EUMR. In case of an infringement of the Article 102 TFEU, national competition authorities, whose powers was granted by the ECN + Directives,[391] may not only impose financial sanctions to the undertaking abusing of the

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[389] Opinion of Advocate General Kokott, (*supra* note 366) para. 230

[390] *Towercast v Autorité de la concurrence and Ministère de l'Économie, (supra* note 361) para. 131.

[391] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019 L 11, p. 3). On that directive, See generally

dominant position, but they may also require the undertakings in question '*to bring that infringement to an end'* , throughout the imposition of any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. In particularly severe instances, this may entail either partial or complete dissolution of the merged entity, a recourse not permissible under the EUMR due to the principle of proportionality. In such circumstances, where parties proceed with a merger after notifying it under Article 22 EUMR without awaiting approval from the Commission, thereby infringing Article 7(1) EUMR and violating the standstill obligation, the only recourse available would typically be the imposition of a fine.[392]

Finally, the jurisprudence of the European Courts so far seems to not agree with the extension of the scope of Article 22 EUMR to include those concentrations not meeting either EUMR or national thresholds, however, a decisive response on the matter is still waited by the CJEU with the decision that will be taken on the *Illumina/Grail* question.

4. The Right of File Access and The Right of Defence in Merger Control

The right of file access to the Commission's documents in merger control is considered as a representation of the right of defence. The right of file access has been designated in order to ensure the parties involved in the investigation the possibility to develop a coherent and adaptive defence. Considering the significance this principle owns under EU law, the Court stated that decisions taken by the Commission on the infringement of

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Arsenidou, E., '*The ECN+ Directive', in Dekeyser, K. et al. (eds), Regulation 1/2003 and EU Antitrust Enforcement – A Systematic Guide'*, Wolters Kluwer, 2023, pp. 143-149.

[392] Opinion of Advocate General Kokott (*supra* note 366) para. 63.

competition law without respecting the right to file access, would be annulled for the infringement of the undertaking's right of defence.[393]

The right of access to file, reported under article 18 EUMR,[394] has indeed been defined by the Court case law as '*a corollary of the principle of respect for the rights of the defence'*, which means that '*the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence*'.[395]

The right of access to file is trigger by the delivery, to the interested parties by the Statement of Objections, which is an act destinated at informing the involved undertakings of all the facts and documents that led to the Commission's ultimate decision.

This document must be crafted in a manner that allows the implicated undertakings to draw legal conclusions regarding the alleged violations, to pinpoint all documents used as evidence in support of the objections and comprehend the potential ramifications should the Commission proceed with enforcement measures. As this document serves as the initial step towards affording the right to be heard to the concerned undertaking or party, it must be sent by the Commission within a very short time, in order to provide the involved parties adequate time to review the allegations and evidence and furnish their responses. The statement of objections has been analysed with the aim of incorporating the right of access to the file at specific junctures prior to the final decision is taken, while also affording individuals or undertakings the opportunity of presenting arguments in their defence.[396]

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[393] Judgment of 17 December 1991, *Hercules Chemicals v Commission*, Case T-7/89, EU:T:1991:75, para. 76 and 77.

[394] See Article 18 of the EUMR.

[395] Judgment of 7 January 2004, *Aalborg Portland and Others v. Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, para. 68.

[396] S. Zigelski, *'Statement of Objections (SO), Global Dictionary of Competition Law',* Concurrences, Art. N° 12176.

The first paragraph of Article 18 EUMR states that the right to file access is granted to those undertakings, or associations of undertakings, which, at every phase of the procedure and prior to the request to the Advisory Committee, ask the Commission to make views of the objections against them.

However, the relevant paragraph for this matter is the third one of Article 18 EUMR, which highlights the duty of the Commission to base their decisions *'only on objections on which the parties have been able to submit their observations*', and it further adds that *'access to file shall be open at least to the parties directly involved*', namely those to whom the Commission has addressed the Statement of Objection.[397] So, it is upon the addressee of the document to decide whether to exercise its right of access to file or not. If the addressee chooses not to do so, it cannot claim for its right to be respected afterwards.

The documents made accessible to the parties are '*all documents, which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation*'.[398] In cases where the Commission acquires documents unrelated to the investigation, it may return such documents to the undertaking from which those have been obtained. Consequently, cease to form part of the file.[399]

The right of access to file is not absolute, it must never go beyond what is required to ensure respect for the rights of the defence. Article 18 EUMR grants the parties the right of access to the file used by the Commission to elaborate their assessment, it must be read in compliance with the restrictions reported by Article 17 EUMR, as professional secrecy, and those under Article 18(3) EUMR. The documents Commission Notice on file access

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[397] See Article 18(3) of the EUMR.

[398] EuropeanCommission 'Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (Text with EEA relevance)' OJ 2005/C 325/07, para. 8.

[399] *Ibid*. para. 9.

distinguished accessible from non-accessible documents. Accessible are all the documents that the Commission has obtained during the course of the investigation, non-accessible are the documents concerning the business secretes of other undertakings, the internal documents of the Commission or other confidential information involved.[400] From what emerges in Article 18(3) EUMR and Article 17 EUMR, the Regulation excludes from the access solely files related to business secret, and not those on other confidential information. However, although the 'very special protection' given to business secrets, the Court case-law grants to both categories of documents equal protection.

Article 18(3) EUMR, allows, for third parties with sufficient interest, the entitlement, upon request, of being heard. While Article 18(4) allows third parties to submit written observations within Commission-set deadlines,[401] and they may be invited to participate in hearings based on their submissions.[402] The latter, however, do not enjoy a right of equal extension as that grated to parties of the concentration. Given the merely incidental effect that the decision creates on them, third parties can only exercise the right of be heard, upon an explicit and justified request, before the Commission[403].The Commission has full discretion not only in the evaluation of the eventual Opinions delivered by third parties on the Statement of Objections, but also on the decision on whether to allow these parties access to the Statement or not.

Another limitation to file access pertains to the need for speed, which characterizes the general scheme of the proceedings before EU law as mandated by Article 41(1) of the Charter of Fundamental Rights.[404]

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[400]Judgment of 17 December 1991, *Hercules Chemicals v Commission*, Case T-7/89, EU:T:1991:75, para. 54.

[401] See Article 16 (1) and (3) of the Implementing Regulation 1269/2013.

[402] Article 16 (3) Implementing Regulation 1269/2013.

[403] Judgment 27 November 1997, *Kaysberg SA v. Commission*, Case T-290/94, ECLI:EU:T:1997:186, para. 105.

[404] See Article 41(1) of the Charter of Fundamental Rights of the European Union (ECHR), OJ(2000/C 364/01).

Lastly, access to file under Article 18 EUMR should be distinguished from public access to documents based on the Regulation (EC) No. 1049/2001.[405] The Transparency Regulation is open to give any requesting natural or legal person access to documents held by the Commission; and the requesting parties do not need to give reason for such request. [406] Documents disclosed under the Transparency Regulation entered in the public domain.[407]

A relevant judgment having as object the right of file access connected to the right of defence is *UPS v Commission* of 2017.

4.1 C-265/17 P, *Commission v. United Parcel Service*

One of the pivotal rulings about the '*right of defence'* for parties involved in merger control is the *UPS v Commission*'s judgment[408]. In this judgment, the CJEU reaffirms that, before adopting a merger decision, parties much be given the opportunity '*to make known effectively their views on the accuracy and relevance of all the factors that the Commission intends to base its decision on*'.[409]

In essence, the central question revolves around whether, in the event the Commission plan to object to a proposed transaction using an econometric model—a tool deemed *'appropriate'* by the CJEU for assessing merger effects—it is obliged to notify the parties

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[405] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L145/43, (further referred as '*The transparency regulation'*).

[406] See Article 6(1) of the Regulation 1/2003.

[407] See Judgments of 21 May 2014, *Catinis v. Commission*, T-447/11, EU:T:2014:267, para. 62; and Judgment of 26 April 2016, Strack v. Commission, T-221/08, EU:T:2016:242, para. 128.

[408] Judgment of 16 January 2019, *Commission v. United Parcel Service*, Case C-265/17 P, EU:C:2019:23.

[409] *Ibid*. para. 31.

of any significant alterations to the model and grant them the opportunity to provide feedback before making a final decision. It remains uncertain whether, following this ruling, the Commission will decrease its reliance on econometric models in the future.

The two companies concerned are United Parcel Service (UPS) and TNT Express NV. Both companies operate on the market of international express small package delivery service.

On 26 June 2012, a notice of prior notification of a concentration was published by the Commission on Article 4 EUMR.
On 30 January 2013 the Commission considered that the concentration between UPS and TNT would be a significant impediment to effective competition on the markets for the services in question in 15 Member States (Bulgaria, the Czech Republic, Denmark, Estonia, Latvia, Lithuania, Hungary, Malta, The Netherlands, Poland, Romania, Slovenia, Slovakia, Finland and Sweden). The Commission believed that the merger would have led to non-collusive monopoly because in some national markets the competitors for the express delivery of small package would be reduced from three to two.

Nevertheless, the merged entity would not be the biggest operator in any of these markets. Lastly, the Commission stated that, despite the parties' efficiency claims, the benefits deriving from the concentration could never compensate its detriment on competition.[410] After announcing publicly that it would not go ahead with that concentration. On 5 April 2013, UPS brought an action for the annulment of the decision at issue,[411] which was dismissed by the Court.[412]

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[410] R. Whish and D. Bailey, *Competition Law (10th edition)* , Oxford University Press, Oxford, United Kingdom, 2021 pp 951-952.

[411] The decision at issue is that where the Commission declared the concentration notified as not to be in compliance with the internal market (Case COMP/M.6570- UPS/TNT Express).

[412] *United Parcel Service, Inc v Commission,* (*supra* note 408).

On 7 March 2017, the General Court annulled the Commission decision of 2013 declaring the incompatibility with internal market of UPS's concentration with TNT, [413] and on 16 January 2019 the European Court of Justice dismissed the appeal brought by the Commission against the General Court judgment.

The Commission brought the action before the CJEU challenging three errors of law made by the General Court, the first two relate to an infringement of the right of the defence and its consequences, while the third alleges infringement of the obligation on the General Court to state reasons for its decision.

The decision of the CJEU on the issue is centred on importance of the right of defence, which is represented through Article18(3) EUMR, and, more detailed, in Article 13(2) of the Regulation No. 802/2004,[414] and how it is linked to the econometric model.

To ensure the respect of Article 18(3) EUMR, CJEU states in paragraph 29 of its judgment that the parties to the decision should be able to submit '*written notice be given to the notifying parties of the Commission's objections, with an indication to those parties of the period within which they may inform the Commission of their views in writing*'[415]. Moreover, parties should be able to submit their views on all the documents on which the Commission intend to base its decision on. The right of defence also ensures the principle of good administration to be followed during the merger procedure.[416]

In first instance, the General Court had considered an infringement of the right of defence committed by Commission the Commission because it did not communicate to the parties the final version of the econometric model before the issuing of the prohibition decision, depriving the latter of the possibility to challenge that model.

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[413] *Ibid.*

[414] Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC). No 139/2004 on the control of concentrations between undertakings OJ L 133, 30.4.2004, para. 1 to 39 (Merger Implementing Directive).

[415] *United Parcel Service, Inc v Commission,* (*supra* note 408) para. 29.

[416] *Ibid*. para. 34.

The Commission defends itself before the CJEU claiming that, following the statement of objections stage, the Commission may change its assessments in the course of the procedure. The way this assessment takes place is not a matter relating to the right of defence, but rather an analysis of the substance of the decision at issue[417].

In order to evaluate whether the econometric model was one of the acts which needed to be communicated to the parties of the decision under Article 18 EUMR, the CJEU noted that the econometric model shows an '*analysis [...] of how concentration might alter the factors determining the state of competition on the markets affected [...] [and] makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely*'[418]. As acknowledged by the Opinion of Advocate General Kokott, [419] the Commission perceived the econometric model as simply a tool to carry out assessments of the concentration proposed. [420] However, the Advocate General added that, in the present case, the econometric model shows the effect on concentration on prices and though it '*undoubtedly constitutes an element on which the Commission essentially relied in its competition-law analysis for the purposes of the adoption of the decision at issue*'.[421]

The CJEU agrees with the Commission regarding the precarious value of the statement of objections, and the fact that its amendments, given its nature as similar to internal documents, do not have to be pursuant to the right of file access. However, the Commission can never '*modify the substance of an econometric model on which it intends to base its objections without that modification being brought to the attention of the undertakings concerned and allowing them to submit their comments in that regard*'.[422]

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[417] *Ibid*. para. 23.

[418] *United Parcel Service, Inc v Commission,* (*supra* note 408) para. 32.

[419] *Ibid*. para. 36.

[420] Case C-265/17 P, *Commission V United Parcel Service* SA[2018], EU:C:2018:628, Opinion Of Advocate General Kokott para. 36.

[421] *United Parcel Service, Inc v Commission,* (*supra* note 408) para. 39.

[422] *Ibid*. para. 37.

The attempt of the Commission to include the econometric model within the documents falling within the field of Article 17(3) of the Merger Implementing Directive, failed. The Advocate General, and later the CJEU, in relation to the principle of file access of Article 18(1) of the EUMR, state that undertakings should be able to submit observations on the objections raised against them and, never do it solely on its request base. Furthermore, the CJEU highlights the importance of the '*need for speed*' in merger proceedings, but it also adds that the latter should always be reconciled with the observance of the right of defence. On that point, the Advocate General argued that the undertaking should not expect nothing more than a '*brief and to-the-point description of the econometric model used by the Commission*'.[423]

The econometric model is used as a tool to predict nature of a merger analysis.
Over the last years, economics has gained significant importance in merger control, in fact, part of the reform which brought to the EUMR enforced nowadays as '*strengthen[ing]further the underpinning of the [Commission's] competition analysis' to allow for 'more rigorous testing of the economic models [the Commission applies] in [its] investigations*.'[424] However, where the CJEU wants to conduct a more '*economically detailed*' analysis in the competition proceedings it has to comply with the time-limits settled for the procedure, and more importantly, with the responsibility of the Commission to conduct a careful and impartial analyses and respect the right of defence of the undertakings concerned.[425]

The CJEU also adds that '*if [...] the Commission does not decide on the final version of the econometric model until a later date, then this delay cannot result in the rights of*

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[423] Opinion of Advocate General Kokott (*supra* note 420) para. 55.

[424] P. Lowe, Director-General Directorate General for Competition European Commission, Speech at the International Bar Association meeting: Future directions for EU Competition Policy (Sept. 20, 2002), http://ec.europa.eu/competition/speeches/text/sp2002_034_en.pdf.

[425] *United Parcel Service, Inc v Commission,* (*supra* note 408) para. 58-59.

defence of the undertakings concerned being prejudiced'[426]. The fact that the econometric model is not used as an exculpatory or incriminating piece of evidence does not mean that does not exclude the Commission from its duty to communicate the document to the parties and to give them the opportunity to submit observations on the objections raised against them.[427]

The argument raised by the Commission according to which the decision could not be annulled because the concentration would still result in a significant impediment to effective competition regardless of its effect on prices in two member States: Denmark and the Netherlands, could not be upheld. Failure to disclose the Commission's methodological choices, especially in the part regarding statistical techniques inherent to those models, would contradict with the objective of encouraging transparency in merger control process and subsequently it would undermine effective judicial review[428] .

The CJEU also endorsed that the breach of right of defence was sufficient to annul the Commission's decision. In fact, the CJEU gave right to the General Court when it observed that the applicant right of defence was infringed in the part where the applicant demonstrated that did, if the econometric model was addressed in its final version it would have not be able to better defend itself.[429] Through the final version of the econometric model, the Commission reduced from 29 to 15 the countries affected by the significant impediment to competition, so a more advantageous situation for the parties.

However, as shown by the Advocate General in its Opinion, the qualitative aspects highlighted by the Commission regarding the fifteen countries might have been less significant if the quantitative econometric assessments, which initially reinforced those

[426] *Ibid* para. 60.

[427] Opinion of Advocate General Kokott (*supra* note 420) para. 40 inter alia See Article 18(1) of the EUMR.

[428] *United Parcel Service, Inc v Commission,* (*supra* note 408) para. 55.

[429] *Ibid*. para. 56.

qualitative factors, became less dependable.[430] The question is on whether too much importance has been given to quantitative evidence and whether a rebalance with qualitative evidence is necessary.

In the UPS analysis, the Commission relied on internal documents, nevertheless without the econometric model showing the effect on prices of merger proceedings, the Commission would have solely been able to identify the problems in two Member States. So, had the Commission only relied on qualitative evidence, the transaction results would have been more realistic. At the same time, the sole use of quantitative evidence is insufficient to increase likelihood of clearance since it may not result in compliance with the outcome of the decision, with the latter being based on a very narrow foundation[431].

Additionally, the Advocate General noted that the undertaking could have defended itself more easily in case the significant impediment to effective competition occurred in solely two member states rather than in 15. Just like the hypothetical presentation of commitments to dispel the Commission's objection would have been more easily to do within two rather than 15 member states. [432]

Furthermore, even though the CJEU and the General Court recognized the possibility of the Commission to rely on documents amended solely in the theories or calculation part on which undertakings have not been able to submit observations on, they did not believe that this is what occurs in the present case. Here the econometric model on which the Commission had based its decision on, differs in a not negligible way as regards the variable used. In particular, the Commission had relied on continuous variables at the discrete variable at the estimation stage and at continuous variable at the prediction stage.[433] The CJEU added that, differently from what the Commission argued, the change

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[430] Opinion of Advocate General Kokott (*supra* note 420) para. 77.

[431] *Ibid*. para. 69-71.

[432] *Ibid*. para. 71- 73.

[433] Opinion of Advocate General Kokott (*supra* note 420) para. 66.

of variable used to analyse the model, and the latter's amendments, could have been '*intuitively'* identified by the undertakings concerned.[434]

It also relevant the behaviour of UPS in the further proceedings having as object the acquisition of TNT by FedEx. On 23 February 2022, UPS raised another appeal before the General Court claiming from a compensation of damages resulting from losses resulting from the Commission decision of 30 January 2013 to block UPS's merger with TNT but allowing TNT merger with FedEx in 2017. The CJEU issues the judgment on 21 December 2023[435] highlighting the lack of casual link between the infringement and the damages claimed, and thus generally reject the UPS's appeal.
The question here is whether any error made by the Commission in the merger control area, can trigger liability for the losses suffered by the parties. The legal principle on which this decision revolves around is Article 340 TFEU[436] on the non-contractual liability of the EU institutions for damages created to individuals in the EU.

Notwithstanding the possibility for UPS to develop a different, and probably easier, defence in case where the final econometric model had been delivered to the concerning undertakings, it cannot be stated that the prohibition on UPS/TNT transaction would have been approved had UPS' procedural rights not been breached.

The General Court,[437] argued that its results would have been different if the undertaking would have been so sure to prove that, if the error had not occurred, the outcome of the case would have been different. And since the Commission decision did not solely rely on what resulting from the econometric model, the infringement of the right of defence was not likely to have a decisive impact on the outcome of the merger control review.

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[434] *United Parcel Service, Inc v Commission,* (*supra* note 408) para. 67-68.

[435] Judgment of 21 December 2023, *United Parcel Service Inc v Commission*, Case C-297/22 P, EU:C:2023:1027.

[436] See Article 340 of the TFEU.

[437] Judgment of 21 December 2023, *United Parcel Service Inc v Commission*, Case C-297/22 P, EU:C:2023:1027.

Moreover, following the CJEU case-law of *Scheneider Eletric*,[438] the CJEU stated that the UPS's decision not to go ahead with the proposed transaction with TNT and of not submitting a new offer on its acquisition, resulted on breaking any direct causal link between the breach of procedural rights and the alleged damage.

Furthermore, UPS also claim a compensation of the breach of procedural right resulting from him being excluded from the merger procedure of FedEx/TNT.

Again, the CJEU centred its decision on the lack of casual link between the breach of the compensation right and the error of the Court. UPS and TNT had explicitly stipulated that in the event of the Commission's rejection of the merger between the two companies, they would share the risk and bear the potential payment of the break-up fee. Just like the fee payment stemming from the contractual agreement between the two parties, UPS's participation in the merger control process of the TNT/FedEx transaction was a result of UPS' free choice. As there was not direct link between the damages sought by UPS for the breaching of procedural right and the decision regarding FedEx acquisition of TNT, UPS's claim had to be categorically dismissed.[439]

Regarding the compensation of damage for the breaching of procedural rights is a representation of the European Union non-contractual liability of Article 340(2) TFUE[440] on which EU institutions can incur only if all the conditions are satisfied, namely the unlawfulness of the conduct alleged against the EU institutions, the fact of damage and the existence of a causal link between the conduct and that institution and the damage complained of. The General Court noted in its judgment of lack of the causal link either in relation to the alleged damage for the payment of the termination fee or for the alleged loss of profits suffered by UPS, and it further found no link to damage related to the cost associated with UPS' participation. Considering that the applicant did not challenge such

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[438] Judgment of 16 July 2009, *Commission v Schneider Electric*, C-440/07 P, EU:C:2009:459.

[439]*United Parcel Service Inc v Commission*, (*supra* note 408) para. 37-41.

[440] See Article 340 of the TFEU.

findings the absence of the link in relation to the three damages had to be upheld before the CJEU.[441]

Lastly, the damages from the loss of opportunity to implement the concentration represented a '*new head of damage*' fundamentally distinct from the damage of the loss of profit resulting from the prohibition of that concentration, and it cannot be considered as a minus in relation to the second. Given that the applicant presented such a request only in response to question put by the General Court, and the fact that the request was made out of time, the present action has been classified as inadmissible.[442]

4.3 Conclusions

In conclusion, the UPS saga has been significant for two main issues.
Firstly, it recalled the importance of the right of the defence in the merger control proceeding, and how its infringement may lead to the annulment of the Commission's decision. It also enshrined the importance of the econometric model in the merger control proceeding, and the significance of the quantitative aspect for analysing of the effects of the merger on the internal market. However, the CJEU, in accordance with the Advocate General Kokott's Opinion, highlighted the importance of balancing the right of defence, as illustrated under Article 18(1) and (3) of the EUMR, with the *'need for speed'* required for merger control proceedings. In fact, the judgment clarifies that solely material changes of the model be notified to the merging parties, and that no more than a brief *'to-the-point'* description of the model should be expected by the parties of the merger.[443]

Secondly, while with the *UPS v Commission*'s judgment of 2017 the CJEU confirmed the liability of the Commission for infringing the right of defence of the undertakings, it subsequently rejected the request for compensation damages raised by UPS in 2023. This

[441] *United Parcel Service Inc v Commission*, (*supra* note 408) para. 61-65.

[442] *United Parcel Service Inc v Commission*, (*supra* note 408) para. 68-71.

[443] Opinion of Advocate General Kokott (supra note 420) para. 55.

judgment represented the starting point leading to the 2023 judgment clarifying the scope of '*economic losses allegedly suffered due to the unlawfulness*', which UPS requested for the 2013 takeover veto. The latter centred on the importance of the causal link between the damages alleged by the applicant, and the Commission infringement, which was lacking in the present case.

The *UPS v Commission's* decision of 2023 was also significant in the part related to the raise of non-contractual liability of the EU institutions and the essential causal link that must be ensured between the standard to prove such damages and their causal link with the authority's error. The absence of such link makes any request for compensation of losses in connection with prohibition decision of the Commission to be inadmissible.

5. Commission Power of Investigation and Judicial Review

When a concentration raises serious doubts on the compatibility with the internal market, the Commission commence its investigation under Article 6(1) (c) of the EUMR.[444]

The Commission may decide on the transaction within solely one phase of investigation, when it considers that the concentration is sufficiently clear and does not need to be implemented with further proof or considerations. Possible scenarios are the approval of the transaction[445] (Article 6.1.b EUMR), the incompatibility of the transaction with the internal market [446](Article 6.1.a EUMR), or the approval of the transaction by subjecting it to further commitments (Article 6.2 EUMR). A fourth possibility, in case where it is uncertain whether the concentration may raise serious doubts to its the compatibility with the internal market, the opening of an *'in-depth'* phase of investigation of the Commission

[444] See Article 6(1) (c) of the EUMR.

[445] See Article 6(1) (b) of the EUMR.

[446] See Article 6(1)(a) of the EUMR.

may be opened.[447] Concluding this phase, the Commission decides, under Article 8 EUMR [448] on the compatibility of the concentration with the internal market.

The Commission may also decide on the approval of a merger submitted to commitments,[449] order interim measures to make the merger compatible with the internal market,[450] or revoke the decision in cases where the undertakings delivered wrong information or breached an obligation imposed by the Commission.[451] This phase of the investigation, usually lasting 90 days, is characterized by strong collaboration with the parties to the transaction and a detailed market investigation by the Commission.

The Commission thus owns the power to investigative and impose sanctions in cases where the merger does not respect the EUMR. Examples of such powers, strongly connected to those issued to the Commission under the Transparency Regulation, may be the Commission power to request information,[452] that to carry out one-stop investigation,[453] and that to impose sanctions for the breaching of EUMR provisions.[454]

Remarkable is also the role played by the EU Courts in merger proceedings. In fact, Commission decisions are subjected to judicial review of the EU Courts under Article 263 TFEU,[455] for issues like the lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law or misuse of

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[447] See Article 6(1) of the EUMR.

[448] See Article 8 of the EUMR.

[449] *Ibid*. para. (2).

[450] *Ibid* (5).

[451] *Ibid* (6).

[452] See Article 11 of the EUMR.

[453] See Article 13 of the EUMR.

[454] See Article 14 and 15 of the EUMR.

[455] See Article 263 of the TFEU.

powers. In cases of Commission's decision imposing fines or periodic penalty payments, the EU Courts have unlimited jurisdiction under Article 16 EUMR[456] and 261 TFEU.[457]

The judicial review of the EU Courts has always been considered as a significant tool to prevent a scenario of unlimited combination of power vested by the Commission and of insufficient control over it by the EU Courts. Remarkable was indeed the year of 2001, when the Commission issued a significant number of prohibition decisions, which were later annulled by the General Court. The General Court, in fact, demonstrated a strong preparation and looked deeply into both the Commission's findings of facts and into the interferences drawn from them when determining whether its analysis was affected by clear errors of judgment. Judgments like *Tetra Laval* of 2005 convey a clear message to the Commission for it to be more rigorous in its investigations.

Furthermore, the issue related to the time taken by the EU Courts to issue judgments has been resolved with the possibility to decide through an 'expedited procedure'. The latter is mostly used for prohibition decisions in order to avoid a long gap-time between the Commission's prohibition decision and the General Court's eventual judgment which may result in a changing of the market conditions.

5.2 C-12/03 P , *Commission v Tetra Laval*

On 15 February 2005, with the *Tetra Laval* judgment,[458] the CJEU clarified a fundamental issue related to the extension of the scope of judicial review of EU Courts in relation to the margin of discretion left to the Commission for economic matters; and subsequently on the '*standard of proof'* imposed to the latter in order to take a decision on the legality of a concentration. In essence, the CJEU adjudicated on the factual accuracy, reliability, and consistency of the evidence upon which the Commission relied, as well as whether

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[456] See Article 16 of the EUMR.

[457] See Article 261 of the TFEU.

[458] Judgment of the Court 15 February 2005, *Commission v Tetra Laval*, Case C-12/03 P , EU:C:2005:87.

that evidence encompassed all pertinent information and could substantiate the conclusions drawn.[459]

Firstly, the recognition of the General Court as the primary authority for resolving disputes regarding the Commission's utilization of evidence and economic evaluation in merger control proceedings. After this judgment, the CJEU tended to dismiss appeals claiming that the General Court scrutinized the Commission's assessment excessively, thus exceeding the permissible limits of judicial review. Had the CJEU supported the Commission's argument, the General Court would have been deterred from subjecting the Commission's merger decisions to rigorous scrutiny. Consequently, this would have significantly restricted the efficacy of judicial review, especially given the Commission's evolving '*more economics-based approach*' and the growing significance of intricate factual and economic evidence in merger cases.

Secondly, the judgment did not prohibit conglomerate mergers under the Merger Regulation but imposed strict legal and practical limitations on the Commission's ability to challenge such mergers based on '*leveraging theories'* of competitive harm. The CJEU, finding that the cause-and-effect relationships underlying leveraging theories were uncertain and difficult to establish, mandated a high standard of evidence to support conclusions regarding post-merger leveraging developments. Additionally, by requiring a case-by-case of the effectiveness of behavioural commitments, such as commitments to refrain from bundling different products, the CJEU's judgment has diminished the likelihood of the Commission pursuing leveraging theories in merger reviews. This has forced the Commission to reconsider its approach to evaluating commitments, leading to the rejection of even meticulously to crafted long-term behavioural commitments that adequately address conglomerate concerns.[460]

The case concerned the acquisition of Sidel SA by Tetra Laval BV, and the facts of the case are the following.

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[459] *Tetra Laval II (supra* note 458) para. 39.

[460] U. Quack, C. Ehlermann, J. Burling, J. Ratliff, S. Kim, D. Melamed, & W. Kolasky, *'Antitrust and Competition Law Update: Tetra Laval--A landmark judgement on EC Merger Control'*, Wilmer Cutler Pickering Hale and Dorr Antitrust Series. Published in March 2005, Working Paper 51. Available at https://law.bepress.com/wilmer/art51.

Tetra Laval BV (Tetra) was a French company part of the Tetra Laval group which also involves Tetra Pak company, leader in the cartoon packing sector, and other companies active in the plastic sector mainly as converter, in particular by producing and suppling empty packaging to producers of high-density polyethylene bottles (HDPE). Sidel SA (Sidel), on the other hand, was a French company leader in the production and supply of SBM machines. SBM machines were stretch-blow-mounding machines used to produce plastic bottles (PET). Furthermore, Sidel was also active in barrier technology to make PET compatible with gas and light.
On 27 March 2001 Tetra proposed the acquisition of the entirety Sidel's shares through a public bid. On 18 May 2001 the Tetra notified to the Commission the proposed concentration with Sidel under Article 3(1)(b) of the Regulation No. 4064/89. Following the notification, the Commission argued that the operation raised serious doubts on the compatibility with the common market. After analysing the case under Article 6(1) of Regulation No. 4064/89, the Commission blocked Tetra's acquisition of Sidel due to the conglomerate effects that the merger would have on the market, particularly the impact of combining products from neighbouring markets. The Commission argued that Tetra's acquisition of Sidel would enable Tetra to persuade its customers transitioning to PET to opt for Sidel's SBM machines, thereby strengthening its dominant position in the carton packaging market by eliminating a significant competitor like Sidel.[461] The Commission argued that Sidel's acquisition would have enable Tetra to leverage its dominance in the carton packaging market to achieve dominance in the neighbouring plastics packaging market.[462]

Tetra Laval brought and action for the annulment of the contested decision on 15 January 2002. On 30 January 2002 the Commission adopted, on the base of Article 8(4) of the Regulation No. 4064/89, a decision setting out measures to restore condition of effective competition. On 25 October 2002, the General Court annulled the Commission decision

[461]Commission Decision of 31 January 2003, *Tetra Laval/Sidel*, Case COMP/M. 2416, , [2002] OJ L227/02 available at https://ec.europa.eu/competition/mergers/cases/decisions/m2416_62_en.pdf.

[462] M. F. Bay & J. R. Calzado '*Tetra laval II: the coming of age of the judicial review of Merger decisions'*, World Competition, Issue 4, published in 2005, pp. 433-453.

in its entirety.[463] The latter stated that the Commission had mistaken into judging how Tetra strengthened its dominant position in the carton sector and gave Tetra conditional approval to close the transaction in January 2003. In this case, the time reported under Article 10(5) of the Regulation No. 4064/89 might be re-started, and the Commission shall re-examine the case. On 8 January 2003, the Commission appealed before the CJEU requesting to set aside the judgement of the General Court and subsequently declared the concentration to be incompatible with the common market.

The Commission's appeal rested on several legal grounds, with the most pivotal being the issue concerning the standard and burden of proof. The Commission contended that the General Court had overstepped its jurisdiction under Article 230 TFEU by assessing its decision in terms of factual elements and the substance of the parties' arguments.[464]

The General Court found that the Commission had overestimated the anticipated growth in the PET sector and that the evidence provided by the Commission was insufficient to demonstrate that potential leveraging would have resulted in the establishment or reinforcement of a dominant position in the relevant markets by 2005.[465]Additionally, the General Court noted that the Commission did not adequately demonstrate the existence of separate markets for sensitive and non-sensitive products for SBM machines. And finally, the General Court concluded that the Commission failed to establish that Tetra's dominant position in the carton market would be strengthened following its acquisition of Sidel, as such an assertion could not be automatically inferred solely from the existence of a dominant position.[466]

The Commission presented five grounds of appeal, yet the pertinent issue centred exclusively on the first two grounds of appeal, the former addressed the CJEU's decision regarding the extent of judicial review in the substantive assessment within the EU merger control and the standard of proof required of the Commission. While the latter has

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[463] Judgment of 25 October 2002, *Tetra Laval B/Commission*, Case T-5/02, ECLI:EU:T:2002:264.

[464] See Article 230 of the TFEU.

[465] *Tetra Laval II (supra* note 458) para. 15.

[466] *Ibid*. para. 16.

reported a violation of Articles 2 and 8 of Regulation No. 4064/1989, arguing that the Commission did not take into account the commitments offered by the entities resulting from the merger to avoid leveraging practices and, moreover, did not consider, as a possible remedy, the commitment not to engage in abusive conduct.

The Commission contends that the General Court deviated from the '*test of manifest error of assessment'* and instead demanded '*convincing evidence'*, thereby breaching Article 230 EC Treaty by disregarding the Commission's discretion in complex factual and economic matters. It further argued that for evaluating whether the prohibition decision was sufficiently justified '*the General Court has […] exceeded its role, which is to review the administrative decision of the Commission for clear errors of fact or reasoning, and not to substitute its view of the case for that of the Commission*.'[467] On the other hand, in relation to the standard of proof, the Commission claimed that '*the General Court has imposed a disproportionate standard of proof for merger prohibition decisions [thus] upset[ting] the balance between the interests of the merging parties and the protection of consumers, which is provided for in the Merger Regulation*'.[468]

In assessing judicial review, as per the CJEU's judgment in the *Kali and Salz*[469] and Advocate General Tizzano's Opinion on *Tetra Laval's* case[470], it was crucial to ascertain, '*Without entering into the merits of the Commissions assessments, […] whether the factual information on which such assessments are based is accurate and whether the conclusions drawn as to fact are correct; whether the Commission undertook a thorough and painstaking investigation, and in particular whether it carefully inquired into and took sufficiently into consideration all the relevant factors; and whether the various passages in the reasoning developed by the Commission in order to arrive at its*

[467] Commission appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice, IP/02/1952, published on 20 December 2002, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_02_1952.

[468] *Ibid*.

[469] Judgment of 10 December 1969, *Commission v France*, Joined Cases 6/69 and 11/69, ECLI:EU:C:1969:68 (further referred as *Kali & Salz*).

[470] Case C-12/03 P, *Commission v Tetra Laval,* Delivered on 25 May 2004, Opinion of Advocate General Tizzano.

conclusions in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness'. [471] In substance the key for the judicial review was not much its *'legal standard'* but more the way Courts applied it.

The CJEU found the first ground of appeal unfounded and stated that the General Court infringed Article 230 TFEU when exercising judicial review, the concentration and verifying its incompatibility with the common market under Article 2(2) and (3) of the Regulation No. 4064/89 but did not satisfy the standard of proof required.

The CJEU recognized the Commission discretion in the part concerning the economic matter when giving proof on a certain decision, however, the CJEU added that such discretion did not deprive the European Courts of the duty to review on the Commission's interpretation of information of an economic nature. The General Court, indeed, argued that for conglomerate mergers, as the one occurring in the present case, the Commission needed to present elements of evidence similar to those needed with regard of a situation of collective dominance.[472] Conglomerate mergers must be treated just like other mergers, and they could be impeded under the EUMR as long as they create/strengthen a dominant position in the common market or in a substantial part of it and that, as a result, effective competition will be significantly impeded.[473] Nevertheless, the General Court added that from the evidence presented by the Commission in support of Article 2(3) of the Regulation No. 4064/89, such as its PCI report, it was not possible to either estimate such a growth in the use of PET for 2005 or to affirm that PET could displace HDPE as the main material competing with carton by 2005. The CJEU gave right to the General Court when it stated that the growth in the use of PET packaging for sensitive products, in relation to the limits applicable to the review of an administrative decision by the European Courts.

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[471] Opinion of Advocate General Tizzano (*supra* note 470) para. 88.

[472] *Tetra Laval II (supra* note 458) para. 40.

[473] Commission Decision of 31 January 2003, Tetra Laval/Sidel, Case COMP/M. 2416, [2002] OJ L227/02 para. 120 availabile at https://ec.europa.eu/competition/mergers/cases/decisions/m2416_62_en.pdf. See also Article 2(3) of the Regulation No. 4064/1989.

The CJEU agreed with the level of review made by the General Court on the evidence showed by the Commission, which merely set out that the latter's analysis was incomplete. On this regard, the Court pointed out that the General Court could discover only throughout various findings of the contested decision that the perspective of the Commission of the growth of the PET market, and how the operations leveraged its position in the carton market especially in relation to packaging UHT milk was exaggerated since *'fresh milk is not a product for which the marketing advantages offered by PET have any particular importance'*.[474]

In conclusion, the CJEU ruled that conglomerate mergers are legal in so far as the Commission assess their anti-competitive effects under Article 2 of the Regulation No. 4064/89 by showing '*convincing evidence'*.

The CJEU in the present case emphasizes the '*adequacy'* of judicial review and how the scope of application of thereof, especially for mergers with conglomerate effects, where a *'prospective analysis of the situation'* is more than necessary.[475] The substantial question is whether this interpretation of judicial review can be solely applied to mergers with conglomerate effects, or its scope is unlimited? As results from the CJEU case-law, the Court has already adequate its judicial review to the specific case in some other judgments such as the '*Kali and Salz's* case,[476]concerning a clearance decision.

Also, the Advocate General highlighted that the judicial review should ascertain '*whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness*'.[477]

The following question is whether this interpretation given to the judicial review can also be applied for the EUMR, since *Tetra Laval* judgment was decided under the Regulation

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[474] *Idib*. para. 46-47.

[475] *Tetra Laval II (supra* note 458) para. 39.

[476] Judgment of 14 May 1975, *Kali und Salz AG and Kali-Chemie AG v Commission of the European Communities*, Joined cases 19 and 20-74, ECLI:EU:C:1975:58.

[477] Opinion of Advocate General Kokott (*supra* note 470) para. 88.

No. 4064/1989. The jurisdictional power recognized by the CJEU to the General Court on reviewing on the discretion left to the Commission, especially that of economic nature, is conferred by the decision at stake at paragraph 38, where the CJEU states '*the basic provisions of the Regulation [No. 4064/1989] , in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Community Courts of the exercise of that discretion*'. [478]

The amending of the test under Article 2 of the Regulation No. 4064/1989, which became the SIEC[479] with the EUMR, did not change this. The CJEU confirmed the fundamental role of the General Court in the judicial review and affirmed its position in continuing to exercise judicial self-restraint concerning technical matters. The sweeping nature of judicial review was especially crucial given the rising complexity of economic analysis and evidence presented in disputed merger cases. For merging parties, the extended duration of proceedings before the General Court already hampers the practical effectiveness of judicial review. If the Commission's decisions were shielded from judicial scrutiny solely due to the perceived complexity of economic assessments, litigation in merger cases would become even less viable.

The other relevant point of the first ground of appeal relates to the stand of proof required by the General Court for merger decisions, the two arguments were indeed strictly connected. President Versterdof argued that '*albeit different concepts, the standard of proof and standard of review are so closely linked to become inseparable*' and '*the intensity of judicial control […] will fluctuate depending on the underlying standard of proof required by the administrative body having taken the decision on the merits […]*'.[480]

The Commission argued that the General Court in *Tetra Laval* had requested to produce '*convincing evidence*' which was higher than the standard of request under the *Kali &*

[478] *Tetra Laval II (supra* note 458) para. 38.

[479] SIEC is the acronym of '*significant impediment of effective competition'*.

[480] D. Bailey, *Standard of proof in ec merger proceedings: A common law perspective*. Mergers and Acquisitions: Volume III (pp.845-850) published by Taylor and Francis Ltd on 2 March 2017.

Salz of a '*cogent and consistent body of evidence*'.[481] The CJEU decision on rejecting the appeal of the Commission was simple to take, and mostly relied on the statement made by Tetra at paragraph 32 of the judgment at stake, which pointed out that *'the Commission's first ground of appeal is merely a semantic discussion of the terms used in the judgment under appeal and does not relate to the substantive examination carried out by the Court of First Instance*'.[482]

The CJEU established that the evidence on which the CJEU relied on must be '*actually accurate, reliable and consistent but also [...] contain[ing] all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'*.[483] In other words, the General Court's demand for thorough examination and compelling evidence to prove the anti-competitive effects of a merger is not a new standard imposed on the Commission. Rather, it underscored the fundamental role of evidence in substantiating the merits of a merger decision.

Furthermore, the CJEU added that conglomerate-mergers, as the one occurring in the specific case '*call[...] for a close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition on the reference market'*[484] and, that such examination must be supported by '*convincing evidence thereof*' considering that the effects of these kind of mergers were generally neutral.[485] The General Court replied to the statement of the Commission on the high degree required for the standard of evidence by stating that the adjective '*convincing*' was actually referred to '*essential function of evidence*', which was that of '*establish[ing] convincingly the merits of an argument or, as in the present case, of a decision on a merge*r'.[486]

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[481] Judgment of 14 May 1975, *Kali und Salz AG and Kali-Chemie AG v Commission of the European Communities*, Joined cases 19 and 20-74, ECLI:EU:C:1975:58.para. 229.

[482] *Tetra Laval II* (*supra* note 458) para. 32.

[483] *Ibid.* para. 39.

[484] *Tetra Laval II* (*supra* note 458) para. 40.

[485] *Tetra Laval I* (*supra* note 463), para. 155.

[486] *Tetra Laval II* (*supra* note 458) para. 41.

The Advocate General argued that it was the Commission itself, in the *Kali & Salz*'s case, to impose a '*strong burden of proof*', or the obligation to produce '*solid proof*' of decisions.[487] He added that, for the Commission to establish the creation/strengthening of a dominant position resulting in a significantly impediment in common market or in a substantial part of it, it was sufficient to gather solid elements in the course of thorough and painstaking investigation in support of such a statement.[488] Given its nature, conglomerate mergers required a stronger standard of proof, since the Commission should be able to carry out predict events '*which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted*'.[489]

Subsequently, the CJEU, in paragraph 43 of the decision, pointed out two issues concerning the Commission's task about the prospective analysis distinguishing merger control decisions. Firstly, it was necessary to assess the factors influencing the competitive landscape of a specific market, which could be influenced by the proposed merger. Secondly, this assessment should involve closely examining the potential cause-and-effect chains to determine which was most likely to occur, the so-called leveraging theory.

The expression '*convincing evidence*' was significant for understanding that the CJEU did not raise in general the standard of proof, nor it made it harder for conglomerate mergers, it simply requested that the proof was sufficient to '*support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it* would *be plausible*'. So the CJEU did recognize the lawful approach of the General Court in requiring the application of the '*test of manifest error of assessment'* for both the judicial review and the standard of proof', [490] and it also recognized the peculiarity of conglomerate mergers and affirmed the necessity of a stronger quality of proof in the

[487] Commission Decision of 14 December 1993, *Kali- Salz/MdK/TreuhandSee*, Case No IV/M.308, 94/449/EC, OJ L 186/0038, available at https://eur-lex.europa.eu/eli/dec/1994/449/oj.

[488] Opinion of Advocate General Kokott (*supra* note 470) para. 74.

[489] *Tetra Laval II* (*supra* note 458) para. 42.

[490] *Tetra Laval II* (*supra* note 458) para. 42.

specific case, given the power of the latter in predicting future events over a long period of time.[491]

Regarding the question on whether or not the standard of proof required should be applicable for both '*prohibiting'* and '*clearance'* decisions, the CJEU did not explicitly stated that the '*convincing evident'* standard of proof effectively created a presumption to be applied solely to prohibition decisions. In fact, regardless of the specific reference to standard of proof required for conglomerate mergers,[492] in the following parts the CJEU talks more in general of the standard of proof, and which how *'convincingly'* was more linked to the effectiveness of the function of the proof, than on the thigs that such proof had to prove.

Furthermore, the CJEU stated that the task of the Commission is that to ascertain which scenario is most likely to come into effect, which would eventually include a possible clearance decision or a prohibition one. The Commission must thus '*balance the probabilities*' that the anti-competitive effect comes into existence after the merger. As regard this eventual distinction between clearance and prohibition decisions and standard of proof, the Court claims that it in this decision it basically relies on the standard of proof settled by *Kali & Salz*, which concerned a '*clearance decision'*.[493] In substance, the Commission must always sustain its decision with *'convincing evidence'* notwithstanding of its outcome.

The second ground of appeal the Commission argued that the General Court infringed Articles 2 and 9 of the Regulation No. 4064/89, in so far as the General Court required the former to firstly taking account of the impact which the illegality of certain conduct had on the incentives for the merged entity to engage in leveraging and, secondly, to assess, as a potential remedy, the commitments of not to adopt any abusive conduct.

491 *Ibid.* para. 44.

492 *Ibid*.

493 Judgment of 14 May 1975, *Kali und Salz AG and Kali-Chemie AG v Commission of the European Communities*, Joined cases 19 and 20-74, ECLI:EU:C:1975:58. para. 22.

Per the General Court's ruling, the Commission had to assess whether a company's motivation to partake in leveraging activities might be diminished or eliminated due to the illegality of the behaviour, the probability of detection, actions by competent authorities at both the EU and national levels, and potential financial penalties[494]. In other words, the Commission contested the part of the judgment alleging a '*lack of foreseeable conglomerate effect*' on the merger, based on the behavioural commitments offered by Tetra , namely to manage Sidel and Tetra Pak as separate entities and not to breach Article 82 EC Treaty (now Article 102 TFEU). Both commitments would have resulted in prohibiting abuses of a dominant position.

This ground of appeal was strictly linked with the former, here the CJEU argued that, since in order to prove anti-competitive effects of a conglomerate merger under Article 2 Regulation No.4064/89, it was necessary to take into account all the '*convincing evidence'* of the case, including the commitments presented by the parts, including the factors liable to reduce or eliminate the anti-competitive effects of the conduct.[495]

The CJEU found part of the second ground as well founded, however, the request of annulment of the contested decision was based on the Commission's refusal to take into account the behavioural commitments, a stance rejected by the former.[496]

At first, the CJEU gave right to the Commission in the part where the General Court erred in law by rejecting the Commission's conclusions on the adoption by the merged entity of conduct likely to result in leveraging. The CJEU argued that such a requirement would be counter to the principle of the merger control under the Regulation No. 4064/89 which ensured an *ex-ante* control in order to prevent anti-competitive effects before they come into existence. The CJEU agreed with the General Court insofar as the Commission failed, when establishing the anti-competitive conduct of Tetra, at taking in consideration all the relevant incentives and disincentives of Tetra's conducts, including the commitments offered by Tetra when assessing such infringement and '*the possibility that*

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[494] *Tetra Laval I (supra* note 463),para. 159.

[495] *Tetra Laval II* (*supra* note 458) para. 71.

[496] *Ibid*. para. 89.

the conduct is unlawful'.[497] A lasting alteration of the structure of the relevant market would have resulted in a significant impediment to effective competition as long as the concentration as direct and immediate effect of creating conditions in which abusive conduct was possible and economically rational.[498]

The Commission claimed that when assessing such a scenario, the Commission had to demonstrate that the future creation of a dominant position in the relevant market would be penalized under Article 82 EEC Treaty in several legal orders.[499] The CJEU replied by saying that such a statement was '*too speculative*' and to require it '*would not allow the Commission to base its assessment on all of the relevant facts with a view to establishing whether they support an economic scenario in which a development such as leveraging will occur*'.[500]

The Commission swiftly rejected Tetra Laval's commitments during the administrative proceedings, deeming them akin to a mere pledge to abstain from unlawful behaviour and thus inadequate according to the precedents set in the *Gencor* decision.[501] The CJEU replied by highlighting the distinction occurring between the facts of the *Gencor* and that of *Tetra Laval*. In fact, the SBM market, which the Commission aimed at protecting, could only be altered by leveraging, since the merger would have resulted in the strengthening of Tetra's position in the carton market.[502]

On that regard, the CJEU stated that the Commission should have had considered the commitments offered by Tetra when assessing the creation of a future dominant position of the latter in the SBM market, since the latter where able to prevent the creation of a dominant position for Tetra in the PET market within the meaning of Article 2(2) and (3)

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[497] *Tetra Laval II* (*supra* note 458) para. 74.

[498] *Ibid.* para. 79.

[499] *Ibid.* para. 77.

[500] *Ibid.*

[501] Judgment of 25 March 1999, *Gencor v. Commission,* Case T-102/96, ECLI:EU:T:1999:65.

[502] *Ibid*. para. 82 -84.

of the Regulation No. 4064/89.[503]The commitments offered by Tetra Laval, in form of behavioural remedies, not to bundle Tetra Pak's carton packaging products and Sidel's SBM machines, would have been sufficient to prevent the structural changes in the SBM market. The excuse given by the Commission when refusing to accept these behavioural remedies, '*as a matter of principle'* [504] could not be sustained.

In conclusion, the CJEU's ruling reaffirmed that meticulously devised behavioural remedies can legitimately address the Commission's apprehensions in conglomerate cases. Specifically, in situations like the Tetra Laval decision, a behavioural commitment could represent the sole viable remedy, as the structural impacts of an action may only manifest in the future, following potentially anti-competitive behaviour.

5.3 Conclusions

Tetra Laval II judgment concluded that the judicial review of merger decision should be straightforward, and the evidence supporting it effectively convincing, however, the administrative discretion of the Commission, and thus the separation of powers at EU level should always be respected.

After this judgment, the Commission aimed at improving its investigation and the reasoning of its cases by introducing a series of internal and procedural changes, such as the chief economist, peer review, regular meetings with the merging and third parties, requesting more information from merging parties.

This judgment was also helpful for merging firms, which are now more aware of the potential of judicial review and prevent themselves to fall in the so called *'grey-zone'*, which related to situation where it is hard to foresee the effects of the notified transaction. The Advocate General pointed out that, regardless of the outcome of the investigation,

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[503] *Tetra Laval I (supra* note 463) para. 161 inter alia *Tetra Laval II* (*supra* note 458) para. 85.

[504] *Tetra Laval I (supra* note 463), para. 429.

such as the clearance or prohibition decisions, the Commission is under the obligation to clear the transaction.

Additionally, the judicial review has become a part of the total procedure of merger control, and it gets incorporated in the general time taken to evaluate the merger. This approach speeds up several decisions under the EUMR, which, also in compliance with the principle of the '*need for speed'*, were decided in less than seven months. The Advocate General Tizzano also stressed the intensity of the review as resulting from Tetra Laval is proportional to the scope of '*review of legality'*, since it resulted to be integrated with the power of inquiry and investigation belonging to the Commission.

For what regards the standard of proof, the Commission is still relying on that outcoming from the Tetra's decision when assessing a decision under Article 2(2) or 2(3) EUMR. Considering the principle resulting from the judgment according to which '*the essential function of evidence […] is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger*',[505]it looks natural that the CJEU is requiring higher standard for those new theories of harm effecting competition. The CJEU ruling also carries wider significance, particularly concerning the division of roles between the Commission as an administrative entity and the EU Courts as a reviewing body. It serves as a notable reminder that the EU Courts were prepared to thoroughly examine the Commission's merger assessments based on the presented evidence.

[505] *Tetra Laval II* (*supra* note 458) para. 43.

CHAPTER 3:

SUBSTANTIVE ASPECTS OF MERGER CONTROL

1. The SIEC Test

Article 2 of the EUMR[506] is responsible for determining whether a concentration, once the Commission's jurisdiction is confirmed, would lead to a significant impediment to competition.

It is under Article 2 EUMR that the SIEC test develops. This test is crucial to merger control, as any decision by a competition authority to approve or block a transaction hinge on an economic assessment grounded in this substantive framework. Mergers that significantly impede effective competition are prohibited under the EUMR. This test enables the Commission to adopt a more effects-based approach when evaluating a concentration.[507]

Article 2(1) of the EUMR enounces two factors that the Commission should consider when making its appraisal. The so-called '*appraisal criteria'* of Article 2(1) are:

'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 outwit the Community:

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives avail- able 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'.

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[506] See Article 2 of the EUMR.

[507] H. Stakheyeva, *Test SIEC*, *Global Dictionary of Competition Law*, Concurrences, Art. N° 89155.

Additionally, Article 2(1) of the EUMR does not establish a hierarchy among the factors the Commission should consider and emphasizes that these factors are not exhaustive, requiring the Commission to take all relevant elements into account when assessing a merger.

Article 2(2) EUMR aims at preventing the Commission to impede mergers which would not create a significant impediment to effective competition. Whereas Article 2(3) EUMR states that in case the concentration would raise such effect, the Commission should prohibit its realization.

In both Article 2(1) and (2) EUMR it is relevant the concept of dominance. Within its original version under the Regulation No 4064/89, the SIEC test examined whether a concentration would have created or strengthened a dominant position thereby significantly impeding effective competition. With the uprisal of the EUMR, the question changed into whether the merger would lead to a SIEC, namely a significant impediment to effective competition, by creating or strengthening a dominant position. The reason of such upgrade is including the issue of '*non-collusive oligopoly'*, raising after the *Airtours*,[508] within the meaning of such a test.

Furthermore, the current version of the test goes beyond the mere concept of dominance. The SIEC test indeed, captures transactions that do not necessarily create or strengthen a dominant position but can still cause an impediment to competition, for example the non-collusive oligopoly which creates coordinated effects between the parties.[509]

Albeit dominance remains a significant factor in leading to a substantial impediment to effective competition, a merger can no longer be blocked solely on the grounds of creating a dominant position if a robust post-merger competitive environment is maintained. It is the Commission's responsibility to determine whether the merged entity would be capable

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[508] Judgment of 6 June 2002, *Airtours plc v Commission of the European Communities,* Case T-342/99, ECLI:EU:T:2002:146.

[509] H. Stakheyeva*, Test SIEC, Global Dictionary of Competition Law, Concurrences, Art. N° 89155.*

of impeding effective competition in the market, with the creation and reinforcement of a dominant position still being the primary consideration in this assessment.[510]

The major difference between the SIEC test and the dominance test can be seen in cases of concentrations not creating a dominant position or strengthen an existing one, but for that where the parties of the transaction can increase the price unilaterally after the merger.[511] When examining the nature of a concentration and its potentiality to significantly impede effective competition, the Commission will observe several factors, for example the structure or all related markets, the potential competitors, market shares of those part of the concentration, and convenience of access to market and inputs by these undertakings. The competitive conditions existing at the time of the merger are another relevant comparison for evaluating the effects of a merger.[512] Thereby, it is a duty of the Commission to prove, through convincing evidence, that the merger is incompatible with the internal market.

The burden of proof imposed upon the Commission when assessing the impediment to competition raised to very high standards after the upgrading of the SIEC test. In fact, after the inclusion of collective dominance within the test, the burden of proof has been raised up to including collective dominance and its unilateral effects doctrine within such test. Within an oligopolistic market, indeed, dominance and coordinate effects are not required as long as a significant impediment to effective competition can be realized through unilateral effects, such as unilateral price increase.[513] However, it is a duty of the Commission to establish when such a price increase is significant enough to establish an impediment to competition.

Into the Horizontal Merger Guidelines, the Commission states that '*A number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. Not all these factors need to be*

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[510] R. Bailey & D. Whish, *Competition Law (10th edition),* published on September 2021, Oxford University Press, Oxford, United Kingdom, 2021, pp 911-912.

[511] *Ibid*.

[512] *Ibid*. pp.922.

[513] *Ibid*. pp. 918.

present for such effects to be diagnosed. Nor should this be considered an exhaustive list.'[514] Subsequently, a list of factors which should be taken into account when assessing that a certain merger leads to a '*significant price increase in the relevant market*' is showed.[515] Nevertheless, these Guidelines do not establish how a significant price increase may be distinguished from an unsignificant one.

In essence, it is still dubious to guarantee when a price increase is significant enough for prohibiting a competition, and what degree of closeness of competition between the parties is harmful and in which circumstances. Uncertain is also the value of the econometric models used by the Commission for its substantive merger analysis. The Commission acknowledges that such a model alone cannot determine whether a specific outcome is legally significant.[516]

In the following paragraphs it will be discussed how the CJEU dealt with the SIEC test and its evolution, and the general analytical approach toward mergers all in the light of Article 2 of the EUMR. Additionally, a focus will be made on the burden of proof necessary for competitive harm and efficiencies, the value of quantitative analysis, the meanings of *'impediment competitive effect'* and '*closeness of competitors'*, and the definition of collective dominant position. The judgments analysed in this chapter that dealt with this scenario are *Airtour v Commission* , *France v Commission*, *Tetra Laval* and *Impala*.

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[514] Horizontal Merger Guidelines para. 45-48.

[515] *Ibid*. para. 44.

[516] W. Berg & M. Mudrony*, A Year of In-Depth Assessment—EU Merger Control 2015, 37.*

EUR. COMPETITION L. REV. 215 (2016); Werner Berg & Sophia Real, How Close Is Too Close? A Critical Review of the European Commission's Assessment of Closeness of Competition, 7 J. EUR. COMPETITION L. & PRAC. 442, 453 to 455 (2016).

1.1 T-342/99, *Airtours plc v Commission of the European Communities*

The Judgment of *Airtour v Commission*[517] settled the conditions that must be met for a finding of collective dominance under the European Merger Control. With such a ruling the General Court overruled, for the first time, on review, a merger prohibition by the Commission.

On 29 April 1999, Airtours pls, a British company active in the tour operator and package holiday supply sector, announced and notified the Commission under Article 4 of the Regulation No 4064/1989 of its intention to acquire all the shares of its competitor ‚First Choice plc. Following the necessary investigations and issuing the applicant a statement of objections under Article 18 of the Regulation No 4064/1989, the Commission concluded that the proposed merger would have created a collective dominant position in the United Kingdom short-haul package holiday market. In particular, the Commission believed that there would have been an incentive for the operators to restrict market capacity, thereby conflicting with the common market. On 2 December 1999, Airtours pls filed an action before the General Court seeking annulment of the decision.

Relevant in the present case was the second plea alleged by the applicant which challenged a breach of the principle of legal certainty and infringement of Article 2 of the Regulation No 4064/1989[518] and that of Article 253 of the EC Treaty *'inasmuch as the Commission applied an incorrect definition of collective dominance in its appraisal of the present case'.* [519]

Starting with the statement that a concentration was deemed incompatible with the internal market inasmuch as it created or strengthened a dominant position within that market, the Commission assessed that the merger between Airtour plc and First Choice plc would have led to the creation of dominant position and significantly impeded competition in the common market or substantia part of it. More specifically, the

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[517] Judgment of 6 June 2002, *Airtours plc v Commission of the European Communities,* Case T-342/99, ECLI:EU:T:2002:146.

[518] See Article 2 of Regulation No 4064/1989.

[519] *Airtours plc v Commission of the European Communities* (*supra* note 517) para. 48-49.

Commission believed that the concerned transaction would have resulted in the creation of a dominant oligopoly among the three remaining undertakings in the short-haul package holiday market in the United Kingdom.

Before the proposed merger, the Commission could have never had assessed the existence of an oligopolist market, since it was impossible and unprofitable for the four tour operators present on the market (Airtours, FirstChoice, Thomson and Thomas Cook) to restrict their capacity to act freely in order to increase prices and revenues. [520] It was thus the Commission's responsibility to demonstrate that, considering the characteristics of the relevant market, the merger would have led to the establishment of a collective dominant position that would restrict competition due to the reduction in the number of competitors from four to three.

The Commission argued that the proposed merger would leave only three major tour operators—Airtours/First Choice, Thomson, and Thomas Cook—controlling a combined 79% of the market. This concentration of power, the Commission noted, would likely enable these operators to tacitly coordinate by reducing capacity below what would be expected in a truly competitive environment, ultimately driving prices higher than they would otherwise be.[521]

Into its general considerations, the General Court highlights that in order for a collective dominance to be verified three conditions must be fulfilled.[522]

Firstly, each member of the dominant oligopoly, or collective dominance, must be able to know how the other members were behaving in order to control whether or not they were complying with the common policy. Therefore, a sufficient degree of market transparency was necessary to ensure such a condition.

Secondly, undertakings part of the oligopoly must find a constant and sustainable advantage in taking part to the collective dominance. In other words, adequate deterrents

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[520] *Airtours plc v Commission of the European Communities* (*supra* note 517) para. 76.

[521] *Ibid.* para. 77.

[522] *Ibid.* para. 62, the three conditions for the existence of a collective dominant position are all listed in paragraph 62.

were necessary to ensure the long-term incentive not to depart from the common policy. Only when all the participants maintained the pre-established parallel conduct for a long period that all can benefit from the dominant oligopoly.

Thirdly, it had to be proved that the foreseeable reaction of current and future competitors, and of consumers had not jeopardies the results expected from the common policy. Therefore, that policy had to be able to resist the policies of external factors.

The evidence produced by the Commission to assess that a merger might create a situation of collective dominance had to be clear and convincing. Article 2 of the Regulation No. 4064/1989 confers upon the Commission a certain margin of discretion when alleging the impact of a merger on competition in the concerned market, especially with respect to the assessment of the economic nature of that merger.

In its analysis the Commission stated that, the way in which the market previously operated and the fact that there was no impediment to competition in such market, were not relevant factors when assessing the creation of a dominant position resulting from the proposed operation. Thus, the crucial question raised by the Commission is '*whether the proposed operation would alter current market conditions in such a way that the leading operators would no longer act in the same way as they have done in the past*'.[523]

The General Court observed that, considering that the duty of the Commission was evaluating if the concentration might have resulted in a significant impediment to effective competition in the internal market, the level of competition in the relevant market before the transaction was a decisive factor to take into consideration when assessing whether a collective dominant position had been created for the purpose of the Regulation No 4064/1989. The General Court added that the statement of the Commission according to which '*there is already a tendency towards collective dominance in the market at present most especially as regards the setting of capacity*' [524] was not

[523] *Ibid.* para. 81.

[524] Decision of the Commission of 11 September 1999, *Airtours /First Choice*, Case No IV/M.1524 , para. 128 to 138, available at https://ec.europa.eu/competition/mergers/cases/decisions/m1524_en.pdf.

sufficiently justified and no reference was made to the level of competition prior to the notification which appeared necessary in such a stance.

The Commission supported its argument on the existence of a '*tendency towards collective dominance in the concerned market'* by stating that the large operators took a cautious approach to capacity planning and took note of the estimates of their competitors.

The General Court replied by arguing that the natural tendency to cautious capacity planning was a characteristic of the market prior to the transaction which did not show the existence of a collective dominant position restrictive of competition. Volatility of demand makes it rational for the suppliers to protect themselves by adopting a cautious approach to capacity planning. [525]

The Commission kept on sustaining its position in regard of the creation of a collective dominant position by challenging the MMC Report[526] which had concluded that the market was broadly competitive.

The General Court contradicted the Commission by stating that the latter had yet not produced sufficient evidence in support of its statement. Moreover, it added that given the openness of the market in question no significant barriers would prevent any undertaking to entry and that significant evidence on the strength of competition in the concerned market had been showed by the MMC report.[527]

The General Court also noted that the MMC Report did not indicate a significant increase in the market shares of the four companies operating in the short-haul market. Through an in-depth analysis of the market concerned, the General Court showed that the elimination of a mid-sized operator, such as First Choice plc, would have allowed for a new major operator, Thomas Cook, to emerge on the market and subsequently preventing

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[525] *Airtours plc v Commission of the European Communities* (*supra* note 517) para. 88-89.

[526] The MMC report is a report on the supply in the UK of tour operators' services and travel agents' services in relation to foreign package holidays' drafted by the United Kingdom Monopolies and Merger Commission in 1997 (MMC). *Airtours plc v Commission of the European Communities (supra note 517)* para. 93.

[527] *Ibid.* para. 98.

an important change in the structure of competition.[528] The position of the Commission on the absence of volatility, dynamic and fluctuation of the quotes after the transaction was inappropriate inasmuch as it did not prove the excluding of growth by the acquisition which would have included a considerable variation in the major tour operators' shares of the foreign package holiday market.[529]

In substance, the General Court concluded that the Commission made errors of assessment in its analysis of competition for two main reasons. Firstly, it did not provide adequate evidence in support of its findings on the tendency in the industry to collective dominance. Secondly, it did not consider the fact that the main tour operators *'market shares have been volatile in the past and that such volatility show competitiveness of the market'*.[530] In essence, the General Court stated that the Commission's findings were based on incomplete and incorrect assessment of data.

This judgment has been pivotal in determining the degree of evidence required and the way it should be analyzed by the Commission when proving that a merger in an oligopolistic market will result in a position of collective dominance. In particular, the General Court recognized that the Commission's interpretation of the data available was '*inaccurate in its disregard for the fact that the market had been marked by a clear tendency to considerable growth over the last decade in general*'.[531]

The Commission had not been able to challenge its own findings which had concluded that after the proposed merger the '*overall average annual growth rate…was quite low'*.[532] On this regard, even after proved the low growth on the demand side during recent years, the Commission still failed to demonstrate, through specific evidence, that the tendency to grow would have been reversed in future years. The Commission, on the base of the MMC Report, which was drafted solely two years prior to the decision, could not

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[528] *Ibid.* para. 105.

[529] *Ibid.*para. 117.

[530] *Ibid.* para. 120.

[531] *Ibid.* para. 133.

[532] *Ibid.* para. 130.

conclude that market development was characterized by low growth which was, in this instance, a factor conducive to the creation of a collective dominant position by the three remaining large tour operators. [533]

Additionally, the Commission affirmed that the economic theory regarded the volatility of demand as something which makes the creation of a collective dominant position more difficult,[534] whereas stable demand is a factor which renders the existence of a collective dominant position more real. The Commission concluded that economic theory was not relevant in the present case due to the presence of a considerable degree of volatility in the market of short-haul package holidays which allowed all tour operators to have similar perspectives on market developments.[535]

The General Court found that the Commission failed to establish that economic theory was inapplicable in this specific case and erred in concluding that demand volatility facilitated the creation of a dominant oligopoly by the three remaining major tour operators. The Commission reasoning for its prohibition decision was deemed incompatible with economic theory.

The General Court recognized that the cautious capacity planning by tour operators could not be considered significant evidence of oligopolistic dominance, such as market stability and predictability. Consequently, 'caution' could not be seen as evidence of a collective dominant position, but rather as a characteristic of the competitive market existing at the time of notification. With this clarification, the General Court emphasized that the concept of joint dominance aligns with the economic concept of collusion.[536]

Regarding the degree of market transparency, the Commission assessed further statements on the tacit coordination between the tour operators on the short-haul market, which would have led to a collective dominant position conducted by the latter. According to the Commission, (i) the tacit cooperation was not based on prices but on the capacity

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[533] *Ibid.*para. 133.

[534] *Ibid.*para. 141-147.

[535] *Ibid* para. 141-144.

[536] *Ibid* para. 147.

put onto the market, and (ii) the crucial capacity decisions for the coming season were taken during the planning period.[537]

The General Court found that sufficient transparency allowed an operator to estimate the total capacity set by other members of the oligopoly, ensuring alignment with their policies and providing the incentive to do so. Transparency was also crucial for detecting capacity changes by others, distinguishing policy deviations from demand adjustments, and determining if punitive actions are necessary.[538] Thereby, future assessments on the conducts of the concerned undertakings necessary to determine the existence of collective dominance, did not have to be based on a mechanical exercise involving renewing capacity from one year to the next, but instead they had to involve each large tour operator with a very difficult task, which is mostly based on a subjective assessment of numerous variables and factors.[539]

The milestone of planning process was thus the attempt to predict how demand will develop on both the macroeconomic and microeconomic level.[540] In the present ruling, the factors taken into consideration by the Commission are not sufficient to demonstrate tacit coordination between the undertakings concerned. In fact, the Commission's global approach in regard to the total number of packages holidays offered by each operator must encounter some significant difficulties on a practical level, since it did not consider whether each member of the oligopoly can be aware, in practice, of '*the overall level of capacity (number of holidays) offered by the individual integrated tour operators'*.[541]

Furthermore, the Commission did not deliver sufficient evidence to assess the high degree of market transparency between the four tour operators during the planning period. As a matter of facts, even though it was possible to estimate a total capacity level, it was

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[537] *Ibid.*para. 157.

[538] *Ibid*. para. 159.

[539] *Ibid.*para. 160.

[540] *Ibid.*para. 164.

[541] *Ibid.*para. 170.

difficult for the three tour operators to monitor each other's capacity decisions from what emerges from the Commission's allegations.[542]

The General Court clarified that none of the findings of the Commission, such as the development and predictability of demand, demand volatility and the degree of market transparency, were an adequate factor to conclude that the merger would have led to the creation of a collective dominant position.[543]

Additionally, the applicant stated that even if there would have been an incentive for the three remaining parties to tacitly coordinate their capacity strategies after the merger, the absence of effective retaliation mechanisms and subsequently of the long-term incentive to not depart from the common policy, questions whether collective dominance was feasible.

In response to the applicant, the General Court enhanced the importance of a credible punishment mechanism when assessing the creation of a collective dominant position. The concerned undertakings did not only view that position statically at a fixed point in time, but they had to assess it dynamically in order to maintain it over time.[544] In essence, it had to be ascertained whether the individual interests of each tour operator overcome the common interests of the alleged dominant oligopoly. Such a scenario would have been real in case of absence of deterrents for those departing from the common policy.

The General Court noted that the deterrent identified in the Commission Decision, the characteristics of the relevant market and the way in which it worked made it difficult for retaliatory measures to be implemented quickly and effectively enough to act as adequate deterrents.[545] Moreover, the General Court believed that the increasing capacity in selling season would not be a likely deterrent for deviations, because (i) firms had an inborn propension to be caution in their capacity decisions,[546] (ii) even if the deviation conduct

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[542] *Ibid* para. 172 -180.

[543] *Ibid.* para. 181.

[544] *Ibid.* para. 192.

[545] *Ibid*. para. 197.

[546] *Ibid* para. 202.

was exposed by the other members of the oligopoly, reactions involving retaliatory capacity would not be sufficiently rapid,[547] (iii) late-added, low-quality package holidays would struggle to compete with those planned in advance by the deviating operator, who benefitted from acting first.[548] For instance, the General Court analyzed that in case one of the operations had to deviate from the common policy, the other members would find it hard to detect such a conduct due to the lack of transparency of the concerned market as previously affirmed by the CJEU itself.

Moreover, the General Court observed that '*to prove the existence of a collective dominant position, the Commission should also have established that the foreseeable reactions of current and future competitors and consumers would not jeopardise the results expected from the large tour operators' common policy*'.[549] In this case, it meant that if large tour operators reduced capacity below the expected demand for anti-competitive reasons, this reduction had not to be offset by existing smaller operators, potential new entrants, tour operators from other countries or long-haul markets, or by UK consumers reacting in a way that would have undermined the dominant oligopoly.

Considering small operators, the General Court stated that the Commission made two relevant errors. Firstly, it affirmed that small operators would lack access to airline o favorable airline seat terms, preventing them from increasing capacity and capitalizing on the opportunities created by the anticipated under-supply in an anti-competitive environment if the operation were approved.[550] Secondly, by underestimated the ability of these entities to increase capacity to capitalize on opportunities created by the general under-supply induced by large tour operators, thus counteracting the formation of a collective dominant position post-concentration.[551]

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[547] *Ibid* para. 203.

[548] *Ibid* para. 204.

[549] *Ibid.* para. 210.

[550] *Ibid*. para. 251.

[551] *Ibid.* para. 261.

At the same time, in relation to other potential tour operators of the short-haul market, the General Court contended that despite the Commission examined barriers to market expansion beyond a certain size, it failed to consider that the absence of entry barriers likely enables potential competitors to enter and offer products in the market. Consequently, these competitors could quickly and effectively respond if large tour operators align their capacity strategies to create an under-supply situation.[552]

Regarding the capacity of the undertakings part of the potential oligopoly to be able to act independently of consumers, the Commission mistaken in underestimating the role of British consumers which were able to obtain better prices from small tour operators, or also switch to companies offering long-haul foreign package holidays.[553]

The General Court considered that the Commission's '*assessment of the foreseeable reaction of smaller tour operators, potential competitors, consumers and hotel-owners was incorrect and that it underestimated their reaction as a countervailing force capable of counteracting the creation of a collective dominant position*'.[554]

In conclusion, even though the Commission competence to investigate collective dominance have been confirmed, there were uncertainties as to its extent. The General Court gave a structural view of oligopolistic dominance, correlated to coordinated effects and affirmed that most of the enforcement policy of the Commission needs to be strongly justified by a clear burden and standard of proof, whereas in the present case the Commission had ignored more of the evidence presented by the parties and failed to examine the rest, '*the result of the transaction would be to alter the structure of the relevant market in such a way that the leading operators would no longer act as they have in the past and that a collective dominant position would be created*'.[555]

Furthermore, the General Court clarified which the Commission approach to collective dominance. Before the *Airtour*, the Commission's approach to collective dominance

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[552] *Ibid*. para. 269.

[553] *Ibid*. para. 275-276.

[554] *Ibid*. para. 206.

[555] *Ibid*. para. 293.

grounded on a checklist of factors that might have been found in industrial economic texts, and it was generally accepted that *'tacit collusion'* was the fundamental economic principle behind collective dominance. Following such ruling, the Commission stated that collective dominance was not only tacit collusion between the parties of the transaction but that it was '*sufficient for oligopolists to act independently in ways which reduce competition*'.[556] In other words, it was adequate to demonstrate the mere possibility of collusive or parallel behavior without having to prove that there was a significant likelihood of such behavior occurring, given the specific conditions of the market and the firms involved. In the specific case, the Commission affirmed the creation of dominance by the merged firm based on a structural approach looking at the market structure rather than the specific anticompetitive conduct and subsequently failed to provide evidence to satisfy the conditions for tacit coordination.

In *Airtours*, the General Court further affirmed that *'tacit collusion'* must be established on three main conditions already stated above : first each member of the dominant oligopoly must have the ability to know how other members are behaving, second the situation of tacit collusion must be sustainable for the parties to the transaction, and third there must be adequate deterrence to ensure a long-term incentives for the parties not to depart from the conduct.

Based on these findings, the General Court stated that the Commission failed to undertake adequate and proper examination that satisfied the evidentiary standard required in law, and that its findings on the likely impact of the proposed transaction lied on implausible speculations. The General Court based most of the Commission criticism on the poor economic analysis conducted by the latter and the failure to satisfy the requisite standard of proof. The Commission indeed did not to convincingly justify its decision, either through economic analysis or economic evidence. And the evidence in support of its statement was inadequate and insufficient to establish a collective dominant position held by Airtour/First Choice.

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[556] *Ibid*. para. 21.

The commentor A. Burnside suggested that the Commission must, on the base of a detailed assessment of the evidence and existing market material, demonstrate a high level of certainty before acting against a merger.[557]

Throughout the *Airtour* decision, the General Court also dealt with the issue of '*gap cases in oligopolistic market*' namely, situations where the merged entity that could neither give rise to single-firm dominance nor to collective one, but nonetheless had the power to unilaterally raise price above the competitive level.

Following such a case, the EC Commission Commissioner of the time, Mario Monti, believed that European Union's approach to dominance only prohibit merger leading to the creation or strengthening of a dominant position. Differently, under the U.S. standard, merger where prohibit whenever its effects '*may be substantially to lessen competition, or tend to create a monopoly*'.[558] The European dominance test had been confined to a single-firm dominance and had the strong disadvantage of focusing more on a structural view of competition, i.e. on a firm alleged to be dominant, rather than the impact/effects that such a merger has on competition. The Commission reconsidered the test used under the Regulation No 4064/1989 and changed the way and the frequency in which the analysis of coordinated effects of merger was conducted.[559]

In conclusion, the *Airtour* judgment was a landmark case for the European Merger Control for the following aspects. Firstly, it clarified the standard of proof required by a merger prohibition decision: any affirmation of a potential arise of collusion between the firms after the merger must be sufficiently motived and consistent to make such a result plausible. Secondly, it affirmed that collective dominance must be in line with the consensus economic theory and involving an assessment of the risk of tacit coordination by the market players in the post-merger situation. In particular the Court settled three necessary conditions for tacit coordination to be sustainable: (i) sufficient market

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[557] A. Burnside, *Preuve Solide: The CFI Raises the Bar, NI COMPETITION*, Sept. 2002, at 1.

[558] Speech of M. Monti, *EU-U.S. Cooperation in the Control of International Mergers: Recent Examples and Trends, Talk to Institute for International Economics*, Washington DC, published on 30 March 2001, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_01_540.

[559] N. Fabra & M. Motta, *Coordinated Effects in Merger Cases*, CRC América Latina, published on 25 February 2013.

transparency, (ii) incentive of not departing from the common policy; (iii) not jeopardization of the coordination by current and prospective rivals and consumers.

Lastly, the General Court highly criticized the economic analysis conducted by the Commission and pushed towards the adoption of the EUMR with a new test of the assessment of merge control mostly focused on the effects that a merger creates on the competition of the concerning market. Article 2 of the EUMR will prohibit mergers that '*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'* (SIEC test). Despite the maintenance of the reference to '*dominance'*, the new test *de fact*o shifted from a dominance test to *'substantial lessening of competition'* test.

1.2 Joined Cases 6/69 and 11/69, *Commission v France*

France v Commission joined cases,[560] ,also known as *Kali und Salz*, represents a milestone case in the merger control evolution for the CJEU rulings on the concept of collective dominance and the clarification of the situations in which it is considered as existing within the EU Merger control.

On July 14, 1993, the Commission was notified a proposed concentration between Kali und Salz (hereinafter K+S) and Mitteldeutsche Kali (hereinafter MdK), both the companies operating in the potash-salt-based products market. Although the K+S/MdK merger would not result in overall market dominance, the Commission raised concerns about the close connection between K+S and SCPA, a subsidiary of the EMC group, which was K+S's sole distributor in France. The Commission noted that the new entity K+S/MdK would lead to the creation of a dominant position by K+S/MdK and SCPA-specifically, a duopolistic dominant position. Following the parties subjection to commitments including each entity establishing its own distribution network and, in

[560] Judgment of 10 December 1969, *Commission v France*, Joined Cases 6/69 and 11/69, ECLI:EU:C:1969:68 (further referred as *Kali & Salz*).

particular, to K+S/MdK terminating its cooperation with SCPA as distributor partner in France, the Commission approved the concentration on 30 June 1994.

The French Republic sought to annul the contested decision, while SCPA and EMC sought a partial annulment of the contested decision solely involving the conditions imposed. Since both the cases questioned the validity of the same act, the General Court declined jurisdiction of the case before the General Court[561] allowing the CJEU to rule on the annulment application of both the applicants. On 8 February 1995, the CJEU decided to open the oral procedure in the two cases without any preparatory inquiry.

Both the French Republic and the applicant companies, such as SCPA and EMC, seek the annulment, wholly or partially, of the contested decision. The complaints were organized into four main legal pleas. The first three pleas challenged the Commission on the following grounds (i) failure to comply with its obligation to cooperate with national authorities; (ii) incorrect assessment of the effects of the concentration on the German market; (iii) incorrect assessment of the effects of the concentration on the Community market apart from Germany. The fourth plea claimed that (iv) Regulation No 4064/1989 did not permit the declaration of compatibility to be subjected to conditions and obligation affecting third parties not involved in the concentration. The first two pleas were raised solely by the French Government only, while the last two pleas were also joined by the applicant companies.

In the following paragraphs the attention will be centered on the concepts of failing firm defense and the meaning of collective dominance.

The *Kali & Salz* decision finally resolved the issue related to the acquisition of a failing firm under the merger control Regulation. Replying to the issue raised by the applicant and examining the points of the Commission, the CJEU finally elucidated the legal characteristics of this concept. After this resolution, the Commission '*may decide that an*

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[561] Judgment of 20 September 2012, *French Republic v European Commission*, Case T-154/10, ECLI:EU:T:2012:452.

otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm'.[562]

Three cumulative criteria must be satisfied for allowing the acquisition of a failing firm under EUMR: (a) the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking; (b) there was no less anti-competitive alternative purchase than the notified merger; (c) in the absence of a merger, the assets of the failing firm would have inevitably exit the market.[563] It was for the notifying parties to provide promptly the relevant information to support this type of defense.[564]

In its contested decision, the Commission issued a first explanation of when a '*failing firm*' acquisition may be allowed under merger control regulation. It indicated that, a concentration typically leading to the creation or reinforcement of a dominant position by the acquiring company may not be deemed the cause if that dominant position would inevitably occur even without the concentration. It further settled the criterion according to which that a concentration is not responsible for the deterioration of the competitive structure if it is evident that: *'(i) the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking, (ii) the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market, (iii) there is no less anticompetitive alternative purchase*'.[565]

On its behalf, the applicant argued that the Commission, when allowing the concentration by invoking the *'failing firm defense'* concept U.S. antitrust law, it did not take into account all the criteria used in that legislation.[566]Additionally, the Commission arbitrarily introduced the criterion of absorption of marker shares, which, following the perspective

[562] Horizontal Merger Guidelines para. 89.

[563] *Ibid*. para. 90.

[564] *Ibid*. para. 91.

[565] *Kali & Salz* (*supra* note 560) para. 111.

[566] *Ibid.* para. 91. Specifically, the Commission did not considered point (a) and (b) of the United States antitrust legislation.

of the French Government, could not justify the dismissal of the anticompetitive nature of the concentration.[567]

The CJEU firstly clarified the significance of the United States provisions under Community law, stating that while the US antitrust criteria could be useful for developing and comparing antitrust legislation, they could not represent a ground of invalidity for a decision taken under European law.[568]

Starting from the provisions under Article 2(2) and (3) EUMR, the CJEU observed that a concentration had to be approved whenever it did not create or strengthen a dominant position resulting which resulted in a significant impediment to effective competition in the common market and prohibited in case it does. By analyzing this provision in conjunction with the criteria of '*absorption of market shares'*, the CJEU noted that, in case it would have not been considered, a concentration would have deem to be compatible even if, in case the concentration had not occurred, the acquiring undertaking would have not had obtained the entire market shares of the acquired undertaking.[569]

The introduction of this criteria was thus necessary to ensure the causal link between the concentration and the deterioration of the structure, which could be excluded only if the competitive structure of the concerning market would have deteriorated in the same way regardless of the proceeding of the concentration.[570]

The CJEU marks out the absorption of market share criterion consistency with the concept of Article 2(2) of the Regulation No 4064/1989, since it helps to ensure the neutral effects of the concentration regarding the deterioration of the competitive structure of the market.[571]

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567 *Ibid.* para. 91-97.

568 *Ibid.* para. 112.

569 *Ibid.* para. 114.

570 *Ibid* para. 115.

571 *Ibid.* para. 124.

In this case, MdK had remained in operation only because Treuhand was covering its losses. It was likely that Treuhand would have soon be unable to continue providing funds, leading to MdK's eventual closure unless it was acquired by a private company.

Remarkable were the observations made by the Advocate General Tesauro in its opinion.[572]

Firstly, she observed that the Commission is permitted to develop its own version of the pre-existing theory under U.S. law, as long as such theory comply with the object of the Regulation No 4064/1989 and the criterion were properly applied.[573]

Subsequently, the Advocate General Tesauro argued that the Commission's criteria aim to ensure that the strengthening of the dominant position would be inevitable, occurring even if the concentration were prohibited.[574] In particular, the Advocate General highlighted that the criterion in question meets two additional conditions: the undertaking. the firm was bound to exit the market regardless, and there was no alternative, less anticompetitive methods of acquisition.[575]

While the secure withdrawal of the undertaking from the market was acknowledged, the CJEU addressed the second condition regarding the absence of an alternative, less anticompetitive method of acquiring MdK. The French Government cited the lack of market transparency as the reason this condition was not met. However, the CJEU, in accordance with the Commission and the Advocate General Tesauro, concluded that since none of the other private undertakings declared willingness to purchase MdK, this criterion was also satisfied.

To conclude, the Advocate General Tesauro stated that by developing its own version of the theory the Commission could the Commission assess the compatibility of a

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[572] Joined Cases C-68/94 and C-30/95*, French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission ("Kali und Salz")*, [1998] ECR I-1375, Opinion of Advocate General Tesauro.

[573] Opinion of Advocate General Tesauro (*supra* note 572) para. 51.

[574] *Ibid*. para. 52.

[575] *Ibid*. para. 53.

concentration while appropriately considering its social consequences, such as employment protection. This approach aligns with Article 2 of the EC Treaty and the objective and social cohesion of Recital 13. [576]

Regarding the existence of a collective dominant position, the applicant companies and the French Government argued that Article 2(3) of the Regulation No 4064/89 did not cover this scenario because it is not expressly stated, unlike Article 86 of the EC Treaty. However, the Commission contended that the concept of collective dominant position was included in Regulation No 4064/1989, not due to its connection with the undertakings concerned, but because the objective situation itself aligned with the Regulation's primary goal of preventing the creation or strengthening of a dominant position. Additionally, supported by the legal basis of Article 87 and 235 of the EC Treaty, Regulation No 4064/89's aimed to cover lacunas left in competition law by Article 85 and 86 of the EC Treaty. Moreover, the *travaux préparatories* of the Regulation No 4064/1989 did not exclude the collective dominant position from the interpretation of Article 2 of the Regulation No 4064/1989, and that the legislator intentionally formulated this provision as neutral as possible to accommodate the diverse opinions of member states on the control of oligopolies.[577]

The Advocate General did not believe that the Regulation No 4064/1989 conferred the Commission powers to deal with situations of collective dominant position as presented in the presented in such a case. The fact that the legal basis, article 87 and 235 EC Treaty, could confer the Commission such powers did not mean that those powers were conferred. The final question was thus whether the wording of Article 2 of Regulation No 4064/1989 conferred the Commission the power to act against a collective dominant position. The Advocate General Tesauro pushed towards a more restrictive interpretation of Article 2 of the Regulation No 4064/1989, also by recalling its compliance with Recital 15 of the Regulation, which did not considered concentrations with a market share below

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[576] *Ibid*. para. 57.

[577] *Kali & Salz (supra* note 560), para. 159-160.

25% liable to of impeded effective competition. The CJEU agreed with the Advocate General on that point.[578]

However, the CJEU adds that, in relation to the wording of Article 2 of the Regulation No 4064/1989 it cannot be deduced from it that only concentrations creating or strengthening an individual dominant position, held solely by the parties to the concentration, come within the scope of the Regulation.[579]

For the point concerning the *travaux préparatories,* the CJEU stated that it could not be presumed that the intention of the legislator when giving an open designation to Article 2 Regulation No 4064/1989 was that of including also the collective dominant position. Conversely, as observed by the Advocate General, given the difficult compromise on the question of collective dominance among member States, the Commission included Article 2(3) Regulation No 4064/1989 which excluded the prohibition of those concentrations that even though resulting in the creation and strengthening of a dominant position did not significantly impede effective competition.[580]

The CJEU clarifies that the wording of Article 2 Regulation No 4064/1989 and the historical interpretation of Regulation No 4064/1989 did not allow precisely define the scope regarding collective dominant position. Instead, the provision in question had to be interpreted in light of its purpose and general structure.[581] The Regulation No 4064/1989 aimed at ensuring that competition in the common market was not distorted and applied to all concentrations, with a Community dimension that could adversely affect the competition structure.[582]

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[578] Opinion of Advocate General Tesauro, (*supra* note 572), para. 83- 86. *Inter alia Commission v France*, (*supra* note 561) para. 165.

[579] *Kali & Salz,* (*supra* note 560) para. 166.

[580] *Ibid*. para. 167.

[581] *Ibid.* para. 168.

[582] *Ibid*. para. 170.

The CJEU emphasized that limiting Regulation No 4064/1989 to concentrations that created or strengthen a dominant position only for the parties to the concentration, would have not comply with the object of the Regulation itself would have undermined its effectiveness. This was because it would fail to address impact on the overall competitive structure of the Community.[583]

Furthermore, even though not explicitly stated in the Regulation No 4064/1989, third parties affected by concentrations between two other undertakings, viewed as external members of the oligopoly, have the right to express their views on the concentration. This right should have been implicitly deducted from the fundamental principle of European law, which guarantees the right to be heard, even in the absence of any rule governing such procedural rules.[584]

The CJEU further stated that it is incorrect to interpret Recital 15 of the Regulation No 4064/1989 as a ground for automatically excluded from prohibitions all concentrations where the combined share of the undertakings was below 25%. Notably, the CJEU and the Advocate General offered different interpretations of this provision, acknowledging that preambles, including Recital 15, were not part of the Regulation No 4064/1989 operative text. While the Advocate General viewed Recital 15 as '*evidence of the legislature's intention not to include cases of collective dominance within the scope of the Regulation*'.[585]

The CJEU interpreted Recital 15 as a presumption rather than an absolute statement, meaning it did not definitively exclude concentrations with a combined share below 25%. Considering the right to be heard for third parties, the Regulation No 4064/1989 purpose, and the interpretation of Recital 15, the CJEU concluded that collective dominant positions does not fall outside the scope of the Regulation No 4064/1989.[586]

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[583] *Ibid*. para. 171

[584] *Ibid*. para. 174

[585] Opinion of Advocate General Tesauro, (*supra* note 572) para. 85.

[586] *Kali & Salz,* (*supra* note 560) para. 178.

Furthermore, the French Government argued that the Commission had not demonstrated any causal link between the acquisition of MdK and the alleged creation of a duopoly between K+S/MdK and SCPA.[587] Regarding the emergence of a collective dominant position from the merger of MdK/K+S and SCPA, the CJEU sided with the applicant. It ruled that the Commission failed to meet the necessary legal standard to prove that the merger would create a collective dominant position, which was the basis of the Commission's requirement that K&S withdraw from the joint venture with SCPA.[588]

In line with what stated in Article 2(3) of the Regulation No 4064/1989, the CJEU stated that, in order to a allege a collective dominant position, the Commission was obliged '*to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers*'.[589]

The CJEU's interpretation of Article 2 of the Regulation No 4064/89 granted the Commission a particular discretion when analyzing the circumstances of each individual case, particularly in the economic field. This reflected the EU judges' intent to limit the effectiveness of their oversight by emphasizing the economic nature of the rules applied by the Commission in the EUMR. Essentially, the EU Courts would have confined their review to verifying the accuracy of the facts and the absence of any manifest errors in assessment, thereby enabling the Commission to advance its competition policy.

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[587] *Ibid*. para. 211.

[588] *Ibid*. para. 223-224.

[589] *Ibid*. para. 221.

Differently, the Advocate General Tesauro's believed that the discretionary powers of the Commission were framed in even stricter terms, in particular she noted that '*all the more valid with regard to concentrations, the control of which, being necessarily preventative in character, requires an inherently discretionary appraisal on the part of the authority whose task it is to interpret and apply the Regulation*'[590] ; and that the CJEU's review, for the substantive legality's perspective, '*takes the form of scrutiny of the accuracy of the [Commission's] economic and market analysis, of the anticompetitive effects and the correctness of the legal consequences (from the point of view of the characterization of the facts, for example) drawn from the analysis, without, of course, encroaching in the scope of the discretion which the Commission enjoys in the application of the rules on competition*'.[591]

The CJEU believed that a collective dominant position was established when "*economic links or factors which give rise to a connection between the undertakings concerned*" are proved. The market shares held by the parties involved, and the link between K+S and SCPA cited by the Commission as key evidence of the creation of a collective dominant position, did not constitute a sufficiently cogent and consistent body of evidence to prove its existence. [592]

The Commission had indeed based all its evidence for the existence of the collective dominant position on the relevant market on the partnership between K+S and SCPA for the distribution of German potash in France, which however did not constitute a product part of the relevant market.[593] In substance, there was no effective competition between K+S and SCPA on the relevant market.

The CJEU, commenting on the evidence presented by the Commission in support of its statement, asserted that '*the agreement between K+S and SCPA (was considered) [...]*

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[590] Opinion of Advocate General Tesauro (*supra* note 572) para. 21.

[591] *Ibid*. footnote n.33.

[592] *Kali & Salz* (*supra* note 560), para. 226-227.

[593] *Ibid*. para. 230-231.

extremely weak, indeed insignificant evidence of the absence of competition between K+S and SCPA and a fortiori between K+S/MdK and SCPA'.[594]

Due to the insufficient evidence provided by the Commission, it was impossible to conclude that the concentration would lead to a collective dominant position significantly impeding competition in the relevant market. Consequently, the CJEU was compelled to annul the decision in its entirety. A collective dominant position existed when two or more economic entities act together as a single entity. To establish this, the Commission must '*examine the economic links or factors which give rise to a connection between the undertakings concerned*'.[595] The Commission added that confirming the existence of economic links between the undertakings in question was necessary to enable them undertaking to act collectively and independently of their competitors, customers and consumers. Furthermore, the CJEU emphasized an effect-based approach towards collective dominance, indicating that undertakings were collectively dominant as long as they either act or present themselves as single entity in the market.

This judgment was also significant for the emphasis put by the Commission on *'connecting factors'* rather than on economic links in determining whether there was a collective dominance. The approach resulting from this judgment had been confirmed in further rulings of the CJEU, as for example the Irish Sugar's case[596] where the CJEU stated that: *[A]joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers*'.[597]

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[594] *Ibid*. para. 241.

[595] Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, C-395/96,EU:C:2000:132, para. 41.

[596]Judgment of 7 October 1999, *Irish Sugar plc v Commission*, Case T-228/97, ECLI:EU:T:1999:246.

[597] *Ibid*. para. 46.

The CJEU further opted for a wider interpretation of Article 86 EC Treaty ,now 102 TFEU, which included within its application cases where dominance was held not only by a single economic entity but also by economically independent firms holding a collective dominant position. For instance, in the Italian Flat Glass decision, the Commission recognized the existence of a collective dominant position within Article 86 EC Treaty, where the Commission confirmed that three Italian producers of flat glass to hold a collective dominant position and a subsequent abuse of this position. Additionally, in Almelo case,[598] the CJEU explained how a collective dominance should be understood stating that '*However, in order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market. It is for the national court to consider whether there exist between the regional electricity distributors in the Netherlands links which are sufficiently strong for there to be a collective dominant position in a substantial part of the market*'.[599] To clarify, the CJEU was verifying whether the undertakings on the market were adopting the same conduct on the market, and thus performing a so called '*tacit coordination'*.

After enlightening the meaning of '*collective dominant position'* and explaining when it exists, the CJEU, in its judgment *Compagnie Maritime Belge Transports v Commission*[600], finally clarified when such a conduct consists in an abuse under European competition law. Paragraph 36 of the concerning judgement stated that the expression in Article 86 of the EC Treaty implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity. That was how the expression *'collective dominant position', as used in the remainder of this judgment, should be understood'*. So, a dominant position could be held

[598] Judgment of 27 April 1994, *Almelo and Others v NV Energiebedrijf Ijsselmij*, C-393/92, EU:C:1994:171.

[599] *Ibid*. para. 42-43.

[600] Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, C-395/96,EU:C:2000:132.

by two or more economic entities, as long as they act together on a particular market as a collective entity.

In conclusion, through its case-law, the CJEU finally established that a collective dominant position existed when two or more undertakings operating in the same market hold an economic link or factor between each other which enable them to act independently of their, competitors, consumer and customers.[601] However, a collective dominant position constitutes an abuse under the EUMR as long as, there was the creation or the strengthening of a collective dominant position on the market which raised significant impediment to effective competition, also in view of the market structure within an oligopolistic market.

1.3 C-12/03 P, *Commission v Tetra Laval*

Tetra Laval II judgment[602] was significant not only for the aspects related to the *'right of defence'*, as illustrated in precedent Chapter 2, but also for the illustration so called *'form-based'* approach used by the Commission to establish the existence of the dominant position in the relevant market, which was based approach was focused on the behaviour itself. Additionally, this judgment became pivotal for the passage from a '*form-based'* approach to an *'effect-based'* one by the Commission, and it also clarified the definition of the relevant market and assertion of dominance on that market and, the impact on the burden of proof of the parties, that is, how or even if the tying's effects could be proven.

Based on the facts of the case already enounced in Chapter 2 paragraph 5.2, the following paragraph will analyze the substantive aspects of the CJEU decision, in particular in relation to the requiring standard of proof to prohibit a conglomerate type of merger and how this is related to the collective dominance scenario already discussed in the *Airtour* decision.

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[601] *Ibid*. para. 42.

[602] *Tetra Laval II* (*supra* note 458).

To begin, it is essential to review some of the key facts of the case.
At first, the Commission issued a prohibition decision of Tetra Pak' merger initiative since it created a significant impediment to effective competition in the neighboring market. The Commission argued that Tetra Pak's had abused of its dominant position in the carton packaging market to establish a dominant position in the PET packaging market. The Commission believed that given the fact that Tetra Pak would have owned a dominant position on the two markets of Tetra Pak following the merger, such an argument did not require further justifications for declaring the existence of an abuse. Subsequently, the Commission based its argument solely on theoretical foundations rather than raising question on the causes and effects of transfer of market power to be established.

The General Court responded by stating that, to issue a prohibition decision cases where the merger resulted in conglomerate-effects, the Commission should have provided '*convincing evidence'* in support of its stance.[603] Initially, the General Court characterized the merger in question as a merger one of a '*conglomerate nature'*, meaning *'a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers'* . Furthermore, the General Court interpreted Article 2(2) and (3) of the Regulation No. 4064/1989, clarifying that a merger may only be prohibited if it creates or strengthened a dominant position in the common market, or in a substantial part of it, resulting in a significant impediment of effective competition, regardless of the type of merger involved. [604]

In the case of Tetra's acquisition of Sidel, the operation did not immediately result in the creation of a dominant position in the PET packaging market. However, such a result was expected to occur only after some time, and thefore'*it is not the structure resulting from the merger transaction itself which creates or strengthens a dominant position within the meaning of Article 2(3) of the Regulation, but rather the future conduct in question'*. [605]
The General Court emphasized that when analyzing a merger with conglomerate effects,

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[603] Judgment of 25 October 2002, *Tetra Laval BV v Commission of the European Communities*, Case T-5/02, ECLI:EU:T:2002:264 (further refer as *Tetra Laval I*) para. 155.

[604] *Tetra Laval I,* (*supra* note 463) para. 120.

[605] *Ibid.* para. 154.

the Commission should have applied the criteria used for establishing of collective dominance as outlined in the *Airtour* and *Kali & Salz's* judgments .[606]

In its appeal, the Commission challenged the standard of proof imposed by the General Court declaring them disproportionate and it pointed out the infringement of Article 2(2) and (3) of the Regulation No 4064/1989 by the General Court, in the part where it '*it applied a presumption of legality in respect of concentrations with conglomerate effect'*.[607] This *de facto* presumption of legality would have contravened with the wording of Article 2(2) and (3) Regulation No 4064/1989 which imposed a symmetrical double obligation the Commission: to prohibit the concentration when it creates or strengthens a dominant position, and to authorised it if it does not create or strengthen such a position.[608]

The CJEU agreed with the General Court on the standards of review required for a merger having conglomerate effects, noting that these should be evaluated using criteria similar to those applied in assessing the creation of collective dominance '*it calls for a close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition on the reference market'*.[609]

By considering the fundings of the General Court in the *Airtour's* judgment, collective dominance existed as long as the following cumulative factors were verified: transparency of the concerned market, the situation of tacit collusion had to be sustainable for the parties to the transaction, and third there had to be adequate deterrence to ensure a long-term incentive for the parties not to depart from the conduct.

In order to establish the existence of a collective dominant position and issue a prohibition decision the Commission had to produce *'cogent and consistent'* evidence in support of

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[606] *Ibid.* para. 155, *inter alia Airtours plc v Commission of the European Communities (supra note 517)* para. 63, *inter alia* Judgment of 10 December 1969, *Commission v France*, Joined Cases 6/69 and 11/69, ECLI:EU:C:1969:68.

[607] *Tetra Laval II* (*supra* note 458) para. 19.

[608] L. Prete & A. Nucara, *Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear after Tetra Laval?* (2005) European Competition Law Review, pp. 692 to 704.

[609] *Tetra Laval II (supra* note 458) para. 40.

its argument, as established in the *Kali & Salz's* judgment.[610] On its defense the Commission argued that the standard of proof imposed by the General Court in *Tetra Laval I* were differed in both nature and degree from those imposed in *Kali & Salz's* judgment, and were clearly higher than the latter. They differ in degree since they excluded the possibility that another body would have been able to reach a different conclusion, and in nature since they remodel the role of the EU Courts into that of a different authority, fully capable of ruling on the matter in all its complexity and empowered to replace the Commission's views with its own.[611]

On the other hand, Tetra Laval contented that the Commission's ground of appeal was nothing more than '*semantic discussion of the terms used'* which concerned very little the substantive examination carried out by the General Court. [612]

The CJEU responded to the Commission argument by stating that the General Court, when mentioning '*convincing evidence*' it simply required a precise examination of the produced evidence, more specifically it claimed that *'by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of a decision on a merger'*. [613] Thereby, the CJEU gave right to the General Court by highlighting that the mentioning of *'precise examination'* by the General Court in *Tetra Laval I* simply wanted to draw an attention on the *'essential function of evidence'* and not adding conditions to the standard of proof, which remained those established in the *Airtour* and *Kali & Salz's* judgments.

It is possible to further support this interpretation by deeply examining *Tetra Laval II*. The CJEU in fact clarified that the evidence leaned on needed to be '*factually accurate, reliable and consistent'*, should have contained *'all the information which must be taken*

[610] *Kali & Salz* (*supra* note 560) para. 228.

[611] *Tetra Laval II (supra* note 458) para. 29.

[612] *Ibid.* para. 32.

[613] *Ibid.* para. 41.

into account in order to assess a complex situation' and must be *'capable of substantiating the conclusions drawn from it'*.[614] Additionally, the EU Courts had to verify whether the Commission has deeply reviewed all the relevant circumstances.[615]

The CJEU further claimed that, the Commission should have carried out a prospective analysis of how a '*conglomerate-type'* of concentration by altering the factors determining the level of competition on a given market might give rise to a significant impediment to effective competition. Furthermore, since in such a scenario the Commission was called to make a prediction of future events, and not an examination of the past ones, this analysis must be '*carried out with great care',*[616] which made it envisaging various chains of cause and effect with a view to ascertain which of them are the most likely.[617] Differently from the General Court which required the Commission to conclude *'in all likelihood'* the creation or strengthening of an anti-competitive conduct,[618] the CJEU merely addressed the necessity of determining the most probable developments.

The idea that the CJEU aimed at mitigating the General Court stringent formulation of the test appeared to be cryptic also considering that such a test has never been utilized by the EU Courts in previous cases.[619] Focusing on the specific '*conglomerate-type'* of mergers, the CJEU recognized the importance and the difficulty of the establishment of the cause and effect chain considering that *'if such a decision were not adopted, the economic development envisaged by it would be plausible'*.[620] Following this statement, the CJEU stressed on the importance of the quality of evidence put forward by the

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[614] *Tetra Laval II* (*supra* note 458) para. 39.

[615] *Ibid*.

[616] *Ibid.* para. 43.

[617] *Ibid.* para. 43 (emphasis added).

[618] *Tetra Laval I* (*supra* note 463) para. 153.

[619] L. Prete & A. Nucara, *Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear after Tetra Laval?,* (2005) European Competition Law Review, pp. 697.

[620] *Tetra Laval II (supra* note 458) para. 44.

Commission, since it had to be strong enough to conclude that, in case the prohibition had not be adopted, the economic envisaged by it would be plausible.[621]

In substance, the *Tetra Laval II* led to two remarkable observations.

Firstly, it elucidated on the required standard of proof considering the specific case of conglomerate mergers, and, arguably, of collective dominance. The interpretation according to which a higher standard of proof was necessary when referring to these kinds of mergers cannot be assessed as a statement of the General Court since it did not explicitly mention that these settled standards of proof are solely relevant for these types of concentration, but, on the contrary, it considered them applicable to merger control in general.

Secondly, the clarification given first by the General Court and subsequently confirmed by the CJEU did not impose a higher standard of proof upon the Commission, but they simply clarified the duty of the latter to provide cogent, consistent evidence anytime they issue a prohibition decision.

Indeed, the EU Courts reemphasized what already affirmed in the *Kali & Salz's* judgment by simply adding a specification on the quality of evidence the Commission is required to produce. Lastly, the CJEU agreed with the General Court's interpretation of Article 2(2) and (3) of the Regulation No. 4064/1989 and recognized that to issue a prohibition decision the Commission had to prove two cumulative conditions. First, the concentration had to create or strengthen a dominant position in the common market or in a substantial part of it which result in a significant impediment to effective competition; second, if a dominant position was not created the concentration had to be authorized without the needed to examine the effects of the transaction on effective competition.[622]

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[621] *Ibid.* para. 44.

[622] *Ibid.* para. 21.

Advocate General Tizzano[623] contented that the Commission should not be required to establish the anti-competitiveness beyond all doubt. Instead, he argued that it would suffice for the Commission '*on the basis of solid elements gathered in the course of a thorough and painstaking investigation, and having recourse to its technical knowledge, [it] is persuaded that the notified transaction would very probably lead to a creation or strengthening of such dominant position'*.[624] Additionally, the Advocate General disagreed with the dual obligation imposed by Article 2(2) and (3) Regulation No 4064/1989, particularly concerning conglomerate mergers. In this context, he pointed out referred to '*grey area'* surrounding cases where it is particularly difficult to predict the effects of the notified concentrations. In such situations, it was nearly impossible for the Commission to ensure that the likelihood of a dominant position being created or strengthened is significantly greater than the likelihood of it not being created or strengthened. Given these complexities, he suggested that the most reasonable course of action would be for the Commission to approve the notified mergers. His reasoning was based on two main points: (i) Article 10(6) of Regulation No. 4064/1989, which stipulates that if the Commission fails to decide on a notified merger within the specified deadlines, the merger is automatically approved, and (ii) the ability of both the Commission and national antitrust authorities to address potential competition distortions ex post under Article 82 of the EC Treaty. [625]

Following this judgment, some scholars still stressed on the importance of having a clarification of the required standard of proof for merger control decisions. In fact, the operation of interpretation made by the CJEU the Advocate General Tizzano on the wordings used by the General Court in *Tetra I*, tried somehow to mitigate the stricter standards imposed by the former. According to the Advocate General, the Commission needs to prove the very probable anti-competitive effects of the merger, in other words, it had to be convinced that the likelihood of a given merger creating or strengthening a

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[623] Case C-12/03, *Commission of the European Communities v Tetra Laval BV* [2005], ECLI:EU:C:2004:318, Opinion of Advocate General Tizzano.

[624] Opinion of Advocate General Tizzano, (*supra* note 623) para. 73-74.

[625] Opinion of Advocate General Tizzano, (*supra* note 623) para. 75 -81.

dominant position is significantly greater than the likelihood of such a position not being created or strengthened.[626] Similarly, the CJEU mentioned the Commission necessity to ascertain the most likely dynamics which would have occured post-merger in the given market. On the contrary, the formulation used by the General Court appeared more stringent than those used by the CJEU and the Advocate General. However, in order to avoid the application of different tests and subsequently risked proving a semantic exercise, both the CJEU and the Advocate General opted for a reinterpretation of the wording of the text of the first instance ruling.

Nevertheless, the interpretations issued by the CJEU, and the Advocate General would have been highly criticized because of the very little guidance they on their application and how they completely avoid the discussion on certain arguments. For instance, the CJEU did not even consider the claimed symmetrical nature of the obligations outlined in Article 2(2) and (3) of the Regulation No. 4064/1989. Following the words of the Advocate General Tizzano, the CJEU did not express itself on the cases falling with the '*grey area'* of transactions. To fulfill this void, some scholars discussed on the possibility of relying on the argument issued by Advocate General Tizzano on this point. However, rather than relying on the text of Article 10(6) of the Regulation No. 4064/1989, they justified the presumption of legality of these mergers based on the fact, even though there was no application of *ex ante* control, their anti-competitive effects can always be prevented throughout the application of Article 81 and 82 of the EC Treaty. From this perspective, the standard of proof to approve a merger became lower than those required to prohibit it. In other words, if the anti-competitiveness of the transaction cannot be proven to the required legal standard, the Commission should have approved the transaction. This applies even if it believed that the risks of the merger significantly impeding effective competition in the market are comparable to the probabilities of this not occurring.

Being the standard of proof one the milestones of this judgment, the CJEU was obliged to issue a precise and articulate test for it. For this reason, even if the CJEU neither rule

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[626] *Ibid.* para. 74.

specifically on some of the points raised by the Commission nor it considered some of the interesting ends of Advocate General Tizzano, this last interpretation seemed to be the most appropriate to the case.

From a substantive perspective, the CJEU confirmed the application of the Regulation No. 4064/1989 to conglomerate mergers as well. Given the facts that the firms part of these kind of mergers were not actual or potential competitors of each other, the anti-competitive effects result from '*leveraging'*, occurring when firms were able to leverage the market power, they hold on to a given market to secure a dominant position into a different market. The perception of these kind of effects was certainly more complicated than that of horizontal or vertical issues, especially because, as observed by the General Court in Tetra Laval I, the effects of these kind of mergers appeared to be neutral, or, sometimes beneficial for competition.[627]

In *Tetra Laval II ,* the CJEU issued a significant statement on regard of these kind of mergers, stating that: '*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. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important'*.[628]

The CJEU on the one hand confirmed the possibility to assess mergers with conglomerate effects under the Regulation No. 4064/1989. On the other hand, the CJEU imposed important restriction on the Commission when it came to prohibit a merger with these effects. Indeed, even though the CJEU did not mention the neutrality or benefit of conglomerate type of mergers as the General Court, it stated that leveraging behaviours were genetically difficult to predict and it observed that it will be particularly difficult for

[627] *Tetra Laval I* (*supra* note 463) para. 155.

[628] *Tetra Laval II (supra* note 458) para. 44.

the Commission to prove to the requisite legal the anti-competitive nature of conglomerate type of merger.[629]

Remarkable were also the observations made on the value of the future conducts in the analysis of a conglomerate type of merger where the anti-competitive effects were the results of leveraging. Indeed, the General Court agreed that the merger could have resulted in the chance for the new entity of leveraging its dominance in one market to created a dominant position in a different but related market, however the Commission did not demonstrate, to the requisite legal standard, that such a behaviour would have been put into place. In particular, the General Court held that the Commission ought to take into consideration whether the stimulus to practice leverage conducts might have been *'reduced, or even eliminated owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue'.* [630]

The Advocate General Tizzano developed a distinction between mergers which immediately amend the structure of the market and mergers whose effects on the market appeared only after a certain lapse of time because of the parties unlawful conducts. What the Commission did was thus a mere qualification of the type of merger under the second category and thus assessing whether the test reported under Article 2 Regulation No4064/1989 was met.

Contrary to what stated by the Advocate General, the CJEU agreed with the General Court and stressed on the importance of the Commission took into account all the relevant factors included in the parties' behaviours when assessing the possibility that leveraging conducts would have taken place. This judgment might have been interpreted in way that the CJEU emphasized the importance for the Commission to consider all relevant factors when evaluating the potential for leveraging practices to occur. The possibility that such leveraging could have violated Article 82 EC and thus be subject to antitrust proceedings

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[629] *Tetra Laval II (supra* note 458) para. 44-51.

[630] *Tetra Laval I* (*supra* note 463) para. 159.

and appropriate sanctions was, according to the CJEU, inherently a deterrent. The Commission had to take this deterrent effect into account, although a detailed analysis of this disincentive did not require.

One interpretation of the CJEU's ruling is that the significance and consideration the Commission should give to this deterrent factor vary from case to case, primarily depending on the likelihood that companies' illegal practices can be easily detected and penalized by antitrust authorities. The more apparent it is that violations of Article 82 EC Treaty could be swiftly and effectively addressed after the fact, the less necessary preemptive action by the Commission became, and *vice versa*. The Commission should have though provided precise and consistent evidence displaying the chain of cause and effect leading to leveraging.[631]

To conclude, the CJEU's *Tetra Laval II* provided interesting and significant elements for the development of the EC Treaty merger control system. Nevertheless, it was also true that the CJEU lost the opportunity to provide the expected guidance on some key points which the Commission had raised in its appeal, especially in relation to the standard of proof required under the merger control Regulation No. 4064/1989 and the standard of judicial review exercisable by the European Courts.

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[631] L. Prete & A. Nucara, *Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear after Tetra Laval?,* (2005) European Competition Law Review, p. 697-704.

1.4 C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association*

On July 10, 2008, the CJEU overturned a 2006 judgment of the General Court regarding the merger of Sony and Bertelsmann Music Group (BMG) recorded music businesses. [632]

The General Court had, in its judgment, annulled the Commission's clearance decision on the concerning joint venture. Such a judgment represented an antitrust twist in a merger saga beginning in 2004. More than *Tetra Laval II*, the CJEU lighten or even completely removes some of the procedural and substantive positions adopted by the General Court.

On 9 January 2004 *Bertesmann and Sony Music Entertainment* [Sony], two international media companies active in the music sector, notified to the Commission a joint venture to integrate their recorded music businesses which took the name of Sony BMG. On 20 January 2004, the Commission issued a questionnaire to several players on the market, and Impala, an international independent association for music production, illustrated its vision on the incompatibility of the operation with the common market. After sending the parties a statement of objections and delivering an in-depth investigation (Phase II), the Commission declared the concentration compatible with the internal market in July 2004. On 3 December 2004, Impala brought an action against the Commission's approval decision. Impala argued that the decision of the Commission was vitiated by manifest errors and inadequately reasoning. On these regards, the General Court annulled the Commission's clearance decision on 13 July 2006.

The parties to the transaction appealed to the decision of the General Court, with the Commission in support of most of their arguments. In November 2007 the hearing before the CJEU's Grand Chamber took place, and in December 2007 the Advocate General Kokott recommended the dismissal of the appeal.

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[632] Judgment of 10 July 2008, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association* Case C-413/06 P, ECLI:EU:C:2008:392 *(*further refer as *Impala*).

The CJEU found that the General Court committed several errors in law when affirming that the Commission's 2004 decision approving the joint venture Sony BMG was vitiated by manifest error of assessment and was inadequately reasoned.

The judgment should have been analyzed by considering at first the way the General Court approached the issued of evidence and proof presented by the Commission, and secondly and thirdly, alleging an error of law in that the General Court applied an excessive burden and standard of proof regarding decisions approving a concentration.

The appellant put forward seven grounds of appeal when assessing the General Court's error in law. However, this paragraph will focus solely on the relevant on the substantive aspects of EU merger control clarified through this judgment, particularly the relevance of the Statement of Objections (SO), the meaning of collective dominance, the duty to state reasons, and the standard of proof.

The first message delivered by this ruling concerned the relevance of the SO. The CJEU opened its statement by recalling the fundamental principle of Community law part of the right of the defence of the undertaking concerned during the administrative procedure according they had to afford the opportunity spread the Commission's views on the truth and relevance of the facts and circumstances alleged and on the documents used by the authority to support its claim that there has been an infringement of the EC Treaty.[633] Concurrently, both the CJEU and the General Court agreed with the role and nature of the SO, which '[…] *is a procedural and preparatory document which, in order to ensure that the rights of the defence may be exercised effectively, delimits the scope of the administrative procedure initiated by the Commission, thereby preventing the latter from relying on other objections in its decision terminating the procedure in question*'.[634]

It is thus in the nature of the SO to be subjected to amendments made by both the Commission and by the parties' observations delivered in written form and in the oral hearings with the Commission. The Commission was called to take into account what emerged during the administrative procedure, however it might always alter its standpoint

[633]*Ibid.,* para. 61.

[634] *Ibid.* para. 63.

from the SO without the need to explain why it departed from that document, as long as it stated reason of its ultimate decision in its final assessment at the time of the closing of the proceeding.[635]

Considering the judgment under appeal, the General Court focused on the differences between the Commission's decision and the finding of facts made in the SO, and treated the latter as established conclusion by not considering their provisional nature. The CJEU replied by claiming that, regardless of some non-controversial elements which, by reason of empirical and verifiable nature could not be contested, '*it should not be assumed that assessments made in a statement of objections cannot be modified in the light of the replies to such a statement*'.

Furthermore, when given as established certain elements emerging from the SO, the Commission should have demonstrated the reason of its assessment, which it did not.

Regarding the evidence which is submitted after the sending of the SO, the CJEU, held that it is reported in Article 18(3) of the EUMR and in Article 13(2) of the Implementing Regulation that the concerned undertakings '*have the right to submit in their written and oral hearing following receipt of the statement of objections all material which they consider capable of refuting the Commission's objections and of leading it to approve their proposed concentration'*.[636]

In accordance with Article 19 of the EUMR, the Commission could not be required, in each individual case, to send requests for extensive information right before transmitting its draft decision to the Advisory Committee on concentrations.[637]

Furthermore, the Commission noted that the replies to the SO may focus on the elements which the notifying parties considered to be crucial to the result of the formal proceedings, even though they were not considered as such in the SO. Those arguments could not be subjected to more demanding standard of proof as to their probative value and cogency,

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[635] *Ibid* para. 64-65.

[636] *Ibid*. para. 89.

[637] *Ibid*. para. 91.

as requested by the General Court.[638] Such a request would have indeed been contrary to the right of defense of the notifying parties.

About collective dominance, the CJEU confirmed, in compliance with Article 2 of the EUMR, that it arises whenever a concentration would lead to a situation in which effective competition in the relevant market was significantly impeded by the undertakings which together were able to adopt a common policy on the market in order to profit from a situation of collective economic strength.[639]

For tacit coordination to emerge and thus leading to the creation of a collective dominant position which significantly impeded effective competition in the common market, the three elements deriving from the *Airtour* judgment had to be present to assess the long term of tacit coordination of market behavior by the members of the concentration: there had to be a sufficient degree of market transparency, there had to be a deterrent mechanism that came into play in case of deviation, and the reaction of outsiders should have not be such as to jeopardize the results expected from the coordination.[640]

The CJEU mentions in *Airtour* in the part related to the analysis of the criteria assessing the substantive concept of collective dominance. It disagreed with in a mechanical and separate way and pushed towards a global consideration of the latter and also emphasized on the *'overall economic mechanism'* of a hypothetical tacit coordination. [641]

The present judgment centered around the existence of a transparency within the market for recorded music. The General Court believed that, regardless of the three conditions their examination settled by *Airtour*, a theoretical analysis of the concept of collective dominant position might also be established on the basis of what may be a very mixed '*series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position'*.[642]Additionally,

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[638] *Ibid.* para. 92.

[639] *Ibid*. para. 120.

[640] *Ibid* para. 123 inter alia *Airtours V Commission* (*supra* note 518) para. 62.

[641] *Ibid* para. 125 inter alia *Airtours V Commission* (*supra* note 518) para. 164.

[642] *Impala* (*supra* note 632).

the General Court claimed that in case of '*close alignment of prices over a long term period'* without a proper contrary alternative explanation may lead to a presumption of market transparency which subsequently allowed for a collective dominant position to exist.[643]

Advocate General Kokott in his Opinion[644] also noted that the General Court erred in law when considering the analyzing the single elements contributing to the assessment of the collective dominant position, such as list prices, retail prices, net wholesale prices, average net prices, price discounts, the complexity of price structures, as well as price variance and volatility of price. Furthermore, it did not make their examination depending on the actual analysis of the circumstances of the individual case, and specifically on the particular circumstances of the concerned market.[645]

The CJUE affirmed that in such a case the General Court failed to demonstrate the required degree of transparency in as much as it did not adopt an approach based on the analysis of such plausible theory of coordination strategies as may exist in the circumstances.

Furthermore, in relation to the assessment of the General Court on the existence of '*known set of rules'* governing the grant of discount by the major, the CJEU recognized that the former relied on unsupported assertions relating to hypothetical industry professional. In fact, in paragraphs 427 to 429 of the judgment under appeal, the General Court itself acknowledged that the evidence shown by *Impala* were not clear enough, and thus not sufficiently transparent, to demonstrate the existence of market transparency, and subsequently tacit coordination among the concerned undertakings. The General Court failed to recognize that the burden of proof in relation to the purported qualities of such hypothetical coordination in the concerned market laid on Impala.

In substance, the General Court failed into not carrying out a contextual analysis in allegation of collective dominant position of the arguments raised before and

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[643] *Ibid*. para. 252.

[644] Case C-413/06 P, *Impala* SA [2008] ECR I-04951, Opinion of Advocate General Kokott.

[645] Opinion of Advocate General Kokott, (*supra* note 644) para. 53.

subsequently into assessing the present of market transparency and the existence of a collective dominant position.

Furthermore, the applicant claimed that the General Court applied an incorrect standard of reasoning as regards decisions approving a concentration and erred in law when assessing that the Commission did not prove correctly the market opacity.

Article 253 of the TFEU requires that the statement of reasons related to a Commission '*must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review'*. [646] The compliance of the statement of reason to Article 253 TFEU had to be assessed not only in regard of the words of the statement but also in relation to the situation at stake and all the legal rules governing it.

In order to comply with other principles under merger control law, such the need for speed and that of short time scale, the institution adopting the state of reason did not need to precisely justify its position on the matter and neither include the anticipation of potential objections to it. When taking a decision on the compatibility of a concentration with the Common market, the Commission was solely required to *'to set out the facts and the legal considerations having decisive importance in the context of the decision" without taking a position on all the arguments relied on before it'*.[647]

The applicant stated that a decision cannot be annulled on the ground of inadequate reasoning of the Commission. In its statement the applicant relied on Article 10(6) EUMR, which states that approval decisions of the Commission do not have to be reasons since they cannot be challenged on the ground of lack of a statement of reasons.

On this regard, the Advocate General Kokott disagreed with the applicant by arguing that a secondary provision, such as Article 10(6) TFEU, cannot be used to limit the scope of a primary law rule, as that under Article 253 and 230 of the EC Treaty and Article 41(2)

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[646] *Impala* (*supra* note 632) para. 166.

[647] *Ibid*. para. 169.

of the Charter of fundamental rights of the European Union. Article 10(6) EUMR should indeed be interpreted in light of the primary law provisions and thus did not deprive the Commission of its statutory duty to reason the decision in relation to every notified concentration, regardless of its approval or prohibition.

Additionally, the Advocate General Kokott recognized the relevance of Article 10(6) EUMR for the preservation of the need for speed, however, such a provision could not be used as a way to restrict or exclude the principle of legal certainty which is illustrated in the possibility of the decision to be challenged before the European Courts[648].

The CJEU agreed with the observation of Advocate General Kokott on the relevance of Article 10(6) EUMR and on its relationships with primary law provisions, however observations were made in regard of the extension of the duty to state reasons for the first clearance decision.

On this regard, the General Court argued that the Commission did not sufficiently justify its findings in the first clearance decision that the market was not so transparent and subsequently that there was not sufficient basis for a collective dominant position to be settled.

The Advocate General Kokott agreed with the General Court on the matter stating that the Commission failed to justify the nature of the campaign discounts and how these measures were relevant for the transparency of the market and could compensate the elimination of the transparency needed for the existence of a collective dominant position.[649]

Both the General Court and the Advocate General Kokott based their arguments on Article 253 EC Treaty, which requires the Commission to set appropriate reasons for justifying the decision taken and to enable the competent Courts to exercise their power of review.

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[648] Opinion of Advocate General Kokott, (*supra* note 644) para. 100-104.

[649] *Ibid*. para. 113.

As already mentioned by the Advocate General for the previous point, the compliance of the statement of reason to Article 253 EC must be assessed not only in relation to its wording but also of the context and legal rules applied. The Commission could also base its assessment of the degree of difficulty of the individual case and base its reasons by assuming the knowledge of informed market participants, such as *Impala* for the specific case. Furthermore, the Advocate General clarifies that the Commission should have limited its statement to those reasons which were of decisive importance in the context of the decision to make understand the factual and legal considerations of decisive importance in the context of the decision. The reasons were to be logical, comprehensible, not persuasive and free of any internal inconsistencies.

In the present case, the Advocate General and the General Court observed that the Commission failed into stating sufficient reasons and justification of the effects that *'campaign discounts'* had on the existence market transparency. Given that this was the only factor among those listed by the Commission which had the potentiality to militate against the existence of market transparency, and subsequently the finding of the dominant position, the Commission should have explained their effects more detailed and with higher standard of proof also considering the margin of discretion left to the Commission in relation to the complex economic situations.

The CJEU observed that Article 253 EC has to main objects, first it mandated a statement of reasons to allow affected individuals to understand the measure and to enable the European Courts to review it. Second, the adequacy of this statement should be evaluated based on the nature of the measure and its context. By taking in consideration the context of the present case characterized on the one hand by the very little time passed from the submission of the written replies to the SO, and the hearing before the Commission and the end of the formal proceeding, on the other, and by the requirements reported in the decision at stake; the Commission had not failed to provide an adequate statement of reasons for the contested decision.

In particular, the CJEU stated that the Commission had reported the reasons justifying the contested decision, such that Impala could challenge its validity before the competent Court. The CJEU highlighted the distinction between the duty to state reasons, which was an essential procedural requirement, and the question of the validity of the foundations of such reasons, which was a matter of substantive legality of the measure at issue. In particular, the duty for the Commission to state the reasons of its decisions in its formal statement, did not require that those reasons were incorrect. In other words, the essential procedural requirement under Article 253 EC Treaty was fulfilled even if the grounds of such reasons are vitiated since the latter would have been simply classified as an error of the substantive legality of the decision.[650]

On regards of the required standard of proof, the *Impala* judgment finally clarified the required standard of proof under merger control decisions, and how the latter did not variate in relation to the type of decision taken by the Commission.

At first instance, the applicant stated that the standards or proof applied to approval decisions should have not differed from those applied to approval one, also in light of Article 2(2) and (3) of the EUMR which did not mention such a distinction.

In the *Tetra Laval* judgment, the CJEU stated that the prospective analysis *'consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition'* , and made it necessary to prevent various chain of cause and effect with a view to ascertain which one of them is most likely.[651]

However, the CJEU pointed out that such a prospective analysis could justify the general presumption that a notified concentration was compatible or not with the common market. Additionally, the interpretation of Article 10(6) of the EUMR which allowed for a lower standard of proof in case of a concentration resulting deemed compatible with the internal market by the Commission, could be validated. That provision, whose aim was protecting the need for speed under merger control, was an exception to the general scheme of the EUMR, was laid down in Article 6(1) and 8(1) EUMR, according to which the Commission had to rule expressly on the concentration which were notified to it. Also, the Advocate General Kokott in its opinion observes that Article 10(6) EUMR was a mere exception placed in the legislative scheme in conjunctions with the provisions as to time-

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[650] *Impala* (*supra* note 632) para. 187.

[651] *Tetra Laval II (supra* note 458).

limits, and it would have been incorrect to derive from it a general presumption on the compatibility of a concentration with the common market.

Advocate General Tizzano in *Tetra Laval*'s opinion interprets Article 10(6) EUMR based on the fact that a notified concentration was to be deemed compatible with the internal market where the Commission did not take a decision within the prescribed period. Considering this, he believed that, in case of uncertainty, it was better to approve a concentration leading to the creation or strengthening of a dominant position rather than prohibiting one that is compatible. According to this, the General Court's judgment in *Tetra Laval II* has been interpreted as setting a higher standard of proof for prohibition decisions involving '*behavioral'* effects, such as vertical and conglomerate mergers that enable exclusionary practices, compared to cases with immediate structural anti-competitive effects. On the other hand, with the *Impala* judgment, the CJEU clarified that equal standards of proof applies to all kinds of decisions and scenarios of competitive harm. Also, in compliance with the link of cause and effect resulting from the *Tetra Laval II* judgment, the CJEU states that *'the Commission is, in principle, required to adopt a position, either in the sense of approving or of prohibiting the concentration, in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue'*.[652]

Moreover, the CJEU recalled that essential function of evidence already established in *Tetra Laval II* and clarified that an issue on the existence of collective dominance and its inherent complexity of a theory of harm might not have had an impact on the standard of proof which should have applied.

The Advocate General Kokott in his opinion on *Impala* judgment highlighted that the role of the Commission in merger control context is that of giving a prognosis as to the market's future development after the concerned operation, and the plausibility of such prognosis requires that the Commission need provide evidence only for the facts in which it has based its prognosis. It is important to add that the Commission, in its role under

[652] *Impala* (*supra* note 632) para. 52.

merger control simply grants or refuses clearances of administrative law nature for an economic activity, without imposing any sanctions or infringing any personal freedom[653].

In light of these observations and in what stated by the General Court in *General Electric*, the Advocate General concluded that the Commission should have based its decision on "*A prospective analysis ... makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely*"[654], and that it would be inappropriate to set higher standard in merger control procedure since the last word on the review of the prognosis of the Commission on concentrations still belongs to the European Courts.[655]

The *Impala* decision of the CJEU became remarkable among the merger control case-law for a series of significant aspects resulting from it.

Firstly, it clarified the application of the same standard of proof to all types of decisions and scenarios of competition harm in merger control. The CJEU states that what may be the distinctive factor between the different mergers is the economic theory of harm and thus the narrowness of the respective necessary conditions which yield a prognosis of a significant impediment to effective competition (SIEC). Such theory of harm might have been simpler for examples in the cases of horizontal mergers with unilateral effects, and more complicated in horizontal coordinated effects cases. However, the most complex theory of harm was the one related to vertical and conglomerate mergers cases which only indirectly lead to an SIEC since it additionally involves exclusionary conduct. Since these conditions already caught the different probabilities of an SIEC, the same standard of proof should by applied by the Commission to the respective condition.[656]

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[653] Opinion of Advocate General Kokott, (*supra* note 644) para. 204- 206.

[654] Judgment of 14 December 2005, *General Electric v Commission*, Case T-210/01, ECLI:EU:T:2005:456 para. 64, last sentence: '*A prospective analysis consisting in an examination of how a concentration might alter the factors determining the state of competition on a given market, in order to establish whether it would give rise to a serious impediment to effective competition, makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely'*.

[655] Opinion of Advocate General Kokott, (*supra* note 644) para. 209.

[656] T. Käseberg, *Case C–413/06 P, Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala), Judgment of the Grand Chamber of 10 July*, (2009),

Furthermore, within a cost-benefit framework, a higher standard of proof for prohibition decisions compared to clearances suggested that the costs associated with incorrect prohibition decisions, false positives, were greater than those for incorrect clearances, false negatives. Advocate General Tizzano in the *Tetra Laval II*'s opinion, agreed with this statement and justified its reasons throughout Article 10(6) of the EUMR. However, the EUMR did not mention any provision which may have somehow reconducted to this interpretation on the standard of proof.

Secondly, in relation to the nature of the SO, the CJEU emphasized that it was only a provisional procedural document in competition and did not prevent the Commission to take a final decision that departed from it completely. The right of the parties to submit evidence and being heard before the Commission in relation to what stated in the SO, was nothing more than a representation of their right of defense. Thus, the Commission had to take account of what stated by the parties and eventually depart from its objections, in such a case there should not be any increasing of judicial scrutiny by the Courts.

Thirdly, regarding the substantive concept of collective dominance, the CJEU had for the first time endorsed in substance the General Court's *Airtour* criteria for determining collective dominance (*transparency of the market, sustainability of the common conduct, no jeopardize of third parties*). The CJEU also recalled the need to avoid a mechanical approach in their analysis and emphasized on the overall economic mechanism underlying coordinate effects. By using a different language from the *Airtours's* judgment the CJEU clarified that the Commission should present a general analysis of the situations of the markets concerned and firms' (probable) behavior when assessing the creation of a collective dominant position.

Fourthly, in relation to the duty to state reasons, the CJEU annulled the General Court's findings that the Commission erred in law when delivering inadequate reasons to its clearance decision, focusing on the wrong interpretation of Article 10(6) EUMR given by both the parties and the General Court. Article 10(6) EUMR, clarified the CJEU, is indeed a mere exception under the EUMR whose aim was protecting the principles of need for

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46, Common Market Law Review, Issue 1, pp. 255-267, available at <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/46.1/COLA2009010>

speed and time-limits throughout the automatic approval of mergers in cases the Commission failed to issue a decision within the applicable deadline. In the present judgment the CJEU challenged the applicant's interpretation of Article 10(6) EUMR according to which a merger clearance decision could never be annulled for lack of reasoning. Whereas it found that the CJEU concluded that the Commission did not lack to reason its decision because (i) Impala might ascertain the reasoning behind it and (ii) the General Court was able to exercise effective judicial review.[657]

Albeit the Impala judgment did not spell the end of litigation for Sony and BMG since the CJEU ruled on referring the case back to the General Court, it still gained a remarkable position with the merger control case-law. The CJEU mitigated the General Court's *'over-checking'* on Commission's, especially by giving relevance to the time constrained on the Commission and the consequences thereof. Furthermore, the *Impala* judgment raised the standard for merger clearance decisions and encouraged the participation of third parties in competition cases. In conclusion, the effects that such decision had on competition law can be considered generally beneficial. *Impala* might have resulted in more coherent and economically decisions by the Commission, achieved through more democratic proceedings. This would have ensured that only genuinely pro-competitive mergers were approved, potentially strengthening the global economy. Hopefully this would be the case in this new era of European competition law.[658]

1.6 Conclusions

The above discussed judgments have been significant for the clarification of the concept of collective dominance and for the required standard of proof necessary to prove it.

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[657] C. O'Daly, *European Court of Justice Overturns CFI's Impala Judgment and Restores Proper Process in EC Merger Review,* publication of WilmerHale of 14.07.2008, available at <https://www.wilmerhale.com/insights/publications/european-court-of-justice-overturns-cfis-impala-judgment-and-restores-proper-process-in-ec-merger-review-july-14-2008>

[658] E. Vranas-Liveris, *Impala v. Commission: Changing the Tune of European Competition Law*, 83 Chi.-Kent L. Rev. 1497 (2008), available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol83/iss3/14

At first, the *Airtour* judgment was landmark's judgment in the development of the concept of collective dominance. The General Court clarified that the existence of a collective dominant position had to be considered not only statistically, but also on whether such collusion is sustainable over time. Thereby, the Commission was not obliged to demonstrate that there was a specific retaliation mechanism, but that it had to establish the existence of deterrent factors in the specific case.[659]

The General Court also elaborated three cumulative conditions that were essential for a finding of collective dominance: sufficient market transparency, incentive not to depart from the common policy and the lack of jeopardization by current and future competitors or consumers. The three cumulative conditions developed by the General Court in *Airtour* have been used also for other judgments.

The results of *Airtour* have had reactions also in subsequent judgments. For instance, in the *Kali & Salz* judgment the Commission focused on the economic linking factor between two or more undertakings operating on same market which enable them to act independently of their competitors, consumer and customers. It further highlighted that the collective dominant position constituted an abuse under the merger control as long as it raised a significant impediment to effective competition, also in view of the market structure within an oligopolistic market.

Furthermore, the Commission's defeat in *Airtour* incremented the debate about the diction and the scope of the dominance test under the Regulation No. 4064/1989. With the goal of ensuring legal certainty, the most recent substantive test (SIEC) focused on whether a notified concentration would have '*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*' which departed from the original attention to dominance. Moreover, also the 2004 Horizontal Merger Guidelines played a significant role for the development of the concept of dominance. The latter have been important in subsequent decisions of the General Court for the differentiation of *'coordinated effects'* and *'non-coordinated effects'* when defining the concepts of collective and single-firm

[659] *Airtours plc v Commission of the European Communities (supra* note 517) para. 192 and 195.

dominance.[660] More specifically, in relation to coordinated effects, the Commission adopted the three conditions test developed in *Airtour* and codified other principles.[661]

For what concerned the setting of a degree of evidence required for the Commission's decision, in the *Kali & Salz* the CJEU clarified that the Commission had to reproduce '*cogent and consistent'* evidence to justify its decision on notified merger. Subsequent discussions on this topic developed with *Tetra Laval I* when the General Court requested the Commission to reproduce '*convincing evidence'* that a proposed merger in '*all likelihood'* would have given raise to significant anti-competitive effects. However, on its final judgment, namely *Tetra Laval II*, the CJEU clarified that such expression was simply a semantic term used to highlight the importance of the evidence reproduced by the Commission when taking a decision and thereby no further evidence than that already established by the standards set in *Kali & Salz* was required.

With the *Impala* judgment, the CJEU finalized all the points discussed in the previous prohibition decisions.

Firstly, with the *Impala* judgment the CJEU did not only raise the standards of proof, but it also clarified that the Commission is required to adopt the same standards of proof regardless the kind of decision it is willing to adopt.

In the *Airtours* and *Kali & Salz* judgments, the General Court lowered the standard of proof for clearance decisions involving collective dominance, citing that the evidentiary threshold may have been excessively high in some cases, making it difficult to establish behaviors with anti-competitive effects. Subsequently, in case of uncertainty of the anti-competitive effects that these mergers may have on the market on the market, the Commission opted for issuing clearance decision.

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[660] *Ibid*. para. 22. The terms "coordinated" and "non-coordinated" effects were first elucidated in the US Horizontal Merger Guidelines.

[661] *Ibid*. para. 39 and 57.

The *Impala* judgment finally put an end to this practice by imposing upon the Commission the duty to always take a fully reasoned decision based on the sound evidence.[662]

2. The Role of Efficiencies

When assessing the impact of a merger on competition throughout the SIEC test, Recital 29 of the EUMR states that it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertaking concerned. Furthermore, in paragraphs 76 to 88 of the Horizontal Merger Guidelines, the Commission sets out the conditions in which it may take such efficiencies into account. When determining the effects of a merger, the Commission shall take account of all relevant factors including technical and economic progress, as established in the appraisal criteria under Article 2(1) EUMR. However, it is fundamental to acknowledge that no *'efficiency defense'* can save a merger leading to an SIEC: the Commission will consider any potential efficiencies in its overall evaluation of whether the merger will result in a significant impediment to effective competition (SIEC).[663]

Paragraph 78 of the Horizontal Merger Guidelines adds that, for efficiencies to be taken into account, they must be benefitting for the consumers, merger-specific and verifiable. Those parameters are cumulative.

For the benefitting consumer in the relevant market, efficiencies should be substantial and timely. These type of efficiencies gains may be represented by cost reductions, new or improved products or services, which might enable a firm to increase output and reduce prices, thereby reducing the incentive to act in a coordinated manner[664]. Anyways, there

[662] B. Van Rompuy & C.Pauwels, *Is the standard of proof imposed by the Community Courts undermining the efficiency of EC merger control? The Sony BMG joint venture case in Perspective*., EUSA Tenth Biennial International Conference, published on 17 May 2007, pp. 31-33.

[663] R. Whish and D. Bailey, *Competition Law (10th edition)*, Oxford University Press, Oxford, United Kingdom, 202, pp. 923.

[664] Horizontal merger Guidelines para. 81.

had to be an incentive to pass efficiency gains to consumers, and the Commission will be more skeptical when the merger led to a monopoly or a very high degree market power.[665]

Furthermore, regarding the merger specificity and verifiability requirement, the Commission required for the efficiencies to be a direct result of the notified merger, who have the burden of their proof; and they had to allow the Commission to reasonably certain that they were likely to materialize. In other words, it was upon the parties to demonstrate promptly that the proposed efficiencies are merger specific and likely to be materialized.[666]

The *American Airlines v Commission*'s judgment was or relevant significance for the substantive assessment of a proposed remedy and the way merging parties interact with the Commission during the EUMR process.

2.1 T-430/18, *American Airlines v. Commission*

The *American Airlines* judgment [667] concerns a concentration between undertakings in the air transport market, and its relevant on both the substantive assessment of a prospective remedy and the way merger parties communicate with the European Commission during the EUMR procedure. Furthermore, the judgment connected the assessment of scope of a EUMR remedy to an interpretation of a separate industry regulation, in such case the EU Slot Regulation.[668]

On 18 June 2013, the Commission received a notification of a proposed merger between US Airways Group Inc. and AMR Corporation. The Commission believe that the concentration would raise serious doubt as to its compatibility with the internal market as

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[665] *Ibid*. para. 84.

[666] Horizontal Merger Guidelines para. 86 to 88 *inter alia* Judgment of 9 March 2015, *Deutsche Börse v Commission*, Case T-175/12, EU:T:2015:148, para. 362.

[667] Judgment of 16 December 2020, *American Airlines v. Commission*, Case T-430/18,EU:T:2020:603.

[668] Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports.

regards the route between London Heathrow airport (LHR) and Philadelphia International airport (PHL). On 25 July 2013, the parties submitted to commitments. A key point of interest was the granting to the prospective entrant the so called '*grandfather rights'* that is, the *'use-it-or-lose-it'* mechanism.

On 5 August 2013, the Commission declared the merger compatible with the internal market, subject to certain conditions and commitments. The Slot Commitment in the timely and likely to entry on the [LHR-PHL] route , the scope of entry on this route was considered to suffice to resolve the serious doubts identified on this party. Additionally, the prospective entrant was be deemed to have '*grandfathering rights'* for the slots of the LHR-PHL route right after the appropriate use of the slots has been made on the Airport Pair for the *'utilization period'*. Once such period has elapsed, the prospective entrant will be entitled to use the Slot obtained based on the Commitments on any city pair, *'grandfathering right'*. The granting of the grandfathering rights represented a significant element for the Commission to decide on removing all serious doubts about the concentration, based on its precedent decision the IAG/BMI concentration. The commitments provided that Delta Air Lines would have acquired slot rights, if it made *'appropriate use'* of the slots.

On October 2014, Delta Air Lines Inc. (Delta) intended to operate on the LHR-PHL route with a daily frequency on summer 2015. Delta submitted to the Commission, a bid for slots under the final commitments, which was approved by the Commission in December 2014.

On 28 September 2015, American Airlines submitted that Delta's failure to operate the remedy slots in accordance with the bid, thereby under-using them and thus challenged its acquisition of the grandfathering rights for the 2016 summer season. The applicant claimed that Delta Air Lines had not made '*appropriate use'* of the slots remedy.

In April 2018, the Commission declared appropriate the use made by Delta of the slots during the '*utilization period'* and approved the granting of the grandfather rights to Delta regardless the of the inclusion of a definition of such term in the commitments. Furthermore, in the clause 1.9 of the final commitments the Commission clarified that the term '*appropriate use'* should have been interpreted as meaning *'the absence of misuse'* and not as '*use in accordance with the bid'* as argued by American Airlines. In July 2018, American Airlines brought an action of annulment of the Clearance Decision before the General Court relying on two pleas of law: the first alleging an error of law made by the Commission on the interpretation of the term *'appropriate use',* and the second claiming that the Commission had not considered all the relevant factors for the grant of the grandfathering rights to Delta.

The General Court declared the interpretation of the Commission on the term '*appropriate use'* of clause 1.9 of the Final Commitments might have been interpreted *'the absence of misuse'*. It further added that *"the term 'appropriate' implies a use of slots which may not always be completely 'in accordance with the bid' but nonetheless remains above a certain threshold".* [669] To determine such threshold, the General Court referred to the *'use it or lose it'* mechanism. This rule allowed an airline holding slots at a congested airport to retain the same series of slots in the next equivalent IATA season if it had used at least 80% of its slots, provided it can return slots to the coordinator in time for reallocation without penalty, as stated in Article 10(3) EUMR. In the context of airline mergers or alliances, this rule gained additional importance: a remedies purchaser who acquires grandfather rights could choose to operate the slot on a different route than the one initially committed to, making the remedy more appealing to competing airlines.[670]

On 26 March 2021, American Airlines appealed to the judgment before the CJEU relying on a single ground of appeal, alleging that the General Court erred in law in holding that the concept of '*appropriate use'*, should have been interpreted as meaning of the *'absence of use'* and it incorrectly upheld the decision to grand grandfathering rights to Delta in so far as Delta had not operated the slots allocated.

Such ground of appeal has been divided in three limps: in the first limp when interpreting *'appropriate use'*, the General Court failed to take account the objectives of the EUMR, the Commission's Notice on remedies[671] and the specific commitments concluded between the parties to the merger. Secondly, the General Court erred in law when

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[669] *American Airlines v. Commission*, (*supra* note 667) para. 105.

[670] *Ibid*. para. 147.

[671] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), (further refer as the Remedies Notice).

interpreting the concept of '*appropriate use*' as '*absence of misuse*'. Thirdly, the General Court erred in interpreting the Form RM in relation to the final commitments and Clause 1.9 of those commitments, specifically the legal implications of the phrase *'in accordance with the bid'*.

On 16 March 2023, the CJEU issued its judgements in which it dismissed the appeal in its entirety. In the following part each limb will be analyzed individually, and a focus will be made on the interpretation and scope of commitments.

The first limb disputed the purposive and contextual interpretation given by the General Court of the concept of *'appropriate use'* under the Clause 1.10 of the final commitments should have been done in accordance with the objectives of the EUMR and the Commission Notice on remedies.[672]

The CJEU primarily focused on the purposes and aims of commitments, underlined in Recital 30 of the EUMR[673] and from paragraphs 5 and 9 of the Commission's notice on remedies[674] that the final commitments are measures proposed by the parties to the merger in order to eliminate the concerns identified by the Commission. Moreover, those can also represent the preliminary examination (Phase I) when the problems to the concentration are clear and easy to fix through remedies. [675] Thus, the CJEU stated that *'the purpose of the commitments is, on the one hand, to eliminate entirely the competition concerns identified by the Commission such that the concentration in question does not significantly impede effective competition'*.[676]

The CJEU noted that the General Court's failure to explicitly mention the final commitments, the objectives of the EUMR, or the remedies under that regulation when explaining the term *'appropriate use'* in Clause 1.10 of the contested decision does not

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[672] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), (further refer as the Remedies Notice).

[673] See Recital 30 of the EUMR.

[674] See Remedies Notice (*supra* note 167) para. 5 and 9.

[675] *American Airlines v. Commission*, (*supra* note 667) para. 78.

[676] *Ibid*. para. 79.

imply that it overlooked the context or objectives involved. Moreover, the General Court acknowledged that the remedies needed to ensure the notified transaction's compatibility with the internal market. It confirmed that such commitments '*constituted a direct and sufficient response capable of clearly dispelling all serious doubts*'.[677]

The second limb concerns the specific objective of the final commitments, which, according to the applicant, the General Court failed to consider when interpreting the concept of '*appropriate use'*, which, in his opinion, should not be interpreted equally to the *'absence of misuse'*.[678] Paragraphs 86 to 94 of the final commitments recalled the meaning of the specific objective of the concerning documents, which was to replicate in full the daily service previously operated by one of the parties to the merger, and subsequently to dispel the serious doubts raised by the Commission as to the compatibility of the concentration in question with the internal market. [679] On this regard, American Airlines believed that interpreting the concept of *'appropriate use'* as that of '*standard of misuse'*, would have resulted in the adoption of a slot usage level that would have been incompatible with the objective of the final commitments.

In relation to the so called *'grandfathering rights'*, the Advocate General noted in his opinion,[680] six significant issues on the matter.

Firstly, the slot commitment aimed at facilitating entry on the LHR-PHL route by removing the main entry barrier without mandating a specific number of frequencies for prospective entrants.

Secondly, the objective of such commitments was not to replicate US Airways' daily service, but the competitive constraint provided by US before the concentration. The new entity, to whom those constraints were delivered, will ensure that the new entrant would

[677] *Ibid.* para. 81-84.

[678] *Ibid*. para. 107-115.

[679] *Ibid*. para. 86-87.

[680] Case C-127/21 P, *American Airlines V Commission SA* [2022], EU:C:2022:584, Opinion of Advocate General Rantos.

have been able to use such commitments under the same conditions as it was for US Airways before the merger.

Thirdly, the replication of US Airways' daily service was not a precondition for the grant of grandfathering rights to the potential entrant(s). Fourthly, the objective of the grandfathering rights was to make the slot commitments more effective also by contributing to the common objective of eliminating the competition concerned identified by the Commission. Lastly, the Advocate General emphasized that, the objective pursued by the grandfathering clause is the same as that pursued by the commitments: eliminate the competition concerns on the LHR-PHL route.[681]

In conclusion, the CJEU agreed with the Advocate General when affirming that the objective of the commitments was that of replicating the competitive constraints provided by the parties to the merger before the transaction.[682]

In addition, American Airlines argued that the General Court had not considered the full remedial framework of the commitments offered by the parties in the Clause 1.13 of the final document. On that regard, the CJEU stated that the final commitments offered by the parties in the clauses 1.1, 1.26, 1.27 and 1.11 do not provide relevant criteria for determining whether the use of the bid was appropriate. Subsequently, the CJEU agreed with the General Court when stating that the provisions governing the new entrant's bid and the evaluation of that bid were relevant for the grating of remedy slots, but not for that of the grandfathering rights. [683]

The only provision of the final commitments which related to the use of the slots was Clause 1.13(b) of the final commitments, which reported the number of frequencies that the prospective entrant was required to use in order to not be considered as '*misuse*'. The CJEU further agreed with the General Court that, in order to determine whether the

[681] *Ibid*. para. 70-76

[682] *American Airlines V Commission,* (*supra* note 667), para. 91.

[683] *American Airlines V Commission,* (*supra* note 667), para. 100.

entrant had misused or not the allocated slots it had to evaluate its compliance with the principle *'use it or lose it'* carried out in the Airports Slots Regulation.[684]

Regarding the interpretation of the concept of '*appropriate use'* the General Court erred in law when interpreting it in accordance with the concept of *'absence of misuse'*.[685]

Significant in the resolution of this issue is the legal value given to the Airport Slots Regulation. The General Court and the Advocate General considered this Regulation to be relevant not only for the application of the rule to regulate air traffic but also for the ensuring of fair competition between Delta and its main competitor on the LHR-PHL route.[686] In fact, as highlighted by the CJEU in paragraph 133 of the present judgment, even if it pursued a different object from the EUMR, the Airport Slots Regulation might always been taken in consideration in the context of merger control.[687]

According to American Airlines, the judgment under appeal incorrectly gave importance to the content of the Form RM relating to the final commitments. More specifically, American Airlines contested the grounds of the judgment under appeal according to which the information in the Form RM suggests that the expression *'in accordance with the bid'* is not relevant in interpreting the concept of *'appropriate use'* within the meaning of the clause 1.10 of the final commitments.[688]

The Form RM was fundamental for the interpretation of the final commitments. Indeed, the final commitments must always be interpreted in the light of the EUMR, and, considering that the Form RM represented the place where the undertakings provided the required information and documents when submitting commitments, *'the information in the Form RM is necessary to allow the Commission to examine whether the commitments*

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[684] *American Airlines V Commission*, (*supra* note 667), para. 102-104.

[685] *American Airlines V Commission*, (*supra* note 667), para. 107.

[686] Opinion of Advocate General Rantos, (*supra* note 680), para. 105.

[687]*American Airlines V Commission*, (*supra* note 667), para. 127-129.

[688] *Ibid*. para. 145.

are capable of rendering the concentration compatible with the internal market in that they will prevent a significant impediment to effective competition'.[689]

Also, the Advocate General highlighted that '*the Form RM is not a purely preparatory document, […], but a document complementing the commitments which […] is intended specifically to assist the Commission in evaluating the content, aim, viability and effectiveness of proposed remedies and to set out the undertaking's own understanding of those remedies'*.[690]

On this regard, the CJEU clarified that the Form RM was indeed not a purely preparatory document, as stated by American Airlines, but it was useful for gathering the relevant information useful to demonstrate that the remedies taken in those commitments could render the concentration in question compatible with the internal market. In other words, the finality of that document was that of facilitating the Commission's evaluation of those commitments. [691]

Furthermore, by taking int consideration the analysis of the Form RM relating to the final commitments, the General Court held that *"the concept of 'appropriate use' could be interpreted as the absence of 'misuse', within the meaning of Clause 1.13 of the final commitments, in accordance with the objective of the provisions at issue and their context, not merely in the light of that Form RM"*, as claimed by American Airlines.[692]

In relation to the expression *'in accordance with the bid'* reported in the Clause 1.9 of the final commitments, the CJEU gave right to the General Court that such expression only constituted a *'minoristic linguistic change'* to the final commitments since the Form submitted by the parties '*explicitly stated that the final commitments were based on the commitments at issue in the IAG/bmi Case and that the points where the parties diverged*

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[689] *Ibid*. para. 148.

[690] Opinion of Advocate General Rantos (*supra* note 680) para. 113.

[691] *American Airlines V Commission*, (*supra* note 667), para. 150 *inter alia* Opinion of Advocate General Rantos (*supra* note 680) para. 115.

[692] *American Airlines V Commission*, (*supra* note 667), para. 151.

from those commitments would be indicated in the Form RM relating to the final commitments'.[693]

The Advocate General pointed out that *'the Form RM submitted to the Commission by the parties to the merger explicitly stated that the commitments were based on the commitments in the decision in the IAG/bmi case and that the points where the parties diverged from those commitments would be indicated in the Form RM'*.[694] To sum up, the General Court, the CJEU and the Advocate General agreed that it was responsibility of the applicant to indicate any substantial change to the wording of the commitments at issue in the IAG/bmi Case.[695] Furthermore, for the granting of the grandfathering rights, *'the Form RM relating to those commitments refers only to the model corresponding to the commitments at issue in the IAG/bmi Case'*.[696]

Moreover, it clarified that the Form RM '*the concept of 'appropriate use' can be understood only as corresponding to the expression 'in accordance with the bid' in Clause 1.9 of the final commitments, read in conjunction with Clause 1.10 thereof, in so far as an entrant's bid would be seen as the starting point for the 'appropriate use' analysis and for deciding whether to grant grandfathering right*'.[697]

2.3 Conclusions

With this judgment the CJUE elucidated on the effectiveness of behavioral remedies in merger reviews, particularly those involving infrastructure access which might be challenging for the Commission to monitor. This task becomes easier when the activities are already regulated, providing a clear legal benchmark. In *American Airlines v Commission*, the Commission extended its approach by using the Airport Slots

[693] *American Airlines V Commission*, (*supra* note 667), para. 154.

[694] Opinion of Advocate General Rantos, (*supra* note 680) para. 118.

[695] *American Airlines V Commission*, (*supra* note 667), para. 155.

[696] *Ibid*. para. 156.

[697] *Ibid*. para. 157.

Regulation to interpret the scope of access remedies for airport slots, beyond just the access modalities. This helped clarify any ambiguities in the behavioral remedies tied to the American Airlines merging operation.

The General Court, into assessing the commitments interpreted their scope based on the Airport Slots Regulation's definition of '*misuse*', emphasizing the regulatory policy over the precise language of the commitments. This approach may not be favored by merging parties, as it may result in reducing legal certainty, unless the ruling is confined to the specific circumstances of this case and the unique aspects of the airline sector.[698]

Moreover, this judgment has been significant in highlighting the relevance of the Form RM and the necessity of informing the Commission about substantial modifications in proposed commitments to ensure an effective market test, as well as emphasizing the importance of legal certainty for the remedies' purchaser. On this regard, the judgment clarified that the law mandates that merging parties clearly define their proposed remedies during the remedy procedure, particularly any interpretations they intend to rely on in the future that could potentially narrow the scope of the remedy. Any ambiguity arising later should be construed against such a narrowing interpretation.[699]

3. The Quantitative Analysis

In the reviewing of complex mergers, the Commission often relies on quantitative economic analysis to define the relevant market and assessing the likely effects of a merger. However, before this ruling, a broad margin of discretion was left to the Commission in relation to the economic concepts and its approach to evidence which

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[698] G. Gunn, *European Courts Rule on range of competition issues in Pre-christmas Case-load Clearance,* published on 21 December 2020.

[699] J. Robinson*, Fulfilling the Conditions within Merger Commitments: Case T-430/18*, *American Airlines v Commission,* Journal of European Competition Law & Practice, 2021, Vol. 12, No. 9.

made it impossible for, to distinguish a clear test parting those mergers which give rise to competition concerns from mergers which are not problematic.[700]

The quantitative economic methods applied by the Commission to the assessment of mergers can be distinguished in two main types: merger simulation techniques and direct estimation methods. The former aims to estimate the effects of a merger on key competitive variables, typically price, by using an internally consistent model of industry competition that incorporates significant observed or measured market characteristics, such as substitution patterns and margins. In contrast, direct estimation methods analyze the impact of past events in the relevant markets using historical data. For instance, these techniques can measure the effects of previous market entries, often involving one or both merging parties, or past mergers.

Merger simulations revolve around the idea that price techniques are used to approximate the unilateral effects of a horizontal merger. This model has been used by the Commission in a series of recent cases, including the *Hutchison 3G UK/Telefónica UK's* merger. To estimate the potential impact of the merger on final prices, the model assumed that each operator's demand is linearly related to price, meaning that the change in quantity demanded in response to a change in price maintains a constant ratio.

The Commission observed that relying on such model can bring three relevant benefits. First, it provided a quantitative estimate of the merger's impact on competition, helping determine if the transaction will significantly lessen competition. Second, quantifying price effects from a merger simulation complements qualitative evidence on the impact of consolidation in mobile telephony markets, including *'market repair'* benefits, expectation of more '*rational pricing'* and increased revenue from removing a competitor. Third, the merger simulation allows for quantifying likely consumer harm, which can be balanced against substantiated efficiency claims.[701]

[700] Buettner, Thomas, et al. *The Use of Quantitative Economic Techniques in EU Merger Control*, Antitrust, vol. 31, no. 1, Fall 2016, HeinOnline, pp. 68-75.

[701] *Ibid*.

Pricing pressure models might also account for efficiencies in the form of quality improvements following a merger. In recent mobile telephony mergers, including the *Hutchison 3G UK/Telefónica UK,* parties claimed that transactions would enhance network quality (e.g., coverage and speed) and be procompetitive. However, the Commission did not use merger simulation predictions to balance harm against these benefits, as it found the claims either unverifiable or not merger-specific, noting that similar benefits could be achieved through less restrictive alternatives like network sharing. Particularly, the Commission analyzed the parties' gross profit margins, and the proportion of sales lost by one merging party to the other (the diversion ratio) to calculate the gross upward pricing pressure index (GUPPI), which estimates the parties' incentives to raise prices due to the merger.[702]

In the following paragraph, it will be analyzed the response of the CJEU to the General Court findings that the Commission's quantitative analysis did not establish, with a sufficiently high probability, that the parties' prices would significantly increase. The Commission has appealed to the CJEU, arguing that the General Court applied an incorrect standard of proof for the Commission to meet.

3.1 C-376/20 P*, European Commission v. CK Telecoms UK Investments Ltd*

The *CK Telecoms UK Investment v Commission* judgment[703] dealt with relevant significant topics of merger control which had been discussed such as, the relevance of the standard of proof, the assessment of merger below the dominance thresholds, the concepts of *'important competitive force'* and *'closeness competitors'*, and the treatment of efficiencies and quantitative analysis.

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[702] R.Wish & D. Bailey, *Competition Law (10th edition),* published on September 2021, Oxford University Press, Oxford, United Kingdom, 2021, pp 915.

[703] Judgment of 13 July 2013, *European Commission v. CK Telecoms UK Investments Ltd*, Case C-376/20 P, EU:C:2023:561.

The CK Hutchison Holding's judgment has been the first case in which the CJEU addressed the legal test of significant impediment to effective competition, known under the name of SIEC test, to the EUMR and the Horizontal Merger Guidelines. The CJEU concluded that to block a merger or require remedies, the Commission needs to demonstrate based on a 'cogent and consistent body of evidence' that a merger 'more likely than not' will outcome in a significant impediment to effective competition (SIEC). The CJEU reasoned that the prospective nature or a merger review precludes a requirement for the Commission to meet a higher standard of proof ('*strong probability*'), as advised by the General Court.

The judgment clarified that in mergers below the dominance threshold, the so-called '*gap-cases*', finding an SIEC could not be reduced to only to scenarios, as the General Court suggested, where the two conditions indicated in Recital 25 of the EUMR were cumulatively fulfilled, namely: (i) the deleting of an important competitive constraint that the merging parties had exerted upon each other and (ii) a reduction of competitive pressure on the remaining competitors. The CJEU stated that the General Court's restrictive interpretation would have conflicted with the EUMR's goal of achieving effective control over all mergers.

The CJEU upheld the Commission's analysis of gap cases and its interpretations of *'closeness of competition'* and *'important competitive force'*. The CJEU rejected the General Court's stricter criteria that required showing merging parties as '*particularly close'* in highly homogeneous markets. Instead, the Commission might use the relative closeness of merging parties to their competitors as evidence. Furthermore, a merging party can be deemed an *'important competitive force'* without needing to *'stand out'* from its competitors; it was sufficient if it had a greater influence on the competitive process than its market share or similar metrics suggest.

The judgment confirmed that the Commission was not obligated to consider *'standard efficiencies'* in its quantitative analysis of price increased unless these efficiencies met the high standard of proof required for recognizing the parties' claims. This ruling was widely seen as a significant victory for the Commission. Margrethe Vestager, Commissioner for Competition, remarked that the judgment *'validated'* the Commission's approach to merger assessment and emphasized that its importance '*goes* *far beyond the specific circumstances and mobile communications sector affected by the Commission's decision'*.

It remains to be seen whether, in oligopolies with homogeneous products, the Commission simply asserted that each competitor is '*close'* and that one was an *'important competitive force'* to demonstrate a Significant Impediment to Effective Competition (SIEC). While the judgment clarified that all relevant circumstances had be considered, these thresholds were relatively easy to meet in such cases and would be crucial elements in the Commission's analysis.

On 11 September 2015, CK Hutchison Holdings Ltd submitted to the Commission the acquisition of sole control over Telefónica Europe Plc ('O2'), throughout the intermediary of its indirect subsidiary Hutchison 3G UK. At the time in the UK market there were four operators for mobile network: EE Ltd, which was a subsidiary of BT Group plc, acquired by BT Group plc in 2016 (together 'BT/EE'), O2, Vodafone and Hutchison 3G UK Ltd ('Three'), an indirect subsidiary of CK Hutchison Holdings, whose market shares, in terms of subscribers, were approximately [between 30 and 40%],[between 20 and 30%], [between 10 and 20%], and [between 10 and 20%] respectively. The operation of merger unifying Three and O2 would have represented a four-to-three transaction where the two combined parties would have created an entity of around 30%-40% market power, resulting as a main player on the market, formerly held by BT/EE and Vodafone.

In its latest reviews of cases involving mergers between non-dominant players that reduce the market from four competitors to three, the Commission identified situations leading to Significant Impediments to Effective Competition (SIECs). In May 2016, the Commission declared Hutchison Holdings Ltd's acquisition of Telefónica Europe Plc incompatible with the internal market. The biggest concern of the Commission was the reducing of the number of competing mobile network operators in the UK from four to three, resulting with the elimination of Three from the market would have produced *'horizontal non-coordinated effects'* on the retail wholesale market for mobile telecommunications services in the UK: a non-collusive monopoly would be created and enjoyed by Three/O2, Vodafone and Everything Everywhere. Additionally, the remedies offered by the parties were not sufficient to overcome the significant impediment to effective competition. The Commission believed that this scenario would have resulted in a possible increase in prices for mobile telephony services in the UK and a restriction of choices for consumers. Furthermore, the merger might have reduced the quality of service in the UK by hindering the development of mobile network infrastructure in the UK.

On 25 July 2016, CK Telecoms brought an action for the annulment of the Commission decision, which was upheld by the General Court annulled the Commission's decision.[704] The General Court's, contrary to what argued by the Commission, believed that the sole fact that the concentration might have created a merger entity of a 30%-40% market power could not justify a significant impediment to effective competition (SIEC) arising from horizontal non-coordinated effects. The concentration of CK Hutchison Holdings Ltd with Telefónica could have not significantly impede effective competition only based on the reduction of competitors. This case is an example of '*gap cases*'. With the upcoming of the EUMR, the Merger Control was not only turning around the concept of '*dominance*'. The purpose of the EUMR is indeed that of preventing also concentrations where a significant impediment effect to competition was created notwithstanding the absence of a dominant player.

On 28 May 2020, the General Court gave right to CK Telecoms and suppressed the Commission's prohibition decision.

In August 2020 the Commission brought an appeal against the General Court's judgment, and on the same day, it requested and obtained from the General Court to send some secret information constituting business secrets for which the General Court had granted confidential treatment.

On 20 November 2020, CK Telecoms requested the CJEU to grant confidential treatment. Upon the request of the Commission on 24 March 2021, the President of the Court granted the Commission the chance to submit its observations at the hearing. In conclusion, following the Opinion of Advocate General Kokott[705] , the CJEU set aside the judgment

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[704] *CK Telecoms UK Investment v European Commission* (*supra* note 703).

[705] Case C-376/20 P, *European Commission v. CK Telecoms UK Investments Ltd SA* [2022], EU:C:2022:817 Opinion of Advocate General Kokott.

of the General Court in its entirety and referred it back to the General Court for a new ruling.

On the first ground, the Commission challenged the General Court arguing that it applied a too narrow and high standard of proof to '*to demonstrate with a strong probability the existence of a significant impediment to effective competition'*. [706]

The Commission believed that, considering the standard of proof already affirmed in the Tetra Laval and Sony judgments,[707] *inter alia* with Article 2(2) and 2(3) of the EUMR; after the notification of the proposed merger, the Commission is called to adopt a position and settle its standards of proof in accordance that position.[708] The CJEU clarified that the sufficient standard of proof for reviewing a transaction must be the same for all theories of harm to competition, and, in specified that no case-law does not allows for a different implication of standard of proof in relation to the decision of approving or rejecting a concentration.[709] Thus, it is enough for the Commission to demonstrate that it is more likely than not for the merger to significantly impede the competition, despite the type of concentration at hand.

Considering the Commission's discretion to carry out the prospective economic analysis of a merger, and the subsequent EU Courts limits on its reviewing,[710] after the economic analysis is concluded, the CJEU cannot already set its position on whether to accept the merger, and that the imposition of a higher standard of proof for the prohibition of a concentrations rather than its approval is wrong.[711]

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[706] *Ibid*. para. 51.

[707] Judgment of 15 February 2005, *Commission of the European Communities v Tetra Laval BV*, Case C-12/03 P, EU:C:2005:87 *inter alia* Judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392.

[708] *European Commission v. CK Telecoms UK Investments Ltd (supra* note 703) para. 53

[709] *Ibid*. para. 70.

[710] Judgments of 15 February 2005, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, para. 43; of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392, para. 47; and of 16 January 2019, *Commission v United Parcel Service*, C-265/17 P, EU:C:2019:23, para. 32.

[711] *European Commission v. CK Telecoms UK Investments Ltd (supra* note 703) para. 73.

The CJEU also stated that the essential function of evidence in merger control is establishing convincingly the merits of an argument and supporting the conclusions underpinning the Commission's decision, and that the requirements of the standard of evidence do not affect the standard of proof.[712] Just like the function of evidence, also the theory of harm had no effect on the required standard of proof, nor did the type of merger. On that regard, the standard of proof on which the General Court erred with the EUMR, since it requested '*to produce sufficient evidence to demonstrate with a 'strong probability*' the existence of a significant impediment to effective competition and were subsequently too high than those required under the EUMR.[713]

Given the preventing nature of the EUMR, the Commission has a wide discretion on economic matters. The Commission was called to evaluate how such concentration might alter the parameters of competition on the affected market by assessing which facts were *'more likely or not'* to occur in the future and take a decision based on them. Considering, the symmetrical structure of Article 2(2) and (3) of the EUMR, where the former assessed that the Commission had to allow a concentration which did not create any significant impediment to competition on the internal market; and the latter imposes the Commission to prohibit a concentration when it created a significant effect to competition on the internal market.[714] More specifically, the CJEU affirmed the standard of proof required under the EUMR must be sufficiently strong for '*the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it'*.[715]

In conclusion, also having regard of the Commission's margin of discretion in the perspective economic analysis of a merger, it was sufficient for the latter to '*to demonstrate with a 'strong probability the existence of significant impediments' to effective competition following the concentration and that 'the standard of proof*

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[712] *Ibid*. para. 77.

[713] *European Commission v. CK Telecoms UK Investments Ltd (supra* note 703) para. 86-89.

[714] *Ibid*. para. 67.

[715] *Ibid*. para. 87.

applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is 'more likely than not''[716].

The Advocate General Kokott in its Opinion[717] explained the test applied by the CJEU to evaluate the standard of proofs as '*the Commission to provide evidence of the 'most likely' outcome or 'plausibility' of its prospective analysis, which consists of an examination of how, in the light of the various conceivable chains of cause and effect, the merger concerned could give rise to a significant impediment to effective competition'*.[718] As regard the Commission perspective economic analysis, it seemed that such a discretion corresponds precisely with the required '*balance of probabilities*' test requested by the CJEU. The Commission, through the economic analysis would have been able to establish if the market developed envisage was *'particularly likely'* or '*beyond reasonable doubt*' to create a significant impediment to competition.[719] The Advocate General added that the *'balance of probabilities'* test did not require the Commission to prove, free of uncertainties and doubts, that the concentration created a significant impediment to effective competition. The Commission should have provided the *'most likely'* effect of the concentration throughout '*an examination of how, in the light of the various conceivable chains of cause and effect, the merger concerned could give rise to a significant impediment to effective competition*'.[720]

The Advocate General concluded that '*in view of the unitary nature of the concept of 'significant impediment to effective competition', irrespective of the type of concentration concerned, and the symmetry of the standard of proof noted in point 55 above, there is no justification for requiring a higher standard of proof in the case of concentrations giving rise to non-coordinated effects on oligopolistic markets than in the case of concentrations*

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716 *Ibid*. para. 88.

717 Case C-376/20, *European Commission v. CK Telecoms UK Investments Ltd,* SA [2022], EU:C:2022:817, Opinion of Advocate General Kokott.

718 *Ibid*. para. 56.

719 *Ibid*. para. 56.

720 *Ibid*.

giving rise to 'conglomerate' or 'collective' type dominant positions"[721] By saying that, even though there is the creation of non-coordinate effects in this oligopolistic market, the Commission is still called to apply the '*balance of probabilities'* test for the required standards of proof. So, the Commission, in accordance with para 26 and 38 of the Horizontal Guidelines should '*investigate and assess a large number of factors and great deal of evidence which may give rise to a finding of the existence of non-coordinated effects and, consequently, a significant impediment to effective competition*'.[722]

On the second ground of appeal , the CJEU clarified the necessary requirements for mergers below the dominance threshold (gap cases) and recognized that the General Court erred by sustaining that the Commission could only establish a significant impediment to effective competition (SIEC) by satisfying the two cumulative conditions under Recital 25 of the EUMR were verified: (i) the elimination of an important competitive constraint that the merging parties had exerted upon each other and (ii) a reduction of competitive pressure on the remaining competitors.[723]

In situations like the present, where the market concerned was an oligopoly with non-coordinated effects, the General Court's interpretation of Article 2(3) EUMR[724] in the context of Recital 25[725] would have limited the EUMR's scope. This approach was incompatible with the EUMR's goal of establishing effective control over all concentrations that were liable to significantly impede effective competition, even those with non-coordinated effects that did not meet the criteria of Recital 25.[726]

To establish effective oversite of all concerning concentration, the CJEU implied that competition authorities could rely also on other elements. Adopting the General Court's

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[721] *Ibid*. para. 59.

[722] *Ibid*. para. 64.

[723]*European Commission v. CK Telecoms UK Investments Ltd* (*supra* note 703) para. 110-111

[724] See Article 2(3) of the EUMR '*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*'.

[725] See Recital 25 of the EUMR.

[726] *European Commission v. CK Telecoms UK Investments Ltd* (*supra* note 703) para. 112-116.

position would have implied that the removal of competitive constraints between the parties alone would not justify intervention in a transaction.[727] As highlighted in the Attorney General's earlier non-binding recommendation, this perspective would have also prevented consideration of the competitive pressure exerted by remaining competitors on the parties' post-transaction.[728]

For the third ground of appeal, CJEU also highlighted the concepts of *'important competitive force'* and '*close competitors'* and recognized the misinterpretation given by the General Court.

The CJEU emphasized that when interpreting the terms *'important competitive force'* and *'close competitor'*, the CJEU should not rely solely on the Horizontal Merger Guidelines to assess whether the concentration would lead to a significant impediment to effective competitionbut. Instead, it must ensure that '*the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*'.[729]

Starting from the meaning given to '*important competitive force*', the CJEU stated that the General Court erred in law when assessing that to determine the *'important competitive force'* of one undertaking it was sufficient that *'it has having more of an influence on competition than its market share would suggest is sufficient, in itself, to prove a significant impediment to effective competition*'.[730] Nevertheless, the Horizontal Merger Guidelines considered the *'important competitive force'* as one of the factors which may contribute to the impediment of effective competition in the market and, in order for it to be present in an oligopolistic market, the undertakings part of the

[727] *Ibid*. para. 111.

[728] Opinion of Advocate General Kokott (*supra* note 704) para. 76-80.

[729] *European Commission v. CK Telecoms UK Investments Ltd* (*supra* note 703) para. 125.

[730] *European Commission v. CK Telecoms UK Investments Ltd* (*supra* note 703) para. 143.

concentration did not even need to be *'particularly aggressive'* undertakings on that market.[731]

The Commission added that associating the *'important competitive force*' exclusively on the effect that the concentration has on market pricing would have been incomplete.

The General Court imposed too restrictive requirements for an undertaking to be classified as having an *'important restrictive force'*. The Commission had to demonstrate the particularly aggressive competition of the undertaking in terms of price '*that it forced the other players on the market to align with its prices or that its pricing policy was likely to alter significantly the competitive dynamics on the market*'. To clarify, the undertaking concerned must stand out from its competitors in terms of impact of its pricing policy on competitive dynamics on the market concerned.[732]

With this interpretation the General Court created confusion between Article 2(3) EUMR concerning the SIEC test, and Recital 25 of the EUMR about the concept of the elimination of an *'important competitive force'*, which would have lead to the idea that '*any elimination of an 'important competitive force' would amount to the elimination of an important competitive constraint which, in turn, would justify a finding of a significant impediment to effective competition*'. [733]

The CJEU figured out a series of significant points.
Firstly, in the oligopolistic market the undertaking concerned does not need to stand out in terms of impact on competition to be classified as an '*important competitive force'*.[734]
Secondly, the fact that a concentration in an oligopolistic market did not result in an undertaking standing out from its competitors in terms of pricing policies did not mean that such a concentration could have altered the competitive dynamic of the concerned market and lead to a significant impediment to effective competition.[735]

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[731] *Ibid*. para. 148-149.

[732] *Ibid*. para. 154.

[733] *Ibid*. para. 155.

[734] *Ibid*. para. 156.

[735] *Ibid*. para. 160-162.

Thirdly, the Commission previous decisions are merely indications, and cannot preclude the Commission to classify associate the concept of '*important competitive force'* to other situations.[736]

Fourthly, price was not the only important parameter when assessing competitive dynamics and a sole *'price-focused approach'* to classify the *'competitive importance of an undertaking'* would be incomplete.[737]

The Horizontal Merger Guidelines suggest at paragraph 37 that an undertaking had *'important competitive force'* when that had more of an influence on the competitive process than its market share or similar measures would suggest.[738]

The Commission was required to demonstrate that the two parties to the concentration were *'particularly close competitors'* and in doing so it should assess the degree of closeness of competition between the two undertakings.[739]

The General Court argued that, in an oligopolistic market the sole fact that the undertakings were reduced from four to three did not sufficiently prove the elimination of the important competitive constraints that the parties of the concentration exerted upon each other and not even sufficient to establish a significant impediment to effective competition.[740] The closeness of the parties of the transaction was significant but not exclusive in assessing that significant non-coordinated effects that are likely to result from a merger. The '*particularly close'* nature of the two products concerned requires a high level of substitutability between the products of the merging parties and those of the undertakings not part of the transactions. Otherwise, there might have been lower substitutability with the products of the undertakings not part of the concentration, which would incentivize the parties to the concentration to raise prices of their products.

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[736] *Ibid*. para. 164.

[737] *Ibid*. para. 165.

[738] *Ibid*. para. 167.

[739] *Ibid*. para. 188.

[740] *Ibid*. para. 185.

The closeness of the competitors, affirmed the CJEU, was an important, but not exclusive factor, when assessing the effects that such concentration has on the relevant market. The CJEU agreed with the Commission and the Horizontal Merger Guidelines, into assessing that although the reduction of competitors was an important factor when determining the significant impediment to effective competition and it did not exclude other elements which may have led to the same conclusion.

The Advocate General observed that, if that was the case any concentration resulting in a reduction from four to three undertakings should be prohibited. [741] The Horizontal Merger Guidelines settled in paragraphs 26,27 and 28 many other factors rather than the reduction of competitors which contributed to the concentration resulting in non-coordinated effects on the relevant market. For it to have '*important competitive force'* the undertaking suffices that it has '*more of an influence on the competitive process than its market share or similar measures would suggest'*.[742]

General Court stated that the Commission should have included the '*standard'* efficiencies specific to each concentration in its quantitative analysis, also considering what stated in the previous decisions of the Commission. The CJEU confirmed that the past decisions of the Commission were not legally binding and that the *'standard efficiencies'* were not required to be taken into account when settling its position on the transaction.

The standard efficiencies specific for each concentration were part of a quantitative model of the Commission used to establish whether a concentration had restrictive effects. These efficiencies, proved by the so called UPP test, have been identified by the Advocate General as *'default'* efficiencies since all concentrations produced them and they were distinguished from each other, which were '*likely to counterbalance that percentage price increase estimated in the context of a UPP analysis'*.[743] These efficiencies come along with the concentration and represented the potential reduction of production marginal

[741] Opinion of Advocate General Kokott (*supra* note 705) para. 124.

[742] *European Commission v. CK Telecoms UK Investments Ltd* (*supra* note 703) para. 167.

[743] Opinion of Advocate General Kokott (*supra* note 705) para. 152.

costs. The CJEU noticed that the efficiencies the General Court is referring to were neither listed in the EUMR, nor in the Horizontal Merger Guidelines nor in the Regulation No 4064/1989, nor they established that all concentrations gave raise to such efficiencies. And, even though certain concentrations produce efficiencies, it did not produce a presumption that all concentrations produce efficiencies.[744] Moreover, recognizing that all concentrations produced '*standard'* efficiencies and forcing the Commission to solely give proof of those standard efficiencies that '*constitute* '*a component of a quantitative model designed to establish whether a concentration is capable of producing…restrictive effects'* would mean applying different standard of proof in respect to a particular category of efficiencies. Such reversal of the standard of proof can reduce the effectiveness of the EUMR and the practical effect of Article 2 (2) and (3) of the EUMR because it would prohibit concentrations that do not prejudicated competition.[745]

The General Court stated that the Commission had not demonstrated that prices would have increased significantly following the proposed concentration. The General Court supported its argument stating that, in some previous decisions such as the Irish and German cases, the Commission had subjected similar concentrations to certain conditions. On the contrary, the CJEU based its argument on two main points. Firstly, the price increase of the concentration was not as significant as that of the predicted prices increases in Irish and German cases. In fact, it was not required that the undertaking, resulting from the concentration, stand out from its competitors by being *'particularly aggressive'* in terms of price impact on competitive dynamic able to determent that market. Secondly, what emerged from previous Commission's decisions could not be considered as a legal framework for merger control, but they were merely classified as an indication for future cases.[746]

On its fifth ground of appeal the Commission went against the General Court did not analyze all the relevant factors supported the conclusion that the Commission had been

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[744] *European Commission v. CK Telecoms UK Investments Ltd (supra* note 703) para. 237-241.

[745] *Ibid*. para. 242-247.

[746] *Ibid*. para. 156.

able to establish that the proposed concentration would result in a significant impediment to effective competition.

The CJEU clarified that the EU Courts should have established whether the foundation on which the Commission had based its decision on were strong enough to demonstrate the existence of a significant impediment to effective competition, without the necessity to examine by themselves the substance of the assessment of factors or other evidence with have not been challenged by the parties to the proceeding.[747]

To better understand the reviewing role of EU Courts in relation to the evidence presented by the Commission, the Advocate General explained that the EU Courts are '*required to verify the probative nature of the entirety of the relevant and consistent evidence […] relied on by the Commission in order to establish the existence of a significant impediment to effective competition'*.[748] And, in case the evidence provided by the Commission were not sufficient to demonstrate that a concentration entails non-coordinated effects giving rise to a significant impediment to effective competition, such a result may be achieved through a body of evidence and factors, viewed as a whole. However, the General Court, by assessing that the Commission lacked to declare the existence of the significant impediment to effective competition did not consider the factors and findings contested by CK Telecoms, such as the market share analysis,[749] and neither the other assessment carried out by the Commission demonstrating the existence of non-coordinated effects and their impact on competition.

On this regard, the Advocate General noted that the three theories of harm considered by the General Court were independent or interdependent on CK Telecoms' other arguments and pleas, and thereby the General Court had failed to carry out its own overall analysis of the various factors and items supporting those theories and formed the foundation of

[747] *Ibid*. para. 262.

[748] Opinion of Advocate General Kokott (*supra* note 705) para. 162.

[749] *European Commission v. CK Telecoms UK Investments Ltd* (*supra* note 703) para. 264.

the final conclusion in the decision at issue as to the existence of a significant impediment to effective competition.[750]

3.2 Conclusions

What results in the following judgment has been used by the Commission for assessing the so-called '*gap-cases*', thereby cases where the undertaking concerned did not acquire (sole) market power through the merger because other market players with high shares remain on the market. The judgment clarified the nature of those transactions which despite they did not result outcome in the creation or strengthening of a dominant position because of too low market shares, still rise significant impediment of effective competition.

The CJEU emphasized the importance of preserving merger control and of fulfilling the objective scope of Article 2(2) and (3) of the EUMR. To contrast the higher bar for the standard of proof raised by the General Court for the Commission, the CJEU recognized a wider and more flexible discretion for the Commission when applying the SIEC test.

Differently from the *Towercast* and *Illumina/Grail* judgments which discussed the chance to expand the jurisdictional scope of the EUMR to capture non-notifiable acquisitions, so called killer acquisitions. In the *CK Telecoms'* judgment, the CJEU aimed at reinforcing the Commission's hand in horizontal merger enforcement and pushing towards a more interventionistic approach of the latter.

In a statement of July 13th, 2023, the Executive Vice-President Verstager stated that the following judgment validates the Union approach to merger assessment under the EUMR, and the commitment taken by the EU to protect European consumers by rigorously assessing transactions that gave rise to serious competition concerned even while falling short of creatin or strengthening a dominant position. However, some scholars believed

[750] Opinion of Advocate General Kokott (*supra* note 705) para. 169.

that only future decisions will tell how far-reaching the legal effects of this judgment were. [751]

This judgment represented a milestone for the clarification of several concepts used into assessing the effects of the proposed merger on competition.

Firstly, it clarified that having an important competitive force on the market means standing out from the other competitors on the market as regards its effect on competition.

Secondly, the CJEU elucidated the test for a significant impediment to effective competition as that under Article 2(3) of the EUMR and concluded that the Commission must demonstrate that there was a strong probability that a significant impediment to effective competition will result from a merger in order to prohibit it, which was appreciably higher than the balance of probabilities argued for by the Commission. Also, the EU Courts would be more demanding in terms of the evidence required for theories of harm that involve more prospective analysis.

Additionally, the CJEU said that the SIEC test had been extended as a result of the Commission's confusion respecting to the three concepts discussed above. Therefore, by clarifying the concepts once more, one must assume that the effect would be to strengthen Article 2(3) EUMR to the extent the Court deems appropriated, thereby making it more challenging for the Commission to justify prohibiting a merger.

After this judgment, the CJEU's decisions appears likely to reverse this trend and had been clear the CJEU had a better view of four to three mergers than the Commission, as it stated that '*many oligopolistic markets exhibit a degree of competition which can be described as healthy'*.[752] This stands in sharp contrast to the Commission's growing skepticism towards acquisitions in highly concentrated markets. Therefore, it seemed that mergers in oligopolistic markets would be more easily consummated following the

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[751] Statement by Executive Vice-President Margrethe Vestager on today's Court of Justice judgment on the Hutchison/O2 UK merger prohibition decision, Brussels 13 July 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_3852.

[752] *European Commission v. CK Telecoms UK Investments Ltd* (*supra* note 703) para. 2 point 25.

decision, as it will be significantly more difficult for the Commission to prove a substantial impediment to effective competition to the required standard of proof.

Moreover, the CJEU raised the bar materially for the Commission to prohibit mergers or demand extensive remedies from merging parties, particularly in oligopolistic markets. Because the standard of proof raised, it would no longer be sufficient for the Commission to show that harmed was likely to occur. Rather, it must show that it was strongly probable. In other words, the Commission would have to demonstrate that a significant impediment to effective competition was not only likely, but strongly probably, while merging parties had to show that a merger would not be significantly harmful on the balance of probabilities, or trust that the Commission would be unable to prove the probability of harm required. The general impact would be to limit the Commission's discretion which will now have to act with greater care and scrutiny when assessing oligopolistic mergers. This would result in longer and more extensive reviews to prove harm to requisite standard. Therefore, the Commission may need to adopt a more accommodating approach to align with the CJEU's stance. It would be intriguing to see how much it will rely on its own established practices and precedents in future merger cases. The CJEU emphasized in this case that it was is bound by the Commission's decisions or the Guidelines, while the Commission must adhere to the jurisprudence of the European Courts. Consequently, the Commission will likely have to abandon many of its decision-making practices developed over the past decade concerning oligopolistic mergers.[753]

The decision has been heavily criticized for several reasons.
In relation to the standard of proof, Tommaso Valletti, a former Chief Competition Economist at the Commission, put forward the theory according to which innovative companies in technology markets might be engaged to explain how their acquisitions would benefit consumers, and subsequently they should demonstrate that they would not cause harm, thereby shifting a positive burden onto the merging parties.[754] The *CK*

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[753] R. Bunworth, *CK Telecoms UK Limited v. Commission – A Significant Impediment to Effective Protection?*, IIC (2021) 52:283–295 https://doi.org/10.1007/s40319-021-01031-3, Published online: 1 March 2021, Max Planck Institute for Innovation and Competition, Munich 2021.

Telecoms decision, however, has shifted towards the opposite side, and made it sufficient for the merging parties to simply guarantee that the Commission in unable to establish its case with a significant degree of probability.

Furthermore, Article 2(3) EUMR was introduced to remedy a perceived gap due to the sole focus on dominance in merger control at the beginning of the century. Nevertheless, with the linking of the SIEC test to the concept of dominance, the CJEU has arguably restricted the application of Article 2(3) EUMR beyond the intention of the drafter. Mergers that are likely to cause harm to consumers may be consummated with greater ease than before, controversy the protection that the Commission can provide is being neutered by the high threshold being set.[755]

The last annulment by the CJEU on the substantive grounds of a decision by the Commission dated back almost 20 years,[756] highlighting the rarity of such judgments. During Margrethe Vestager's tenure as European Commissioner for Competition, the Commission averaged only one prohibition decision per year, making the CJEU's overturning of one a significant defeat.[757] This ruling was arguably the most important in merger control in over a decade and was poised to become a seminal case.

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[754]Acton M, *Killer acquisitions shouldn't provoke regulatory overreach, Vestager says* (MLex Insight, 28 March 2019).

[755] Hirst N, *CK Hutchison ruling was 'contrary to the very spirit' of EU merger law, Loriot says* (mLex Insight, 10 September 2020).

[756] The General Court quashed three prohibition decisions issued by the Commission in the same year in Airtours/First Choice (T-342/99), Schneider/Legrand (T-310/01) and Tetra Laval/Sidel (T-5/02).

[757] Riedel P, Wilson T and Van Melkebeke A, *General Court strikes blow to EU Commission in mobile telecoms merger,* 12 June 2020.

Conclusions

This thesis aimed at showing throughout the analysis of some of the most relevant rulings in the merging control field how the evolution of merger control within the European Union has been significantly and profoundly shaped by the jurisprudence of the CJEU.

The CJEU's judgments have often served as critical checks on the Commission's approach to merger control, ensuring that the Commission adheres to rigorous standards of proof and thorough economic analysis when assessing mergers. Furthermore, the CJEU contributed to both substantive and procedural aspects of the regulatory framework of merger control. Therefore, the role of the CJEU in reviewing Commission decisions underscores the importance of legal oversight in maintaining fairness and preventing the misuse of power within the merger control process.

The CJEU contributed to the evolution of both procedural and substantial aspects of merger control and the previous chapters illustrated how this happened throughout the analysis of relevant rulings.

In relation to the substantive aspects, the CJEU clarified key legal concepts, such as the legal test of '*significant impediment to effective competition*' (SIEC) and the notion of '*collective dominance*' which are central to the application of the EUMR. For example, the CJEU rulings of Tetra Laval II and CK Telecoms reinforced the necessity for the Commission to demonstrate that a merger would more likely than not lead to significant anti-competitive effects. This led to not only ensuring that merger prohibitions are more rigorously applied but also contributed to the development of a more predictable and transparent merger control in Europe.

From a procedural perspective, the CJEU's judgments clarified the scope of judicial review. In particular, by affirming the General Court's authority to rigorously scrutinize the Commission's economic analyses in Tetra Laval II, the CJEU has safeguarded the balance of power within the EU's competition law framework. This result been crucial in preventing too wide discretionary powers by the Commission, thus enhancing the credibility and fairness of the merger control process.

Significant has also been the refining the standard of proof required for prohibiting mergers and how it changed from the original Regulation 4064/1989, the predecessor piece of legislation on this matter, and the current EUMR. First of all, the CJEU has consistently emphasized that the Commission must base its decisions on a 'cogent and consistent body of evidence', particularly in cases involving complex economic assessments, such as those concerning oligopolistic markets or conglomerate mergers as. This requirement has effectively raised the bar for the Commission, limiting its discretion and compelling it to adopt a more evidence-based and meticulous approach in its evaluations.

Furthermore, the CJEU clarified the scope of the standstill obligation (i.e. Gun-Jumping) and how to deal with Killer Acquisition For what concerns Gun-Jumping, the CJEU reinforced the Commission's power to enforce sanctions for early implementations of transaction before being cleared under the EUMR- while for Killer Acquisitions, on one hand has very recently decided that Art. 22 of the EUMR is not a viable solution for capturing below-the-thresholds mergers. On the other, the CJEU has emphasized the critical role played by Article 102 TFEU in dealing with this type of transaction, including killer acquisition and how those might be examined under this article even if they do not meet the notification thresholds under the EUMR. In particular, the CJEU highlighted that Article 102 TFEU offers a broader scope of protection against anti-competitive behaviours allowing competition authorities to impose more stringent remedies, including potential dissolution of the merged entity.

Overall from these judgments it is clear that the CJEU has played a central role in shaping a more sophisticated and balanced merger control regime in the EU. The CJEU's jurisprudence has guided the Commission in developing a more nuanced approach that considers both legal principles and economic realities. By reinforcing the need for rigorous evidence and careful analysis, the CJEU has helped ensure that merger control serves its intended purpose: to prevent anti-competitive concentrations that could harm consumer welfare and stifle competition.

In conclusion, the cumulative impact of the CJEU's judgments has been to create a robust legal framework that underpins the EU's merger control regime. This framework not only protects the competitive structure of the internal market but also ensures that the enforcement of merger control is consistent, transparent, and economically rational. The CJEU's influence thus remains a cornerstone in the ongoing evolution of European competition law.

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