Marta Zalewska-Głogowska

A More Economic Approach to the Application of EU Merger Control

Economic and legal approaches are different from a normative, as well as from a structural perspective[1]. The former stresses welfare goals and, ultimately, efficiency, thus using formal models in order to demonstrate the welfare effects of the various goals of competition (i.e. maximisation of total welfare versus consumer welfare). Meanwhile, the latter is more functional and focuses on the economic aims of the European Union and on constitutional principles such as the rule of law and legal certainty. Therefore, it views the aims of competition law as sub-goals in relation to a wider set of constitutional goals.

Despite these visible differences, it is widely accepted that the role of economics in competition law has grown significantly in recent decades[2]. Experience has shown that neither a purely legal approach nor a purely economic approach, but rather a combination of these two approaches, is most desirable for the proper functioning of EU competition rules.

The roots of the more economic approach to competition law are to be found in the theses of the Chicago school of antitrust theory, which revolutionized the interpretation of US antitrust law in the 1970s and 1980s[3]. According to the fundamental Chicago view, the pursuit of economic efficiency should be an exclusive goal of competition law[4].

1 C. Kirchner, *Goals of Antitrust and Competition Law Revisited*, [in:] ed. D. Schmidtchen et al., *The More Economic Approach to European Competition Law*, 2007, p. 9.

2 K. Czapracka, *Aksjologiczne ramy unijnego prawa konkurencji*, [in:] ed. A. Nowak-Far, *Konstytucja Gospodarcza Unii Europejskiej. Aksjologia,* 2010, p.133–138; A. Italianer, *The Interplay Between Law and Economics*, Speech at Charles River Associates Annual Conference, Brussels, 8 December 2010.

3 S. Stroux, *US and EC Oligopoly Control*, 2004, p. 179; M.Stefaniuk, M. Swora, *Richarda Allena Posnera ekonomiczna analiza prawa i poglądy na nową gospodarkę*, [in:] *Konkurencja w gospodarce współczesnej,* ed. C. Banasiński, E.Stawicki, 2007, p. 41.

4 R. H. Bork, a prominent member of the Chicago school of thought, wrote: 'competition must be understood as the maximization of consumer welfare or, if you prefer, economic efficiency'; *v.* R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 1993, p. 426–429.

This paradigm shall be perceived as contrary to the ordoliberal economic philosophy[5], which advocates that the aim of competition law is to create and protect the conditions of competition as such, and therefore sees competition as a value in itself and not just as a means by which purely economic objectives – such as efficiency – are to be achieved.

While the concept of the more economic approach originally comes from US antitrust law, it is claimed that it was the European Commission who largely inspired the increased role that economics has come to play in constructing competition under EU law, as well as merger cases[6]. As early as the 1990s, it began to move away from its ordoliberal stance towards a realignment of the goals of competition law with modern economic thinking on efficiency and consumer welfare. This gradual revolution, which covered not only the interpretation, but also the application of substantive law, is often called the 'more economic approach'[7].

In general terms, the more economic approach to the application of EU merger law implies increased reliance on theoretical concepts from industrial economics and quantitative methods of analysis, firstly, in cases of investigations and, secondly, in formulating legislation and defining the criteria that are set[8]. In other words, a tendency of the 'more economic approach' in EU merger control is to base the assessment of each specific case on the assessment of its anti- and pro-competitive effects (effects-based approach), rather than on the form of the intrinsic nature of particular practice (form-based approach)[9]. It is, however, essential to understand that the more economic approach to the application of EU merger law covers different layers: substantive, procedural, organisational and practical. The substantive core of the more economic approach to EU merger control consists of the new prohibition criterion included in Merger Regulation (EC) No 139/2004[10] and the concept of efficiency defence. These substantive issues are, in turn, complemented by some procedural changes, which include *inter alia* an increase in the

5 Ordoliberalism, which was conceived in Germany in the 1930s and nurtured at the University of Freiburg, constitutes a comprehensive political and economic philosophy, which has, however, important implications for competition policy; *v.* A. Jones & B.Sufrin, *EU Competition Law, Text, Cases and Materials*, 2011, p. 35.

6 S. Voigt, *More Economic Does Not Necessarily Mean 'Better' – Perils and Pitfalls of the More Economic Approach as recommended by the European Commission* [in:] *The More Economic Approach to European Competition Law*, ed. D. Schmidtchen et al., 2007, p. 97.

7 The more economic approach affects not only EU merger control but also Article 101 and 102 TFEU. Actually, a more economic approach was already the driving force behind the reform of the treatment of vertical restraints under Article 81 EC, which led to the adoption of the new Block Exemption Regulation EC No 2790/1999.

8 A. Christiansen, *The 'more economic approach' in EU merger control*, 7 CESifo Forum, 2006, p. 34; J. Hertfelder, *Der 'more economic approach' bei Art. 82 EGV,* 2006, p. 10.

9 D. Schmidtchen et al., *op. cit.*, p. 1.

10 Council Regulation EC no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) 2004 OJ L24/1.

Commission's investigative powers and an extension of time limits in complex cases. Moreover, the concept of the more economic approach is related to some organisational changes within the structure of DG Competition, which has led to the recruitment of industrial economists to enhance the Directorate General's economic capabilities. Finally, the more economic approach has also influenced merger control practice, which is particularly noticeable in the common use of quantitative analysis in competitive assessment of notified concentrations.

Merger Control under EU Law

EU merger control constitutes the third pillar of EU competition law, operating beside Article 101 and Article 102 TFEU[11]. It comprises the common idea that legal control of mergers is an important component of any regime for regulating competition[12]. Surprisingly, legal rules on EU merger control do not appear in the text of the Lisbon Treaty[13], but are instead found in the separate Merger Regulation (EC) No 139/2004. This is a consequence of political sensitivity and, at the same time, the controversial nature of merger law in general[14]. A great example of the difficulties involved in the regulation of EU merger control is the negotiations which preceded the adoption of the first Merger Regulation in 1989[15], which took over 16 years (the first draft of merger control regulation was proposed by the Commission as early as 1973).

The primary reason for adopting Regulation (EEC) No 4064/89 was to cover the loophole arising from the fact that under some circumstances the Commission was not entitled to prohibit a merger (under Article 101 and 102 TFEU)[16], although it could have a negative impact on competition within the internal market[17]. Under the regime of Regulation (EEC) No 4064/89 the Commission was empowered, for the first time

11 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 2006 OJ C306/1.

12 P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials*, 2011, p. 1046.

13 Legal provisions on EU mergers were not included in the Treaty of Rome (Treaty establishing the European Economic Community 1957). On the contrary, the now expired Treaty of Paris (Treaty establishing the European Coal and Steel Community 1951) contained Article 66, which regulated merger control for coal and steel undertakings.

14 M. P. Broberg, *The European Commission's Jurisdiction to Scrutinise Mergers*, 2003, p.1–3.

15 Council Regulation EEC no. 4064/89 of 21 December 1989 on the control of concentrations between undertakings 1989 OJ L395/1.

16 As early as 1966 the Commission had published a memorandum on concentrations, which asserted the possibility of controlling those which affected competition at Community level through the use of what are now Articles 101 and 102 TFEU; *v.* Commission's Memorandum on the Problem of Concentration in the Common Market, EC Competition Series, 3 Study, 1966.

17 Recitals of Regulation EEC no. 4064/89; P.Stockenhuber, *Die Europäische Fusionskontrolle. Das materielle Recht*, 1995, p. 19.

in the history of the European Union, with an instrument designed specifically to assess concentrations with a Community dimension[18]. In order to enable the Commission to correctly appraise mergers, the substantive criteria of an assessment, which the Commission was required to undertake when a transaction fell within its jurisdiction, were laid down in Regulation (EEC) No 4064/89. According to Article 2(3) of Regulation (EEC) No 4064/89, a concentration had to be prohibited if it created or strengthened a dominant position, as a result of which effective competition were significantly impeded in the common market or in a substantial part of it. Taken literally, this would have implied a two-tier test involving proof of market dominance and the ensuing impediment of competition[19]. In practice, however, attention was focused almost exclusively on the establishment of market dominance[20].

The so-called dominance test, which could be described as a gradually refined application of the prohibition criterion, constituted the substantive part of the original Merger Regulation and was used for almost 15 years[21].

Beginnings of the More Economic Approach to EU Merger Control

Since that time, both political and economic circumstances have changed radically. Additionally, experience has shown that the substantive test, which was based solely on the creation or strengthening of a dominant position, also called the DPT test – against which mergers were examined – was not perfect. Its flaw was that it did not catch cases of 'unilateral effects' where the merged entity could raise prices even though it was not the largest player (sole dominance) and without the need for any tacit coordination with other players (joint dominance)[22]. Actually, it was the case law of the Court of Justice of the European Union[23] (CJEU) that was to be the ultimate catalyst for change. In 2002,

18 M. Karl, *Der Zusammenschlußbegriff in der Europäischen Fusionskontrollverordnung. Eine Untersuchung unter Berücksichtigung der Entscheidungspraxis der Kommission der Europäischen Gemeinschaften*, 1996, p. 29.

19 J. Barcz et al. , *Prawo Gospodarcze Unii Europejskiej*, 2011, p. VI-148; an alternative interpretation of dominance test provides that mergers that create or strengthen dominance automatically also impede effective competition; *v.* L. Röller, M. de la Mano, *The Impact of the New Substantive Test in European Merger Control*, 2 (1) European Competition Journal, 2006, p. 11.

20 E. Piontek, *Nowetendencje w prawiekonkurencji UE,* 2008, p. 259.

21 Until the adoption of recast Merger Regulation EC no. 139/2004, which came into force on 1 May 2004.

22 R. Wish, *Competition Law*, 2009, p. 853.

23 According to Article 19(1) TEU, the Court of Justice of the European Union includes, for the purposes of EU competition law, the General Court and the Court of Justice. Whereas, pursuant to Article 256(1) TFEU in conjunction with Article 263 TFEU, the General Court hears merger cases at first instance, whereas the Court of Justice hears merger cases at second instance.

the General Court made judgments in three different cases of particular importance: *Airtours*[24], *Schneider Electric*[25] and *Tetra Laval*[26]. In all of them, the General Court struck down individual merger prohibitions that were challenged by applications for annulment. Noticeably, the objections in the three above cases were very similar. In its main findings, the General Court charged the Commission with assessment errors of undoubted gravity by ignoring economic theory and failing to meet the required standards of proof. Undeniably, the General Court's severe criticism effectively raised the threshold for a prohibition decision in terms of the quality and quantity of evidence that the Commission must produce as justification.

As the above-mentioned judgements constituted an unprecedented defeat for the Commission, they also became an incentive for the legislator to rethink the structure of a substantive dominance test. Only two weeks after the General Court handed down the last of these three judgements, the then Commissioner for Competition, Mario Monti – the first economist in the history of the European Union to hold this position – announced significant changes to the Commission's approach to EU merger control[27]. The subsequent result was the introduction of a new, more economic approach to EU merger control.

Merger Control under Regulation EC no. 139/2004

The Commission's new economic approach to EU merger policy was unlike its new approach to Article 101 and 102 TFEU, which was based solely on legally non-binding soft-law. Rather, it was based on a formal legislative amendment to its legal basis. In 2004, the Council, based on a proposal from the Commission, adopted the new Merger Regulation (EC) No 139/2004[28], replacing the original Regulation (EEC) No 4064/89. The recast Merger Regulation came into force on 1 May 2004 and was considered the most far-reaching reform since the introduction of Regulation (EEC) No 4064/89 in 1990.

The amendment of Regulation (EEC) No 4064/89 bore fruit in the creation of totally new substantive assessment criteria for notified mergers. The primary reason for the need to change the wording of the original, the dominance test of EU merger law,

24 Case T-342/99 *Airtours plc v Commission* 2002 ECR II-2585.

25 Case T-310/01 *Schneider Electric SA v Commission* 2002 ECR II-4071.

26 Case T-5/02 *Tetra Laval BV v Commission* 2002 ECR II-4381.

27 M. Monti, *EU Competition Policy,* Speech at the Fordham annual conference on international antitrust law and policy, New York, 31 October 2002.

28 Council Regulation EC no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings 2004 OJ L24/1.

was the existence of a significant 'gap'[29]. The dominance test included in Regulation (EEC) No 4064/89 did not allow the Commission to prohibit mergers that created an oligopolistic situation, even where they would have a negative impact on competition within the internal market[30].

Despite the fact that there was general agreement on the idea that the Commission should be able to prohibit such mergers, the negotiations proceeded with difficulty. The discussion over the new substantive test created two opposing blocs. According to some Member States (i.e. the UK and Ireland), the Council should use the experience of US merger law and introduce the 'substantial lessening of competition' test, also known as the SLC test, which is to be found in the Clayton Act. According to Section 7 of the Clayton Act, the acquisition should be prohibited if it may have the effect of substantially lessening competition, or the tendency to create a monopoly[31].They reasoned that the dominance-based test present under Regulation (EEC) No 4064/89 is logically flawed since dominance is meaningless in economic terms[32]. By contrast, the opponents of the US-inspired solution (particularly Germany) argued that the dominance test included in Regulation (EEC) No 4064/89 was a purely European concept and should be retained, as it was possible to treat problematic, oligopolistic scenarios of mergers under the concept of collective dominance[33]. Moreover, some suggested that the Commission intended to broaden its powers through the revision of Regulation (EEC) No 4064/89, which they believed should not be the case.[34] Finally, the Council reached a solution that combined the two different ideas mentioned above. It introduced a test – the so-called SIEC test – which, on the one hand, was a mirror of the best substantive standards present under various national jurisdictions, and on the other hand, preserved the continuation of the original dominance test from Regulation (EEC) No 4064/89[35].

According to the new test introduced by the recast Merger Regulation (EC) No 139/2004, which is broader than the previous formulation, the Commission is now required to assess whether a concentration would significantly impede effective competition in the internal market, in particular as a result of the creation or the strengthening

29 J. Fingleton, *Does Collective Dominance Provide Suitable Housing for All Anti-Competitive Oligopolistic Mergers?*, [in] *EC Merger Control: A Major Reform in Progress*, ed. G. Drauz, M. Reynolds 2002, p. 349.

30 Merger Regulation EC no. 139/2004, recitals 25, 26.

31 15 U.S.C. § 18 1995.

32 L. Röller, M.de la Mano, *op. cit.*, p. 4.

33 U. Böge, E. Müller, *From the Market Dominance Test to the SLC Test: Are There Any Reasons for a Change,* 23 ECLR, 2002, p. 495, 498.

34 M. P. Broberg, *op. cit.*, p. 1.

35 The Commission described the reached solution as a truly European one; see *Merger Control: Merger review package in a nutshell*, Competition Policy Newsletter Special Edition 2 (2004); Merger Regulation (EC) No 139/2004, recital 6.

of a dominant position[36]. In this way, the concept of dominance, crucial for the old dominance test included in Regulation (EEC) No 4064/89, remains present, although it is no longer an essential condition for prohibiting a notified merger[37].

Apart from a new SIEC test, there were also other equally important amendments introduced by Merger Regulation (EC) No 139/2004. These include e.g. greater procedural flexibility, particularly the ability to stop the decision timetable and to notify proposed concentrations before any binding agreement exists or bid is launched[38] and the introduction of enhanced enforcement powers.

As already stated, the primary reason for amending Regulation (EEC) No 4064/89 and introducing the new reformed test for assessing notified mergers was to catch the 'gap' cases. However, in practice, the Commission's merger policy has undergone a number of significant changes since the recast Merger Regulation (EC) No 139/2004 came into force in 2004, which go far beyond the mere inclusion of 'gap' cases. The Commission even decided to carry out structural changes in the internal organisation of the Competition Directorate by recruiting industrial economists to enhance the Directorate General's economic capabilities[39]. As a consequence, the new SIEC test introduced by Merger Regulation (EC) No 139/2004 is just a part of the whole new European approach, described as a new economic approach to merger issues.

The More Economic Approach in the Commission's Practice

Generally, the more economic approach can be perceived as a concept of realignment of the goals of competition law with modern economic thinking on efficiency and consumer welfare, which covers not only the interpretation but also the application of substantive law[40]. Nevertheless, the Commission's application of the more economic approach to EU merger law is characterized by several different implications.

The direct consequence of the adoption of Merger Regulation (EC) No 139/2004 was the issuance by the Commission of the Horizontal and Non-horizontal (vertical and conglomerate) Merger Guidelines, in 2004 and 2008 respectively[41]. Both these docu-

36 *V.* Article 2(2) and (3) of Merger Regulation EC no. 139/2004; H. Kamann, M. Selmayr ed., *European Competition Law. Texte und Materialien*, 2010, p. 32.

37 Merger Regulation EC no. 139/2004, recitals 25, 26.

38 J. Cook, C.Kerse, *op. cit.*, p. 2.

39 M. Monti, *Merger Control in the European Union: A Radical Reform,* Speech at the European Commission/IBA conference on EU merger control, Brussels, 7 November 2002.

40 A. Jones, B. Sufrin, *op. cit.*, p. 44.

41 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004 OJ C31/5; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2008 OJ C265/6.

ments introduced significant changes to the Commission's substantive interpretation of EU merger law. For the first time the Commission expressly defined its understanding of the legal purpose of EU merger control[42]. Since then it has been clear that the Commission will prevent mergers that are likely to deprive customers of the benefits of competition, such as low prices, high quality products, a wider selection of goods and services and product innovations[43]. In other words, the Commission acknowledged that the purpose of EU merger law is specifically to protect and enhance consumer welfare.

Explicitly connecting the prohibition of mergers with consumer welfare has another very important consequence. The Commission redefined the substantive interpretation of EU merger law and at the same time narrowed down its purpose. According to this new approach, only those mergers which actually pose a danger to consumer welfare can be prohibited. This means that neither the possible damage to market structures nor the idea of freedom of competition, when taken alone, is enough to prohibit a concentration. In the Non-horizontal Merger Guidelines, the Commission clearly states that direct consumer detriment is an indispensable condition for competitive harm under the recast Merger Regulation (EC) No 139/2004[44].

The influence of the redefinition by the Commission of the purpose of EU merger law has to be considered as having an enormous impact on the concept of competitive harm. Furthermore, it was a real turning point in the Commission's approach. Not that long ago, in 2001, the Commission decided to prohibit the merger of two US companies, without even assessing the merger's potential impact on consumer welfare, which caused considerable tension between the European Union and the United States[45].

Although the new interpretation of the concept of competitive harm given by the Commission is very clear, it is not uncomplicated from the legal point of view. The Council amended the old Merger Regulation and adopted the new one, but did not make consumer harm an explicit condition of incompatibility with the internal market, as it was a purely 'European' solution[46]. Although the obligations imposed on the Commission by Merger Regulation (EC) No 139/2004 to take intermediate and ultimate consumers as well as technical and economic progress (provided that it is to consumers' advantage) into account when appraising concentrations, pointing towards a consumer welfare test, these obligations are not decisive as they do not unambiguously exclude a 'total welfare of efficiency' criterion[47]. Furthermore, in the recast Merger Regulation (EC) No 139/2004, it is

42 What is important is that neither the old nor the new Merger Regulation identifies its legal objective, disappointingly.

43 Horizontal Merger Guidelines, point 8l; Non-horizontal Merger Guidelines, point 10.

44 Non-horizontal Merger Guidelines, point 18.

45 *General Electric/Honeywell*, Case COMP/M.2220, Commission Decision 2004 OJ L48/1.

46 A. C. Witt, *From Airtours to Ryanair: Is the more economic approach to EU merger law really about more economics?,* 49 CMLR, 2012, p. 226.

47 A. Lindsay, *The EC Merger Regulation: Substantive Issues*, 2003, p. 47.

explicitly stated that the standards of competitive harm as applied by the CJEU and the Commission under Regulation (EEC) No 4064/89 shall be maintained[48].

Another implication of the more economic approach in the Commission's practice concerns the dominance criterion. The concept of dominance as such is an old concept and was defined for the first time by the CJEU in the 1970s in the context of decisions under what is now Article 102 TFEU[49]. The legal definition laid down by the CJEU stated that the dominant position of an undertaking is attributed as economic strength which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and, ultimately, of its consumers[50]. The concept of dominance is broad and therefore covers not only an undertaking's ability to affect consumer welfare but also the ability to exclude competitors from the market, which could be detrimental to the competitive structure. Therefore, it can be said that the concept of dominance basically captures almost every form of economic strength.

The definition of dominance articulated by the CJEU in the context of decisions relating to Article 102 TFEU was already being used by the Commission while appraising mergers under Regulation (EEC) No 4064/89. This practice was especially important due to the presence of the dominance test, as laid down in Article 2(2) of Regulation(EEC) No 4064/89. The revision of the substantive test of Regulation (EEC) No 4064/89 has the result that dominance is no longer an essential condition for declaring a concentration incompatible with the internal market. In order to bring the dominance concept in line with the Commission's modern welfare-based approach, it would have to be interpreted as inseparably connected with the detriment of consumers, resulting from the undertaking's market powers and thus ability to influence end prices, innovation, output or variety and quality of products. On the contrary, such an interpretation of the dominance criterion would not be compatible either with the original definition of dominance developed by the case law of the CJEU or the wording of the recast Merger Regulation (EC) No 139/2004 which states that the concept of dominance, which was crucial for the old dominance test included in Regulation (EEC) No 4064/89, remains the same[51].

In referring to the merger guidelines issued by the Commission, it is apparent that the Commission is aware of the problematic nature of the traditional definition of the dominance criterion in the context of the SIEC test. Although the Commission, in

48 Merger Regulation EC no. 139/2004, recital 26.

49 Case 27/76 *United Brands Company and United Brands Continental BV v Commission* 1978 ECR 207; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* 1979 ECR 461; Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* 1983 ECR 3461.

50 Case 27/76 *United Brands Company and United Brands Continental BV v Commission*[1978]ECR 207, para 59.

51 Merger Regulation EC no. 139/2004, recitals 25, 26.

the recitals of the Horizontal Merger Guidelines, refers to the original definition of dominance developed by the case law of the CJEU, thus choosing not to reinterpret it as amounting to market power[52], it does not discuss the concept of dominance in their substantive sections, neither in the Horizontal nor Non-horizontal Merger Guidelines.

Instead, both Horizontal and Non-horizontal Merger Guidelines include a formula, according to which the Commission appraises concentrations by examining whether they are likely to generate anticompetitive effects or not[53]. Those effects, according to the guidelines, can either have a 'non-coordinated' or 'coordinated' nature. Non-coordinated effects, also referred to as 'unilateral effects', describe a situation where the elimination of important competitive constraints on one or more undertakings, resulting in increased market power, means that the merged entity gains the ability to increase prices and sustain the increase regardless of the behavior or reaction of other competitors on the market. Meanwhile, coordinated effects are those which arise when the concentration affects the nature of competition in such a way as to create or reinforce tendencies to parallel, uncompetitive behavior within an oligopolistic market[54]. In other words, the entity created by the concentration would not be able to sustain increased prices unless its competitors in the market refrain from price or other forms of competition, not as a result of collusive behavior but solely because each of the undertakings independently recognizes the benefit of not competing aggressively.

The definitions of non-coordinated and coordinated effects included in the merger guidelines seem to create a circumvention of the original dominance formula. On the one hand, the Commission retained the definition of dominance developed by the case law of the CJEU, as it refers to this definition in the recitals of the Horizontal Merger Guidelines and thus chose not to reinterpret it as amounting to market power. On the other hand, however, the Commission, by introducing definitions of non-coordinated and coordinated effects in the merger guidelines, *de facto* read an unwritten market power requirement into the new SIEC test and thus, one could say, abandoned the original criterion of dominance[55].

Although the wording of the merger guidelines is far from unambiguous and unhesitating, the Commission's practice is already more clear and decisive. The Commission's new approach to EU merger control after adopting the recast Merger Regulation (EC) No 139/2004 is predominantly characterised by appraising a concentration based on its effects on competition, rather than based on the creation of a dominant position[56].

52 Horizontal Merger Guidelines, point 2.

53 Horizontal Merger Guidelines, point 22; Non-horizontal Merger Guidelines, point 28.

54 J. Cook, C.Kerse, *op. cit.*, p. 217.

55 A. C. Witt, *op. cit.*, p. 226.

56 *ABF/GBI Business*, Case COMP/M.4980, Commission Decision 2009 OJ C145/12, point 139; *Nokia/Navteq* Case COMP/M.4942 Commission Decision 2009 OJ C13/8, point 262; *TomTom/Tele Atlas* Case COMP/M.4854 Commission Decision 2008 OJ C237/8.

Economic efficiencies should be perceived as another implication of the more economic approach. In terms of merger control, economic efficiency gains, also known as efficiencies, are effects resulting from a concentration which may counteract a merger's negative effects on competition and therefore weigh in favour of an approval decision[57]. There are at least three arguments which support the rationale for taking into account efficiencies resulting from concentrations as a positive factor in concentration appraisal. First of all, the mergers deserve to be treated more benignly than cartels, as they are considered to be less harmful[58]. Therefore, if economic efficiencies are taken into account when appraising cartels[59], there is all the more reason to consider them when evaluating mergers. Secondly, efficiencies may contribute to the achievement of the aims of the antitrust system, for example, through promoting consumer welfare or total welfare, and therefore provide a general benefit to society. Finally, concentrations may create efficiencies that increase competition on the market and such efficiencies should be especially encouraged. Although the above-mentioned arguments are irrefutable, the proper role of efficiencies in the appraisal of mergers has been one of the most controversial issues in the history of EU merger control[60].

Prior to the recast Merger Regulation (EC) No 139/2004, the Commission had never officially pronounced its opinion on whether efficiency effects were capable of offsetting anticompetitive effects under Regulation (EEC) No 4064/89[61]. However, as was stated before, the Commission's current more economic approach to EU merger law is characterized by, among other things, directing merger control especially towards the protection of consumer welfare. From this point of view, the Commission had to alter its previous approach to economic efficiency effects, since these effects lead to an overall increase in welfare, including the welfare of consumers.

Although there is no reference to efficiency effects in the main text of the new Merger Regulation (EC) No 139/2004, its recitals already state that it is appropriate, when ap-

57 P. Verloop, V. Landes, *Merger Control in Europe,*2003, p. 53; F. Russo et al., *European Commission Decisions on Competition. Economic Perspectives on Landmark Antitrust and Merger Cases*, 2010, p. 362.

58 P. Lowe, Director-General of DG Energy and former Director-General of DG Competition, described cartels as 'arguably the most harmful type of competition infringement'; *v*. P. Lowe, *Competition Policy and the Global Economic Crisis*, "Competition Policy International", 2009, p. 19.

59 *V*. Article 101(3) TFEU as well as the Commission's Guidelines on the application of Article 81(3) of the Treaty 2004 OJ C101/97, points 43, 48.

60 A. Lindsay, *op. cit.*, p. 424.

61 What is interesting is that the 1989 draft of Regulation EEC no. 4064/89 contained a provision, according to which, mergers could be approved when contributing to the attainment of the basic objectives of the Treaty in such a way that their economic benefits prevail over the negative effect they cause to competition; see Amended proposal for a Council Regulation EEC on the control of concentrations between undertakings 1989 OJ C22/14, recital 16.

praising a concentration, to take into account any substantiated and likely efficiencies in order to determine the impact of a concentration on competition, as it is possible that the efficiencies brought by the concentration counteract its negative effects on competition[62].

The Commission explains the role of efficiency effects in appraising a concentration in more detail in the Horizontal and Non-horizontal Merger Guidelines[63]. According to the guidelines, the Commission takes efficiencies into consideration as one part of the overall competitive assessment of a concentration. However, in the Commission's opinion, efficiencies may counteract a merger's harmful effects only if they cumulatively meet three conditions: (i) the efficiencies benefit consumers; (ii) are merger-specific; and (iii) are verifiable[64]. Since the merger guidelines contain a clear recognition of the phenomenon of efficiencies offsetting the anticompetitive effects of a concentration, one could expect the Commission's practice to be in the same vein. The reality, however, is different. Since adopting the new Merger Regulation (EC) No 139/2004, the Commission has never approved a merger with serious anticompetitive effects on the grounds of countervailing efficiencies[65].This is not to say that merging parties in antitrust procedures do not try to demonstrate the existence of potential economic efficiencies of the notified concentration[66].

Finally, the Commission's new, more economic approach is first and foremost associated with the use of quantitative analysis in competitive assessments. Such analyses also play an important role in US merger law[67]. They vary between relatively straightforward win/loss analyses to much more complicated and sophisticated merger simulation models. But whatever the form of such quantitative analysis is, the aim is always the same: namely to balance a concentration's pro-competitive effects against its anticompetitive effects in order to determine whether the conduct is on the whole beneficial, neutral or detrimental to consumer welfare. The definition and results of econometric analysis sound perfect in theory but the truth is that not everybody agrees that its benefits outweigh its disadvantages. First of all, it must be pointed out that the results of quantitative

62 Merger Regulation EC no. 139/2004, recital 29.

63 Horizontal Merger Guidelines, point 76; Non-horizontal Merger Guidelines, point 13.

64 Horizontal Merger Guidelines, point 78.

65 However, the Commission has occasionally cited efficiencies as additional factors for approving concentrations that did not present any serious anti-competitive effects; see *TomTom/Tele Atlas*, Case COMP/M.4854, Commission Decision 2008 OJ C237/8, point 238.

66 An excellent example of this is in the *Ryanair/Aer Lingus* case, where the Commission, in its final prohibition decision, reached the conclusion that, although the parties put effort into their detailing and quantifying of the expected efficiencies, they did not prove in a sufficient manner that the efficiencies meet the required conditions; see *Ryanair/Aer Lingus*, Case COMP/M.4439, Commission Decision 2008 OJ C47/9, point 1151.

67 I. Kokkoris, *Do Merger Simulation and Critical Loss Analysis Differ Under the SLC and Dominance Test?,* 27 (5) ECLR, 2006, p. 248.

analyses are not justiciable, as judges, who are usually not highly trained economists, cannot review them[68]. Others are of the opinion that using econometric analysis in legal assessments makes it more difficult to predict the end result of the case, and thus reduces legal certainty[69]. It is worth noting, however, that a more rigorous and economic analysis based approach is likely to lead to a significant increase in information which has to be provided by the parties of the antitrust proceedings. As a consequence, the Commission reviews the notified merger in much more detail, using the financial data prepared by bankers and analysts and internal documentation prepared in relation to the merger and markets concerned. All of this can only contribute to an increase in the transparency and objectivity of the whole procedure.

The reality in recent times is that econometric tools have often been applied in the Commission's competition practice[70]. From the formalistic point of view, the frequent use of econometric studies by the Commission has one more effect: increasing the length of time it takes the Commission to take prohibition decisions, which is influenced by numerous quantitative analyses[71]. One could assume that the use of quantitative analyses has fundamentally altered the Commission's approach to merger assessments. But such an opinion proves to be misleading on closer inspection. It is important to note that econometric tools have not replaced the legal test underlying the Commission's competitive assessment[72]. Furthermore, they very often only serve the purpose of establishing facts relevant to the previously carried out legal evaluation[73]. In such cases, the subsequent econometric calculations are simply regarded as additional evidence to the traditional, legal analysis of the relevant qualitative factors. So one could conclude that the use of quantitative analyses has not changed the Commission's approach to merger control at all, but merely supports evidence resulting from traditional, legal qualitative analyses which remain the fundament of the Commission's assessment.

68 A. Schmidt, S. Voigt, *Der „moreeconomicapproach" in der Missbrauchsaufsicht: Einige kritische Anmerkungen zu den Vorschlägen der Generaldirektion Wettbewerb*, 11 Wirtschaft und Wettbewerb, 2006, p. 1097.

69 U. Böge, *Reform derEuropäischen Fusionskontrolle*, 2 Wirtschaft und Wettbewerb, 2004, p. 138.

70 Examples of recent cases where the Commission decided to use econometric studies include: *Ryanair/Aer Lingus* where the Commission carried out a cross-section and several fixed-effects analyses to prove competitive restraints of the parties; and *Kraft Foods/Cadbury,* where the Commission used the econometric model to calculate the degree of cross-price elasticity between different types of food.

71 *Ryanair/Aer Lingus* Commission Decision from 2007 exceeded 500 pages, whereas by comparison the very first merger prohibition from 1991 (*Aerospatiale-Alenia/de Havilland* (Case IV/M.53) Commission Decision [1991] OJ L334/42) covered less than 40 pages.

72 D. J. Neven, *Competition economics and antitrust in Europe,* 21 (48) Economic Policy, CEPR & CES & MSH, 2006, p. 741.

73 A. C. Witt, *op. cit.*, p. 227.

Conclusions

The more economic approach to the application of EU merger law is a consequence of a gradual revolution which is spreading over different layers: substantive, procedural, organisational and practical, and must be seen in its wider context, as it covers not only merger control but competition law as a whole. The actual effect of this process is an interplay between the legal and economic issues present in merger cases, which has recently grown stronger. As a consequence, merger cases have become an intricate combination of legal arguments backed by solid economic analysis.

During the 1990s, the Commission had already begun to move away from its ordoliberal stance towards a realignment of the goals of competition law aided by modern economic thinking on the areas of efficiency and consumer welfare. Nevertheless, the major changes came later. The most significant was the adoption of the new Merger Regulation (EC) No 139/2004, which replaced the original Regulation (EEC) No 4064/89. The amendment to the original Regulation (EEC) No 4064/89 bore fruit in the creation of totally new substantive assessment criteria, the so-called SIEC test, of notified mergers. The introduction of the SIEC test, as a method of merger assessment based on the merger's market effects, including both the pro-competitive and the anti-competitive effects, opens new and broad perspectives to economists dealing with competition. But the recast Merger Regulation (EC) No 139/2004 was not the only legal change to introduce a more economic approach in EU merger control law. Although they are not legally binding, it is nevertheless very important to mention the Commission's Horizontal and Non-horizontal Merger Guidelines.

The effect of legal changes introduced by the above-mentioned legal acts is manifested in the Commission's practice. Analysis of the Commission's recent decisions leads to the conclusion that the Commission's more economic approach in EU merger control has several different implications. The most important of these implications should be recalled: the definition of the economic purpose of merger provisions; the new interpretation of the concept of competitive harm; the new attitude to the dominance criterion; the acknowledgement of efficiency gains as factors which may counteract a merger's harmful effects; and the popularization of quantitative analysis.

SUMMARY

The more economic approach to the application of EU merger control

In general terms, the more economic approach to the application of EU merger law implies increased reliance on theoretical concepts from industrial economics and quantitative methods of analysis, firstly in the case of investigations and, secondly, when formulating legislation and defining the criteria that are to be set. In other words, a tendency

of the more economic approach to EU merger control is to base the evaluation of each specific case on an assessment of its anti- and pro-competitive effects (effects-based approach), rather than on the form of the intrinsic nature of a particular practice (form-based approach). In this article, the author presents the development of the more economic approach to the application of EU merger control and analyses the implications of this new trend which is present in the European Commission's practice.
Keywords: EU merger control, more economic approach, European Commission